

## The State Origins of Federal Plenary Power

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Hidetaka Hirota, [\*The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy\*](#), 99 *Journal of American History* 1092 (March 2013).

Where does federal plenary power over immigration come from? For a long time now, scholars have pinpointed the definitive starting point in the 1889 Supreme Court case of *Chae Chan Ping v. U.S.* (aka *The Chinese Exclusion Case*), which announced that immigration control was “an incident of sovereignty” and thus a matter for Congressional—not state or judicial—power. In an excellent new article, historian Hidetaka Hirota challenges this basic assumption. He argues convincingly that federal plenary power arose not only from the Court’s reading of international and constitutional law, but also from a long history of state practices of migrant policing and control. The federal government took political, administrative, and procedural cues from the state immigration regimes that predated Chinese Exclusion, particularly those in the influential states of New York and Massachusetts.

Hirota is not the first to look at state immigration power. As he acknowledges, Gerald Neuman and Kunal Parker have done foundational work in this area, exploring the ways that state regulation of the poor and of fugitive slaves served as precursors to federal immigration control. Hirota’s focus is on the ways that states dealt with foreigners arriving from Europe in ports along the Atlantic coast. The border that mattered in this period was a coastal one, not a land border. With no modern visa system in place, state officials had no control over who would seek to land on their shores. Hirota recounts how the Atlantic seaboard states developed a comprehensive approach to preventing or limiting the migration of the poor, as well as removing them after entry if necessary. State officials created boards of immigration to oversee efforts and devised systems of bonds and taxes. Ship captains who brought passengers who were “likely to become permanently a public charge” had to supply bonds in the event that a passenger required poor relief. If the ship companies did not provide the bonds for those passengers, state officials would prohibit the passengers in question from landing. Ship companies would have to return the passengers to Europe on their own dime. States also charged a head tax (in lieu of bonds or in combination with them), which was a fee on all healthy passengers. This was used to offset the cost of receiving destitute passengers. Of course, these taxes would give rise to the Passenger Cases in 1849 and to *Henderson v. New York* in 1876. In combination, these cases greatly limited the states’ power to tax passengers, based on the Supreme Court’s interpretation of the Commerce Clause.

The story so far recounted is a relatively familiar one, but what follows is new. Hirota demonstrates that the state experience with barring destitute migrants led directly to federal exclusionary measures. He connects the dots with clear evidence. States, fearful of the loss of revenue after *Henderson*, worked together to pass federal legislation that looked just like the extant state laws. State officials in New York and Massachusetts collaborated on draft bills that were sent to Congress. As a Massachusetts official explained of a draft bill, it was “an extension to the whole nation and under the authority of law, of the old state system of dealing with immigration.” (P. 1097.) The resulting federal Immigration Act of 1882 had several provisions that were taken directly from state practices: the bill included a tax to pay for the care of destitute migrants, it excluded those “likely to become a public charge,” as well as criminals and the mentally disabled, and it made ship captains liable for the cost of return passage of excluded migrants.

The influence of state governments over federal exclusion went deeper than legislative lobbying to include the implementation and administration of the new act. For almost a decade, the federal government relied on state officials to inspect migrants entering the ports and to decide who was excludable. Federal officials even reimbursed state boards for the cost of removing excludable immigrants after entry. After 1891, this “state-federal joint administration” was nationalized: Congress created a federal core of officials to administer the law. But state influence continued; as

Hirota recounts, many of these new federal officials were themselves former state inspectors.

Hirota argues that the presence and active involvement of state officials had a lasting impact on the treatment of migrants themselves in the federalized system. His research helps to explain a long-standing conundrum about immigration law: the remarkable lack of due process protections and the enduring presence of unchecked discretion. He recounts how state officials had acted with virtual impunity before the 1880s in removing paupers. He argues that this approach, which vested broad discretion in state officials, was then taken on and naturalized in federal efforts. As he writes, "In making federal immigration law more comprehensive, policy makers simply codified what had become the norm in the practical enforcement of immigrant exclusion and deportation." That norm included "practically unrestricted power over immigrants." (P. 1107.)

Hirota successfully moves nineteenth-century immigration history out of the powerful shadow of Chinese Exclusion. He demonstrates that state economies, not just racial animus, were at the heart of decisions about exclusion of migrants, and that the Atlantic seaboard states had a disproportionate influence on the federal legislation and procedure that resulted. His work is an excellent corrective to the standard narrative of federalism and migration control and it is sure to stimulate new historical inquiry.

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