COLUMBIA LAW REVIEW

VOL. 93 DECEMBER 1993 NO. 8

THE LOST CENTURY OF AMERICAN IMMIGRATION LAW (1776–1875)

*Gerald L. Neuman**

INTRODUCTION

Legal discussions of immigration regulation in the United States rest upon a myth. This pervasive myth asserts that the borders of the

* Professor of Law, Columbia University School of Law. This Article is dedicated to C., who has waited a long time for it. I owe deep gratitude to Bradley J. Nicholson, who spent the summer of 1988 collecting statutes with me, and diverse thanks to many others, including Barbara Black, Seth Kreimer, Bruce Mann, Henry Monaghan, Eben Moglen, John Mulkern, John Scanlan, Maryellen Fullerton and the other participants in a faculty workshop at Brooklyn Law School, and the staffs of Biddle Law Library and Columbia Law Library. For generous support of the research, I thank the Ida Russell Cades Memorial Fund, the Dean's Fund, the Institute for Law and Economics of the University of Pennsylvania Law School, the John M. Olin Foundation, the Samuel Rubin Program for the Advancement of Law and Equality Through Law and the Walter E. Meyer Research in Law and Social Problems Fund of the Columbia University School of Law.

United States were legally open until the enactment of federal immigration legislation in the 1870s and 1880s.

In some ways, this is a pleasant myth, and it seems ungracious to contradict it. The myth reinforces the identification of the United States as a nation of immigrants and provides a historical basis for criticizing later policies of immigration restriction. Moreover, the myth has a substantial foundation in fact: U.S. legal policy warmly welcomed certain kinds of immigration, and restrictive laws were often poorly enforced.[1] Neither Congress nor the states attempted to impose *quantitative* limits on immigration.

Nonetheless, the borders were not legally open. Regulation of transborder movement of persons existed, primarily at the state level, but also supplemented by federal legislation. Some of this legislation is immediately recognizable as immigration law,[2] while other legislation is less easily recognized because it applied to citizens of other states as well as foreign immigrants.[3]

Historians of immigration have not been wholly unaware of the existence of these laws,[4] but in recent decades they have focused primary attention on the experience of the immigrants who arrived.[5] Immigration lawyers and judges, on the other hand, have been accustomed to accounts that suppress the pre-1875 regulation.

Correcting this misimpression has more than academic importance. For better or worse, history plays a large role in contemporary legal argument. Inattention to the early history of immigration regulation has distorted debates on the solution of current problems. Most directly, the argument has been repeatedly offered, in connection with the rights of "illegal aliens," that neither the original Constitution nor the Civil War Amendments contemplated the existence of illegal aliens because there was no immigration law until 1875. As I will show, this argument is wrong even on its own narrow terms. Furthermore, ignoring the early history of immigration regulation impairs constitutional

---

1. Indeed, much of the border was physically open, in the sense of not being controlled by any authority derived from the government of the United States. See, e.g., Oscar J. Martínez, Troublesome Border 55–62 (1988). But that did not change in 1875.

2. For example, prohibitions on the landing of foreign convicts. See infra Part II.A.

3. For example, the poor laws of some states. See infra Part II.B.

4. See, e.g., E.P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 388–404 (1981); William S. Bernard, Immigration: History of U.S. Policy, *in* Harvard Encyclopaedia of American Ethnic Groups 486, 488 (Stephan Thernstrom ed., 1980). For the closer attention of an earlier generation, see Edith Abbott, Immigration: Select Documents and Case Records 97–99 (1924). But cf. Robert E. Cray, Jr., Paupers and Poor Relief in New York City and Its Rural Environs, 1700–1830, at 4 (1988) (disparaging the "dull, legalistic treatments authored by social welfare experts during the 1930s and 1940s").

5. See, e.g., Oscar Handlin, Boston's Immigrants: A Study in Acculturation at ix–x (rev. ed. 1979); Ewa Morawska, The Sociology and Historiography of Immigration, *in* Immigration Reconsidered: History, Sociology, and Politics 187 (Virginia Yans-McLaughlin ed., 1990).

understandings of the scope and character of federal immigration power, and of the way in which this power is distributed between Congress and the President.

This Article proceeds in four Parts. The first explains why an investigation of pre-1875 immigration legislation is necessary and has contemporary importance. The second Part, the bulk of the Article, examines the principal categories of immigration regulation in the first century of our national existence. Once these categories have been described and illustrated, the third Part can respond to two likely objections to the significance of state immigration legislation: that it was ineffective, and that it was unconstitutional. The fourth Part sketches possible implications of this history in two areas of current debate: the role of judicial review in immigration law and the constitutional status of "illegal aliens."

I. The Need for Investigation

The myth of an era of unrestricted immigration to the United States is so widespread in the legal literature that authors cited to illustrate it need feel no individual embarrassment. Typical statements include Justice Blackmun's observation in *Kleindienst v. Mandel* that "[u]ntil 1875 alien migration to the United States was unrestricted."[6] The leading immigration law treatise asserts that "[t]he first one hundred years of our national existence was a period of unimpeded immigration. . . . The gates were open and unguarded and all were free to come."[7] The myth is embodied in Emma Lazarus's poetic fiction that the Statue of Liberty once welcomed the "tired and poor" and the "wretched refuse" of teeming shores,[8] an ideal that some writers have seen as betrayed by the *subsequent* federal immigration policies.[9]

---

6. Kleindienst v. Mandel, 408 U.S. 753, 761 (1972).

7. 1 Charles Gordon & Stanley Mailman, Immigration Law and Procedure 2-5 (rev. ed. 1993). The text goes on to admit that some states "sought to impose local controls from time to time," but adds that "these state statutes"—seemingly all of them—were "declared unconstitutional by the Supreme Court," restoring the impression of open borders. Id. at 2-5 to 2-6.

8. See John Higham, Send These to Me: Immigrants in Urban America 71–80 (rev. ed. 1984) (explaining the slow "transformation" of the Statue of Liberty into an immigration icon). Lazarus's poem "The New Colossus" was written in 1883 as part of a fundraising drive for the erection of the Statue, which finally occurred in 1886; a tablet containing the text of the poem was placed on the Statue's pedestal in 1903. See id. at 71–74. As David Martin has pointed out, federal exclusion of immigrants on a variety of grounds, including the likelihood of becoming a public charge, had already begun by the time Lazarus wrote. See David A. Martin, Major Issues in Immigration Law 1 (1987); Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214.

9. See, e.g., Mark Gibney, United States Immigration Policy and the 'Huddled Masses' Myth, 3 Geo. Immigr. L.J. 361, 367 (1989); Mary L. Sfasciotti, Employer Sanctions Under the Immigration Reform and Control Act of 1986, 76 Ill. B.J. 384, 390 (1988); Patricia I. Folan Sebben, Note, U.S. Immigration Law, Irish Immigration and

Some authors[10] have probably been led astray by the compilation of "State Immigration Legislation" in Volume 39 of the 1911 Report of the Dillingham Commission.[11] Most of the legislation included in that compilation was designed to *facilitate* immigration or to determine the rights of immigrants in matters like land ownership. Few of the statutes to be discussed in this article, except the passenger acts of some states and the anti-Chinese laws of California, are reprinted there.[12] Yet no less an authority than John Higham has asserted that "[a]ll immigration legislation to 1907 is chronologically compiled in" the report.[13]

Another standard source, Edward Hutchinson's *Legislative History of American Immigration Policy 1798–1965*, warns that the 1911 compilation is "not complete, especially for the earliest years of statehood," but still Hutchinson relies too heavily on the Report's "authoritative but brief account of state legislation."[14] Hutchinson's limited attention to state legislation is understandable in a book intended to deal almost exclusively with activity in the United States Congress.[15] A less obvious limitation of Hutchinson's study results from its tendency to define the scope of "immigration policy" by extrapolation backwards from modern legislative categories. For example, he tracks legislation to suppress the "coolie trade," which later became a pretext for restriction of immigration from China, but ignores the suppression of the African slave trade.[16] He includes the modern regime of exclusion of aliens on

---

Diversity: Céad Míle Fáilte (A Thousand Times Welcome)?, 6 Geo. Immigr. L.J. 745, 747 (1992).

10. For example, Gerald L. Neuman, Back to *Dred Scott*?, 24 San Diego L. Rev. 485, 497 (1987) (book review).

11. S. Doc. No. 758, 61st Cong., 3d Sess. (1911) [hereinafter 1911 Report]. This Commission was created under the 1907 Immigration Act, and ultimately produced a multi-volume report on immigration and its effects, which was made the basis for later restrictive legislation. See T. Alexander Aleinikoff & David A. Martin, Immigration: Process and Policy 49 (2d ed. 1991). The compilation makes an ambiguous claim to include "the principal legislative enactments of the various States respecting immigration, including the earlier laws of some of the seaboard States for the regulation of the movements from foreign countries." 1911 Report, supra, at 488.

12. On the other hand, the compilation includes such later gems as the 1901 Missouri statute prohibiting the importation into the state of "afflicted, indigent, or vicious children," an activity attributed to the New York Children's Aid Society. 1911 Report, supra note 11, at 722.

13. John Higham, American Immigration Policy in Historical Perspective, 21 Law & Contemp. Probs., Spring 1956, at 213, 218 n.24; see also Higham, supra note 8, at 38 n.14 (later version of same essay).

14. Hutchinson, supra note 4, at 396 n.20; cf. id. at 400–01 ("[C]opies of these acts were not included in the 1911 Immigration Commission Report compilation of state laws, nor have they been located elsewhere.").

15. See id. at 3 & n.1. The discussion of state legislation covers only a few pages in a background chapter. See id. at 396–404.

16. The bracketing of the slave trade may have resulted in Hutchinson's omission of the important Act of Feb. 28, 1803, ch. 10, 2 Stat. 205, prohibiting the entry of either slaves or free blacks in violation of state law. See infra text accompanying note 238.

public health grounds, but not the related regime of quarantine.[17]

As these examples illustrate, questions of categorization arise when we look in the past for immigration laws. Both state and federal governments enacted prohibitions on the importation of African slaves; there are plausible reasons for and against characterizing such laws as regulating immigration.[18] Other statutes may not be immediately recognizable as immigration laws because their sanctions were not aimed directly at the immigrants, but rather at the persons responsible for transporting them. Moreover, when states are the regulating units, migration controls may apply equally to international and interstate migration, or to United States citizens as well as aliens. Yet even if such controls do not reflect policies specifically directed against immigrants, they do not produce a regime of open borders.

While these distinctions may explain why an older immigration law may not have been categorized as such by indexers or codifiers,[19] and may be hard to find or even to recognize once found, they should not deflect attention from the substance of the regulation. If we are interested in probing the myth of legally open borders, then we should be looking for valid laws prohibiting the movement or transportation of an alien across a portion of the United States border.[20] For purposes of this article, a statute regulates immigration if it seeks to prevent or discourage the movement of aliens across an international border, even if the statute also regulates the movement of citizens, or movement

---

17. Compare Hutchinson, supra note 4, at 416–19 with infra Part II.C (discussing state quarantine regulation).

18. Factors against include that the "immigration" was involuntary, that the involuntary "immigrants" were not viewed legally as fully persons, and that calling the slave trade "immigration" seems offensively euphemistic. On the other hand, modern immigration laws do apply to involuntary as well as voluntary migration, see Plyler v. Doe, 457 U.S. 202, 219–20 (1982); D'Agostino v. Sahli, 230 F.2d 668, 670–71 (5th Cir. 1956), and subjection to the slave trade was the migratory experience of the ancestors of many Americans. Cf. Roger Daniels, Coming to America 54–55 (1990) (deploring artificial cleavage between black history and immigration history reinforced by failure to view slave trade as form of migration). A technical argument against characterizing the importation of slaves as a form of immigration may be derived from the Migration or Importation Clause of Article I, § 9 of the U.S. Constitution. See Walter Berns, The Constitution and the Migration of Slaves, 78 Yale L.J. 198, 199 (1968).

19. Actually, nineteenth-century usage more frequently referred to "emigration" and "emigrants."

20. Some authors recall that states once attempted to regulate migration, but assume that these efforts can be dismissed because they were unconstitutional. As I will show later, the invalidity of state legislation is by no means clear, even in retrospect. See infra Part III.B. Today, state immigration legislation is preempted by pervasive federal regulation, a factor obviously absent prior to 1875. See Hines v. Davidowitz, 312 U.S. 52, 73–74 (1941). Moreover, some state immigration regulation received express congressional endorsement. See infra text accompanying notes 204–205, 238.

Of course, for some historical purposes, the legal invalidity of state restrictions would be unimportant so long as the restrictions were actually enforced, or potential immigrants were deterred by the belief that they would be enforced.

across interstate borders, and even if the alien's movement is involuntary.[21]

The question whether the nation's borders were legally open has more than historical significance. First, the supposed novelty of unlawful migration has been invoked as a basis for calling into question the constitutional status of aliens who have illegally entered the United States. For example, the counting of undocumented aliens for apportionment purposes has been challenged on the theory that undocumented aliens are not "persons" within the meaning of the apportionment clauses:[22]

> Most important, on each occasion when the phrase 'whole number of persons' was adopted as part of the Constitution, there was no person who could be an undocumented alien; prior to enactment of the first immigration statute in 1875, all aliens were lawfully present in the United States. Therefore, in determining who must be counted for congressional apportionment purposes, the term 'persons' need not be read as embracing those possessing a status that did not exist at the time of constitutional enactment and amendment.[23]

Similarly, a proposal to reinterpret the Citizenship Clause of the Fourteenth Amendment[24] so that a child born in the United States would

---

21. This definition may seem broader than colloquial usage, but it is in fact narrower than the definition in 8 U.S.C. § 1101(a)(17) (1988), which defines "immigration laws" as including the Immigration and Nationality Act (INA) and "all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation or expulsion of aliens." Among the travel controls on citizens and aliens in INA § 215, one provision applies only to citizens. See 8 U.S.C. § 1185(b) (1988) (requiring valid passport for entry or departure from United States).

The definition of "immigration" in the field of demography includes all persons entering a country, regardless of their nationality. See Hania Zlotnik, The Concept of International Migration as Reflected in Data Collection Systems, 21 Int'l Migration Rev. 925, 927 (1987). "Immigration" may also be distinguished from temporary migration, as assuming entry for permanent residence. See, e.g., Black's Law Dictionary 750 (6th ed. 1990); cf. 8 U.S.C. § 1101(a)(15) (1988 & Supp. III 1991) (distinguishing between "immigrant" and "nonimmigrant alien"). Federal immigration law has always included the limitations on temporary as well as permanent entrants.

22. See U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

23. Jim Slattery & Howard Bauleke, "The Right to Govern is Reserved to Citizens": Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes, 28 Washburn L.J. 227, 231 (1988). Slattery is a member of the House of Representatives and was one of the plaintiffs in a lawsuit challenging the use of population figures that included undocumented aliens for reapportionment purposes after the 1990 census. See Ridge v. Verity, 715 F. Supp. 1308 (W.D. Pa. 1989) (dismissing suit on standing grounds). It may be noted that Slattery and Bauleke cite as their source Charles Gordon & Ellen G. Gordon, Immigration and Nationality Law (student ed. 1982), an abridged edition of the leading immigration treatise cited supra note 7.

24. U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

not be guaranteed citizenship unless one of its parents was a citizen or a lawful permanent resident alien has been fortified with the argument that, until 1875, "[t]he nation maintained a policy of completely open borders,"[25] and so "[t]he question of the citizenship status of the native-born children of illegal aliens never arose for the simple reason that no illegal aliens existed [in 1866], or indeed for some time thereafter."[26] Chief Justice Rehnquist has not yet adduced this claim as a basis for denying that undocumented aliens have rights under the Fourth and Fourteenth Amendments, but may do so soon.[27]

Second, modern immigration law is permeated with the assumption that regulating immigration is inherently a federal activity with close links to foreign relations. In the seminal *Chinese Exclusion Case*,[28] the Supreme Court treated immigration undesired by Congress as differing only in degree from invasion by a hostile foreign government, and concluded that judicial review had no application to federal immigration policy. Since that time, immigration law has included anomalies, and even barbarities,[29] that would be tolerated in no other field of regulation. The Supreme Court long denied that there were any judicially enforceable constitutional limits on federal immigration policy.[30] More recently, it has accorded only the most limited judicial review to immigration policies that implicate the constitutional rights of United States citizens, relying on the "political" character of immigration regulation and its implications for "our relations with foreign powers."[31] Recalling the history of state migration controls exposes the artificiality of this categorization. States retain other powers whose abuse could have international repercussions, such as taxation of foreign corpora-

---

25. Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity 92 (1985).

26. Id. at 95; see also id. at 116.

27. See United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990) (regarding question whether "the Fourth Amendment applied to illegal aliens in the United States" as open).

28. 130 U.S. 581 (1889).

29. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (returning resident alien may be excluded and incarcerated forever on Ellis Island without notice or hearing if no other country will take him); cf. Landon v. Plasencia, 459 U.S. 21, 33–34 (1982) (distinguishing, but not overruling, *Mezei*).

30. See, e.g., Galvan v. Press, 347 U.S. 522, 530–31 (1954) (substantive immigration policy not constrained by due process); United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904) (immigration policy not constrained by First Amendment); Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893) (Congress has power to exclude or expel any class of aliens it sees fit).

31. Fiallo v. Bell, 430 U.S. 787, 796 (1977) (upholding discrimination on grounds of gender and illegitimacy in family reunification provisions of immigration laws); see also Kleindienst v. Mandel, 408 U.S. 753 (1972) (upholding executive refusal to waive exclusion of Marxist for academic conference). These cases employed a "facially legitimate and bona fide reason" standard that appears roughly equivalent to the rational basis test.

tions and prosecution of aliens for local crimes.[32] It was hardly inevitable that states would retain these, while being denied the power to exclude foreign criminals.[33] All such powers are subject to abuse and discrimination, and all can lead to international incidents.[34]

A third consequence is more speculative. The myth of open borders has obstructed historical analysis of the President's role in immigration policymaking prior to 1875. Our ignorance of this period reinforces the present uncertainty about the distribution of immigration power between Congress and the President, which has resulted from the Supreme Court's failure to maintain a consistent identification of immigration control as a mere instance of Congress' power over foreign commerce. Claims of inherent presidential power in this field should be subject to the usual wide-ranging inquiry, including investigation of historical practice. As examples in this article will illustrate, prior to 1875 the United States diplomatic establishment did sometimes make known to foreign governments the desires of the United States regarding certain categories of immigration.[35] Often, the documentation indicates that the policies pursued in this manner derived from state legislation or congressional resolutions, not from independent presidential initiative. These examples suggest an understanding of presidential power as derivative, not inherent, but I do not know how representative the incidents that have come to my attention are. More research is required in this aspect, as in other aspects, of the nineteenth century history of immigration regulation, but so long as the open borders myth prevails, no one will do it.

In the meantime, my purpose in this Article is historical: to explore the regulation of immigration to the United States in the century preceding 1875, and to encourage further work by others in the same field. Although the Article touches on contemporary constitutional issues, it does not purport to resolve any of them. The final Part will sketch my own estimate of the implications of the history uncovered thus far for the first two of the three aforementioned current debates.

---

32. Cf. Keller v. United States, 213 U.S. 138, 148 (1909) (invalidating as beyond federal power statute prohibiting the maintenance of an alien in a house of prostitution: "[C]an it be within the power of Congress to control all the dealings of our citizens with resident aliens?").

33. See, e.g., Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government."); State v. Camargo, 537 P.2d 920, 922 (Ariz. 1975) (state lacks power to control entry of alien, even as condition of probation after conviction for crime).

34. Perhaps I should add at this point that I will not be arguing in favor of the transfer of power over immigration back to the states, and that I agree that the present functional division is advantageous both for effective regulation and for the protection of aliens' rights. But this division is neither natural nor inevitable in United States federalism or in federalism generally, as illustrated by Canada and Germany, where federal sub-units still have immigration responsibilities.

35. See infra text accompanying notes 55–58, 167–170, 281–282.

II. Major Categories of State Immigration Legislation

This Part first discusses five major categories of immigration policy implemented by state legislation: regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination. Aside from slavery, all of these categories played significant roles in the second, federal century of immigration law. The illustrations are drawn largely from the states of the Atlantic Coast, from Maine to Texas, partly because these include the states under the greatest pressure from European immigration, and partly as a concession to the shortness of life. This Part concludes by giving brief notice to two policies that played a minimal role before 1875, but became more prominent in the later federal law: ideological restriction and alien registration.

A. *Crime*

State opposition to the immigration of persons convicted of crime continued a longstanding dispute of the colonial period. The sentencing of felons to transportation to America and their shipment to the colonies as indentured servants had sparked repeated protests, including Benjamin Franklin's famous proposal to ship rattlesnakes to England in return.[36] Several colonies attempted to pass restrictive legislation,[37] but after the enactment of the Transportation Act of 1718[38] such legislation was frequently vetoed by the British government.[39] Independence released the states from that control, but also widened the field by tempting other European nations to dump their convicts in the United States.

The outbreak of the Revolutionary War immediately obstructed the British policy of penal transportation to America. When peace came in 1783, the British made some attempts to send convicts to the United States secretly, as ordinary indentured servants. One shipload was successfully landed in Baltimore in December 1783, but a second ship in 1784 was refused permission to enter United States ports, and

36. See Benjamin Franklin, Felons and Rattlesnakes, *in* 4 Papers of Benjamin Franklin 130 (Leonard W. Labaree ed., 1961) (reprinting letter published in Pennsylvania Gazette, May 9, 1751).

37. See, e.g., Act of 1730, 1730 N.J. Acts & Laws 35; Act of Feb. 14, 1730, 4 Pa. Stat. 164; Edith Abbott, Historical Aspects of the Immigration Problem 542–47 (Arno Press 1969) (1926) (reprinting provisions of statutes of Virginia, Maryland, and Delaware).

38. This act made transportation to the colonies a punishment that courts had statutory authority to impose for certain felonies. Earlier, transportation had been accomplished through the grant of a conditional pardon by the Crown, which required the consent of the criminal. After the passage of this act, transportation became a more common occurrence. See 11 William Holdsworth, A History of English Law 573–75 (1938); infra notes 64–67 and accompanying text (on conditional pardons).

39. See, e.g., A.G.L. Shaw, Convicts and the Colonies 32–33 (1966).

ended up in British Honduras.[40] The British then abandoned their efforts and established the penal colony at Botany Bay in Australia.[41]

Meanwhile, the states began enacting legislation to make certain that penal transportation to the United States would not be resumed. Georgia enacted a statute in 1787 directing that felons transported or banished from another state or a foreign country be arrested and removed beyond the limits of the state, not to return on penalty of death.[42] More importantly, the Congress of the Confederation adopted a resolution in September 1788, recommending that the states "pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States."[43]

Within a year, several states responded to the Congress' call, although by varying modes of implementation. Connecticut limited itself to the Congress' recommendation by banning the introduction of convicts sentenced to transportation by a foreign country.[44] Massachusetts, Pennsylvania, South Carolina, and Virginia more broadly prohibited the importation of persons who had ever been convicted of crime.[45] Some of these statutes prohibited migration from sister states,[46] while others limited their bans to convicts from abroad.[47] All the states but Georgia directed their sanctions toward those responsible for bringing the convict into the state. The remedial provisions of Pennsylvania's statute went beyond deterrence, expressly requiring persons responsible for bringing a convict into the state from abroad to remove the convict from the United States at their own expense.[48] Massachusetts integrated its convict statute with its poor laws, and indeed, to draw a clear distinction between the exclusion of criminals and the exclusion of the undesired poor would be anachronistic. Massachu-

---

40. See A. Roger Ekirch, Great Britain's Secret Convict Trade to America, 1783–1784, 89 Am. Hist. Rev. 1285 (1984).

41. See Mollie Gillen, The Botany Bay Decision, 1786: Convicts, Not Empire, 97 Eng. Hist. Rev. 740 (1982). Although transportation to the United States ceased to be British national policy after the 1780s, there were recurrent charges in the nineteenth century that local officials were inducing criminals to emigrate to the United States. See, e.g., H.R. Exec. Doc. No. 253, 43d Cong., 1st Sess. 28 (1874).

42. See Act of Feb. 10, 1787, 1787 Ga. Acts 40.

43. "Resolved, That it be, and it is hereby recommended to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." 13 J. of Cong. 105–06 (Sept. 16, 1788).

44. See Act of Oct. 1788, 1788 Conn. Acts & Laws 368.

45. See Act of Feb. 14, 1789, ch. 61, § 7, 1789 Mass. Acts 98, 100–01; Act of Mar. 27, 1789, ch. 463, 1788–89 Pa. Acts 692; Act of Nov. 4, 1788, No. 1542, 1788 S.C. Acts 5; Act of Nov. 13, 1788, ch. 12, 1788 Va. Acts 9. These states were later followed by Maine, Maryland, New Jersey, New York, and Rhode Island. See infra note 51 and accompanying text.

46. Georgia, Massachusetts, later Maine, Rhode Island.

47. Connecticut, as already mentioned, plus Pennsylvania, South Carolina, Virginia, later New Jersey, Maryland, New York.

48. See Pa. Act of Mar. 27, 1789, ch. 463. New Jersey later borrowed this provision from Pennsylvania. See Act of Jan. 28, 1797, ch. 611, § 3, 1797 N.J. Acts 131, 131.

setts criminalized the knowing landing of persons who had been convicted in another state or country of infamous crime, or sentenced to transportation, or who were "of a notoriously dissolute, infamous and abandoned life and character," and required masters of arriving vessels to file passenger manifests including a report of the "character and condition" of each passenger.[49]

In later years, after the federal Constitution had taken effect, further states enacted similar legislation, and states that already had such legislation reenacted or amended their provisions.[50] Maine, Maryland, New Jersey, New York and Rhode Island borrowed statutes from other states or devised their own.[51] Strangely, New York seems not to have passed a convict exclusion statute until 1833.[52] Although the indentured servant system declined,[53] incidents of European nations' sending foreign convicts to America continued and excited protests.[54] The exclusion of convicts became a relatively uncontroversial element of nativist demands for immigration restriction from the 1830s until the Civil War.

The federal government was slow to take action to exclude foreign convicts.[55] On several occasions before the Civil War, houses of Con-

---

49. Mass. Act of Feb. 14, 1789, ch. 61, §§ 6, 7. These provisions were later adopted by Rhode Island. See Act of 1798, § 17, 1798 R.I. Laws 348, 358.

50. For later enactments from the first group of states, see, e.g., Ga. Code, pt. 1, tit. 2, ch. 2, § 48 (1867); Act of Feb. 16, 1794, ch. 32, § 16, 1794 Mass. Acts & Laws 375, 384; Act of Apr. 15, 1851, No. 368, § 1, 1851 Pa. Laws 701, 701; Va. Code tit. 54, ch. 198, § 39 (1849).

51. See, e.g., Act of Feb. 24, 1821, ch. 22, § 6, 1821 Me. Laws 90, 91–92; Act of Jan. 6, 1810, ch. 138, § 7(3), 1809–10 Md. Laws; N.J. Act of Jan. 28, 1797, ch. 611; Act of Apr. 25, 1833, ch. 230, 1833 N.Y. Laws 313; R.I. Act of 1798, § 16.

52. I have found no earlier New York statute excluding convicts, unless they were covered by the provision of the poor laws concerning a passenger who "cannot give a good account of himself." Act of Mar. 7, 1788, ch. 62, § 33, 1788 N.Y. Laws 133, 146. The 1833 statute, see supra note 51, appeared at the beginning of the first wave of nativist agitation. See David H. Bennett, The Party of Fear: From Nativist Movements to the New Right in American History 49–50 (1988). The statute also followed a widely publicized incident of transportation of convicts from Hamburg in 1832. See S. Exec. Doc. No. 42, 28th Cong., 2d Sess. 2–4 (1845); Günter Moltmann, Die Transportation von Sträflingen im Rahmen der deutschen Amerikaauswanderung des 19. Jahrhunderts, *in* Deutsche Amerikaauswanderung im 19. Jahrhundert 147, 150–55 (Günter Moltmann ed., 1976).

53. See David W. Galenson, White Servitude in Colonial America: An Economic Analysis 179–80 (1981) ("Although apparent isolated cases of the indentured servitude of immigrants can be found as late as the 1830s, the system had become quantitatively insignificant in mainland North America much earlier, probably by the close of the eighteenth century."); Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870, at 163–72 (1991).

54. See, e.g., Maldwyn A. Jones, American Immigration 94, 130 (2d ed. 1992). For confirmation of the practice from German archives, see Moltmann, supra note 52, at 168–80.

55. One early exception might be mentioned: the intervention of Rufus King in the

gress requested information from the Executive on the shipment of convicts and paupers by foreign governments.[56] According to the information provided, the United States' diplomatic protests to Switzerland and various German states did meet with some success.[57] In 1866, Congress took a further step by enacting a resolution "protesting against Pardons by Foreign Governments of Persons convicted of infamous Offences, on Condition of Emigration to the United States," labelling them "unfriendly and inconsistent with the comity of nations," and requesting the President to insist that such incidents not be repeated.[58] Finally, in 1875, a prohibition of convict immigration was included in the first federal statute restricting European immigration.[59]

In 1917, the federal government also began deporting aliens from the United States for committing crimes of moral turpitude after their arrival.[60] The state law precursors of this technique were two institutions of the criminal law: banishment and conditional pardon. To the best of my knowledge, no state statutes singled out aliens for expulsion from the state or the United States as punishment for serious crime,[61] but aliens were subject to these generally applicable sanctions.

The archaic punishment of banishment survived into the first century of American independence.[62] A number of states adopted constitutional provisions prohibiting the "exile" or "transportation" of persons from the state, though in some instances the prohibition only

---

fall of 1798, while ambassador to Great Britain, to prevent the release of Irish political prisoners on condition of their departure for the United States. King acted, however, in the spirit of the newly adopted Alien Act of 1798, rather than from concern about criminality per se. See 2 Charles R. King, The Life and Correspondence of Rufus King 635–49 (1895).

56. See, e.g., S. Res. of Feb. 2, 1847, Cong. Globe, 29th Cong., 2d Sess. 305; S. Res. of Dec. 23, 1844, Cong. Globe, 28th Cong., 2d Sess. 62.

57. See, e.g., S. Exec. Doc. No. 161, 29th Cong., 2d Sess. 1 (1847) (Switzerland and Baden); S. Rep. No. 173, 28th Cong., 2d Sess. 133–34 (1845) (reprinting translation of proclamation directing police to prevent shipment of criminals through the port of Bremen); Moltmann, supra note 52, at 178–81 (attributing German states' halting of practice to their desire for good commercial relations with United States).

58. S.J. Res. 24, 39th Cong., 1st Sess., 14 Stat. 353 (1866). Examples of inquiries and protests by the Grant administration were collected and submitted to Congress in H.R. Exec. Doc. No. 253, 43d Cong., 1st Sess. (1874).

59. See Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding "persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration").

60. See Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889.

61. As will be mentioned later, slaves and free blacks were specially vulnerable to banishment. See infra notes 249–251 and accompanying text.

62. Indeed, the period began with the massive banishment of British loyalists, a practice whose soundness as a matter of political theory was endorsed by Supreme Court dicta in Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.); id. at 20 (opinion of Cushing, J.) ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government."); cf. In re Look Tin Sing, 21 F. 905, 910–11 (C.C.D. Cal. 1884) (Field, J.) ("[N]o citizen can be excluded from this

protected citizens of the state.[63]

More significantly, the functional equivalent of banishment could be accomplished through the grant of a conditional pardon, a form in which banishment persists to this day.[64] State governors were often expressly or impliedly empowered to pardon offenders on condition that they leave the state or the United States, for a period of years or forever.[65] Because so many crimes were capital in the eighteenth and

---

country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress.").

Perhaps it would be better to suppress this discussion, given Justice Scalia's recent application of the New Antiquarianism to the Eighth Amendment. See Harmelin v. Michigan, 111 S. Ct. 2680, 2682 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.). Whether banishment from the country is cruel and unusual punishment is an open question. But see Dear Wing Jung v. United States, 312 F.2d 73, 75–76 (9th Cir. 1962) (suspension of prison sentence on condition that alien defendant depart from United States held unconstitutional as either cruel or unusual punishment or denial of due process of law); State v. Sanchez, 462 So. 2d 1304, 1309–10 (La. App. 1985) (suspension of prison sentence on condition that defendant permanently leave United States held unconstitutional banishment). An affirmative answer does not inexorably follow from Trop v. Dulles, 356 U.S. 86 (1958), which involved denationalization rather than banishment. Nor does a negative answer follow from the cases on deportation of aliens, which rest conspicuously on the ground (or fiction) that deportation is not punishment. See, e.g., Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (Holmes, J.); Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).

63. See Ala. Const. of 1819, art. I, § 27 (citizens only); Ark. Const. of 1874, art. II, § 21; Ill. Const. of 1818, art. VIII, § 17; Kan. Const. of 1859, Bill of Rights, § 12; Miss. Const. of 1817, art. I, § 27 (citizens only); Ohio Const. of 1802, art. VIII, § 17; W. Va. Const. of 1872, art. III, § 5.

Exile received a different kind of mention in provisions of other state constitutions that were modeled on the "law of the land" clause of Magna Charta. These provisions directed that no one should be, inter alia, outlawed or exiled, unless by the judgment of his peers or the law of the land. See, e.g., Ark. Const. of 1836, art. II, § 10; Md. Const. of 1776, Declaration of Rights, § 11; Mass. Const. of 1780, pt. I, art. XII. It does not seem appropriate, however, to view such clauses as giving express constitutional approval to the practice of exile, and indeed some constitutions included both provisions, see, e.g., Ill. Const. of 1818, art. VIII, §§ 8, 17.

64. See, e.g., 2 James Kent, Commentaries on American Law *33 (conditional pardon "equivalent, in its effect and operation, to a judicial sentence of exportation or banishment"); Gerald R. Miller, Note, Banishment—A Medieval Tactic in Modern Criminal Law, 5 Utah L. Rev. 365, 369–74 (1957).

65. See, e.g., Act of Dec. 24, 1795, ch. 82, § 2, 1795 Md. Laws (authorizing commutation of sentence to banishment from state or country); Act of Mar. 8, 1780, ch. 154, § 5, 1780 Pa. Laws 319, 320 (authorizing pardon conditioned on leaving country); Act of May 31, 1820, § 17, 1820 N.J. Pub. Acts 134, 137 (authorizing pardon conditioned on leaving state or country); Ex parte Marks, 28 P. 109, 110 (Cal. 1883) (leaving state); People v. James, 2 Cai. R. 57, 57 (N.Y. Sup. Ct. 1804) (leaving country); Flavell's Case, 8 Watts & Serg. 197, 198–99 (Pa. 1844) (same); State v. Fuller, 1 McCord 178 (1821) (leaving state).

A state governor's pardon that was conditioned on the defendant's remaining permanently outside the United States threatened execution of the original sentence if the defendant reentered *any* of the states. See, e.g., People v. Potter, 1 Edm. Sel. Cas. 235, 245–50, 1 Parker. Crim. R. 47, 57–61 (N.Y. Cir. Ct. 1846) (defendant pardoned in New York on condition of leaving United States, and later arrested in Louisiana). Of

early nineteenth century,[66] many defendants were likely to accept such a pardon, and to comply with it.[67] Now that the federal government actively deports aliens, twentieth-century courts have had some difficulty sorting out which forms of banishment of an alien defendant from the country usurp the Attorney General's deportation power,[68] but in the nineteenth century this conflict had not yet arisen.

B. *Poverty and Disability*

In neither the eighteenth century nor the nineteenth century did American law concede the right of the poor to geographic mobility. At the time of Independence, the states took with them the heritage of the English poor laws, which made the relief of the poor the responsibility of the local community where they were legally "settled."[69] These laws gave localities various powers to prevent the settlement of persons who might later require support, and to "remove" such individuals to the place where they were legally settled. Accordingly, some of the most important provisions of state immigration law are sprinkled through the state poor laws.

This limited conception of the rights of the poor was expressly articulated in Article IV of the Articles of Confederation, which excepted "paupers, vagabonds and fugitives from justice" from the equal enjoy-

---

course, this was the very practice that the states protested when European countries engaged in it and the criminal predictably emigrated to the United States.

66. See, e.g., Lawrence M. Friedman, A History of American Law 280–84 (2d ed. 1985).

67. Courts in a few states have nonetheless held that since acceptance of a pardon is voluntary, pardons conditioned on banishment do not amount to exile or transportation within the meaning of a state constitutional prohibition. See Ex parte Hawkins, 33 S.W. 106, 106, 107 (Ark. 1895); Ex parte Lockhart, 12 Ohio Dec. Reprint 515 (Super. Ct. 1855); Ex parte Snyder, 159 P.2d 752, 754 (Okla. Crim. App. 1945); see also Carchedi v. Rhodes, 560 F. Supp. 1010, 1013, 1017–18 (S.D. Ohio 1982) (following *Lockhart*).

68. See, e.g., United States v. Jalilian, 896 F.2d 447, 448–49 (10th Cir. 1990) (federal court cannot impose special condition of probation requiring alien defendant to leave country); United States v. Hernandez, 588 F.2d 346, 350–52 (2d Cir. 1978) (federal court cannot impose special parole term conditioned on alien defendant's leaving country and not returning); Yadyaser v. State, 430 So. 2d 888, 891 (Ala. Crim. App. 1983) (narrowly construing probation condition that alien defendant travel abroad on one-way ticket); State v. Camargo, 537 P.2d 920, 922 (Ariz. 1975) (modifying probation condition so that it requires alien defendant to be turned over to INS for proceedings not inconsistent with law, and thereafter to comply with immigration laws, but not precluding a lawful reentry); State v. Karan, 525 A.2d 933, 933–34 (R.I. 1987) (alien defendant's permanent return to India, negotiated as part of plea bargain, held not facially invalid); Hernandez v. State, 613 S.W.2d 287, 290 (Tex. Crim. App. 1980) (state court cannot require as condition of probation that alien defendant remain in Mexico and not return without its prior consent).

69. See, e.g., David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 20–25, 46–48 (1971); Stefan A. Riesenfeld, The Formative Era of American Public Assistance Law, 43 Cal. L. Rev. 175, 223–24 (1955); cf. James W. Ely, Jr., Poor Laws of the Post-Revolutionary South, 1776–1800, 21 Tulsa L.J. 1, 17–18 (1985) (settlement laws rarely enforced in South).

ment of the privileges and immunities of citizens.[70] Although the Constitution omits this qualification from its Privileges and Immunities Clause,[71] the courts continued to assume that paupers had no right to travel.[72]

The history of state measures against "foreign paupers" from 1776 to 1875 is complicated by the development of poor laws generally in the same period. The rough similarity among state laws at the beginning of the period was disrupted both by varying local conditions and by the uneven pace of evolution from the traditional system of local fiscal responsibility for transfer payments (or "outdoor relief") to a more centrally financed system that relied more heavily on institutionalization. Modern scholarship has devoted much attention to David Rothman's thesis that almshouses became more prevalent in the nineteenth century because the poor came to be seen as deviants in need of control rather than as neighbors undergoing misfortune.[73]

The high incidence of "pauperism" among immigrants raised concern and hostility. Many Americans viewed their country as a place where the honest, industrious, and able-bodied poor could improve their economic standing, free from the overcrowding and rigid social structure that blocked advancement in Europe.[74] Failure to become self-supporting was seen as evidence of personal defects.[75] Many feared that European states were sending their lazy and intemperate

---

70. Article IV of the Articles of Confederation began:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant . . . .

71. U.S. Const. art. IV, § 2, cl. 1.

72. See Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 142–43 (1837). The right of the poor to travel was not vindicated until Edwards v. California, 314 U.S. 160 (1941); see also Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating residence requirements for welfare benefits). Persons who are "fugitives" in only a loose sense of the word still have a diminished right to travel. See Jones v. Helms, 452 U.S. 412, 419 (1981) (father's commission of misdemeanor by abandoning his children "qualified" his right to travel).

73. See Rothman, supra note 69, at 290. For qualifications of Rothman's conclusions, see, e.g., Cray, supra note 4; James W. Ely, Jr., "There are few subjects in political economy of greater difficulty": The Poor Laws of the Antebellum South, 1985 Am. B. Found. Res. J. 849; Steven J. Ross, "Objects of Charity": Poor Relief, Poverty, and the Rise of the Almshouse in Early Eighteenth-Century New York City, *in* Authority and Resistance in Early New York 138 (William Pencak & Conrad E. Wright eds., 1988).

74. See, e.g., Rothman, supra note 69, at 155–61.

75. See id. at 161–65; Michael B. Katz, The Undeserving Poor: From the War on Poverty to the War on Welfare 12–15 (1989).

subjects, as well as the mentally and physically disabled, to burden America.[76]

State and local efforts to avoid these burdens had very limited results.[77] The states were more successful in raising money to defray the expense of supporting impoverished immigrants than in preventing their landing, although at some periods financial disincentives may have led carriers to screen their passengers. I give particular attention here to the states of Massachusetts and New York before discussing the situation in some other states and the federal responses. This attention is justified by the circumstances that New York City and Boston were the two leading immigrant receiving ports, and that their efforts to deal with foreign paupers provoked three of the five leading Supreme Court cases on state immigration law.[78]

1. *Massachusetts*. — Like other states, Massachusetts built on the English poor law system of settlement. The 1794 poor law eliminated the earlier practice under which towns could disclaim financial responsibility for undesired newcomers by giving them a pro forma "warning" not to remain.[79] After 1794, persons newly arriving in a town became settled inhabitants if they met certain statutory criteria, such as property ownership, or if they received express permission of the town government.[80] Until 1868, however, virtually all of these statutory criteria included citizenship requirements.[81] A town was responsible for relief of any poor person found within it, subject to rights of reimbursement from the town where the individual had his legal settlement, or from the Commonwealth if the individual had no legal settlement in any Massachusetts town.[82] Alternatively, instead of seeking reimburse-

---

76. See, e.g., Benjamin J. Klebaner, The Myth of Foreign Pauper Dumping in the United States, 35 Soc. Serv. Rev. 302 (1961) (finding claims inflated in quantitative terms).

77. Municipal ordinances as well as state statutes played a role in this system. See Benjamin J. Klebaner, State and Local Immigration Regulation in the United States Before 1882, 3 Int'l Rev. Soc. Hist. 269, 273–74, 281 (1958) (discussing ordinances of Newark, Perth Amboy, Charleston and Norfolk). Despite its title, Klebaner's article deals almost exclusively with bonding and commutation provisions, a subcategory of laws dealing with migration of the poor.

78. See Henderson v. Mayor of New York, 92 U.S. 259 (1876); Passenger Cases, 48 U.S. (7 How.) 283 (1849) (Passenger Case involving Massachusetts law); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). The fourth case is the Passenger Case involving the New York head tax for the support of the marine hospital, and the fifth case is Chy Lung v. Freeman, 92 U.S. 275 (1876), involving California.

79. See Act of Feb. 11, 1794, ch. 8, 1794 Mass. Acts & Laws 347. Although "warning out" took the form of an order to leave the town, its usual effect was only to prevent the newcomer from acquiring an entitlement to the support of the town in case of indigency. See, e.g., Robert W. Kelso, The History of Public Poor Relief in Massachusetts, 1620–1920, at 49–51 (1969) (reprinting 1922 ed.).

80. See Mass. Act of Feb. 11, 1794, ch. 8, § 2.

81. See id.; Act of June 9, 1868, ch. 328, § 1, 1868 Mass. Acts & Resolves 247, 247; Kelso, supra note 79, at 62.

82. See Act of Feb. 26, 1794, ch. 32, §§ 9, 13, 1794 Mass. Acts & Laws 375, 379,

ment, the town could have the individual "removed" to his place of lawful settlement, or "by land or water, to any other State, or to any place beyond sea, where he belongs."[83]

The legislation included measures to prevent the entry of persons who would become chargeable. The 1794 poor laws imposed a penalty on any person who knowingly brought a pauper or indigent person into any town in the Commonwealth and left him there.[84] This provision applied to intrastate and interstate, as well as international, dumping of the poor. As interpreted by the courts, the crime involved an element of bad intent to foist the expense of the pauper onto the public, and did not cover innocent transportation of the poor.[85] The 1794 poor laws backed up this prohibition with a requirement that masters of vessels report the "names, nation, age, character and condition" of passengers brought "from any foreign dominion or country without the United States of America," but placed no other special burdens on the vessel.[86]

Beginning in 1820, however, Massachusetts returned to the colonial system of demanding security from masters of vessels when their passengers seemed likely to become paupers.[87] The 1820 statute required a bond to indemnify the town and the Commonwealth for expenses arising within three years with respect to any passenger lacking a settlement in the Commonwealth who was considered liable to become a public charge.[88] In 1831, this provision was amended to apply only to alien passengers, and the master was given a choice between posting security for those alien passengers whom the town officials thought might become public charges and paying the sum of five dollars per alien passenger landed.[89] Reportedly, masters usually preferred to give bond rather than pay; experience later demonstrated that the state had difficulty collecting on these bonds.[90]

---

383. Litigation between towns over responsibility for particular indigent persons was very common in this period and represented a major inefficiency in the system.

83. Id. §§ 10, 13.

84. See id. § 15.

85. See Inhabitants of Deerfield v. Delano, 18 Mass. (1 Pick.) 465, 469 (1823); Inhabitants of Greenfield v. Cushman, 16 Mass. 393, 395 (1820); cf. Mass. Rev. Stat. ch. 46, § 24 (1836) (adding phrase "and with intent to charge such town with his support").

86. Mass. Act of Feb. 26, 1794, ch. 32, § 17.

87. See Emberson E. Proper, Colonial Immigration Laws 29–30 (1900).

88. See Act of Feb. 25, 1820, ch. 290, 1820 Mass. Laws 428. The amount and duration of the bond was repeatedly changed by later legislation; I will not burden the reader with all of these changes.

89. See Act of Mar. 19, 1831, ch. 150, § 1, 1831 Mass. Laws 719, 719–20. The 1820 act had been titled "An Act to prevent the introduction of Paupers, from foreign ports or places," but its strictures had applied to all passengers lacking a settlement in the Commonwealth.

90. See Klebaner, supra note 77, at 277 (emphasizing difficulty of proving identity); see also Report of the Commissioners of Alien Passengers and Foreign Paupers: 1854, Mass. House Doc. No. 123, at 17 (1855) [hereinafter 1854 Commissioners' Report]

Faced with an increase in the number of indigent immigrants in the 1830s,[91] Massachusetts eliminated the master's choice between bond and payment. The 1837 law bifurcated the obligations instead. First, the master was forbidden to land without bond any alien passenger found upon examination to be within a group of categories of persons presenting a high risk of becoming a public charge, including those with mental or physical disabilities.[92] Second, the master was required to pay two dollars per alien passenger who was *not* in the high-risk categories.[93] This payment was rationalized as commutation of a hypothetical bond, compensating the state for the risk that the passenger would later become a public charge.[94]

A bare majority of the United States Supreme Court invalidated the two-dollar payment as an impermissible head tax on alien passengers in the *Passenger Cases*.[95] By the time this decision was finally announced, the numbers of impoverished immigrants arriving in Massachusetts had been magnified by famine in Ireland.[96] The state responded to the Supreme Court's decision first by repealing the head tax,[97] and then by the subterfuge of requiring bonds for *all* alien pas-

---

(noting insolvency of a bonding company). In 1853, the commissioners of alien passengers were authorized to commute outstanding bonds for present payment "upon such terms as in their judgment may promote the interest of the commonwealth." Act of May 23, 1853, ch. 366, § 1, 1853 Mass. Acts & Resolves 585, 585.

91. See Kelso, supra note 79, at 130.

92. See Act of Apr. 20, 1837, ch. 238, § 2, 1837 Mass. Laws 270, 270. The list of high-risk categories was modified over time. Compare id. § 2 ("lunatic, idiot, maimed, aged or infirm persons incompetent in the opinion of the officers so examining, to maintain themselves, or who have been paupers in any other country") with Act of Mar. 20, 1850, ch. 105, § 1, 1850 Mass. Acts & Resolves 338, 339 ("a pauper, lunatic, or idiot, or maimed, aged, infirm or destitute, or incompetent to take care of himself or herself without becoming a public charge as a pauper") and Act of May 20, 1852, ch. 279, § 1, 1852 Mass. Acts & Resolves 195, 195 ("any lunatic, idiotic, deaf and dumb, blind, or maimed person") and Mass. Gen. Stat. ch. 71, § 15 (1859) ("insane, idiotic, deaf and dumb, blind, deformed or maimed person, among said passengers, or alien who has before been a public charge within this state"). The list was narrowed after the creation of an intermediate-risk category in 1852, which seems to have been a response to City of Boston v. Capen, 61 Mass. (7 Cush.) 116 (1851) (official cannot require bond for persons judged likely to become a public charge unless they are within listed categories). See infra text accompanying notes 100–101.

93. See Mass. Act of Apr. 20, 1837, ch. 238, § 3. Identification of high-risk passengers rested in the discretion of local officials, however, and was vulnerable to lax enforcement, particularly since financial responsibility for foreign paupers lay with the Commonwealth and not the town. See Mass. Sen. Doc. No. 109, at 8–9 (1847) (noting Boston official's unauthorized practice of accepting head tax in lieu of bond for high-risk passengers; and proposing transfer of authority to state officials to ensure stricter enforcement); Act of May 10, 1848, ch. 313, 1848 Mass. Acts & Resolves 796 (implementing this transfer).

94. See Norris v. City of Boston, 45 Mass. (4 Met.) 282, 287 (1842) (Shaw, C.J.), rev'd sub nom. Passenger Cases, 48 U.S. (7 How.) 283 (1849).

95. 48 U.S. (7 How.) 283 (1849).

96. See, e.g., Handlin, supra note 5, at 45–52, 242.

97. See Act of Mar. 16, 1849, ch. 34, 1849 Mass. Acts & Resolves 20.

sengers, while permitting the master to make a "voluntary" commutation payment in lieu of bond for those passengers who were not in the high-risk categories.[98]

Initially the commutation payment was a flat two dollars,[99] but in 1852 the state authorized officials to demand bond or a higher commutation payment to cover passengers whom they judged to present an intermediate risk of future indigence.[100] This system remained in force until 1872, when the state abolished all bonding and commutation for passengers outside the high-risk category.[101] Bonding of high-risk passengers continued, however, as did a newer requirement of bonding by corporations importing labor into the state.[102]

In 1851, the state exempted from the bonding requirements those vessels on purely interstate routes, but subjected them and land carriers to liability for the support or removal of foreign passengers who became a public charge within one year of arrival.[103] In succeeding years, the state invoked this provision for the removal of paupers to other states and to Canada at the expense of railroad companies.[104] Eventually, however, it was undermined by the Supreme Judicial Court's refusal to construe it as applying to common carriers who transported passengers without reason to know that they were likely to

98. See Mass. Act of Mar. 20, 1850, ch. 105, § 1.

99. See id.

100. See Mass. Act of May 20, 1852, ch. 279. In 1854, for example, payments varying between $5 and $25, and averaging $21, were received for 114 alien passengers in the intermediate risk category. See 1854 Commissioners' Report, supra note 90, at 36. According to one author, the price of an adult's ticket from Liverpool to New York in 1850 averaged in the $17–$20 range. See Thomas W. Page, The Transportation of Immigrants and the Reception Arrangements in the Nineteenth Century, 19 J. Pol. Econ. 732, 738 (1911).

101. See Act of Apr. 2, 1872, ch. 169, § 1, 1872 Mass. Acts & Resolves 123, 123. In the meantime, the state oscillated between the adoption and repeal of provisions affording a refund of the payment or a cancellation of the bond for non-high-risk alien passengers in transit through the state who left within forty-eight hours after arrival. See Act of May 23, 1853, ch. 360, 1853 Mass. Acts & Resolves 580, 580–81 (enacting); Act of Apr. 27, 1865, ch. 160, 1865 Mass. Acts & Resolves 557 (repealing); Act of May 5, 1870, ch. 215, § 1, 1870 Mass. Acts & Resolves 143(reenacting). Klebaner attributes the refund provisions to competition with other states for shipping business. See Klebaner, supra note 77, at 282. For different reasons, the port state's taxation of immigrants in transit to interior states had provoked Justice Grier's criticism in the Passenger Cases, 48 U.S. (7 How.) 283, 463–64 (1849) (opinion of Grier, J.).

102. See Mass. Pub. Stat. ch. 86, §§ 5, 12 (1881). The labor importation provision, requiring bonds "conditioned that neither such person, nor any one legally dependent on him for support, shall within two years become a city, town, or state charge," originated in 1866. See Act of May 28, 1866, ch. 272, § 2, 1866 Mass. Acts & Resolves 253, 253. By its wording, it appeared to cover any person lacking a settlement in the state, not just aliens.

103. See Act of May 24, 1851, ch. 342, §§ 3–5, 1851 Mass. Acts & Resolves 847, 848.

104. See, e.g., 1854 Commissioners' Report, supra note 90, at 13–16.

become a public charge.[105] The same liability was also extended to "any corporation or party" bringing strangers into the state.[106]

Because aliens were not entitled to "settlement" under the poor law provisions, unnaturalized immigrants remained permanently subject to deportation under the provisions of the poor laws empowering local officials to seek an order causing paupers without settlement to be sent back where they "belonged" at public expense.[107] In practice, however, local officials had little incentive to take the trouble to remove paupers for whom they would otherwise be paid—perhaps overpaid—by the Commonwealth.[108] In the 1850s, the nativist reaction to heavy Irish immigration led the Massachusetts legislature to address this problem.[109] It created state workhouses and required the towns to send paupers without a settlement in the Commonwealth to those workhouses in lieu of state payments for their support in the town.[110] State officials were authorized to initiate proceedings for the removal of paupers "to the place or country from which they came."[111] These interstate and international removal activities were documented in annual reports to the state legislature and applauded in the nativist press.[112]

2. *New York*. — The post-Revolutionary poor laws of New York State also began as variations on the classical eighteenth-century form.[113] As revised in 1788, the statute decreed that strangers who gave notice of their arrival in a city or town would acquire a legal settlement if they remained twelve months without being ordered removed.[114] If during that period a justice of the peace found the

105. See Fitchburg v. Cheshire R.R., 110 Mass. 210, 212–13 (1872).

106. Mass. Act of May 28, 1866, ch. 272, § 1.

107. See Mass. Act of Feb. 26, 1794, § 13; see also Mass. Pub. Stat. ch. 86, § 38 (1881) (codified descendant of same provision). By 1859, the authority to remove paupers beyond the sea had been expressly limited to cases involving noncitizens. See Mass. Gen. Stat. ch. 71, § 52 (1859).

108. See Kelso, supra note 79, at 122–23; see also 1854 Commissioners' Report, supra note 90, at 9 (criticizing failure of local officials to have carriers remove paupers).

109. See John R. Mulkern, The Know-Nothing Party in Massachusetts: The Rise and Fall of a People's Movement 39, 94–95 (1990). Mulkern points out that the implementation of this statute, see infra notes 110-12, should be recognized as a major success for the nativists in the 1850s, though the statute itself was enacted before the election in which the Know-Nothing Party gained control of the state government. This interpretation contradicts the traditional assertion that the Massachusetts Know Nothings did nothing to curb immigration. See id. at 103–04 & n.55.

110. See Act of May 20, 1852, ch. 275, 1852 Mass. Acts & Resolves 190.

111. Id. § 7. In practice, some officials bypassed the statutory procedures and had paupers returned at public expense without seeking the approval of a justice of the peace. See 1854 Commissioners' Report, supra note 90, at 45–46 (objecting to this irregularity).

112. See, e.g., Report of the Commissioners of Alien Passengers and Foreign Paupers: 1855, Mass. House Doc. No. 41 (1856); 1854 Commissioners' Report, supra note 90; Mulkern, supra note 109, at 103, 138–39.

113. See Raymond A. Mohl, Poverty in New York: 1783–1825, at 55–59 (1971).

114. See Act of Mar. 7, 1788, ch. 62, § 5, 1788 N.Y. Laws 133, 134.

strangers likely to become a public charge, he could order them removed.[115] Until 1813, paupers who returned after removal were subject to severe corporal punishment as well as retransportation.[116]

Removal was at first accomplished by the cumbersome process of "passing on": officials of each town along the path of migration conducted the stranger to the town from which she had come until they reached a town where the stranger was legally settled or passed the stranger on across the border of the state.[117] For paupers who had entered the state through New York City, later provisions authorized removal to that city by passing on or otherwise.[118] A further amendment in 1817 provided for removal directly to places of legal settlement in other states or in Canada.[119]

New York fundamentally revised its poor laws in the 1820s, partly from dissatisfaction with the costs and complications of removal, and partly from a desire to deter "pauperism" by replacing outdoor relief with a system of county workhouses.[120] The revision abolished the practice of removing indigents from one county to another.[121] Instead, persons were to be supported in the county where they fell into need, with the expense to be shared between the town and the county.[122] The revision also eliminated removal out of the state, a procedure which, the reformers had noted, had often been impeded by the danger that the officials performing the removal would be punished by the receiving state.[123] At the same time, New York preserved its own penalties on any person who brought a pauper into the state and left him there, and it further obliged the offender "to convey such pauper out of the state, or support him at his own expense."[124]

Meanwhile, special provisions addressed paupers arriving by sea. The port of New York became, after all, the principal port of immigration to the United States. The 1788 poor law required masters of vessels arriving at New York City to report within twenty-four hours the

---

115. See id. § 7.

116. Compare id. § 10 with Act of Apr. 8, 1813, ch. 78, 1812–13 N.Y. Laws 279 (omitting corporal punishment and retransportation provision).

117. See N.Y. Act of Mar. 7, 1788, ch. 62, § 7; Mohl, supra note 113, at 58.

118. See N.Y. Act of Apr. 8, 1813, ch. 78, § 7.

119. See Act of Apr. 5, 1817, ch. 177, § 3, 1817 N.Y. Laws 176, 176–77.

120. See Report of the Secretary of State in 1824 on the Relief and Settlement of the Poor (1824), reprinted in 1 New York State Bd. of Charities, Annual Report for the Year 1900, at 939 (1901) [hereinafter Yates Report]; 1 David M. Schneider, The History of Public Welfare in New York State: 1609–1866, at 235–42 (1938).

121. See Act of Nov. 27, 1824, ch. 331, § 8, 1824 N.Y. Laws 382, 385.

122. See id. § 6.

123. See Yates Report, supra note 120, at 953.

124. See N.Y. Rev. Stat. pt. 1, ch. 20, tit. 1, § 64 (1829); N.Y. Rev. Stat. pt. 1, ch. 20, tit. 1, § 69 (1836); cf. Winfield v. Mapes, 4 Denio 571 (N.Y. Sup. Ct. 1847) (affirming fine imposed on Pennsylvania officials for returning a pauper to New York State).

names and occupations of all the passengers whom they had landed.[125] If a reported passenger could not "give a good account of himself or herself" or appeared likely to become a charge to the city, the vessel was required either to return the passenger to the place of embarkation within a month, or to enter into a bond with sufficient surety that the passenger would not become a charge.[126] This system was modified in 1797 by requiring the vessel to give bond *before* landing emigrants from foreign countries.[127] Thereafter, no provision required the removal of alien paupers coming from Europe who had been permitted to land.[128] Instead, the legislative efforts were directed primarily toward imposing financial responsibility on vessels for their passengers.

The 1797 statute had required bonding of only those passengers deemed likely to become chargeable to the city. The officials' discretion was rechanneled in 1799 by a statute authorizing them to demand a bond for any alien passenger in such amount (up to $300) as they considered proper to indemnify the city against the risk that the passenger would become chargeable within two years.[129] For most passengers, the officials developed a practice of permitting the master to commute the bond for a few dollars.[130] The 1799 statute also attempted to prevent evasion by imposing penalties on vessels that put ashore within fifty miles of the city alien passengers who intended to proceed to the city.[131] When this regulation proved ineffectual,[132] the reporting and bonding requirements were revised to include passen-

---

125. See N.Y. Act of Mar. 7, 1788, ch. 62, § 32. Residents were also subject to fine for sheltering foreigners without notifying the city. See id.

The information required in the vessels' reports increased over the years. The reporting provision of the 1824 passenger act, upheld by the Supreme Court in Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), called for the name, place of birth, place of last legal settlement, age and occupation of the passengers. See Act of Feb. 11, 1824, ch. 37, § 1, 1824 N.Y. Laws 27, 27.

126. N.Y. Act of Mar. 7, 1788, ch. 62, § 33.

127. See Act of Apr. 3, 1797, ch. 101, § 2, 1797 N.Y. Laws 134, 135.

128. Under this regime, the vessel could avoid penalties by demonstrating that the alien passenger had been "taken or sent to some foreign country without having been suffered to land." Act of Apr. 1, 1799, ch. 80, § 5, 1799 N.Y. Laws 429, 430. One author explains that "[t]he transoceanic removal policy for alien paupers quickly became unworkable," but does not indicate his basis for this explanation other than the laws themselves. Mohl, supra note 113, at 60.

In contrast, city officials could directly order the removal to their home states of citizen passengers who were deemed likely to become chargeable. See N.Y. Act of Feb. 11, 1824, ch. 37, § 3; N.Y. Act of Apr. 1, 1799, ch. 80, § 8.

129. See N.Y. Act of Apr. 1, 1799, ch. 80, § 2; see also Mohl, supra note 113, at 60; Klebaner, supra note 77, at 291.

130. See Klebaner, supra note 77, at 273 (citing figures of $3 and $5 per passenger between 1817 and 1819).

131. See N.Y. Act of Apr. 1, 1799, ch. 80, § 3.

132. See Yates Report, supra note 120, at 1013 ("It is almost an every day occurrence for vessels from Halifax, St. Johns and other possessions of the British in North America, to land passengers at some of the eastern ports, generally at Fairfield in Connecticut, about 60 miles from this city, who proceed on foot to this place, and mix

gers who had been landed outside New York City with the intention of proceeding to the city.[133]

If the bonding requirements were intended to deter the transportation of indigents, the lawmakers failed to anticipate the opportunities for profitable evasion created by the massive increase in immigration in the 1830s. Some bondsmen sought profit by taking on enormous, and therefore uncollectible, liabilities at a trivial per-passenger price.[134] Worse, some bondsmen actually accepted responsibility for the support of bonded immigrants who fell into need, and the city found itself confronting a vicious system of private poorhouses.[135] The administration of the bonding and commutation system was itself plagued by embezzlement.[136]

In 1847, the state reformed the bonding system by creating a board of Commissioners of Emigration, including as ex officio members the presidents of the German and Irish emigrant aid societies.[137] They were made responsible for overseeing a more effective and discriminating system of passenger reporting and bonding, as well as the protection of immigrants from fraud and abuse. Bonds were required for certain categories of alien passengers deemed likely to become public charges, including those with mental or physical disabilities, the elderly, and even single mothers.[138] Otherwise, one dollar was charged per alien passenger in lieu of bond.[139] When the Supreme Court invalidated head taxes in the *Passenger Cases*,[140] the New York Legislature

---

with the crowd unobserved."); Klebaner, supra note 77, at 273 (noting ease of violation in New Jersey).

133. See N.Y. Act of Feb. 11, 1824, ch. 37, §§ 1–2; see also id. § 4 (requiring aliens entering city with intention of residing to report themselves within 24 hours and to specify the vessel in which they had arrived). In 1849, this loophole-closing feature was extended to passengers intending to proceed to any destination in New York State. See Act of Apr. 11, 1849, ch. 350, § 1, 1849 N.Y. Laws 504, 504–05.

134. See Friedrich Kapp, Immigration, and the Commissioners of Emigration of the State of New York 45–49 (1870).

135. See id. at 50–59; see also Schneider, supra note 120, at 304–05.

136. See Kapp, supra note 134, at 46–48.

137. See Act of May 5, 1847, ch. 195, § 4, 1847 N.Y. Laws 182, 184–85.

138. See id. § 3 ("any lunatic, idiot, deaf and dumb, blind or infirm persons, not members of emigrating families, and who from attending circumstances are likely to become permanently a public charge"); N.Y. Act of Apr. 11, 1849, ch. 350, § 3 ("any lunatic, idiot, deaf, dumb, blind or infirm persons not members of emigrating families or who from attending circumstances are likely to become permanently a public charge, or who have been paupers in any other country or who from sickness or disease, existing at the time of departing from the foreign port are or are likely soon to become a public charge"); Act of July 11, 1851, ch. 523, § 4, 1851 N.Y. Laws 969, 971–72 (adding maimed persons, persons above the age of sixty years, widows with children, or any woman without a husband and with children).

139. See N.Y. Act of May 5, 1847, ch. 195, § 2. A similar charge was soon imposed on alien passengers arriving in upstate ports, but the bonding system was not extended to those ports. See Act of Dec. 10, 1847, ch. 431, 1847 N.Y. Laws 557.

140. 48 U.S. (7 How.) 283 (1849). The New York passenger case, *Smith v. Turner*, did not directly involve the New York passenger act, but rather the head tax for the

reformulated the charge as a voluntary option to the giving of an actual, rather than a hypothetical, bond.[141] (Ultimately, the Supreme Court was unimpressed with this designation and invalidated the commutation charge for solvent passengers in *Henderson v. Mayor of New York*,[142] one of the cases that brought to an end the era of state immigration law.)

To prevent the types of abuse that had occurred earlier, the 1847 statute addressed the capitalization of the bonding companies[143] and made the Commissioners of Emigration responsible for the maintenance and support of passengers who would otherwise become a public charge.[144] The Commissioners were also empowered to apply their funds "to aid in removing any of said persons from any part of this state to another part of this, or any other state, or from this state, or in assisting them to procure employment, and thus prevent them from becoming a public charge."[145]

Unlike the nativist officials of 1850s Massachusetts, New York's Commissioners of Emigration were not hostile to immigration, and they expressed a preference for helping immigrants find work.[146] The inclusion of representatives of immigrant communities on the board and its combination of regulatory and social service functions reflected a more hospitable intention. Nonetheless, the Annual Reports of the Commissioners indicate that they also used their powers to facilitate the voluntary return of alien passengers to Europe,[147] and sometimes used their discretion in setting commutation fees to induce the vessel owner to return passengers at his own expense rather than bond or commute for them.[148]

---

support of the marine hospital. See infra text accompanying notes 180–182. The companion case, *Norris v. City of Boston*, did involve the Massachusetts poor law.

141. See N.Y. Act of Apr. 11, 1849, ch. 350, § 1. The statute imposed more expensive bonding requirements for the higher risk passengers. This statute also consolidated the commutation money with the head tax for the marine hospital that had been invalidated in the Passenger Cases.

The head tax in the northern ports was similarly recast with a bonding option, but there was no inspection for higher risk passengers in those ports. See Act of April 11, 1849, ch. 405, 1849 N.Y. Laws 562.

142. 92 U.S. 259 (1876).

143. See N.Y. Act of May 5, 1847, ch. 195, § 3.

144. See id. §§ 4, 5.

145. Id. § 4.

146. See, e.g., Annual Reports of the Commissioners of Emigration of the State of New York, 1847 to 1860, at 135 (1861) [hereinafter Reports of Commissioners of Emigration] (1853 Report).

147. See, e.g., id. at 135, 177, 198, 215, 233, 255, 270 (271, 570, 54, 104, 170, 68 and 67 passengers "sent back to Europe at own request" in 1853, 1855, 1856, 1857, 1858, 1859, and 1860, respectively).

148. See, e.g., id. at 157 (1854 Report) ("[T]he Commissioners have not been negligent in applying the powers already given to them by the laws under which they act, in requiring the full bonds, and enforcing the penalties now provided in certain cases of this class, or of commuting them at a rate sufficient to provide for the probable expense

In their 1857 Report, the Commissioners noted with satisfaction the "improved character and condition of the emigration," which they attributed to a number of causes, including:

> the more stringent legislation, and the action under it, of the officers of the Commission, aided by the co-operation of the consuls and diplomatic officers of the United States abroad, thus excluding, in a great degree, the most worthless class, sent by local or State authorities abroad, to be thrown upon our shores for support, or to live by worse means.[149]

3. *Other States and Federal Responses*. — Other states dealt with the legacy of the English poor laws in different ways. The settlement-and-removal system remained strong in New England. Maine, like its parent Massachusetts, continued to provide for removals out of state.[150] Bonding was imposed for out-of-state passengers in 1820, although officials were given the option of accepting commutation payments in 1838.[151] Rhode Island towns could not physically remove an out-of-state person themselves, but could order him to depart; between 1803 and 1838, he was subject to whipping if he failed to depart or if he returned.[152] Rhode Island later made railroads financially responsible for the passengers they brought into the state, and adopted a bonding and commutation system for passengers brought by vessel.[153]

Pennsylvania's poor laws, prior to 1828, provided for out-of-state removals or carrier liability only after the passengers had been landed.[154] If the "importer" of "infant, lunatic, maimed, aged, impotent or vagrant" persons were identified, he could be required to give security "to carry and transport such [persons] to the place or places whence such [persons] were imported or brought from, or otherwise to

---

of the support of such paupers, or on condition of returning such persons (especially if convicts) to their own country.").

149. Id. at 213 (1857 Report).

150. See Act of Mar. 21, 1821, ch. 122, § 18, 1821 Me. Laws 422, 433 (removal "by land or water to any other State, or to any place beyond sea where he belongs"); Me. Rev. Stat. ch. 24, § 31 (1857); In re Knowles, 8 Me. 71 (1831).

151. See Act of June 27, 1820, ch. 26, 1820 Me. Laws 35; Act of Mar. 22, 1838, ch. 339, 1838 Me. Pub. Acts 497. Klebaner, supra note 77, lists bonding and head tax provisions from Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, and California.

152. See Margaret Creech, Three Centuries of Poor Law Administration: A Study of Legislation in Rhode Island 147 (1969). After 1838, the punishments included fine, confinement to the workhouse, or being bound to service for a year. See R.I. Rev. Stat. ch. 51, § 35 (1857).

153. See Act of June 1847, 1847 R.I. Acts 27; R.I. Rev. Stat. ch. 51, §§ 5–8 (1857); see also Creech, supra note 152, at 123–25. Creech noted that it was still a crime in 1936, when she wrote, to bring into and leave in any town an unsettled poor person. See id. at 125.

154. See Act of Mar. 29, 1803, ch. 155, § 21, 1801–03 Pa. Laws 507, 525–26 (removal of person likely to become a public charge); id. § 23 (liability in certain cases).

indemnify" the town for any charge.[155] An overhaul of the poor relief system in 1828 emulated contemporary changes in other states by emphasizing almshouses and by adopting a bonding and commutation system for arriving passengers.[156] In practice, one historian notes, the officials preferred head money to bonding, but he also reports several cases "in the 1850's where persons were allowed to bring infirm relatives from Ireland only if sufficient bond was given."[157] Maryland, in contrast, contented itself with a $1.50 head tax, disguised after 1850 as a commutation payment.[158]

Farther south, the English tradition of settlement and removal seems to have weakened in practice, if not on the books. A recent study concludes that the evidence "strongly suggests that the settlement provisions went largely unenforced."[159] One cause of the relaxed attitude may have been that "[t]he great waves of pre-Civil War immigration largely bypassed the region."[160] Nonetheless, some states were "watchful to avoid being burdened with imported paupers."[161] In South Carolina, a colonial poor law of 1738 remained in force throughout our period, requiring masters of vessels to give security for any passengers found to be "impotent, lame or otherwise infirm, or likely to be a charge to the parish."[162] In addition, Charleston required bonding or commutation for all out-of-state passengers, at regressive rates.[163]

New Orleans, in contrast to other Southern cities, became an important immigrant port, primarily for passengers intending to proceed up the Mississippi in the years before railroads linked the Eastern ports with the Midwest.[164] Louisiana had a statutory vehicle for regulating

---

155. Id. § 23; see Klebaner, supra note 77, at 278 (giving examples of enforcement).

156. See Act of Mar. 5, 1828, No. 79, 1827–28 Pa. Laws 162; see also Priscilla F. Clement, Welfare and the Poor in the Nineteenth-Century City: Philadelphia, 1800–1854, at 55–57 (1985) (discussing replacement of outdoor cash relief by almshouse in 1828 Philadelphia reform).

157. Klebaner, supra note 77, at 279.

158. See Act of Mar. 1833, ch. 303, § 2, 1832–33 Md. Laws; Act of Feb. 17, 1835, ch. 84, § 1, 1834–35 Md. Laws; Act of Jan. 30, 1850, ch. 46, 1849–50 Md. Laws; Klebaner, supra note 77, at 280.

159. Ely, supra note 73, at 859.

160. Id. at 874. Immigrants' preference for free states may have reflected antipathy to slavery, or a sense of their greater opportunities in free society.

161. Benjamin J. Klebaner, Public Poor Relief in Charleston, 1800–1860, 55 S.C. Hist. Mag. 210, 218 (1954); see also Ely, supra note 73, at 861.

162. S.C. Act of Mar. 25, 1738, No. 671, § 5; S.C. Rev. Stat. tit. 8, ch. 29, § 24 (1873). Klebaner records one effort by Charleston in 1832 to compel a captain to remove a pauper he had brought. See Klebaner, supra note 161, at 218.

163. See Klebaner, supra note 161, at 218 ($2 per steerage passenger, 25¢ per cabin passenger). Klebaner notes that commutation was made subject to the Harbor Master's consent in 1846. See id.

164. See Joseph Logsdon, Immigration through the Port of New Orleans, *in* Forgotten Doors: The Other Ports of Entry to the United States 105, 107–08, 110 (M. Mark Stolarik ed., 1988).

these arrivals in its vagrancy laws, which required examination of all alien passengers, and empowered city officials to require the vessel to give security that the passenger would not "become a vagrant . . . or be found guilty of any crime, misdemeanor or breach of the peace" within two years.[165] Louisiana also imposed a head tax for revenue purposes in 1842, which was disguised as a commutation payment after the *Passenger Cases*, and which was, in fact, enforced.[166]

The concern that paupers were being sent to the United States as a matter of official government policy by European countries led the states to call for federal action. In the 1830s and 1840s, congressional resolutions sought information from the Executive regarding foreign government assistance for the emigration of paupers.[167] In 1855, efforts to enact a bill to prevent the immigration of criminals and paupers triggered states' rights objections in the Senate and rejection by the House of Representatives.[168] Meanwhile, the Executive responded to some incidents with diplomatic protests, which may have induced caution on the part of foreign governments.[169] These protests continued after the Civil War,[170] and finally a ban on the landing of any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" was included in the second federal statute regulating European immigration.[171] The public charge provision has played an important role in federal immigration law ever since.

C. *Contagious Disease*

Governments have traditionally protected the public health by interfering with the migration of individuals suspected of carrying contagious diseases. Exclusion on grounds of contagious disease was not

---

165. Act of Mar. 16, 1818, § 2, 1818 La. Acts 110, 110; La. Rev. Stat. § 15 (1852).

166. See Act of Mar. 26, 1842, ch. 158, 1841–42 La. Acts 454; Act of Mar. 21, 1850, No. 295, 1850 La. Acts 225; Klebaner, supra note 77, at 280 ("Collections from this source reached a peak of more than $70,000 in 1854."); see also Commissioners of Immigration v. Brandt, 26 La. Ann. 29 (1874) (upholding bonding version of statute as consistent with *Passenger Cases*).

167. See S. Res. of Feb. 2, 1847, Cong. Globe, 29th Cong., 2d Sess. 305 (foreign criminals and paupers); S. Res. of Dec. 23, 1844, Cong. Globe, 28th Cong., 2d Sess. 62 (paupers and convicts); S. Res. of Mar. 19, 1838, Sen. J., 25th Cong., 2d Sess. 619 (foreign paupers); S. Res. of July 4, 1836, Sen. J., 24th Cong., 1st Sess. 548 (paupers).

168. See Hutchinson, supra note 4, at 40–41. Hutchinson asserts that the Senate passed the bill, but he cites only the House proceedings, and I have found nothing in the Senate debates or the Senate Journal that confirms his assertion. One might expect the states' rights obstacle to be more decisive in the Senate because the South was more heavily represented there.

169. See, e.g., H.R. Rep. No. 1040, 25th Cong., 2d Sess. 47 (1838); Klebaner, supra note 76, at 304, 305.

170. See, e.g., H.R. Exec. Doc. No. 253, 43d Cong., 1st Sess. 1–6 (1874).

171. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214. The statute also imposed a federal head tax, see id. § 1, replacing the head taxes and surrogates invalidated by the Supreme Court in Henderson v. Mayor of New York, 92 U.S. 259 (1876).

added to the federal immigration laws until 1891, somewhat later than the exclusion of Chinese laborers, convicts, and persons likely to become a public charge. This delay does not indicate that public health regulation of migration was a novelty, but rather reflects the strength of the tradition of federal deference in that area to state regulation of migration, exercised for most of the nineteenth century through the mechanism of quarantine.

The term "quarantine" derives from a forty-day period of isolation and cleansing imposed on arriving travelers and their goods to make sure that they were not infected; the practice originated in the fourteenth century as a measure against the plague.[172] Quarantine measures were later applied to other acute diseases with high mortality rates, especially smallpox, yellow fever, typhus and cholera.[173] Passengers and crew could be isolated on board the vessel or removed to a quarantine station, hospital, or "lazaretto." Asymptomatic passengers were isolated for observation; those already infected would either die or recover, and in either case cease to spread the infection. (In the meantime, however, they might infect quarantine personnel or other passengers detained in quarantine.) During quarantine, the vessel itself, its cargo, and the personal possessions of the passengers might also be subjected to treatment intended as disinfection.

Quarantine practices should be distinguished in two respects from the federal immigration exclusions that began in 1891. First, quarantine usually targeted acute diseases, while federal immigration exclusions extended to chronic diseases whose victims were not likely to recover or die after a limited period of isolation. The federal medical exclusions were adopted in addition to, not instead of, a quarantine system.[174] Second, quarantine laws applied to a state's own citizens as well as to aliens and citizens of other states.[175] This feature is under-

---

172. See, e.g., Oleg P. Schepin & Waldemar V. Yermakov, International Quarantine 11–13 (Boris Meerovich & Vladimir Bobrov trans., 1991); Wesley W. Spink, Infectious Diseases: Prevention and Treatment in the Nineteenth and Twentieth Centuries 7 (1978).

173. See Hugh S. Cumming, The United States Quarantine System During the Past Fifty Years, *in* A Half Century of Public Health 118, 120 (Mazÿck P. Ravenel ed., 1921).

174. See Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 396 (1902) ("[W]e think [the federal immigration laws] do not purport to abrogate the quarantine laws of the several States, and that the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary, and subject to such quarantine laws."). Moreover, the emphasis on *nonfatal* chronic diseases at the turn of the century reflected a desire to be more selective in the choice of immigrants, not merely the need to protect the resident population from infection. See Jenna W. Joselit, The Perceptions and Reality of Immigrant Health Conditions, 1840–1920, *in* U.S. Immigration Policy and the National Interest: Staff Report to the Select Commission on Immigration and Refugee Policy app. A at 195, 209–30 (1981); Alan M. Kraut, Silent Travelers: Germs, Genes, and American Efficiency, 1890–1924, 12 Soc. Sci. Hist. 377, 378, 385 (1988).

175. I do not know whether, in practice, quarantine officials exercised their

scored by the common provision that unauthorized persons going aboard a vessel in quarantine or entering the quarantine grounds rendered themselves subject to detention in quarantine.[176]

Some state laws went beyond standard quarantine measures by providing for the punishment or expulsion of travelers from proscribed places. In some instances, officials were authorized to suspend commerce with infected locales by proclamation.[177] In Massachusetts, town officials could warn any person coming from an out-of-state place where "small-pox or other malignant distemper" was prevailing to leave the state within two hours or "be removed into the State from whence he or they may have come," unless disabled by sickness.[178] In New York, town officials had the authority to examine a person who had come from infected places and to send him out of the state if they had good cause to suspect that he was infected, unless he was an inhabitant of New York.[179]

Passing mention should also be made of New York's head tax for the support of the marine hospital. Beginning in 1797, the state levied a tax on the crews and passengers (regardless of nationality) of vessels entering the port of New York, to defray the expense of caring for patients in the lazaretto.[180] In later years, excess revenues from this tax were diverted to other uses.[181] This was the head tax invalidated by the Supreme Court on commerce clause grounds in *Smith v. Turner*, one of the *Passenger Cases*.[182]

As for actual quarantine, state legislation in the period before 1875 exhibited numerous variations. There were quarantines at seaports

---

discretion more favorably toward local citizens, for example, in deciding whether fellow passengers should be quarantined for observation when an infected passenger was found.

176. See, e.g., Conn. Rev. Stat. tit. 91, § 6 (1821); Act of Dec. 17, 1793, § 3, 1793 Ga. Laws 25, 26; Act of Mar. 10, 1821, ch. 127, § 13, 1821 Me. Laws 443, 448; Act of June 20, 1799, ch. 9, § 14, 1799 Mass. Acts 308, 313; Act of June 10, 1803, § 7, 1803 N.H. Laws 7, 11–12; Act of Apr. 8, 1811, ch. 175, § 12, 1811 N.Y. Laws 246, 250; Act of 1793, ch. 3, § 3, 1793 N.C. Acts 36, 37; R.I. Pub. Laws, § 5 (1822); Va. Act of Dec. 26, 1792, ch. 129, § 8.

177. See, e.g., Conn. Rev. Stat. tit. 91, § 9 (1821) (interdiction of communication with town or place in adjoining state; willful violation subject to fine); Act of Jan., 1799, ch. 17, § 2, 1799 Del. Laws 4, 48 (may suspend altogether intercourse by land); Act of Apr. 17, 1795, ch. 327, § 4, 1794–95 Pa. Acts 734, 735 (stoppage of intercourse with infected places within the United States; persons transgressing to be fined as well as quarantined).

178. Act of June 22, 1797, ch. 16, § 2, 1797 Mass. Acts & Laws 130, 130–31. Maine also retained this provision after its separation from Massachusetts. See Act of Mar. 10, 1821, ch. 127, § 2, 1821 Me. Laws 443, 443.

179. See Act of Mar. 27, 1794, ch. 53, § 2, 1794 N.Y. Laws 525, 526.

180. See Act of Mar. 30, 1797, ch. 67, § 5, 1797 N.Y. Laws 93, 94.

181. See, e.g., N.Y. Rev. Stat. pt. 1, ch. 14, tit. 4, §§ 7, 11 (1829) (surplus to be paid to society for the reformation of juvenile delinquents in the city of New York).

182. 48 U.S. (7 How.) 283 (1849).

and, less commonly, quarantines at interstate borders.[183] Some legislation delegated broad discretion to local authorities,[184] while other legislation prescribed a framework of more and less stringent quarantine measures depending on such factors as the ports from which the vessel arrived, the occurrence of illness among the passengers and crew, and the date of arrival.[185] Quarantine was often more exacting in the hot months, because it had been observed that yellow fever outbreaks followed seasonal patterns.[186]

The particular ports of embarkation were taken into account at several levels of regulation. The international maritime quarantine regime included the issuance of "bills of health" to vessels by officials at the ports from which they embarked, certifying the state of public health at the time of departure.[187] Some legislation specified geographic zones for which more stringent quarantine was required regardless of the bill of health.[188] Executive officials were often authorized to proclaim a foreign or domestic port infected on an emergency basis.[189]

---

183. For provisions regarding land quarantines, see, e.g., Ala. Code pt. 1, tit. 13, ch. 1, § 967 (1852); Conn. Rev. Stat. tit. 91, § 15 (1821); Ga. Code pt. 1, tit. 15, ch. 2, § 1402 (1867); Act of Apr. 1, 1803, ch. 178, § 16, 1803 Pa. Laws 593, 613; Act of Dec. 5, 1793, ch. 19, § 2, 1794 Va. Acts 26, 26. (Since the focus of this article is on the regulation of migration, I will not discuss quarantine of nontravelers within their own houses or in hospitals.)

184. See, e.g., Ala. Code pt. 1, tit. 13, ch. 1, § 960 (1852); Act of Nov. 1793, ch. 34, § 2, 1793 Md. Laws; Act of June 20, 1799, ch. 9, §§ 8, 9, 1799 Mass. Acts 308, 311; Va. Code tit. 25, ch. 86, § 13 (1849).

185. See, e.g., Act of Apr. 10, 1850, ch. 275, tit. 2, art. 1, 1850 N.Y. Laws 597, 599–600; Act of Apr. 11, 1799, ch. 228, §§ 4–7, 1799 Pa. Laws 489, 492–97; Act of Sept. 26, 1868, No. 59, § 2, 1868 S.C. Acts Spec. Sess. 110, 111.

186. See, e.g., John Duffy, A History of Public Health in New York City 1625–1866, at 145 (1968); Charles E. Rosenberg, The Cholera Years 14 (1962). In retrospect, the yellow fever season reflected the life cycle at different latitudes of the mosquito that transmitted the disease.

187. See Schepin & Yermakov, supra note 172, at 25, 106–09, 208–09; Sidney Edelman, International Travel and our National Quarantine System, 37 Temp. L.Q. 28, 29–30 (1963); cf. Act of Mar. 18, 1858, No. 269, § 5, 1858 La. Acts 187, 188 (more favorable treatment of vessel presenting clean bill of health); Act of Apr. 4, 1798, ch. 141, § 5, 1798 Pa. Laws 289, 291–92 (same).

188. See, e.g., Act of Feb. 3, 1812, § 1, 1812 N.J. Laws 19, 19 (vessels from south of Georgia); Act of Apr. 14, 1820, ch. 229, § 4, 1820 N.Y. Laws 208, 210 (vessels from Mediterranean, Asia, America south of equator, and Madeira, Canary, Cape de Verd, Western or Bahama islands); id. § 5 (vessels passing south of Cape Henlopen, Del.); Pa. Act of Apr. 1, 1803, ch. 178, § 6 (vessels from Mediterranean); Act of Apr. 2, 1821, ch. 126, § 1, 1821 Pa. Laws 210, 210–11 (vessels from south of Cape Fear, N.C.). Conversely, a particular zone could be favored with less stringent quarantine regulation. See Act of Apr. 18, 1825, ch. 212, 1825 N.Y. Laws 322 (giving the ports of Canton and Calcutta more favorable treatment than other Asian ports). Professor Duffy conjectured that this last New York statute resulted from lobbying by local merchants trading with those ports. See Duffy, supra note 186, at 330.

189. See, e.g., Act of Mar. 15, 1855, No. 336, § 13, 1855 La. Acts 471, 474–75; Act of Apr. 9, 1856, ch. 147, § 24, 1856 N.Y. Laws 230, 236; S.C. Act of Sept. 26, 1868, No. 59, § 23.

Those who found it impossible or inconvenient to comply with quarantine laws sometimes resorted to evasion, corruption, or violation.[190] Travelers to Philadelphia and New York, for example, sometimes tried to evade quarantine by landing in New Jersey, and legislation was occasionally passed to close this loophole.[191] Local officials might also be bribed; it has been observed that, "[f]ortunately for New York City, forcing vessels to unload their cargoes and undergo the contemporary cleansing procedures presented more opportunities for enriching the officials than simply permitting them to land. In consequence, the enforcement of the quarantine laws, for its day, was relatively effective."[192] Masters of vessels who failed to submit to quarantine and passengers who eloped from quarantine were usually subject to criminal prosecution.[193]

Both facially and as applied, quarantine regulation went through cycles of tightening and relaxation, even to the point of abandonment. As one historian noted, "[t]he history of all quarantine laws shows that their enforcement varied in direct ratio to the recency or imminent threat of a major epidemic disease."[194] Moreover, throughout the nineteenth century, the practice of quarantine was bound up with a scientific controversy over the causes of the relevant diseases.[195] Quarantine measures reflected a "contagionist" theory of the disease, which held that the disease was spread geographically by infected persons or things. "Anticontagionists" maintained that the disease had local environmental origins (possibly in "miasmas"), and was not spread by travelers; quarantines were therefore useless, expensive and cruel distractions from more appropriate local sanitary measures. The predominant influence of anticontagionists in Boston, for example, prevented quarantine there against the cholera epidemic of 1866.[196] Historians have noted an ideological aspect to the popularity of anticontagionism in the mid-nineteenth century, when the substantial in-

190. For a striking vignette of immigrants leaping from boats to break through quarantine lines, see Rosenberg, supra note 186, at 24.

191. See, e.g., Act of Nov. 19, 1799, ch. 836, 1799 N.J. Laws 654, 654 ("Whereas it hath been represented to the legislature, that for want of due provision on the part of this state, the laws of the states of Pennsylvania and New-York, for preventing contagious diseases, have been repeatedly evaded . . . ."); Pa. Act of Apr. 11, 1799, ch. 228, § 7 (prohibiting entry of recently landed persons who would be subject to quarantine if they landed directly in Philadelphia); Duffy, supra note 186, at 165–66.

192. Duffy, supra note 186, at 330.

193. See, e.g., Conn. Rev. Stat. tit. 91, §§ 3, 6 (1821); Ga. Code pt. 1, tit. 15, §§ 1401, 1404 (1867); La. Act of Mar. 15, 1855, No. 336, §§ 13, 14; N.H. Act of June 10, 1803, §§ 1, 6; N.Y. Act of Apr. 10, 1850, ch. 275, tit. 2, art. 5, §§ 30–31; N.C. Rev. Code ch. 94, §§ 1–2, 5 (1855); Pa. Act of Apr. 1, 1803, ch. 178, §§ 4, 13; S.C. Act of Sept. 26, 1868, No. 59, §§ 26–28.

194. Duffy, supra note 186, at 86.

195. See, e.g., id. at 124, 237–39; Rosenberg, supra note 186, at 72–81.

196. See Michael Les Benedict, Contagion and the Constitution: Quarantine Agitation from 1859 to 1866, 25 J. Hist. Med. 177, 183–84 (1970).

terference of quarantines with free trade chafed against laissez-faire economics.[197] Toward the end of the century, advances in bacteriology both vindicated the contagionist theory and reinforced some of the local sanitary practices of the anticontagionists. Improved diagnostic techniques also reduced the inefficiencies of quarantine.[198]

In the mid-nineteenth century, contagionists and anticontagionists carried on their debate in national and international conferences aimed at standardizing (or relaxing) quarantine practices.[199] Within the United States, proposals for a federal quarantine law had a heavy burden of tradition to overcome. State authority over quarantine legislation had long enjoyed the unequivocal endorsement of the federal government. The issue first arose in 1796, when a Representative from Maryland proposed that the President be authorized to regulate the quarantine of foreign vessels arriving in United States ports.[200] The bill provoked a debate in the House on the locus of authority over quarantine, with the proponents (mostly Federalists) contending that quarantine laws were regulations of commerce and therefore beyond state authority.[201] The bill's opponents defended state authority on various grounds, including the right of self-defense, varying local conditions, characterization of quarantine as an internal police regulation, and denial that pestilential diseases were objects of commerce.[202] The proposal failed by a large majority,[203] and Congress instead authorized the President to direct federal customs officials to aid in the execution of state quarantine and health laws.[204] Congress reiterated these instructions in an act of 1799 designed to harmonize quarantine and customs enforcement.[205]

These statutes contributed to John Marshall's recognition in *Gibbons v. Ogden* that "quarantine laws [and] health laws of every description" formed part of the "immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government."[206] At the same time, Marshall observed that "Con-

197. For the argument, see Erwin H. Ackerknecht, Anticontagionism Between 1821 and 1867, 22 Bull. Hist. Med. 562, 567, 589–92 (1948). For local examples, see Duffy, supra note 186, at 134–35, 330–31, 353.

198. See Cumming, supra note 173, at 125.

199. See Duffy, supra note 186, at 349–50 (national); Schepin & Yermakov, supra note 172, *passim* (international); Les Benedict, supra note 196, at 178–81 (national).

200. See 5 Annals of Cong. 1227 (1796).

201. See id. at 1347–59 (remarks of Reps. S. Smith, W. Smith, Bourne, Sitgreaves, Hillhouse).

202. See, e.g., id. at 1348, 1358 (remarks of Reps. Giles, Holland) (self-defense); id. at 1350–51, 1358 (remarks of Reps. Milledge, Holland) (local conditions); id. at 1353, 1354 (remarks of Reps. Gallatin, W. Lyman) (internal police); id. at 1355 (remarks of Rep. Giles) (not object of commerce).

203. See id. at 1359 (46 to 23).

204. See Act of May 27, 1796, ch. 31, 1 Stat. 474.

205. See Act of Feb. 25, 1799, ch. 12, 1 Stat. 619.

206. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824); see also id. at 205–06.

gress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce."[207] Even after the Civil War, in anticipation of the cholera epidemic of 1866, Congress rejected a proposal to substitute uniform federal regulation of quarantine for the traditional system of cooperation with state laws.[208]

After 1875, the states continued to regulate quarantine with federal cooperation, and the Supreme Court continued to reaffirm state authority in the field.[209] Meanwhile, scientific support for the contagion theory helped build a consensus in favor of national quarantine enforcement. Starting in 1878, federal health officials became more actively involved in quarantine.[210] Then, in 1893, federal legislation authorized imposition of nationwide minima for international quarantine and invited the states to make voluntary transfers of their quarantine establishments to the federal government.[211] Concurrent regulation lasted until 1921, when New York became the last state to surrender its international quarantine functions.[212]

D. *Race and Slavery*

A far more controversial category of state immigration legislation concerned the movement of free blacks.[213] In the antebellum period, there was no national consensus on the propriety of such legislation:

---

207. Id. at 206.

208. See J. Res. of May 26, 1866, 14 Stat. 357; Cong. Globe, 39th Cong., 1st Sess. 2444–46, 2483–85, 2520–22, 2548–50, 2581–89 (1866); Les Benedict, supra note 196, at 184–93.

209. See Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886); see also Louisiana v. Texas, 176 U.S. 1, 21 (1900) ("[Q]uarantine laws belong to that class of state legislation which is valid until displaced by Congress. . . ."); Patterson v. Kentucky, 97 U.S. 501, 505–06 (1879) (states may lawfully exclude "not only convicts, paupers, idiots, and persons likely to become a public charge, but animals having contagious diseases."); Railroad Co. v. Husen, 95 U.S. 465, 472 (1878) (A state "may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge as well as persons affected by contagious or infectious diseases."). For a different category of immigration-related health laws, see In re Wong Yung Quy, 2 F. 624 (C.C.D. Cal. 1880) (upholding state regulation and taxation of disinterment and transportation of bodies of the deceased, despite interference with Chinese religious custom of returning migrants' bodies to China).

210. See Cumming, supra note 173, at 121–22; Edelman, supra note 187, at 31–33. Under the 1878 Act, consuls were to report the health conditions in foreign ports, and federal officials were authorized to impose quarantine if necessary in ports where no quarantine system existed, although they were not to interfere with existing state or municipal systems. See Act of Apr. 29, 1878, ch. 66, 20 Stat. 37.

211. See Act of Feb. 15, 1893, ch. 114, 27 Stat. 449; Cumming, supra note 173, at 122–23; Edelman, supra note 187, at 32–33.

212. See Cumming, supra note 173, at 123; Edelman, supra note 187, at 33.

213. Terminology is a sensitive issue; I use the term "black" in the hope that it is currently the least offensive means of referring specifically to people who were either African or (partly or entirely) of African ancestry. It would be too misleading to use a term like "African-American" in this context, because it is important to focus on the fact

slave states insisted that it was essential to the preservation of their institutions, some free states insisted that it was unconstitutional, and other free states adopted such legislation themselves.[214] Historians have reasonably suggested that a primary cause of the federal government's failure to adopt qualitative restrictions on immigration before the Civil War was the slave states' jealous insistence on maintaining power over the movement of free blacks as a states' right.[215]

The legislation restricting free blacks was voluminous and has been intensively studied.[216] This Article can therefore limit itself to illustrative discussion and to placing these restrictions in the context of state regulation of immigration. I also contrast the state restrictions on movement with regulation of the international slave trade, the one form of immigration regulation in which the federal government was actively involved during our period.

1. *Prohibiting Immigration of Free Blacks to the State.* — The objections raised to migration of free blacks were various. Many white inhabitants of the "free" states shared in racial prejudice against blacks and opposed what we would now call a multiracial society.[217] Many also professed fear that Southern slave-owners would emancipate slaves who were no longer able to work and send them to burden the Northern states.[218] As a result, several free states erected barriers to the entry of blacks. Blacks seeking to reside in some Northern states were obliged to give surety not to become a public charge and for good behavior.[219]

---

that the legislation discussed in this section applied, and in some instances was specifically designed to apply, to foreign nationals, e.g., British subjects.

214. Though categorizing states as slave or free may be a useful shorthand in this brief discussion, it should be remembered that there was considerable diversity within these categories, and that states' policies regarding both slavery and free blacks changed over time.

215. See Carl B. Swisher, The Taney Period 1836–64, at 393 (1974) (Oliver Wendell Holmes Devise History of the Supreme Court of the United States vol. V); see also In re Ah Fong, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) ("[W]e cannot shut our eyes to the fact that much which was formerly said upon the power of the state in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits.").

216. See, e.g., Ira Berlin, Slaves Without Masters: The Free Negro in the Antebellum South (1974); Barbara J. Fields, Slavery and Freedom on the Middle Ground: Maryland during the Nineteenth Century (1985); John H. Franklin, The Free Negro in North Carolina 1790–1860 (Russell & Russell 1969) (1943); A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period (1978); Leon F. Litwack, North of Slavery: The Negro in the Free States 1790–1860 (1961); Paul Finkelman, Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North, 17 Rutgers L.J. 415, 430–43 (1986); A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia, 26 Harv. C.R.-C.L. L. Rev. 17 (1991).

217. See George M. Fredrickson, The Black Image in the White Mind 133–35 (Wesleyan Univ. Press 1987) (1971); Litwack, supra note 216, at 66–67.

218. See Litwack, supra note 216, at 67–68.

219. See Act of Jan. 17, 1829, § 1, 1829 Ill. Rev. Code 109, 109 (but excepting

In other instances, blacks were forbidden to move into the state altogether,[220] sometimes pursuant to the command of the state constitution.[221] There is reason to doubt how often these laws were actually enforced, but attempts were made,[222] and, as late as 1864, the Illinois Supreme Court upheld a conviction, fine, and forcible indenture for the crime of entry by a mulatto.[223]

In slave states, the mere visibility of black people living in freedom was regarded as a grave threat to the operation of the system of slavery.[224] Moreover, slaveholders feared that free blacks would foment or facilitate escape, or conspire to bring about slave revolts.[225] Revolutionaries from the West Indies and, later, black citizens of states where abolitionism flourished were particularly feared.[226] As the nineteenth century progressed, the ideological struggle between abolitionists and the defenders of slavery as a virtuous institution founded on the alleged biological inferiority of blacks accentuated the anomalous position of free blacks in slave states. Attitudes toward free blacks hardened, and

---

blacks who were citizens of one of the United States); Ind. Rev. Laws ch. 66, § 1 (1831); Act of Jan. 25, 1807, ch. 8, § 1, 1807 Ohio Acts 53, 53; see also Act of Mar. 30, 1819, § 3 1819 Ill. Laws 354, 354-55 (requiring persons bringing slaves into the state for purpose of emancipation to post bond against the freedman's becoming a public charge).

220. See Act of Feb. 12, 1853, § 3, 1853 Ill. Gen. Laws 354, 354; Act of June 18, 1852, ch. 74, § 1, 1852 Ind. Rev. Stat. 375, 375; Act of Feb. 5, 1851, ch. 72, § 1, 1850–51 Iowa Acts 172, 172.

221. See, e.g., Ill. Const. of 1848, art. XIV ("The general assembly shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of color from immigrating to and settling in this State; and to effectually prevent the owners of slaves from bringing them into this State, for the purpose of setting them free."); Ind. Const. of 1851, art. XIII, § 1 ("No negro or mulatto shall come into, or settle in, the State, after the adoption of this Constitution."); Or. Const. of 1857, art. I, § 36 ("No free negro or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside or be within this State . . . and the Legislative Assembly shall provide by penal laws for the removal by public officers of all such negroes and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ or harbor them.").

Immigration lawyers will have noticed that the Oregon constitution expressly required employer sanctions. Indiana went further and wrote the employer sanctions right into the constitution. See Ind. Const. of 1851, art. XIII, § 2 ([A]ny person who shall employ such negro or mulatto, or otherwise encourage him to remain in the State, shall be fined in any sum not less than ten dollars, nor more than five hundred dollars.").

222. See Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 88 n.62, 154 (1981); Litwack, supra note 216, at 71–73; see also Finkelman, supra, at 95 n.88 (citing cases); Finkelman, supra note 216, at 436–43 (on rarity of enforcement).

223. See Nelson v. People, 33 Ill. 390 (1864). The defendant in that case had probably been a slave, but the statute and most of the court's reasoning seem to apply equally to slave and free.

224. See, e.g., Berlin, supra note 216, at 88–89; Fields, supra note 216, at 39; Eugene D. Genovese, Roll, Jordon, Roll: The World the Slaves Made 411–12 (1974).

225. See, e.g., Berlin, supra note 216, at 95; Franklin, supra note 216, at 73.

226. See, e.g., Berlin, supra note 216, at 35–36, 114–15.

Southern legislation became even more hostile.[227] True, public opinion was divided throughout the antebellum period, and many whites recognized the important economic and social roles that free blacks played.[228] But even where this recognition suspended the enforcement of restrictive laws, their threat remained.[229]

Slave state legislation usually barred the entry of free blacks who were not already residents of the state.[230] Penalties were often imposed on persons bringing in free blacks.[231] Over time, some states extended these prohibitions to their own free black residents who sought to return after traveling outside the state, either to a disapproved location or to any destination at all.[232] Slave states often required that emancipated slaves leave the state forever, on pain of reenslavement.[233] Shortly before the Civil War, several slave states

---

227. See, e.g., id. at 364–70; Finkelman, supra note 222, at 234–35; Genovese, supra note 224, at 399.

228. See, e.g., Berlin, supra note 216, at 377–78; Fields, supra note 216, at 82–84; Franklin, supra note 216, at 140–41.

229. See, e.g., Berlin, supra note 216, at 331–36; Franklin, supra note 216, at 58.

230. See, e.g., Ala. Code pt. 1, tit. 13, ch. 4, art. 2, §§ 1033, 1034 (1852); Act of Jan. 20, 1843, § 2, 1843 Ark. Acts 61, 61; Act of Jan. 28, 1811, ch. 146, § 1, 1811 Del. Laws 400, 400; Act of Dec. 19, 1818, No. 512, § 3, 1818 Ga. Acts 126, 127; Act of Mar. 16, 1830, § 3, 1830 La. Acts 90, 91; Act of Jan. 3, 1807, ch. 56, § 1, 1806–07 Md. Laws; Miss. Code ch. 37, art. 2, § 80 (1848) (enacted June 18, 1822); Act of Feb. 12, 1827, ch. 21, 1826–27 N.C. Acts 13; Act of Dec. 20, 1820, § 2, 1820 S.C. Acts & Resolutions 22, 22; Act of Dec. 12, 1793, ch. 23, § 1, 1793 Va. Acts 28, 28; Berlin, supra note 216, at 92; Franklin, supra note 216, at 41–48; see also Ky. Const. of 1850, art. X, § 2 ("The general assembly shall pass laws providing that any free negro or mulatto hereafter immigrating to, and any slave hereafter emancipated in, and refusing to leave this State, or having left, shall return and settle within this State [sic], shall be deemed guilty of felony, and punished by confinement in the penitentiary thereof."); infra text accompanying notes 242–245 (discussing Missouri constitution).

231. See, e.g., Miss. Code ch. 37, art. 17, § 4 (1848); N.C. Act of Feb. 12, 1827, ch. 21, § 4; S.C. Act of Dec. 20, 1820, § 3; Va. Act of Dec. 12, 1793, ch. 164, § 2. The North Carolina and Virginia statutes cited here made exceptions for free black crew members who departed with their vessels and free blacks who were servants of travelers passing through the state.

232. See, e.g., Del. Act of Jan. 28, 1811, ch. 146, § 4 (traveling outside state for six months); Act of Dec. 26, 1835, § 3, 1835 Ga. Acts 265, 266 (unless traveling to "an adjoining State"); La. Act of Mar. 16, 1830, § 7 (traveling outside United States); Act of 1830–31, ch. 14, 1830–31 N.C. Acts 16 (traveling outside state for 90 days); Act of Dec. 21, 1822, ch. 3, § 1, 1822–23 S.C. Acts & Resolutions 12, 12 (leaving state for any length of time); Va. Code tit. 30, ch. 107, § 29 (1860) (leaving state for education, or traveling to free state for any reason); see also Act of Mar. 14, 1832, ch. 323, § 2, 1831–32 Md. Laws (traveling outside state for 30 days without first filing statement of intent to return; exception if visiting Liberia). Free black residents employed in certain occupations requiring travel were exempt from most of these prohibitions.

233. See, e.g., Ky. Const. of 1850, art. X, § 2 (quoted supra note 230); Va. Const. of 1850, art. IV, § 19 ("Slaves hereafter emancipated shall forfeit their freedom by remaining in the commonwealth more than twelve months after they become actually free, and shall be reduced to slavery under such regulation as may be prescribed by law."); Ala. Code pt. 2, tit. 5, ch. 4, § 2047 (1852); Act of Mar. 12, 1832, ch. 281, § 3, 1831–32 Md. Laws; N.C. Rev. Code ch. 107, § 50 (1855); Va. Act of Mar. 2, 1819, ch.

considered forcing their free black populations to choose between enslavement and expulsion,[234] and Arkansas actually passed such legislation.[235]

To the extent that these laws were directed at immigration from abroad, they had some congressional support. Several of the state prohibitions on the entry of free blacks had been enacted in the wake of the successful slave revolt in Saint Domingue, which ultimately produced the nation of Haiti.[236] These states did not welcome French slaveowners bringing with them slaves who might have been infected with the dangerous idea of a universal right to liberty, or free people of color fleeing the factional violence in Saint Domingue. Nor did they welcome free blacks expelled from other French colonies that feared a replication of the revolt.[237] In 1803, the Southern states succeeded in obtaining the enactment of a federal statute prohibiting the importation of foreign blacks into states whose laws forbade their entry.[238] Thus, as in the case of quarantine, the states secured federal coopera-

---

111, § 61; cf. La. Rev. Stat., Black Code §§ 78, 79 (1856) (jury to decide whether emancipated slave will be permitted to remain in state); Genovese, supra note 224, at 399.

234. See Berlin, supra note 216, at 370–80; Fields, supra note 216, at 80–82; Franklin, supra note 216, at 211–16; see also Va. Const. of 1850, art. IV, § 20 ("The general assembly . . . may pass laws for the relief of the commonwealth from the free negro population, by removal or otherwise."); Genovese, supra note 224, at 399.

235. See Act of Feb. 12, 1859, No. 151, 1858–59 Ark. Acts 175; Berlin, supra note 216, at 372–74, 380. The effective date of the legislation was ultimately postponed, but by then nearly all the free blacks had left the state. See id.

236. See, e.g., Act of Dec. 19, 1793, 1793 Ga. Acts 24 (forbidding importation of slaves from West Indies, and requiring free blacks entering state to give security for good behavior); Act of 1795, ch. 16, § 1, 1795 N.C. Acts 79, 79 (emigrants from West Indies forbidden to bring slaves or persons of color over age of fifteen); Act of Dec. 20, 1794 1794 S.C. Acts & Resolutions 34 (barring entry of slaves or free blacks from outside U.S.); Act of Dec. 17, 1803, § 2, 1803 S.C. Acts & Resolutions 48, 49 (barring entry of slaves or free blacks from West Indies, or South America, or who have ever been resident in French West Indies); see also Berlin, supra note 216, at 35–36.

237. The arrival of free blacks expelled from Guadeloupe provided the immediate impetus for the 1803 federal statute. See Petition to Prevent the Importation of Certain Persons Whose Admission is Prohibited by Certain Laws of the State Governments (1803), reprinted in 1 The New American State Papers: Labor and Slavery 27 (1973); W.E.B. Du Bois, The Suppression of the African Slave-Trade 84–85 (Schocken Books 1969) (1896).

238. See Act of Feb. 28, 1803, ch. 10, 2 Stat. 205. The prohibition applied to importing or bringing in "any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman, of the United States, or seamen, natives of countries beyond the Cape of Good Hope . . . provided always, that nothing contained in this act shall be construed to prohibit the admission of Indians." The exception for natives, citizens, and registered seamen of the United States was evidently added to accommodate the Northern view, expressed in the debates, that free African-Americans had rights of interstate travel. See 12 Annals of Cong. 467–68 (1803) (remarks of Rep. Bacon). The statute also had the effect of making it a federal crime to import slaves into states where such importation was prohibited; the latter qualification was necessary because Congress lacked the power to outlaw importation until 1808.

tion in the enforcement of their immigration laws. John C. Calhoun later invoked this "precedent" as recognizing

> the very important right, that the States have the authority to exclude the introduction of such persons as may be dangerous to their institutions—a principle of great extent and importance, and applicable to other States as well as slaveholding, and to other persons as well as blacks, and which may hereafter occupy a prominent place in the history of our legislation.[239]

Laws prohibiting the free black citizens of one state to enter another state arguably raised serious questions under the Privileges and Immunities Clause of the federal constitution.[240] On the other hand, nineteenth-century courts did not recognize an unqualified right of interstate travel for all categories of citizens.[241] The exclusion of free blacks excited national controversy when Missouri attempted to enter the Union under a constitution that expressly required it.[242] An obfuscating compromise was reached under which Missouri agreed not to apply this provision inconsistently with the Privileges and Immunities Clause;[243] but even if strictly observed,[244] this concession would have

---

239. John C. Calhoun, Speech in Reply to Criticisms of the Bill to Prohibit the Circulation of Incendiary Publications Through the Mail (Apr. 12, 1836), *in* 13 The Papers of John C. Calhoun 147, 156 (Clyde N. Wilson ed., 1980) (arguing that Congress should also prohibit the mailing of abolitionist literature into the Southern states).

240. U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). For examples of cases discussing these questions see, e.g., Scott v. Sandford, 60 U.S. (19 How.) 393, 425 (1857) (if a free black were a citizen, then "the State officers and tribunals would be compelled . . . to receive him . . . and allow him to enjoy all the rights and privileges of citizenship"); Smith v. Moody, 26 Ind. 299 (1866) (recognition of blacks as U.S. citizens invalidates state bar on entry).

241. See supra text accompanying notes 69–72. But see Lemmon v. People, 20 N.Y. 562, 611 (1860) (Denio, J.) (dictum) ("[I]t does not seem to me clear that one who is truly a citizen of another State can be thus excluded, though he may be a pauper or a criminal, unless he be a fugitive from justice. The fourth article of confederation contained an exception to the provision for a common citizenship, excluding from its benefits paupers and vagabonds as well as fugitives from justice; but this exception was omitted in the corresponding provision of the Constitution.").

242. See Mo. Const. of 1820, art. III, § 26 (making it duty of legislature "[t]o prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever"). The issue had previously arisen in connection with the federal act of 1803, see supra note 238.

243. See J. Res. of Mar. 2, 1821, 3 Stat. 645 ("that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the constitution of the United States"); Litwack, supra note 216, at 34–39.

244. A defense based on this compromise was successfully raised in the case of Andrew Hatfield, who was born in Pennsylvania and later moved to St. Louis, and was prosecuted there for residing without a license. See the brief summary under the title *Free Negroes in Missouri*, 3 Western L.J. 477, 478 (1846). But a year later Missouri enacted a new statute expressing an absolute bar on the entry of free blacks, in the language of

left considerable scope for application, given that most Southern states did not regard their own free black residents as citizens.[245] Moreover, it was widely argued that free blacks were not "citizens" of the free states in the constitutional sense, a position ultimately adopted by the majority in the *Dred Scott* decision.[246]

Slave states also subjected their free black residents to more stringent regulations and criminal laws than whites.[247] In most states, free blacks were required to register to demonstrate their free status and entitlement to reside, and were subject to frequent demands to produce proof of their registered status.[248] Free blacks could be banished from the state or from the country for certain offenses, in addition to or instead of the punishment meted out to whites.[249] For a brief period, Virginia combined enslavement and banishment as punishment, by providing for free blacks to be sold into slavery and transported beyond the borders of the United States,[250] although I am not sure how this

---

its 1820 constitution. See Act of Feb. 16, 1847, § 4, 1847 Mo. Laws 103, 104; Litwack, supra note 216, at 38.

245. See, e.g., Cooper v. Mayor of Savannah, 4 Ga. 68 (1848); State v. Newsom, 27 N.C. (5 Ired.) 250 (1844); State v. Claiborne, 19 Tenn. (Meigs) 331 (1838). But see State v. Manuel, 20 N.C. (4 Dev. & Bat.) 122 (1838).

246. See Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 68–73 (1978). Pendleton v. State, 6 Ark. 509 (1846), and State v. Claiborne, 19 Tenn. (Meigs) 331 (1839), both reached this conclusion in the course of upholding state prohibitions on the entry of free blacks.

247. I discuss here only some aspects of this regulation that bear a particular relation to immigration regulation; I do not purport to be sketching a full picture of the subordinated position of free blacks, or even to list the restrictions that would seem most significant to a general reader.

248. See, e.g., Ark. Act of Jan. 20, 1843, § 3; Act of Dec. 19, 1818, § 5, 1818 Ga. Acts 811, 813; Miss. Code ch. 37, art. 2, § 81 (1848); Va. Act of Mar. 2, 1819, ch. 111, §§ 67–77; Berlin, supra note 216, at 93–94, 327–32.

249. See, e.g., Ala. Code pt. 1, tit. 13, ch. 4, art. 2, § 1040 (1852) (free persons of color imprisoned in penitentiary must leave state after discharge unless pardoned); La. Act of Mar. 16, 1830, § 9 (if convicted of writing or speaking against slavery or racial hierarchy, whites to be fined and imprisoned up to three years, while free persons of color to be fined and imprisoned at hard labor for up to five years and then banished from state for life); Act of Mar. 14, 1832, ch. 323, § 12, 1831–32 Md. Laws (free blacks may be banished to foreign country for noncapital offenses, at discretion of court); Md. Code art. 30, § 199 (1860) (any free negro confined in penitentiary shall be banished from state after pardon or expiration of term); S.C. Act of Dec. 20, 1820, § 6 (if convicted of circulating antislavery writings, whites to be fined and imprisoned one year, while free persons of color to be fined for first offense, and on second offense to be whipped and banished from state on pain of death).

250. See Act of Feb. 21, 1823, ch. 32, 1823 Va. Acts 35 (imposing sale and transportation abroad as punishment for any free black or mulatto convicted of an offense previously punishable by two or more years in prison); Act of Feb. 18, 1825, ch. 45, 1824-25, Va. Acts 37 (same punishment for free black convicted of grand larceny). The Virginia provisions were repealed in 1828, see Act of Feb. 12, 1828, ch. 37, 1828 Va. Acts 29; Berlin, supra note 216, at 183. In the meantime enslavement and transportation abroad as punishment for larceny had been upheld against constitutional

practice could have been legally reconciled with the federal prohibition on the export of slaves.[251]

Since all of this legislation was intimately tied to the racial character of American slavery, the reader may be tempted to dismiss it as part of an obsolete law of bondage rather than view it as significantly related to immigration law. But the parallels between this legislation and late nineteenth-century immigration law are striking. The first major immigration policy added by the federal government was exclusion of Chinese laborers; this category, too, was racially defined.[252] The federal legislation was preceded by a series of state legislative efforts on the West Coast to restrict and exclude the Chinese.[253] These efforts began in the 1850s, and the local anti-Chinese policy was often explicitly linked with contemporaneous anti-black policies.[254] The movement against the Chinese was partly a campaign for a white racial identity for the United States and partly a struggle between differing regimes of labor. The expressions of fear that free American labor could not compete with "coolie" labor mirrored the traditional argument of the Free Soilers that coexistence with slavery—and sometimes even with free blacks—would degrade free white labor.[255] In later years, the federal

---

challenge by the Virginia Supreme Court. See Aldridge v. Commonwealth, 4 Va. 447, 449–50 (1824) (ban on cruel and unusual punishment does not apply to free person of color); see also A. Leon Higginbotham, Jr. & Anne F. Jacobs, The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia, 70 N.C. L. Rev. 969, 1023–24 (1992).

States more frequently used sale and transportation abroad as a punishment for people who were already slaves. See, e.g., Act of Jan. 6, 1810, ch. 138, § 9, 1809–10 Md. Laws; N.C. Rev. Code ch. 107, § 39 (1855); Act of Jan. 15, 1801, ch. 43, 1800–01 Va. Acts 24; Va. Code tit. 54, ch. 200, § 7 (1860); Philip J. Schwarz, The Transportation of Slaves from Virginia, 1801–1865, 7 Slavery and Abolition 215 (1986).

251. See Act of Mar. 22, 1794, ch. 11, § 1, 1 Stat. 347, 347.

252. The first Chinese exclusion act, Act of May 6, 1882, ch. 126, 22 Stat. 58, did not define "Chinese," and after the lower courts divided over whether it applied only to subjects of the Empire of China, compare United States v. Douglas, 17 F. 634, 638 (C.C.D. Mass. 1883) (Empire only) with In re Ah Lung, 18 F. 28, 32 (C.C.D. Cal. 1883) (Field, J.) (entire race), Congress was careful to specify its broad scope. See Act of July 5, 1884, ch. 220, § 15, 23 Stat. 115, 118 ("all subjects of China and Chinese, whether subjects of China or any other foreign power"); Act of Sept. 13, 1888, ch. 1015, § 3, 25 Stat. 476 ("all persons of the Chinese race").

253. See, e.g., Roger Daniels, Asian America: Chinese and Japanese in the United States Since 1850, at 33–37 (1988); Charles J. McClain, Jr., The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870, 72 Cal. L. Rev. 529, 535–45 (1984).

254. See Alexander Saxton, The Indispensable Enemy: Labor and the Anti-Chinese Movement in California 19–20 (1971); Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 100–03 (1990).

255. See Elmer C. Sandmeyer, The Anti-Chinese Movement in California 25–31 (1991 ed.); Saxton, supra note 254, at 33–37, 259–61; Takaki, supra note 254, at 101; cf. Eric Foner, Free Soil, Free Labor, Free Men 60–63, 266–67 (1970) (on arguments against slaves and free blacks); Litwack, supra note 216, at 158–161 (on arguments against free blacks).

immigration laws also adopted some of the techniques by which the mobility of free blacks had been restricted: first a prohibition on new immigration, then a bar to the return of lawful residents who traveled abroad, and lastly a requirement that those already resident register and present proof of their legal presence, with expulsion of persons not registered.[256]

2. *The Seamen's Acts*. — Later themes of immigration law emerge clearly in another category of legislation against free blacks that requires fuller discussion: the regulation of free black seamen arriving in Southern ports. This legislation sparked a constitutional dispute that was carefully smothered, and produced a major diplomatic embarrassment for the United States in the antebellum era. This is a story that has been told often,[257] but one that immigration lawyers need to hear.

Among the first wave of Southern laws against the entry of free blacks, some contained express provisos to accommodate vessels whose crews included black sailors, so long as the sailors were to depart with their ships.[258] But Southern fears of insurrection intensified after the Missouri Compromise debate polarized national opinion on slavery, and particularly after the discovery of the Denmark Vesey conspiracy in 1822 in Charleston.[259] South Carolina was no longer willing to permit black sailors to wander at liberty even temporarily and enacted a re-

256. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (first exclusion act); Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (forbidding return); Act of May 5, 1892, ch. 60, 27 Stat. 25 (registration and arrest and removal of unregistered); cf. Ark. Act of Jan. 20, 1843, §§ 6–8 (unregistered free blacks subject to fine and servitude to work off fine, repeatedly, until they depart state); Act of Dec. 26, 1835, § 2, 1835 Ga. Acts 265, 266 (same). Understandably, the federal immigration laws did not adopt the alternative Southern technique of selling unregistered persons into slavery. Not until 1986 did the federal government adopt the Midwestern technique of making the official certificate of lawful residence a key to sanctions against persons employing undocumented immigrants. Compare 8 U.S.C. § 1324a (1991) (rendering employment of unauthorized aliens unlawful and requiring employer to examine documentation of employment authorization) with Act of Jan. 17, 1829, § 1, 1829 Ill. Rev. Code 109, 109–10 (imposing fines for hiring black who does not have certificate of compliance with procedure for gaining residence); Act of June 18, 1852, ch. 74, §§ 5, 7, 1852 Ind. Laws 375, 375–76 (certificate of registration conclusive evidence in prosecutions against employers, unless notice to employer of fraud shown).

257. See, e.g., Fehrenbacher, supra note 246, at 69–71; William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836, at 109–17 (1968); Donald G. Morgan, Justice William Johnson: The First Dissenter 192–206 (1954); Swisher, supra note 215, at 378–82; William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760–1848, at 132–40 (1977). Most accounts draw on a pair of articles, Philip M. Hamer, Great Britain, the United States, and the Negro Seamen Acts, 1822–1848, 1 J. S. Hist. 3 (1935) [hereinafter Hamer I], and Philip M. Hamer, British Consuls and the Negro Seamen Acts, 1850–1860, 1 J. S. Hist. 138 (1935) [hereinafter Hamer II].

258. See, e.g., Act of Dec. 20, 1800, § 11, 1800 S.C. Acts & Resolutions 31, 35; Act of Dec. 12, 1793, ch. 24, 1793 Va. Acts 28.

259. See, e.g., Freehling, supra note 257, at 53–61. Vesey was a carpenter in Charleston who had bought himself out of slavery, and who preached freedom and

quirement that any black seamen arriving on a vessel be held in jail at its master's expense until the vessel left.[260] Several other states followed South Carolina's lead, or adopted "quarantine" regulations requiring black crew members to remain on the ship and forbidding local blacks to communicate with them.[261]

Enforcement of such laws was calculated to infuriate both Northern states and foreign nations whose ships included black crew members. Several incidents arose in South Carolina in 1823. In one, the captain of an American ship unsuccessfully sought relief from the state courts, while in another, a British captain complained to his government, which in turn protested to Secretary of State John Quincy Adams.[262] Adams's intervention with South Carolina leaders seems to have produced a lull in enforcement, but a vigilante association in Charleston exerted contrary pressure.[263]

The conflict revived with the imprisonment of Henry Elkison, a Jamaican sailor on a British ship, pending his ship's departure from Charleston harbor. The case was brought before Justice William Johnson on circuit;[264] the British consul in Charleston participated in the litigation on Elkison's behalf, and the vigilante association conducted the defense.[265] Johnson held that the statute infringed the exclusive federal power over foreign commerce and also the treaty of commerce and navigation between the United States and Britain.[266] He rejected the state's claim of "necessity," which had been formulated with a vehemence that foreshadowed the Nullification crisis.[267] Nonetheless, Johnson concluded that he lacked jurisdiction to issue a writ to

---

equality. He allegedly planned an insurrection of slaves, slaughter of masters, and escape to Haiti, but the plot was discovered and repressed with numerous executions.

260. See Act of Dec. 21, 1822, ch. 3, § 3, 1822–23 S.C. Acts & Resolutions 12, 12. In its original form, the statute provided that the seaman would be sold as a slave if the master failed to pay or left without him. See id. This sanction was replaced a year later, see Act of Dec. 20, 1823, ch. 20, §§ 3, 12, 1823–24 S.C. Acts & Resolutions 60, 63. The amendment also exempted crewmembers of U.S. and foreign naval vessels, so long as they did not come ashore after being warned to remain on board. See id. § 8.

261. See, e.g., Act of Jan. 9, 1841, ch. 15, §§ 21–24, 1840–41 Ala. Acts 19 (black crew members to be confined in jail at vessel's expense until departure); Act of Dec. 26, 1826, § 5, 1826 Ga. Acts 161, 162 (imposing curfew on black sailors and requiring vessels to post bond for compliance); Act of Dec. 22, 1829, 1829 Ga. Laws 168 (subjecting vessels with black crewmembers or passengers to "quarantine"); La. Act of Mar. 16, 1842, No. 123, § 1 (black crew members to be confined in jail at vessel's expense until departure); see also Act of Jan. 4, 1831, ch. 30, § 1, 1830–31 N.C. Acts. 29 (subjecting vessels with black crew members or passengers to "quarantine"), repealed by Act of Jan. 14, 1832, ch. 19, 1831–32 N.C. Acts 14–15.

262. See Hamer I, supra note 257, at 4.

263. See Freehling, supra note 257, at 113; Hamer I, supra note 257, at 4–5.

264. See Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366).

265. See id. at 493–94; Hamer I, supra note 257, at 5.

266. See 8 F. Cas. at 495.

267. See id. at 494 ("[T]hey have both strenuously contended, that ex necessitate it was a power which the state must and would exercise, and, indeed, Mr. Holmes

the sheriff for Elkison's release.[268] The opinion was violently denounced in South Carolina, and neither Johnson nor the federal government was able to prevent enforcement of the statute; in the meantime, Elkison apparently was released to depart with his ship.[269] Johnson continued the controversy by responding to his critics in both signed and pseudonymous essays.[270] This dispute formed an essential part of the background of *Gibbons v. Ogden*,[271] in which the Supreme Court first expounded the exclusivity and supremacy of congressional power over navigation as a form of interstate commerce.

The *Elkison* case was only the first of the confrontations between Britain and the Southern states over the issue of black seamen.[272] Adams sought to calm the British by assuring them that he would try to prevent enforcement of the statute, but that in a federal system[273] he would need time to persuade South Carolina officials. South Carolina, however, definitively rebuffed him.[274] Incidents continued in that and other states, and so, intermittently, did British protests.[275] The treaty issue was particularly difficult because of an ambiguous clause in the applicable treaty making liberty of commerce reciprocal, "subject always to the laws and statutes of the two countries, respectively."[276]

---

concluded his argument with the declaration, that, if a dissolution of the Union must be the alternative, he was ready to meet it."). See Freehling, supra note 257, at 113–16.

268. See 8 F. Cas. at 497–98. Johnson held that the writ de homine replegiando would not lie against the sheriff, but noted that it would lie against a private purchaser if the state really attempted to enslave and sell Elkison, as the South Carolina statute permitted. See supra note 260. Federal habeas corpus jurisdiction had not yet been extended to persons held in state custody.

269. See Hamer I, supra note 257, at 7–9.

270. See Morgan, supra note 257, at 196–202.

271. 22 U.S. (9 Wheat.) 1 (1824); see also id. at 230–31 (Johnson, J., concurring); Wiecek, supra note 257, at 134–36. Felix Frankfurter characteristically glossed over Elkison's case in his The Commerce Clause Under Marshall, Taney and Waite 13 & n.8 (1937), which whitewashed Taney and obscured the connection between slavery and the commerce cases.

272. Hamer also notes later protests from France. See Hamer II, supra note 257, at 144 n.20.

273. See Hamer I, supra note 257, at 8–10. He also secured an opinion from the Attorney General, agreeing with Johnson that the statute was invalid. See 1 Op. Att'y Gen. 659 (1824) (Wirt).

274. See Hamer I, supra note 257, at 10–12; Wiecek, supra note 257, at 136–38.

275. See Hamer I, supra note 257, at 12–21, 24–28.

276. Convention of Commerce and Navigation, July 3, 1815, U.S.-U.K., art. I:

> There shall be between the territories of the United States of America, and all the territories of His Brittanick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security

The U.S. diplomatic stance changed after Andrew Jackson's Attorney General took a more expansive view of states' rights, and affirmed the states' authority to enact such laws;[277] he also relied in part on the 1803 federal statute forbidding the bringing in of foreign blacks excluded by state laws.[278] The Northern states also continued to protest, but Congress would not act.[279] In 1844, Massachusetts sent agents to South Carolina and Louisiana to institute judicial proceedings to test the constitutionality of the laws, but they were forced to flee under threat of mob violence.[280] Later in that decade, Secretary of State Buchanan instructed the U.S. consul in Jamaica to cooperate in securing compliance with these state laws,[281] and he informed the British that, if they insisted that enforcement of the state laws violated the commercial treaty between the two nations, it would become necessary to abrogate the treaty.[282]

Ultimately the British learned to bypass Washington and to undertake diplomacy directly with the Southern states.[283] The consuls achieved some success in Louisiana and Georgia,[284] but reawakened

---

for their commerce, but subject always to the laws and statutes of the two countries, respectively.

Hamer reports that the British themselves were uncertain that this treatment of British sailors violated the treaty, given that black sailors from Northern states were treated no better. See Hamer I, supra note 257, at 13–14.

277. See 2 Op. Att'y Gen. 426 (1831) (Berrien); Hamer I, supra note 257, at 14–15. Berrien's successor as Attorney General, Roger Taney, also drafted an opinion, which ultimately was not published, upholding the legislation; historians have noted how this draft prefigured Taney's arguments in the Dred Scott case two decades later. See Fehrenbacher, supra note 246, at 70; Wiecek, supra note 257, at 139.

278. See 2 Op. Att'y Gen. at 441–42. Chief Justice Marshall, in contrast, had construed this statute on circuit as not applying at all to foreign crew members who would be leaving with the vessel, on the somewhat ingenious ground that they brought the vessel in rather than vice versa. See Wilson v. United States, 30 F. Cas. 239, 244–45 (C.C.D. Va. 1820) (No. 17,846). For Marshall's oft-quoted comparison of the *Wilson* and *Elkison* cases, see infra text accompanying note 370.

279. See, e.g., Free Colored Seamen—Majority and Minority Reports, H.R. Rep. No. 80, 27th Cong., 3d Sess. (1843) (including attack on and defense of laws); Hamer I, supra note 257, at 22; Wiecek, supra note 257, at 139–40.

280. See Hamer I, supra note 257, at 22–23; Wiecek, supra note 257, at 140. That same year, a federal judge in Massachusetts declared Louisiana's statute unconstitutional on commerce clause grounds, while deciding a dispute over the wages due a black sailor who had been imprisoned under it. See The Cynosure, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3,529).

281. See Hamer I, supra note 257, at 26 n.94.

282. See id. at 25–27.

283. See Hamer II, supra note 257 (passim). When the news spread that the British were in direct diplomatic contact with South Carolina officials, this contact was criticized in other states as bolstering that state's secessionist notions of sovereignty. See id. at 140–52.

284. See Hamer II, supra note 257, at 142–43; Act of Feb. 7, 1854, no. 94, 1853–54 Ga. Acts 106 (permitting black sailors to land subject to permission of local authorities); Act of Mar. 18, 1852, No. 279, §§ 1, 2, 1852 La. Acts 193, 193 (permitting black sailors to remain on vessel if bond given for their removal, and to land where

controversy in South Carolina, which was always quick to resent outside interference.[285] The consul in Charleston was replaced in 1853, and finally in 1856 his successor gained the concession of an amendment permitting black sailors to remain on their ships, so long as bond was posted that they would not come ashore.[286]

The controversy concerning the exclusion of free black sailors is particularly important as an instance in which state immigration law created a persistent diplomatic embarrassment for the United States that the federal government proved powerless to solve. In the West, a similar embarrassment was threatened when California attempted to exclude Chinese immigrants. Indeed, since the anti-Chinese movement stigmatized the entire population of a single foreign power, it created greater potential conflict with China than the seamen's laws did with England or France. (During the era of the seamen's laws, the United States was less concerned about its image in Africa, and refused diplomatic recognition to Haiti.) As the anti-Chinese movement escalated, however, the balance of power between the states and the Union was shifting. Open efforts to prevent Chinese immigration were precluded by the most-favored-nation clause of the 1868 Burlingame Treaty,[287] and reinforced by an express provision of the 1870 Civil Rights Act.[288] The Supreme Court showed itself both motivated and able to intervene against more covert exclusion efforts.[289] The end re-

---

necessary for their duties, subject to permission of local authorities). Louisiana backslid in 1859, necessitating further intervention. See Act of Mar. 15, 1859, No. 87, § 1, 1859 La. Acts 70; Hamer II, supra note 257, at 167–68.

285. See Hamer II, supra note 257, at 146–66; see also Roberts v. Yates, 20 F. Cas. 937 (C.C.D.S.C. 1853) (No. 11,919) (upholding constitutionality of the statute). The consul had initiated the Roberts litigation, and a state court case as well, on the dubious advice of Secretary of State Daniel Webster that South Carolina might respect a Supreme Court decision invalidating the statute. See Hamer II, supra note 257, at 155–60.

286. See Act of Dec. 20, 1856, No. 4311, 1856 S.C. Reports & Resolutions 573; Hamer II, supra note 257, at 160–66.

287. See Treaty of July 28, 1868, United States-China, art. 6, 16 Stat. 739, 740 ("Chinese subjects visiting or residing in the United States [] shall enjoy the same privileges, immunities and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization . . . upon the subjects of China in the United States.").

288. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 ("No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country . . . ."); see In re Parrott, 1 F. 481 (C.C.D. Cal 1880); In re Ah Fong, 1 F. Cas. 213, 217–18 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice). McClain, supra note 253, at 561–67. Two earlier efforts to keep out the Chinese by discriminatory taxation had been invalidated by the state courts on commerce clause grounds, following the *Passenger Cases*. See Lin Sing v. Washburn, 20 Cal. 534 (1862); People v. Downer, 7 Cal. 170 (1857).

289. See Chy Lung v. Freeman, 92 U.S. 275 (1876).

sult, of course, was part of the post-Civil War transfer of the power to regulate immigration from the states to the federal government.

3. *The Migration of Slaves*. — Conceived broadly as the migration of individuals into a state, immigration encompasses both voluntary and involuntary movement.[290] Regulation of the international and interstate slave trades warrants attention in this context. So does the regulation of fugitive slaves. Examination of the regulatory policies and the reasoning in judicial opinions exhibits continuities between the movement of slaves and the migration of free persons.

One of the United States Constitution's infamous compromises with slavery was the "Migration or Importation" Clause, which barred Congress until 1808 from prohibiting the importation of slaves into any of the original states that were willing to receive them.[291] By the time that period had expired, nearly every state where slavery had not been abolished had enacted its own prohibition against importation of slaves from abroad.[292] Congress quickly acted to add a federal prohibition of the international slave trade but left the interstate trade largely unregulated.[293] In later years, Congress enacted statutes tightening the federal prohibition.[294]

Because Congress was initially legally disabled from regulating importation of slaves from abroad, and was at all times politically disabled from regulating the interstate slave trade,[295] much was left to the states. State regulation of the movement of slaves took a variety of forms. Slave states had acted to prohibit the international slave trade in the period before Congress was empowered to do so, although their commitment to enforcing these laws was weak, and a movement to repeal the prohibition developed as the ideological defense of slavery

---

290. Cf. Daniels, supra note 18, at 54–55 (deploring artificial cleavage between black history and immigration history reinforced by failure to view slave trade as form of migration).

291. See U.S. Const. art. I, § 9, cl. 1 ("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 . . . ."). Article V ruled out amendments of the Constitution that would lift this bar to congressional action.

292. See, e.g., W.E.B. Du Bois, supra note 237, at 71–74. South Carolina, however, first prohibited the trade and then repealed its prohibition. See Act of Dec. 17, 1803, § 1, 1803 S.C. Acts & Resolutions 48, 48–49 (repealing former acts). Even this statute, however, prohibited importation of slaves from the West Indies, since they might spread the spirit of revolt. See id. § 2; see Du Bois, supra, at 72.

293. See Act of Mar. 2, 1807, ch. 22, 2 Stat. 426. See generally Du Bois, supra note 237, at 104–05 (describing debate over the bill in Congress). The statute also imposed some regulation on the interstate coastwise trade, in order to increase the enforceability of the ban on the international trade. See 3 Op. Att'y Gen. 512 (1840).

294. See, e.g., Act of Mar. 3, 1819, ch. 101, 3 Stat. 532; Act of May 15, 1820, ch. 113, §§ 4–5, 3 Stat. 600, 600–01; Act of June 16, 1860, ch. 136, 12 Stat. 40.

295. The constitutionality of federal regulation of interstate trade in slaves was also disputed. See Berns, supra note 18, at 198–99.

hardened.[296] In addition, some slave states sought at various times to exclude the interstate slave trade,[297] or to keep out individual slaves whose characteristics were considered objectionable.[298] Since these states' objection was usually not to slavery per se, these regulations may be considered comparable to traditional immigration laws.

Conversely, some free states had no fundamental objection to the entry of slaves as persons, but rather condemned the institution of slavery; accordingly, they provided that slaves entering the state would be free.[299] When the slaves fled into the state against the will of a slave-owner who then sought their return, the free state's policy could be overridden by the Fugitive Slave Clause of the Constitution and the federal legislation thereunder, although some states struggled to circumvent these limitations.[300]

Legislation in other free states more closely resembled traditional immigration regulation, for these states objected to the entry of blacks, whether slave or free. Illinois, as we have seen, banned all black immigration, and sought to expel fugitive slaves rather than to protect them.[301]

State regulation of the movement of fugitive slaves became entangled with state resistance to enforcement of the fugitive slave laws, and

---

296. See Du Bois, supra note 237, at 71–73, 85–86, 168–83; Fehrenbacher, supra note 246, at 514 & n.1; Ronald T. Takaki, A Pro-Slavery Crusade: The Agitation to Reopen the African Slave Trade (1971).

297. See, e.g., Act of Dec. 31, 1796, ch. 67, 1796 Md. Laws (1840) (generally barring importation of slaves into state, with exceptions); Act of May 13, 1837, 1837 Miss. Laws 343, repealed by Act of Feb. 23, 1846, ch. 63, 1846 Miss. Laws 234 (prohibiting introduction of slaves into state for sale). Mississippi's power to prohibit the sale of slaves into the state was argued and then addressed in obiter dicta in Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841), where six of seven Justices affirmed the state's power to regulate slavery. See id. at 507–08 (opinion of McLean, J.); id. at 508 (opinion of Taney, C.J.); id. at 510 (statement of Story, Thompson, Wayne and McKinley, JJ.).

298. See, e.g., Act of Jan. 31, 1829, No. 24, § 13, 1828–29 La. Acts 38, 48 (barring introduction of slaves who had been accused of conspiracy or insurrection or who had even resided in any county while any conspiracy or insurrection had occurred in that county); Act of Jan. 29, 1817, § 1, 1816–17 La. Acts 44, 44 (punishing introduction of slaves previously convicted of certain crimes or insurrection); Va. Act of Mar. 2, 1819, ch. 111, § 3 (barring introduction of slaves transported from other states for crime).

299. See generally Finkelman, supra note 222 (tracing development of legal doctrine that slaves brought into free states became free). When a slave-owner attempted to settle in a free state while bringing her slaves with her, the state's power to free them was largely uncontroversial, even in the South, at least until the 1850s. Emancipation was more controversial where the slave-owner was only temporarily visiting the state, or merely in transit through the state. See id. at 181–85; Fehrenbacher, supra note 246, at 54–56.

300. See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462; Fugitive Slave Act of 1793, ch. 51, 1 Stat. 302; see also Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 159–91 (1975); Fehrenbacher, supra note 246, at 40–47, 177; Wiecek, supra note 257, at 155–59, 196–98, 286–87. See generally Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780–1861 (1974).

301. See Act of Feb. 12, 1853, 1853 Ill. Laws 57.

produced some Supreme Court discussion of state power over migration. In *Prigg v. Pennsylvania*,[302] Joseph Story vainly attempted to remove that controversy from the plane of state politics by ascribing to the federal government an exclusive authority to return fugitive slaves to out-of-state claimants. At the same time, however, Story distinguished the state's power when acting for its own benefit "to arrest and restrain runaway slaves, and remove them from [its] borders, and otherwise to secure [itself] against their depredations and evil example."[303] This dictum became holding in *Moore v. Illinois*,[304] where the Court affirmed a state criminal conviction for secreting a runaway slave, on the grounds that the state could rightfully prevent the immigration of persons "unacceptable" to it. Robert Grier observed:

> In the exercise of this power, which has been denominated the police power, a State has a right to make it a penal offence to introduce paupers, criminals, or fugitive slaves, within their borders, and punish those who thwart this policy by harboring, concealing, or secreting such persons. Some of the States, coterminous with those who tolerate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals.[305]

This passage illustrates well the antebellum habit of subsuming control over the movement of blacks, slave or free, within the state's general power of control over the movement of persons.[306]

E. *Ideological Restriction and Alien Registration*

Although this Article does not claim comprehensive coverage,

---

302. 41 U.S. (16 Pet.) 539 (1842). In this much-studied case, the Supreme Court overturned a slavecatcher's conviction under Pennsylvania law for removing an alleged fugitive slave from the state despite a state magistrate's refusal to issue a certificate of removal. Story's interpretation of the Fugitive Slave Clause of the Constitution as imposing a duty of affirmative implementation exclusively on the federal government formed part of his explanation why the states could not impose procedural constraints on the master's right of recapture. See id. at 615–16.

303. Id. at 625.

304. 55 U.S. (14 How.) 13 (1853) (Grier, J.).

305. Id. at 18.

306. See also Passenger Cases, 48 U.S. (7 How.) 283, 426–29 (1849) (opinion of Wayne, J.) (asserting states' right to exclude paupers, vagabonds, fugitives from justice, and free blacks); id. at 457 (opinion of Grier, J.) (asserting states' right to exclude lunatics, idiots, criminals, paupers, and free blacks); id. at 473–74 (Taney, C.J., dissenting) (asserting that states' rights to exclude paupers and free blacks derive from power to decide who should reside among its citizens); id. at 550 (Woodbury, J., dissenting) (asserting that states' power to exclude slaves, free blacks, convicts, and paupers all bear same relation to commerce power); State v. Claiborne, 19 Tenn. (Meigs) 331, 341 (1838) ("If this law applied to Englishmen or Frenchmen it would be constitutional, were it not for treaties and naturalization laws; for surely every free State has a right to prevent foreigners going to it . . . .").

some notice should be given to two further immigration policies that the federal government adopted for a short period of time: ideological restriction and alien registration. As even immigration lawyers vaguely remember, the federal government briefly entered the alien regulation business in 1798. The package of legislation known to history as the Alien and Sedition Acts included three statutes directed specifically at aliens: the Naturalization Act of 1798,[307] the Alien Enemies Act,[308] and the Alien (or Alien Friends) Act.[309]

The Alien Act contained the notorious provision that gave the President unfettered discretion to arrest and deport any alien he regarded as dangerous.[310] This act targeted aliens with radical (i.e., pro-French) ideas and was vehemently condemned along with the Sedition Act in the Virginia and Kentucky Resolutions and allied Jeffersonian literature.[311] The condemnation rested both on individual rights grounds and on federalism grounds—the opponents maintained that Congress had been delegated no power to control the admission of aliens.[312] Through these Resolutions and Madison's celebrated Report on the Virginia Resolutions, later incorporated in Elliot's Debates, this argument passed into the states' rights literature.[313] The Alien Enemies Act, in contrast, applied only in time of war, and could be viewed as an exercise of the war power. Madison conceded its validity,[314] and it remains on the books.[315]

The Alien Act was not the only instance of ideological restriction in the new nation. The revolutionary period had witnessed ideological restriction at the state level in the form of prohibitions of the return of loyalists, and Virginia adopted a state precursor of the Alien Act in 1792.[316] Thereafter, ideological restriction expressed itself in the Southern efforts to "quarantine" free blacks and to exclude slaves who

---

307. Act of June 18, 1798, ch. 54, 1 Stat. 566.

308. Act of July 6, 1798, ch. 66, 1 Stat. 577.

309. Act of June 25, 1798, ch. 58, 1 Stat. 570. The Sedition Act, ch. 74, 1 Stat. 596, was a criminal statute equally regulating the speech of citizens and aliens, and not a regulation of migration.

310. See Alien Act § 1.

311. See Gerald L. Neuman, Whose Constitution?, 100 Yale L.J. 909, 927–38 (1991).

312. See id. The Kentucky Resolutions also invoked the Migration or Importation Clause, which withheld power from Congress until 1808 to interfere with a state's willing reception of persons.

313. See 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 546, 554–59 (Philadelphia, J.B. Lippincott & Co. 2d ed. 1836) [hereinafter 4 Elliot's Debates]; Neuman, supra note 311, at 928–29.

314. See 4 Elliot's Debates, supra note 313, at 554.

315. See 50 U.S.C. §§ 21–24 (1988). For a modern example of its enforcement, see Ludecke v. Watkins, 335 U.S. 160 (1948).

316. See Act of Nov. 16, 1792, ch. 62, § 2, 1792 Va. Acts 65, 65 (declaring it "lawful for the governor . . . [to] compel[] to depart this Commonwealth, all suspicious persons" from foreign powers from whom the President "shall apprehend hostile designs" against the United States).

had been near the scene of conspiracies or insurrections.[317]

Mandatory federal registration of aliens was attempted, but soon abandoned. The Naturalization Act of 1798 is commonly remembered for stretching out the residence period required before naturalization from five to fourteen years, an inhospitable policy that led to its repeal in 1802.[318] More interesting for present purposes, however, was the alien registration system imposed by section 4 of the Act. It required all white aliens arriving in the United States to report themselves to a designated officer within forty-eight hours of arrival, and to receive a certificate of registry; aliens already residing in the United States were required to register within six months.[319] Not only was the certificate of registry mandatory evidence in a later naturalization proceeding,[320] but aliens failing to register were subject to fine, and could be compelled to give security for their future behavior.[321]

This registration requirement may have had little effect; a few years after its passage, a newspaper described it as having "been disregarded both by aliens themselves and by the magistrates of places in which they resided."[322] In 1803, Congress was told that the threat of deportation under the Alien Act had deterred immigrants from calling themselves to the government's attention even by filing declarations of intent to become citizens.[323] The repeal of the Naturalization Act in 1802 eliminated the legal requirement that aliens register. At the same time, the 1802 Naturalization Act attempted to make registration at time of arrival a documentary prerequisite to later naturalization (as required evidence of the period of residence).[324] This conditional requirement, however, did not produce compliance, either. As James Buchanan reported to the House of Representatives in 1828, the registration provision of the 1802 act met with "almost universal" neglect,[325] and it was

317. See supra note 298.

318. See Act of June 18, 1798, ch. 54, § 1, 1 Stat. 566, repealed by Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155.

319. See id. § 4.

320. See id. § 6.

321. See id. § 5. Justice Black, however, appears not to have had this statute in mind when he stated, "So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration act was passed." Hines v. Davidowitz, 312 U.S. 52, 70–71 & n.28 (1941) (citing Alien Act and Alien Enemies Act and alluding to the "political upheaval" they caused).

322. Frank G. Franklin, The Legislative History of Naturalization in the United States 107 (1906) (quoting from January 1802 issue of the Kentucky Palladium).

323. See 12 Annals of Cong. 569–77 (1803); Franklin, supra note 322, at 110–14. This and other arguments resulted apparently in the Act of Mar. 26, 1804, ch. 47, 2 Stat. 292, which waived the requirement of the filing of a declaration of intent before naturalization for all aliens who had been residing in the United States during the period when the 1798 Naturalization Act was in effect.

324. See Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154.

325. 4 Cong. Deb., pt. 2, at 2556 (1828) (remarks of Rep. Buchanan) ("The neglect is common, nay, almost universal, because aliens do not know the law, and would not, for sometime after their arrival, conform to it, even if they did. . . . [S]ome courts do, and

accordingly repealed.[326]

F. *Summary*

Thus, state immigration law in the century preceding 1875 included five major categories: regulation of the migration of convicts; regulation of persons likely to become or actually becoming a public charge; prevention of the spread of contagious diseases, including maritime quarantine and suspension of communication by land; and regionally varying policies relating to slavery, including prohibition of the slave trade, bans on the migration of free blacks, and the seamen's acts. Federal statutes backed up the state quarantine laws and state laws barring importation of slaves or free black aliens. Federal diplomatic efforts gave some support to state policies against the "dumping" of convicts and paupers.

The legislation employed three principal methods for dealing with undesired immigration: return of the immigrant, punishment of the immigrant,[327] and punishment of third parties responsible for the immigrant's arrival. Some state laws provided for the return of immigrants in each of the five major categories.[328] No laws threatened punishment of convicts or paupers for immigrating, unless they had previously been removed; direct punishment was more frequently threatened against travelers evading quarantine restrictions and free blacks entering a state unlawfully.

Punishment of responsible third parties was employed in each of the five major categories. The prevalence of this strategy deserves some comment. Carrier sanctions have the advantage of being directed at the more deterrable participant in the forbidden transaction.[329] Carriers are repeat players with more to lose and less to gain from illegal immigration.[330] Moreover, the historically formative experiences of

---

others do not, carry this part of it into execution. . . . [I]t would be better at once to dispense with this registry.").

326. Act of May 24, 1828, ch. 116, § 1, 4 Stat. 310, 310; Franklin, supra note 322, at 178–80.

327. The text applies here the convention that the involuntary physical return of an alien is distinguishable from punishment.

328. See, e.g., Act of Feb. 10, 1787, 1787 Ga. Acts 40 (convicts); Act of Mar. 27, 1789, ch. 463, § 3, 1788–89 Pa. Acts 692, 693 (convicts); Act of Feb. 26, 1794, ch. 32, § 13, 1794 Mass. Acts & Laws 375, 383 (poor law); Act of Mar. 10, 1821, ch. 127, § 2, 1821 Me. Laws 443, 443 (quarantine); Act of Mar. 27, 1794, ch. 53, § 2, 1794 N.Y. Laws 525, 526 (quarantine); Act of Feb. 10, 1831, ch. 66, § 2, Ind. Rev. Laws 375–76 (1831) (free blacks); Act of Dec. 12, 1793, ch. 23, § 1, 1793 Va. Acts. 28, 28 (free blacks).

329. Cf. John Kaplan, Abortion as a Vice Crime: A "What If" Story, 51 Law & Contemp. Probs., Winter 1988, at 151, 164 (discussing deterrence of abortion by imposing criminal sanctions on physicians).

330. See Maryellen Fullerton, Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands, 29 Va. J. Int'l L. 33, 93 (1988) (discussing asymmetric incentives under modern carrier sanctions provisions). The 1803 federal statute supporting the laws of the Southern states against entry of free

convict and pauper immigration included emigration induced by foreign public officials, with the full knowledge of the carriers. These factors, plus the transoceanic character of most nineteenth-century immigration, probably explain the long tradition of carrier sanctions in United States immigration law.

III. Two Objections

This section addresses two possible reasons for minimizing the importance of state immigration legislation: first, that it was too ineffective to deserve attention, and second, that it can have no normative significance because it was unconstitutional.

A. *The Ineffectiveness of State Regulation*

The inattention of contemporary historians to nineteenth-century immigration legislation may result in part from its extreme ineffectiveness. The most dramatic modes of immigration enforcement are the exclusion and return of immigrants and their deportation after entry. It appears that the number of such events was fairly small. One might conclude that the state laws existed only on the books, and had no practical effect.[331]

Consideration of only the exclusion and deportation rates, however, underestimates the impact of state immigration law. Quarantine laws, for example, operated by delay and not by permanent exclusion. In times of perceived peril, quarantine was more likely to be strictly enforced. Maritime quarantine might lead to the death of the would-be immigrant who was stopped at the port, rather than deportation to another country, or to admittance of the immigrant after she had survived the disease. But as a barrier to free migration it had serious practical significance.

Moreover, the legislation probably had some effect in deterring immigrants.[332] When enforced, for example, the bonding and commutation payment provisions of the passenger acts could increase the cost to the carrier. The size of the commutation payment for passengers identified as presenting a significant risk of future indigence could be quite

---

blacks imposed forfeiture of the vessel as one of the penalties. Cf. 8 U.S.C. § 1324(b) (1988) (providing for forfeiture of vessels, vehicles and aircraft for knowingly or recklessly bringing in an alien in violation of law).

331. One might wish to go further and conclude that poor enforcement demonstrated that the true policy of the nation was to welcome all immigrants. But that would be reading too much into the failure of implementation. Poor enforcement accompanied much state legislation of the nineteenth century. See, e.g., Friedman, supra note 66, at 284–86. Poor enforcement has also accompanied federal immigration legislation of a later period.

332. I will not venture an estimate of the effectiveness of the laws against free black immigration. In most Southern states, the legal and social status of free blacks was precarious enough to discourage their entry even without a legal prohibition.

substantial in relation to the price of the ticket.[333] The incidence of the cost increase is not certain, but, to the extent that it was passed on to passengers, it would increase the cost of the voyage, making it that much harder for impoverished Europeans to emigrate, or increasing the likelihood that they would emigrate to other states or other countries.[334] (On the other hand, the lack of control at the land borders made possible circuitous immigration to the regulating states.) Some of the handbooks for emigrants published in Europe advised emigrants where they faced exclusion.[335] Discriminating commutation systems may also have induced some screening of passengers by carriers.[336]

Perhaps more significantly, exclusionary legislation articulated local policy choices that signaled to carriers and European governments opposition to the "dumping" of paupers and convicts. Penalties probably decreased the willingness of carriers to contract with officials for the transportation of groups of poor or convicted persons. The federal diplomatic establishment sometimes expressly invoked state regulations in its protests against public facilitation of the emigration of undesired residents to the United States.[337] If the borders of the United States had been truly open to all comers, then European governments could have overtly pursued such policies, and at certain periods would have.

B. *The Constitutionality of State Immigration Legislation*

State immigration legislation might be considered irrelevant to the question whether the borders of the United States were legally open if such legislation was clearly unconstitutional, and especially if it was so regarded at the time. The standard story emphasizes a series of cases that, in retrospect, support the current doctrine that regulation of im-

---

333. See supra note 100.

334. See Klebaner, supra note 77, at 284, 288–89.

335. See H.R. Rep. No. 359, 34th Cong., 1st Sess. 146 (1856) ("The circular issued by the immigration agents in the interior of Germany, caution [sic] immigrants who are deformed, crippled, or maimed, &c., against taking passage to New York, and advise them to go by way of Baltimore, New Orleans, or Quebec, where the laws prohibiting the landing of immigrants of the above classes do not apply."); S.H. Collins, The Emigrant's Guide to and Description of the United States of America 67 (n.p., Joseph Noble 4th ed. n.d.) ("When paupers are sent by the parish, it is imperative that each family should have at least five pounds, and be able to produce it before they will be allowed by the American Government to set a foot in the United States: should this not be attended to, they will not be allowed to land."); Klebaner, supra note 77, at 288; Logsdon, supra note 164, at 107, 109.

336. See Klebaner, supra note 77, at 288.

337. See H.R. Rep. No. 1040, 25th Cong., 2d Sess. 47 (1838) (re public charges); H.R. Exec. Doc. No. 253, at 7–8 (1874) (same); see also id. at 10 ("[H]e is acting in opposition to the laws of the United States, by encouraging the shipment of criminals as emigrants to that country."); id. at 36 ("Against such an introduction of pauper population this Government must earnestly remonstrate as in violation of the laws of the United States and of international comity . . . .").

migration is an exclusive power of the federal government. Closer inspection reveals that these cases are more equivocal than the modern account admits, and that other materials indicate greater acceptance of state power over immigration in the period before the Civil War. Moreover, some state regulation enjoyed the explicit endorsement of Congress. Of course, there is no point in seeking a definitive or "objective" answer to the question of the constitutionality of state immigration legislation before 1875, since none exists; we may attempt, however, to gain a more accurate understanding of the range of contemporary opinion on the subject.

There are actually two issues of validity that should be considered separately. The sweeping objection to state immigration laws is that they infringe an exclusive federal power, usually identified in the nineteenth century as the foreign commerce power.[338] A more limited objection is that state regulation of immigration, as applied to an immigrant from a particular country, may violate an existing treaty between the United States and that country.

1. *Exclusive Federal Power*. — The standard account traces a progression through four phases of Supreme Court discussion. First, in *Gibbons v. Ogden*,[339] in the course of invalidating the New York steamboat monopoly, John Marshall clarified that the carriage of passengers was included within the meaning of "commerce,"[340] and he expounded in dictum the exclusivity of the federal commerce power.[341] Second, the Taney Court retreated slightly in *Mayor of New York v. Miln*,[342] upholding a state's power to demand that the master of a vessel provide data concerning the passengers being landed from the vessel after a transatlantic voyage; Joseph Story dissented on grounds of the exclusivity of the federal commerce power, claiming also that the lately deceased Marshall had agreed with him on the first hearing of the case.[343] On the third occasion, in the *Passenger Cases*,[344] even the Taney Court invalidated state head taxes on passengers as an unconstitutional interference with foreign commerce, though by a bare majority. Finally, after the Civil War, the Waite Court revisited the issue and unanimously declared the exclusive character of federal power over immigration in the companion cases *Henderson v. Mayor of New York* [345] and *Chy Lung v.*

338. Later, in the *Chinese Exclusion Case*, 130 U.S. 581, 603–05, 609 (1889), the Court suggested that federal power to exclude aliens was inherent in the external sovereignty of the nation.

339. 22 U.S. (9 Wheat.) 1 (1824).

340. See id. at 215–16.

341. See id. at 197–200.

342. 36 U.S. (11 Pet.) 102 (1837).

343. See id. at 160. The case had been reargued because of the initial disagreement among the Justices. See id. at 105.

344. 48 U.S. (7 How.) 283 (1849).

345. 92 U.S. 259 (1876).

Freeman.[346] By that time, the federal government had "begun" to regulate immigration,[347] and the affirmation of exclusive federal power led to a rapid growth in federal immigration regulation over the next twenty years.

Even within this standard line of cases, there is a counterstory to be read that favors state authority. In *Gibbons v. Ogden*, Marshall had observed that some actions that might be regulated by Congress under its power over interstate or foreign commerce could also be regulated by a state under its power of police, so long as no actual conflict with federal legislation occurred.[348] Among the examples of legitimate state regulation Marshall gave were the quarantine and health laws of the states.[349] He interpreted the congressional statutes directing federal officers to assist in the execution of state quarantine laws as predicated on the constitutionality of those state laws.[350]

The majority in *Mayor of New York v. Miln*[351] expanded this understanding of the police power to encompass the exclusion of other dangerous passengers. Although the Court limited its holding to the reporting provisions of the New York passenger act, which were directly before it,[352] the opinion expressed approval of the general purpose of the state regulation:

> We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease.[353]

The concurring opinions were equally explicit and less tentative about convicts.[354]

---

346. 92 U.S. 275 (1876).

347. The Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, excluding convicts and prostitutes, as well as increasing the stringency of the "coolie trade" statutes, is usually identified as the first federal immigration statute. See, e.g., Gordon & Mailman, supra note 7, at 2–6.

348. See 22 U.S. (9 Wheat.) 1, 203–05 (1824).

349. See id. at 205–06.

350. See id.; see supra notes 204–207 and accompanying text.

351. 36 U.S. (11 Pet.) 102 (1837).

352. See id. at 143. Story thought even these provisions unconstitutional because in excess of the reporting required by Congress. See id. at 158–59 (Story, J., dissenting). He also addressed the broader issue and concluded à la *Gibbons v. Ogden* that the federal regulation of vessels carrying passengers affirmatively authorized the landing of all passengers in the states. See id. at 159.

353. Id. at 142–43.

354. See id. at 148 (opinion of Thompson, J.) ("Can anything fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance?"); id. at 153b (opinion of Baldwin, J.) ("On the same principle by which a state may prevent the introduction of infected persons or

The *Passenger Cases* did not repudiate this understanding of the police power. The seriatim opinions addressed two slightly different cases. The New York case, *Smith v. Turner*, involved a statute levying head taxes on arriving crew members and passengers for the support of a marine hospital and other purposes.[355] The other case, *Norris v. City of Boston*, involved the provisions of the Massachusetts poor law that levied a head tax on those alien passengers who were *not* considered likely to become a public charge (alien passengers who *were* considered likely to become a public charge could not be landed unless sufficient security was posted).[356] A bare majority of the Court agreed to invalidate the head taxes, but at least four of those Justices indicated their approval of the pauper exclusions sanctioned by the *Miln* dicta.[357]

The majority's efforts to describe the limits of the state police power over immigrants yielded diverse formulations. Robert Grier invoked "the sacred law of self-defence" as justifying the exclusion of "lunatics, idiots, criminals, or paupers," and also the exclusion of free blacks from the slave states.[358] In fact, Grier focused his condemnation on interference by the seaport states with passengers *in transit to other states*, not with those intending to settle instate.[359] John McLean agreed that the states had not parted with "that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of any thing which may corrupt the morals, or endanger the health or lives of their citizens."[360] Only James Wayne expressly confronted and rejected the dissenters' argument that the states had retained full discretion to identify and remove any persons they considered dangerous to their welfare.[361] For Wayne, there existed a limited set of categories of persons whom the states could rightfully exclude regardless of the will of Congress; these categories defined the boundary between the federal commerce power and

---

goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers who will add to the burdens of taxation, or convicts who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease.").

355. See Passenger Cases, 48 U.S. (7 How.) 283, 283–84 (1849).

356. See id. at 285–86.

357. See id. at 410 (opinion of McLean, J.); id. at 426–27 (opinion of Wayne, J.); id. at 457 (opinion of Grier, J.). Catron concurred in Grier's analysis of the police power question, see id. at 452 (opinion of Catron, J.). McKinley's view is less clear; he purported to concur with the reasoning of McLean and Catron, but some passages in his brief opinion seem to imply a narrower view of state power. See id. at 452–55 (opinion of McKinley, J.).

358. Id. at 457.

359. See id. at 463–64 (opinion of Grier, J.); see also id. at 457–58 ("It is not a fee or tax for a license to foreigners to become denizens or citizens of the Commonwealth of Massachusetts . . . ."). Again, Catron concurred in Grier's analysis of the police power issue. See id. at 452, 464 (opinion of Catron, J.).

360. Id. at 400 (opinion of McLean, J.); see also id. at 406, 410.

361. See id. at 427–28 (opinion of Wayne, J.).

the state police power.[362] Not surprisingly, his list included paupers, vagabonds, fugitives from justice, and free blacks seeking to enter slave states.[363]

The four dissenters saw no inherent limit to the states' sovereign authority over the entrance of aliens. Levi Woodbury maintained:

> [I]t is for the State where the power resides to decide on what is sufficient cause for it,—whether municipal or economical, sickness or crime; as, for example, danger of pauperism, danger to health, danger to morals, danger to property, danger to public principles by revolutions and change of government, or danger to religion.[364]

Peter Daniel invoked at length the Jeffersonian polemics against the Alien Act of 1798 to demonstrate that power over the entry of aliens was vested exclusively in the states.[365] Chief Justice Taney insisted on the state's right to expel "any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens," without interference by Congress.[366] Taney also sounded the alarm with regard to recognizing in Congress a power to force the admission of free blacks into the slave states,[367] while Woodbury, from a Northern perspective, warned that the states' power over the entry of foreigners, whether black or white, was indivisible.[368]

As this summary indicates, a truly exclusive federal power over interstate and international migration would have been highly threatening under antebellum conditions. The federal government would have been forced to choose policies controlling the transborder movement of both free blacks and slaves. This undercurrent to the commerce debate had been obvious from the beginning. As previously explained, the question of state authority had arisen before Justice William Johnson on circuit shortly prior to *Gibbons v. Ogden*, in the highly charged context of exclusion of free black seamen from Southern ports.[369] Johnson's willingness to declare the statute unconstitutional contrasts with the caution of Marshall, expressed in an oft-quoted letter to Story:

> Thus you see fuel is continually added to the fire at which *exaltées* are about to roast the Judicial Department. You have, it is said, some laws in Massachusetts, not very unlike in principles to that which our brother has declared unconstitutional. We have its twin brother in Virginia; a case has been brought

362. See id. at 426–29.
363. See id.
364. Id. at 528 (Woodbury, J., dissenting).
365. See id. at 508–14 (Daniels, J., dissenting).
366. Id. at 466 (Taney, C.J., dissenting). Samuel Nelson concurred in Taney's dissent. See id. at 518 (Nelson, J., dissenting).
367. See id. at 474 (Taney, C.J., dissenting).
368. See id. at 550 (Woodbury, J., dissenting).
369. See supra notes 264–271 and accompanying text.

> before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act.[370]

In fact, the Supreme Court avoided a confrontation on these issues during Marshall's lifetime.

The Taney Court's decisions regarding fugitive slaves produced further reasoning supportive of a state police power over migration. In *Prigg v. Pennsylvania*,[371] while maintaining the exclusivity of the federal government's authority to return fugitive slaves to out-of-state claimants, Story distinguished the state's power to exclude them for its own benefit:[372]

> We entertain no doubt whatsoever, that the states, in virtue of their general police power, possesses full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, *as they certainly may do in cases of idlers, vagabonds, and paupers*.[373]

As we have already seen, the Court converted this dictum into holding in *Moore v. Illinois*, where it reaffirmed the states' police power to "make it a penal offence to introduce paupers, criminals, or fugitive slaves, within their borders."[374]

The lower courts understood the Supreme Court as approving

---

370. Letter from John Marshall to Joseph Story, Sept. 26, 1823, quoted in 1 Charles Warren, The Supreme Court in United States History 626 (1932).

371. 41 U.S. (16 Pet.) 539 (1842).

372. A similar distinction between expulsion for the state's internal benefit and delivery for the benefit of an outsider had appeared in the inconclusive case of Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840). There the Court was evenly divided over the power of the state of Vermont to return a murder suspect to Canada for prosecution. Four Justices concluded that Vermont's proposed surrender of Holmes to Canada for prosecution would have been tantamount to entering into an *agreement* for his extradition, and would therefore trespass on the exclusive federal power to conduct intercourse with foreign governments. See id. at 573–74 (opinion of Taney, C.J., joined by Story, McLean, and Wayne, JJ.). The other four Justices were more protective of the state's power to expel fugitives, at least in the absence of an actual agreement between Vermont and Canada. See id. at 584 (opinion of Thompson, J.); id. at 586–586h (opinion of Baldwin, J.); id. at 588 (opinion of Barbour, J.); id. at 596–97 (opinion of Catron, J.). Even those Justices who took the narrower view of the state's authority, however, agreed that a state's police power included the power to exclude or expel an alien criminal for the protection of its own population. See id. at 568–69, 578 (opinion of Taney, C.J., joined by Story, McLean, and Wayne, JJ.); see also id. at 586–586h (opinion of Baldwin, J.).

373. *Prigg*, 41 U.S. (16 Pet.) at 625 (emphasis added). The subject of state power to prohibit the *sale* of slaves into the state had recently been addressed in dicta in Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841), where six of seven Justices affirmed the state's power. See id. at 507–08 (opinion of McLean, J.); id. at 508 (opinion of Taney, C.J.); id. at 510 (statement of Story, Thompson, Wayne, and McKinley, JJ.).

374. Moore v. Illinois, 55 U.S. (14 How.) 13, 18 (1853) (Grier, J.); see also supra notes 302–306 and accompanying text.

state police power over certain categories of migrants. In some instances these cases were invoked as suggesting a broad state power, while in others they were read as limiting state power to a short list of traditional categories. For example, Chief Justice Lemuel Shaw had relied on *Gibbons* and *Miln* to support a head tax in lieu of bond for the support of pauper immigrants in his opinion (reversed by the Supreme Court) in *Norris v. City of Boston*.[375] The police power was also invoked to uphold bond-posting statutes in Louisiana and New York.[376] The California Supreme Court, in contrast, denied the state's authority to require bonds or payment for those passengers who showed no sign of being "more likely than the average of mankind to become paupers, vagabonds, or criminals."[377] It had previously concluded that the state's police power extended to the expulsion of slaves,[378] but not to the exclusion of Chinese immigrants.[379] Justice Field similarly held on circuit that the state's power of exclusion in "self-defense" was limited to traditional categories of health, crime and poverty.[380]

The notion of a limited set of permissible state law exclusions raises an interesting question regarding the characterization of immigration policy as state or federal. To the extent that nothing in federal law *required* the states to enact the traditional exclusions, the choice of policy remained with the states. But to the extent that a short list of exclusion policies had privileged status in federal constitutional law, the federal judiciary shared responsibility for these policies, and they represented something more than local choices. Similarly, Congress shared responsibility for those policies that it reinforced with federal legislation, like quarantine and exclusion of free blacks,[381] and other

375. 45 Mass. (4 Met.) 282 (1842), rev'd sub nom. Passenger Cases, 48 U.S. (7 How.) 283 (1849).

376. Commissioners of Immigration v. Brandt, 26 La. Ann. 29 (1874) (citing *Mayor of New York v. Miln* and *Passenger Cases*); Candler v. Mayor of New York, 1 Wend. 493 (N.Y. Sup. Ct. 1828) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

377. State v. Steamship Constitution, 42 Cal. 578, 586 (1872).

378. In re Perkins, 2 Cal. 424 (1852) (upholding return of slaves who were in California at time of statehood to out-of-state masters; citing *Prigg v. Pennsylvania*); cf. Nelson v. People, 33 Ill. 390 (1864) (upholding exclusion of both slaves and free blacks from state).

379. Lin Sing v. Washburn, 20 Cal. 535, 578 (1862) (invalidating heavy residence tax on Chinese immigrants) ("We may dismiss from the case the question of the power of the States to exclude obnoxious persons, such as paupers and fugitives from justice, for it nowhere appears that the Chinese are a class of that description; nor does the act pretend to deal with them as such."). Stephen Field, at that time California's Chief Justice, dissented. See id. at 582 (Field, C.J., dissenting). Field's shifting positions on anti-Chinese legislation sometimes reflected his career interests.

380. In re Ah Fong, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) (listing convicts, lepers, persons afflicted with incurable disease, paupers, idiots, lunatics, and others likely to become a charge on the public). Field attributed broader views of the state's discretion to the distorting influence of the slave states' desire to exclude free blacks. See id. at 216–17.

381. See supra notes 204–205, 210–212, 237–239 and accompanying text.

policies for which it provided diplomatic intervention, like pauper and convict exclusion.[382]

Even the *Henderson* and *Chy Lung* cases, normally cited as extinguishing state power over immigration, left open the question of police power to exclude dangerous immigrants. *Henderson* involved New York's efforts to deal with pauper immigration by imposing a variation of the head tax invalidated in the *Passenger Cases*; masters of vessels were facially required to post bond against their passengers becoming public charges, but permitted to commute the bond by payment of $1.50 per passenger.[383] In *Chy Lung*, a California statute granted officials broad discretion to demand bonds or commutation payments from masters as a condition of landing alien passengers, including those deemed "a lewd or debauched woman."[384] The Court viewed both statutes as invalid efforts to raise money from foreign immigration,[385] but it took the opportunity for a broad reexamination and affirmation of congressional power over immigration.

Nonetheless, the Court avoided opening the nation's borders. The cases were decided in a transitional period; Congress had just begun to regulate immigration from Europe, addressing some of its criminological aspects, but not yet its poverty and public health aspects.[386] Accordingly, while striking down New York's imposition of commutation payments on all passengers as an unconstitutional interference with foreign commerce, the Court added: "Whether, in the absence of [action by Congress], the States can, or how far they can, by appropriate legislation, protect themselves against *actual* paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign countries, we do not decide."[387]

---

382. See supra notes 59, 171. Moreover, as previously mentioned, the Congress of the Confederation had urged the states to adopt convict exclusion legislation in 1788. See supra text accompanying note 43.

383. See Henderson v. Mayor of New York, 92 U.S. 259 (1876).

384. Chy Lung v. Freeman, 92 U.S. 275, 277 (1876).

385. Although the Court stressed the danger to foreign relations posed by abusive state implementation, it also interpreted the California statute as having the "manifest purpose . . . not to obtain indemnity, but money." Moreover, "[t]he amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one-fifth of all he can obtain." Id. at 280.

386. The 1875 federal statute, in addition to increasing the barriers against importation of unfree labor from Asia, generally prohibited the immigration of persons under sentence for nonpolitical crimes or whose sentence had been remitted on condition of emigration, and of women imported for purposes of prostitution. See Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477. In 1882, Congress further prohibited the landing of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214. It was not until the 1890s that the federal government began to take over state quarantine functions and to prohibit the admission of persons suffering from loathsome or dangerous contagious diseases. See Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084; supra notes 211–212 and accompanying text.

387. *Henderson*, 92 U.S. at 275. Similarly, in *Chy Lung*, the Court noted:

Although this language may suggest doubt regarding traditional categories of state immigration control, their continuing validity was assumed in other commerce cases decided shortly thereafter.[388] And in 1886, the Court went out of its way to uphold the traditional subjection of vessels in foreign commerce to state quarantine regulations as a matter of local concern for which uniform national legislation was not required.[389] The Court repeated this endorsement of state quarantine laws as late as 1902.[390]

Thus, even those state immigration statutes that lacked the express consent of Congress cannot be dismissed in retrospect as clearly ultra vires. The nineteenth-century search for the mysterious line between the exercise of the police power and the regulation of commerce left indeterminate room for state control of immigration. The uncoupling of migration from slavery by the Civil War made federal regulation possible, and the coincidence that the first new pressure for immigration restriction involved discrimination against a particular country made federal regulation necessary. The advocates of Chinese exclusion called upon Congress to do what the states could not. The *Chy Lung* decision also introduced an emphasis on the foreign affairs implications of abusive immigration regulation. This shift in focus set the stage for the justification of federal immigration power as an aspect of the nation's external sovereignty a decade later in the *Chinese Exclusion Case*.[391] Through a dialectical process, federal regulation steadily expanded, and the Supreme Court steadily contracted state powers. But it is anachronistic to project this modern constitutional understanding onto the earlier period.

> We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.

Chy Lung, 92 U.S. at 280.

388. See Patterson v. Kentucky, 97 U.S. 501, 506 (1879); Railroad Co. v. Husen, 95 U.S. 465, 471 (1878) (A state "may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in *The Passenger Cases* . . . by Mr. Justice Grier, in the sacred law of self-defence.").

389. See Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455, 465–66 (1886); cf. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (enunciating local concern doctrine). The Court had reaffirmed state power over quarantine as recently as 1874, while invalidating a state tonnage tax intended to finance quarantine enforcement. See Peete v. Morgan, 86 U.S. 581, 582 (1874) ("That the power to establish quarantine laws rests with the States, and has not been surrendered to the General government is settled in *Gibbons v. Ogden*.").

390. See Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 387 (1902).

391. 130 U.S. 581 (1889).

2. *Immigration Under Treaties*. — Another objection to state immigration legislation should be considered here: its possible inconsistency with treaties. The federal government had enacted affirmative immigration law from the beginning of the republic by entering into treaties of friendship, commerce and navigation with other nations. These treaties created reciprocal rights of entry for purposes of commerce, subject to certain conditions. The extent of those rights and conditions was subject to dispute, and was probably consistent with most state immigration restrictions.

The state head taxes in the *Passenger Cases* conceivably burdened the rights of free ingress granted under a commercial treaty with Great Britain.[392] Several Justices in the *Passenger Cases* asserted this conflict as an additional reason for invalidating the head taxes, but without offering careful analysis of the treaty language and its implications for the powers of the state; relevant considerations are sprinkled among the majority and dissenting opinions.

An initial question to be resolved is whether ordinary immigrants, not carrying on commerce themselves, enjoyed rights of access under the treaty.[393] In fact, when the federal government finally adopted quantitative restrictions on immigration in the 1920s, it concluded that they did not—preserving access as nonimmigrants for merchants and their families satisfied the United States' obligations under the typical commercial treaty.[394] If this answer is not a modern reinterpretation, then such treaties had only limited potential for conflict with state immigration laws.

Even without so limiting the scope of the treaties, one could ask whether the treaty language rendering the rights granted "subject always to the laws and statutes of the two countries, respectively" subordinated the right of access to nondiscriminatory state laws;[395]

---

392. The Justices could not agree on which treaty was applicable, the 1815 Convention to Regulate Commerce and Navigation, or the 1794 Jay Treaty. The same objection had been made in *Miln*, but the defendant did not make his nationality a matter of record, and the existence of a relevant treaty could not be determined. See Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 143 (1837) (Barbour, J.). Both Justice Barbour and Justice Thompson further noted that such treaties subjected foreign citizens to the local laws governing local citizens. See id. (Barbour, J.); id. at 152 (Thompson, J., concurring). In fact, reporting obligations under the New York law did not depend on the nationality of the vessel or its master.

393. See Passenger Cases, 48 U.S. (7 How.) 283, 411 (1849) (opinion of Wayne, J.) (yes); id. at 451 (opinion of Catron, J.) (yes); id. at 568 (Woodbury, J., dissenting) (no); id. at 506 (Daniel, J., dissenting) (no).

394. See Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925); Robert R. Wilson, "Treaty-Merchant" Clauses in Commercial Treaties of the United States, 44 Am. J. Int'l L. 145 (1950); cf. 8 U.S.C. 1101(a)(15)(E) (Supp. III 1991) (current nonimmigrant provision for treaty traders and investors).

395. See 48 U.S. (7 How.) at 408 (opinion of McLean, J.) (no, subject only to federal laws); id. at 426 (opinion of Wayne, J.) (no, subject only to subsequent regulation of conduct); id. at 451 (opinion of Catron, J.) (same); id. at 472 (Taney, C.J.,

and, if so, whether the relevant standard of nondiscrimination required equality with the state's own citizens, with citizens of sister states, or with nationals of the most favored nation.[396] A broad reading of the "subject always to the laws" proviso could have left states substantial discretion to adopt categorical exclusions of "undesirable" classes, applied uniformly to interstate and international migration (or perhaps just to international migration).[397] Discrimination against a particular treaty partner would have been invalid, as the courts told California.[398]

If the broad reading of the proviso is rejected, the possibility remains that a constitutional line between the federal commerce power and the state police power could have been read into the treaty, preserving those prerogatives that the federal government could not invade; or more directly, that the federal government lacked the power to enter into a treaty overriding state immigration laws based on traditional police power concepts.[399] Under current constitutional understandings of the commerce clause and the treaty power, this strategy would fail because the reach of Congress' immigration power is complete and because the treaty power is now viewed as extending beyond the content of Congress' other enumerated powers. But these understandings were not established in the mid-nineteenth century, and some majority Justices in the *Passenger Cases* appeared to believe that the federal government could not deprive the states of core police powers over immigration.[400]

Alternatively, a treaty could have been interpreted in accordance with Justice Harlan's later dictum in *Yamataya v. Fisher*, that even if it had not contained

> that specific exception, we should not be inclined to hold that the provision in the treaty with Japan that the citizens or subjects of each of the two countries should have "full liberty to

---

dissenting) (yes). The language quoted is from Article 1 of the 1815 Convention; similar language appeared in Article 14 of the Jay Treaty ("but subject always as to what respects this article to the laws and statutes of the two countries respectively").

396. See 48 U.S. (7 How.) at 569 (Woodbury, J., dissenting) (same rights as "other foreigners"). If there is no limit on the substance of the "laws and statutes," then the access right is almost entirely nugatory.

397. Cf. supra note 276 and accompanying text (discussing British uncertainty over "subject always to the laws" clause).

398. See In re Ah Fong, 1 F. Cas. 213, 218 (C.C.D. Cal 1874) (No. 102) (Field, Circuit Justice) (invoking most favored nation clause in 1868 Burlingame Treaty with China); see also In re Quong Woo, 13 F. 229, 233 (C.C.D. Cal. 1882) (same); In re Ah Chong, 2 F. 733, 738 (C.C.D. Cal. 1880) (same); In re Parrott, 1 F. 481, 485 (C.C.D. Cal. 1880) (same).

399. See 48 U.S. (7 How.) at 506 (Daniel, J., dissenting) (no such power conferred on federal government); cf. id. at 426 (opinion of Wayne, J.) (paupers, vagabonds, suspected persons and fugitives from justice are not within regulating power of federal government).

400. See id. at 425–26 (opinion of Wayne, J.); id. at 457 (opinion of Grier, J.); id. at 400, 409 (opinion of McLean, J.).

> enter, travel, or reside in any part of the territories of the other contracting party," has any reference to that class, in either country, who from their habits or condition, are ordinarily or properly the object of police regulations designed to protect the general public against contact with dangerous or improper persons.[401]

Had the issue of state exclusion of paupers or criminals from a treaty nation been squarely presented before the Civil War, the Supreme Court would most likely have validated the traditional exclusions in this manner.

IV. WHAT FOLLOWS?

If the open borders story is exposed as a myth, then a body of legal experience becomes available for exploration, and it becomes necessary to reexamine legal arguments that rely on the absence of that experience. Part I of this Article identified three issues of current importance that may be illuminated by a more accurate history of immigration law: the status of illegal aliens, the anomalous stance of judicial review, and the relationship between congressional and presidential power. This list is not exhaustive.

On the third issue, congressional and presidential power, the data I have found are too fragmentary to justify even tentative conclusions. More research into U.S. diplomatic intervention on the subject of immigration is necessary,[402] and it is difficult to predict whether the results would be substantial or orderly enough to contribute to current controversies.

The abundant material on state regulation, in contrast, already permits discussion of its implications for the debates on judicial review and illegal aliens. A sketch of my own interpretation of those implications follows.

Immigration law prior to 1875 was a complex hybrid of state and federal policy. Federal decision-makers validated certain local policies. Congress gave explicit approval to state quarantine laws and state laws excluding black aliens; Supreme Court Justices assigned some categories of immigration regulation to state police power in language that indicated approval rather than indifference; and the Executive urged

---

401. Yamataya v. Fisher, 189 U.S. 86, 96–97 (1903) (deportation of recently arrived alien found likely to become a public charge consistent with treaty provision rendering liberty of entry subject to "[']the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries' ") (quoting Treaty on Commerce and Navigation, Mar. 21, 1895, U.S.-Japan, 29 Stat. 848, 848–49).

402. Such research need not be limited to the period before 1875. For a slightly later example, see William Mulder, Immigration and the "Mormon Question": An International Episode, 9 W. Pol. Q. 416, 422–27 (1956) (describing diplomatic effort to reduce immigration of Mormons prior to the enactment of an exclusion ground for polygamists in 1891).

foreign governments to respect policies whose only statutory embodiment was in state law. The failure to enact uniform immigration policies at the national level resulted from a combination of forces—not just pro-immigration sentiment, but also a desire to keep migration policy within state authority. When slavery ceased to divide the nation, national immigration regulation became possible.

In the meantime, the issues of crime, poverty and disease among immigrants were treated as matters of legitimate local concern. It was not until 1876, in *Chy Lung v. Freeman*, that the Supreme Court puffed them up into foreign policy questions.[403] To the extent that immigration regulation today turns on these issues (which is substantial), the equation of immigration with foreign policy is a fiction. That does not mean that the states should resume their earlier responsibilities for regulating migration. There are practical reasons why immigration can be more effectively regulated by the federal government, with its overseas diplomatic establishment and its near-exclusive authority to enter into agreements with foreign governments.[404] There are also reasons why the unit of government that includes the diplomatic establishment would often be more sensitive to the rights of aliens than would the average state. But that does not mean that an alien's deportation for crime is more a foreign policy question than is his execution.

The Supreme Court, having used geopolitical concerns as part of its explanation for cutting back on California's power to mistreat the Chinese in the 1870s, stressed the geopolitical ramifications of international migration as the core of its explanation for declining to engage in judicial review of federal discrimination against the Chinese in the 1880s.[405] The Court treated control of migration as an aspect of the external sovereignty of the nation comparable to the war power. The resulting doctrine of the nonjusticiability of challenges to substantive immigration policy persisted until the 1970s,[406] being applied to such

403. See Chy Lung v. Freeman, 92 U.S. 275, 278 (1876). The opinion in that case accurately foreshadows the future course of immigration law, but is not terribly persuasive as written. The regulation of aliens' entry is a power subject to abuse by individual state officials. So is every other power over aliens.

404. See U.S. Const. art. I, § 10, cl. 3; Raymond S. Rodgers, The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments, 61 Am. J. Int'l L. 1021 (1967).

405. See Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

406. See, e.g., Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 255–57; Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 550–60 (1990). The "plenary power" terminology in this context is confusing and unfortunate. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824):

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the

bases of exclusion and deportation as narcotics offenses, prostitution, "feeble-mindedness," contagious disease, anarchism, and likelihood of becoming a public charge.[407]

Between 1943 and 1965, Congress discarded the principle of racial discrimination upon which federal immigration law had been founded.[408] This reform enabled the Supreme Court to open the door to a limited form of judicial review of immigration policy under an extraordinarily deferential standard.[409] At the same time, the Court insisted on categorical treatment of substantive immigration regulation. Justice Powell emphasized that immigration decisions "may implicate our relations with foreign powers," and "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."[410] He was therefore unmoved by the evident irrelevance of these concerns to the particular statute before him, which discriminated on grounds of gender and illegitimacy in the reunification of family members.

The history described in this Article corroborates the impression given by Powell's own language ("may implicate," "frequently") that the correlation between the substance of immigration policy and the factors that have been invoked to justify extreme judicial deference is very weak. When the states performed central functions of immigration regulation relating to poverty, crime, and public health, these issues were not regarded as nonjusticiable. Indeed, the late nineteenth-century Supreme Court described the boundary line between exclusive federal immigration power and a surviving core of state police power as depending on necessity.[411] The modern Supreme Court's move from nonjusticiability to extraordinary deference represents a welcome advance, but its refusal to engage in a more differentiated exercise of judicial review, reserving extraordinary deference for those occasions that justify it, remains an unreasoned refusal.

Finally, what can the nineteenth-century materials tell us about the

---

same restrictions on the exercise of the power as are found in the constitution of the United States.

407. See, e.g., Marcello v. Bonds, 349 U.S. 302 (1955) (ex post facto deportation of narcotics offender who had a citizen wife and children); Kaplan v. Tod, 267 U.S. 228 (1925) (exclusion of "feeble minded" daughter of naturalized citizen); Low Wah Suey v. Backus, 225 U.S. 460 (1912) (deportation of prostitute who had a citizen husband and child); Zartarian v. Billings, 204 U.S. 170 (1907) (exclusion of naturalized citizen's minor daughter on grounds of contagious disease); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904) (deportation of anarchist); Yamataya v. Fisher, 189 U.S. 86 (1903) (deportation of recently arrived immigrant as likely to become a public charge).

408. See, e.g., Daniels, supra note 18, at 328–29, 338–41 (discussing repeal of Chinese Exclusion Act and ultimate abandonment of demographically-tailored national origin quotas).

409. See cases cited supra note 31.

410. Fiallo v. Bell, 430 U.S. 787, 796 (1977) (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

411. See supra text accompanying notes 385–389.

rights of undocumented aliens? In recent years, some lawyers have supported their preferred interpretations of the Constitution by drawing conclusions from the historical claim that no illegal aliens existed before the modern era of federal immigration law began in 1875.

Evaluating this claim requires caution. I have seen no evidence that the term "illegal alien" was in general use before 1875.[412] That term is more a colloquial label than a legal phrase, however.[413] Its central connotation is an alien whose presence in this country involves a violation of the law that has not been cured. There are different manners in which an alien's presence could be said to violate the law,[414] and there are different forms of curative government action that may impart degrees of legality to the alien's presence.[415] The legal consequences of immigration law violations vary greatly with circumstances, and are constantly changing.

From the point of view of an individual state, an alien whose entry involved a violation of state law would seem to be an "illegal alien." The parallel holds most strongly in those instances where the state law addressed its prohibition to the alien, or where physical removal of the alien was a legal sanction.[416]

---

412. Moreover, the earliest use of the term that LEXIS or WESTLAW turns up in a judicial opinion occurs in Waisbord v. United States, 183 F.2d 34, 35 (5th Cir. 1950), which is itself not a masterpiece of decorum. The term "undocumented alien," of course, is even newer.

413. "Illegal alien" does appear as a defined term in both 8 U.S.C. § 1365(b) (1988) and 29 C.F.R. § 500.20(n) (1992), but the two definitions are context-driven and inconsistent. The former specifies a category of aliens who were unlawfully in the United States at the time they committed a felony, and the latter refers to aliens without employment authorization.

414. For example, some forms of unauthorized presence involve criminal violations while others do not; some nonimmigrants render themselves deportable by violating conditions of their admission, while others do so by passage of time; some aliens enter without inspection even though they are legally entitled to enter. Some aliens who have been paroled into the country pending decision on a request for admission are thought of as illegal aliens, even though they are not unlawfully in the country at all. Permanent resident aliens who commit acts rendering them deportable are not normally thought of as illegal aliens. The Immigration and Nationality Act itself recognizes that one may fail to maintain lawful status "through no fault of his own or for technical reasons." 8 U.S.C. § 1255(c) (1988).

415. An alien's presence may be tolerated as a matter of administrative discretion under the rubric of deferred action; an alien may apply for asylum, or for temporary protected status; millions of aliens were permitted to apply for legalization under 8 U.S.C. §§ 210, 245A (1988); an eligible alien may also apply for adjustment of status under 8 U.S.C. § 245.

416. The parallel fades almost completely, however, in a legal regime that relies solely on bond posting and commutation fees. One might simply view such a regime as authorizing the entry of all immigrants, and merely trying to shift public costs onto the carrier. Still, the regime can operate as an immigrant screening system if the state imposes charges high enough to affect carriers' behavior. Then carriers could select passengers at ports of embarkation, either directly or by setting ticket prices that impoverished emigrants could not meet, or carriers could decide after arrival and official

The parallel may seem weaker when the state law punished a carrier or other third party but not the immigrant. Still, concentration of sanctions on the third party does not indicate that the immigrant was authorized to enter the United States, any more than concentration of sanctions on the seller indicates that a consumer is authorized to purchase forbidden goods or services. Whether the exclusionary purpose justifies considering unlawfully landed passengers as the equivalent of modern "illegal aliens" depends on whether one considers the salient feature of illegal status to be the objective contradiction between the alien's presence and the will of the territorial sovereign or the subjective culpability of the individual alien in violating a legal norm directed specifically to her. Federal immigration law is usually regarded as a system of civil regulatory control of the objective state of affairs, as exemplified by Justice Holmes' definition of deportation as "simply a refusal by the Government to harbor persons whom it does not want."[417] This objective character also explains the application of the label "illegal alien" to children and others who are not responsible for their presence in the United States.[418] Thus, state laws with only third-party sanctions may have produced further categories of "illegal aliens."

More analysis is needed to decide whether a state's "illegal aliens" were also "illegal aliens" vis-à-vis the United States. In most cases, that depends on how one aggregates varying local criteria. The one uniform federal policy was the ban on importation of slaves from 1808 on. But immigration law need not be territorially uniform. An excludable alien in New York is no less excludable because the same ground of exclusion is inapplicable in Guam.[419] The varying state laws in the

---

inspection that it would be more profitable to return a passenger to Europe than to pay the charges. Immigrants who could formally comply with the requirements would be authorized to enter, even if they later imposed costs on the state—in a broader sense they may have been "undesired," but it does not seem accurate to consider them "illegal." Immigrants who evaded the system by fraud or by landing in secret, on the other hand, might be comparable to modern-day illegal entrants, whether or not the legal system imposed a sanction on them directly.

417. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913). This definition was intended to contrast with an understanding of deportation as punishment, which would subject immigration regulation to a series of constitutional limitations from which it is presently exempt. See Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 24–27 (1984).

418. See, e.g., Reno v. Flores, 113 S. Ct. 1439 (1993); Plyler v. Doe, 457 U.S. 202 (1982). The objective contradiction of expressed sovereign will would also appear to be the relevant feature in analyzing the consequences of "illegal alien" status under a consent-based theory that makes an obligation of the polity depend on its voluntary invitation of aliens into the community. It is true, however, that Professors Schuck and Smith, who offer a consent-based theory of citizenship, sometimes emphasize the personal culpability of undocumented parents as part of their argument for denying citizenship to those parents' children. See Schuck & Smith, supra note 25, at 99.

419. Cf. 8 U.S.C. § 1182(l) (1988) (providing for nonimmigrant visa waiver program in Guam).

nineteenth century were enacted by different governments, but some of those laws were backed up by federal statutes, and others enjoyed federal approval. If the policy of the United States was to leave certain categories of immigration regulation to the states, then constitutionally valid state immigration laws embodied the immigration policy of the United States. An illegal immigrant to Massachusetts who remained in Massachusetts would then be an illegal immigrant to the United States, even if that immigrant would have faced no barrier in entering Michigan.[420]

Thus, it seems fair to say that "illegal aliens," even vis-à-vis the nation, have always existed in the United States. They are not a new phenomenon that could not have been contemplated by the Framers of the Constitution, or of the Fourteenth Amendment. An originalist argument that "illegal aliens" lack Fourth Amendment rights, or should be excluded from the census, or that the U.S.-born children of such aliens are not entitled to citizenship, cannot be made without evidence that they were treated in that fashion in the eighteenth and nineteenth centuries. My own research has turned up no evidence that would support those propositions.[421] If the originalists can find such evidence, then the time will come to discuss its relevance to constitutional interpretation. But they cannot excuse themselves from providing the evidence by invoking the myth of open borders.

CONCLUSION

The open borders story was too good to be true. Did we really believe that the powerholders in the antebellum United States were content to receive *anyone* who wanted to immigrate, even among those from Europe? Know Nothingism and open borders were not the only alternatives.

Recovering the lost century of American immigration law is a substantial task, which this article can only begin. Further investigation by others may strengthen or undermine the conclusions suggested here. The modern school of immigration law scholarship has brought political theory, comparative law, economics, empirical fieldwork, and other interdisciplinary perspectives to bear. It should also recognize the complexity of the past.

---

420. If we wish to frame this in terms of a theory of political consent, cf. supra note 418, then the federal constitutional validity of state immigration laws would suggest that the state is authorized to withhold the polity's consent to the entry of an alien across its borders.

421. To the contrary, it is clear that the intent of the Fourteenth Amendment to confirm citizenship of all former slaves born in the United States must have included the children born to the tens of thousands of illegally imported slaves. See Neuman, supra note 10, at 499–500.