# IMMIGRATION LAW AND SLAVERY: RETHINKING THE MIGRATION OR IMPORTATION CLAUSE

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The origins of immigration law are deeply connected to slavery. An examination of that connection calls the constitutional foundation for immigration law into question, alters the calculus for judicial review of federal immigration action, reframes our understanding of federalism, and lays bare the nation's exploitative dependence on immigrant labor. This Article shifts the paradigm by focusing on a long-neglected textual reference to a federal immigration power: the Migration or Importation Clause enumerated in Article I, Section 9, Clause 1 of the Constitution. Scholars have mostly discounted the Migration or Importation Clause's relation to federal immigration power because of its connection to slavery. In sharp contrast, this Article contends that the Migration or Importation Clause makes sense as a referent of the federal immigration power *because* of its connection to slavery, which was deeply intertwined with immigration in the early republic.

The history of the Constitutional Convention reveals that the framers specifically discussed slavery and immigration together and were aware that their chosen wording for the Migration or Importation Clause would apply to free immigrants. An originalist understanding of the clause therefore supports a federal immigration power under the Commerce Clause, which was the presumptive basis for regulating the slave trade after the 1808 date set out in the Migration or Importation Clause.

The legacy of the Migration or Importation Clause continues to reverberate in immigration law. Slavery was an atrocity that inflicted intergenerational harm on Black Americans; in contrast, immigrants have often enjoyed opportunities and passed on wealth. Nonetheless, the current structure of immigration law perpetuates nineteenth century labor norms for the millions of undocumented workers who under threat of deportation do much of the nation's most difficult work for lower pay and with fewer legal protections than documented workers. Reckoning with the ties between immigration law and slavery offers an opportunity to reflect on the failures of this system, and also reveals a new path forward. In the face of an exploitative system, the strategies and logic of abolitionism offer hope for a better immigration future.

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## INTRODUCTION

The United States is a country of immigrants, but not all of them came by choice. Slavery and immigration were deeply connected in the colonies and early republic. However, the story of federal immigration law, as scholars usually tell it, does not begin until after emancipation.[1]

1. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 13 (1984). Articles that deeply engage with the connections between slavery and immigration include Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996); and Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273 (2009). Neither of these articles, however, comprehensively addresses the Migration or Importation Clause despite being groundbreaking in recognizing the influence of slavery on the development of immigration law. Other scholars primarily discuss slavery as an issue that impeded the development of federal immigration law as states sought to preserve their ability to regulate the movement of Black persons and southern Supreme Court justices contested a broad reading of the Commerce Clause that would allow for regulation of slavery. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 35–40, 44–47 (1996); KUNAL M. PARKER, MAKING FOREIGNERS:

According to this traditional account, the text of the Constitution says nothing about immigration power.[2] In the early days of the republic, states regulated immigration as a function of their "police power," while the federal government played a limited role before the Civil War. According to this account, Southern states supposedly blocked federal regulation before the war in order to preserve their ability to limit immigration by free Black people.[3] It took a sectional war, the escalating transformation of the Northern economy to industrial capitalism, two economic downturns, and a buildup of anti-Asian sentiment to spur the federal government to act.[4] The Supreme Court built the constitutional foundation of modern immigration law on the blocks of Chinese exclusion.[5] It upheld the government's racist new immigration law, creating a novel and textually unsupported doctrine of plenary federal

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IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 84, 104–08 (2015); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 98–99 (2002). In contrast, this Article describes how pro-slavery interests sometimes advocated for the development of federal immigration law as a mechanism to protect slavery and limit the political power of immigrants and Northern states. *See infra* Section I.E.

2. *See* KEVIN KENNY, THE PROBLEM OF IMMIGRATION IN A SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE NINETEENTH-CENTURY UNITED STATES 4 (2023); STEPHEN LEGOMSKY & DAVID THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 110 (7th ed. 2019); Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1421 (2022); Cleveland, *supra* note 1, at 81; Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 611 (2013); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532 (2001).

3. NEUMAN, *supra* note 1, at 19 n.a, 34–40; PARKER, *supra* note 1, at 84, 108; KENNY, *supra* note 2, at 1.

4. For various accounts of the federalization of immigration law, see Schuck, *supra* note 1, at 5–6; LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 2–6 (Thomas A. Green & Hendrik Hartog eds., 1995); Cleveland, *supra* note 1, at 112–17; Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 9–13 (2002); Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMANS. 181 (2005) [hereinafter *Preserving the Exceptional Republic*]; 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 (2010) [hereinafter *Immigration as Invasion*].

5. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12 (1998); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 34 (2019); ADAM B. COX & CHRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 34 (2020).

power despite the preceding century of state immigration regulation.[6] To this day, the Court relies on plenary power to support a doctrine of exceptional deference to the federal government in the immigration arena.[7]

However, this body of scholarship, which is built on the notion that the federal immigration power is unenumerated, overlooks an obvious textual source. The Migration or Importation Clause explicitly references a federal immigration power:

> 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 one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[8]

This language plainly supports federal prohibitions on "migration" after 1808, and by implication, more general regulation of immigration. Yet the clause has long been discounted as textual evidence of federal authority to regulate immigration because of its historical connection to slavery.[9] The prevailing view of the clause is that "such persons" was purely a euphemism for enslaved individuals for the benefit of those

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6. *See generally* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 274 (1984).

7. *See* Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1287 (2022).

8. U.S. CONST. art. I, § 9, cl. 1.

9. *See, e.g.*, Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198, 214 (1968); Ilya Somin, *Why the Migration or Importation Clause of the Constitution Does Not Imply Any General Federal Power to Restrict Immigration*, WASH. POST (Apr. 19, 2016, 8:25 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/19/why-the-migration-or-importation-clause-of-the-constitution-does-not-imply-any-general-federal-power-to-limit-immigration/ [https://perma.cc/S5PW-ABJR]; Ilya Somin, *Does the Constitution Give the Federal Government Power over Immigration*?, CATO UNBOUND (Sept. 12, 2018), https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration/ [https://perma.cc/FD9C-DRMK]. *But see* Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 127 PA. ST. L. REV. 643, 671 (2023) ("The most straightforward way to understand the migration-or-importation clause, read as an exception to the foreign commerce power, is to think that Congress would possess the general power to prevent migration after 1808."); John C. Eastman, *The Power to Control Immigration Is a Core Aspect of Sovereignty*, 40 HARV. J.L. & PUB. POL'Y 9, 10 (2017) (arguing that the Migration or Importation Clause implied a federal power to regulate immigration after 1808); John Eastman, *Congress Has Both Textual and Inherent Authority to Regulate Immigration, and a Good Thing That It Does*, CATO UNBOUND (Sept. 26, 2018), https://www.cato-unbound.org/2018/09/26/john-eastman/congress-has-both-textual-inherent-authority-regulate-immigration-good/ [https://perma.cc/P68D-X7BE] (same).

founders who found explicit reference to slavery indelicate or who hoped to shortly abolish it.[10] According to this view, "migration" was inserted alongside "importation" just to clarify that it was not things but people at issue.[11]

This Article debunks the traditional view that the connection between "migration" and "importation" was a mere semantic nicety. Part I of the Article describes the history of the Migration or Importation Clause in order to explain its linkage between immigration and slavery. It follows the interpretative pathway of the clause through the Constitutional Convention, the Alien and Sedition Act debates, the debates over the Missouri Compromise, and several nineteenth century Supreme Court cases. Throughout this path, slavery influenced the clause's interpretation in different ways at different moments. Professor Walter Berns, who has written the seminal scholarship on the Migration or Importation Clause, labeled the argument that the clause authorized federal regulation of immigration the "Southern interpretation" and argued that it was part of an effort on the part of Southerners to resist regulation of the interstate slave trade.[12] Yet a broad view shows that the interpretation that Professor Berns ascribed to Southerners was not just a regional one.[13] Rather, the interpretation is consistent with the statements of the framers during and immediately after the convention.[14] Conversely, some Southerners, like Chief Justice Taney, opposed the "southern interpretation," arguing that the Migration or Importation Clause dealt with a single issue: the slave trade.[15]

Slavery was central at almost every moment in the nineteenth century immigration debate. Despite the traditional account that Southerners resisted federal action on immigration, some Southern politicians like Representative William R. Smith of Alabama were leaders in an antebellum movement for federal immigration reform, justified in part by reference to the Migration or Importation Clause.[16] Slavery was also the impetus when Congress passed the Anti-Coolie Act of 1862, as part of an abolitionist effort to prevent Asian contract laborers

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10. *See* Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMANS. 413, 425–26 (2001).

11. *See Passenger Cases*, 48 U.S. (7 How.) 283, 476 (1849) (Taney, C.J., dissenting); *id.* at 542 ("The word 'migration' was probably added to 'importation' to cover slaves when regarded as persons rather than property, as they are for some purposes.") (Woodbury, J., dissenting).

12. Berns, *supra* note 9, at 199.

13. *See infra* Part II.

14. *See infra* Part II. This sentence has been edited for clarity since it was initially published.

15. *See infra* p. 1152.

16. *See infra* pp. 1156–58.

from replacing enslaved workers under conditions approximating slavery.[17] The slavery paradigm impacted the construction of early immigration legislation whether it was slavery's defenders or opponents who were proposing it.

Part II offers an originalist interpretation of the Migration or Importation Clause. The early debates over the meaning of the clause provide powerful evidence that the clause references a federal power to regulate immigration after the year 1808. Part III considers the implications of this analysis. It argues that the Migration or Importation Clause implies a power under the Commerce Clause to regulate immigration, since the Commerce Clause was considered the presumptive basis for Congress to regulate the slave trade after 1808.[18] This, in turn, offers grounds to reconsider the plenary power doctrine, which is based on the notion that federal immigration power is constitutionally unenumerated and inherent in sovereignty. There is precedent for judicial review of Congress's Commerce power, which erodes the exceptional judicial deference that is a mainstay of plenary power.[19]

Part IV considers the legacy of slavery in immigration law. Many have argued that the Migration or Importation Clause cannot relate to immigration because of its close connection to slavery. Yet the history of both slavery and immigration in the United States reveal that the two are historically interconnected, making the Migration or Importation Clause an apt, if unsettling, instrument for addressing the two issues. The debates at the Constitutional Convention show that for some founders, like George Mason, Oliver Elsworth, and Charles Pinckney, immigration and slavery were two sides of a coin—two systems for extracting labor and wealth in the new country.[20] The rampant exploitation of undocumented workers in the American economy today is a legacy of this historical relationship between slavery and immigrant labor. The latter survives as a vestige of the former.

The history and language of the Migration or Importation Clause is consistent with an immigration system that today facilitates the

17. MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION 36–38 (2006).

18. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 216–17 (1824). *See also* Berns, *supra* note 9, at 213.

19. For a discussion of how shifting to Commerce Clause authority would impact immigration law jurisprudence, see Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 703–11 (2018).

20. *See infra* pp. 1132–33.

exploitation of poor immigrant workers.[21] After the labor reforms of the New Deal and Civil Rights movement, the United States is a very different place for workers. Yet for millions of undocumented workers, it is as if these reforms never happened; for the most part they continue to labor under a laissez faire system of robber baron-style capitalism.[22] One way to resist this system is to rely on the radical vision that abolitionists used to dismantle slavery.[23] By embracing this vision, it is possible to consider reforms that might otherwise seem impossible, like a right to employment for undocumented workers in the United States, and the legal protections that go with it.[24]

## I. A HISTORY OF THE MIGRATION OR IMPORTATION CLAUSE

From the Constitutional Convention until the late nineteenth century, lawmakers discussed whether the Migration or Importation Clause offered authority for federal immigration law. This debate orbited the question of slavery, the two issues linked not only by the constitutional text but by the political economy of the early republic. During and after the Civil War, Congress drew on the rhetoric of abolitionism to pass several immigration statutes targeting Asian immigrant laborers, called "coolies," whom congressmen analogized to slaves.[25] During this period, the Supreme Court rejected the Migration or Importation Clause as a basis for federal immigration authority in dicta that seemed both inaccurate and anticlimactic considering the extensive discussions that had preceded it.[26] Instead, not long after, the Court justified Chinese exclusion by seizing on a theory of unenumerated immigration power as an inherent aspect of the nation's sovereignty.[27] That theory has since become dogmatic. However, excavating the century of constitutional history that preceded it reveals the weak underpinnings of plenary power and can offer other important insights concerning American immigration law.

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21. *See infra* Part IV.
22. *See* Magee, *supra* note 1, at 277.
23. *See id.*
24. *See infra* Part IV.
25. JUNG, *supra* note 17, at 11–12.
26. *People v. Compagnie Generale Transatlantique*, 107 U.S. 59, 62 (1883).
27. *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581, 603–04 (1889).

### *A. The Constitutional Convention*

The first drafts of the Constitution were authored by a Committee of Detail that formed out of the Constitutional Convention in July 1787.[28] The draft of the clause debated by the delegates was eventually contained in Article VII, Section 4 of the draft Constitution, a provision that would have banned taxes or duties on exports and on "the migration or importation of such persons as the several States shall think proper to admit."[29] In addition, it would have banned any prohibition upon the "migration or importation of such persons."[30] This clause provoked a debate among the delegates, with some of them criticizing slavery, and others threatening that their states would not agree to a Constitution without protection against a ban on the slave trade.[31] It initially appeared that the clause would be voted down 8-3, until the issue was committed to a committee and several Northern states formed a bargain with the Southern ones that prevented a ban on importation or migration until 1808.[32]

During the debate, delegates stated views that exemplified the conflict that would ensue between economic systems founded on slavery versus immigration. Charles Pinckney of South Carolina spoke glowingly of the economic advantages of slavery.[33] But two of the delegates—George Mason and Oliver Elsworth—stated the opposite view. In offering up a litany of the evils of the slave trade, Mason stated an argument that Adam Smith first made and that would later become popular in the antebellum North—that slavery was inefficient because enslaved persons were not motivated to work by self-interest.[34] He stated,

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28. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at xxii–xxiii (Max Farrand ed., 1911).

29. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (Max Farrand ed., 1911). An initial draft just used the word "importation." *Id.* at 143. Another draft version used the word "emigration" instead of "migration." *Id.* at 168–69. At the time, the words "emigration" and "immigration" were used interchangeably. David L. Lightner, *The Founders and the Interstate Slave Trade*, 22 J. EARLY REPUBLIC 25, 33 n.8 (2002).

30. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 183.

31. *Id.* at 369–75, 415.

32. Thomas Jefferson, Notes of a Conversation with George Mason (Sept. 30, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 428 (John Catanzariti ed., 1990).

33. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 371.

34. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 413 (Edwin Cannan ed., 1976). *See generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR, at xxxvi (1995).

"Slavery discourages arts [and] manufactures. The poor despise labor when performed by slaves."[35] In addition, he argued that enslaved persons "prevent the immigration of Whites, who really enrich & strengthen a Country."[36] Over a decade earlier, he had offered the same juxtaposition of slavery and immigration, stating that "[t]he Policy of encouraging the Importation of free People & discouraging that of Slaves has never been duly considered in this Colony, or we [should] not at this Day see one Half of our best Lands in most Parts of the Country remain [unsettled], [and] the other cultivated with Slaves. . . ."[37]

Mason's comments presage the economic divergence that would escalate in the next century between North and South—with the South maintaining an agrarian economy dependent on enslaved labor and the North making industrial advances fueled by immigration.[38] Oliver Elsworth somewhat cynically seconded George Mason's vision of a more prosperous economic future without slavery, one that for him was premised on low-wage laborers, predicting, "As population increases; poor laborers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our Country."[39] Elsworth's remarks suggest the theme of "wage slavery" that would become prominent in the nineteenth century, when both labor activists and pro-slavery Southerners analogized the poor conditions of the Northern working class to slavery.[40]

Ultimately, Gouverneur Morris proposed that the contentious issue be committed to a committee that would consider it alongside other topics that could lead to compromise, including taxes on exports and a navigation act.[41] The delegates voted accordingly to refer Sections 4 through 6 of Article VII of the proposed Constitution to a "Committee of Eleven" composed of a member from each state, including James Madison, who would later become an influential interpreter of the Migration or Importation Clause.[42]

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35. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 370.

36. *Id.*

37. George Mason, Scheme for Replevying Goods and Distress for Rent (Dec. 23, 1765), *in* 1 THE PAPERS OF GEORGE MASON 1725–1792, 61 (Robert A. Rutland ed., 1970).

38. *See* PARKER, *supra* note 1, at 82–83.

39. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 371.

40. FONER, *supra* note 34, at xvii–xix.

41. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 374.

42. *Id.* at 374–75, 396. Section 5 prohibited a "capitation tax" unless in proportion to the census; Section 6 required a two-thirds majority of the House to pass any "navigation act." *Id.* at 183.

The committee members from Georgia and South Carolina then reportedly "struck up a bargain" with three New England states to "join to admit slaves for some years."[43] In exchange, Georgia and South Carolina agreed to change a clause that required a two-thirds House majority to pass any "navigation act."[44] Thus, when the committee returned, they proposed to leave Section 5, strike Section 6 pertaining to the two-thirds vote for navigation acts, and modify Section 4 to read, "The migration or importation of such persons as the several States now existing shall think proper to admit, shall not be prohibited by the Legislature prior to the year 1800—but a Tax or Duty may be imposed on such migration or importation at a rate not exceeding the average of the Duties laid on Imports."[45] The delegates then amended the proposal to change the year 1800 to 1808.[46]

Gouverneur Morris suggested that the clause be further amended to "read at once, 'importation of slaves into N. Carolina, S—Carolina & Georgia.'"[47] According to him, this "would avoid the ambiguity by which, under the power with regard to naturalization, the liberty reserved to the States might be defeated."[48] Exactly what he meant by this is unclear, but Morris revealed earlier in the convention that he had somewhat more restrictive views concerning immigrants than some of the other delegates, as he favored a longer waiting period before naturalized persons could become senators.[49] Thus, it is possible he intended to cut out the reference to "migration" and frame the clause explicitly around the importation of enslaved persons into the three Southern states, thereby preserving the "liberty" of states to regulate immigration going forward rather than creating the impression that the federal government had that power pursuant to the Naturalization Clause. No other delegate sought clarification of his remarks nor commented on whether or not to include the term "migration." However, Roger

43. Jefferson, *supra* note 32, at 428.

44. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 396.

45. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 396.

46. *Id.* at 409, 415.

47. *Id.* at 415. In his concurrence in the *Passenger Cases*, Justice McKinley stated that an unsuccessful effort was made during the Convention to cut the word "migration." *Passenger Cases*, 48 U.S. (7 How.) 283, 453 (1849) (McKinley, J., concurring). He may have been referring to Gouverneur Morris's suggestion that the text be amended to explicitly protect the "importation of slaves" into North Carolina, South Carolina, and Georgia. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 415.

48. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 415.

49. *Id.* at 235.

Sherman and George Clymer stated that they preferred not to use the term "slave," so Morris withdrew his motion.[50]

The first part of the provision restricting a ban on any prohibition of migration or importation prior to 1808 passed with the support of New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, and Georgia.[51] As the delegates moved on to considering the tax or duty on migration or importation, Gouverneur Morris spoke up again, pointing out "that as the clause now stands it implies that the Legislature may tax freemen imported."[52] George Mason then replied that "the provision as it stands was necessary for the case of Convicts in order to prevent the introduction of them."[53] Mason did not explain his comment, but perhaps he thought that immigration by persons with criminal convictions could be discouraged with a head tax. In any event, the delegates subsequently voted to amend the provision to read, "a tax or duty may be imposed on *such importation* not exceeding ten dollars for each person."[54]

Morris's comments and the other delegates' responses reveal that they were aware that the clause, as written, applied to immigration. In fact, during the state ratification debates, James Wilson and James Iredell explained that the purpose of amending the language concerning the ten-dollar tax was to limit it to enslaved individuals and to prevent it from applying to immigrants.[55] In the Pennsylvania debate, James Wilson addressed a comment that the provision might "prohibit the introduction of white people from Europe, as this tax may deter them from coming amongst us."[56] He clarified that the delegates had amended the language of the provision to avoid authorizing a federal tax on migrants:

> A little impartiality and attention will discover the care that the Convention took in selecting their language. The words are, "the migration or importation of such persons, &c., shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation." It is observable here that the term migration is dropped, when a tax or duty is

50. *Id.* at 415–16.

51. *Id.* at 416.

52. *Id.* at 417.

53. *Id.*

54. *Id.* at 409 (emphasis added).

55. DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR 22–23 (2006).

56. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 160–61 (Max Farrand ed., 1911).

> mentioned, so that Congress have power to impose the tax only on those imported.[57]

During the North Carolina debates, James Iredell made a similar point in a conversation with James Galloway, who spoke out against the slave trade but did not want the tax on importation "extended to all persons whatsoever."[58] He argued that North Carolina needed additional citizens, so "instead of laying a tax, we ought to give a bounty to encourage foreigners to come among us."[59] In response, Iredell stated:

> The committee will observe the distinction between the two words migration and importation. The first part of the clause will extend to persons who come into this country as free people, or are brought as slaves. But the last part extends to slaves only. The word migration refers to free persons; but the word importation refers to slaves, because free people cannot be said to be imported. The tax, therefore, is only to be laid on slaves who are imported, and not on free persons who migrate.[60]

The amendment of the Migration or Importation Clause to limit the ten-dollar tax to enslaved persons and to exempt immigrants from it shows that the provision was meant to apply to immigration as well as slavery.[61] At least some of the delegates, like George Mason, intentionally connected the issues of slavery and immigration and viewed the two as alternate means of settling the country.[62] It is therefore unsurprising that they arrived at language that seems to address both topics in the same sentence.

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57. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 452–53 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 2 ELLIOT'S DEBATES].

58. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 101 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 4 ELLIOT'S DEBATES].

59. *Id.*

60. *Id.* at 102 (emphasis removed).

61. Lightner, *supra* note 29, at 28.

62. *See id.* at 28–29.

### *B. The Alien and Sedition Acts*

The 1790s was a period of fierce competition between the Jeffersonian Republican Party and the Federalist Party.[63] Jeffersonian Republicans opposed the centralizing policies of the Federalists and initially favored relations with France; the Federalists, for their part, favored relations with Great Britain and saw revolutionary France as a dangerous and destabilizing force.[64] In 1796, Thomas Jefferson lost the presidential election to the Federalist John Adams.[65] In an environment of escalating xenophobia and hostility towards France, Congress passed a series of four laws collectively known as the Alien and Sedition Acts, which targeted non-citizens and Jeffersonian Republicans.[66] The laws expired two years after enactment, and when Thomas Jefferson was later elected president, he pardoned all those convicted under the Sedition Act.[67]

One of the laws, known as the Alien Act, gave the president the power to summarily deport any noncitizen whom he deemed a threat.[68] During the floor debate over the Alien Act, Republicans argued against it on many grounds, including that it violated the Migration or Importation Clause.[69] On June 16, 1798, Representative Albert Gallatin of Pennsylvania, a Swiss immigrant himself, spoke against the Alien Act. He argued that it violated the Suspension Clause, Due Process Clause, and the Migration or Importation Clause.[70] According to Representative Gallatin, regulation of immigration was a power held by the states at the time the Constitution was adopted, and states like Pennsylvania continued to regulate it.[71] He stated that the term "migration" in the Migration or Importation Clause "must relate to free emigrants," and it prevented Congress from prohibiting migration prior to 1808, meaning that the power remained exclusively with the states.[72]

Representative Baldwin of Georgia, who had been a delegate to the Constitutional Convention, rose to corroborate Representative Gallatin's

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63. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND CIVIL LIBERTIES 10–12 (1956).

64. *Id.*

65. *Id.* at 5.

66. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989–90 (2002).

67. *Id.* at 989. For a discussion of the unpopular reception of the Alien Act and doubts thereafter concerning its constitutionality, see Justice Field's dissent in *Ting v. United States*, 149 U.S. 698, 744–61 (1893) (Field, J., dissenting).

68. Cole, *supra* note 66, at 989.

69. *See* 8 ANNALS OF CONG. 1963–64, 1968–69 (1851).

70. *Id.* at 1956–57.

71. *Id.* at 1956.

72. *Id.* at 1957.

understanding of the Migration or Importation Clause. Baldwin correctly recalled that, when the delegates discussed the clause, they believed that its language "would extend to other persons besides slaves, which was not denied, but this did not produce any alteration of it."[73] Representative Harper suggested that Representative Baldwin might have been mistaken in his memory, since if the delegates had intended to create an immigration power, "it would have been without any limitation of time."[74] Representative Dayton of New Jersey, who was the Speaker of the House and had also been a delegate to the Constitutional Convention, then rose to strenuously disagree with Representative Baldwin's memory of the convention, asserting that "in the discussion of its merits, no question arose, or was agitated respecting the admission of foreigners, but, on the contrary, that it was confined simply to slaves . . . ."[75]

Representative Edward Livingston of New York argued in favor of Representatives Gallatin and Baldwin's understanding of the clause, emphasizing that there would have been no need to use the word "migration" if it applied only to enslaved persons:

> Migration is a voluntary change of a country; but who ever heard of a migration of slaves? The truth is, both words have their appropriate meaning, and were intended to secure the interests of different quarters of the Union. The Middle States wished to secure themselves against any laws that might impede the emigration of settlers. The Southern States did not like to be prohibited in the importation of slaves; and so jealous were they of this provision, that the fifth article was introduced to declare that the Constitution should not be amended so as to do it away.[76]

The acts passed 46-40, and the Republicans shifted their opposition to the acts to the states, which they argued had the power to nullify unconstitutional federal initiatives.[77] Republican-led resolutions against the acts passed the Virginia and Kentucky legislatures in 1798 and 1799. Thomas Jefferson drafted the Kentucky Resolution of 1798, and he argued in it that the Alien and Sedition Acts violated the Migration or

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73. *Id.* at 1968–69.

74. *Id.* at 1991.

75. *Id.* at 1993.

76. *Id.* at 2009. In the eighteenth century, "immigration" and "emigration" were used interchangeably. Lightner, *supra* note 29, at 32–33 n.8.

77. 8 ANNALS OF CONG. 2028 (1851); Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 726 (1995) ("The Republicans were arguing not just that the new legislation was unjust, but also that it was within state power to nullify unconstitutional federal initiatives.").

Importation Clause because "to remove [alien friends], when migrated, is equivalent to a prohibition of their migration [before 1808], and is, therefore; contrary to the [Migration or Importation Clause] of the Constitution, and void."[78]

On February 25, 1799, a House committee report responded to this argument.[79] The report asserted as a general matter that the Alien and Sedition Acts were constitutional pursuant to Article IV, Section 4 of the Constitution, which guarantees protection against invasion, and the Necessary and Proper Clause of Article V, Section 8.[80] It rejected the argument that the federal government lacked authority to pass immigration laws until 1808 due to the Migration or Importation Clause for three reasons. First, the report argued that the clause must pertain only to enslaved persons and not to immigrants, because otherwise it would have been illogical to limit its reach to the states then in existence or to prevent its application until the year 1808.[81] Second, the report contended that restricting immigration is a different matter than deporting dangerous individuals, and third, the report stated that the federal government must have the power to deport dangerous non-citizens because the power was necessary for national security and had not been granted by the Constitution to the states.[82]

James Madison, who was a member of the Committee of Eleven that amended the Migration or Importation Clause, responded directly to the House report in his report to the Virginia Legislature. He stated first that the United States had a novel political system under which "there are powers exercised by most other governments, which, in the United States, are withheld by the people both from the general government and from the state governments."[83] Next, he pointed out the fallacy of inferring "that the powers supposed to be necessary, which are not so given to the state governments, must reside in this government of the United States."[84] Madison seemingly implied the possibility that neither states nor the federal government had the power to deport.

During the debates over the Alien and Sedition Acts, prominent founding figures like Thomas Jefferson offered textualist arguments against the law based on the Migration or Importation Clause. Representative Livingston offered a theory about why the "migration" language was included—that it served the interests of the middle states

78. 4 ELLIOT'S DEBATES, *supra* note 58, at 540–41 (emphasis omitted).
79. 9 ANNALS OF CONG. 2985–87 (1851).
80. *Id.* at 2986.
81. *Id.* at 2986–87.
82. *Id.* at 2987.
83. 4 ELLIOT'S DEBATES, *supra* note 58, at 559.
84. *Id.*

that wanted to protect their ability to secure new free settlers just as much as the southernmost states wanted to protect their ability to acquire enslaved workers.[85] Federalists responded with counter-textualist arguments that the clause could not have been meant to apply to immigration: First, it would not make sense to limit immigration authority to the regulation of then-existing states or to after the year 1808.[86] And, second, there must be inherent authority over immigration as a matter of national security.[87] The Alien and Sedition Acts have been widely repudiated,[88] but nearly one hundred years afterward, the Federalists' counter-texualist defense of them based on national security and sovereignty resurfaced during the Chinese Exclusion case as the rationale for the plenary power doctrine.[89]

### *C. The Missouri Compromise*

Congress outlawed the slave trade in 1808.[90] Yet the number of enslaved individuals in the United States continued to grow. When the Alien and Sedition Acts were passed, there had been about 657,000 enslaved persons in the United States; by 1820, there were more than 1.5 million.[91] Moreover, the rise of cotton in the South had greatly increased the price paid for enslaved individuals.[92] The bulk of enslaved persons were in Virginia, and Virginia's fields were considerably exhausted, creating a financial incentive for Virginia planters to favor expansion of the territory in which slavery was lawful so that they could better sell enslaved persons.[93]

In 1818, Missouri, which was part of the Louisiana Territory, petitioned for statehood.[94] On February 13, 1819, Representative James Talmadge of New York introduced an amendment to the Missouri statehood bill providing "that the further introduction of slavery or involuntary servitude be prohibited . . . and that all children of slaves

85. 8 ANNALS OF CONG. 2009 (1851).

86. 9 ANNALS OF CONG. 2986–87 (1851).

87. *Id.*

88. SMITH, *supra* note 63, at 159.

89. *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889).

90. ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA 4 (2007).

91. *Id.* at 38.

92. *Id.*

93. *Id.* at 5–6.

94. *See id.* at 33.

born within the said state, after admission thereof into the Union, shall be free at the age of twenty-five years."[95]

Talmadge's amendment provoked a fierce debate in Congress concerning slavery and its expansion. On February 15, 1819, Representative Timothy Fuller of Massachusetts argued extensively in favor of the Talmadge amendment. One of his principal arguments was that Congress had the authority to restrict slavery in Missouri under the Migration or Importation Clause, "which provides, that 'the migration or importation of such persons as any of the States that existing shall admit, shall not be prohibited by Congress till 1808.' This clearly implies that the *migration* and importation may be prohibited *after* that year."[96] Representative Fuller did not address in his remarks the possibility that the word "migration" applied to voluntary immigration other than free Black people. Despite this omission, his argument that the word "migration" in the clause authorized Congress to restrict slavery from new states gained other influential followers.

After an October 1819 meeting in Trenton, New Jersey calling for a ban on the introduction of slavery into Missouri, a New Jersey philanthropist named Elias Boudinot mailed a circular letter with the aim of galvanizing opposition to the extension of slavery.[97] The letter reached John Jay, one of the authors of the Federalist Papers, the former President of the Continental Congress, and the first Chief Justice of the Supreme Court (but not one of the framers). Jay responded with a letter to Boudinot in which he asserted that "the constitutional authority of the Congress [under Article I, Section 9] to prohibit the migration and importation of slaves into any of the States, does not appear questionable."[98] Jay's letter was widely circulated after Boudinot released it to the press.[99]

That year, a Philadelphia editor named Robert Walsh decided to address the Missouri controversy. Walsh was famous at the time for a book he had written that was widely viewed as an apology for the institution of slavery.[100] While drafting the book, he corresponded with

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95. *Id.* at 35–36.

96. 33 ANNALS OF CONG. 1183 (1855).

97. GLOVER MOORE, THE MISSOURI CONTROVERSY 1819–1821, at 70–73 (1953).

98. Letter from John Jay to Elias Boudinot (Nov. 17, 1819), *in* 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 430, 430 (Henry P. Johnston ed., 1893).

99. MOORE, *supra* note 97, at 72–73.

100. *See generally* ROBERT WALSH, JR., AN APPEAL FROM THE JUDGMENTS OF GREAT BRITAIN RESPECTING THE UNITED STATES OF AMERICA (1819); Joseph Eaton, *From Anglophile to Nationalist: Robert Walsh's* An Appeal from the Judgments of Great Britain, PA. MAG. HIST. & BIOGRAPHY, Apr. 2008, at 141, 141–42.

James Madison to solicit his perspective on the treatment of enslaved persons in Virginia.[101] As Walsh worked on a new manuscript on the Missouri question, he again reached out to Madison to ask his view of the proper interpretation of the term "migration" in Article I, Section 9 of the Constitution.[102]

Later that month, Madison sent a lengthy response, in which he explained that South Carolina and Georgia were "extremely averse" to ending the slave trade, while New Hampshire, Massachusetts, and Connecticut sought to amend the powers over navigation and commerce.[103] Thus, the clause was the product of compromise between these states. Madison also noted that some states did not want the term "slaves" to be included in the Constitution, leading to the use of the phrase "migration or importation of persons":

> The term migration allowing those who were scrupulous of acknowledging expressly a property in human beings, to view imported persons as a species of emigrants, whilst others might apply the term to foreign malefactors sent or coming into the Country. It is possible tho' not recollected, that some might have had an eye to the case of freed blacks, as well as malefactors. But whatever may have been intended by the term "migration" or the term "persons," it is most certain, that they referred, exclusively, to a migration or importation from other countries into the U. States; and not to a removal, voluntary or involuntary, of Slaves or freemen, from one to another part of the U. States.[104]

Madison went on to argue that this view was supported by the absence of any discussion of the domestic slave trade, or of any effort to propose amendments concerning that issue, at any state ratifying conventions.[105] The issue was significant enough, Madison implied, that

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101. Letter from Robert Walsh Jr. to James Madison (Feb. 15, 1819), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-01-02-0366 [https://perma.cc/Q2UT-C9MS].

102. Letter from Robert Walsh Jr. to James Madison (Nov. 11, 1819), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-01-02-0498 [https://perma.cc/3EV3-VWLW]. For a summary of the correspondence between Madison and Walsh, see DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 107–13 (1989).

103. Letter from Robert Walsh Jr. to James Madison (Nov. 27, 1819), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-01-02-0504 [https://perma.cc/2MRH-ZXDQ].

104. *Id.*

105. *Id.*

it would have led to debate and proposed amendments had the clause been understood to apply to the domestic slave trade.[106] Moreover, he noted that Congress had seemingly not understood itself to have power over the domestic slave trade under the Migration or Importation Clause during the period between 1808 and 1819, since it wasted no time banning the importation of enslaved persons in 1808 but took no effort to regulate the domestic trade.[107]

Despite Madison's letter, Walsh went ahead and published a 116-page manuscript arguing the opposite. In his *Free Remarks on the Spirit of the Federal Constitution*, he contended that the Migration or Importation Clause was in fact drafted with an eye to the eventual eradication of slavery.[108] Walsh labeled the argument that the clause had been meant to apply not just to slavery but also to immigration as "absurd," citing James Madison's Federalist No. 42, in which he had stated: "Attempts have been made to pervert this clause into an objection against the Constitution by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent voluntary and beneficial emigration from Europe to America."[109] Madison's vehement rejection of Walsh's interpretation of the clause made Walsh's reliance on him to make his point a bit awkward, but in January 1820 Walsh sent Madison a copy of *Free Remarks*, stating that he had approached "these subjects with the boldness which the liberality of your character naturally inspires," and insisting that he had published part of his manuscript before he received Madison's response to his letter.[110] He also admitted that he "did not, in fact, wish to be convinced, as to the constitutional point, so deep were my impressions of the

106. *Id. See also* Letter from James Madison to James Monroe (Feb. 10, 1820), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-02-02-0008 [https://perma.cc/UA3Q-XMZE] ("I should deem it impossible that the memory of any one who was a Member of the General Convention could favor an opinion that the terms did not then exclusively refer to migration & importation into the U. S. Had they been understood in that Body in the sense now put on them, it is easy to conceive the alienation they would have there created in certain States. And no one can decide better than yourself, the effect they would have had on State Conventions, if such a meaning had been avowed by the advocates of the Constitution. If a suspicion had existed of such a construction, it would at least have made a conspicuous figure among the Amendments proposed to the Instrument.").

107. Letter from Robert Walsh Jr. to James Madison, *supra* note 101.

108. A PHILADELPHIAN, FREE REMARKS ON THE SPIRIT OF THE FEDERAL CONSTITUTION, THE PRACTICE OF THE FEDERAL GOVERNMENT, AND THE OBLIGATIONS OF THE UNION RESPECTING THE EXCLUSION OF SLAVERY FROM THE TERRITORIES AND NEW STATES 38 (1819) (popularly attributed to Robert Walsh).

109. *Id.* at 17 (quoting THE FEDERALIST NO. 42 (James Madison)).

110. Letter from Robert Walsh Jr. to James Madison (Jan. 2, 1820), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-01-02-0529 [https://perma.cc/5HSA-FFWM].

inexpediency [and] even criminality of the establishment of the institution of slavery beyond the Mississippi."[111]

Madison quickly responded to Walsh's letter, pointing to Federalist No. 42 as proof that "migration" did not mean "immigration," despite Walsh's misunderstanding. First, he noted that "Mr. Wilson, with the proceedings of that assembly [the Constitutional Convention] fresh on his mind, distinctly applies the term [migration] to persons coming to the U. S. from abroad."[112] Next, he asserted "that a consistency of the passage cited from the Federalist with my recollections, is preserved by the discriminating term 'beneficial' added to 'voluntary emigrations from Europe to America.'"[113] In other words, Madison claimed to have only dismissed criticisms that the clause would prevent beneficial immigration, but not to have disclaimed that it offered authority to regulate any immigration at all.

While Madison and Walsh corresponded, Congress continued to debate the Missouri bill. Talmadge's amendment passed narrowly in the House of Representatives but was struck from the Missouri statehood bill in the Senate, and the House refused to pass the amended bill.[114] In late 1819, the House passed a bill admitting both Missouri and Maine, the former presumably as a state that would allow slavery and the latter as a free state.[115] Throughout February 1820, Congress fiercely debated the Missouri bill and the restriction on slavery in the proposed new state. Anti-restrictionists argued that Congress lacked the constitutional power to restrict slavery; restrictionists heavily relied on the Migration or Importation Clause as offering such authority based on their reading of "migration" as applying to the interstate migration of enslaved persons.[116]

Several anti-restrictionist congressmen responded that "migration" was intended to apply to immigrants, not enslaved persons.[117] For example, Representative Philip Barbour made the point that the clause refers to "[t]he migration or importation of such persons as any of the States now existing shall think proper to admit," and said that the use of

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111. *Id.*

112. Letter from Robert Walsh Jr. to James Madison (Jan. 11, 1820), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-01-02-0533 [https://perma.cc/QTL4-VHFB].

113. *Id.*

114. MOORE, *supra* note 97, at 54.

115. *Id.* at 89.

116. *See, e.g.*, 35 ANNALS OF CONG. 1271–72 (1855). For a general description of the debate, see LIGHTNER, *supra* note 55, at 54–57.

117. *See, e.g.*, 35 ANNALS OF CONG. 317–19 (1855) (statement of Sen. James Barbour); *id.* at 1238 (1855) (statement of Rep. Philip P. Barbour); 36 ANNALS OF CONG. 1316 (1855) (statement of Rep. Charles Pinckney).

the term "admit" only made sense if individuals were coming from outside the United States.[118]

One of the longest speeches concerning the Migration or Importation Clause came from Representative Charles Pinckney, who drew from his memories as a delegate to the Constitutional Convention and claimed that the clause was intended as a "negative pregnant," restraining congressional action on immigration for twenty years and affirmatively granting Congress power over it afterward.[119] Using much more florid language, he echoed Representative Livingston's account during the Alien and Sedition Act debates concerning the rationale for a twenty-year embargo on immigration:

> [A]t this time, we had immense and almost immeasurable territory, peopled by not more than two millions and a half of inhabitants, it was of very great consequence to encourage the emig[r]ation of able, skilful, and industrious Europeans. . . . That the safest mode would be to pursue the course for twenty years, and not, before that period, put it at all into the power of Congress to shut it; that, by that time, the Union would be so settled, and our population would be so much increased, we could proceed on our own stock, without the farther accession of foreigners; that, as Congress were to be prohibited from stopping the importation of slaves to settle the Southern States, as no obstacle was to be thrown in the way of their increase and settlement for that period, let it be so with the Northern and Eastern, to which, particularly New York and Philadelphia, it was expected most of the emigrants would go from Europe: and it so happened, for, previous to the year 1808, more than double as many Europeans emigrated to these States, as of Africans were imported into the Southern States.[120]

There is nothing in the records of the Constitutional Convention, the ratification debates, or Madison's correspondence to corroborate Pinckney's account, which has the tone of exaggeration to it. It is, however, interesting that he connected slavery and immigration as complimentary Southern and Northern systems for settling the country, suggesting that in fairness immigration should be terminated when the slave trade was. In framing the two as alternative systems, his remarks echoed those of George Mason during the convention, and they also foreshadowed mid-century Southern nativism in response to fears of the

118. 35 ANNALS OF CONG. 1238–39 (1855).
119. 36 ANNALS OF CONG. 1316 (1855) (emphasis omitted).
120. *Id.* at 1316–17.

North's immigration-based growth and many immigrants' abolitionist views.[121]

The Senate ultimately added a provision in February 1820 to the bill that no new slave states be admitted to the Union out of the Louisiana Territory north of the latitude of 36°30', which was Missouri's southern border.[122] On March 2, 1820, the House passed the Senate version of the bill,[123] and President James Monroe signed it into law four days later.[124] Congress's resolution of the Missouri controversy held the peace between North and South for a quarter century but did not clarify the meaning of the Migration or Importation Clause. There is no indication that Congress believed the restriction on the admission of new slave states north of 36°30' was authorized by the clause. As some congressmen pointed out during the debates, the clause was not necessarily on point to any such restriction, because even if it authorized Congress to prohibit the domestic migration of enslaved persons, that did not mean that it authorized Congress to impose restrictions on a new state's admission to the Union.[125] Some of those congressmen who voted for the compromise might have believed that it was authorized by another authority, such as the Admissions Clause, the Commerce Clause, the Necessary and Proper Clause, or natural law. The debates, in any event, revealed Congress to be divided in its view of the scope of the Migration or Importation Clause. In the years ahead, the Supreme Court would be the next to weigh in on its meaning.

### *D. Migration or Importation Clause Jurisprudence*

In the wake of the Missouri Compromise, the Court decided a series of cases concerning the federal commerce power and the Migration or Importation Clause. During this time, it issued no dispositive holding concerning the meaning of the clause. Rather, the Court's statements about the Migration or Importation Clause came largely in the form of dicta or in the concurrences or dissents of individual justices that never commanded the majority of the Court.[126] While debating the Missouri Compromise, Southern congressmen commonly argued for an interpretation of the clause that applied to immigration.[127] However,

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121. *See infra* Section I.E; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 370 (recording remarks by George Mason).

122. FORBES, *supra* note 90, at 5.

123. 36 ANNALS OF CONG. 1587–88 (1855).

124. Missouri Compromise of 1820, ch. 22, 3 Stat. 545 (1820).

125. *See* 35 ANNALS OF CONG. 1238 (1855) (statement of Rep. Philip Barbour).

126. *See infra* Sections I.D.1, I.D.3–4.

127. *See* 36 ANNALS OF CONG. 1316 (1855).

some pro-slavery members of the Supreme Court later interpreted it the opposite way,[128] perhaps as part of a broader effort to avoid a reading of the Commerce Clause that would apply to the transportation of persons and therefore to slavery. Following the Civil War, Congress took a more active role in passing immigration legislation,[129] and the Court seemed to settle on Commerce Clause authority for federal immigration action without drawing any support from the Migration or Importation Clause.[130] In 1883, the Court anticlimactically ended the lengthy debates on the topic by clarifying in dicta that the clause applied only to African Americans.[131] In the Chinese Exclusion case that it decided soon afterward, the Court settled on an unenumerated source for federal power that it has adhered to ever since.[132]

### 1. *GIBBONS V. OGDEN* AND *ELKISON V. DELIESSELINE*

In *Gibbons v. Ogden*,[133] the Court considered the constitutionality of a steamboat monopoly granted by the state of New York.[134] Thomas Gibbons challenged the arrangement as violating the exclusive power of the federal Congress to regulate commerce; Aaron Ogden, who was a beneficiary of the state monopoly, argued that the federal power was shared with the states and that the transportation of passengers was not commerce.[135]

In his majority opinion, Chief Justice Marshall considered whether the distinction between the transportation of passengers and cargo was constitutionally significant.[136] He explained that the text of the Migration or Importation Clause suggested that the Commerce Clause authorized the federal government to regulate both.[137] The clause, he said, "has always been considered as an exception from the power to regulate commerce." By applying to both migration and importation it clarified that the Commerce Clause applied to both:

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128. *See Passenger Cases*, 48 U.S. (7 How.) 283, 474–75 (1849) (Taney, C.J., dissenting); *id.* at 510–11 (Daniels, J., dissenting).

129. *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

130. *See Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

131. *See New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 62 (1883).

132. *See Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581, 603–04 (1889).

133. 22 U.S. (9 Wheat.) 1 (1824).

134. *Id.*

135. *See id.* at 9–42.

136. *Id.* at 215–17.

137. *Id.* at 216–17.

> Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.[138]

Thus, Chief Justice Marshall rejected the gloss put on the Migration or Importation Clause by the slavery restrictionists during the Missouri Compromise. However, his view of the clause in *Gibbons* is probably dicta, since he went on to state that the resolution of whether the Commerce Clause applied to passengers was unnecessary to decide the case, because even if steamboats did transport passengers, their "principal employment is the transportation of merchandise."[139] Chief Justice Marshall also avoided fully resolving the question of the extent of state concurrent powers to regulate commerce, pointing out that a federal statute addressed the licensing of steamboats, effectively preempting New York's law.[140]

These larger questions that Chief Justice Marshall avoided were ones with significant ramifications for slavery. If passengers could be articles of commerce subject to Commerce Clause regulation, then persons could be articles of commerce, including enslaved persons. That meant that Congress had authority to prohibit the domestic slave trade—a power that many Southern congressmen strongly contested during the Missouri Compromise.[141] Moreover, if Congress's power over commerce was exclusive and states lacked concurrent power to regulate it, that suggested a federal power to control, limit, or even abolish slavery. Thus, it is probably no coincidence that Chief Justice Marshall avoided addressing these questions in the embattled environment following the Missouri Compromise debates.

Justice William Johnson, however, did not shirk them. He stated in his concurrence both that Congress had exclusive power over commerce and that passengers were articles of Congress subject to potential regulation under the Commerce Clause.[142] In support of his understanding of the Commerce Clause, he cited the Migration or Importation Clause, noting that it gives "Congress a power to prohibit,

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138. *Id.* Justice Story echoed this view of the Migration or Importation Clause in his influential early treatise on American Law. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1331 (1833).

139. *Gibbons*, 22 U.S. at 219–20.

140. *Id.* at 220–21.

141. *See* FORBES, *supra* note 90, at 21.

142. *Gibbons*, 22 U.S. at 227, 231 (Johnson, J., concurring).

where the States permit, although they cannot permit when the States prohibit."[143]

The Southern backlash to this position became clear later that year when Justice Johnson decided a case while presiding over a district court in South Carolina. In *Elkison v. Deliesseline*,[144] he considered a South Carolina law requiring the imprisonment of free Black sailors while their ships were in port.[145] If the captain of the ship failed to comply, the captain could be prosecuted and the Black sailor enslaved.[146]

An "association of gentlemen . . . organized themselves into a society to see the laws carried into effect," and the lawyer for that association appeared before Justice Johnson to defend the law.[147] In addressing its constitutionality, the lawyer for the association "concluded his argument with the declaration," that he would prefer "a dissolution of the Union" to conceding the federal government's power to supplant the South Carolina law.[148]

Consistent with his opinion in *Gibbons*, Justice Johnson held that the law conflicted with Congress's exclusive power to regulate commerce.[149] In December 1823, a livid South Carolina Senate passed a set of resolutions in response to the opinion, condemning "an unconstitutional interference with [the state's] colored population."[150] The final resolution unequivocally rejected the notion of federal authority to regulate their "property."[151] The South Carolina backlash to Justice Johnson's opinion in *Elkison* helps explain why Chief Justice Marshall was unwilling to go as far as Justice Johnson in *Gibbons*. Some Southerners considered a strong and exclusive federal Commerce Clause authority to be a threat to the institution of slavery.[152] This dynamic likely impacted the Court's decisions concerning federal power over immigration in the Antebellum Era.

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143. *Id.* at 230.
144. 8 F. Cas. 493 (1823).
145. *Id.* at 493.
146. *Id.*
147. *Id.* at 494.
148. *Id.*
149. *Id.* at 495.
150. NILES WKLY. REG., Dec. 25, 1824, at 264.
151. *Id.*
152. LIGHTNER, *supra* note 55, at 78–79 (quoting Thomas Ritchie, *The Three Sweeping Clauses*, RICHMOND ENQUIRER, Mar. 4, 1841).

### 2. *MAYOR OF NEW YORK V. MILN*

In 1837, a very different Supreme Court returned to the Commerce Clause in *Mayor of New York v. Miln*.[153] *Miln* involved a New York statute requiring ship captains to identify all foreign passengers brought into the city.[154] The Court had originally heard argument in 1834, and Chief Justice Marshall reportedly would have struck down the New York statute but lacked a clear majority on his side because Justice Johnson was ill, so he held the case over.[155] In the meantime, both Justice Johnson and Chief Justice Marshall died, and Justice Duvall retired. Three Southerners replaced them: Robert Brooke Taney of Maryland, James W. Wayne of Georgia, and Philip Pendleton Barbour of Virginia.[156] Justice Barbour was one of the Southern representatives who had spoken out against restricting slavery in Missouri, arguing not only against the restrictionists' view of the Migration or Importation Clause, but more broadly for a very narrow view of the Commerce Clause.[157] In *Miln*, he had an opportunity to further his vision of limited federal power.

Both the plaintiff and defendant in *Miln* made arguments based on the Migration or Importation Clause. The plaintiff contended that, because the clause prevented federal action on immigration until 1808, it was clear that the states held the power concurrently with the federal government.[158] The defendant argued that the clause demonstrated that the federal government held power over immigration, and because it had exercised that power through legislation concerning passengers, it had "occupied the ground."[159]

Justice Barbour did not discuss the Migration or Importation Clause, or Chief Justice Marshall's inference from it that the Commerce Clause extended to passengers as well as goods. According to him, New York's law was justifiable as an exercise of its police power and the Commerce Clause was inapposite because persons were not articles of commerce; only goods were.[160] Justice Story disagreed, dissenting based on his view that the Court held in *Gibbons* that the Commerce Clause applied to the transport of passengers.[161] Perhaps in response to Justice Story, Justice Barbour held that, even if passengers could be articles of commerce, the

153. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).
154. *Id.* at 102.
155. Bilder, *supra* note 1, at 800.
156. *Id.*
157. *See* 35 ANNALS OF CONG. 1239–40 (1855).
158. *Miln*, 36 U.S. at 111.
159. *Id.* at 119–21.
160. *See id.* at 136–37.
161. *Id.* at 155–57 (Story, J., dissenting).

New York law applied to persons who had ceased to be passengers and therefore could not be regulated under the Commerce Clause.[162]

In resolving the case on the grounds that persons were not articles of commerce, Justice Barbour established a precedent that was consistent with his view during the Missouri controversy that Congress lacked authority to regulate the domestic slave trade. He likewise avoided resolving whether states concurrently held Commerce Clause power with the federal government—a question with implications for regulation of the domestic slave trade.[163]

### 3. THE *PASSENGER CASES*

The Court looked again at the issue of state authority to regulate immigration in 1849 in two companion cases commonly called the *Passenger Cases*.[164] In one of the least coherent decisions in the history of the Supreme Court, it found New York and Massachusetts laws requiring the payment of taxes and bonds for passengers arriving in those states to violate the Commerce Clause.[165] However, each of the justices in the majority wrote their own opinion, making it difficult to understand how the Court thought the Commerce Clause precluded the state legislation. Justices McLean, Wayne, Catron, McKinley, and Grier held both statutes to be void; Chief Justice Taney, and Justices Daniel, Nelson, and Woodbury, would have upheld them.

The 5-4 majority in the *Passenger Cases* hinged on the opinion of Justice John McKinley of Alabama, who, with the agreement of Justices Wayne and Catron, wrote a separate opinion to state his views on the Migration or Importation Clause.[166] Justice McKinley discussed the drafting and amendment of the clause to clarify that a tax could be imposed on imported persons but not on migrants.[167] Based on this history and the plain language of the provision, he concluded that "migration" in the clause refers to immigrants and "importation" to enslaved

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162. *Id.* at 138–39.

163. *Id.* at 132.

164. *Passenger Cases*, 48 U.S. (7 How.) 283, 475–77 (1849).

165. *See* Gordon, *supra* note 19, at 673.

166. *Passenger Cases*, 48 U.S. at 452–53 (McKinley, J., concurring). *See also id.* at 455 ("Mr. Justice Catron concurs in the foregoing opinion [of Justice McKinley], and adopts it as forming part of his own, so far as Mr. Justice McKinley's individual views are expressed, when taken in connection with Mr. Justice Catron's opinion."); *id.* at 412–14 (Wayne, J., concurring) (explicitly agreeing with Justice McKinley and stating that the Migration or Importation Clause includes "the migration of other persons, as well as the importation of slaves").

167. *Id.* at 453.

persons.[168] From that conclusion, he proceeded to find that Congress had the power to prohibit the admission of noncitizens after 1808, and because it could exclude, it necessarily also held the power to admit noncitizens.[169] Justice McKinley then proceeded to hold that "the whole power over the subject belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations."[170] He further held that this power, in conjunction with the Necessary and Proper Clause, "seems necessarily to include the whole power over this subject; and the Constitution and laws of the United States being the supreme law of the land, State power cannot be extended over the same subject."[171] Thus, according to Justice McKinley, passengers could not be subject to state laws until they become part of the population of a state, temporarily or permanently.[172]

Chief Justice Roger Taney of Maryland and Justices Peter Daniel of Virginia and Levi Woodbury of New Hampshire all drafted dissents that explicitly rejected Justice McKinley's view of the Migration or Importation Clause.[173] All three insisted that the clause was intended only to apply to slavery, citing Madison's Federalist No. 42—apparently without being aware of Madison's explanation that he did not intend the meaning they ascribed to Federalist No. 42.[174] It is odd that Chief Justice Taney, infamous as the Southern author of the *Dred Scott*[175] decision, rejected the view of the Migration or Importation Clause that anti-restrictionists had propounded during the Missouri Compromise and that Professor Berns later referred to as the "Southern interpretation" of the clause.[176] But he did, as did the ardently pro-slavery Virginian Justice Daniel, suggesting that interpretation of the provision was not a simple

168. *Id.*

169. *Id.* at 454.

170. *Id.*

171. *Id.* at 455.

172. *Id.*

173. *Id.* at 474–77 (Taney, C.J., dissenting); *id.* at 512–13 (Daniel, J., dissenting); *id.* at 542–43 (Woodbury, J., dissenting).

174. *Id.* at 474–75, 511, 543; *see infra* Part II.

175. 60 U.S. (19 How.) 393 (1857).

176. *Id.* at 411. In *Dred Scott v. Sandford*, Chief Justice Taney stated that the Constitution refers to "the people" or "citizens" when setting out the rights of citizens and contended that Black persons were not intended to fall within those categories. *Id.* He cited the Migration or Importation Clause as one of two clauses of the Constitution that was clearly not designed to refer to citizens, stating that "neither the description of persons therein referred to, nor their descendants," were embraced within the terms "citizens" or "the people of the United States." *Id.* He thus assumed that the term "such persons" in the clause referred only to enslaved Black people, otherwise his argument would also exclude White immigrants from citizenship. *See* Berns, *supra* note 9, at 199 n.4.

matter of regionalism, or that by the time of the *Passenger Cases*, the constitutional strategy of slavery's Southern proponents had shifted.

Justice Woodbury also argued that the Migration or Importation Clause was not an affirmative grant of power to Congress, but "one entirely of limitation on power," and since the immigration power is "nowhere else in the Constitution expressly granted to Congress, the section seems introduced rather to prevent it from being implied except as to slaves, after 1808, than to confer it in all cases."[177] If there was an affirmative source of power behind the Migration or Importation Clause, Justice Woodbury argued, it was the Commerce Clause, but as Justice Barbour had done in *Miln*, Justice Woodbury asserted that the Commerce Clause could not apply to free passengers.[178] And even if it did, he said, it was a power held concurrently with the states.[179]

The doctrinal confusion created by the *Passenger Cases* was temporarily resolved in *Henderson v. Mayor of New York*,[180] in which the Court considered another New York statute that required payment of a bond, or a fee in lieu of a bond, for each non-citizen passenger.[181] *Henderson* was decided after the Civil War and the Thirteenth Amendment had taken the issue of slavery off the table, which may explain why the question of the federal source for an immigration power proved less contentious. Without discussing the Migration or Importation Clause, the Court unanimously held that Congress had exclusive power under the Commerce Clause to regulate the admission of non-citizens into the United States.[182]

### 4. *NEW YORK V. COMPAGNIE GÉNÉRALE TRANSATLANTIQUE*

In *New York v. Compagnie Générale Transatlantique*,[183] the Court reiterated its holding from *Henderson* and in the process arguably rejected the Migration or Importation Clause as a basis for a federal immigration power.[184] New York had passed another head tax on passengers.[185] It had attempted to get around the holding of *Henderson* by claiming that its new law was enacted in furtherance of a general inspection law passed by the state, and that the two statutes derived

177. *Passenger Cases*, 48 U.S. (7. How) at 541 (Woodbury, J., dissenting).
178. *Id.*
179. *Id.*
180. 92 U.S. 259 (1875).
181. *Id.* at 261.
182. *Id.* at 273–74.
183. 107 U.S. 59 (1883).
184. *Id.* at 60–62.
185. *Id.* at 60.

authority from Article 1, Section 10, Clause 2 of the Constitution, which generally prohibits state taxes on imports or exports "except what may be absolutely necessary for executing its inspection laws."[186] New York argued that the Migration or Importation Clause was authority for considering noncitizen passengers to be imports, since it allows a tax on importation.[187]

The Court rejected New York's argument, stating:

> There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words "migration" and "importation" refer to the different conditions of this race as regards freedom and slavery. When the free black man came here he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports or exports within the meaning of the Constitution.188

In addition, the Court held that New York's law goes far beyond the permissible scope of an "inspection law," and was really just a transparent attempt to evade the holding of the Court's prior line of cases finding fees on passengers to violate the Commerce Clause.[189]

The Court cited no authority for its incredible claim that "[t]here has never been any doubt" that the clause applied exclusively to "persons of the African race," failing to mention the extensive debate on precisely that topic from the *Passenger Cases*, the Missouri Compromise, and the Alien and Sedition Act debates.[190] Ultimately, its claim that the clause was racially limited was unnecessary to its holding that "free human beings are not imports or exports."[191] The history of the Constitutional Convention strongly supported that point, since the clause was amended to apply the language authorizing a tax just to imported persons and not to migrating ones.[192] The Court could have cited this history and rejected New York's argument by saying that the Migration or Importation Clause only authorizes a tax as to enslaved persons who were "imported," not as to free migrants whatever their race.

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186. *Id.* at 60–61.
187. *Id.* at 61.
188. *Id.* at 62.
189. *Id.* at 62–63.
190. *Id.* at 62.
191. *Id.*
192. *Id.*

Therefore, the Court's statement that the clause applied exclusively "to persons of the African race" was dicta.[193] As a result, *Compagnie Générale Transatlantique* arguably has not closed the door on arguments that the Migration or Importation Clause offers textual authority for a federal immigration power. Alternatively, if the language restricting the clause to African Americans is read as part of the holding and not dicta, it is so inconsistent with the text and history of the clause that it deserves to be overruled.

### *E. Know Nothings, Abolitionists, and Early Federal Immigration Legislation*

Between 1845 and 1855, severe crop failures and devastating famines in Europe caused more than 2.5 million persons to immigrate to the United States.[194] In contrast to the predominately British and Protestant immigrants who had come earlier, the newer immigrants were mostly Irish or German and heavily Catholic.[195] The new western states and territories were welcoming of White immigrant settlers. So-called "declarant aliens" who had stated their intention to seek citizenship were authorized to vote,[196] and non-citizens often could hold property.[197] But in other parts of the country, the wave of immigration sparked a nativist backlash.[198] Congress began to consider immigration legislation in the 1840s, such as "A Bill to Prevent the Importation of Paupers and Criminals into the United States" in 1847.[199]

Immigrants tended to be members of the Democratic Party, Catholic, and opposed to the temperance movement; nativist sentiment was common among Whigs, Protestants, and temperance reformers.[200] There were also tensions between the native-born working class who competed with foreign-born workers, and between the rural residents who resented the growing power of the immigrant vote in the cities.[201] Around 1852, a nativist political party emerged to cater to these constituencies and the growing xenophobia of the time.

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193. *See id.*

194. PARKER, *supra* note 1, at 83.

195. *Id.*

196. NEUMAN, *supra* note 1, at 65; PARKER, *supra* note 1, at 100; DARRELL OVERDYKE, THE KNOW NOTHING PARTY IN THE SOUTH 18–19 (1950).

197. PARKER, *supra* note 1, at 101.

198. *Id.*

199. H.R. 601, 29th Cong. (1847).

200. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 136 (1988).

201. *Id.*

Two nativist secret fraternal societies—the Order of United Americans and the Order of the Star Spangled Banner—merged to form the new party.[202] Members pledged to vote for no one except native-born Protestants and when asked by outsiders about the order, were to respond "I know nothing."[203] This "Know Nothing" party, also known as the "Native American Party," or eventually just "American Party," sought various anti-immigrant reforms, including increasing the waiting period for naturalization to twenty-one years, restricting officeholding to native born citizens, and imposing a waiting period of several years after naturalization before immigrants could vote.[204]

At the same time, Congress began to reconsider the Missouri Compromise. In 1854, Senator Stephen Douglas of Illinois proposed the Kansas-Nebraska Act.[205] A revised version of the bill submitted in January repealed the Missouri Compromise, replacing it with a principle of "popular sovereignty" under which the residents of new states would vote themselves on whether to allow slavery.[206] The bill and its eventual enactment precipitated a wave of protest over the extension of slavery.[207]

Recent immigrants, especially German immigrants influenced by the European revolutions of 1848, were at the vanguard of the anti-slavery movement instigated by the Kansas-Nebraska Act.[208] For example, on March 16, 1854, German immigrants protesting in Chicago marched to Court House Square and set fire to a banner bearing a caricature of Stephen Douglas.[209]

Southern senators pointed to this and other immigrant protests as a basis for restricting immigrant voting and excluding unnaturalized immigrants from acquiring western lands under pending homestead legislation.[210] Senator Stephen Adams of Mississippi called attention to the Chicago protest, "the number of foreigners," and "the riots in our cities," provocatively asking, "tell me if you do not see a danger."[211] Delaware Senator John Clayton offered an amendment to the Kansas-Nebraska Act on March 2, 1854, that would deny noncitizens the right to vote or to hold public office anywhere in the new territories, thereby

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202. *Id.* at 135.

203. *Id.*

204. *Id.* at 136, 140.

205. BRUCE LEVINE, THE SPIRIT OF 1848: GERMAN IMMIGRANTS, LABOR CONFLICT, AND THE COMING OF THE CIVIL WAR 152–53 (1992).

206. *Id.* at 153.

207. *Id.*

208. *Id.* at 153–56.

209. *Id.* at 204–06.

210. *Id.* at 206.

211. *Id.*

barring them from participating in the "popular sovereignty" process for deciding the issue of slavery in new states.[212] All but one of the senators who voted for the amendment came from slave states; all those who opposed it came from free states.[213] The provision did not pass but revealed the growing sentiment among Southerners that immigrants posed a threat to the extension of slavery. In January 1855, Southern editorials warned of German immigrant advocacy for reforms like the abolition of slavery, universal suffrage, free courts, old age homes, the end of capital punishment, the eight-hour workday, and a ban on congressional prayers.[214]

The Kansas-Nebraska Act radically altered the political allegiances of the mid-nineteenth century United States. The Whig Party and the Northern wing of the Democratic Party lost members to the new Know Nothing party and the anti-slavery Republican and Free Soil Parties.[215] Initially, the Know Nothing Party enjoyed considerable strength in the North, but in the wake of the Kansas-Nebraska Act "[t]he center of nativist gravity began to shift southward," with the party winning elections in Maryland and Kentucky, gaining control of the Tennessee legislature, and winning forty-five percent of the votes in five other Southern states.[216] "Nativist riots and election-day violence featured more prominently in southern cities than in the North," with gangs like "the Plug Uglies and Blood Tubs" as "notorious enforcers of Know-Nothing dominance at the ballot box."[217]

Southern Know Nothings opposed immigration for reasons that were partly distinct from Northern members of the party and that centered on slavery. Northern Know Nothings often aligned with Republicans and Free Soilers to oppose the extension of slavery.[218] But Southern Know Nothings were typically pro-slavery and their views on slavery influenced their concerns about immigration. In addition to concerns about immigrant abolitionism and immigrant voting against slavery in the western territories, there was a sense among Southern nativists that immigrants were largely settling in the North, increasing Northern

212. *Id.* at 155.

213. *Id.*

214. OVERDYKE, *supra* note 196, at 17.

215. MCPHERSON, *supra* note 200, at 138–140.

216. *Id.* at 140.

217. *Id.* at 141

218. TYLER G. ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S 106 (1994).

political power in the House to legislate against slavery, and that a surplus of immigrant labor might reduce the value of enslaved labor.[219]

Around this time, the Know Nothing Party began to push immigration reform in the House of Representatives. On January 2, 1855, "A Bill to Prevent the Introduction into the United States of Foreign Criminals, Paupers, Idiots, Lunatics, and Insane and Blind Persons" was introduced into Congress, proposing for perhaps the first time passport controls and grounds of exclusion.[220] Know Nothing Party member Representative William R. Smith of Alabama gave a lengthy speech to Congress about two weeks later, describing the Know Nothing Party and its mission and explicating its view of the dangers of immigration and Catholicism.[221] Representative Smith called in his speech not only for the power to exclude, but also the power to "banish aliens"—an early demand for a deportation power that would not coalesce until the late nineteenth century.[222]

Representative Smith was as pro-slavery as he was anti-immigrant. During the Civil War, he became a colonel in the Confederate Army and represented Alabama in the First and the Second Confederate Congresses.[223] During Alabama's secession debates, he spoke ardently in favor of slavery, stating, "I do not believe that the African Slave Trade would be immoral in itself now—or that it ever has been immoral. I hold, that the African, taken from his native wilds and placed in the ranks that march onward from savage to civilized life, is greatly benefitted."[224] His secession comments place his earlier speech concerning immigration in context. Given what is known about his views concerning slavery, it is clear what he was speaking about when he told the House that "foreigners

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219. John David Bladek, America for Americans: The Southern Know Nothing Party and the Politics of Nativism, 1854–1856, at 66–68 (1998) (Ph.D. dissertation, University of Washington) (on file with the University of Washington ResearchWorks Archive).

220. H.R. 613, 33d Cong. (1855).

221. *See* CONG. GLOBE, 33d Cong., 2d Sess. 94 (1855) (statement of Rep. W.R. Smith).

222. *Id.* at 97. For a history of the deportation power, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

223. Anne Easby-Smith, The Life of William Russell Smith, William Russell Smith of Alabama, His Life and Works 1, 11 (1931) (unpublished manuscript) (on file with the University of Alabama Libraries Special Collections).

224. WILLIAM RUSSELL SMITH, THE HISTORY AND DEBATES OF THE CONVENTION OF THE PEOPLE OF ALABAMA, BEGUN AND HELD IN THE CITY OF MONTGOMERY, ON THE SEVENTH DAY OF JANUARY, 1861 IN WHICH IS PRESERVED THE SPEECHES OF THE SECRET SESSIONS, AND MANY VALUABLE STATE PAPERS 201 (Elec. ed. 2000), https://docsouth.unc.edu/imls/smithwr/smith.html [https://perma.cc/3GFY-JPWH].

. . . do not sufficiently understand our *institutions*."[225] If there could be any doubt, he went on to emphasize the connection between radical ideas like abolitionism and immigrant organizations like the German Social Democratic Association.[226] He highlighted the pro-abolitionist and anti-Fugitive Slave Law views of the *New York Tribune*, which had criticized the Know Nothing Party.[227]

In March, the House tabled the immigration bill.[228] A few months later, the Know Nothing Party held its first national conference in Philadelphia. Southerners and Northern conservatives aligned at the conference to pass a plank endorsing the Kansas-Nebraska Act.[229] Afterward, "the party wasted away in the North while it grew stronger in the South."[230]

The following year, Representative Smith filed a follow-up immigration bill entitled "A Bill to Prevent the Introduction into the United States of Foreign Criminals and Paupers."[231] In support of the bill, the House Committee on Foreign Affairs catalogued a variety of problems it claimed were associated with immigration, from pauperism and crime to juvenile vagrancy and infidelity.[232] The report extensively discussed whether the federal government had authority to regulate immigration, favorably citing the comments of Judge Wilson and Judge Iredell in the Pennsylvania and North Carolina constitutional ratifying conventions, Chief Justice Marshall's majority opinion and Justice Johnson's concurrence in *Gibbons v. Ogden*, and Justice McKinley's concurrence in the *Passenger Cases*.[233]

The 1854 Platform of the Free Germans was tacked onto the end of the report, presumably to highlight the supposedly dangerous radicalism of immigrant groups.[234] The platform's first point was a call for a ban on the extension of slavery, an end to the Fugitive Slave Law, and the "gradual extermination of slavery."[235]

Just as the Know Nothings connected the issues of immigration and slavery, so too did some of their opponents. In the wake of passage of the Kansas-Nebraska Act, Abraham Lincoln wrote to Joshua Speed in

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225. CONG. GLOBE, 33d Cong., 2d Sess. 95 (1855) (statement of Rep. W.R. Smith) (emphasis added).

226. *Id.*

227. *Id.* at 96.

228. H. JOURNAL, 33d Cong., 2d Sess. 582–83 (1855).

229. MCPHERSON, *supra* note 200, at 141.

230. *Id.*

231. H.R. 124, 34th Cong. (1856).

232. H.R. REP. NO. 34-359 (1856).

233. *Id.* at 23–25.

234. *Id.* at 29.

235. *Id.* at 29–30.

Kentucky who had asked him where he stood on the issue of slavery.[236] Lincoln responded by both criticizing slavery and stating unequivocally that he was "not a Know-Nothing."[237] He would rather, he said, move to Russia "where despotism can be taken pure, and without the base alloy of hypocracy" than live in a country run by Know Nothings who subverted the promise of the Declaration of Independence with their hostility to "negroes, and foreigners, and Catholics."[238]

Within six years, the South seceded from the Union, shifting the country's focus to war. Even so, the issues of slavery and immigration remained connected. Concern had been growing in Congress concerning the traffic in "coolies"—Asian laborers who were widely employed on Caribbean plantations in the British Empire after its abolition of slavery in 1838.[239] After generations of debating whether it had power to do so, the wartime Congress finally passed federal immigration legislation, the Anti-Coolie Act of 1862,[240] which prohibited U.S. citizens from importing "coolies" that Republican Congressmen feared could be used to replace enslaved Black labor across the South.[241] In effect, this "last slave-trade act . . . was simultaneously the first immigration law."[242]

The end of the war brought renewed attention to immigration, as Chinese laborers increasingly immigrated to work in the United States.[243] These laborers "confused the boundary between slavery and freedom, between black and white, causing the mass demand for Asian migrant laborers as well as appeals for their exclusion in the postbellum United States."[244] These demands eventually culminated in passage of the Page Act of 1875,[245] prohibiting immigration of Asian forced laborers and prostitutes, and the Chinese Exclusion Act of 1882.[246] The proponents of Chinese exclusion drew on the rhetoric of abolitionism and characterized the racist new law as an effort to combat slave labor.[247]

The Supreme Court, when it weighed in on Congress's power to pass the new legislation, upheld Chinese Exclusion based on a theory of

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236. Letter from Abraham Lincoln to Joshua F. Speed (Aug. 24, 1855), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320–23 (Roy P. Basler ed., 1953).

237. *Id.* (emphasis omitted).

238. *Id.* at 323.

239. JUNG, *supra* note 17, at 4, 14, 33.

240. Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27, 12 Stat. 340 (1862).

241. *See* JUNG, *supra* note 17, at 36–38.

242. *Id.* at 38.

243. *Id.* at 76–106.

244. *Id.* at 6.

245. Page Act of 1875, ch. 141, 18 Stat. 477.

246. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

247. *See* JUNG, *supra* note 17, at 11–12.

inherent federal power as a function of sovereignty.[248] It made no mention of the Migration or Importation Clause or the Commerce Clause justification for federal immigration regulation that it had seemed to decisively settle on fourteen years earlier in *Henderson*, but instead found that federal authority over immigration was plenary as an inherent aspect of sovereignty.[249] This inaugurated what most commentators consider the modern era of immigration law, in which federal courts have largely exhibited extraordinary deference to Congress and the President in the immigration arena based on unenumerated notions of sovereignty, national security, and foreign affairs.[250] With the repudiation of slavery, focus on the Migration or Importation Clause as a grant of federal power over immigration seemed to have died too, as though the two issues were symbiotically connected in the clause, and the one could not survive without the other.

## II: AN ORIGINALIST UNDERSTANDING OF THE MIGRATION OR IMPORTATION CLAUSE

The eighteenth and nineteenth century history of the Migration or Importation Clause reveals a dissolving consensus that the clause related to immigration. Resistance to the clause as a source of federal immigration authority occurred during the battle over the Alien and Sedition Acts and continued throughout the Antebellum Era as the opponents and defenders of slavery both sought to use the clause in support of or against arguments for federal regulation of slavery. Arguments about the Migration or Importation Clause receded in the postbellum era, and now there are few proponents of the clause as supporting federal authority over immigration regulation.[251] Yet the predominant school of constitutional interpretation today is probably originalism, which looks to the original meaning of the Constitution. For those following this approach, it is necessary to unwind the interpretative battles over the clause and look for its original meaning at the time of ratification. An examination of the original meaning of the Migration or Importation Clause is worth undertaking—the most significant

248. *See Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889).

249. *Id.*

250. *See generally Immigration as Invasion*, *supra* note 4 (interpreting the modern federal immigration power in regards to its transition from commercial regulation grounded in Congress's commerce power into judicial deference to the nation's inherent sovereignty).

251. *But see* Green, *supra* note 9, at 671; Eastman, *supra* note 9, at 10.

examination of the clause in legal scholarship occurred in 1968, prior to modern originalism scholarship.[252]

There are many schools of originalism.[253] The dominant form of originalism since the 1980s looks to the "original public meaning" of a text.[254] According to this school, what the founders themselves intended a text to mean is less important than how the text would have been commonly interpreted in the late eighteenth century.[255] Some originalists, like Professor Donald Drakeman, care more about the intentions of the founders themselves.[256] Under either approach, there is powerful evidence that the original meaning of the Migration or Importation Clause was to restrict the federal government from using its authority under the Commerce Clause to restrict the slave trade *or immigration* before 1808.

Starting with the text, the clause 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 one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[257]

Who was intended by "such persons"? According to one school of thought, stretching from John Jay during the 1819 Missouri Compromise debates to Professor Ilya Somin in recent years, "persons" was intended purely as a euphemism for enslaved individuals.[258] But the text says

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252. *See* Berns, *supra* note 9.

253. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251–53 (2019).

254. *Id.* at 1251. *See also* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 404 (2012).

255. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

256. DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2020).

257. U.S. CONST. art. I, § 9, cl. 1.

258. Letter from John Jay to Elias Boudinot, *supra* note 98; Ilya Somin, *Why the Migration or Importation Clause of the Constitution Does Not Imply Any General Federal Power to Restrict Immigration*, WASH. POST (Apr. 19, 2016, 8:25 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/19/why-the-migration-or-importation-clause-of-the-constitution-does-not-imply-any-general-federal-power-to-limit-immigration [https://perma.cc/6WXV-C8U6]; Ilya Somin, *Does the Constitution Give the Federal Government Power over Immigration?*, CATO UNBOUND (Sept. 12, 2018), https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration/ [https://perma.cc/L7X6-JE6G]. *See also Passenger Cases*, 48 U.S. (7 How.) 283, 474 (1849) (Taney, C.J., dissenting); *id.* at 511 (Daniel, J., dissenting); A PHILADELPHIAN, *supra* note 108, at 16–17 (popularly attributed to Robert Walsh).

"persons," not "enslaved persons," and in the eighteenth century, just as today, "persons" could have meant any kind of migrant.

Moreover, the provision plainly distinguishes between "migration" and "importation," since it authorizes a tax for the latter but not the former.[259] In the *Passenger Cases*, Chief Justice Taney and Justice Woodbury argued that the terms "migration" and "importation" were synonyms, with the former inserted, as Justice Woodbury blithely remarked, in order "to cover slaves when regarded as persons rather than property, as they are for some purposes."[260] Historian David Lightner also noted the possibility that the terms might both "have been intended to refer to the bringing in of slaves."[261] He noted that in an early draft of the clause, only the word "importation" was used, and he suggested that the inclusion of the term "migration"

> could have been an effort to accommodate those delegates who insisted that the Constitution, as the fundamental law for the entire nation, should not recognize property in slaves. . . . If the 1808 clause had used only the word 'importation' to refer to the bringing in of slaves, it would have carried a strong implication that property was involved.[262]

Yet regardless of what the original intention was by including the word "migration," the text developed in a way that makes it impossible to consider the term synonymous with "importation." The delegates eventually amended the provision to allow for a tax on "importation" but not "migration," and during the ratification debates James Wilson and James Iredell clarified that the distinction was intentional in order to allow the slave trade to be taxed without taxing free migration.[263] As

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259. U.S. CONST. art. I, § 9, cl. 1.

260. *Passenger Cases*, 48 U.S. at 542 (Woodbury, J., dissenting). *See also id.* at 476 (Taney, C.J., dissenting).

261. LIGHTNER, *supra* note 55, at 21. Professor Mary Bilder, on the other hand, has raised the possibility that both "importation" and "migration" might have been understood by some to refer to immigration, particularly in states like Pennsylvania and Maryland, "where the trade in indentured servants had continued into the late eighteenth century . . . ." Bilder, *supra* note 1, at 787 (citing the comments of Gouverneur Morris of Pennsylvania at the Constitutional Convention, Luther Martin at the Maryland ratifying convention, and Robert Whitehill at the Pennsylvania ratifying convention).

262. LIGHTNER, *supra* note 55, at 21; Lightner, *supra* note 29, at 32 (emphasis omitted). Lightner also noted the possibility that "'migration' could have been intended by the founders to encompass slaves moving over state lines, and whites immigrating into the United States, and slaves coming into the United States, all at the same time." *Id.* (emphasis omitted).

263. 2 ELLIOT'S DEBATES, *supra* note 57, at 452–53; 4 ELLIOT'S DEBATES, *supra* note 58, at 100–01.

Lightner ultimately concludes, implicit in the comments of Wilson, Iredell, and others "was the assumption that the word 'migration,' whatever else it may or may not have encompassed, did embody the immigration of white people into the United States."[264]

Even if migration and importation are not synonyms, migration might mean the interstate migration of enslaved persons rather than immigration. This interpretation appears to have first surfaced during the 1819 debates over the Missouri Compromise as part of an argument that the federal government had authority to limit the expansion of slavery to newly admitted states. Lightner points out that Congress could arguably have prohibited the interstate slave trade under an expansive reading of the Commerce Clause without reliance on the Migration or Importation Clause.[265] Nonetheless, the argument for authority to end the interstate slave trade under the Migration or Importation Clause was so popular among antislavery activists in 1819 that Professor Berns labeled the contrary view—that the clause applied to immigration rather than the domestic migration of enslaved persons—as the "Southern interpretation."[266]

In fact, the interpretation of the Migration or Importation Clause was not a simple regional matter, as some Northerners, like Albert Gallatin of Pennsylvania, Edward Livingston of New York, and Justice Story of Massachusetts, followed what Professor Berns called the "Southern interpretation,"[267] and some Southerners, like Chief Justice Taney of Maryland and Justice Daniel of Virginia, later rejected it.[268] Although slavery strongly influenced interpretation of the clause, its impact was more complex than Professor Berns suggested, manifesting one way during the Missouri Compromise and another during subsequent litigation. Southern justices like Barbour and Taney shifted the battlefield in early nineteenth century cases to the Commerce Clause—opposing any reading of the clause that would treat persons as commerce and allow for the regulation of slavery.[269]

Ultimately, the best way to come to an originalist understanding of the Migration or Importation Clause is not by looking to the 1819 congressional debates or the Supreme Court cases that came afterward.

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264. LIGHTNER, *supra* note 55, at 23.

265. *Id.*

266. Berns, *supra* note 9, at 199. David Lightner strongly disputes Berns's argument that what Berns called the "southern interpretation" was false. *See* LIGHTNER, *supra* note 55, at 19–21.

267. Berns, *supra* note 9, at 199.

268. *See id.* at 199 n.4; *Passenger Cases*, 48 U.S. (7 How.) 283, 474 (1849) (Taney, C.J., dissenting); *id.* at 506–07, 512 (Daniels, J., dissenting).

269. *See, e.g.*, *Passenger Cases*, 48 U.S. (7 How.) at 489–91 (Taney, C.J., dissenting).

Instead, it is necessary to start with the convention itself. Those who care about the intent of the founders would focus first and foremost on their statements during the convention and afterward. On the other hand, those adhering to an original public meaning approach would start instead with the text, asking how it commonly would have been understood at the time.

Late eighteenth-century dictionaries reflect a meaning of "migration" equivalent in a general sense to the present one. Nathan Bailey's 1763 Universal Etymological English Dictionary defines "Migration" as "a removing or shifting the Habitatien."[270] Samuel Johnson's 1755 Dictionary of the English Language defines "Migration" as the "Act of changing place."[271] This general definition could apply to domestic or international migration.

The latter meaning is very prominent in contemporaneous sources. The Declaration of Independence uses the term "migration" as part of its critique that King George had restricted immigration: "He has endeavoured to prevent the Population of these States; for that purpose obstructing the Laws for naturalization of foreigners; refusing to pass others to encourage their *Migrations* hither; and raising the Conditions of new Appropriations of Lands."[272] On the other hand, "migration" was also used to refer to internal movement from one state to another. For example, during the South Carolina ratification debates, Rawlins Lowndes stated, "With respect to migration from the Eastern States to the Southern ones, [I] do not believe that people [will] ever flock here in such considerable numbers."[273]

On its face, the clause therefore could apply to both international and domestic migration, to enslaved persons, to immigrants, or to free migrants from one state to another. A pure textual approach—one looking to late eighteenth-century usage—cannot dispositively answer the question whether the clause supports federal authority over immigration. Even original public meaning originalists therefore might focus in this case on "the drafting process, . . . debates during the drafting and ratification process, and the early history of implementation of the constitutional provision."[274]

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270. N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 1763).

271. SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 2d ed. 1756).

272. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) (emphasis added).

273. 4 ELLIOT'S DEBATES, *supra* note 58, at 309.

274. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1621 (2017).

As described in Part I, the history of the convention and the following ratification debates show the founders believed that the provision related not just to slavery, but also to free European immigration. After Gouverneur Morris noted that an early version of the clause would have allowed for a tax on "freemen," the delegates amended it so that the clause would apply to importation but not migration. Further, James Iredell and James Wilson explained the drafters' intent to allow taxation of the slave trade but not immigration during the North Carolina and Pennsylvania ratification debates.[275]

Despite this clear history, a variety of influential commentators from the nineteenth century through the present have disputed that this was the founders' intention. Most of them, beginning with Philadelphia editor Robert Walsh, have heavily relied on James Madison's Federalist No. 42 as evidence for their position.[276] Since James Madison was a member of the Committee of Detail that first drafted the Migration or Importation Clause, his views are important. In Federalist No. 42, Madison stated: "Attempts have been made to pervert this clause into an objection against the Constitution by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent voluntary and beneficial emigration from Europe to America."[277] Yet as described in Part I, Madison later explained to Walsh that he did not intend by this language to discount that the clause related to immigration, but just to argue that it should not prevent beneficial immigration.[278] Professor Berns found this explanation unconvincing, and argued that Madison changed position.[279] However, Madison's views during the 1819 debates are consistent with the statements during the late eighteenth century of his co-delegates, like James Wilson.[280] As Madison pointed out to Robert Walsh, James Wilson explained during the ratification debates that "migration" applied to persons coming to the U.S. from abroad.[281]

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275. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 409; 2 ELLIOT'S DEBATES, *supra* note 57, at 452–53; 4 ELLIOT'S DEBATES, *supra* note 58, at 101.

276. *See* Ilya Somin, *Response to John Eastman on the Limits of Federal Power*, CATO UNBOUND (Oct. 2, 2018), https://www.cato-unbound.org/2018/10/02/ilya-somin/response-john-eastman-limits-federal-power/ [https://perma.cc/2HT7-W34J]; Berns, *supra* note 9, at 216–17; *Passenger Cases*, 48 U.S. (7 How.) 283, 474 (1849) (Taney, C.J., dissenting); *id.* at 511 (Daniel, J., dissenting); A PHILADELPHIAN, *supra* note 108, at 16–17 (popularly attributed to Robert Walsh).

277. THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961).

278. A PHILADELPHIAN, *supra* note 108, at 17 (popularly attributed to Robert Walsh).

279. *See* Berns, *supra* note 9, at 216–17.

280. *See* 2 ELLIOT'S DEBATES, *supra* note 57, at 452–53.

281. Letter from James Madison to Robert Walsh Jr., *supra* note 110.

Madison's recollection of James Wilson's explanation suggests that he was basing his interpretation of the clause on his own recollections of its drafting and the discussions afterward, rather than changing his views as Professor Berns argued. In addition, his views are consistent with those of his fellow Republicans during the eighteenth century debates over the Alien Act. At that time, his ally, Thomas Jefferson, explicitly made the argument in the Kentucky Resolution that the Migration or Importation Clause prevented federal regulation of immigration prior to 1808.[282]

The Federalist defenders of the Alien Act responded to Thomas Jefferson's Kentucky Resolution with a House Report in which they contended that it would not have made sense for the founders to limit federal authority to regulate immigration until the year 1808, or to allow Congress to regulate immigration into new states but not ones existing at the time of the convention.[283] Professor Berns repeated this argument in his 1968 law review article.[284] Yet the congressional debates show that this is exactly what the framers did. The framers may have limited federal authority because they did not imagine that Congress would attempt to regulate White immigration for any states—new or old—before 1808, so they thought it was a nonissue.[285] Moreover, the clause did not bar regulation of immigration; it simply barred *federal* regulation. The founders might have viewed it as reasonable to leave the issue to the states for a few decades. Charles Pinckney contended during the Missouri Compromise debates that the delegates viewed a period of federal nonregulation prior to 1808 as quid pro quo for the bar on federal regulation of the slave trade during that time.[286] At the very least, this was Pinckney's view, even if it cannot be ascribed to the other delegates. From an eighteenth-century perspective, it might have just made sense to join the two issues, since slavery and immigration were perceived as being alternative modalities of settler colonialism.[287] As for why the delegates might have allowed federal regulation of new states but not ones existing at the time of the convention, they might have done so because those states were the ones at the table.

Ultimately, the best objections to interpreting "migration" as meaning immigration are counter-textual. The text itself strongly supports a reading of "migration" as distinct from the importation of enslaved persons, because it authorizes a tax on the latter but not the

282. *See* 4 ELLIOT'S DEBATES, *supra* note 58, at 541.

283. 9 ANNALS OF CONG. 2987 (1851).

284. *See* Berns, *supra* note 9, at 217.

285. *See* Lightner, *supra* note 29, at 33. *See also* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 128–29 (1975).

286. *See* 36 ANNALS OF CONG. 1316–17 (1855).

287. *See infra* Part IV.

former. Although "migration" might be interpreted to apply to enslaved domestic migrants rather than immigrants, the history of the convention and ratification debates weighs against this reading and in favor of reading "migration" as meaning "immigration." And if the support of James Madison, who helped draft the provision, is not enough, there are a host of other founders and jurists who also endorsed this view, including: Justice James Iredell,[288] President Thomas Jefferson,[289] Senator (and Constitutional Convention delegate) Charles Pinckney,[290] Justice (and Constitutional Convention delegate) James Wilson,[291] Chief Justice John Marshall,[292] and Justice Joseph Story.[293] From an originalist perspective, the evidence that the Migration or Importation Clause related to immigration as well as the slave trade is extremely convincing.

## III: THE IMPACT OF AN ORIGINALIST UNDERSTANDING OF THE MIGRATION OR IMPORTATION CLAUSE

In his dissent in *Fong Yue Ting v. United States*,[294] Justice Brewer criticized the doctrine that the immigration power was "inherent in sovereignty" as "indefinite and dangerous."[295] Yet this theory of an unenumerated plenary power has become axiomatic.[296] Relying on plenary power, the Court has repeatedly affirmed Congress's power to make "rules that would be unacceptable if applied to citizens."[297] But if the Migration or Importation clause references immigration, and restricts congressional action concerning it prior to 1808, then Congress's power over immigration is enumerated rather than inherent. An originalist understanding of the Migration or Importation Clause as referencing immigration requires rethinking a plenary power doctrine that has become entrenched for almost a century and a half. This Section considers the implications of doing so and argues that the principal consequence would be to situate the immigration power within the Commerce Clause and authorize constitutional review of immigration

288. 4 ELLIOT'S DEBATES, *supra* note 58, at 100–01.

289. *Id.* at 541.

290. 36 ANNALS OF CONG. 1316–17 (1855).

291. 2 ELLIOT'S DEBATES, *supra* note 57, at 452–53.

292. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 216–17 (1824).

293. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1331 (Boston, Hillard, Gray, & Co. 1833).

294. 149 U.S. 698 (1893).

295. *Id.* at 737 (Brewer, J., dissenting).

296. *See* LEGOMSKY & THRONSON, *supra* note 2, at 110; Bowie & Rast, *supra* note 2, at 1421; Cleveland, *supra* note 1, at 81.

297. *Demore v. Kim*, 538 U.S. 510, 521 (2003) (citing *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

legislation according to the same standards that apply to other areas of law. This could have significant consequences, since the plenary power doctrine lurks in the background of decisions affirming draconian immigration powers like the mandatory detention of certain immigrants and categorical exclusion based on nationality.[298]

### *A. Locating the Federal Immigration Power within the Commerce Clause*

The Migration or Importation Clause is contained in Section 9 of Article I of the Constitution.[299] Structurally, Section 9 has long been understood as setting out the limits on Congress's power.[300] The source of congressional power comes instead from Section 8.[301] It would be odd, therefore, to read the Migration or Importation Clause as being an independent source of congressional authority over immigration. If that were the case, it would be the only clause within Section 9 to set out a source of federal authority over a topic rather than a restriction on federal power. More naturally, the Migration or Importation Clause is read as restricting authority that the founders believed would have otherwise come from a clause in Section 8. According to Professor Jack Balkin, this source was assumed to be the Commerce Clause "both in the debates in Philadelphia and at the time of the Founding."[302] In Federalist No. 42, James Madison stated that the Commerce Clause of Section 8 offered authority for regulating the slave trade after the 1808 benchmark set out in the Migration or Importation Clause.[303] If the Commerce Clause empowered Congress in Madison's view to regulate importation, then presumably it also empowered Congress to regulate migration.[304] This is

298. *See id.*; *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

299. U.S. CONST. art. I, § 9, cl. 1.

300. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

301. *Id.* at 412.

302. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 26 (2010) (referencing Edmund Randolph's comments during the Virginia Ratifying Debates). *See also* Green, *supra* note 9, at 668–69.

303. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961).

304. For a contrary view that the original source of congressional power over immigration was not the Commerce Clause but instead the language of Article I, Section 8, Clause 10 giving Congress authority to "define and punish . . . Offences against the Law of Nations," see Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause*, 11 BRIT. J. AM. LEGAL STUD. 209 (2022). As Professor Natelson describes, a variety of commentators at the time of and preceding ratification of the Constitution recognized the power of nations to control immigration, suggesting that Congress might "define and punish" immigration-related offenses. *Id.* at 225–35. However, those commentators addressed the issue at most

exactly what Chief Justice Marshall said in *Gibbons v. Ogden*,[305] and Justice Story repeated this point in his influential *Commentaries on the Constitution*.[306]

Beginning in *Mayor of New York v. Miln*, some pro-slavery Supreme Court justices began to dispute that the Commerce Clause offered Congress any authority to regulate the movement of individuals, probably because this principle might also support federal regulation of slavery.[307] However, after the Civil War and emancipation, the issue lost its controversial character, and in *Henderson v. Mayor of New York*, the Court held that the Commerce Clause authorized the federal government to regulate the admission of non-citizens into the United States.[308]

Fourteen years after *Henderson*, the Supreme Court decided *Chae Chan Ping v. United States*,[309] in which it turned away from the Commerce Clause as a source for federal immigration power, settling instead on an unenumerated plenary power inherent in the nation's sovereignty.[310] That holding, however, is in deep tension with an originalist understanding of the Migration or Importation Clause. The Migration or Importation Clause, interpreted according to originalist principles, instead supports the Court's earlier holding from *Henderson* that the Commerce Clause provides the federal authority to regulate immigration.[311] Originalist principles support overruling *Chae Chan Ping* and embracing instead the *Henderson* holding, which has never in any event been overturned. *Chae Chan Ping* also uses anti-Asian language to affirm the principle that Congress can discriminate based on race in

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as a matter of general principle and did not even agree at that level of generality. *Id.* Professor Natelson's argument departs from the conventional view of the Law of Nations Clause "as a rather limited power to either enact regulatory statutes governing the conduct of individual persons who violate international law, or to constitute tribunals to adjudicate the conduct of such individuals." *See* J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 849 (2007). The theory also runs up against nearly a century and a half of jurisprudence holding that deportation is not "punishment." *See Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime."). While the Define and Punish Clause does have intuitive appeal as the source of more punitive forms of immigration power, it has less obvious connection to decisions concerning the scope and terms of admission of non-citizens.

305. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207, 216–17 (1824).

306. STORY, *supra* note 293, § 1331.

307. *See supra* Section I.D.2.

308. *Henderson v. Mayor of New York*, 92 U.S. 259, 273–74 (1875). *See also Head Money Cases*, 112 U.S. 580, 591 (1884).

309. (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

310. *Id.* at 609.

311. *Henderson*, 92 U.S. at 273–74.

admissions.[312] Overruling it would vindicate the nondiscrimination norms that are otherwise mainstream in United States constitutional law.[313]

An originalist understanding of the Migration or Importation Clause supports an existing body of scholarship arguing for the Foreign (or possibly even Interstate) Commerce Clause as a source for federal authority over immigration.[314] These authors, however, have not considered the impact of the Migration or Importation Clause on their analysis. The original history of the clause strongly supports the argument that the immigration power is enumerated and tethered to Congress's power over commerce.

### *B. Confirming Judicial Review over Immigration Law*

One of the principal consequences of the plenary power doctrine has been a reluctance on the part of the judiciary to review federal actions relating to the admission or removal of noncitizens.[315] A large volume of scholarship exists critiquing courts' extraordinary deference to the federal government in immigration matters pursuant to the plenary power doctrine.[316] Some scholars have argued that the plenary power doctrine has weakened, particularly with respect to procedural due process

312. *See Chae Chan Ping*, 130 U.S. at 595–96.

313. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987).

314. *See* Gordon, *supra* note 19, at 689–93 (Foreign Commerce Clause); *id.* at 693–98 (Interstate Commerce Clause); STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 186 (1987); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 866 (1989); Chin, *supra* note 5, at 56–57.

315. Legomsky, *supra* note 6, at 255.

316. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 151–52 (2002); Legomsky, *supra* note 6, at 273–74; Chin, *supra* note 5, at 11–12; Ray, *supra* note 5, at 34; Kim, *supra* note 7, at 1347; Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 575–76 (2017); Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 186 (2016); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1970 (2013).

challenges.[317] However, others argue that the doctrine remains strong,[318] and the Supreme Court continues to reference plenary power in cases upholding extraordinary federal actions, such as President Trump's ban on the entry of persons from a number of predominately Muslim nations.[319] Professor Catherine Kim sums up the embattled state of immigrant rights today: "In areas ranging from the right to habeas corpus; procedural due process; discrimination on the basis of race, national origin or religion; free speech; and detention . . . noncitizens today enjoy even fewer constitutional protections than they did at the end of the twentieth century."[320]

A number of scholars have argued that courts would reduce their exceptional deference to the federal government in the immigration arena if the immigration power were located in the Commerce Clause rather than arising out of the nation's sovereignty.[321] According to Professor

317. *See* D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555, 1576, 1585 (2021) (arguing that "dark matter"—"a widely shared but informal . . . understanding of the law" limits the reach of the plenary power doctrine and prevents it from allowing systemic racial discrimination in admissions along the lines of Chinese exclusion); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61 (2015) ("This Article posits that the trend in the Supreme Court's contemporary immigration decisions suggests that the plenary power doctrine—the bedrock of immigration exceptionalism—is once again heading toward its ultimate demise."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) ("[P]rocedural due process has served in a significant number of cases as a 'surrogate' for the substantive judicial review that the plenary power doctrine seems to bar."); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (describing the Court's use of "phantom norms" from mainstream public law in order "to undermine the plenary power doctrine through statutory interpretation").

318. *See* Kim, *supra* note 7, at 1291; Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 28 (2015).

319. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). *See also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1980 n.26 (2020) ("In *Fong Yue Ting v. United States*, and many other cases, the Court noted that the Constitution gives Congress plenary power to set requirements for admission.") (citations omitted).

320. Kim, *supra* note 7, at 1291.

321. *See* Gordon, *supra* note 19, at 701–10; Chin, *supra* note 5, at 57; Aleinikoff, *supra* note 314, at 866; Lindsay, *supra* note 316, at 255. *But see* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 720 (2005) (noting that in the 1909 case *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), the Court identified the Commerce Clause as the source

Jennifer Gordon, a shift to Commerce Clause authority would, at a minimum, "counteract the reflexive assumption embedded in the plenary power doctrine's tie to sovereignty and foreign affairs that all immigration law relates to foreign relations and/or national security."[322] The impact of such a shift might be greatest when "plaintiffs challenge an aspect of immigration law or policy that directly regulates immigrant employment or that was enacted in response to labor market concerns."[323] In contrast, in cases that actually do raise national security concerns, the Court would likely continue to exercise great deference to federal immigration decisions.[324]

An originalist understanding of the Migration or Importation Clause should weaken the reflexive version of the plenary power doctrine and the notion of immigration exceptionalism.[325] Whether doing so ultimately benefits immigrants is another matter.[326] The mere fact that the Court is willing to review federal immigration action does not mean that it will recognize that immigrants themselves have rights in the face of federal action.[327]

### *C. Presidential Power over Immigration?*

The Court has held at times that both Congress and the president have plenary power over immigration law as an inherent aspect of

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of federal power over immigration but still applied the plenary power doctrine to reject a due process challenge in the immigration context).

322. Gordon, *supra* note 19, at 701.

323. *Id.* at 703.

324. *Id.* at 708–10.

325. For a description of "immigration exceptionalism" when it comes to judicial review of cases involving immigrant rights, see David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 593–99 (2017).

326. Professor Christopher Green, for example, argues based on the Migration or Importation Clause that Congress has authority to regulate immigration pursuant to the Foreign Commerce Clause, but also argues for shifting much protection of individual rights from the Equal Protection and Due Process Clauses to the Privileges or Immunities Clause, which protects only citizens. Under his radical reinterpretation of the Constitution, Congress is free—but not required—to enact legislation protecting immigrants under the Commerce Clause. Congress is also free to enact laws adversely impacting immigrants with minimal constitutional backstop. Green, *supra* note 9, at 687–91.

327. *See* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 393–433 (2013) (describing a shift of federal courts in immigration cases away from a rights-based approach to one favoring federalism or administrative law and arguing that this shift is to the detriment of immigrants).

national sovereignty.[328] But the Commerce Clause, read in combination with the Migration or Importation Clause, only authorizes Congress to regulate immigration. This raises the question of whether courts might shift their review of presidential or executive agency action in response to a revised interpretation of those provisions.

Professors Adam Cox and Cristina Rodríguez identify "three channels" of presidential power over immigration: claims of inherent executive authority, formal mechanisms of congressional delegation, and what they call "de facto delegation"—Congress's radical expansion of deportation grounds without providing resources sufficient to deport all deportable non-citizens.[329] According to Cox and Rodríguez, the resulting existence of a large and functionally undeportable undocumented population "gives the President the power to exert control over the number and types of immigrants inside the United States."[330]

Of these three channels identified by Cox and Rodríguez, a revised understanding of the immigration power as being enumerated under the Commerce Clause would only seem clearly in tension with the first—claims of inherent authority. Yet, there are few modern examples of the president acting based on a pure claim of inherent executive authority. Cox and Rodríguez cite President Roosevelt and President Truman acting as though they possessed inherent authority to establish and maintain a guest worker program, and President Reagan's Office of Legal Counsel citing "the President's inherent authority to protect the sovereignty of the country" as one basis for the Administration's legal authority to establish a policy of interdicting Haitian asylum seekers on the high seas.[331] But for Haitian interdiction, the Reagan Administration also claimed statutory authority pursuant to Section 212(f) of the Immigration and Nationality Act.[332] There is no significant example of a president in recent years baldly claiming inherent authority to act in the immigration arena without some statutory authorization, although that authority has at times been contested.[333]

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328. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009).

329. *Id.* at 462–63.

330. *Id.* at 463.

331. *Id.* at 485, 498.

332. *Id.* at 498.

333. For example, both the Deferred Action for Childhood Arrivals (DACA) program created by President Obama and President Trump's Migrant Protection Protocol, which required asylum seekers to wait in Mexico for their cases to be decided, were challenged as violating the INA. *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022); *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated and remanded sub nom. Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021).

Cox and Rodríguez detail the growth of presidential power over immigration, but this growth has largely been driven either by formal or de facto congressional delegation.[334] The embattled immigration litigation landscape of the past two administrations demonstrates that many federal courts are already very receptive to reviewing presidential immigration policymaking that is arguably not supported by the Immigration and Nationality Act.[335] Courts today already appear to largely view Congress as the ultimate authority for immigration law, so tethering the immigration power to the Commerce Clause might not change much when it comes to federal court review of presidential immigration action.

### *D. State Power over Immigration?*

Under the plenary power doctrine, the federal government has exclusive power over immigration.[336] Relying in part on the plenary power doctrine, the Court has used three tests to determine whether state action related to immigration is preempted: structural preemption, field preemption, and conflict preemption.[337] State regulations concerning the admission or removal of non-citizens are structurally preempted because they interfere with the federal government's exclusive power over immigration; other laws that implicate immigration or immigrants in areas outside of immigration (*i.e.*, "alienage" cases) are preempted when Congress has "occupied the field" in that area or when they conflict with federal legislation.[338] Would an originalist understanding of the Migration

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334. *See generally* COX & RODRÍGUEZ, *supra* note 5, at 34 (explaining that one theory of presidential power over immigration based in inherent power led to pre-eminent control over immigration).

335. *See, e.g.*, *Texas*, 50 F.4th at 531 (affirming in part a district court injunction against the Biden Administration's DACA program that granted employment authorization and a deportation reprieve to certain undocumented youth). Professors Cox and Rodríguez criticize courts' efforts to infer policy goals from the Immigration and Nationality Act (INA) that are arguably inconsistent with presidential action, as the INA represents a variety of competing policies developed over time by different Congresses. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 151–59 (2015).

336. *Arizona v. United States*, 567 U.S. 387, 395 (2012) ("It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.").

337. Abrams, *supra* note 2, at 607–11.

338. *Id.* Conflict preemption looks to

> whether the state law is in such conflict with the federal regulatory scheme that the state law undermines the federal scheme. It could do this in one of two ways: by making it "impossible for a private party to comply with both state and federal law," or by "stand[ing] as an obstacle to the accomplishment

or Importation Clause and a shift to a commerce clause-based immigration power change this analysis?

As Justice Scalia noted in his dissent in *Arizona v. United States*,[339] the text of the Migration or Importation Clause itself recognizes the right of states to control migrant admissions up until at least 1808.[340] Did that mean that they were to maintain concurrent authority over immigration after 1808, or that the federal government would take exclusive authority over the issue at that time? Justice Scalia pointed out in *Arizona* that states widely regulated immigration throughout much of the nineteenth century, which perhaps supports an argument for concurrent state authority.[341] Yet Justice McKinley, in his concurrence in the *Passenger Cases*, examined the text of the Migration or Importation Clause, and thought that after 1808 the federal government's authority to regulate immigration pursuant to the Commerce Clause was exclusive.[342] Later, when the Court recognized immigration as falling under the Commerce Clause in *Henderson v. Mayor of New York* and *Chy Lung v. Freeman*,[343] it held that the power was exclusively held by the federal government.[344] In finding the power to be exclusive, the Court noted the importance of the issue to "international relations," and the need for "a uniform system or

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> and execution of the full purposes and objectives of Congress"—known, respectively, as "impossibility preemption" and "obstacle preemption."

*Id.* at 608 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000)).

339. 567 U.S. 387 (2012).

340. *Id.* at 422 (Scalia, J., dissenting) ("As this Court has said, it is an '"accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions."' That is why there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States' similar power, subject to federal abridgment) was contained in Art. I, § 9, which provided that '[t]he 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 one thousand eight hundred and eight . . . .") (citations omitted) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)).

341. *Id.* at 419 (Scalia, J., dissenting) (citing Gerald Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1835, 1841–80 (1993)).

342. *Passenger Cases*, 48 U.S. (7 How.) 283, 454 (1849) (McKinley, J., concurring) ("The power to prohibit the admission of 'all such persons' includes, necessarily, the power to admit them on such conditions as Congress may think proper to impose; and therefore, as a condition, Congress has the unlimited power of taxing them. If this reasoning be correct, the whole power over the subject belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations.").

343. 92 U.S. 275 (1875).

344. *Henderson v. Mayor of New York*, 92 U.S. 259, 272 (1875); *Chy Lung*, 92 U.S. at 280.

plan"—that "[t]he laws which govern the right to land passengers in the United States from other countries . . . be the same in New York, Boston, New Orleans, and San Francisco."[345] During the pre-plenary power period when the Court considered immigration to be an aspect of the Commerce Clause, it held that the power was exclusively federal, and it has never overturned that precedent.[346]

Professor Kerry Abrams argues that the structural form of immigration preemption that developed at the time of *Henderson* and *Chy Lung* has become conflated with plenary power, even though the two are distinct concepts.[347] Thus, Professor Abrams argues that in some alienage cases the Court has applied what she calls "plenary power preemption," a form of "analysis that folds in the national sovereignty concerns from the structural preemption and plenary power cases, by construing the specific alienage regulation as regulations of immigration in disguise."[348]

Plenary power preemption might explain the Court's decision in *Arizona v. United States*, in which the Court struck down various Arizona provisions as preempted, including one authorizing state police to arrest individuals if there was probable cause to believe they had committed a deportable offense.[349] Even though this provision did not obviously conflict with federal immigration law, Justice Kennedy held that it possibly conflicted with federal enforcement priorities, since the government has discretion to not enforce immigration law in some cases.[350]

According to Professor Abrams, plenary power preemption in cases like *Arizona* might be serving to "carv[e] out a doctrinal space for deference to the executive branch" that would not exist in a more traditional mode of preemption analysis.[351] On the other hand, she acknowledges that plenary power preemption might be just be "another example of the malleable character of obstacle preemption in all of its forms."[352] If the first possibility is correct, then stepping back from the plenary power doctrine might impact preemption analysis. On the other hand, if *Arizona* is just an example of the malleable character of conflict preemption analysis, the impact might be limited. As Professor Abrams acknowledges, Arizona had premised its legislation with a policy

345. *Henderson*, 92 U.S. at 273.

346. *Id.*; Abrams, *supra* note 2, at 621–22.

347. Abrams, *supra* note 2, at 617.

348. *Id.* at 619.

349. *Arizona v. United States*, 567 U.S. 387, 408–09 (2011).

350. Abrams, *supra* note 2, at 628, 632.

351. *Id.* at 635. *See also* Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 708 (2014).

352. Abrams, *supra* note 2, at 640.

statement of "attrition through enforcement."[353] The very notion of a state immigration policy is at odds with an exclusive federal immigration power, and that is as true if the source of that power is the Commerce Clause as it would be under the plenary power doctrine.

## IV. RECKONING WITH THE LEGACY OF SLAVERY IN IMMIGRATION LAW

Scholars have increasingly recognized that African persons who were enslaved and forced to come to the United States were immigrants.[354] A parallel point is that in the United States, immigrants have often been treated like they are enslaved.[355] Slavery was an atrocity with lasting harm perpetrated to this day on Black people in the United States.[356] In contrast, immigrants have often enjoyed opportunities and passed on wealth.[357] Yet, a disturbingly large share of the labor of immigrants of color in this country has been uncompensated or undercompensated.[358] In 2009, Professor Rhonda Magee called on immigration scholars to reconsider the relationship between "the historical underpinnings of today's immigration system" and "the relevant law and policy regulating the transportation of enslaved people as part of the slavery system."[359] The history of the Migration or Importation Clause demonstrates that this relationship between slavery and immigration law hearkens to the nation's founding. From these roots has grown a system of immigrant labor exploitation that is at the heart of today's immigration policy problems.

Until 1819, a significant share of migration to the former colonies and then the United States was of European indentured servants—persons who agreed to a term of unpaid servitude in exchange for payment of the

353. *Id.* at 632–33.

354. *See* Magee, *supra* note 1, at 276–77; ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 54 (HarperPerenial 1991) (1990); Aaron S. Fogleman, *From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution*, 85 J. AM. HIST. 43, 50 (1998); PAUL R. SPICKARD, ALMOST ALL ALIENS: IMMIGRATION, RACE, AND COLONIALISM IN AMERICAN HISTORY AND IDENTITY 9 (2007).

355. *See* Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC'Y 133, 139–41 (2012).

356 For a discussion of slavery's multigenerational impact on Black Americans, see Ronald W. Walters, *The Impact of Slavery on 20th- and 21st-Century Black Progress*, 97 J. AFR. AM. HIST., No. 1–2, 2012.

357. *See generally* Joseph P. Ferrie, *The Wealth Accumulation of Antebellum European Immigrants to the U.S., 1840–60*, 54 J. ECON. HIS. 1 (1994).

358. *See* Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1570–71 (2015).

359. Magee, *supra* note 1, at 276.

cost of their passage.[360] Convicts shipped by Great Britain to the colonies also for a time comprised a significant share of indentured servants.[361] These White immigrants were treated like articles of commerce, whose term of labor could be bought and sold.[362] Along with indentured servants came hundreds of thousands of African forced migrants who were kidnapped, violently uprooted from their homes, and then, if they survived the often deadly transatlantic voyage, sold into slavery in this "new world."[363]

Slavery and indentured servitude share some things in common. They were both systems of labor, forms of property, and methods of immigration.[364] Together they comprised a substantial share, if not a majority, of immigration during the colonial era. But it is also important to recognize the differences between the two. Indentured servants became free, while enslaved persons and their progeny overwhelmingly remained in bondage until the Civil War. During the colonial era, White people commonly became indentured servants; Black people were enslaved. Thus, while immigration to the colonies and then the United States frequently involved bound labor and the treatment of persons as commodities, there was a racial demarcation line, with White immigrants faring better. To this day, that racial demarcation line persists in a set of laws and practices that disproportionately benefit White immigrants while negatively impacting people of color.[365]

In a single sentence, the Migration or Importation Clause neatly sums up this dynamic. It recognizes growth as a priority. It avoids the term "slave," but nonetheless makes clear that immigrants could be enslaved or free. The language George Mason used at the convention aptly describes the zeitgeist that shaped the clause. Mason saw slavery and immigration as competing methods for settling the country, and thought that of the two, immigration was the one that was more likely to

360. Bilder, *supra* note 1, at 751–61.

361. *Id.* at 756–57.

362. *Id.* at 761–66.

363. Magee, *supra* note 1, at 280–81.

364. Bilder, *supra* note 1, at 761 ("Indentured servitude was both a labor relationship and a way of moving people from Great Britain and Europe to British North America. Indentured servants were simultaneously individuals who increased population and a pool of bound labor. They were considered a commodity; their movement was part of a transatlantic commerce.").

365. *See* Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1613–14 (2022); Bill Ong Hing, *Addressing the Intersection of Racial Justice and Immigrant Rights*, 9 BELMONT L. REV. 357, 388 (2022); Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139, 1150–69 (2021).

be economically successful.[366] Oliver Elsworth chimed in to predict a future in which slavery "will not be a speck" because "poor laborers will be plenty as to render slaves useless."[367] Unlike Mason and Elsworth, Charles Pinckney was a proponent of slavery, but he also described slavery and immigration as competing regional systems of labor and settlement.[368] According to Pinckney, the Migration or Importation Clause reflected a give-and-take between the North and South, whereby each agreed to pursue their favored system for a period of twenty years without federal interference.[369]

After that twenty-year period expired, the defenders and opponents of slavery battled in Congress and the courts over the meaning of the Migration or Importation and Commerce Clauses. The authority of the federal government to regulate immigration was viewed as a stand-in for its authority to regulate slavery, making it difficult for a majority of the Supreme Court to agree the power existed.[370] Throughout this time, states regulated immigration,[371] and much of that regulation focused on free Black people, who became "a species of internal foreigner comparable to the 'illegal alien' of the next century: restricted at borders, vulnerable to exploitation and intimidation because they might be present in violation of law, punishable with expulsion and other sanctions."[372] As Professor Kunal Parker says, "At the point of freedom, blacks became aliens of a sort, excludable and removable."[373]

By the mid-nineteenth century, the South and the North had each become militant defenders of their approach to settler colonialism.[374] The rallying cry of the Northern Free Soil Party—"Free Soil, Free Speech, Free Labor, Free Men"—embodied both the enthusiasm of many Northerners for a westward expansion fueled by immigration and their belief that democracy and slavery were incompatible.[375] In contrast,

366. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 370.

367. *Id.* at 371.

368. 36 ANNALS OF CONG. 1316–17 (1855).

369. *Id.*

370. *See* Bilder, *supra* note 1, at 792–819.

371. NEUMAN, *supra* note 1, at 35–40; Maritza I. Reyes, *Opening Borders: African Americans and Latinos Through the Lens of Immigration*, 17 HARV. LATINO L. REV. 1, 28–29 (2014).

372. PARKER, *supra* note 1, at 95.

373. *Id.* at 97.

374. *See supra* Section I.E.

375. *See Preserving the Exceptional Republic*, *supra* note 4, at 185–96; *From Free Soil to Free Silver: US Political Parties of the 19th Century*, ILL. HIST. & LINCOLN COLLECTIONS (Nov. 1, 2022), https://publish.illinois.edu/ihlc-blog/2022/11/01/from-free-soil-to-free-silver-us-political-parties-of-the-19th-century/ [https://perma.cc/3GT5-95C2].

Southerners believed that the Northern system of free labor really exploited poor White people and undermined the relative social equality necessary for Republican government.[376] Perverse as it was, the Southern critique was correct that the "free labor" system of the North was premised on massive inequality. The Southern charge of "wage slavery" was even shared by the nineteenth century labor movement.[377] As historians of the nineteenth century note, it was White men who enjoyed the privilege of free labor, leaving out many other groups who were exploited for much of the work in free states, including women, Chinese immigrants, Mexican Americans, and free Black people.[378]

As the nation expanded in the mid-nineteenth century, immigration became a flashpoint, with Southerners concerned that immigrant labor would devalue enslaved labor, add to the demographic and political strength of the North, and that immigrants would move to the territories and vote against them becoming slave states.[379] As a result, the anti-immigrant Know Nothing Party grew in the South and Southerners like Representative William R. Smith of Alabama were among the first proponents of comprehensive federal immigration legislation.[380] For many Southerners in the 1850s, immigration was an issue like the Fugitive Slave Law, as to which Southerners favored federal solutions over states' rights.[381]

Southern legislators may have favored federal immigration legislation to protect slavery, but when Congress finally passed federal

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376. *See* SMITH, *supra* note 224, at 223–24 ("There is no proposition clearer to my mind, than this—banish African Slavery from among us and you destroy Democratic liberty. For liberty under the form of a Democratic Government, without African Slavery, is in my opinion an impossibility. The necessity of society demands the discharge of menial duties. Those who shall discharge them, must and will occupy the position of an inferior. Let that inferior class be composed of the African, and the equality of the white race is maintained—otherwise, grades in Society will follow, first social then political, destructive not only of the form but the life of Democracy.") (statement of James Ferguson Dowdell).

377. Helga Kristin Hallgrimsdottir & Cecilia Benoit, *From Wage Slaves to Wage Workers: Cultural Opportunity Structures and the Evolution of the Wage Demands of the Knights of Labor and the American Federation of Labor, 1880–1900*, 85 SOC. FORCES 1393, 1394, 1402 (2007).

378. *See* FONER, *supra* note 34, at xxx ("Thus, free labor embodied a contradiction akin in some ways to slavery's—since no one could remain independent without enlisting uncompensated labor, free labor for some rested on dependent labor for others.").

379. Bladek, *supra* note 219, at 66–68.

380. *See id.* at 71–73.

381. *See*, *e.g.*, *Prigg v. Pennsylvania*, 41 U.S. 539, 562–63 (1842) (holding that Pennsylvania legislation prohibiting the removal of persons from the state for purposes of enslaving them contradicted Article IV, Section 2 of the Constitution and the Fugitive Slave Law).

immigration laws, it justified them with the rhetoric of abolitionism. Congress's first three immigration statutes—the Anti-Coolie Act of 1862, the Page Act of 1875, and the Chinese Exclusion Act of 1882—targeted Asian immigrants coming to work under indentured or other labor contracts. In the wake of emancipation, Congress analogized Asian immigrants' labor contracts to slavery and excluded Asian immigrants as an ostensibly anti-slavery measure.[382]

Abolitionist rhetoric aside, early immigration law clearly had a White-supremacist purpose. First with Chinese exclusion, and then nationality-based immigration quotas passed in 1921 and 1924, Congress's early immigration laws were designed to exclude people of color and preserve a Northern and Western European population.[383] Mexican immigrants crossed freely back and forth to serve the needs of growers who depended on migrant labor, but immigration officials and prosecutors used a variety of tactics, including a new illegal entry criminal provision, to make sure their stay was temporary.[384] During the Great Depression, local and national officials collaborated in the repatriation of a massive number of Mexican Americans, including many United States citizens, and then when the nation's labor needs shifted during World War II, the country created a Bracero program to import Mexican workers who were tied to particular employers who often exploited them.[385] After the war, the country pursued, in tandem with the Bracero program, "Operation Wetback"—a militarized campaign of deportation for undocumented Mexican workers.[386] The combination of the Bracero Program and Operation Wetback insured a disposable supply of low wage Mexican workers who were unable to assert rights to decent wages or working conditions because they were bound to particular employers in a legal structure that shared more than incidental features with slavery.[387]

Congress terminated the Bracero program in 1964 and abolished the racist national origin quotas but replaced them with a uniform per-country cap (applied to the Western Hemisphere at a later date) that fell radically short of the demand for visas by Mexican immigrants, leading

382. JUNG, *supra* note 17, at 11–12.

383. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21–37 (2004).

384. *Id.* at 67–71. *See also United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1008 (D. Nev. 2021) (describing the racist history of the illegal entry provision), *overruled by United States v. Carrillo Lopez*, 68 F.4th 1133 (9th Cir. 2023).

385. NGAI, *supra* note 383, at 71–75, 95.

386. *Id.* at 155–56.

387. *Id.* at 129–58.

to an increase in unauthorized Mexican immigration.[388] When Congress regulated immigrant employment for the first time in the 1980s as part of an effort to control illegal immigration, it did not make unauthorized work illegal; it barred employers from hiring most unauthorized workers and required them to check workers' legal status.[389] However, the Immigration and Naturalization Service never tried too hard to enforce this prohibition, and the enlistment of employers in immigration enforcement has given unscrupulous ones a powerful tool to exploit undocumented workers.[390]

The result is a system in which much of the country's work is done by what Justice Brennan called a "shadow population" of undocumented workers who disproportionately work in dangerous and underpaid positions,[391] while largely lacking access to the employment and labor protections enjoyed by other Americans.[392] The laissez faire market for undocumented labor is a slice of the nineteenth century preserved in the post-New Deal, post-Civil Rights era United States.

Thus, the first century of comprehensive federal immigration legislation tracked the pathway set out by the Migration or Importation Clause. As Oliver Elsworth predicted, slavery became "but a speck,"[393] but poor laborers abounded to settle the country and do its hardest labor. They have disproportionately been immigrants, who were not imported, but have migrated to work in conditions that nonetheless have often felt close to slavery.[394] Since slavery was, as Professor Magee says, "our nation's first system of 'immigration law,'" it should not surprise us that "the formal system that developed was inculcated with the notion of a permanent, quasi-citizen-worker underclass."[395]

The central moral failings of slavery are to treat people like property and to do so based on their race. Frequently, immigration policy has

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388. *Id.* at 261; Hing, *supra* note 365, at 373.

389. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 138–40 (2009).

390. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195; Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 404 (2001).

391. *Plyler v. Doe*, 457 U.S. 202, 218 (1982).

392. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1090–91 (2011); Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 275–76 (2010); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1366–71 (2009).

393. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 371.

394. Ontiveros, *supra* note 355, at 139.

395. Magee, *supra* note 1, at 276.

replicated these problems, creating smooth pathways to status and privilege for White immigrants while relegating a disproportionately large number of immigrants of color to precarious work that bears many of the hallmarks of slavery. Alongside this system of precarious immigrant work, a vast enforcement system exists that disproportionately detains and deports immigrants of color.[396] This enforcement system operates like a cudgel to keep undocumented workers from trying to establish employment and labor rights.[397] As Professor Wishnie has remarked, the combination of the deportation system and employer sanctions "recall[s] in some respects the post-Civil War schemes of peonage and debt bondage, in which private landowners invoked the power of the state to enforce discriminatory and unconscionable labor agreements that perpetuated the enslavement of African-Americans after emancipation."[398]

Yet, the connections between immigration and slavery have not only resulted in "a racially segmented labor-based immigration system," but also a "racially diverse (even if racially hierarchical) 'nation of immigrants'"—what Professor Magee labels as "among the United States' most pernicious and most precious gifts to civilization."[399] Through understanding the connections between slavery and immigration, there is the possibility of a redemptive path. One way to combat the racist structures of immigration law is to study "strategies of resistance to the law and policy by which transatlantic and domestic chattel slavery were dismantled."[400] Scholars have begun to argue for an abolitionist approach to issues of detention and deportation.[401] However, the nation's enforcement structure is but one piece of a larger system that subjugates poor people and people of color in the United States. That system produces enormous wealth for a portion of the population based on the labor of workers whose bargaining position is fundamentally

396. Hlass, *supra* note 365, at 1617–22; CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 35–37 (2019).

397. Wishnie, *supra* note 390, at 216.

398. *Id.*

399. Magee, *supra* note 1, at 298–99.

400. *Id.* at 277.

401. *See* Hlass, *supra* note 365, at 1636–58; McKanders, *supra* note 365, at 1170–71; Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1045–46 (2021); Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 201 (2021); Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants' Rights Movement*, 68 UCLA L. REV. DISCOURSE 68, 71 (2020); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 250 (2017).

compromised by their insecure legal status.[402] This structural inequality with respect to labor and employment has the effect, as Professor Jennifer Lee has argued, of causing "unequal treatment and subordination of workers of color."[403]

One vision on par with nineteenth century abolitionism would be to recognize, as Professor Lee has urged, a right to employment and all of its legal protections for undocumented workers in the United States.[404] This would be a shift that would at last truly vindicate the nineteenth century rallying cry of free labor.[405] As Professor Magee notes, "the demand of capital for off-market labor" is a central legacy of slavery and a driver of American immigration policy.[406] The philosopher Michael Walzer recognizes the sovereign prerogative of nations over borders, but calls the rule of citizens over non-citizens "probably the most common form of tyranny in human history."[407] One fundamental way to upset this tyranny would be to abolish restrictions on the employment of undocumented immigrants and guarantee all workers access to the same labor and employment protections.[408]

## CONCLUSION

Taken together, immigration and slavery tell the story of migration in the United States. Throughout the country's history, the two have bled together, with the Migration or Importation Clause serving as a porous boundary. It is true that the exploitation faced by immigrants cannot compare to the lasting and intergenerational harms caused by slavery; immigration has created opportunities for generations of immigrants and

402. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1004; *see also* Kim, *supra* note 359, at 1561.

403. Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDOZO L. REV. 1893, 1928 (2021).

404. *See id.* at 1914–15. *See also* Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 281 (2017).

405. *See generally* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 452 (1989) (discussing the Republican vision of "free labor" that culminated in the Thirteenth Amendment and that involved "substantial equality between employees and their employers and sufficient labor autonomy to permit individual autonomy").

406. Magee, *supra* note 1, at 298.

407. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (1983).

408. *Cf.* D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 822–23 (arguing according to Michael Walzer's moral philosophy that labor and employment rights should not be based on legal status).

their progeny in the United States, while the vestiges of slavery have reliably reproduced inequality for Black Americans. But it is also true that the immigration system has facilitated the existence of a large population of undocumented immigrant workers and perpetuated the conditions under which they experience rampant exploitation.[409] This is one legacy of the Migration or Importation Clause.

Another legacy of the Migration or Importation Clause is the United States' diverse and pluralistic society—one made possible by both slavery and immigration.[410] This irony suggests the possibility of continued evolution. First, the history of the Migration or Importation Clause calls for a doctrinal reevaluation of the plenary power doctrine and creates the possibility for more meaningful judicial review in the immigration arena moving forward.[411] Second, legislative reforms that seem to face insurmountable political hurdles today—like a right to lawful employment for undocumented workers in the United States—seem possible when viewed in the historical context of slavery. The history of the United States is not just one of enslavers and profiteers, but also of abolitionists and visionaries, who even during the era of *Dred Scott* had the faith to fight for a better future.

409. *See* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1621 (2018).

410. Magee, *supra* note 1, at 276–77.

411. *See supra* Section III.B.