Immigration and the Constitution: A New Historical Interpretation

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Date : February 28, 2011

James E. Pfander and Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, **96 Va. L. Rev. 359 (2010).**

Modern immigration law is built upon a specific historical foundation: the efforts of lawmakers to exclude Chinese immigrants from the country in the late nineteenth century. Remarkably, all of the early cases affirming the constitutionality of Chinese Exclusion are still good law. Based on this jurisprudence, Congress has "plenary power," free of judicial oversight, over the substance of laws seeking either to exclude migrants or to deport them. Hypothetically speaking, if Congress were today to pass a law declaring that people of Middle Eastern heritage would not be admitted into the country, it would not face constitutional scrutiny (unless, of course, the Court decided to overturn the *Chinese Exclusion Case*). Plenary power has served to insulate immigration law not only from equal protection norms, as the above example demonstrates, but also from other constitutional challenges, including those to retroactive lawmaking. To provide just one example, a legal permanent resident today can be detained and deported for a misdemeanor crime committed decades ago that was not a deportable crime at the time she committed it.

Scholars have critiqued the disconnect between immigration regulation and constitutional norms using a variety of methodologies. Rarely, however, has legal history been among them. The reasons for this are varied, but one of the primary ones is the relative silence of the Constitution on matters of immigration. The Constitution does not explicitly refer to immigration at all, and the Framers did not expressly discuss immigration policy. This has led to a widely-held assumption that there is not much to learn from the Founding Era to guide Congress and the courts in decisions about modern immigration regulation. In their article, *Reclaiming the Immigration Constitution*, James Pfander and Theresa Wardon effectively challenge this assumption. They do so using the most persuasive tools of legal history: in-depth, nuanced research into a rich and little-discussed trove of primary source material.

The basic argument of the article is clear: to understand what lawmakers in the founding era thought about immigration regulation, we must look to naturalization law. The authors demonstrate that matters of immigration and naturalization were "virtually synonymous" in this period. They point to two main reasons for this link: the difficulties of travel to the fledgling country and the extant laws barring aliens from owning property. When migrants made the long, difficult journey to the eastern seaboard, they did so with an expectation of staying (precluding the modern phenomenon of return migration) and of becoming naturalized citizens (which was the only way that they could own property and therefore make a life the newly adopted homeland). The authors argue that when the Framers drafted the naturalization clause of the Constitution, giving to Congress the power "to establish a uniform rule of Naturalization," they were fully aware that the content of such a law would guide immigration policy, since migrants relied on naturalization rules to decide whether to migrate in the first place. An attention to the reliance interest of would-be migrants and current legal permanent residents underlay the Framers' concern for creating a "uniform" and "established" federal rule, one that would prevent the states from drafting conflicting and shifting naturalization laws.

This concern for what the authors aptly call the norms of "prospectivity, uniformity, and transparency" in naturalization law did not end with the framing of the Constitution but continued to guide naturalization law in the early Republic. Pfander and Wardon draw on drafts of the 1790, 1795, and 1798 naturalization laws and the congressional debates surrounding them to make their point. Lawmakers were clearly concerned with protecting those who entered under prior state regimes, before the passage of federal law, from adverse consequences. In debating later changes to naturalization laws, they carefully avoided making amendments that would function retrospectively to disadvantage those who migrated in reliance on an earlier framework. The guiding impulse behind early naturalization law – which

was inextricably linked to immigration regulation – was a respect for widely-agreed upon procedural norms.

With these findings, the authors are able to do something that many works of legal history (often by design) do not: play out the direct ramifications of their historical findings for contemporary immigration law. Locating immigration constitutionalism in early naturalization law challenges three specific elements of the modern framework: retrospective laws, private naturalization bills, and the public rights doctrine. As a whole, this theory of immigration constitutionalism casts doubt, in a novel way, on the notion of Congress's unfettered plenary power over immigration matters. The authors do not dispute that Congress has wide latitude when it comes to the substance of immigration regulation, but they argue that its procedures must be guided by the founding norms of prospectivity, uniformity and transparency. These three together would lead to much more robust protection of the rights of immigrants, particularly those who have established roots in this country. There is some indication in recent case law that judges are already enforcing these procedural norms, albeit inconsistently. This article gives them even greater reason to do so, grounded in solid historical interpretation of the Founding Era and the early Republic.

Cite as: Allison Tirres, *Immigration and the Constitution: A New Historical Interpretation*, JOTWELL (February 28, 2011) (reviewing **James E. Pfander and Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 359 (2010).**), http://legalhist.jotwell.com/immigration-and-the-constitution-a-new-historical-interpretation/.