



Constitutionalism

Regulation of Immigration Historically a State Function

By Joseph Baldacchino

Besides dealing with a crucial issue of public policy, the controversy over Arizona's recently adopted law concerning aliens within its borders illustrates a disturbing lack of familiarity with relevant constitutional law and precedent. The controversy offers a striking example of the deterioration of American constitutionalism.

The state law in question, enacted in April, requires police in Arizona to check the legal status of persons whom they reasonably suspect of being in the country illegally while forbidding racial profiling. The purpose is to "discourage and deter the unlawful entry and presence of aliens" within the state's borders.

The Justice Department in Washington has asked a federal district court to block Arizona's enforcement of the law, arguing that "the power to regulate immigration is exclusively vested in the federal government." In support of its position, the department cites the clauses in article I that give Congress authority to "establish an uniform Rule of Naturalization" and to "regulate Commerce with foreign Nations" as well as the clause in article II authorizing the President to

"take care that the Laws be faithfully executed."

For its part, Arizona does not deny the pre-eminent authority of the federal government to regulate immigration. Rather, it contends that its law is meant only to enforce already existing federal immigration laws that are not being adequately enforced by the federal government. "The truth is the Arizona law is both reasonable and constitutional," according to the state's governor, Janice Brewer. "It mirrors substantially what has been federal law in the United States for many decades. Arizona's law is designed to complement, not supplant, enforcement of federal immigration laws."

Yet it is a measure of how much constitutional interpretation has changed over time that at an earlier period of American history it was generally accepted that the regulation of immigration was primarily a state function, and the big question waiting to be settled was whether the federal government had any share in this power.

If this seems strange, it is because Americans, since the creation of the Bureau of Immigration and Naturalization in 1906, have come increasingly to think of the regulation of immigration and that of the naturalization of citizens as closely related functions. Earlier, however, the two forms of regulatory activity were viewed as

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distinct. Thus, Congress enacted the first federal law establishing requirements for naturalization in 1790, within a year of the adoption of the Constitution. But it was not until 1875, nearly a century later, that Congress first placed any restriction on immigration.

Prior to that time, the U.S. Supreme Court recognized in a series of decisions that the control of immigration was a constitutional function of the states as part of their "police power." The latter, considered a direct attribute of sovereignty, includes the authority to make all laws within a state's territory for the protection of public order, safety, health, welfare, and morals.

While never directly addressing the immigration issue, Chief Justice John Marshall, though a renowned champion of strong national governance, declared in several landmark decisions (*Gibbons v. Ogden*, 22 U.S. [9 Wheat.] 1 [1824] and *Brown v. Maryland*, 25 U.S. [12 Wheat.] 419 [1827]) that the general government had *no* jurisdiction over such matters except when authorized by an explicit grant of power, such as the power to punish counterfeiting given in article 1, section 8.

An early instance of the Supreme Court's upholding the states' authority to restrict immigration was its 1837 ruling in *New York v. Miln* (36 U.S. [11 Pet.] 102). In that case, the New York state legislature had passed "an act concerning passengers in vessels arriving in the port of New York." The law required the master of every vessel arriving in that port to provide to the city government within 24 hours a written report containing the names, ages, place of birth, and last legal settlement of all passengers.

The law further required that a bond be posted of up to \$300 per passenger to hold harmless the city from all expenses if such person were to become chargeable to the city within two years. Failure to post such bond within three days was subject to a fine of \$500 per person.

Still another provision required that, "whenever any person brought in such vessel, not being a citizen of the United States, shall . . . be deemed" by the city to be likely to become a public burden, "the master of the vessel shall, on an order of the mayor, &c., remove such person without delay to the place of his last settlement."

When in August 1829 the master of a ship arriving in the city from a foreign country with

100 passengers was fined \$15,000 for failure to file the required report, he challenged the New York law's validity, arguing that it "assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

The Supreme Court upheld the New York law by a 6-to-1 margin. The lone dissenter was Justice Joseph Story, who said that the statute conflicted with federal powers under the Commerce clause. As summarized in the syllabus, the Court majority ruled as follows:

The act of the Legislature of New York is not a regulation of commerce, but of police, and, being so, it was passed in the exercise of a power which rightfully belonged to the state. The State of New York possessed the power to pass this law before the adoption of the Constitution of the United States. The law was "intended to prevent the state's being burdened with an influx of foreigners and to prevent their becoming paupers, and who would be chargeable as such." The end and means here used are within the competency of the states.

Justice Philip Barbour's opinion noted that the legislation of New York being challenged was obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons who come from foreign countries without possessing the means of supporting themselves. There can be no mode in which the power to regulate internal police could be more appropriately exercised. New York, from her particular situation, is perhaps more than any other city in the Union exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil; they have endeavored to do so by passing, amongst other things, the section of the law in question. We should upon principle, say that it had a right to do so.

The state, Barbour wrote, had a "bounden and solemn duty" to "advance the safety, happiness and prosperity" of its citizens and to provide for their "general welfare, by any and every act of legislation, which it may deem to be conducive to these ends." The state's internal police powers, he added, were "complete, unqualified, and exclusive."

Another Supreme Court decision that upheld the authority of the states, derived from the

police power, to expel non-citizens from their territory was *Prigg v. Pennsylvania* (41 U.S. 539) in 1842. At issue were Pennsylvania laws passed in 1788 and 1826 forbidding the removal of persons from the state for the purpose of putting them into a condition of slavery in another state.

Writing for the court, Justice Story opened the door to future “personal liberty” laws in Pennsylvania and several other states by suggesting that state magistrates did not have to enforce the federal fugitive slave law if forbidden to do so by state legislation. But he struck down the existing laws under challenge as violating the Fugitive Slave clause of the Constitution (later negated by adoption of the 13th Amendment) and the congressionally passed Fugitive Slave Act of 1793, which took precedence over the state laws owing to the federal supremacy clause.

Justice Story emphasized, however, that, while the enforcement of the Fugitive Slave clause was an exclusively federal power, the court was “by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty.”

The police power, he said, “extends over all subjects within territorial limits of the States, and has never been conceded to the United States. . . . We entertain no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, . . . as they certainly may do in cases of idlers, vagabonds and paupers” (emphasis added).

The states’ exclusive powers of police—including the authority to permit or prevent non-U.S. citizens from residing within their borders at their discretion—was again reaffirmed in the 1847 *License Cases* (46 U.S. 504). At issue were the laws of three states (Massachusetts, Rhode Island, and New Hampshire) restricting the sale of imported alcoholic beverages, which were challenged as violating the federal power over interstate and foreign commerce. In a decision consisting of nine separate opinions, all seven justices upheld the state laws under review but for a variety of reasons.

Yet in their various opinions in the *License Cases*, all of the justices vigorously endorsed the states’ powers of police; that is, the power to

regulate for a broad range of purposes, including public health, public morals, public safety, and all other legislation for the internal policy of a state. Police powers, the justices stressed, had never been delegated to the general government and belonged exclusively to the states.

Giving the greatest weight to the states’ retained powers of police was Justice Robert Grier. Because those powers affect the safety and morals of the community, said the jurist, they “lie at the foundation of social existence” and therefore take precedence over laws “which relate only to property, convenience, or luxury,” including those enacted by the general government under its commerce powers. “It has been frequently decided by this court,” Grier explained,

“that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.” . . .

It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. . . . *Paupers and convicts are refused admission into the country* [i.e., the state; emphasis added]. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference.

The immigration issue arose yet again in the Supreme Court’s 1849 decision in *Smith v. Turner* and *Norris v. Boston*, collectively known as the *Passenger Cases* (48 U.S. 283). By a five-to-four majority, the court held that the power of the general government to regulate foreign commerce was exclusive, a decision overturned in *Cooley v. Board of Wardens* (53 U.S. 299) just two years later. By the same majority, the court struck down Massachusetts and New York laws that taxed passengers arriving on ships inbound from other states or other nations.

Disallowed was a Massachusetts provision requiring that alien passengers arriving in the

state's ports or harbors be permitted to land if they were deemed unlikely to pose an immediate financial burden to the state but only after the ship's master had paid two dollars per passenger so landing, with the proceeds to be used "for the support of foreign paupers." Also declared unconstitutional was a requirement of New York law that, before ships arriving from other nations or other states landed, "hospital moneys" be collected for each incoming passenger, including citizens of New York itself, to be used for the support of the marine hospital on Staten Island.

By various lines of reasoning, five justices held that the two-dollar-per-passenger fee required by Massachusetts as well as the levies for "hospital moneys" imposed by New York were duties on imports prohibited to the states by article I, section 10, clause 2. The effect of these "duties," the majority added, was unconstitutionally to regulate interstate and foreign commerce.

But though five justices struck down Massachusetts's two-dollar fee per arriving passenger to support those aliens who might later become paupers, all nine justices expressed approval of another Massachusetts provision forbidding the entry of aliens who were found to be "lunatics, idiots, maimed, aged, or infirm, incompetent to maintain themselves, or who have been paupers in any other country" unless a bond of \$1,000 was paid in their behalf.¹

The latter provision, wrote Justice John McLean, "is the exercise of an unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge," while the former, he contended, "was a regulation of commerce, and not being within the power of the State, the act imposing the tax is void."¹

Significantly, those in the majority did not deny that the states could pass any law pursuant to their police powers unless forbidden by their own constitutions or in conflict with a legitimate federal law under the supremacy clause. Justice

James Wayne, for example, while denying that states possess unlimited discretion concerning the admittance of aliens, conceded that "the States have the right to turn off paupers, vagabonds, and fugitives from justice The States may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off."

But what the majority justices gave with one hand, they took back with the other by arrogating to themselves the right to determine the states' motives in adopting each provision of every law enacted. Thus, Justice McLean acknowledged that "a State cannot regulate foreign commerce, but it may do many things which more or less affect it."

He also wrote, however, that "[n]o one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged."

In this particular case, McLean and his colleagues in the majority decided that restricting one class of aliens was a valid exercise of the state's right, under its police powers, to limit the burden of pauperism upon its citizens but that restricting the other class of aliens was being done by the state for some purpose not encompassed by its police powers, such as raising revenue, although the precise distinguishing characteristic of that other purpose was not entirely clear.

For Chief Justice Roger Brooke Taney and his brethren in the minority, however, this distinction by the majority between the two classes of aliens was nothing less than the substitution by the court of its own discretion for the discretion reserved exclusively to the states that was itself the police power. The majority, noted Taney, approved the exclusion of one group but not of the other. "Yet," wrote the chief justice,

there is no provision in the Constitution of the United States which makes any distinction between different descriptions of aliens, or which reserves the power to the State as to one class and denies it over the other. And if no such distinction is to be found in the Constitution, this

1. If the wording of the Massachusetts provision upheld by the court seems harsh or politically incorrect, consider that the *federal* immigration law enacted by Congress decades later in 1882 denied entry to "idiots, lunatics, and persons likely to become a public charge."

court cannot engraft one upon it. The power of the State, as to these two classes of aliens must be regarded here as standing upon the same principles. It is in its nature and essence a discretionary power, and if it resides in the State as to the poor and the diseased, it must also reside in it as to all.

Elaborating on the same issue, Justice Levi Woodbury emphasized that, as the power to exclude aliens belongs exclusively to the states, "it is for the State where the power resides to decide on what is sufficient cause for it,—whether municipal or economical, sickness or crime; as, for example, danger of pauperism, danger to health, danger to morals, danger to property, danger to public principles by revolutions or change of government, or danger to religion."

Woodbury noted that the states' power, recognized in *Prigg*, to establish their own immigration policies without interference from the general government was wholly distinct from the latter's power to establish a uniform rule of naturalization. The two powers do not conflict, he explained, because "acts of naturalization apply to those aliens only who have already resided here" for a period of years, "and not to aliens not resident here at all, or not so long."

Addressing the same issue, Chief Justice Taney wrote:

It cannot be necessary to say any thing upon the article of the Constitution which gives to Congress the power to establish a uniform rule of naturalization. The motive and object of this provision are too plain to be misunderstood. Under the Constitution of the United States, citizens of each State are entitled to the privileges and immunities of citizens in the several States; and no State would be willing that another State should determine for it what foreigner should become one of its citizens, and be entitled to hold lands and to vote at its elections. For, without this provision, any one State could have given the right of citizenship in every other State; and, as every citizen of a State is also a citizen of the United States, a single State, without this provision, might have given to any number of foreigners it pleased the right to all the privileges of citizenship in commerce, trade, and navigation, although they did not even reside amongst us.

The nature of our institutions under the Federal government made it a matter of absolute necessity that this power should be confided to the government of the Union, where all the States were represented, and where all had a voice; a necessity so obvious that no statesman could have overlooked it.

Congress's naturalization power, the chief justice concluded, "has nothing to do with the admission or rejection of aliens, nor with immigration, but with the rights of citizenship. Its sole object was to prevent one State from forcing upon all the others, and upon the general government, persons as citizens whom they were unwilling to admit as such."

In the *Passenger Cases*, four justices held that the regulation of aliens within their borders was exclusively a state function. Five other justices held that the states' power in this area, though clearly encompassed by the states' exclusive police power, was subject to federal limitation, but only if a state's action violated a specific constitutional prohibition such as imposing a duty on imports or if it conflicted with a law of Congress enacted pursuant to its own legitimate constitutional functions.

In contrast, the sweeping objections to the Arizona law now coming from the U.S. Government and many public commentators show deep ignorance or cynical disregard of constitutional law and history related to the issue in question.

The point of this article is not that one public-policy preference is superior to another but that constitutional government requires respect for law and precedent. Long ago politicians and amenable Supreme Court justices started promoting political objectives by simply ignoring important elements of the Constitution and reading new, hitherto unknown meaning into it. The controversy over the Arizona law and not least the actions of the federal government with regard to it show a flagrant disregard of the spirit, substance, and history of the U.S. Constitution while exemplifying the growth of arbitrary, capricious government.