"An Assessment of Immigration Federalism in the Nineteenth Century"

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Abstract: In a federal system of government, why did the U.S. national government wait until 1882 to take over control of immigration policy from the states and localities? This phenomenon is especially curious since the control of entry/exit into and across a nation's borders is so fundamental to the very definition of a state. Is it because the American state was too weak to do so, or specifically that the national government lacked administrative capacity to handle immigration until the late twentieth century? I argue that the delay of the national government taking over immigration was not due to a lack of administrative capacity. Instead, there were regionally specific reasons that the states preferred to retain control of migration policy. In the northern seaboard states, the priority was excluding the poor, sick, and criminal, who, if admitted, would pose social and economic burdens on those states. In the South, the motivation was preserving slavery and guarding against slave insurrections. The national government could not take over migration policy until a series of political events uncoupled slavery and migration policy in the South, and the federal government assumed financial responsibility for screening poor, sick, and criminal immigrants in the North.

”There can be no concurrent power respecting such a subject-matter [policies regarding freedom of movement]. Such a power is necessarily discretionary. Massachusetts fears foreign paupers; Mississippi, free negroes.”

—Frederich Kapp, New York City Commissioner of Emigration[1]

Introduction

In a federal system, who, the national government or the states and localities, regulates immigration policy? The fact that there was a tough political and legal fight over Arizona's controversial S.B. 1070 immigration law, which culminated in the Supreme Court decision, *AZ v U.S.,*[2] in 2012 illustrates that the answer to that question is not an easy or obvious one. Long before *AZ v U.S.* grabbed headlines, the national government of the United States was probably best known in immigration policy for carrying out the exclusion of an entire ethnic group via the Chinese Exclusion Act of 1882, as well as its imposition of discriminatory national origins based laws that lasted until 1965. These infamous shows of strength by the national government though were preceded by its almost complete absence in immigration in the nineteenth century. Indeed, it may surprise many that for roughly 150 years before the Civil War, it was the states that were responsible for the regulation of immigrants.

Contemporary discussions about immigration policy paint a deceptively parsimonious and definitive portrait of the division of national and sub-national power over this policy area when in fact the balance of power between the national government and subnational units in any policy area is an ongoing political negotiation. The federal system in the United States, which is enshrined in the U.S. Constitution, lays out only a

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[1] Frederich Kapp, 1870 . *Immigration and the Commissioners of Emigration of the State of New York*, (New York: The Nation Press), 177.
[2] 567 U.S. ___ (2012)

general framework for the distribution of power and authority between the national and subnational governments. In every period of U.S. history, the location of the mysterious line dividing national and subnational authority as well as the specific details of power sharing arrangements between the levels of government are in fact determined in large part by politics, and these political forces and constraints are temporally specific. A reexamination of state and federal policy control over immigration in the nineteenth century will illustrate the scope of overall government power over immigration and will also help one understand the continually contested division of labor between the national government and its subnational units.

In the nineteenth century, the national government did not control immigration policy, subnational units, the states and localities, had exclusive control over a set of policies that affected the ability of large classes of persons to enter and travel in U.S. territory. These groups included: immigrants, free African Americans, black navy sailors from foreign ships, the poor, the sick, and the criminally convicted.[3] Only with a systematic examination of state controls over what is known today as immigration policy can one appreciate the severe limitations against an individual's ability to move into and within the U.S. before the Civil War. In the nineteenth century, the federal system was a safety valve that accommodated tremendous sectional strain. But that system's political accommodations came at the expense of politically weak and vulnerable members of society, including foreign and native blacks, the poor, the sick, and the convicted, who had no freedom of movement.

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[3] Gerald Neuman, "The Lost Century of U.S. Immigration Law (1776-1875)" *Columbia Law Review*, Vol. 93, No. 8 (Dec., 1993), pp. 1833-1901, 1837, 1841.

In the instance of policies regarding the movement of peoples, it was the very existence of the federal system that underwrote a vast system of control over the liberty of movement on many groups of people, not solely immigrants, that were deemed dangerous, nuisances, or undesirable by the states and localities. The federal system worked to redistribute and multiply the permutations of coercive powers to control the liberty of movement of various groups of people via a phalanx of state laws. Political scientist William Riker has cautioned that it is an "ideological fallacy" that "federal forms are adopted as a device to guarantee freedom."[4] As the case of migration policy before the Civil War will show, it was the sectional difference accommodated by a federal system before the Civil War that was centered on race and slavery that greatly affected regional perceptions of who constituted "dangerous persons". As historian Brian Balogh noted, the federal system that was "built into the U.S. Constitution allowed the American state to address very real sectional differences without formally writing geographical sections into the constitution."[5]

I argue in this article that the national government did not take over migration policies until after 1882 because both northern and southern states had very strong, albeit dissimilar, incentives to keep closely for themselves any policy regarding the liberty of movement. The northern states were trying to guard against an influx of the poor, sick, and convicted, who could become local economic and social liabilities. The southern states wished to preserve and upkeep their slavery system, so ceding control to the national government over policies that impinged on the movement of persons was

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[4] William Riker, *The Development of American Federalism* (Kluwar Academic Publishers, 1987), 14.

[5] Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth Century America*, (Cambridge University Press, 2009), 75.

unthinkable. The national government did not control migration policies in the nineteenth century because the states would not allow it. Additionally, the framers had tied their own hands with the infamous migration and importation clause ratified in the original constitution that prohibited the national government from legislation on the "migration and importation of such persons" until 1808; historians have long known the implications of that clause for slavery, but the clause also helps explain why the national government did not enter into the regulation of immigrants any earlier.. It also dictated the form of immigration restrictions in this time period.

This article is separated into four main sections. The article begins with a review of the literature on the American State. The second section delves into the distinct priorities and political concerns driving northern and southern states in the nineteenth century to retain control over policies implicating liberty of movement. The third section shows how the competition among states made possible by the federal system also worked to eventually lead to federal consolidation in this policy area. The article concludes with an assessment of the role of the Civil War in transitioning state power over migration policies to the national government.

This article explores that very distinctive nature and the effects of the early American state, which is the federal design of the American political system and its effect on early immigration policy. Here, sociologist Michael Mann's distinction between "despotic power" and "infrastructural power" helps shed light on the situation. Mann advocated assessing state power along two dimensions, despotic power, which he described as "the range of actions which the elite is empowered to undertake without routine, institutionalized negotiation with civil society groups", and, by contrast,

infrastructural power, which is defined as "the capacity of the state actually to penetrate civil society, and to implement logistically political decisions throughout the realm."[6] With respect to policies governing the movement of people into and across U.S. territory, the antebellum central government did not enjoy despotic power, but it was through the state governments that infrastructural power was exercised. That division of labor had profound ramifications for the individual liberties, especially the freedom of movement, of those who belonged to vulnerable populations. Aristide Zolberg's elegant synthesis of immigration policy in *A Nation by Design: Immigration Policy in the Fashioning of America* is one of the few books on the subject that does focus on the role of the colonies and then the states in immigration policy. And Zolberg notes that "However powerful, the effects of social forces, external and internal, are not automatically translated into policy outcomes, but are mediated by political structures." He goes on to name some of these structures, including "the allocation of decision-making authority and power between levels and branches of government" in addition to other features of the government, but his project was not to focus squarely on that variable.[7]

With regard to the body of the scholarship on immigration policy itself, most has focused on national institutions and policies and the comparisons to European models have been comparisons to countries with unitary systems.[8] Two studies mention subnational units to the extent that they are used as models of different manners in which

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[6] Michael Mann, "The Autonomous Power of the State: Its Origins, Mechanisms, and Results," in John A. Hall ed., *States in History* (Oxford, 1986), 112 (some original emphasis omitted), 113.
[7] Aristide Zolberg, 2008. *A Nation by Design: Immigration Policy in the Fashioning of America*, (New York: Russell Sage and Harvard University Press), 20.
[8] Until the last 5 years or so, much of the work on immigration policy has focused on the federal level, with the notable exception of Luis F.B. Plascencia; Gary P. Freeman; Mark Setzler The decline of barriers to immigrant economic and political rights in the American States: 1977-2001, *International Migration Review* 2003;37(1):5-23.

states approached receiving immigrants, but these studies do not focus on the relationship between the states and the national government.[9]

As the case study of nineteenth century policy on the movement of persons will show, an exclusive focus on national policy and on entry/exit policy would produce an incomplete assessment of true state strength in the nineteenth century as well as erroneously suggest that before the national government took over immigration policy after 1882, there were open borders.[10] In the 150 years before the Civil War, colonies and then states created a vast network and range of laws regulating the movement of persons into and across colonial and U.S. territory that they jealously guarded from national government intervention. By the time the national government took over immigration beginning in 1882, federal immigration policy was merely a replication of policies that had already been pioneered and perfected by the colonies and states. This article tells the story of why the states/localities, and not the national government, led the way in migration policies.

II. Assessing the administrative capacity of the nineteenth century central government

The most common theory about why the national government did not assume power over immigration policy was the assumption that it simply lacked administrative capacity to manage immigration. So exactly how powerful was the national government in the nineteenth century? Balogh wrote that the prevailing scholarly understanding that the national government did not have significant influence over the lives of citizens until the twentieth century is wrong. He added that the U.S. was far from being "stateless"

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[9] Larry Fuchs, *The American Kaleidoscope*, (CT: Wesleyan Press, 1990) and Susan Martin, *A Nation of Immigrants*, (NY: Cambridge University Press, 2011)
[10] Neuman, "The Lost Century of Immigration Law", 1833-1834.

until the twentieth century when it built administrative capacity. He agreed that in the nineteenth century, to the extent citizens felt the influence of the government on their lives, it was usually the effect of local government, but Balogh argued, the already powerful national government's power in the nineteenth century was "hidden" and "out of sight" from the view and perception of average citizens.[11]

Likewise, legal scholar Jerry Mashaw has flatly rejected the prevailing scholarly assumptions that administrative law did not begin until the late nineteenth century and that before then, this area of law was a "backwater—a place of little importance in the grand scheme of governance." Mashaw shows that, contrary to the prevailing scholarly view, the national government did not do anything significant until it built up its administrative capacity in the twentieth century." In fact, the administrative state started very early. He noted, "From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action." The first Congress was apparently very busy, establishing the Departments of War, Foreign Affairs, Treasury, the Naval Department and Post Office. Other legislation was passed dealing with navigation (from providing lighthouses, to registering vessels, to establishing a system of seamen's hospitals), the Customs Service, and the Bank of the United States.[12]

To give one a sense of the scale of just two of these institutions, the U.S. Postal Service and marine hospital network. By 1828, the U.S. Postal Service was built up enough that there were 74 post offices for every 100,000 inhabitants, compared to Great

[11] Balogh, *A Government Out of Sight*, 19-20.
[12] Jerry L. Mashaw, "Recovering American Administrative Law: Federalist Foundations, 1787-1801" *The Yale Law Journal*, 115:1256 at 1258-1260, 1277.

Britain's 17 and France's four for the same number of citizens. John describes the U.S. postal services as "the linchpin of the postconstituional communications infrastructure and the central administrative apparatus of the early American state."[13] The national government was able to finance and spread the mail service throughout the vast and expanding territory it had control over. Meanwhile, as early as 1798, the national government created a network of marine hospitals to care for "sick and disabled seamen." These hospitals were financed through "taxing sailors wages—at the rate of twenty cents per month—to finance health care for ailing sailors in ports throughout the country." Most impressively, federal customhouse officials kept track of and administered these funds, including determining eligibility criteria for the mariners' stay at the hospitals. As historian Gautham Rao adds:

> The federal customhouses efficiently collected the marine hospital tax. Rough estimates suggest that from 1800 to 1812, mariners' wages fluctuated from fifteen to twenty dollars per month. Marine hospital taxes constituted a withholding of between 1 and 1.33 percent per month. In these years, tax collection peaked in 1809 at $74,192, the majority of which came from New York, Boston, Philadelphia, Baltimore, and Charleston—a trend that would continue throughout most of the century. On the strength of the marine hospital tax, the federal government established a network of hospitals and other health care facilities for the merchant marine.[14]

This network of hospitals treated "several thousand" mariners each year due to the importance of the status of mariners to the early American economy. As Rao explained, "The early United States was deeply dependent on maritime commerce and thus on merchant sailors as well, who literally carried goods and capital across the Atlantic." The Customs officials were also charged with determining the eligibility of admission into

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[13] Richard R. John, "Governmental Institutions as Agents of Change" *Studies in American Political Development* (Fall 1997) 347-380, 371.

[14] Gautham Rao, "Sailors' Health and National Wealth: Marine Hospitals in the Early Republic" in *Common-Place*. Vol 9 No. 1 (October 2008) (Available at: http://www.common-place.org/vol-09/no-01/rao/)

these hospitals via keeping and checking records of whether mariners had actually paid their hospital money through their garnished wages. Administrative apparatus and procedures were also put in place to determine whether mariners once admitted to a hospital retained eligibility status based on their health status.[15]

In addition to beginning to create national agencies and administrative capacities in the nineteenth century in these areas, the central government also attempted a widespread economic embargo against Britain and France. In the name of foreign policy concerns, the national government, under the republican administration of Thomas Jefferson, created a delegation of discretion to lower-level administrative and Executive branch officials who in turn carried out this highly forceful and unpopular practices on the citizenry.[16] Mashaw views the embargo of 1807-1809 as the first "great national experiment in economic regulation", not the Interstate Commerce Act of 1887. He also describes it as requiring "the use of domestic coercive authority that was more aggressive and intrusive than the Federalists' hated Alien and Sedition Acts."[17] The embargo shows that what was thought to be a "weakling" central government actually had quite formidable and coercive powers.

For the purposes of understanding the nature of national power in the nineteenth century, though, the Jefferson embargo has also been called an "extensive form of

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[15] Gautham Rao. "Administering Entitlement: Governance, Public Health Care, and the Early American State" in *Law & Social Inquiry* Volume 37, Issue 3, 627-656, (Summer 2012), 628, 635-638.

[16] Jerry L. Mashaw, "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829." *The Yale Law Journal,* 116:1636, 1648. The British and the French had consistently been harassing American ships by seizing them and commandeering American seamen.

[17] Mashaw, "Reluctant Nationalists", 1646, 1639, 1643. Mashaw speculates that the reason that Jefferson abandoned his own ideology of limited national government was that the Federalists were no longer a threat and the realities of an expanding nation required compromised with Republican ideological commitments.

peaceful coercion" and "regulatory authority of astonishing breadth and administrative discretion of breathtaking scope." The embargo required that no American ships could sail for a foreign port unless cleared by the President. The President designated his authority to carry out this act to "officers of the revenue, and of the navy and revenue cutters of the United States." Administrative officials designated by the President, not approved by Congress, and the national navy were pressed into service of enforcing the embargo. Of course, the number of national government officials required to carry out this act were inadequate to prevent the widespread evasion and smuggling engendered by this very unpopular law.[18] As well, the states and American merchants and shippers who exported much of their products abroad complained bitterly of the national government's overreach and oppressiveness with the embargo. But the fact remains that the national government, perceived by scholars to be insignificant until the twentieth century, was powerful enough (or at least perceived to be so) to be charged with overreaching its authority with the unpopular embargo, precipitating mass resistance.

Even in an area, welfare policy, where the United States is commonly viewed as a laggard compared to European counterparts, scholars have shown that the national government was more active before the New Deal than previously believed. Sociologist Theda Skocopol has argued in *Protecting Soldiers and Mothers* that the welfare state as we know it did not begin during the New Deal and in fact has its roots far before the 1930 and began in the aftermath of the Civil War with pension programs for soldiers and their families. Similarly, sociologist Michelle Landis Dauber has argued in The *Sympathetic State: Disaster Relief and the Origins of the American Welfare State*, that the long history

[18] Mashaw, "Reluctant Nationalists", 1655, 1648, 1650, 1663.

of federal disaster relief began in 1790 when direct payments were made to fire victims via private relief bills but by 1822, payments were disseminated to "general relief bills benefiting a defined class of claimants" by bureaucrats in the national government. As Dauber explains, "Beginning in 1794, with the relief of distress caused by the Whiskey Rebellion, these funds were most often administered through centralized federal relief bureaucracies appointed by the executive branch, which evaluated applicants and distributed benefits according to statutory eligibility criteria."[19] There was administrative capacity for pensions, marine hospitals, and disaster relief long before the modern welfare state. Why was there no parallel national level bureaucracy for the regulation of the movement of people and the welfare of immigrants?

Instead of being absent until the twentieth century, the national government laid crucial groundwork for many policy areas, including transportation, integrated markets, and corporations. Balogh also contends that in the nineteenth century, power was "inverted" in that the nation's capital was not the locus of power; the national government's power was most visible in the periphery as the young nation expanded into new territories. Indeed, in U.S. territories that had not become states, the national government had plenary power and did not have to share authority with the states or any local government.[20] It is a supreme irony that even as the national government was pushing the United States' borders further and further to expand its geographical existence, it simultaneously did not control who could enter into U.S. territory or travel

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[19] Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Belknap: Harvard University Press, 1995) and Michelle Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State*, (Chicago: The University of Chicago Press, 2013), 5.

[20] Balogh, *A Government Out of Sight*, 19-20, 154.

across it since the states during the nineteenth century had a stranglehold on all of those policies.

The creation of the national bank and treasury, pension, and disaster relief have nothing to do with the regulation of the entry and exit and movement of immigrants, but the regulation of immigrants could have conceivably been entrusted to some of the newly created departments of the national government. The Department of War could have regulated refugees or aliens from countries with which the U.S. was at war. Similarly, the Department of Foreign Affairs' purview might have included the management and treatment of aliens. The Naval Department, which had already been pressed into service by Jefferson's embargo, could have also screened the entry and exit of persons on ships since it was screening ships for the embargo already. The Customs Service could have managed the admissions of not just sick mariners, but immigrants too. In short, there was an array of already existing federal agencies that could have conceivably been charged with the duty of screening entering immigrants. But none of these possible exercises of administrative agency power came to pass.

The nineteenth century national government had quite a bit of administrative capacity. Mashaw, Balogh, Skocopol, Rao, Dauber and others are correct that the national government was not a weakling from the earliest days of the Republic. Yet these federal agencies also did not regulate migration, leaving these policies to the states instead. The cause of this arrangement seems not to be a lack of administrative capacity on the part of the federal government per se, since the national government had built extensive administrative apparatuses, systems, and processes within other policy areas. If the answer to the question of why federal authority over immigration policy was not

assumed until after 1882 is not because of a lack of administrative capacity, then the answer lies elsewhere.

III. Regional preoccupations for state control over the liberty of movement

A. The Northern States: Managing the poor, sick, and criminal

In the nineteenth century, the motivation for both the northern and southern states to retain control over polices regarding migration came down to self-preservation. Of course, the manner in which the northern and southern states perceived of self-preservation was quite different. In the North, the main motivation for restriction on liberty of movement was to mitigate the social and economic effects of large-scale immigration. In the South, the impetus was preserving slavery and the concomitant white supremacist social hierarchy. And even with these regionally specific concerns, there was an overlay of a strong political cultural inclination and tradition of deference to the public welfare, which was a local, not national concern.

Regional priorities for self-preservation then translated into a myriad of laws affecting the liberty of movement. Legal scholar Gerald Neuman cautioned that it is very easy to miss nineteenth century laws that affect immigrants because some of those laws were not aimed at immigrants, but "rather at the persons responsible for transporting them." This was the form of the most popular type of immigration restriction carried out by the northern states. He further indicated that immigration historians often missed laws regarding slavery and statutes that regulated the movement of citizens and non-citizens

alike across international and even interstate borders.[21] These kinds of laws were the form of migration restrictions most likely taken by the southern states.

From the colonial period to the 1800s, in the northeastern seaboard states, which received the lion's share of immigration, there was no significant bureaucratic infrastructure in place at the state level, much less the federal level, to process or to provide any services or protections to arriving immigrants or to screen them. It was not until the mid-1800s that state control over immigration was beefed up.[22] In theory, the states initial foray into immigration regulation was precipitated by their concern over foreign pauperism. In practice, the regulation of immigration through the creation of a bureaucracy and of new regulations and other infrastructure was shouldered by a few states that were home to large and busy ports such as Massachusetts, New York, Pennsylvania, and Maryland, who were hit by the brunt of the social and financial cost of the huge immigrant flow.[23] And even then, many of the state mechanisms to screen poor, sick, and criminal immigrants were continuations of policies that began in the colonial period.

One way to understand why the states and localities made laws regarding public health, the poor, and morality as well as the zeal with which they carried out these laws is that in the nineteenth century, there was not yet any kind of welfare state, social service agencies, or any local or national government apparatus to manage the poor, the sick, and

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[21] Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders and Fundamental Law*, (New Jersey, Princeton University Press). Also see Neuman, "The Lost Century of American Immigration Law", 1836-1838.
[22] Robert Ernst, 1994. *Immigrant Life in New York City, 1825-1863*, (New York: Syracuse University Press), 28-29.
[23] William S. Bernard "Immigration: History of U.S. Policy" in *Harvard Encyclopedia of American Ethnic Groups*, (eds. Stephen Thernstrom, Ann Orlov and Oscar Handlin) (Belknap: Harvard University Press, 1980), 488.

the criminal. Like the English poor laws, the poor and sick were the economic and social responsibility of the local community where they were "legally settled" and the responsibility of private charities and churches. Immigrants were not entitled to "settlement' under poor laws and even those who were admitted to the U.S. but who were not naturalized were still subject to deportation by local officials and returned at public expense.[24] Therefore, states and localities had tremendous interest in creating laws and policies that kept the poor and sick out of their jurisdiction. As well, states during this period were very intent on "removing" some poor in their jurisdiction to somewhere where the person presumably was "legally settled", including back to their home country.[25]

All of these types of local laws also fell under the general social and political understanding of the broader rubric of laws regarding "the people's welfare" and the public good. As Novak has argued in his very comprehensive study, *The People's Welfare: Law and Regulation in the Nineteenth Century*, that century was a distinctive point in time where the preoccupation was about a public society and the common good, which were prioritized over individual liberties and commercial rights.[26] In both North and South, a premium was also placed on social order, which had to be preserved for the good and welfare of the public.

Another feature of nineteenth century governance was that it was local. States and localities enforced many of aspects of slavery and liquor laws, two areas of law that

[24] Neuman, *Strangers to the Constitution*, 26.
[25] Neuman, "The Lost Century", 1846.
[26] Novak, 1996. *The People's Welfare* (Chapel Hill, NC: University of North Carolina Press), 9.

show the extensiveness and invasiveness of subnational exercises of power.[27] Novak persuasively argues that the nineteenth century American state was far from weak and "stateless", even though the national government had limited administrative capacity because subnational units were carrying out extensive regulation of private property, the economy, use of public spaces, alcohol, and over classes of people who were deemed to be poor, sick, disorderly, or dangerous. In the name of the common law maxim *salus populi suprema lex est* ("the people's welfare is the supreme law"), states regulated many aspects of private life.[28] They did this through many categories of laws that had implications for immigration: laws about morality, public health (fire safety/quarantine/occupational licensing), nuisance laws (about the use of public spaces), poor laws (including laws aimed at those who transported allegedly the poor and the sick to the U.S.), and a large body of laws about slavery.

After the Revolutionary War, state immigration policies were often facsimiles or improvements of colonial era policies. Although there was undoubtedly a range of variation of policies across the colonies, the commonalities in approach among some of these policies created the template for future state and federal policies. Two general forms of colonial policy were adopted and perpetuated by the states after the Revolutionary War: local government's exercise of authority and control over the movement of peoples into and out of the colonies, and the national government leaving it to the local governments and entrepreneurs to manage the entry and exit of persons.[29]

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[27] Balogh, *A Government Out of Sight*, 7.

[28] Novak, *The People's Welfare*, 3, 9. Novak also states *salus populi* worked in conjunction with *sic utere tuo*, "Use your own property so as not to injure another's property."

[29] William S. Bernard "Immigration: History of U.S. Policy" in *Harvard Encyclopedia of American Ethnic Groups*, (eds. Stephen Thernstrom, Ann Orlov and Oscar Handlin) (Belknap: Harvard University Press, 1980), 487-488.

The age of mass migration in the mid-nineteenth century really pushed eastern seaboard states to adopt policies to control the movement of people. Although the colonial period saw much immigration, no time period in history saw the magnitude of movement of people as in the period from 1812-1914, the age of mass migration to the United States. When the federal government began collecting data on immigration in 1820, it showed each decade registering a dramatic increase in immigration arrivals:

1820s	128,502
1830s	538,381
1840s	1,427,337
1850s	2,814,554
1860s	2,081,261
1870s	2,742,137
1880s	5,248,568[30]

This "first wave" of immigration occurred at a time when the U.S. population was relatively small. One can gain some sense of the scale of immigration by assessing the immigrant entrants as a percentage of the overall U.S. population. In the decades of 1830, 1840, and 1850, immigrants constituted 14, 28, and 32 percent respectively of the overall U.S. population increase. Between 1820 and 1860, the U.S. population tripled from 9.6 million to 31.5 million and immigration was a great contributor to this increase.[31] Put differently, the 1860 census showed that almost one half of residents of New York were foreign born and well over one-third of the population of Boston was foreign born.[32]

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[30] U.S. Department of Homeland Security, *Yearbook of Immigration Statistics, 2010*, "Table 2: Persons Obtaining Legal Resident Status by Region and Selected Country of Last Residence: FY 1820-2009, 6. The federal government did not collect any immigration statistics until 1820.
[31] Daniel J. Tichenor, 2002. *Dividing Lines: The Politics of Immigration Control in America*, (New Jersey: Princeton University Press, 56)
[32] Maldwyn Jones, 1960. *American Immigration*. (Chicago, IL: University of Chicago Press), 93, 117. Other cities which showed half of their population were foreign born were: Chicago, Cincinnati, Milwaukee, Detroit, and San Francisco.

Caring for sick, poor, and convicted immigrants

In the early nineteenth century, relief to the poor was viewed as a religious or philanthropic responsibility. Before 1847, the subject of the care and support of immigrants was left either to general quarantine and poor laws or to local ordinances."[33] Out of necessity, the State of New York was forced to maintain an almshouse, hospitals and several dispensaries and a disproportionate number of immigrants seemed to end up there. Connecticut, Oregon, and Washington, "which had no foreign passenger traffic to speak of" were the only seaboard states never to have legislated on the subject of indigent immigrants.[34] But by 1830, 33 states all over the U.S. had immigration bureaus, reflecting the importance of the subject to the states.[35]

Foreign convicts were a concern and they were excluded outright from entry in the colonial period. Upon recommendation by the national government after the American Revolution convict exclusion laws were subsequently adopted by Georgia in (1785), Massachusetts (1789), Pennsylvania (1788), South Carolina (1788), and Virginia (1788). After the ratification of the constitution, more states either copied laws from other states or devised their own, including Maine (1821), Maryland (1797), New Jersey (1797), New York (1798), and Rhode Island (1798). After the American Revolution ended, this problem became less of a concern because the British abandoned their efforts

[33]Bernard, "Immigration: History of U.S. Policy", 488 and Ernst, *Immigrant Life in New York City*, 25.
[34] Benjamin J. Klebaner, "State *and* Local Immigration Regulation in the United States before 1882," *International Review of Social History* 3 (1958): 269-95, 271.
[35] Alexandra Filindra, *E Pluribus Unum? Federalism, Immigration, and the Role of American States*. Doctoral dissertation. (Department of Political Science, Rutgers University—New Brunswick, October 2009), 91.

to try to ship convicts to the United States and instead established the penal colony at Botany Bay in Australia.[36]

Many of these policies for the poor were driven by the widespread belief that foreign countries and their governments were concertedly dumping not just convicts, but also paupers into the United States so that their home countries would not have to support them.[37] Friederich Kapp, a former New York Commissioner of Emigration, charged that, "the unscrupulous conduct of European governments and cities in transferring to our country aged and decrepit paupers, and occasionally even criminals" resulted in financial and social problems for New York.[38]

Historian Benjamin Klebaner contested this claim that foreign governments were dumping their paupers into the United States by noting the foreign laws prevented the transportation of paupers. Klebaner also noted the actual number of paupers in the official statistics of imported foreign paupers from the sending countries was much smaller than the public believed, and that one must be careful to distinguish between "needy foreigners who had been sent over at the expense of their native community" and those who had "come without assistance of public funds but subsequently had to apply

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[36] Edward Prince Hutchinson, 1981. *Legislative History of American Immigration Policy* (Philadelphia: University of Pennsylvania Press), 11, 400. There is some dispute about the existence of these laws, none of which have been found and have been omitted in the 1911 Dillingham Immigration Commission Report, which is regarded to be an authoritative source. Nevertheless, Hutchinson finds echoes of the resolution in a 1794 Massachusetts law that fines a shipmaster who transports convicts. Neuman's, "Lost Century of American Immigration Policy" article does enumerate these convict exclusion laws passed by states before and after the ratification of the constitution, 1841-1843.

[37] Benjamin J. Klebaner, "The Myth of Foreign Pauper Dumping in the United States", *The Social Service Review*, Vol. 35, No. 3 (Sept. 1961), pp. 302-309, 302

[38] Frederich Kapp, *Immigration and the Commissioners of Emigration*, (New York, D. Taylor, 1870), 89.

for relief in their new homeland."[39] Yet the fact remained that in any city or area where immigrants congregated, a large proportion of those dependent upon government assistance were indeed foreign-born. One estimate showed that from 1845 to 1860, between one-half and two-thirds of Boston's paupers were immigrants, while in New York in 1860, "no fewer than 86 percent of those on relief were foreign born."[40] Zolberg similarly reports that in New York, "from the turn of the century onward the foreign-born constituted about one-third of poorhouse inmates" and by 1825, "when immigrants constituted 4.6 percent of the city's population, they amounted to 40 percent of almshouse admissions."[41] Klebaner does note, however, that "the greatest burden [to care for indigent immigrants] fell on the important ports of entry" since the "most diligent and well-to-do of the immigrants pushed into the interior, while the poorer, less desirable foreigners tended to remain" at or near the ports where they arrived.[42]

State methods of control of the poor and sick

Not surprisingly, Massachusetts and New York also led the way in the effort to pass laws requiring steamship captains to provide bonds for passengers who were found likely to become a public charge. Zolberg reports that "the principal port-of-entry states armed themselves with legislation designed to screen out paupers and convicts, as well as to compensate the receiving communities and philanthropic bodies for some of the social costs imposed on them by the screen's imperfections."[43]

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[39] Klebaner, "The Myth of Foreign Pauper Dumping", 303, 306, 307. Klebaner notes that it was very easy for new immigrants to find themselves on public assistance since many had used all their funds to pay for the voyage, others fell ill during the journey, and others who could not find jobs upon arrival.
[40] Jones, *American Immigration*, 133.
[41] Zolberg, *A Nation by Design*, 115.
[42] Klebaner, "The Myth of Foreign Pauper Dumping", 307-308.
[43] Zolberg, *A Nation by Design*, 117.

The form migration controls took was tied to several factors, including the constitutional text and the lack of sufficient administrative capacity. In the colonial period, there was limited administrative capacity and a lack of systematic and institutionalized procedures to screen out the sick and the poor. As Zolberg stated, "Since under the prevailing rudimentary regulatory regime it was almost impossible to inspect individuals and hold them accountable, colonial legislatures and port-of-entry bodies sought to deter their entry by imposing head taxes and security bonds, to be paid by shippers or prospective employers, and whose proceeds were sometimes used for the support for charitable institutions." New York, where two-thirds of the new arrivals landed, had the most extensive and elaborate inspection and welfare laws as well as refinements of the shipmaster reporting system, known as "manifesting", a practice that began in the colonial period. Manifesting required the ship-owner not just to provide a list of names of all passengers, but also their physical condition and occupation and other information that would aid in the determination of whether the person would become a social or economic liability of the local community.

Further, with the ratification of the U.S. Constitution in 1787, another limit was applied to the method and scope of restriction by the Constitution's migration and importation clause. As Zolberg explained:

> Given America's self-imposed constraint against barring "immigration or importation" prior to 1808, regulation was largely aimed at producing revenue to offset the costs incurred by city and charitable organizations. Most of the devices entailed some form of security to be put up by shippers on behalf of persons "likely to be chargeable to the community, " which could sometimes be commuted into the payment of a much smaller cash fee. A flat head tax was sometimes added as well. These costs were passed on to the passengers

> themselves in the form of higher fares and thereby expected to eliminate or at least minimize the most destitute.[44]

The lack of administrative capacity to inspect each and every passenger thoroughly explains why the methods of control by the colonies and later the states took the form of head taxes, bonds, and other financial assurances to ease the financial burdens on local communities. The migration and importation clause in the original constitution partially explains why migration policy was a subnational and not national policy.

Continuing with colonial practices, on March 7, 1788, a New York act required shipmasters to transport back to the "place from whence he came" or "enter into bond to the mayor, alderman and commonality of the city of New York" the sum of 200 pounds to guard against persons likely to become a public charge.[45] New York followed up with several other pieces of legislation to protect itself from bearing the cost of indigent persons, including four subsequent acts passed in 1797, 1824, 1827, and 1847 that stipulated various financial punishments of shipmasters who transported indigent immigrants.[46] The New York State Passenger Act of 1824 required shipmasters to report to the state the name, birthplace, last legal settlement, age and occupation of each arriving passenger. The shipmaster's endorsement of the signed report "with the signature of two sureties" constituted a "bond up to $300 for each alien passenger to indemnify the city in case such immigrants or their children became public charges within two years."[47]

Massachusetts passed similarly tough legislation to protect itself from the burden of poor immigrants. It passed a settlement act like New York did in 1789 and also had a

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[44] Zolberg, *A Nation by Design*, 43, 75.
[45] Hutchinson, *Legislative History of American Immigration Policy*, 397.
[46] Hutchinson, *Legislative History of American Immigration Policy*, 398.
[47] Robert Ernst, *Immigrant Life in New York City*, (Syracuse: Syracuse University Press, 1994), 25-26.

manifesting (reporting) requirement authorizing "overseers or Selectmen" to "set to work" for one year any persons, immigrant or not, "able of body, who have no visible means of support."[48] Other acts passed in Massachusetts in 1794, 1810, 1830, 1835, 1837, and 1848. Most of these acts were variations of laws that held shipmasters financially responsible for transporting persons found upon inspection to be "lunatic, idiot, maimed, aged or infirm persons incompetent in the opinion of the officer examining, to maintain themselves, or who have been paupers in any other country."[49]

In later years, in many states, the bond could also be commuted in favor of a flat tax. In fact, the bonds were "nearly always commuted in favor of a fixed rate head tax", which went to fund immigrant hospitals and other services. Many states allowed for the option of a tax or bond. In Massachusetts (1837-1849) and New York (1847-1849), the ship owner had to "bond defective passengers and pay the head money [tax] for the others." The Massachusetts law was later invalidated in 1849 by *The Passenger Cases*, 48 U.S. 283 (1849) and several states had to amend their laws. Thereafter, Massachusetts and New York allowed the shipmaster the option of choosing bond or commutation for healthy passengers (and later for all passengers).[50]

Although other eastern seaboard states also passed reporting/manifesting and bonding laws to guard themselves against the burden of an influx of poor immigrants, it was New York and Massachusetts "that took the lead in this form of legislation" because they were most affected. And it was the attempts of these two states to pass severe legislation that eventually brought constitutional challenges against state action in this

[48] Cited in Hutchinson, *Legislative History of American Immigration Policy*, 397.
[49] Hutchinson, *Legislative History of American Immigration Policy*, 399-400. (citing the Massachusetts act of 1837.)
[50] Jones, *American Immigration*, 128, 153 and Klebaner, "State and Local Regulation of Immigration", 270-271.

area vis-á-vis the national government.[51] By the mid-1800s, New York and Massachusetts had to staff almshouses, multiple medical facilities, and a full-scale immigration landing depot at Castle Garden. The local institutions in these two states alone illustrate the extensive administrative capacity built up at the local level in the nineteenth century to manage the immigrants, the poor, and the sick. In addition to offices to collect taxes and bonds for immigrants, and buy property for the care of immigrants, state immigration officials were empowered and had tremendous discretion to deport, remove, and relocate persons deemed undesirable to other parts of the state, other parts of the U.S., or to send the immigrant back to their country of origin. The elaborate network of state level bureaucracy stands in sharp contrast to the national government's absence of a parallel bureaucracy and personnel to manage migration during this time period.

State institutions designated to the immigrant poor and sick

Dealing with sickly immigrants also required the creation of state and local institutions. Since 1797, New York maintained a Marine Hospital on Staten Island for the dual purpose of caring for sick and disabled seaman and quarantining immigrants with contagious or infectious diseases. But immigrants who contracted noncommunicable diseases after their arrival were not usually admitted. The care of immigrants at the Marine Hospital was financed by a head tax on passengers and crews entering the port, set in 1845 as two dollars for cabin passengers and fifty cents for steerage passengers. In its peak year in 1852, the Marine hospital treated almost 9,000 patients and the "official

[51] Hutchinson, *Legislative History of American Immigration Policy*, 400.

capacity was listed as 556 beds and the emergency capacity at 776."[52] Since the Marine Hospital was supposed to be one of the first mechanisms for screening and quarantining sick immigrants to prevent them from entering the city, jurisdiction of the hospital was transferred in 1847 from the Health Officer to the Emigration Commissioner. In April 1849, the facility became formally restricted to treating people with contagious diseases.[53]

One of the first things that the Commissioner of Emigration did upon the creation commission was in 1847 was to establish the Emigrant Refuge and Hospital on Ward's Island, which was technically an almshouse. For a brief time between 1853-1855, the Ward's island hospital complex "formed the largest hospital center in the world." The collection of "hospital money" that funded all these institutions stopped when the Supreme Court declared the tax unconstitutional in 1849 in the *Passenger Cases*, 48 U.S. 283 (1849).[54] Before the "hospital money" head tax was invalidated, the state quarantine law provided for the care of sick and destitute immigrants who received free medical care at Ward's Island upon arrival for one year. They were transferred to the Almshouse if at the end of the year they were not well enough to leave.[55] Despite that financial setback of having the head tax invalidated, by 1852, the state of New York, through a network of about half a dozen specialized medical facilities was caring for over 20,000 patients, a large proportion of whom were immigrants.[56]

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[52] John Duffy, *A History of Public Health in New York City 1625-1866* (New York: Russell Sage Foundation, 1968), 490-492. In 1831, a separate hospital for Negro seamen was established.
[53] Kapp, *Immigration and the Emigration Commission of the State of New York*, 125.
[54] Duffy, *A History of Public Health*, 492-493, 496, 518; Ernst, *Immigrant Life in New York City*, 26-27; and Klebaner, "State and Local Regulation of Immigration", 272.
[55] Kapp, *Immigration and Emigration Commission of the State of New York*, 125.
[56] Duffy, *A History of Public Health*, 518.

After 1875, the states continued to regulate quarantine with the cooperation of the federal government, and the Supreme Court continued to approve of this arrangement.[57] Exclusion of immigrants on the grounds of contagious disease did not happen under federal law until 1891, after "the exclusion of Chinese laborers, convicts, and persons likely to become a public charge". As Neuman explains, "This delay does not indicate the pubic health regulations of migration was a novelty, but rather reflects the strength of the tradition of federal deference to state regulation of migration in that area, exercised for most of the nineteenth century through the mechanism of quarantine."[58] It was not a lack of administrative capacity that delayed federal intervention, it was federal deference based on the established tradition of *salus populi*.

Quarantine is not usually synonymous with immigration policy, and indeed quarantine laws are often missed in studies of immigration when in fact they play a huge role in regulating the entry and exit of persons. Neuman wrote, "Quarantine laws, for example, operated by delay and not by permanent exclusion. In times of perceived peril, quarantine was more likely to be strictly enforced. Maritime quarantine might lead to the death of the would-be immigrant who was stopped at the port, rather than deportation to another country, or to admittance of the immigrant after she had survived the disease. But as a barrier to free migration it had serious practical significance."[59] Kapp, a former New York Commissioner of the Emigration Board, described the authority of the quarantine officer this way: "It was then, and still is, the law of the State of New York that a vessel arriving at Quarantine is under the control of the health officer, and that consequently the ship-owners can exercise no control over their own vessels until they

[57] See cases from Neuman, "Lost Century of American Immigration", Pg. 1865, FN 209.
[58] Neuman, *Strangers to the Constitution*, 31.
[59] Neuman, "The Lost Century of American Immigration Law", 1865, 1884.

pass out of the hands of that officer."[60] State quarantine officers then had the authority to override control of the vessel from even the ship owners and officers and the ship could not unload any passengers or goods until they were cleared by the state quarantine officer.

New York's Emigration Commission

There was virtually no national immigration policy until 1819, when the federal government took a nominal step into the arena by requiring state officials to report information about arriving immigrants to the Secretary of State. Up to this point, the states collected data on immigrant arrivals, but there was no nationwide or systematic collection of immigration data.[61] In the mid-1800s, states, especially those with high immigration arrivals, started setting up more formal governmental structures to manage immigrants. New York established a Commissioner for Emigration in 1847 and Massachusetts centralized its immigration bureaucracy and receipt of funds in the state Board of Commissioners of Alien Passengers and State Paupers in 1851.[62]

In response to the calls from immigrant benevolent societies to the state to more systematically provide for poor and sick immigrants and to oversee the bonding system, New York created its Board of Commissioners of Emigration.[63] The Board of Commissioners of Emigration had ten members and included ex officio members who were leaders in the German and Irish emigrant aid societies. The members were either

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[60] Kapp, "Immigration, and the Commissioners of Emigration of the State of New York", 63.
[61] Kapp, Friedrich. Immigration, and the Commissioners of Emigration of the State of New York. New York : The Nation Press, 1870. "Bonding and Commuting—Private Hospitals for Immigrants", pgs. 40-41 Available at: http://nrs.harvard.edu/urn-3:FHCL:902280?n=2 (Kapp was one of the Emigration Commissioners in New York. His 1870 report seems to be the most comprehensive one of the period and has served as a primary source for many scholars.)
[62] Klebaner, "State and Local Regulation of Immigration", 276.
[63] Kapp, *Immigration, and the Commissioners of Emigration*, 86.

appointed by the governor or the mayors of New York and Brooklyn, and the presidents of the German Society and Irish Emigrant Society.[64] The commission office moved several times before they were finally relocated to Castle Garden in 1858.[65] From May, 1847, when the Commission was established, to the end of 1875, over 500,000 immigrants had benefited from the services of the Commission's many offices, a smaller number had been "fed and lodged temporarily and supplied with cash relief in the city", and another 250,000 had been assisted by counties that were paid directly by the Emigration Commission office.[66]

The commission was not only in charge of overseeing the bonding system but also the system of reporting passengers, as well as "the protection of immigrants from fraud and abuse." Therefore the function of this commission was a mixture of regulatory and social services. The Commissioners also were also authorized to use their funds to help immigrants find jobs and also to remove/deport them from any part of the state to another part of the state, or to remove them altogether from the state, or deport them to their home country, in order to prevent them from becoming a public charge. By the end of 1875, Klebaner reports, "over 58,000 persons" had been "forwarded to a destination in the United States or returned to Europe at their own request" via funds of the Emigration

[64] Ernst, *Immigrant Life in New York City*, 28-29. Kapp, *Immigration, and the Commissioners of Emigration*, 100.
[65] *Frank Leslie's Popular Monthly*, "New York Assumes Control of Affairs at Leading Port", Vol XXV January to June 1888. (Available at: http://www.gjenvick.com/Immigration/CastleGarden/1888-AHistoryOfCastleGardenImmigrationStation.html) and Kapp, *Immigration, and the Commissioners of Emigration*, 105-106.
[66] Klebaner, "State and Local Regulation of Immigration", 275.

Commission.[67] Therefore, the New York Emigration Commission had the power of relocation of a person from one part of the state to another, exile, and deportation.

Caste Garden Landing Depot in New York

Based on a New York investigation into the abuses of immigrants and the feeding frenzy on the docks by a plethora of unsavory people who sought to rob new immigrants of their earnings and savings, New York established the Castle Garden depot in 1855 to receive immigrants, an entirely state run operation. The New York state legislature had passed an act to lease the space that sat at the bottom of Manhattan Island.[68] At Castle Garden, there was an elaborate system and bureaucracy set up, with different departments to process immigrant arrivals and in contrast to the open decks that were a free for all, immigrants at Castle Garden were landed in an orderly manner and more importantly, in an environment controlled by the State of New York and relatively shielded from those who would prey upon immigrants. The Commissioner of Castle Garden as well as the almost all-voluntary staff served without pay and were guided by "a spirit of benevolence" rather than restriction.[69] Klebaner described Castle Garden as "a miniature welfare state."[70]

At Castle Garden, there were seven official departments that systematically processed and landed immigrants, with departments that conducted reception and orientation, a hospital where sick immigrants could recuperate, an inexpensive restaurant, free baths, baggage carrying services, and a communal kitchen.[71] In his 1870

[67] Neuman, The Lost Century of American Immigration, 1855 and Klebaner, "State and Local Regulation of Immigration", 275.
[68] Kapp, *Immigration, and the Commissioners of Emigration*, 106-107.
[69] Bernard, "Immigration: History of U.S. Policy", 489.
[70] Klebaner, "State and Local Regulation of Immigration", 276.
[71] Bernard, "Immigration: History of U.S. Policy", 489.

Commission report, Kapp enumerated the benefits of Castle Garden to multiple entities. He noted that for the immigrants, the establishment of Castle Garden created an environment in which immigrants could be landed in a "more safe and speedy" manner in their person and effects after "having been put on shore, predators being limited to fellow-passengers, and but slight opportunity existing for successful pillage by them. In relief from the importunities and deceptions of runners and brokers." For the shippers, he noted the greater efficiency in which they could unload all at once passengers and merchandise. For the Emigration Commission, Castle Garden meant more systematic procedures of discovering persons who were ill or likely to become a public charge and who would require a bond. For the statistician, Castle Garden allowed the opportunity to "furnish reliable data" of arriving immigrants. And for the general community of New York, Kapp stated that the benefit of Castle Garden was to contribute to the "diminution of human suffering" by reducing "calls on the benevolent throughout the country; and in the dispersion of a band of outlaws attracted to this port by plunder, from all parts of the earth." [72]

I provide a detailed description here of the functions of the various departments and services offered so that one can gain a sense of the extensive scope and breadth of the specialized bureaucracy that had been set up by the state of New York to land, process, and direct immigrants after their arrival. When ships arrived in New York harbor, the first stop was the quarantine station, six miles from shore, where a state official who had first state official contact via the Boarding Department, who would board the ship to check how many passengers had died during the voyage, the number and nature of the sick, and then to make an official report to the General Agent and Superintendent at Castle Garden.

[72] Kapp, *Immigration, and the Commissioners of Emigration*, 109-110.

The boarding agent would then ride with the ship until it docked, making sure that the law that the ship could have no communication with those on shore until it was officially docked was enforced.[73]

Upon the ship anchoring, the Boarding Agent was replaced by a Metropolitan police officer on detail to Castle Island. A Landing Agent and Custom Inspector, who inspected the baggage, greeted the ship. The immigrants were then inspected by a medical inspector and anyone who was sick who did not get flagged on the quarantine inspection were transferred to one of the medical facilities on either Ward's or Blackwell's Island.[74] The Registration Department would then record the immigrants' names, nationality, former place of residence, intended place of residence and other information. They were then directed to agents of railroads who would provide transportation to different locations within the United States. The immigrants' previously tagged baggage was then delivered to the railroad companies directly. Those remaining in the city could arrange to have their baggage delivered to a local address or to be stored until they could locate lodging. There was also a currency exchange (with rates clearly posted), information department, letter writing department staffed by scribes fluent in many immigrant languages, and a forwarding department that would keep all letters and remittances from the friends and family of immigrants. Boarding house keepers, who were duly licensed and certified by the Mayor were allowed into the Rotunda where the processed immigrants waited. Possibly one of the most useful services was a labor exchange where an intelligence officer sought to put immigrants with certain skills in touch with employers from all over the country who needed those skills and who had

[73] Kapp, *Immigration, and the Commissioners of Emigration*, 111-112.
[74] Kapp, *Immigration, and the Commissioners of Emigration*, 112.

been vetted for "character and other necessary qualifications." Finally, there was a Ward's Island agent, assisted by two physicians, who would take applications for the refuge and hospital for those who were sick and could not afford to pay for medical care.[75]

Castle Garden, a tiny city unto itself, was open daily, and at night if necessary. Annual rent for the facility was $12,000. The total number of staff of Castle Garden and that of the Marine Hospital at Staten Island was 76 officers and employees. Their yearly salaries totaled $82,894.[76] From its opening in 1855 to its closing in 1890, Castle Garden landed and distributed 9,725,430 immigrants supervised and processed by state officials.[77] Castle Garden was run not as a detention station, but as "a protective charity foundation" in providing "safety form swindlers and confidence men, a hospitable reception for newcomers, practical advice and social services."[78] As Ernst summarized it, "Castle Garden was of great advantage of the immigrant. He was landed more speedily and more safely than before. He was less subject to the deception of swindlers."[79]

From 1876 to 1882, the eve of the federal takeover, New York state taxpayers spent over one million dollars for institutions to care for immigrants.[80] A similar statistic is derived by Kapp who reported that the New York Emigration Commission's reimbursement to counties in the state for the care of immigrants from May 5, 1847, to

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[75] Kapp, *Immigration, and the Commissioners of Emigration*, 112-117.
[76] Kapp, *Immigration, and the Commissioners of Emigration*, 124.
[77] *Frank Leslie's Popular Monthly*, "New York Assumes Control of Affairs at Leading Port", Vol XXV January to June 1888. (Available at: http://www.gjenvick.com/Immigration/CastleGarden/1888-AHistoryOfCastleGardenImmigrationStation.html)
[78] Bernard, "Immigration: History of U.S. Policy", 489.
[79] Ernst, *Immigrant Life in New York City*, 31.
[80] Klebaner, "State and Local Regulation of Immigrants", 275.

December 31, 1869, was $994,279 and the reimbursement to hospitals was $163,371, bringing the grand total to $1,169, 651 in a 22-year period.[81] The State of New York had by far the most elaborate network of institutions and services for the care and regulation of immigrants. Only Massachusetts came close to having a comparable setup. Other coastal states also established immigration boards staffed by social reformer and humanitarians who served without pay to manage immigrants.[82] Whether they liked it or not, the migration and importation clause of the constitution barred federal legislation in this area and given the prevailing nineteenth century understanding of people's welfare, the care of the sick and poor were local concerns.

Timing and sequence of immigration policies

Scholars of American Political Development are often interested in the timing as well as the sequence of events. This article specifically attempts to ascertain why it took so long for the national government to take over immigration policy from the states. The chart below summarizes a broad array of immigration activities in which the policies were pioneered first by either the colonies or the states and then later duplicated by the national government. Although some of these policy categories overlap, such as a variety of laws from bonds, to head taxes, to quarantine laws, all designed to address the issue of indigent and sickly immigrants, the chart catalogues the variety and creativity of a host of immigration policies created by the colonies and states.

Table 1: Year of first passage of various types of immigration policy

Type of policy	**Earliest year of colonial/state law**	**First year of federal law**

[81] Kapp, *Immigration, and the Commissioners of Emigration*, 126.
[82] Bernard, "Immigration: History of U.S. Policy", 488.

Migration incentives and inducements (including land grants, advertising abroad, employment incentives)	All the colonies	1864
Exclusions -religious -indigent -sick and diseased -mental defect -felons/convicts	 colonies MA (1645) * *[83] VA (1671)	 N/A 1882 1893 1882 1917
Bond on arriving passengers	NY (1691)	N/A
Head tax on arriving passengers	PA (1729)	1882
Return of inadmissible immigrant to home country at shipmaster expense	New Plymouth (1658)	1882
Manifesting (reporting)	New York (1691)	1893
Quarantine of the sick (as opposed to deportation)	1797 (NY)	1921 (Feds take over function altogether)
Steerage laws governing health, safety, and condition of steamship and passengers	1837 (MA)[84]	1819
Landing depot/processing center	New York Castle Garden (1855-1882)	Ellis Island (1892-1954)
Deportation/removal to home country or other part of state or U.S.	Banishment of Quakers and Catholics in the colonies	Alien Enemy Act (1798)
Bureaucratic structure in the form of formal institutions (Emigration Boards/Commissions, almshouses, Health inspectors etc.)	NY Emigration Commission (1847)	1864 (Congress passes law establishing Bureau of Immigration)
Naturalization	Colonies and states all could naturalize persons, each colony/state had own policy	1790 and 1795

[83] Colonies and states dealt with the sickly and indigent through bonding, head tax, manifesting, or quarantine laws.

[84] Act of 1837, Massachusetts State Laws, ch. 238, pg. 270 "An Act Relating to alien Passengers" found in *Reports of the Immigration Commission*, (Washington, DC, Government Printing Office, 1911) Vol. 39 , pg. 692-693.

Collection of statistical data	Individual states responsible for data collection. No systematic standards or reporting requirements to national gov.	1820

As the chart summarizes, in just about every permutation of immigration policy in the nineteenth century except steerage laws, the national government followed the policies of the colonies and states; the national government did not lead, although they provided tacit support for local and state policies.

The immigration policies of the northern states illustrate the 18th and 19th century tradition of the poor, sick, and criminal being local responsibilities pursuant to the strong notion of *salus populi*. Since arrivals could not be pre-inspected before their entry to the U.S. nor could inspection be as very thorough, most seaboard states between 1819 and 1822, "from Maine to Florida" enacted some sort of measure to reimburse themselves for the economic expenses posed by the poor, sick, and convicted. New York though, led the way in devising the most sophisticated system and was the first to extend the bond system to all passengers on the ship and raising sanctions for violations. New York laws also empowered the mayor to deport even citizens who landed at the port."[85] All of these head tax and bonding laws as well as quarantine and other public health laws affected shipmasters, owners and immigrants into the U.S. The overriding concern for the public welfare during this time period also explains why there was never a second thought about infringing on the rights and privacy of those immigrants who were being screened out or of those whose liberty of movement was severely restricted.

[85] Zolberg, *A Nation by Design*, 117.

B. The Southern States: Preserving slavery and self-preservation against slave insurrections

While the northeastern seaboard states' primary concern was protecting themselves against the social and economic effects of poor, sickly, and convicted immigrants, the southern states' view of migration policy was driven by a decidedly different set of concerns. As Balogh noted, while "nobody questioned the constitutional authority of Congress to clear local barriers to interstate trade", the parochial orientation of the Senators precluded congressional action challenging the Supreme Court's decision on trade policy.[86] However, policies remotely impinging on the right to regulate the movement of persons were an entirely different story. Aside from the focus on public welfare, in the southern states, the big consideration that drove the balance of power between the national government and the states was the existence of slavery, or more precisely the cost of maintaining the peculiar institution. The concerns were two-fold. First, slave states had to be very vigilant about protecting state power against federal encroachment.[87] Any perceived or actual expansion of federal power was met with virulent resistance. There was the constant threat of the national government becoming so powerful that it would overwhelm the states and their choice to practice slavery. Second, there was the ongoing internal challenges to the social order of southern social hierarchy.[88] Policing the boundaries of the mixing of the races as well as guarding against internal slave insurrections accounted for much of the motivation for state and local policies that affected immigrants and even citizens of non-African descent.

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[86] Balogh, *Government Out of Sight*, 339.
[87] Balogh, *Government Out of Sight*, 144
[88] Novak, *The People's Welfare*, 53

Any expansion of federal power was viewed with suspicion for fear that it would "interfere with the slave economy". Writing about the debates over internal improvements in the nineteenth century, including developing the Army Corps of Engineers and the postal service, Balogh indicated that the defenders of federal power cited not only the "general welfare" and the "necessary and proper" clause of the constitution in support, but also "national defense" and "commercial benefits". Meanwhile, the opponents of theses expansions of the national government's power questioned whether these projects were really national in scope and why they would not be better executed at the state level. More tellingly, they "pointed to the growing sectional divide over federal powers that might one day threaten slavery." Indeed the National Bank and internal improvements were all cause for alarm in the South.[89] Similarly, national disaster relief, which saw a huge drop off in the twenty years leading up to the Civil War, was also regarded as a threat to state power. The thinking in the South was that federal disaster relief portended unwanted expansion of federal power and the possibility of "inciting secessionist sentiments" in the Democratic Party that might split the party.[90]

In the lead up to the Civil War, the preservation of the institution of slavery in the South brought new imperatives for controlling the migration of people and an extension of the states' rights view to an extreme. Riker pointed out, despite the traditional argument that federalism encourages freedom, in the case of the Civil War and Jim Crow, "states rights" has been used "as a veiled defense first of slavery, and then of civil tyranny. Here it seems that federalism may have more to do with destroying freedom

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[89] Balogh, *A Government Out of Sight*, 138, 144.
[90] Dauber, *The Sympathetic State*, 25.

than with encouraging it."[91] The immigration case study shows that slave states used the federal system to their advantage and to the detriment of free blacks, slaves, and black navy seamen.

The racial imbalance in some states presented a variety of problems. In South Carolina for instance, in the 1800s, blacks, free and slave together also outnumbered whites, causing psychological nervousness among the white population. Historian William W. Freehling reports that throughout many districts in South Carolina in the 1830s, "the ratio of Negroes to whites reached unsettling proportions...No other area in the Old South contained such a massive, concentrated Negro population."[92] Of course a racial imbalance by itself does not lead to a call for restriction of mobility, but the issue was of slavery, which led to other complications.

Slavery was obviously not just an economic system, but also a social order predicated on a belief in white supremacy. Law, though, can enforce social order. As Novak wrote, the "well regulated society" presumed a correspondence between laws and "community standards." Many laws were passed in the South with the goal of preventing racial mixing, which constituted a disturbance to the racial order and a violation of community standards. Novak added, "Race and class hierarchies powerfully shaped, and in some cases determined, antebellum conceptions of immorality and disorder." In the pursuit of the public good, laws in both North and South often turned on unequal enforcement; based on race of the clientele or owners, certain businesses were shut down as "illegal" or "disorderly nuisances." In the North, the same sorts of activities when

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91 William H. Riker, *Federalism: Origin, Operation, Significance*, (Boston: Little, Brown Company, 1964), 40-41,140.

92 William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina 1816-1836*. (New York: Oxford University Press), 11

performed by whites, such as drinking, cursing, and noise, were little cause for concern, but blacks that were engaging in the same type of activity were guilty of "disorder." But in the South, the tolerance was even lower. Any racial mixing, including dancing and just meeting together, was suspect and ran afoul of laws against "disorder." Allegations of "drunken negroes" apparently "triggered disorderly [public and private] house prosecutions" especially in the South.[93] The question is not so much about what is the public welfare as whose public welfare was being protected.

Given the large number of the black population who were enslaved, a constant worry in the slave states was rebellion. Conceptions of the public welfare were alive and well in the South, including the particular notion, as old as Vattell, which included "self-defense" and "self-preservation" as the ultimate in one's own caretaking of oneself.[94] The worry about insurrection became even much more acute after the Denmark Vesey rebellion, organized by Vesey, a slave who bought his own freedom after winning a lottery. Even though the conspiracy was crushed in 1822, when details spread about the elaborate plans and the extent of the participation, South Carolinian residents grew nervous. As Freehling indicated, the memory of the rebellion remained "long thereafter a searing reminder that all was not well with slavery in South Carolina." He adds that the "most pervading legacy" of the Denmark Vesey rebellion "was a compulsion to check abolitionist propaganda and to stop congressional slavery debates." The Denmark Vesey affair was followed by disturbances in 1826, 1829, and then 1831 with the Nat Turner Revolt in Virginia and its high number of causalities. Even though that revolt did not spread to South Carolina, "the possibility of contagion created a serious panic over

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[93] Novak, *The People's Welfare*, 170, 162, 161.
[94] Novak, *The People's Welfare*, 33.

insurrection."[95] With good reason, many of the white residents of slave states had paranoia of slave insurrections.

The response of southern states to guard against insurrection was brutal and varied and included "Negro laws" and Black Codes, which further infringed on the civil liberties of blacks. A primary goal was to prevent the infusion of free blacks into the area who may spread incendiary ideas and whose very presence as free blacks was a constant reminder to the slave population of their lack of freedom. Around 1820, South Carolina and many area states began passing laws designed to limit the population of free blacks: South Carolina masters could not free their slaves, "and colored freeman were denied the right to enter the state."[96] The right to travel for black citizens and even manumission was abridged based on South Carolina's overriding social fear of slave insurrections and the state's concern for self-preservation and self-defense.

Black navy seamen laws

South Carolina bolstered its practice of minimizing the numbers of free blacks and their interactions with the local slave population by also restricting the movement of black navy sailors. The problem arose because ships from the North and the South would dock in Charleston for days and in 1822, Freehling reported, "Negro sailors who stepped ashore had free run of the city. This permissive arrangement invited contact between northern Negro abolitionists and the lowcountry slaves. It also allowed colored seamen from San Domingo to stride through the streets of Charleston." The uneasiness of the "gentry" with the intermixing of free blacks and slaves lead South Carolina in 1822 to pass a law that required all black sailors to be "seized and jailed" for the duration of their

[95] Freehling, *Prelude to Civil War*, 54, 60, 63.
[96] Freehling, *Prelude to Civil War*, 53.

ship's docking in Charleston.[97] The penalties for violation of the law was a fine of "not less than $1000 and imprisonment of not less than two months." More seriously, the black navy seamen who were detained "shall be deemed and taken as absolute slaves, and sold…by the state."[98]

This law, and a similar one in Virginia, created a major federalism conflict because it violated treaties the national government had signed with foreign powers. In this case, Great Britain strenuously objected to the imprisonment and possible sale of its citizens in violation of its international treaty.[99] Negro seamen laws were passed by South Carolina and Virginia and were enforced over repeated and vigorous objections by the Adams administration. The issue caused repeated diplomatic embarrassment to the national government, which was powerless to stop the practice. Eventually, the British and French diplomats just chose to bypass the Adams administration altogether and attempted to negotiate with, and in one case, bribe with a case of expensive champagne the local state officials to lift the seamen ban.[100] The negro seamen laws are a stark example of a state that in contravention of federal law, successfully blocked the entry and passage of free blacks into its territory and abrogated treaties signed between the national government and foreign nations.

The crisis came to a head in a case before the Supreme Court when a free black man from Jamaica, Harry Elkinson, was imprisoned on his ship in Charleston harbor. He

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97 Freehling, *Prelude to Civil War*, 111-112

98 Cited in Paul Brest, Sanford Levinson, Jack Balkin, Akhil Amar, and Reva Siegel, *Processes of Constitutional Decisionmaking: Cases and Materials* (5th ed.), (New York: Aspen Publishers, 2006), 201.

99 Freehling, *Prelude to Civil War*, 111-112,

100 Philip M. Hamer, "Great Britain, The U.S. and the Negro Seamen Acts, 1822-1842" *Journal of Southern History*, (1935) pp. 3-28. See also Martha Putney, *Black Sailors: Afro-American Merchant Seamen and Whalemen*, (New York: Greenwood Press, 1987), 13 and Neuman, *Strangers to the Constitution*, 38-39.

submitted a writ of *habeas corpus* to the Supreme Court. His argument was based on the fact that his incarceration contradicted the Constitution, which states that all treaties would be the supreme law. In *Elkinson v Deliesseline* (1823*)*, the Court invalidated South Carolina's negro seamen law as a violation of the commerce clause, but it had no way to enforce its decision.[101] The slave states became even more apprehensive of federal authority after the Supreme Court decision in *Gibbons v Ogden* (1824) was handed down a year later. *Gibbons* was a case about New York State's steamship monopoly, which the Supreme Court decided was an unconstitutional interference in interstate commerce.

In that decision, a passage was of particular concern to the slave states. Chief Justice Marshall had made clear reference to the migration and importation clause that was in the original constitution. He noted in the *Gibbons* opinion that he read that clause as meaning the migration and importation of slaves by the states would not extend past the year 1808. As historian Charles Warren indicated, "It was this phrase of his opinion which caused great alarm in the South, for that specific question had already arisen in two cases in the United States circuit courts. Virginia and South Carolina had enacted statutes directed against the entrance of free Negroes into the state, and providing for their detention in custody until the vessel on which they arrived should leave port."[102] Marshall had invalidated the New York steamship monopoly based on his belief that it violated the commerce clause. The states of South Carolina and Virginia, however, shared the view that their negro seamen laws were not about impeding commerce as it

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[101] 8 F. Cas. 493 (D.S.C. 1823)

[102] Charles Warren, *The Supreme Court in United States History, 1821-1855*, Volume 2 (Boston, MA: Little and Brown, 1922), 84-84.

was about the state's right and obligation to guard the public safety against free negroes from the North who may incite insurrection in the local slave population, a justifiable exercise of police power.

Years after the state lost the *Elkinson* case, South Carolina continued to imprison black navy seamen and it claimed it had successfully nullified federal law in the Seamen Controversy. Despite repeated entreaties from northern states and foreign governments, the national Congress also refused to act to stop South Carolina's flouting of federal law.[103] Therefore, as Freeling reports, South Carolina's boast was an accurate one, and it was a claim that could also be made of the state's voiding of federal law by abridging federal mail delivery as well.

South Carolina censoring the mail

Aside from preventing persons who might incite violence with the "wrong" types of ideas, another part of the southern strategy was to censor the mail since it was believed that northern abolitionists were behind the slave insurrections.[104] Richard R. John, who has written about the U.S. postal service and its importance to the commercial development of the nation as well as the institution's role in the rise of party politics, has argued that the best index to measure the strength of a government institution in the early republic "was the extent to which they bound together in a national community millions of Americans, most of whom would never meet in person."[105] What John and others viewed as an institution that had the capacity to bind and spread the civic culture of the new republic was viewed by the southern states as a potential threat to public peace.

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[103] Freehling, *Prelude to Civil War*, 114-115 and Neuman, *Strangers to the Constitution*, 38-39.
[104] Freehling, *Prelude to Civil War*, 113, 111.
[105] John, "Governmental Institutions as Agents of Change", 373.

Their justifications for censoring the mail, very much in line with the notions of self-defense and regard for the people's welfare notion of the era, were of course attempts by the slave states to keep incendiary ideas about freedom at bay. For example, historian Clement Eaton noted, "The Southern censorship of the mails during the last three decades before the Civil War could be justified only on the ground that the safety of the people is the supreme law…Southerners feared that, if abolition publications were allowed free circulation in the South, eventually these inflammatory writings would fall into the hands of some brooding Nat Turner or Denmark Vesey." The national government, hailed by scholars for its vaunted postal system, could spread the postal service to cover most of its geographical territory, but could not prevent the southern states from censoring the mail. Or as Easton and others suggested, the national government yielded and "took the path of least resistance" since states like South Carolina fought so hard and the national government acquiesced to censorship based on the understanding that states had a right to self-defense.[106]

In the South, considerations of the existence, preservation, and perpetuation of slavery drove policies regarding migration. The same *salus populi* conception of self-defense and self-preservation that left northern states with the duty to care for the poor and sick immigrants was the same doctrine relied upon by southern states to claim the right of self-defense against any policy or persons that threatened the public wellbeing and safety—however differently it was conceived of in the South. This notion meant that

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[106] Clement Eaton, "Censorship of the Southern Mails ", *The American Historical Review*, Vol. 48. No. 2 (Jan. 1943), pp. 266-280, 278, 280. Also see generally Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge: Harvard University Press, 1998). Johns is aware that abolition mail was censored and says President Jackson and his postal general Kendall were sympathetic to the southern position and willfully turned a blind eye to it based on their own belief in states' rights and the view that sovereign states had a right to defend themselves against threats. pgs. 269-271

the southern states were extremely wary of any policy, however innocuous looking, that might be subterfuge for an expansion of federal power that might eventually threaten slavery. The self-preservation mentality also lead the South to justify outright violation of federal laws when it came to policies about the movement of persons, specifically free blacks, and even of inanimate objects like mail. One could see, given the wish to preserve slavery, why the South might find any federal policies that attempted to regulate the movement of people, both domestic and international, to be a threat. As a result, black citizens and foreign blacks alike suffered abridgements of their movement and basic liberty.

IV. Factors contributing to federal consolidation

State competition for immigrants

It could have been one aspect of the federal system itself that lead to the consolidation of most immigration functions under federal control. One way to see federalism is that it creates multiple laboratories of democracy and that one can learn from the proliferation of different attempts to solve common social and economic problems. But the flip side of that coin is that multiple approaches can also breed competition and a "race to the bottom" in which states try to do the least for their citizens for fear of being flooded by more citizens because their rights, benefits, and privileges are more generous than other states. Zolberg has referred to this competition among states as "a classic 'prisoners' dilemma': all would be better off if they imposed restrictions, but each had an interest in lowering them to maximize its share of the traffic. New Jersey

notoriously kept is landing requirements very low so as to attract traffic destined for New York, to which the passengers were then transported by lighter."[107]

From the very beginning, colonies and then states competed amongst each other to recruit immigrants because immigrants meant population and revenue increase. These recruitment efforts extended overseas with states sending representatives to European cities to extol the virtues of their individual states. States each tried to outdo each other by offering inducements of cheap land.[108] The central government during this period left it to the states to carry out this type of immigration recruiting.[109] These recruiting practices transitioned to restrictionist practices at the beginning of the 19th century when northern states attempted to minimize the economic and social costs of poor and sickly immigrants. These efforts took the form of head taxes until the Supreme Court invalidated these taxes and the states switched to a bonding system. As the eastern seaboard states became more overwhelmed by the high volume of immigrants, they begged the national government for relief, but none was forthcoming until New York took the step of threatening to close down Castle Garden and cease all immigration screening altogether until the national government helped defray some of the costs for poor and sick immigrants.[110]

New York had also drawn the ire of many other states because other states believed that New York was only interested in shipping policy because of the amount of shipping revenue the state was receiving, and not actually concerned about the condition of immigrants. Many others also criticized Castle Island for being an extension of the

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[107] Zolberg, *A Nation by Design*, 76.
[108] Filindra, *E Pluribus Unum,* 95 and Jones, *American Immigration*, 250.
[109] Thernstrom et al. *Harvard Encyclopedia of Racial and Ethnic Groups*, 487-488.
[110] Filindra, *E Pluribus Unum* 250.

corrupt Tammany Hall political machine. Still other states saw New York and Massachusetts as getting in the way of railroad reform.[111] New York of course saw itself as on the front lines of immigration and of providing a great service to the rest of the other states by "filtering" the weakest immigrants out before they headed into other states. As former Commissioner of Emigration Kapp maintained:

> While New York has to endure nearly all of its evils, the other states reap most of the benefits of immigration…Our State acts, so to speak, as a filter in which the stream of immigration is purified: what is good passes beyond; what is evil, for the most part remains behind. Experience shows that is the hardy, self-reliant, industrious, wealthy immigrant who takes his capital, his intelligence, and his labor to enrich the Western or Southern states.

Of course the other states did not see it that way and were jealous of the huge revenue that New York, Massachusetts, and Pennsylvania were receiving from immigration. These other states advocated a federal centralization of immigration in which the revenues collected from immigrants would then be redistributed equally to all the states.[112]

Head taxes invalidated by the Supreme Court

Finally, a series of Supreme Court rulings that invalidated the ability of states to collect head taxes or bonds on arriving immigrants to defray the cost of caring for poor and sickly ones hammered the last nail in the coffin of state control over immigration. In a trio of cases beginning with *The Passenger Cases* (1849), *Chy Lung v Freeman* (1875), and *Henderson v Mayor of the City* (1876).[113] When the New York and Massachusetts taxes on the vessel owner were invalidated by *The Passenger Cases*, because the Court equated a tax for each passenger to be paid by the ship owner, the states turned to

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111 Filindra, *E Pluribus Unum,* 95-96 and Jones, *American Immigration*, 250.
112 Kapp, Immigration and Emigration Commissioners of the State of New York, 153-154.
113 Klebaner, "State and Local Immigration Regulation", 286-287 and 7 How. (48 U.S.) 283 (1849), 92 U.S. 259 (1876), and 92 U.S. 275 (1876), respectively.

individual bonds on each arriving passenger. Unfortunately for these states, these bonds too were invalidated in *Chy Lung v Freeman* and *Henderson v Mayor of the City of New York* as an unconstitutional state interference with Congress' commerce power. With the primary ability of the northeastern seaboard states' efforts to protect themselves from the ills of mass migration gone, the states clamored for federal economic reimbursement to take care of poor, sickly, and criminal immigrants. That wish was granted in 1882 when the national government passed a federal immigration head tax.

The multiple effects of the Civil War

Among the factors that transitioned the control of migration policy to the national government was the Civil War, which Novak has called the "midwife to the American liberal state." It created "new definitions of individual freedom, state power, nationalism, and constitutionalism" that are discussed in the next chapter.[114] The Civil War had several effects on migration policy. First, it settled the slavery question for once and for all. With slavery outlawed, the main motivation of the southern states fighting so hard to preserve their prerogative on all policies regulating the movement of people was lessened if not dropped. As Balogh had noted, the expansion of national government power was most successful where there was the least local and state resistance to it and that the national government had difficulty enforcing unpopular legislation. He was writing about the frontier and the territories, where the national government did not have to share power with the states, but his point could also be applied to the states on the subject of

[114] Novak, *The People's Welfare*, 241.

slavery.[115] When the states stopped fighting so hard to preserve control over any and all policies regarding the movement of persons, the national government was able to move into that space.[116]

Second, the Reconstruction amendments, for the first time, created individual rights, which were henceforth called upon to counter the public welfare and as a result the tradition of *salus populi* faded.[117] There really was no concept of the right to privacy or civil liberties until the passage of the Reconstruction Amendments creates substantive due process, or the idea that there are certain rights so fundamental that no government has the right to ever take these away. Individual rights and fundamental rights led to the erosion of the principles of the public welfare.

VI. Conclusion

On the question of what constitutes the proper division of labor between the national government and subnational units on immigration, the case of nineteenth century immigration law illustrates several points about federalism. First, there is no *correct* division of labor. Even though the Constitution provides guidelines, the constitutional text is just that, suggestions, not hard and fast rules. The location of that dividing line and details of power sharing arrangements depend on politics and are reinforced by law. In this instance, the North and South had distinct reasons for wishing to preserve control over policies governing the movement of many types of persons…until they could not keep control over those policies. Second, nineteenth century immigration federalism teaches us that no configuration of national and subnational power over a subject area is

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115 Balogh, *A Government Out of Sight*, 154, 175.
116 Neuman, *Strangers to the Constitution*, 51.
117 Novak, *The People's Welfare*, 232.

permanent and is instead a continuing negotiation between the two levels of government. The northern and southern states reserved their prerogative on regulating the liberty of movement until it became economically unsustainable in the North and politically unfeasible in the South. Federalism creates a fluid and temporally specific arrangements of national and subnational power. Finally, all assessments of the strength of the American state must take seriously the power of subnational units. In the instance of nineteenth century immigration federalism, the national government's lack of monopoly of both despotic and infrastructural power did not mean more liberty for immigrants. Unfortunately, the control of infrastructural power by the states led to an overwhelming array of laws that severely circumscribed immigrants and other groups' liberty of movement. Riker is right: the connection between federal systems and liberty needs to be carefully examined.