

# IMMIGRATION, FREEDOM, AND THE CONSTITUTION

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In recent years, many conservatives have come to favor a highly restrictionist approach to immigration policy. But that position is in conflict with their own professed commitment to principles such as free markets, liberty, colorblindness, and enforcing constitutional limits on the power of the federal government. These values ultimately all support a strong presumption in favor of free migration.

## I. IMMIGRATION AND FREEDOM

Let us focus on free markets first. Immigration restrictions are among the the biggest government interventions in the economy. They prevent millions of people from taking jobs, renting homes, and pursuing a wide range of opportunities that they could otherwise have. Economists estimate that if we had free migration throughout the world, we could double world GNP.<sup>1</sup> That is not a gaffe or a mispring; it is a real estimate. Perhaps doubling GNP is overly optimistic. Still, increasing it by, say, 50 percent is a greater effect than virtually any other realistically feasible change in economic policy.<sup>2</sup>

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1. Michael A. Clemens, *Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?*, J. ECON. PERSP. 83 (2011), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.25.3.83> [<https://perma.cc/JD93-7VWR>]; Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labor Mobility: Calculations and Policy Implications*, 14 J. DEV. ECON. 61, 70 (1984); John Kennan, *Open Borders*, 16 REV. ECON. DYNAMICS 1, 10–11 (2013), <http://www.ssc.wisc.edu/~jkennan/research/OpenBorders.pdf> [<https://perma.cc/4W66-F2M7>].

2. Clemens, *supra* note 1, at 101.

The reason why immigration restrictions have such an enormous effect is pretty simple. People become much more productive when they move from countries where they have little or no opportunity to use their talents, to those where they can be more productive. Just crossing from Mexico to the United States makes a person three or four more times more productive than they otherwise would be, even without improving their skills in any way.<sup>3</sup> And the opportunities to improve skills are, for most immigrants, far greater in the U.S. than where they initially came from. There is an enormous amount of wealth that can be created just by cutting back on our immigration restrictions.

But it would be a mistake to say that the issue here is primarily economic. It is also, and even more fundamentally, about freedom. When people come to the United States from poor and oppressive societies, they increase their freedom in many ways. Think of refugees fleeing religious or ethnic persecution, women escaping patriarchal societies, or people fleeing massacres such as those perpetrated by ISIS. The ancestors of most modern Americans escaped such oppression during the period when we wisely did not have the kinds of immigration restrictions that we do today. If we had today's immigration policies back then, the ancestors of most of the current US population would never have been allowed to come.

Immigration restrictions undermine the freedom of native-born Americans as well as immigrants. Because of our immigration laws, millions of native-born Americans cannot hire the workers they want, associate with the businesses that they choose, nor benefit from the entrepreneurship of immigrants; on average, they tend to be more entrepreneurial than native-born citizens.<sup>4</sup>

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3. Ernesto Aguayo-Téllez & Christian I. Rivera-Mendoza, *Migration from Mexico to the United States: Wage Benefits of Crossing the Border and Going to the U.S. Interior*, 39 POL. & POL'Y 119, 132 (2011).

4. See, e.g., ROBERT W. FAIRLIE, SMALL BUS. ADMIN., IMMIGRANT ENTREPRENEURS AND SMALL BUSINESS OWNERS, AND THEIR ACCESS TO FINANCIAL CAPITAL 1 (2012), <https://www.sba.gov/sites/default/files/rs396tot.pdf> [<https://perma.cc/7VHB-ERVE>]; Dan Viederman, *What We're Talking About: The Negative Business Impact of Anti-Immigration Laws*, DIGITALCOMMONS@ILR (Nov. 2011), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2151&context=globaldocs> [<https://perma.cc/6EV2-J4FT>]; Catherine Rampell, *Immigration and Entrepreneurship*, N.Y. TIMES (July 1, 2013), [http://economix.blogs.nytimes.com/2013/07/01/immigration-and-entrepreneurship/?\\_r=0](http://economix.blogs.nytimes.com/2013/07/01/immigration-and-entrepreneurship/?_r=0) [<https://perma.cc/Q87K-K2UD>].

## II. IMMIGRATION AND DISCRIMINATION

Current immigration policy is also inimical to the principle of color-blindness in government. In December 2014 President Obama's Department of Homeland Security concluded that it cannot enforce immigration restrictions unless it continues to engage in massive racial profiling. This is the one area where the Obama administration believes that racial profiling is a good thing.<sup>5</sup>

Such profiling affects not just immigrants but millions of native-born citizens whose sole crime is that they happen to be of the same race or ethnicity as many undocumented immigrants.<sup>6</sup> If you believe in ending racial discrimination in government policy, this would be a great place to start. I am aware of no other area where federal law enforcement openly resorts to racial discrimination on such a large scale, even under a liberal administration that is, in general, hostile to racial profiling.

Most conservatives and libertarians support the principle of colorblindness in public policy, or at least a strong presumption in favor of it. We do not believe that the government should discriminate on the basis of race or ethnicity. Why? Because these are morally irrelevant characteristics. Your race or ethnicity says nothing about the kinds of rights you should have. It is not a morally relevant characteristic, and not something you have any control over.

The same is true of the place where you happen to be born. In and of itself, being born on one side of a line on a map or another is a morally irrelevant characteristic. It says nothing about the kinds of rights or the amount of freedom that you should have. Ultimately, we support colorblindness because we do not believe in restricting people's freedom based on their choice of parents. The same principle should apply to immigration policy.

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5. Ilya Somin, *Obama Administration Decides to Continue the Use of Racial Profiling in Immigration Law Enforcement*, VOLOKH CONSPIRACY (Dec. 7, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/07/obama-administration-decides-to-continue-racial-profiling-in-immigration-law-enforcement/?utm\\_term=.1f1d12b5c959](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/07/obama-administration-decides-to-continue-racial-profiling-in-immigration-law-enforcement/?utm_term=.1f1d12b5c959) [<https://perma.cc/JWC7-ZD9U>].

6. *See id.*; Ilya Somin, *Immigrants are Not the Only Victims of Immigration Restrictions*, VOLOKH CONSPIRACY (Oct. 2, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/02/immigrants-are-not-the-only-victims-of-immigration-restrictions/> [<https://perma.cc/DU6D-RFTJ>].

## III. HOW TO DEAL WITH POSSIBLE DOWNSIDES OF IMMIGRATION

A presumption in favor of open borders immigration does not mean we can never have any restrictions on free movement of any kind. We can restrict the movement of terrorists, violent criminals, people with contagious diseases, and so forth.<sup>7</sup> But the key point here is that we can and sometimes should restrict such movement regardless of whether the person in question is a native-born citizen or not, and regardless of where they happened to be born. I am not arguing there should never be restrictions of any kind, merely that those restrictions should not be based on who you chose for your parents and on what side of a line on the map you happen to be born.

Immigration like everything else, does have its downsides. Nothing is a free lunch. However, virtually all the standard objections are either overblown or addressable by means less draconian than forcibly consigning people to lives of poverty and oppression in the Third World. Here, I will just mention one such issue. But similar points apply to others.

Many fear that increasing immigration might lead to increased welfare spending. The social science research actually suggests that in the long run, this is not true.<sup>8</sup> Controlling for other variables, states with more immigrants do not have higher per capita welfare spending than other states.<sup>9</sup> In Western Europe, nations with more immigrants actually have lower per capita welfare spending than their counterparts because natives tend to be more opposed welfare spending when they think that the funds might go to immigrant groups.<sup>10</sup>

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7. See S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 114TH CONG., THE STATE OF AMERICA'S BORDER SECURITY 83–93 (2015) (providing for a variety of methods for controlling the border).

8. See Ilya Somin, *Increased Immigration is Unlikely to Increase the Size of the Welfare State*, VOLOKH CONSPIRACY (Feb. 18, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/increased-immigration-is-unlikely-to-increase-the-size-of-the-welfare-state/?utm\\_term=.3b2ea75c7536](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/increased-immigration-is-unlikely-to-increase-the-size-of-the-welfare-state/?utm_term=.3b2ea75c7536) [<http://perma.cc/C9FD-S76T>] (reviewing recent research on the subject).

9. See Zachary Gochenour & Alex Nowrastch, *The Political Externalities of Immigration: Evidence from the United States* (Cato Inst. Working Paper No. 14, 2014), <https://www.cato.org/publications/working-paper/political-externalities-immigration-evidence-united-states> [<https://perma.cc/XH6Y-XXP3>].

10. See, e.g., ALBERT ALESINA & EDWARD GLAESER, FIGHTING POVERTY IN THE US AND EUROPE (2004); Nate Breznau, *Immigrant Presence, Group Boundaries, and Sup-*

But let's say you are still concerned about this problem. There is an obvious solution: Simply deny welfare benefits to this group of immigrants, or limit them to whatever level you consider appropriate. The 1996 Welfare Reform Act already does this for many welfare programs.<sup>11</sup> That can be extended if necessary. If conservatives devoted their efforts to such measures rather than to promoting immigration restrictions, that would be enormously beneficial for both immigrants and natives. Other common complaints against immigration have similar "keyhole" solutions that are far preferable to immigration restrictions.<sup>12</sup>

#### IV. WHY THERE IS NO GENERAL FEDERAL POWER TO RESTRICT IMMIGRATION UNDER THE CONSTITUTION

I will end by focusing on Congress's supposed power over immigration.<sup>13</sup> If you read Article I of the Constitution,<sup>14</sup> you rapidly come to a very simple conclusion: there is no general power to restrict immigration there. It just is not listed anywhere in the Constitution. There is a power over naturalization, to grant or withhold citizenship.<sup>15</sup> But naturalization is not the same thing as immigration. People can live in a country without being citizens. Similarly, their movement can sometimes be restricted, even if they are citizens. The Founders knew that no less than we do.

Today, many would argue that Congress has broad authority over immigration because of the Foreign Commerce Clause—the power to regulate commerce with foreign nations.<sup>16</sup> Such an approach is consistent with the broad modern interpretation of

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*port for the Welfare State in Western European Societies*, 59 *ACTA SOCIOLOGICA* 195 (2016); Gary P. Freeman, *Migration and the Political Economy of the Welfare State*, 485 *ANNALS AM. ACAD. POL. & SOC. SCI.* 51, 57–58 (1986).

11. Pub. L. No. 104-193, 110 Stat. 2105.

12. For a good overview, see Bryan D. Caplan, *Why Should We Restrict Immigration*, 32 *CATO J.* 1 (2012). On the general concept of "keyhole solutions," see *Keyhole Solutions*, OPEN BORDERS, <http://www.openborders.info/keyhole-solutions/> [<http://perma.cc/2KT6-PEFK>].

13. The argument of this Part is a brief summary of a much more detailed article I am writing on this subject.

14. U.S. CONST. art. I, §§ 1–10.

15. *Id.* art. I, § 8.

16. U.S. CONST. art. I, § 8 cl. 3.

the Congress power over interstate commerce.<sup>17</sup> But at least as a matter of original meaning, simple movement from place to place was not considered commerce. The very same clause that gives Congress the power to regulate foreign commerce also gives it authority over interstate commerce.<sup>18</sup> Nobody at the time of the founding or for decades thereafter thought it gave Congress the ability to ban people from moving from one state to another.<sup>19</sup> If the Interstate Commerce Clause as an original matter does not include that power, then the Foreign Commerce Clause, which is in fact the very same clause, does not grant the power to restrict international migration

Many conservatives, including John Eastman, have argued for a similarly narrow interpretation of the commerce power in other contexts.<sup>20</sup> The same reasoning applies here. For the first hundred years of American history, this was actually the dominant interpretation of the Constitution: that Congress did not have a general power to restrict immigration.

It was not until the 1870s and 80s that Congress, with the passage of the Page Act and the Chinese Exclusion Act, enacted systematic immigration restrictions, as a result of an upsurge in anti-Chinese racism.<sup>21</sup> In 1889, the Supreme Court upheld the Chinese Exclusion Act.<sup>22</sup> The Court recognized that this power is not actually listed in Article I of the Constitution, but held that it was an inherent attribute of sovereignty—something that all governments must have.<sup>23</sup>

There are two problems with that claim. First, the federal government got along for 100 years without having this power, so it is far clear that they must have it. Second, if we assume that seemingly essential powers are present without needing to

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17. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005).

18. U.S. CONST. art. I, § 8, cl. 3.

19. See generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

20. See, e.g., John C. Eastman, *Minutes from a Convention of the Federalist Society: The Roberts Court and Federalism*, 4 N.Y.U. J.L. & LIBERTY 330, 337 (2009).

21. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Sarah H. Cleveland, "Powers Inherent in Sovereignty": *Indians, Aliens, Territories, and the Nineteenth Century Origins of the Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

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

23. *Id.* at 609.

be enumerated, then why do we enumerate things that are even more inherent, such as the power to declare war,<sup>24</sup> raise armies,<sup>25</sup> and so forth? These powers are far more essential than the power to restrict immigration. Yet they had to be enumerated. The whole point of enumeration is to ensure that Congress's powers, and those of the federal government generally, are limited.<sup>26</sup> As Chief Justice John Marshall put it, "enumeration presupposes something not enumerated."<sup>27</sup> The powers that are not enumerated are not included. That is the basic principle that originalists usually apply to assertions of federal power. And it should apply here, as well..

#### CONCLUSION

At our best, we should be the nation of the Statue of Liberty, not the nation of walls and deportations. Freedom for both immigrants and natives alike: That is what will truly make America great again.

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24. U.S. CONST. art. I, § 8, cl. 11.

25. *Id.* art. I, § 8, cl. 12.

26. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 369 (1833).

27. *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 195 (1824).