

Can We Tell Those Huddled Masses To Scram? Immigration And The Constitution

by Becky Akers for the Foundation for Economic Education

In 1873 some Presbyterians in Kentucky invited a young Canadian to be their pastor. Tensions in the border state were still high following the War of Southern Independence, and the congregants hoped that a neutral outsider could pacify folks not only within their own church but even across denominations.

Rev. A.B. Simpson succeeded so well that he was next called to the 13th Street Presbyterian Church in New York City . Once again his Biblical preaching resonated not only with the wealthy Americans of 13th Street Presbyterian but also with the Italian immigrants thronging the neighborhood. About 100 of them were soon clamoring to join the church. An immigrant himself, Rev. Simpson was delighted. His church, however, was not. The man who had reconciled Yankees and rebels was unable to convince his fellow Christians to welcome poor foreigners. Rev. Simpson left the Presbyterians and eventually founded the Christian and Missionary Alliance. Today the denomination numbers approximately 2.5 million members in 40 countries (see “What Is the Alliance Doing Today?” www.cmalliance.org/whoweare/whoweare-present.jsp).

Immigration has pitted Americans against one another for over a century now. Intriguingly, that’s about the same amount of time the federal government has presumed an interest in the issue. Its interference has turned the debate over immigration into a toxic brew. But when we strain the emotion and rhetoric from it, it boils down to a simple question: should the state regulate our comings and goings?

From the beginning colonial governments have involved themselves with American immigration. Sometimes that involvement was as total as the French and Spanish kings’ spending their subjects’ money to export colonists to the New World and then ruling them. Other times there was less picking of poor people’s pockets: the British Crown preferred to grant charters.

On April 10, 1606, for example, King James chartered the London Company, a group of merchants and noblemen, to settle Virginia . Charters may have been “traditional legal instruments,” as Gordon Wood puts it in *The Radicalism of the American Revolution*, but they were fishy enough to stink. They allowed a government to “harness private enterprise and private wealth to carry out desirable public goals, such as founding a colony. . . . In return for the public service, such corporate grants gave to the recipients certain exclusive legal privileges, including the right to govern an area. . . .”

Other immigrants came without any government support at all. The Puritans emigrated despite—and because of—the Crown’s opposition to their ideas. Famously fleeing government’s corruption and persecution for a better, freer life in the New World, they were some of America ’s earliest immigrants and the archetype of most who would follow.

As these newcomers transformed the eastern strip of the American continent from a wilderness into 13 British colonies, the Crown continued to influence immigration by unloading its “criminals” there. People were convicted of capital crimes in England on a

depressingly regular basis, not because they were more vile than folks elsewhere, but because a man, woman, or child could be hanged for any of 300 felonies in the seventeenth century. Fortunately reprieves were almost as common as hangings—providing the victim left for America. This was essentially a life sentence to house arrest: convicts were closely guarded until their ship sailed, “put in irons” once aboard, and sold as indentured servants when they landed.

The government shipped these unfortunates exclusively to its chartered colony, Virginia, from 1619 to 1640; its excuse was that disease had depopulated the place. Actually it didn't need an excuse: charters privileged certain citizens over others only if they agreed that the government was in ultimate control. And so the waves of convicts lapped the next century: 4,500 sailed for America, primarily Virginia and Maryland, from 1661 to 1700; in the 50 years before the American Revolution 30,000 more did too, accounting for about 15 percent of immigrants during those decades.

Along with the convicts went the beggars and con men swarming England. They too were often rounded up and shipped against their will to the colonies.

Naturally the upright and industrious colonists already flourishing in America objected to this influx. Both Virginia and Maryland passed laws by the end of the seventeenth century that barred this dumping of humanity; as Virginia's House of Burgesses explained, “the complaints of several of the council and others, gent. Inhabitants . . . representing their apprehensions and fears lest the honor of his majesty and the peace of this colony be too much hazarded and endangered by the great numbers of felons and other desperate villains sent hither from the several prisons in England . . .” (Page Smith, *A New Age Now Begins: A People's History of the American Revolution*). The “gent. Inhabitants” had apparently forgotten who was boss. Parliament reminded them by overriding their legislation with its own in 1717.

And the convicts kept arriving. The Virginia Gazette of May 24, 1751, carried the following lamentation: “When we see our Papers fill'd continually with Accounts of the most audacious Robberies, the most cruel Murders, and infinite other Villanies [sic] perpetrated by Convicts transported from Europe, what melancholy, what terrible Reflections must it occasion! What will become of our Posterity? These are some of thy Favours, Britain! Thou art called our Mother Country; but what good Mother ever sent Thieves and Villains to accompany her children; to corrupt some with their infectious Vices and murder the rest?” Perhaps this early animosity to “Thieves and Villains” lives on in the hostility confronting immigrants today.

Germans Discouraged

On the other hand, government discouraged the sort of settlers the colonists wanted. People from the German principalities had a reputation for working hard and for loving liberty. The latter trait prompted the Crown to discourage their immigration in ways Jefferson noted in the Declaration: “[King George III] has endeavored to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.”

It seems, then, that whether dumping or discouraging, the government got it wrong when it came to immigration. The Founders took a lesson: their Constitution gave the federal

government no authority to control an individual's movement into or out of the country. They did allow Congress "To establish an uniform Rule of Naturalization" (Article I, Section 8). Thus though the Founders distrusted government to regulate immigration, they permitted it to set requirements for citizenship. Power over mere procedure, rather than over practice, was all that men steeped in natural law confided to the state.

This libertarian stance was tested during the new nation's first years, when the French Revolution with its animus against aristocracy sent refugees running for America. Their titles rankled Americans, who feared "aristocratical principles" as much as some modern Americans fear terrorism. But they didn't plead with the federal government to violate the Constitution by limiting immigration. Instead, Congress tinkered with the format for naturalization, raising the years of residency required before an immigrant could apply for citizenship, while adding an oath of allegiance and the renunciation of noble titles. Importantly, the impetus for citizenship still came from the immigrant. He went to a courthouse and took the oath because he wanted to, not because federal agents cruised the country checking papers and arresting those without the right ones.

No Such Word

The Constitution never mentions the word "immigration." The closest it comes is "migration," which it uses only once, in Article I, Section 9: the Feds are prohibited from interfering with "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit. . . ." This applied specifically to slavery, though some folks take it out of context to justify controlling immigration at the state level. That, of course, is a philosophical dodge: it merely shifts power over immigrants from one governmental group to another without answering the question of whether any litter of bureaucrats and politicians should dictate other people's movements.

A final constitutional reference to immigration comes with the requirements for holding elective offices. Presidents must be native-born; representatives and senators must have resided in the country for seven and nine years, respectively.

Apparently, then, the Founders considered a man's movements far too integral to freedom to surrender to government. They did share one concern about immigration with modern Americans, though: assimilation. They worried that people coming from monarchies (which is to say, people coming from almost anywhere in the late eighteenth-century world) would, like the French aristocrats, neither understand nor value freedom. Jefferson warned that "Our [government] . . . is a composition of the freest principles of the English constitution, with others derived from natural rights and natural reason. To these nothing can be more opposed than the maxims of absolute monarchies. Yet, from such, we are to expect the greatest number of emigrants. They will bring with them the principles of government they leave, imbibed in their early youth. . ." (Notes on Virginia, quoted at www.cis.org/articles/cantigny/fonte.html#II).

Jefferson was not alone in pondering the difficulties of assimilation; many of the Founders, including Washington and Madison, did too. Their conclusions are often quoted out of context, making them seem opposed to freedom of movement. If they were, it's odd that they neglected to list "oversee, regulate, and control immigrants" among the government's constitutional duties.

Assimilation has gnawed at Americans throughout our history. Many viewed newcomers with suspicion—enough Americans with enough suspicion that they formed the Know-Nothing Party in 1849. Later reincarnated as the American Party, the Know-Nothings espoused other planks besides nativism, most notably anti-slavery; still, their platform tried to rewrite the Constitution by declaring, “Americans must rule America ; and to this end, native-born citizens should be selected for all state, federal, or municipal offices of government. . .” (quoted in Smith). But for every Know-Nothing there were other Americans happy to widen the field of potential employees, employers, customers, and friends.

So far neither group had been able to compel the other to its opinion by force of law. Indeed, as Paul Johnson writes in *A History of the American People*, “No authority on either side of the Atlantic was bothered with who was going where or how. . . . An Englishman, without passport, health certificate or documentation of any kind—without luggage for that matter—could hand over £10 at a Liverpool shipping counter and go aboard. . . . If [the ship didn’t sink but] reached New York he could go ashore without anyone asking him his business, and then vanish. . . . There was no control and no resentment. . . . In the five years up to 1820, some 100,000 people arrived in America without having to show a single bit of paper.” Those were halcyon days for the Fourth Amendment and its prohibition on government’s unreasonable searching of papers and effects. In fact, if the Amendment were still respected today, no bureaucrat could demand an ID, a green card, or other documents from anyone, citizen or not.

The early 1800s fortunately lacked exclusive unions, a minimum wage, OSHA, a Department of Labor, an IRS, and most licensing. So immigrants found all the work they wanted on arrival, despite their large numbers: from 1815 to 1860, more than 5 million people came from Europe to the United States . And yet, Johnson writes, “what all observers [of American life] recorded was the absence of begging. As one of them put it in 1839: ‘During two years spent in traveling through every part of the Union , I have only once been asked for alms.’ ”

Free movement remained the standard until after Civil War convulsed the country. In 1875, just a few years before Rev. Simpson would ask his American Presbyterians to welcome foreign converts, Congress passed unconstitutional legislation to keep convicts and prostitutes from entering the nation.

No doubt the Congress was jaded after all the assaults on the Constitution generated by the late war. What were another one or two—or hundred? And who could argue that convicts and prostitutes should be allowed in the country anyway? Surely if the Founders had been as enlightened as their Victorian descendants, they would have excluded such miscreants. Their grandchildren kindly remedied their oversight.

After convicts and prostitutes were proscribed, increasing numbers of folks failed to meet with congressional approval, and the government denied them freedom of movement as well: ex-convicts in 1882, along with Chinese laborers, lunatics, and idiots. Paupers, polygamists, and people with infectious diseases were added to the list in 1891, as were the so-called insane, while 1917 saw the illiterate barred from the country.

This high-handed legislation sparked lots of litigation; a few cases even landed before the Supreme Court. Curiously, when upholding the decisions of the new “superintendent of

immigration” against foreigners who mistakenly believed themselves in the land of the free, the Court appealed to national sovereignty, congressional edicts, international norms, democracy—anything but the Constitution. *Chae Chan Ping v. U.S.* concerned a “subject of the emperor of China , and a laborer by occupation. He resided at San Francisco . . . until June 2, 1887 when he left for China . . . , having in his possession a certificate in terms entitling him to return [to the United States]. . . .” Unfortunately for Mr. Chae, Congress passed the Chinese Exclusion Act on October 1, 1888. This act not only invalidated his papers; it also imbued Congress with an authority heretofore unsuspected: the Court thundered, “Congress has power, even in times of peace, to exclude aliens from, or prevent their return to, the United States, for any reason it may deem sufficient.” In fact, so “established” was this power that only a portion of the decision discusses it; the Court muses far more about a treaty then current with China , debates whether treaties are “of higher dignity than acts of Congress,” and finally concludes they aren’t.

But where did Congress’s previously unknown “power . . . to exclude aliens” originate? The Court took a stab at explaining:

The discovery of gold in California in 1848 . . . was followed by a large immigration. . . . [L]aborers came from [China] in great numbers [A]s their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field. . . . The competition between them and our people . . . and the consequent irritation . . . [were] followed, in many cases, by open conflicts. . . . It seemed impossible for them to assimilate with our people [Californians] saw . . . great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation. . . . So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific coast and from private individuals, that congress was impelled to act on the subject.

A pity Californians weren’t as agitated about the “existing and anticipated evils” of large government as they were about “large immigration.”

Argument from Authority

The Court bolstered its appeal to raw democracy with another august argument, the “because the government says so, that’s why” theory.

When once it is established that congress possesses the power to pass an act, our province ends. . . . 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. . . . As said by this court . . . speaking by Chief Justice MARSHALL: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions, therefore to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”

Including, apparently, the Constitution.

In the absence of constitutional recourse, the decision also quoted such luminaries as “Mr. Marcy, the secretary of state under President Pierce,” who opined, “Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war.”

The Chae Court threw a sop to the supreme law of the land in the decision’s last pages: “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, when, in the judgment of the government, the interests of the country require it, cannot be granted away. . . .” But “sovereignty” as an excuse for curtailing freedom of movement is an alarming argument given the crimes governments claim as their “sovereign” prerogatives. War, plundering and taxation, fiat money and inflation, imprisonment of political opponents, torture—these are just some of the evils governments call sovereign rights. It follows that if the Feds have sovereignty to restrict movement, they also have sovereignty to torture, to dispossess dissidents, to rule by whim rather than by law.

The Court didn’t flinch from these implications. It clearly concluded, “Whatever license, therefore, Chinese laborers may have obtained . . . to return to the United States . . . is held at the will of the government, revocable at any time, at its pleasure [sic].” Under sovereignty rather than the Constitution, other freedoms are no doubt “revocable at any time,” at the government’s pleasure too.

This dictatorial dialectic has distorted cases contemporary and modern. In *Lem Moon Sing v. United States* (1895) the Supreme Court circuitously proclaimed, “The power of congress to exclude aliens altogether from the United States , or to prescribe the terms and conditions upon which they may come to this country . . . is settled by our previous adjudications.” The echoes reverberated in 1972, when the Court rehearsed history in *Kleindienst v. Mandel*: “Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. . . . Other legislation followed,” among the most revealing that of 1940, which barred “aliens who, at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government.” Now we come to the Feds’ real interest in immigration: screening immigrants for their political ideologies. Not surprisingly, “The pattern [of power over immigrants] generally has been one of increasing control. . . .”

Inhumanity went hand in hand with this anti-constitutionalism. In 1882 the overfed U.S. government began robbing people who were often wearing everything they owned by assessing immigrants an entrance fee. Nine years later it rewarded the victims with their own bureaucracy: the Office of Immigration would henceforth harass them full-time. Originally part of the Treasury Department (talk about barking up the wrong tree: exactly how many of “the tired, the poor, those yearning to breathe free” were promising pickings for Treasury?), it eventually immigrated to the Justice Department and was a forerunner of the current Center for Immigration Services—a bureaucracy whose idea of “service” coincides with that of the IRS.

Inhumanity has in fact always characterized the state’s approach to immigration. The more power government gains over immigrants, the more cruelly it treats them. Even if

one is unpersuaded by philosophical or constitutional arguments, one must favor freedom of movement out of simple compassion.

Migrant Travel, Then and Now

When the Crown “mercifully” reprieved convicts from immediate death in the seventeenth and eighteenth centuries, it was often condemning them to one by slow torture while crossing the Atlantic . (Paying passengers didn’t fare much better.) The trip took anywhere from four weeks to three months, during which passengers grappled with impossibly crowded quarters, fatal fevers, and rancid rations. The wonder is not that the mortality rate was shockingly high but that it wasn’t higher.

Travelers must have suffered from acute thirst every hour they were at sea. Fresh water had to be carried on board and stored, and storage soon turned it brackish. Aggravating their thirst was the fact that folks subsisted “on salt”—their rations consisted almost entirely of preserved meat and ship’s biscuit (hard, thick crackers). The meat spoiled despite its salt, and insects infested the biscuit. Scurvy and malnutrition’s other maladies added to the suffering and deaths.

Tragically, the trip to America can be as torturous and fatal for modern immigrants as it was for their colonial counterparts. Despite quantum leaps in technology that put jumbo jets with meals, bottled water, reclining seats, and comfortable temperatures within the budgets of many immigrants (some of whom pay hundreds and thousands of dollars to illegal “guides”), many still spend weeks, months, or even years arduously traveling to the United States . They languish on homemade rafts and die in unventilated trucks and trailers; those who survive are often sick, scared, and starving when they finally arrive. The U.S. government and its unconstitutional control over them are almost entirely to blame for this monumental misery (the rest of the credit goes to the tyrannies immigrants are fleeing).

Because it has abandoned the logic and morality of natural law, U.S. policies on immigration are as senseless as they are cruel. For example, Cuban refugees risk everything, including life itself, to flee their island gulag in whatever will float. Yet under 1995’s “wet foot/dry foot” agreement between Fidel Castro and Bill Clinton, Cubans who reach U.S. water but not U.S. soil are forcibly returned to Castro’s clutches. As they near the end of their 90-mile voyage from Cuba to Florida , when they are most vulnerable, the Coast Guard “interdicts” these refugees, sometimes dousing them with pepper spray and shooting them with water cannon to prevent their wet feet from ever becoming dry.

Allowing government to control immigration guarantees that barbaric and baffling policies will continue to kill people and ruin lives. It also means that the state decides who gets in; the country’s character and composition are determined by a handful of bureaucrats rather than the decisions of millions of individuals. And each restriction government imposes on immigrants, each limit it sets to their freedom, limits ours as well.

When immigrants have to show papers proving they belong here, we do, too. When the State is permitted to brutalize them, it practices tactics it can turn on us. Perhaps most frightening of all is the reflection that a government strong enough to keep others out is also strong enough to keep us in.

As always, those who ask Leviathan to shackle others often wind up wearing the chains themselves.

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