

**THE CONSTITUTIONALITY OF IMMIGRATION SANCTUARIES AND  
ANTI-SANCTUARIES: ORIGINALISM, CURRENT DOCTRINE, AND A  
SECOND-BEST ALTERNATIVE**

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ABSTRACT

*The Supreme Court's immigration jurisprudence has little basis in the original meaning of the Constitution. This Article explains and defends that claim, and then suggests what the Court might do to ameliorate the effects of its past mistakes without overruling a raft of settled precedents.*

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## INTRODUCTION

Immigration law is notoriously complex and controversial. In the political arena, there could hardly be a wider range of policy views. Donald Trump, for example, has advocated the deportation of millions of people who came here illegally,<sup>1</sup> many of whom have presumably been productive and law-abiding residents for years, or even decades. Hillary Clinton, who opposed him in the last election, was accused of favoring the diametrically opposite position of “open borders.”<sup>2</sup> That does not appear to be her current position,<sup>3</sup> but other politicians advocate policies that would come close to effectively opening the borders.<sup>4</sup> Perhaps reflecting the political salience of the issues, academics who have chosen to immerse themselves in

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<sup>1</sup> See, e.g., Benjy Sarlin, *Trump Recommits to Mass Deportation in Fiery Immigration Speech*, NBC NEWS (Sept. 1, 2016, 8:20 AM), <https://www.nbcnews.com/politics/2016-election/trump-recommits-mass-deportation-fiery-immigration-speech-n641016>. Trump’s statements about this issue have varied from time to time, but he pretty consistently favored mass deportation policies during his presidential campaign.

<sup>2</sup> In a speech to a private audience in South America, which was disclosed by WikiLeaks, Clinton said: “My dream is a hemispheric common market, with open trade and open borders, some time in the future with energy that is as green and sustainable as we can get it, powering growth and opportunity for every person in the hemisphere.” *What Hillary Clinton Really Said About ‘Open Borders,’* THINKPROGRESS (Oct. 20, 2016, 1:47 AM), <https://thinkprogress.org/what-hillary-clinton-really-said-about-open-borders-9c005c2b6d16/>. After this quote was leaked, Clinton claimed that she was referring only to cross-border trade in energy. This would seem to dissolve the distinction that everyone else makes between free trade and the open borders that exist within the United States and the European Union. Moreover, the structure of the sentence pretty clearly implies that green energy is a distinct part of the dream, not the sole feature of a “hemispheric common market.” Clinton has refused to release a full transcript of the speech, which might have resolved whatever ambiguity can be found in the leaked quotation.

<sup>3</sup> See Patrick Wintour, *Hillary Clinton: Europe Must Curb Immigration to Stop Rightwing Populists*, GUARDIAN (Nov. 22, 2018, 9:00 AM), <https://www.theguardian.com/world/2018/nov/22/hillary-clinton-europe-must-curb-immigration-stop-populists-trump-brexit> (“I admire the very generous and compassionate approaches that were taken particularly by leaders like Angela Merkel, but I think it is fair to say Europe has done its part, and must send a very clear message—‘we are not going to be able to continue provide refuge and support’—because if we don’t deal with the migration issue it will continue to roil the body politic.”).

<sup>4</sup> See, e.g., Press Release, Mark Pocan, U.S. Representative, House of Representatives, Members of Congress Introduce Legislation to Terminate ICE and Transfer Critical Functions to Other Agencies (July 12, 2018), <https://pocan.house.gov/media-center/press-releases/members-of-congress-introduce-legislation-to-terminate-ice-and-transfer> (advocating abolition of the federal agency responsible for investigations of immigration violations, apparently because it has not focused exclusively on “hardened criminals, gangs and terrorists”); Roque Planas, *It’s Time to Decriminalize Immigration, Say Top Texas Dems*, HUFFPOST, (Aug. 23, 2018, 2:17 PM), [https://www.huffingtonpost.com/entry/time-to-decriminalize-immigration-top-texas-democrats\\_us\\_5b7c3985e4b0348585fb0db5?ylo](https://www.huffingtonpost.com/entry/time-to-decriminalize-immigration-top-texas-democrats_us_5b7c3985e4b0348585fb0db5?ylo). The policy that Hillary Clinton has publicly forsworn, moreover, has no shortage of proponents. See, e.g., Bryan Caplan, *Why Should We Restrict Immigration?*, 32 CATO J. 5, 6 (2012) (declaring the existence of a moral presumption in favor of open borders and applying a kind of strict scrutiny analysis to laws that restrict immigration); *Pro-Open Borders People*, OPEN BORDERS, <https://openborders.info/pro-open-borders-people/> (last visited Feb. 19, 2019) (listing people who support open borders).

this field generally seem to interpret the Constitution and other laws in ways that tend to advance their own preferences. Those preferences run pretty strongly against restrictionist policies.

I am no expert, nor even much of a dabbler, in the intricacies of the statutory and regulatory framework. Nor do I have strong views about immigration policy. Every set of policies, existing and proposed, contains a complicated mix of potential costs and benefits to the nation as a whole, and to various groups that have conflicting factional interests. There is also considerable uncertainty about how the costs and benefits of various policy options would play out over time. High-decibel moralizing and self-confident predictions from advocates of various ideological agendas are frequently accompanied by fallacious arguments and slogans that are unmoored from reality.<sup>5</sup> I'll confess to thinking that the deportation of millions of peaceable aliens is no more practicable than it would be humane. But neither do I think that refusing admission to people who chanced to be born outside our borders is a grotesque injustice that demands correction.<sup>6</sup> Identifying the optimal policy mix, which must lie somewhere between these poles, is not an achievement to which I can lay claim.

My contribution to this Symposium will focus on broader questions involving federalism. I believe that the Supreme Court's immigration jurisprudence is fundamentally misguided, in the sense that it has little basis in the original meaning of the Constitution. In this Article, I will explain why I think so and what the Court might do to ameliorate the effects of its past mistakes without overruling a raft of settled precedents.

Part I analyzes the text of the Constitution, which offers a reasonably clear allocation of authority over immigration between the state and federal governments. The Foreign Commerce Clause empowers Congress to limit the entry of aliens onto American soil, and the Naturalization Clause authorizes Congress to set uniform criteria for admission to American citizenship. Nothing on the face of the Constitution permits Congress to displace the states' residual authority over aliens, which includes the power to exclude or expel unsuitable persons from their own territory.

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<sup>5</sup> For an accessible and non-ideological introduction to the economics of immigration policy, see generally GEORGE J. BORJAS, *WE WANTED WORKERS: UNRAVELING THE IMMIGRATION NARRATIVE* (2016).

<sup>6</sup> Cf. Ilya Somin, *The Hereditary Aristocracy of Citizenship*, *VOLOKH CONSPIRACY* (July 7, 2018, 6:20 PM), <https://reason.com/volokh/2018/07/07/the-hereditary-aristocracy-of-citizenship> (maintaining that citizenship, much like membership in old-time aristocracies, “force[s] many people into poverty and oppression based largely on circumstances of birth,” and thus “often perpetrates comparably grave injustice”). In my view, it is unjust to conflate a democratically adopted national decision to withhold the privileges of citizenship from outsiders with the oppression of a subordinate population by a hereditary political class.

Part II reviews early debates in Congress about the scope and nature of federal power over immigration. There were important disagreements, some of which resemble today's policy debates, but Congress generally refrained from going much beyond what the text of the Constitution pretty clearly authorizes.

Part III traces the evolution of Supreme Court doctrine. The Court began by rooting federal immigration authority primarily in the Foreign Commerce Clause, where it belongs, but then misinterpreted that Clause. In the late nineteenth century, the Justices made a dramatic and largely unexplained shift to a non-textual theory under which broad federal authority over immigration and aliens is treated as an inherent aspect of American sovereignty.

Part IV shows that this doctrinal shift may not have had much practical significance. In non-immigration contexts, the Court eventually interpreted the Commerce Clause itself in a way that gave Congress practically the same far-reaching authority that the inherent power theory bestows in the immigration field. Thus, even if the Court had stuck with the Foreign Commerce Clause as the primary source of federal authority over immigration, the result would likely have been much the same as what the Court has mistakenly put in its place.

Part V assumes that the Court is very unlikely to reconsider the well-established inherent power theory. In recent decades, however, the Justices have been experimenting with doctrinal devices designed to put some limits on the almost unlimited Commerce Clause authority that previous cases had mistakenly conferred on Congress. The Article concludes with two examples showing how these limiting doctrines can and should be used to resolve recent immigration controversies in which some states have desired to pursue policy objectives to which federal officials object.

## I. THE CONSTITUTIONAL TEXT

American federalism, properly understood, rests on two principles that are derived from the language and structure of the Constitution. First, the federal government has only those powers that have been delegated to it in the Constitution, either expressly or by clear implication. Second, and correlatively, the states possess all powers that have not been taken away from them—either expressly or by clear implication—by the Constitution or a valid federal law.<sup>7</sup>

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<sup>7</sup> For a model of how these principles should be applied, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845–926 (1995) (Thomas, J., dissenting).

Article I, Section 8 does not refer expressly to immigration. It does contain a clause giving Congress the power to establish a uniform rule of naturalization, and Congress exercised that power right off the bat in the First Congress.<sup>8</sup> Naturalization laws can and do affect immigration, and the debate about the first naturalization bill in the House resembled today's policy disputes in some respects. Some legislators, for example, worried that too much immigration, especially by the wrong kind of people, would be detrimental to the country.<sup>9</sup> Others worried that erecting obstacles to citizenship would discourage badly needed workers and investors from coming to America.<sup>10</sup> Accordingly, there were different views about whether the path to citizenship should be relatively short and easy or more demanding.<sup>11</sup>

During that debate, however, no one suggested that the Naturalization Clause gave Congress any power to control immigration itself. For good reason. A rule of naturalization specifies the conditions and procedures under which an alien may become a citizen, which has serious implications because the Privileges and Immunities Clause curtails the right of state governments to exclude or discriminate against citizens from other states.<sup>12</sup> A uniform national rule of naturalization was the obvious way to address the negative externalities that could arise if some states naturalized too many people, or too many people considered undesirable by other states.<sup>13</sup> This solution has no necessary implication for rules under which aliens may be admitted to or excluded from a state's own territory, or about the regulation of their rights and obligations while they are present on her soil. The need for federal discretion to control naturalization does not imply a need to control immigration, as members of the First Congress recognized.<sup>14</sup>

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<sup>8</sup> U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . .”); Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

<sup>9</sup> See 1 ANNALS OF CONG. 1147–64 (1790) (Joseph Gales ed., 1834) (reporting a House debate on naturalization bill).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> 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.”).

<sup>13</sup> See THE FEDERALIST NO. 42 (James Madison) (Gideon ed., 1818).

<sup>14</sup> Several Members of the First Congress declared that they lacked authority to displace state decisions about the substantive rights and privileges of their citizens and objected to a proposal imposing residence requirements for holding political offices. See 1 ANNALS OF CONG., *supra* note 9, at 1147–64. This proposal was dropped, and the enacted statute went so far as to include this proviso: “That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed.” 1 Stat. at 104.

Article I contains another provision that does appear to give Congress a general authority over immigration, namely the Foreign Commerce Clause.<sup>15</sup> The word “commerce” can refer to almost any form of intercourse, and the migration of people is not very different from the import of goods and services.<sup>16</sup> The language of the Migration or Importation Clause,<sup>17</sup> moreover, plainly covers free persons and indentured servants, as well as slaves.<sup>18</sup> What would be the point of putting an

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations . . .”).

<sup>16</sup> One might argue that migration into the country does not qualify as commerce because no formal business arrangement is necessarily involved in any particular crossing of the border. Migration, however, generally does entail some kind of commercial transaction, such as paying somebody to transport or guide the migrant, just as a foreigner who wants to send a gift to someone in the United States must ordinarily pay someone to convey the item across our borders. Thus, the monopoly law at issue in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), was a regulation of interstate commerce, even though some of the ferry passengers who traveled from New Jersey to New York may have had non-commercial reasons for making the trip.

Even in cases where people simply walk across the border, that act is almost always part of an endeavor aimed at consummating commercial exchanges after they enter the United States, which would seem to make their migration regulable pursuant to the Necessary and Proper Clause. If there are isolated cases of migration totally lacking in any commercial element, and thus perhaps not covered by a technical reading of the word “commerce” in the Constitution, the states would have authority to provide by law for the migrants’ exclusion and expulsion.

<sup>17</sup> 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, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).

<sup>18</sup> It has been asserted, occasionally during the founding period and more commonly since that time, that the Migration or Importation Clause applied only to slaves. There was, however, no consensus during the founding period about the existence of an unstated proviso confining this clause to the slave trade. See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 82 n.572 (2002) (citing comments on both sides of the issue). If the Framers merely wanted to avoid referring expressly to the “peculiar institution,” they could have done so without including the word “Migration.” Chief Justice Marshall made the obvious point about the Constitution’s text:

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

*Gibbons*, 22 U.S. at 216–17. Even if the word “Migration” had been omitted, the constitutional language would apparently still not have referred solely to the slave trade. See Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 761 (1996) (“Indentured servants were simultaneously individuals who increased population and a pool of bound labor. They were considered a commodity; their movement was part of a transatlantic commerce. . . . [T]he transportation of indentured servants was generally perceived as a commerce of ‘imported’ persons.”).

*The Federalist* is sometimes invoked as support for the slavery-only interpretation. Writing as Publius in *Federalist* No. 42, Madison said that the Constitution’s power to regulate foreign commerce would include a power to prohibit the importation of slaves after 1808. THE FEDERALIST NO. 42, *supra* note 13, at 215 (James Madison). That is indisputable. But the undoubted applicability of the Clause to the slave trade does not imply that it was inapplicable

expiration date on this prohibition unless Congress could begin exercising its regulatory power at the end of the period?<sup>19</sup> And where would this power come from, if not from the Foreign Commerce Clause?

The Foreign Commerce Clause is the most obvious source of congressional power to regulate immigration, and nothing on the face of the Constitution forbids the states from continuing to exercise the same power, as they had been doing before the Constitution was adopted and would continue to do for at least twenty years afterward. The Supremacy Clause undoubtedly implies that Congress can preempt such regulations,<sup>20</sup> but that is all it does. And nothing on the face of the Constitution deprives the states of their authority to regulate aliens residing within their borders, or even to exclude them from their territory.<sup>21</sup>

This straightforward reading of the Constitution's text may sound radically out of step with mainstream thought today. It is certainly not the Supreme Court's chosen doctrine, and it is probably safe to say that it never will be. But that doesn't make it wrong, especially when one considers how inconsistent the Court itself has been over time and how analytically weak and confused the current state of its doctrine is.

## II. CONGRESS WEIGHS IN ON THE REGULATION OF ALIENS

Specialists in the field have written detailed studies of America's immigration debates and the tortuous evolution of Supreme Court

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elsewhere, and Madison drew no such inference. He also said the Clause was not "calculated to prevent voluntary and beneficial emigrations from Europe to America." *Id.* at 217. This was also quite true. Before 1808, the states had unfettered power to authorize and encourage such emigration, and nothing in the Clause suggests that either the states or the general government should prevent such commerce from continuing after 1808. Madison was a careful writer, and a careful reading of these passages in *The Federalist* provides no evidence that the Clause was understood to apply only to the slave trade.

<sup>19</sup> *Cf. Gibbons*, 22 U.S. at 191 ("It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend.")

<sup>20</sup> U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

<sup>21</sup> In fact, the states continued to exercise a nearly plenary authority over immigration by non-citizens, as well as over resident aliens, for many decades after the Constitution was adopted. From 1788–1789 alone, four states adopted laws banning entry by anyone convicted of a crime. During the early nineteenth century, states experimented with a variety of laws designed to exclude or expel paupers and people carrying infectious diseases. States also adopted a variety of laws regulating or forbidding the migration of slaves and free blacks. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 11–12, 19–43 (1996).

doctrine, which I will not attempt to replicate.<sup>22</sup> It will suffice to touch here on a few of the most important historical and jurisprudential moments.

The first significant debate about the regulation of aliens came in 1798, in what was also the first great national controversy about federalism.<sup>23</sup> The context was an undeclared and politically divisive naval war with France. Congress was dominated by Federalists, who pushed through several bills that purported to strengthen national security.<sup>24</sup> Jeffersonians strongly opposed the Adams Administration's hostility toward the French Revolution and saw the new laws as devices for suppressing domestic political dissent.<sup>25</sup> Indeed, the Jeffersonians thought the Federalists were trying to destroy their political party, and they fought back with vigor.<sup>26</sup> The intensity of the opposition to these Alien and Sedition Acts was so strong that Madison and Jefferson induced the legislatures of Virginia and Kentucky, respectively, to declare some of them unconstitutional and to urge resistance against their enforcement.<sup>27</sup> That storm passed, as one hopes that today's divisive debates will also subside. I will focus here on certain legal questions raised by these controversial statutes.

There were two Alien Acts. The Alien Enemies Act generated little controversy at the time, and it remains on the books in a slightly modified form today.<sup>28</sup> This statute authorized the President to deport citizens or subjects of a nation with which we were at war.<sup>29</sup> It would be hard to deny that this is a necessary and proper means of carrying out the war powers expressly granted by the Constitution to Congress and the President. Even the Jeffersonians in Congress ended up supporting this bill.<sup>30</sup>

The so-called Alien Friends Act presented a tougher case.<sup>31</sup> This statute gave the President virtually unfettered authority to deport any resident alien he judged to be dangerous to the peace and safety of the nation.<sup>32</sup> The House of Representatives conducted an extended debate about which

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<sup>22</sup> A useful study of materials bearing on my topic can be found in Cleveland, *supra* note 18, at 81–163.

<sup>23</sup> Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927 (1991).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 928.

<sup>26</sup> *Id.*

<sup>27</sup> THE AMERICAN REPUBLIC: PRIMARY SOURCES 398–400 (Bruce Frohnen ed., 2002).

<sup>28</sup> Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended 50 U.S.C. § 21 (2012)).

<sup>29</sup> *Id.*

<sup>30</sup> See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 255 (1997) (“Republicans sputtered over the vagueness of the alien enemies bill when it was first introduced but did not attack it in principle, and it was they who finally insisted on its enactment once some of its more objectionable features were withdrawn.” (footnotes omitted)).

<sup>31</sup> Act of June 25, 1798, ch. 58, 1 Stat. 570.

<sup>32</sup> *Id.*



provision of the Constitution, if any, authorized the bill.<sup>33</sup> Proponents offered a number of theories about the constitutional basis for the deportation power which ranged from the dubious to the borderline absurd.

One seemingly plausible suggestion relied on the Foreign Commerce Clause, whose plain language allows the exclusion of aliens. But how does that imply authority to *expel* aliens after they have become lawful residents? One Member defended the bill on the ground that foreigners generally came here for commercial purposes, but that claim was rebutted with the observation that the bill did not regulate merchants as such, and that it had nothing to do with how commerce was carried on.<sup>34</sup>

Another colorable argument was that the bill represented a reasonable extension of the principle that justified the Alien Enemy Act. Aliens from nations with which we are not at war, or not yet at war, might be just as dangerous as people who are technically enemy aliens.<sup>35</sup> No doubt, but the same could be said of slaves.<sup>36</sup> If all of the slaves were subject to deportation at the discretion of Congress, the abolition of slavery could have been accomplished by an act of the national legislature. Nobody thought that would be constitutional. An even more outlandish argument rested on references to the general welfare in the Preamble and in the Taxation Clause.<sup>37</sup> Such theories make the enumeration of powers in Article I sheer surplusage, and would have authorized just about anything, including for example the abolition of slavery.<sup>38</sup>

Finally, in an argument completely detached from the text of the Constitution, an inherent federal power to expel aliens was conjured out of the nature of government.<sup>39</sup> This may be the most far-fetched argument of them all since it evades the obligation to show that the power was given to the federal government rather than left with the states. It is also the very argument on which the Supreme Court eventually settled, as we shall see.

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<sup>33</sup> There was also debate about whether the measure violated the civil rights of aliens and whether it delegated too much discretion to the President. I leave these issues aside in order to focus on the principles of federalism.

<sup>34</sup> 8 ANNALS OF CONG. 1958, 1974–75 (1798) (Joseph Gales ed., 1851).

<sup>35</sup> *Id.* at 1986–87. The Sedition Act was defended by John Marshall and others with a similar argument. See Report of the Minority on the Virginia Resolutions, reprinted in 5 THE FOUNDERS' CONSTITUTION 136–39 (Philip B. Kurland & Ralph Lerner eds., 1987); Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435 (2007). That is a sign of the seductiveness of such arguments, not of their soundness.

<sup>36</sup> 8 ANNALS OF CONG. *supra* note 34, at 1996.

<sup>37</sup> *Id.* at 1969.

<sup>38</sup> *Id.* at 1968.

<sup>39</sup> *Id.* at 1969–70.

The Virginia and Kentucky Resolutions very plausibly denied that the federal government had been delegated authority to displace the states' power over resident aliens during peacetime.<sup>40</sup> The Alien Friends Act was apparently never enforced, and it expired in 1800. In the following decades, Congress did next to nothing in the way of regulating immigration (except for outlawing the slave trade) or resident aliens (outside the naturalization context). This left the states free to adopt regulations of their own, including laws that excluded undesirable aliens, and the states did exactly that.<sup>41</sup>

### III. THE SUPREME COURT TAKES OVER

The law might have been left right there, which is where the text of the Constitution seems to put it. Unfortunately, the Supreme Court embarked on one of its weirder jurisprudential journeys, which created what we know as the dormant or negative commerce power, and eventually what is known as the inherent power doctrine.

*Gibbons v. Ogden* drew the plausible inference that Congress has plenary authority to regulate commerce, "that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>42</sup> This was almost enough to answer the constitutional question posed by the *Gibbons* case: because the Court interpreted a federal statute (however dubiously) to preempt New York's ferry boat monopoly, this inference effectively decided the issue.<sup>43</sup> Many questions were left open about the line dividing commerce internal to a state from interstate and foreign commerce and about the reach of the Necessary and Proper Clause. Some of those questions have proved to be very challenging. But few serious questions need ever have arisen about the authority of the states to regulate interstate and foreign commerce in the absence of a preemptive federal law.

The text of the Constitution answers that question with about as much clarity as one could hope for. Why would one even think that the

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<sup>40</sup> THE AMERICAN REPUBLIC, *supra* note 27, at 399–400.

<sup>41</sup> NEUMAN, *supra* note 21, at 19–43.

<sup>42</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

<sup>43</sup> Justice Johnson argued, quite persuasively in my view, that New York's statute was not preempted by the federal law on which Chief Justice Marshall relied. Johnson therefore could not avoid the question of state power to regulate interstate commerce, as Marshall did. He answered the question with an extensive argument in favor of interpreting the Commerce Clause to grant an exclusive power to Congress. *Id.* at 222–40 (Johnson, J., concurring).

Constitution took this power away from the states? The Framers were quite capable of assigning certain powers exclusively to the federal government. Article I, for example, gives Congress the power to “exercise *exclusive* Legislation in all Cases whatsoever” over the district established as the seat of government.<sup>44</sup> Similarly, the Constitution expressly prohibits the states from exercising certain powers that are given to the federal government, such as making treaties, coining money, and emitting bills of credit.<sup>45</sup> Some powers, moreover, may be exercised by the states only with the consent of Congress.<sup>46</sup> The text of the Constitution uses none of these locutions to abolish or limit the preexisting authority of the states over interstate and foreign commerce. Nor does the Constitution give Congress a power to establish “uniform” laws on this subject, which might at least have suggested that once Congress enters the field the states are implicitly ousted from it.<sup>47</sup>

Unfortunately, Marshall’s opinion in *Gibbons* contains some obiter dicta to the effect that the following argument has “great force”:

[T]hat, as the word ‘to regulate’ implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a *uniform whole*, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.<sup>48</sup>

Whatever force such an argument might have had in a case dealing with the Constitution’s provisions conferring power to establish a “uniform” rule of naturalization or “uniform” laws on bankruptcies, it has no force at all as an inference based entirely on the word “regulate.” Nor has the Court ever accepted the argument to which Marshall attributed “great force.”

Some Justices have argued, a bit more plausibly, that the purpose of the Commerce Clause implies that the states must be deprived of a concurrent regulatory power. That purpose is usually understood as the prevention of friction among the states, or the prevention of economic protectionism, or both.<sup>49</sup> Apart from the lack of support for an inference of exclusivity in the

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<sup>44</sup> U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

<sup>45</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>46</sup> U.S. CONST. art. I, § 10, cls. 2–3.

<sup>47</sup> That would not by any means be a necessary inference, as the Supreme Court recognized at an early date with respect to the bankruptcy power. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (holding that the congressional power to establish “uniform Laws on the subject of Bankruptcies throughout the United States” is concurrent rather than exclusive). But at least it would have been an inference with some connection to the Constitution.

<sup>48</sup> *Gibbons*, 22 U.S. at 209 (emphasis added).

<sup>49</sup> *See, e.g., id.* at 222–40 (Johnson, J., concurring); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S.

text of the Constitution, the arguments resting on the purpose of the Clause are manifestly fallacious. The Constitution contains two other provisions that allow those very purposes to be achieved without any assistance from a judicially concocted dormant commerce power. First, the Privileges and Immunities Clause of Article IV forbids the states from engaging in much of the behavior that has so concerned those who have thought the states require judicial supervision. Second, whatever is left over could easily be addressed through congressional exercise of the regulatory authority actually provided in the Commerce Clause.

Although the Court never adopted the exclusivity theory alluded to in *Gibbons*, another dictum from that case had more influence, at least for a while. Acknowledging that the states undoubtedly retain authority over an immense mass of legislation dealing with such things as health, transportation, and local commerce, Marshall suggested that they might sometimes use the so-called police power to do just what Congress can do under the Commerce Clause:<sup>50</sup>

All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.<sup>51</sup>

This principle enabled the Court to avoid resolving the exclusivity issue in *Willson v. Black-Bird Creek Marsh Co.*<sup>52</sup> and *New York v. Miln*.<sup>53</sup> *Miln* deserves special attention here because it upheld a state immigration law which required the master of a vessel to give local officials a list with the names and other information about all passengers being brought into the City of New York. Justice Barbour's majority opinion stressed that "a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States."<sup>54</sup> *Gibbons* had expressly approved local inspection laws that protected against tainted goods, and *Miln* recognized an equal right of the states to guard against the moral or economic pestilence of paupers, vagabonds, and convicts.<sup>55</sup>

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525, 532–36 (1949); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

<sup>50</sup> *Gibbons*, 22 U.S. at 203–04.

<sup>51</sup> *Id.* at 204.

<sup>52</sup> 27 U.S. (2 Pet.) 245 (1829) (relying, implicitly, on a police power justification to uphold a state law that authorized the building of a dam that obstructed a navigable waterway of the United States).

<sup>53</sup> 36 U.S. (11 Pet.) 102, 132–133 (1837).

<sup>54</sup> *Id.* at 139.

<sup>55</sup> *Id.* at 142–43; *see also id.* at 132 ("We shall not enter into any examination of the question whether

Two subsequent cases featured vigorous but inconclusive skirmishes about the exclusivity issue.<sup>56</sup> In *Cooley v. Board of Wardens*,<sup>57</sup> the Court finally put the general theory to rest. The case involved a state law requiring the use of local pilots in the Port of Philadelphia. This was undoubtedly a regulation of navigation and, thus, a regulation of interstate and foreign commerce under *Gibbons*. Rather than pretend that the law was actually an exercise of the police power, and that this case was distinguishable from *Gibbons*, which would have been hard to do with a straight face, Justice Curtis invented a whole new theory. Subjects of the federal commerce power that are “in their nature national, or admit only of one uniform system . . . require exclusive legislation by Congress.”<sup>58</sup> The local pilot law at issue was upheld because the Court concluded that a diversity of rules was needed to deal with the peculiarities of navigation in various ports.<sup>59</sup>

This theory has no basis in the text of the Constitution, which does not distinguish between “national” commerce and “local interstate” commerce or “local foreign” commerce. By liberating constitutional doctrine from the Constitution’s text (and its history as well), the Court empowered itself to become an almost unfettered arbiter of the extent to which state governments would be allowed to govern anything that can be characterized as commerce. *Cooley* even went so far as to proclaim that Congress is forbidden to give states the privilege of regulating “national” interstate and foreign commerce.<sup>60</sup> Although the Court later relented on this issue,<sup>61</sup> its own power has not been much reduced as a practical matter.

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the power to regulate commerce, be or be not exclusive of the states, because the opinion which we have formed renders it unnecessary: in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states.”).

Justice Story’s lone dissent maintained, quite correctly, that if a regulation like the one at issue in this case had been adopted by Congress, it would have been authorized by the Commerce Clause. That becomes irrelevant once one accepts Marshall’s statement in *Gibbons* that the same or very similar actions can be taken pursuant to the federal commerce power and the states’ police power. In a shockingly blatant mischaracterization of the public record, however, Story maintained that this rendered the New York statute unconstitutional because Chief Justice Marshall had resolved the exclusivity issue in *Gibbons*. *See id.* at 158 (Story, J., dissenting). He even went so far as to maintain that Marshall, who had died while *Miln* was pending before the Court, agreed that *Gibbons* had adopted the exclusivity theory. *Id.* at 161.

<sup>56</sup> Passenger Cases, 48 U.S. (7 How.) 283 (1849); License Cases, 46 U.S. (5 How.) 504 (1847). Although several Justices addressed the exclusivity issue in their opinions, there was no majority opinion in either case.

<sup>57</sup> 53 U.S. (12 How.) 299 (1851).

<sup>58</sup> *Id.* at 319.

<sup>59</sup> *Id.* at 319–20.

<sup>60</sup> *See id.* at 318.

<sup>61</sup> *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

With respect to typical commercial activities, the Justices eventually erected a Rube Goldberg dormant commerce contraption that continues to divide the Justices and to baffle anyone who tries to make sense of their jurisprudence.<sup>62</sup> With respect to immigration, however, they took a somewhat different path.

The first step was to use *Cooley's* theory to create a new rule of federal exclusivity for some immigration cases. *Miln* had upheld a state immigration regulation as a valid exercise of the police power, and *Cooley's* immediate effect was therefore to extend protection for state prerogatives even to certain regulations of interstate commerce itself. *Henderson v. Mayor of New York*,<sup>63</sup> however, deployed the judicial discretion inherent in the *Cooley* test to go in the opposite direction. The Court now invoked *Cooley* to invalidate a state law that addressed the threat of indigent immigrants by requiring shipowners to post a bond or pay a fee for each passenger brought into the state.<sup>64</sup> It was clear, thought the Court, that the laws governing the right to land passengers from other countries ought to be the same in all American ports, and it was *unclear* whether the states have a right to do anything at all to protect themselves from undesirable immigrants if Congress does not do it for them.<sup>65</sup>

Simultaneously, *Chy Lung v. Freeman*<sup>66</sup> struck down a California statute that required a bond from a ship's owner or master when a state inspector suspected specific immigrants of having undesirable traits such as lunacy, physical handicaps, criminal records, or bad morals. In this case, the Court at least offered a reason for disabling the states from screening immigrants: "[O]therwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."<sup>67</sup> In neither *Henderson* nor *Chy Lung*, however, did the Court explain why the Constitution does not trust Congress to use its unquestioned Commerce Clause power to prevent the bad effects that so worried the Justices. This should be no surprise as there is nothing in the Constitution that evinces such mistrust. These cases thus confirm that the *Cooley* theory was not only unmoored from the Constitution's text but also

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<sup>62</sup> For a review, see *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259–65 (1987) (Scalia, J., concurring in part and dissenting in part). For recent examples of the continuing confusion, see, for example, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) or *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

<sup>63</sup> 92 U.S. 259 (1875).

<sup>64</sup> *Id.* at 272–73.

<sup>65</sup> *Id.* at 273, 275.

<sup>66</sup> 92 U.S. 275 (1875).

<sup>67</sup> *Id.* at 280. Once again, the Court expressed doubt about the right of states to do anything to protect themselves from undesirable immigrants and stressed that, even if such a right exists, it "can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." *Id.*

unchained from the most basic principles of enumerated and separated powers.

Those structure-of-government principles were soon weakened in a different way. *Chy Lung*'s allusion to foreign relations provided the Court's very odd rationale for exercising a power given by the Constitution not to the judiciary but to Congress. In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*,<sup>68</sup> the Court addressed the flip side, pointing to foreign relations as the reason for construing congressional authority over aliens very broadly. The California Gold Rush had attracted immigrants from countries around the world, including China. In 1868, the United States entered into a treaty with China for other reasons, and Congress subsequently enacted implementing legislation that regulated the treatment of Chinese nationals in America.<sup>69</sup> By 1878, Congress was coming under tremendous political pressure to curtail the numbers of Chinese on the west coast.<sup>70</sup> Most of them were unmarried men who worked as laborers, often underbidding their domestic competitors, and they were thought to be unwilling to assimilate into American life. Congress finally enacted a statute providing, among other things, that certain Chinese nationals who went back to China would not be readmitted to the United States, even if they had been given certificates authorizing their reentry when they left.<sup>71</sup>

*Chae Chan Ping* found that this statute contravened express provisions of the 1868 treaty, but held that Congress has the authority to repeal or modify treaties whenever it sees fit, just as it may repeal or modify statutes.<sup>72</sup> The Court might then have upheld the statute as a regulation of foreign commerce, which it obviously was. Instead, the Court suggested that the power to exclude aliens is an aspect of sovereignty that the federal government must possess because the United States is a sovereign nation.

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . .

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence

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68 130 U.S. 581 (1889).

69 Cleveland, *supra* note 18, at 112–16.

70 *Id.*

71 *Id.*

72 *Chae Chan Ping*, 92 U.S. at 609.

and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.<sup>73</sup>

One might try reading this passage to mean no more than that the enumerated powers of Congress convey the authority to exclude aliens from the United States. This would be wishful thinking. The list of sovereign powers with which the passage concludes contains items that have nothing to do with immigration, and the Court does not attribute the exclusion power to any specific constitutional provisions. Much of the opinion, moreover, is occupied with establishing the proposition that the exclusion power is an aspect of sovereignty under international law. The sovereign American states no doubt possessed that power before the Constitution was adopted, but whether this (or any other) aspect of sovereignty remains with the states, or was delegated to the new federal government, is a question to which international law is hardly dispositive, if it is even relevant.

One might argue that the Court's verbiage amounts to little more than harmless error because it is so obvious that the regulation at issue in *Chae Chan Ping* was a valid exercise of the foreign commerce power. The last paragraph of the Court's opinion seems to offer some support for this reading because it distinguishes the challenged statute (which involved exclusion of aliens) from the 1798 Alien Friends Act, which involved *expulsion*, and notes that the constitutionality of the latter statute had been challenged "by men of great ability and learning."<sup>74</sup> In *Fong Yue Ting v. United States*, however, the Court declared that the "absolute and unqualified" right to expel aliens rests on the same ground as the right to exclude.<sup>75</sup> Even more clearly than in *Chae Chan Ping*, the Court rested its holding entirely on a theory of sovereignty associated with international law and completely detached from the constitutional principle of limited and enumerated powers.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

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<sup>73</sup> *Id.* at 603–04; *see also id.* at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one." (emphasis added)).

<sup>74</sup> *Id.* at 610.

<sup>75</sup> 149 U.S. 698, 707 (1893).



In the recent case of *Nishimura Ekiu v. United States*, 142 U.S. 651, 659, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said ‘It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress.’

....

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union, and the only American flag known throughout the world is the flag of the United States.<sup>76</sup>

This doctrine has been repeatedly reaffirmed. As the Court recently put it:

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government’s constitutional power to ‘establish a uniform Rule of Naturalization,’ and its inherent power as sovereign to control and conduct relations with foreign nations.<sup>77</sup>

The Court never explained why it shifted from the Commerce Clause to this inherent power theory based on international law. But the shift is now so firmly embedded in the case law that the principle of limited and enumerated federal powers seems beyond recovery.<sup>78</sup>

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<sup>76</sup> *Id.* at 704–05, 711.

<sup>77</sup> *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (internal citations omitted) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982); then quoting U.S. CONST. art. I, § 8, cl. 4).

<sup>78</sup> As *Henderson* indicated even before the inherent power theory was adopted, the Court appears to regard authority over immigration as exclusively federal. For an argument that this should be treated as a question that is still open, and that classic values of federalism should be operable, see Claire Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008).

The much-criticized “plenary power doctrine,” which is a kind of offshoot of the inherent power theory, has been used to limit the individual constitutional rights available to aliens. The Supreme Court’s decisions have been trending away from this theory of absolute power in the context of individuals, but not in the context of the rights of states. See Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 496, 496 n.46 (2018). One commentator suggests that the Court has adopted an especially aggressive preemption approach in the immigration context as a substitute in part for a stronger equal protection doctrine that would give illegal aliens more protection. Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

#### IV. THE COMMERCE CLAUSE ALTERNATIVE TO THE INHERENT POWER THEORY

Perhaps the Court's repudiation of the structural Constitution has made no practical difference. If the Justices had continued to look primarily to the Commerce Clause as the source of authority for immigration regulations, as they did until the late nineteenth century,<sup>79</sup> they might still have ended up with a jurisprudence effectively indistinguishable from what they have erected on the basis of the inherent power fiction. The inherent power theory was adopted at a time when the Court was attempting to develop interstate commerce doctrines that would put meaningful limits on congressional power to displace the regulatory authority of the states.<sup>80</sup> Perhaps the Justices were more reluctant to interfere with congressional discretion in a context that might have implications for our foreign relations.<sup>81</sup> In the end, however, the Court wound up in pretty much the same place with respect to ordinary commerce as it did with respect to immigration.

The Court's experiments with limitations on the commerce power were not successful. This case law never came close to generating an analytically elegant doctrine, let alone one that could stand up against the political forces driving Congress to regulate more and more of American life. Beginning with several famous decisions associated with the New Deal, the Court appeared for many decades to have conferred a general police power on Congress.

If a small business buys and sells products across state lines, that's all it takes to justify congressional regulation of labor relations within the company.<sup>82</sup> The federal government can decide how much workers must be paid and how long they may work, so long as their employer produces goods destined for another state.<sup>83</sup> Limits can be put on the crops a farmer may grow, even for his own use, if such use by enough farmers could affect

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<sup>79</sup> I say "primarily" because some regulations can no doubt be justified under other provisions of the Constitution, as the 1798 Alien Enemies Act was. The federal government's general responsibility for the conduct of foreign relations, however, cannot create a general power to regulate resident aliens for the same reason that the Necessary and Proper Clause did not justify the Alien Friends and Sedition Acts of 1798. *Cf. Medellin v. Texas*, 552 U.S. 491, 498–99 (2008) (refusing to preempt state law limits on successive habeas corpus petitions that were alleged to conflict with American treaty obligations and with the President's discretion to manage the nation's foreign relations).

<sup>80</sup> *See e.g.*, *Adair v. United States*, 208 U.S. 161 (1908); *Hopkins v. United States*, 171 U.S. 578 (1898); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *The Trademark Cases*, 100 U.S. 82 (1879); *United States v. DeWitt*, 76 U.S. 41 (1870).

<sup>81</sup> *See Cleveland*, *supra* note 18, at 133–34.

<sup>82</sup> *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

<sup>83</sup> *United States v. Darby*, 312 U.S. 100 (1941).

the price of farm products in other states.<sup>84</sup> The commerce power can be used to ban racial discrimination at any small business that uses products from another state or serves customers from other states.<sup>85</sup> A local loan shark can be prosecuted under federal law because some other loan sharks belong to gangs that have interstate operations.<sup>86</sup> Good luck finding anyone who does much of anything that isn't also done by some interstate enterprise, or couldn't affect interstate commerce if enough people did it.

In 1995, the Supreme Court's *Lopez* decision shocked the legal world by finding that Congress had exceeded its Commerce Clause authority when it criminalized the possession of a firearm in or near a school.<sup>87</sup> The Court concluded that the law had nothing to do with commerce or any sort of economic activity, and that the conduct it regulated could not substantially affect interstate commerce through repetition elsewhere.<sup>88</sup> Five years later, the Court reviewed a statute that created a civil cause of action for victims of "gender-motivated violence," and held that Congress may not regulate violent criminal conduct solely because of the aggregate effect of such conduct on interstate commerce.<sup>89</sup>

*Lopez* did not purport to overrule any prior decisions, and the opinion raised more questions about the scope of the commerce power than it answered. But because the Court had finally identified *something* that is beyond Congress's reach, many observers hoped or feared that the decision signaled a coming restoration of the principle of limited and enumerated federal powers.<sup>90</sup> Soon enough, however, any such expectations proved to have been misplaced. Congress reenacted the gun-free school zone law, along with a new provision requiring prosecutors to prove that the firearm had at some time traveled in interstate commerce.<sup>91</sup> *Lopez* had signaled that this was one way for the legislature to convert a local activity into one that Congress could regulate, and the new statute has been upheld.<sup>92</sup> If an object acquires a magical power to subject anyone who possesses it to the regulatory jurisdiction of Congress, merely because the object crossed state lines at some time in the past, the Constitution's principle of enumerated

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<sup>84</sup> Wickard v. Filburn, 317 U.S. 111 (1942).

<sup>85</sup> Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

<sup>86</sup> Perez v. United States, 402 U.S. 146 (1971).

<sup>87</sup> United States v. Lopez, 514 U.S. 549 (1995).

<sup>88</sup> *Id.* at 561–63.

<sup>89</sup> United States v. Morrison, 529 U.S. 598 (2000).

<sup>90</sup> See Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995); Symposium, *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 633 (1996).

<sup>91</sup> See 18 U.S.C. § 922 (2012).

<sup>92</sup> United States v. Dorsey, 418 F.3d 1038 (9th Cir. 2005); United States v. Danks, 221 F.3d 1037 (8th Cir. 1999).

powers is not much more than a guideline for drafting statutes.<sup>93</sup>

Congress has not yet reenacted the sexual violence statute, but it apparently need only add a requirement that a plaintiff prove some kind of interstate nexus. Perhaps the defendant had moved across a state line to attend college.<sup>94</sup> Or perhaps he committed the tort while wearing clothing manufactured in another state or containing materials from out of state. Or perhaps he drove to the scene of the tort in an automobile containing parts manufactured out of state.

In addition to the interstate-nexus gambit, *Lopez* also alluded to regulations forming an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity is regulated.<sup>95</sup> This was the basis on which a federal regulation controlling the consumption of home-grown agricultural products had previously been upheld, and the Court extended its reach by applying it to marijuana grown and consumed in a state that specifically authorized use of the plant for medical purposes.<sup>96</sup>

So far, the Court has recognized only trivial or symbolic limits on the reach of the Commerce Clause. In *NFIB v. Sebelius*,<sup>97</sup> for example, five Justices, including Chief Justice Roberts, concluded that the Commerce Clause does not authorize Congress to force consumers to participate in commerce by purchasing specified kinds of health insurance policies that they don't want. But Roberts then joined the four who dissented from this conclusion in upholding the program anyway. The legal mandate to purchase health insurance, which was enforced by what the statute called a "penalty," was converted by the Court into a mere suggestion, and the penalty was dubbed a tax that consumers were free to avoid by engaging in the kind of commerce Congress wanted to stimulate.<sup>98</sup> Roberts' opinion acknowledged that the only reason to interpret the mandate-plus-penalty as a voluntarily incurred tax was to avoid holding it unconstitutional.<sup>99</sup> To complete the farce, he waved away serious arguments that such a tax would be subject to the Constitution's apportionment requirement with the

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<sup>93</sup> Cf. *United States v. Alderman*, 565 F.3d 641, 646 (9th Cir. 2009) (holding that the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under the Commerce Clause). A petition for certiorari was denied in this case, over the dissent of Justice Thomas (joined by Justice Scalia), 562 U.S. 1163 (2011) (Thomas, J., dissenting).

<sup>94</sup> Cf. *Lopez*, 514 U.S. at 567 (noting that in that case there was "no indication that [the defendant] had recently moved in interstate commerce").

<sup>95</sup> *Id.* at 561.

<sup>96</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>97</sup> 567 U.S. 519 (2012).

<sup>98</sup> *Id.* at 561–74.

<sup>99</sup> *Id.*

question-begging comment that the Court had not previously recognized a category of direct taxes that would include this unprecedented kind of tax.<sup>100</sup>

## V. WHAT NOW?

Although the Supreme Court has been unwilling to recognize any meaningful limits on the scope of congressional power under the Commerce Clause, it has used other techniques to preserve a modest sphere of state autonomy. Nothing about the Court's inherent power theory should prevent those doctrines from being adapted and applied in the immigration field.

Consider, for example, the regulation of the states themselves. Well before *Lopez*, the Court had repeatedly confronted questions about congressional power to regulate the wages and hours of state and local employees. The federal government had engaged in such regulation of private businesses since the New Deal, and Congress began extending coverage to various categories of state employees in the 1960s. In *Maryland v. Wirtz*,<sup>101</sup> the Court upheld the new regulations as a valid exercise of the commerce power. In 1976, *National League of Cities v. Usery*<sup>102</sup> overruled *Wirtz* and sought to articulate a legal test that would limit congressional power over the states. In 1985, *Garcia v. San Antonio Metropolitan Transit Authority*<sup>103</sup> overruled *National League of Cities*, holding that Congress has the same extensive authority to regulate the states and their subdivisions that the Court has given it over private employers. In response to the majority's insistence that the states must rely on the political process for protection against federal overreaching, four Justices vigorously dissented. They refused to acquiesce in what Justices Powell and O'Connor characterized as an abdication of judicial responsibility,<sup>104</sup> or to rely on what Justice O'Connor wryly called Congress's "underdeveloped capacity for self-restraint."<sup>105</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> 392 U.S. 183 (1968).

<sup>102</sup> 426 U.S. 833, 855 (1976).

<sup>103</sup> 469 U.S. 528, 531, 556 (1985).

<sup>104</sup> *Id.* at 567 n.12 (Powell, J., dissenting) ("This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process."); *id.* at 581 (O'Connor, J., dissenting) ("If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.").

<sup>105</sup> *Id.* at 588 (O'Connor, J., dissenting).

A few years later, *Gregory v. Ashcroft*<sup>106</sup> created a new canon of statutory construction designed to restore some protection for the states from federal regulation. Justice O'Connor's majority opinion suggested that *Garcia* should not be considered settled law, but it refrained from overruling it.<sup>107</sup> Instead, the Court adopted a clear-statement rule under which federal regulatory statutes will be deemed to apply to the states only when the text does so without the slightest ambiguity.<sup>108</sup> This interpretive rule reduces the likelihood that Congress will casually or inadvertently regulate the states, and makes it more difficult for courts and executive agencies to find authority for regulations that Congress did not affirmatively enact.

In another post-*Garcia* development, the Court has developed an "anti-commandeering" doctrine that forbids Congress to require states to assist in the administration of federal regulatory programs. *New York v. United States*<sup>109</sup> and *Murphy v. NCAA*<sup>110</sup> held that state legislatures may not be ordered either to enact or refrain from enacting laws. *Printz v. United States*<sup>111</sup> applied the anti-commandeering principle to protect state executive officials from being ordered to administer federal regulatory programs. The doctrine discourages Congress from displacing the regulatory authority of the states because it will often be costlier, in financial and political terms, for the federal government to impose and administer a program itself than to conscript the states as its agents.

A third doctrine involves conditional grants to the states. The Supreme Court has held that Congress may spend money in the pursuit of the general welfare, whether or not the spending would be authorized by any of the specific grants of legislative power in Article I.<sup>112</sup> To call this doctrine dubious would be an understatement. Writing as Publius in *The Federalist*, Madison explained with his customary incisiveness why this conclusion is inconsistent with the text of the Constitution and why it would subvert the Constitution's use of enumeration to limit congressional power.<sup>113</sup> What is

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<sup>106</sup> 501 U.S. 452 (1991).

<sup>107</sup> *Id.* at 464.

<sup>108</sup> *Id.* at 460–61, 467.

<sup>109</sup> 505 U.S. 144 (1992).

<sup>110</sup> 138 S. Ct. 1461 (2018).

<sup>111</sup> 521 U.S. 898, 933 (1997).

<sup>112</sup> *United States v. Butler*, 297 U.S. 1, 65–66, 68 (1936). After endorsing this general proposition, the Court then declared: "We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states." *Id.* at 68. The Court did not explain how these putative rights could have been reserved to the states except through the absence in the Constitution of a delegation to Congress of a power to aid agriculture.

<sup>113</sup> THE FEDERALIST NO. 41, *supra* note 13, at 213–15 (James Madison).

often mislabeled as the Spending Clause gives Congress powers of taxation; it says nothing about spending, and its reference to the general welfare refers only to a purpose for which the taxation power may be exercised. The power to spend money actually arises from the Necessary and Proper Clause, and thus must be anchored in some other specific constitutional authorization.

The Court's misinterpretation of the spending power complements its nearly total abandonment of restrictions on congressional regulatory power under the Commerce Clause. But as with the anti-commandeering doctrine and *Gregory's* clear-statement rule, the Court has at least recognized the need to inhibit the legislature from casually displacing state authority. One way that Congress puts pressure on the states to adopt federal policies is through conditional grants: offers of money that come with provisos requiring recipient states to comply with federal dictates. The Court has tried in various ways to reduce the temptation for abuse of this lever. As *South Dakota v. Dole* noted, if Congress places conditions on grants to the states, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."<sup>114</sup> Another potentially powerful restraint is that the conditions must be related to the federal interest in whatever is being funded.<sup>115</sup>

The Foreign Commerce Clause is fairly read to authorize Congress to limit the admission of aliens, and to enforce its decisions by removing aliens who enter or remain in the United States without federal authorization.

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<sup>114</sup> 483 U.S. 203, 207 (1987) (alterations in original) (internal quotation marks omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

<sup>115</sup> *Id.* at 207–08 (“[O]ur cases have suggested (without significant elaboration) that conditions on federal grants *might be* illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” (emphasis added) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)); *cf. id.* at 213 (O’Connor, J., dissenting) (objecting that the Court’s “application [in this case] of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing”).

The underlying spending is also supposed to be invalid if it does not serve the general welfare, but this restriction has been utterly toothless, as the Court itself seems to have recognized. *See id.* at 207 & n.2. The Court has also noted the obvious rule that conditions on federal grants may not require a state to do something that would be unconstitutional for the state to do on its own, such as violate individual rights protected by the Fourteenth Amendment. *Id.* at 208.

Finally, financial inducements offered to the states may not be so coercive that they go beyond pressure to compulsion. *Id.* at 211. In *NFIB v. Sebelius*, 567 U.S. at 519, 580–83, the Court held that the threatened loss of more than ten percent of a state’s total budget was a “gun to the head” that constituted “economic dragooning.” The Court provided virtually no explanation of where the line might lie between permissibly coercive pressure and impermissibly coercive compulsion, and it seems unlikely that Congress will take steps in the immigration area that come close to crossing whatever line the Court may someday draw.

But that's about it.<sup>116</sup> The Court's inherent power doctrine, standing alone, displaces the police power of the states with respect to the regulation and even expulsion of resident aliens in ways that are generally inconsistent with the original meaning of the Constitution. Because there is almost no chance that the Court will revive the principles of the Constitution itself, it should at least take ameliorative steps akin to those it has taken with respect to the Commerce Clause and the spending power.

Although the three ameliorative doctrines just summarized do not necessarily reflect the original meaning of the Constitution,<sup>117</sup> they do push the outcomes of judicial policymaking in a direction more consistent with the original meaning. For that reason, these existing doctrines should be used, and in some cases extended, to minimize the infringements on state autonomy made possible by the Court's misguided immigration jurisprudence. The principles summarized in *South Dakota v. Dole*, along with the anti-commandeering decisions, can readily reduce one form of federal overreach. The Supreme Court should go even further by applying *Gregory v. Ashcroft's* clear-statement rule in all cases that involve federal intrusions on the power of states to regulate aliens within their borders.

Two examples may be used to illustrate my proposal. First, states that refuse to assist the federal government in enforcing valid federal immigration laws are exercising their inherent constitutional right to regulate or refrain from regulating aliens as they see fit. Similarly, other states are exercising the same constitutional right when they supplement federal efforts to enforce valid federal laws with state regulations that go beyond what the federal government has chosen to adopt. The genuine constitutional right of the states to regulate and even expel aliens from their territory is much broader, but existing judicial doctrine can easily be shaped to recognize at least a modicum of the discretion that the Constitution itself leaves with the state governments.

#### A. Sanctuaries

Many local jurisdictions and some states have adopted so-called sanctuary policies under which they refuse, to one degree or another, to

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<sup>116</sup> There are no doubt some specific and limited circumstances in which Congress does have legitimate grounds for exercising additional powers, such as providing for traditional grants of diplomatic immunity and for the expulsion of enemy aliens during time of war.

<sup>117</sup> See, e.g., Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1960, 1967 (1993) (collecting evidence that the original meaning of the Constitution permits Congress to compel state executive officers to enforce federal law); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 829, 831, 845, 847 (1999) (criticizing *New York* and *Printz*, and proposing an alternative rationale for an anti-commandeering doctrine).



assist or cooperate with the federal agencies charged with enforcing immigration laws.<sup>118</sup> Such cooperation generated some controversies in the 1980s, and federal efforts to enlist state and local agencies in immigration enforcement accelerated after the 9/11 terrorist attacks.<sup>119</sup> Although these efforts slowed in some respects toward the end of the Obama Administration, they have been pushed hard again by the Trump Administration. Several rationales have been advanced for sanctuary policies, perhaps most importantly that local police can more effectively enforce the ordinary criminal law if victims and witnesses are not discouraged from cooperating by fear of trouble arising from their immigration status.<sup>120</sup>

Whatever their merits or shortcomings as law enforcement policies, voluntary efforts by local officials to cooperate with the federal government are commonplace and perfectly legal.<sup>121</sup> Federal efforts to *pressure* local officials to help with immigration enforcement, which intensified in 2017, do raise serious issues. Shortly after his inauguration, for example, President Trump issued Executive Order 13768, which announced that certain federal monies would be withheld from sanctuary jurisdictions.<sup>122</sup> The Administration sought to enforce the Order by imposing new conditions on grants in a pre-existing program under which a statutory formula specifies how certain funds are to be distributed to state and local governments. Henceforth, grant recipients would be required to (1) give federal immigration agents access to their jails for law enforcement purposes, (2) provide federal authorities with notice of the release date of detainees, and (3) certify compliance with 8 U.S.C. § 1373, a statute that prohibits state and local governments from restricting their own agencies and employees from sharing immigration information with federal agents.

A number of jurisdictions quickly brought lawsuits challenging the new policy. So far at least, the Administration has had little or no success in defending its position in the courts. As *Trump v. Hawaii* should remind us, that could change.<sup>123</sup> But it shouldn't. This enforcement policy is an

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<sup>118</sup> See Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1736 (2018) (reporting that more than 500 sanctuary policies have been collected and posted online).

<sup>119</sup> *Id.* at 1719–23.

<sup>120</sup> Other justifications have included: local control over priorities and resources; avoiding unlawful arrests and detentions; complying with equal protection norms; promoting diversity and inclusion; and expressing opposition to federal policies. *Id.* at 1752–73.

<sup>121</sup> Under the Criminal Alien Program, for example, which has been operating since the 1980s, federal immigration agents are sometimes offered access to local jails in order to investigate the inmate population for immigration violations. Similarly, local officials can be deputized as immigration agents under a 1996 amendment to the Immigration and Nationalization Act. For a summary of these and related programs, see *id.* at 1724–36.

<sup>122</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

<sup>123</sup> In 2016, candidate Donald Trump called for a ban on admitting Muslims into the country, a

unconstitutional effort to use conditional grants as levers for pressuring state officials into exercising their police power according to federal dictates.

First, the statute authorizing the grant program says nothing at all about access to jails or notice of release dates, and the Executive should at the very least be stopped from imposing conditions that Congress has not itself specifically and unambiguously selected.<sup>124</sup> The propriety of the exercise of such discretion, which is not a settled issue, can and should be resolved by the Supreme Court in favor of the states.<sup>125</sup> If the Justices were to adopt a *Gregory*-like clear statement rule specifically for the immigration field, this and other sound results would easily follow.

Second, *South Dakota v. Dole*'s relatedness requirement should be enforced much more strictly than it was in *Dole* itself. If a city applies for money with which to purchase more police cars or train more SWAT teams, conditions requiring the police to administer its jails according to federal dictates should be disallowed. If Congress wants local jurisdictions to admit its agents to their jails or notify federal agents about the pending release of aliens subject to deportation, it should at least be required to do so by attaching such conditions to a grant related to the operation of the jails. Here again, a clear-statement rule like *Gregory*'s would assist in the enforcement of the relatedness requirement.

Third, using a grant condition to secure compliance with Section 1373 is unconstitutional because the information-sharing statute itself violates the anti-commandeering principle. It prevents state and local governments from controlling decisions by their own subordinate officials and employees about sharing information, as well as from controlling how these

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proposal that was later qualified in some respects. After a clumsy initial effort to tighten border security, President Trump eventually issued a proclamation restricting the entry of people from eight countries (most of them with Muslim-majority populations) that his Administration deemed insufficiently diligent in collecting and sharing information about their nationals who sought to come to the United States. The Ninth Circuit invalidated the proclamation on the ground that it violated two federal statutes. By a vote of 5-4, however, the Supreme Court reversed; one of the statutory provisions at issue gave the President ample discretion to issue the proclamation, while the other provision did not even apply to admission decisions. The Court also rejected the plaintiffs' claim that the proclamation violated the Establishment Clause. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (reversing the lower court's grant of a preliminary injunction of President Trump's travel ban and remanding the case for further review). For a more detailed analysis of the litigation, see Josh Blackman, *The Travel Bans*, 2018 CATO SUP. CT. REV. 29.

<sup>124</sup> According to a dictum in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), an unfettered right to exclude aliens from the United States "is inherent in the executive power to control the foreign affairs of the nation." Even if the Court were to so hold, which it has not, such a decision would not imply that the Executive has the unilateral power to impose immigration-related conditions on grants to state and local governments.

<sup>125</sup> *Accord* Va. Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) (stating that in order for Congress to place conditions on a state's receipt of federal funds, it must do so clearly and unambiguously).

subordinates use their time. It liberates state and local employees from the laws and policy decisions by which they would otherwise be bound, and thus effectively prevents state governments from declining to participate in a federal regulatory program. This conflicts with the fundamental principle on which *New York v. United States*, *Printz*, and *Murphy v. NCAA* are based.<sup>126</sup>

At the time of this writing, the Trump Administration's effort to cut off funds to "sanctuary jurisdictions" has been enjoined by several courts,<sup>127</sup> and rightly so. If Congress is serious about enlisting reluctant state and local governments to help enforce its immigration laws, it can do so through grants that are closely related to the federal program, that have unambiguous conditions attached, and that offer funding that is generous enough to induce cooperation. One can debate the wisdom of adopting such a policy, as well as whether it is consistent with the original meaning of the Constitution. But if it's permitted, there really should be no debate about the appropriate forum for the policy debate. This is a decision for Congress to make and, until Congress does so, the Executive has no valid grounds for interfering with decisions by state and local governments to refuse their cooperation.

### B. *Anti-Sanctuaries*

Donald Trump's campaign for the presidency relied in significant part on appeals to voters who wanted more aggressive action to prevent illegal immigration and to deport illegal aliens. That may explain his Administration's decision to attack the sanctuary policies adopted in some jurisdictions, but it does not justify measures that short-cut the legally

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<sup>126</sup> *Reno v. Condon*, 528 U.S. 141 (2000), upheld a federal statute restricting the disclosure of certain information either by private parties or by states. Unlike that statute, Section 1373 does not apply evenhandedly to the public and private sectors. *Id.* at 143. *Reno* does appear to allude in passing to a provision permitting, and in some cases requiring, that certain information be disclosed by state and local governments. See Josh Blackman, *Sanctuary Cities and the Constitutionality of 8 U.S.C. 1373*, JOSH BLACKMAN'S BLOG (Apr. 21, 2017), <http://joshblackman.com/blog/2017/04/21/sanctuary-cities-and-the-constitutionality-of-8-u-s-c-1373/> (pointing out that *Reno* characterizes certain disclosures under the statute in question as mandatory). But *Reno* also reconciled its decision in that case with the "principles enunciated in *New York* and *Printz*" by observing that the statute at issue did "not require state officials to assist in the enforcement of federal statutes regulating private individuals." 528 U.S. at 151. Under Section 1373, however, state and local governments cannot prevent their own employees from assisting in federal law enforcement efforts.

<sup>127</sup> See, e.g., *City of Philadelphia v. Attorney Gen. of the U.S.*, 916 F.3d 276, 288 (3d Cir. 2019) (holding that conditions imposed on certain grants pursuant to E.O. 13768 were not authorized by statute); *New York v. U.S. Dep't of Justice*, 343 F. Supp. 3d 213, 244 (S.D.N.Y. 2018) (enjoining enforcement of E.O. 13768 and holding Section 1373 unconstitutional); *City of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 973 (N.D. Cal., 2018) (same); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 879 (N.D. Ill. 2018) (same).

appropriate means of doing so. Federalism, however, should work both ways, and the Obama Administration erred in the other direction. One conspicuous mistake was its attack on an Arizona law that sought to protect the state by supplementing federal immigration enforcement efforts. Unfortunately, the Supreme Court sustained this assault by the Executive on the state's extremely limited effort to protect herself.

In *Arizona v. United States*,<sup>128</sup> the federal government challenged four provisions of the Arizona statute. One section made failure to comply with federal alien-registration rules a state-law misdemeanor. The law also made it a state misdemeanor for an illegal alien to seek or engage in work in Arizona. A third provision authorized warrantless arrests of anyone whom the arresting officer had probable cause to believe had committed an offense that made the person deportable. Finally, the statute required that officers who stopped, detained, or arrested a person must in certain circumstances (such as when the individual does not have a driver's license) try to verify the person's immigration status with the federal government.

The Obama Administration obtained a preliminary injunction against the enforcement of all four provisions, which the Supreme Court reviewed. Justice Kennedy's majority opinion conceded at the outset that a massive influx of illegal aliens across the state's southern border had produced an epidemic of serious social problems, including crime, property damage, and environmental problems.<sup>129</sup> This appears to have resulted, at least in part, from a federal decision to concentrate its enforcement resources in California and Texas, thus funneling illegal migrants into Arizona.<sup>130</sup> All of the Justices agreed that the pre-enforcement injunction against the fourth provision, which could be interpreted and enforced in ways that would not conflict with any federal law, must be lifted. The majority, however, concluded that the other three provisions were preempted by federal immigration law. Three dissenting Justices wrote separate opinions, each of which advanced somewhat different arguments.

The law of preemption is in one respect perfectly clear and in some others very murky. Courts are indisputably required by the Supremacy Clause to apply valid federal laws even if there are state laws to the contrary. It is much less obvious how courts should go about deciding whether a specific state law is preempted by a specific federal law.

Two categories of preemption are noncontroversial. Where Congress has the authority to regulate, it may expressly preempt the states from doing so. And where there is a conflict that makes it impossible for a

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<sup>128</sup> 567 U.S. 387, 392–93 (2012).

<sup>129</sup> *Id.* at 397–98.

<sup>130</sup> *Id.* at 434 (Scalia, J., concurring in part and dissenting in part).

regulated party to comply with both a federal and state law, federal law must be followed.

Two other categories developed by the courts raise more difficult questions. Field preemption is invoked when a court concludes that Congress has regulated a specific field so thoroughly that it presumably would not want its regulations supplemented by any state laws. Obstacle preemption is found when a court thinks that a state law may frustrate or undermine the full achievement of what the court believes to be the purpose of a federal law. Not surprisingly, field preemption and obstacle preemption cases dominate the case law with obstacle preemption having become particularly pervasive.<sup>131</sup> These two statutory construction doctrines require courts to make educated guesses about what Congress would have said about questions that its statutes do not address, and the applications are highly context-dependent.<sup>132</sup> Justice Kennedy's majority opinion in *Arizona* illustrates how far field preemption and obstacle preemption can be pushed, and the disparate dissenting opinions show that there is no consensus on an alternative approach.

The Court concluded that the new misdemeanor for violating the federal registration statute, which provided slightly different penalties than those found in federal law, was preempted because Congress has impliedly occupied the field of alien registration regulations.<sup>133</sup> The majority emphasized the possibility that Arizona might prosecute some individuals whom federal officers would choose not to prosecute but did not explain why this would necessarily conflict with federal law.<sup>134</sup>

The Court also held that the provision creating a new misdemeanor for unauthorized employment activities by aliens was barred by a federal statute that expressly preempted states from penalizing *employers* for such

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<sup>131</sup> See, e.g., *Camps Newfound/Owatonna, Inc., v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (“[O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it.”).

<sup>132</sup> Although application of the doctrine is a matter of statutory construction, the basis for preemption lies in the Constitution's Supremacy Clause. One might therefore think that courts should look to the original meaning of that Clause in order to discover how statutes should be construed. For one effort to do so, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32 (2000) (arguing that neither obstacle preemption nor a practice of narrowly construing federal statutes in order to avoid preemption is consistent with the original meaning of the Supremacy Clause). Justice Thomas has adopted this view, which has been criticized as unworkable in the modern world by at least one commentator. See *Wyeth v. Levine*, 555 U.S. 555, 582–604 (2009) (Thomas, J., concurring in the judgment) (arguing that the Court's sweeping approach to preemption is inconsistent with the Constitution); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 3–4 (2013) (discussing Justice Thomas's textualist approach to preemption and its influence on the Supreme Court).

<sup>133</sup> *Arizona*, 567 U.S. at 403.

<sup>134</sup> *Id.* at 402.

immigration violations.<sup>135</sup> The federal statute is silent about state penalties on aliens who seek or accept employment, and the Court did not explain why Congress would expressly preempt the one category and impliedly preempt the other. Instead, the majority simply asserted that Congress had created a balance that would be upset by the Arizona law.<sup>136</sup>

The Court also rejected Arizona's authorization for the warrantless arrest of individuals based on probable cause that they are eligible for deportation.<sup>137</sup> This, said the majority, created an obstacle to achieving congressional purposes because it was not among the ways in which the federal government has specifically authorized state officials to act as immigration officers.<sup>138</sup>

Compared with the other dissenters, Justice Alito's disagreements with the majority were relatively limited. He agreed that the alien-registration provision was preempted because he thought the issue had been decided in a 1941 precedent.<sup>139</sup> On the other hand, he disagreed with the majority on the employment regulation, largely because he thought it should be upheld under a 1976 precedent.<sup>140</sup> Justice Alito could find nothing in the purposes of the federal statutes that would be frustrated when state officials detain criminal aliens whom the federal government itself is required by law to take into custody, and he would therefore have upheld the warrantless arrest provision.<sup>141</sup>

Justice Scalia's elaborate and sharply worded dissent began by accepting the shift from the Commerce Clause to international law and the inherent power theory:

I accept [the extensive federal immigration law that now exists] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States. As this Court has said, it is an “accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.” That is why there was no need to set forth control of immigration as one of the enumerated powers of Congress . . . .<sup>142</sup>

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<sup>135</sup> *Id.* at 406.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 403.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 441 (Alito, J., concurring in part and dissenting in part) (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

<sup>140</sup> *Id.* (citing *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)).

<sup>141</sup> *Id.* at 457.

<sup>142</sup> *Id.* at 422 (Scalia, J., concurring in part and dissenting in part) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)).

If the reasoning in this supposedly originalist argument were sound, it would follow that all attributes of sovereignty that are recognized in international law are inherent in the federal government and need not have been enumerated in the Constitution. But the Constitution enumerates some, and only some, of those attributes. Why some but not others, and why these particular attributes? Rather than address this obvious question, Justice Scalia asserted that the states have retained the sovereign prerogative to regulate immigration except to the extent that their laws conflict with the exercise of what he considers an inherent attribute of sovereignty possessed by the federal government.<sup>143</sup> But how is this more than a bare assertion?

Instead of making an effort to interpret the text of the Constitution, Justice Scalia maintained that the only question in the case was whether any federal statutes unequivocally abrogated Arizona's inherent sovereign power over immigration, apparently because he thought that state power over immigration is analogous to state sovereign immunity.<sup>144</sup> In the sovereign immunity context, however, the Court has found that abrogation is permitted only on the basis of powers specifically granted to Congress after the adoption of the Eleventh Amendment.<sup>145</sup> The requirement of unequivocal abrogation in that context "arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects."<sup>146</sup> There is no analogous textual basis for Scalia's inherent-sovereignty theory. Practically everything governments do can be conceptualized as a manifestation of an inherent attribute of sovereignty, which does nothing to determine whether a given power was given exclusively or concurrently to Congress or left entirely with the states. Justice Scalia treats authority over immigration as a concurrent power and says that Congress must unequivocally express a determination to abrogate the states' power to control immigration.<sup>147</sup> Justice Scalia's novel theory about concurrent inherent powers is little more than an *ipse dixit*, and so is his demand for a rule requiring what he calls unequivocal abrogation.

For Justice Thomas, this case required only a straightforward application of his understanding of the original meaning of the Supremacy Clause, which he had adopted outside the immigration context several years earlier.<sup>148</sup> In his view, the Constitution limits preemption to cases where the ordinary meaning of the texts of a federal and state law conflict

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<sup>143</sup> *Id.* at 422.

<sup>144</sup> *Id.* at 423 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996)).

<sup>145</sup> See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

<sup>146</sup> *Seminole Tribe*, 517 U.S. at 55–56.

<sup>147</sup> *Arizona*, 567 U.S. at 423 (Scalia, J., concurring in part and dissenting in part).

<sup>148</sup> *Id.* at 437 (Thomas, J., concurring in part and dissenting in part).

with each other.<sup>149</sup> Under that rule, none of the four Arizona provisions were preempted, whether or not there was any tension with purposes that might be attributed to the federal immigration statutes.<sup>150</sup>

Justice Thomas's understanding of the Supremacy Clause would go a long way toward protecting the states from inappropriate federal intrusions on their regulatory authority over aliens. But because his theory sweeps far beyond the immigration context, it has implications that will make its adoption by the Court unlikely.

Justice Scalia's approach would have effects similar to Justice Thomas's in the immigration context, but his adoption of the inherent power theory renders his position untethered to the original meaning of the Constitution. That, in turn, means that the rule he adopts is unlikely to appeal to those who think originalism requires arguments and evidence about original meaning rather than ipse dixits.<sup>151</sup>

Justice Alito's approach, with its reliance on his interpretation of the Court's precedents, would tend to continue producing the kind of fluctuating results that have been observed since the Court left the original meaning of the Constitution behind. At several points, Alito invokes precedents requiring that courts find a "clear and manifest" purpose to preempt in areas traditionally regulated by the states.<sup>152</sup> If a majority of Justices took such a rule seriously, as Justice Alito did in this case, the effect might be comparable to what we could expect from Justice Thomas's approach. As Justice Kennedy's opinion vividly demonstrates, however, it is very easy for judges to find that something is clear and manifest on the basis of little or no evidence.<sup>153</sup> The *Gregory* canon would be more difficult to evade, both in the Supreme Court and in the lower courts, and is therefore superior to Justice Alito's approach.

*Gregory* also shows how a majority of Justices might agree on a way to reduce the damage to federalism arising from the inherent power theory. The first step would be for the Court to acknowledge that this theory is extremely dubious, even though it is so well-settled that judicial prudence

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 440.

<sup>151</sup> For additional examples of Scalia's unsatisfying efforts to reconcile originalism with the acceptance of unconstitutional precedents, see Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL'Y 91 (2019); Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism*, 48 PERSPS. ON POL. SCI. 7, 10–11 (2018).

<sup>152</sup> See *Arizona*, 567 U.S. at 441, 451–53, 459 (Alito, J., concurring in part and dissenting in part) (referring to the "clear and manifest" language from *DeCanas*).

<sup>153</sup> The majority opinion itself recites the "clear and manifest" purpose requirement, which had no discernable constraining effect on the Court's analysis. See *id.* 567 U.S. at 400 (citing the "clear and manifest" language from *Rice* and *Wyeth*).



may counsel against its repudiation. The Court could then adopt *Gregory*'s canon of construction, which accomplishes what is most needed in the immigration area: the prevention of inadvertent congressional infringements on state prerogatives as well as unauthorized infringements carried out by executive agencies and judges acting in the name of Congress. When the Constitution has been construed to strip from the states their legal protection against intrusive exercises of congressional power, the Court "must be absolutely certain that Congress intended such an exercise" before interpreting a statute to do so.<sup>154</sup> In other words, "it must be plain to anyone reading" the federal statute that it preempts state law.<sup>155</sup>

*Gregory* was a 5-4 decision made possible when Justice Souter replaced Justice Brennan, who had been a member of the 5-4 majority in *Garcia*. *Arizona v. United States* was a 5-3 decision in a case from which Justice Kagan was recused. If we assume that she would likely have voted with the majority, Justice Kennedy's resignation means that the Court may be only one more retirement away from having five Justices who would be willing to apply the *Gregory* canon in the immigration area. If that were to happen, the Supreme Court could visibly treat contentious issues like sanctuary policies and state efforts to reduce the social costs of illegal immigration with an even hand.

In light of the intensity that has come to permeate the political debates about immigration, the appeal of such visible evenhandedness might even persuade Chief Justice Roberts that the *Arizona* approach is not in the long run interest of the Court as an institution. He seems to be extremely touchy about the Court's political reputation, which is not surprising in the leader of what will be known to history as the Roberts Court. It is not inconceivable that he might be persuaded that the *Gregory* approach would offer more protection for the Court's reputation than the ferocious disregard for state interests in the *Arizona* majority opinion. So perhaps the Court need not even wait for another retirement.

#### CONCLUSION

The Constitution sets forth a pretty clear allocation of power over immigration between the state and federal governments. The Foreign Commerce Clause empowers Congress to exclude aliens from the United States as it sees fit, to expel those who violate exclusion laws, and to enact uniform naturalization laws. The states retain a residual authority to

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<sup>154</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

<sup>155</sup> *Id.* at 467.

regulate aliens who reside within their borders and to expel unwanted aliens from their own territory.

The Supreme Court has rejected the Constitution's allocation of power in favor of a judicially invented theory that attributes to the federal government a very broad inherent authority over aliens. This doctrine is almost certainly so well-settled that the Court will cling to it no matter how problematic it is as an interpretation of the Constitution and no matter how many practical problems it creates.

The Court has faced a similar problem arising from its latitudinarian interpretation of the Interstate Commerce Clause. In that context, the Justices have developed several ameliorative doctrines, including the anti-commandeering principle of *New York v. United States* and its progeny, as well as the clear-statement rule of *Gregory v. Ashcroft*. The same doctrines can and should be applied in the immigration area.

The anti-commandeering doctrine should and likely will be used to blunt the Trump Administration's efforts to force state and local governments to assist in the enforcement of federal immigration laws. Unfortunately, the Court has already established an important precedent, *Arizona v. United States*, that unnecessarily and inappropriately interprets existing statutes to preempt the states from protecting their own interests in the face of federal underenforcement of the immigration laws. That approach should be repudiated and replaced with a clear-statement rule that allows the states to reinforce federal law enforcement unless they are forbidden to do so by an express or absolutely unambiguous statutory command.