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Tribes, Nations, States: Our Three Commerce Powers

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ABSTRACT

The scope of federal power is sometimes seen as a long-running battle between two stories. Story One sees the commerce power as initially broad, mistakenly contracted in the late nineteenth century, then properly restored in 1937 as the national power to deal with national problems. Story Two sees 1937 as the mistake, and the commerce power as properly read to be limited.

The truth is more complicated. Story Two is partly right: the *interstate* commerce power—the power to regulate "commerce among the several states"—is limited to the transportation and sale of goods from one state into another. Local agriculture, mining, and manufacturing lie outside it. But Story One is also partly right. The *foreign* and *tribal* commerce powers to regulate "commerce with foreign Nations" and "commerce with the Indian Tribes" are much broader than the interstate-commerce power. Wherever citizens of France or members of the Cherokee Nation travel in America, all their commercial transactions with American citizens, however local or small-scale—purchasing a single cup of coffee, renting an apartment, or making a contract as part of practicing a profession—lie within federal power.

Restoring this distinction among the three commerce powers solves several problems in constitutional law:

(1) It allows the abandonment of the textually-untethered, Tenth-Amendment-flouting "plenary power" over foreign affairs and tribes.

(2) It justifies federal protection of tribal members in the Indian Child Welfare Act, challenged in *Brackeen v. Haaland*.

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(3) It allows Fourteenth Amendment protection of equality and civil liberty to shift back to the Privileges or Immunities Clause, limiting constitutional protection for non-citizens to "process of law" and "protection of the laws," but supporting Congress's 1870 and 1986 prohibitions on discrimination against non-citizens.

(4) It explains three gaps in antidiscrimination law: federal citizenship classifications, racial tribal classifications, and state reservations of certain governmental functions to citizens.

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I. INTRODUCTION

The commerce power is the central battleground in the long-running war over the size of the federal government. Fans and foes of the collapse of the Supreme Court's opposition to the New Deal in 1937[1] tell two very different stories about that power.

Fans of 1937 paint it as the restoration of its original broad meaning. Many point to John Marshall's description of the power in *Gibbons v. Ogden* over "that commerce which concerns more States than

1. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–43 (1937) (upholding federal power over labor conditions because of their potential effect on interstate commerce); *see also* United States v. Darby, 312 U.S. 100, 123 (1941) (same); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (allowing federal power over locally-consumed wheat); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) (allowing federal power over insurance contracts).

one."[2] According to this three-stage Story One, the commerce power started out properly big, then was made too small,[3] then became properly big again.

Foes see 1937 instead as a betrayal of the original design of limited federal power. They point to things like Marshall's description of "that immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government."[4] According to this two-stage Story Two, the commerce power was first properly small, then was made too big.

The truth, alas, is more complicated than either of these stories, because the commerce power itself is complicated, both textually and historically. The power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[5] has three components: (1) a foreign commerce power; (2) an interstate commerce power; and (3) a tribal commerce power. Only two of these—the tribal and foreign commerce powers—cover local commerce.

The anti-1937 Story Two is thus partly right. "Commerce among the several states" is limited to the transportation and sale of goods from one state into another—that is, commerce that "concerns" more than one state because it involves the movement of goods from one state to another. An *effect* on interstate commerce from labor conditions in local agriculture, mining, or manufacturing is not enough.

However, the pro-1937 Story One is partly right too. While local buying and selling that merely *affects* other states is not generally subject to federal power, the commerce power does extend to two sorts of local commercial transactions: those with citizens or subjects of other countries ("commerce with foreign Nations") and those with tribal members ("commerce with Indian Tribes"). Both "Nations" and "Tribes" consist of people, rather than territory. The foreign and tribal commerce powers are thus much broader than the interstate-commerce power.

This view means that wherever citizens of France or members of the Cherokee Nation travel in America, all their commercial transactions with American citizens, however local or small-scale, lie within federal

2. Gibbons v. Ogden, 22 U.S. 1, 194 (1824); for the invocation of this passage from *Gibbons* during the New Deal, see, for example, Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

3. *See, e.g.*, Paul v. Virginia, 75 U.S. 168, 183–84 (1869) (no federal power over insurance); United States v. E.C. Knight, 156 U.S. 1, 12 (1895) ("commerce among the several states" in antitrust act excludes manufacturing); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (no federal power over products of child labor); Carter v. Carter Coal, 298 U.S. 238, 307–10 (1936) (no federal power over labor conditions with large, but "indirect," effect on interstate commerce).

4. *Gibbons*, 22 U.S. at 203.

5. U.S. CONST. art. I, § 8, cl. 3.

power. Purchasing a single cup of coffee, renting an apartment, or making a contract as part of practicing a profession are all part of "commerce with foreign Nations" or "commerce with the Indian Tribes" if done by tribal members or foreign citizens or subjects. Constitutionally speaking, the "nation" of France is limited neither to France's government nor its territory; neither is the "tribe" of the Cherokee limited only to its government or land. Nations and tribes consist of individual people. Those individuals' commerce with American citizens is "commerce with" those nations and tribes.

While a few scholars have considered possible differences among the nature of the three commerce powers,[6] none have considered the difference between defining their nature based on territory or citizenship.

Restoring this distinction among the three commerce powers solves several problems in constitutional law. Initially, it allows the abandonment of the textually untethered "plenary power" over tribes[7] and foreign affairs.[8] While the Declaration of Independence did say that the newly-independent colonies had "Power to . . . do all other Acts and Things which Independent States may of right do,"[9] the Tenth Amendment makes clear that those powers were either included in the Constitution or passed to the states.[10]

This divided reading of the commerce power explains two presuppositions of the slave-importation clause of Article I section 9 clause 1, one in favor of federal power and one limiting it. First, the federal government plainly *does* have power over the "migration or importation" of people *after* 1808,[11] and this view explains why such migration and importation are "commerce with foreign nations," i.e., commerce involving some of the people who compose those other nations.

On the other hand, a limited interstate commerce power is required to vindicate the migration-or-importation clause's broader presupposition of the lack of federal power to deal with local activities, like slavery, based solely on their effect on interstate commerce. Insulating just the

6. *See generally* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003).

7. *See* United States v. Kagama, 118 U.S. 375, 384–85 (1886).

8. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893).

9. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

10. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

11. U.S. CONST. art. I, § 9, cl. 1 ("The [m]igration or [i]mportation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .").

slave trade until 1808 plainly presupposes that Congress lacked power to abolish slavery itself prior to the Thirteenth Amendment.

More particularly, a broad tribal commerce power supports federal power to enact the Indian Child Welfare Act, whose constitutionality the Court will review soon.[12] Just as the transfer of custody in the "migration or importation" of children from other countries is part of "commerce with foreign nations," the transfer of the custody of individual tribal members is part of "commerce with the Indian Tribes."

A broad federal power to protect non-citizens' local buying and selling would also allow several parts of Fourteenth Amendment law to focus again on equal citizenship. That law is the product of three big mistakes: the improper shrinking of the Privileges or Immunities Clause, which deals with citizens' rights, in 1873,[13] and the improper expansion of the Due Process and Equal Protection Clauses, which deal with all persons, in both 1877[14] and 1886.[15]

Many scholars have long advocated returning the Privileges or Immunities Clause to be a shield against "hostile and discriminating legislation" against citizens,[16] the Due Process Clause to be a guarantee of "process of law,"[17] and the Equal Protection Clause to be a guarantee of "protection of the laws."[18] The worry about such a move, though, is what would happen to non-citizens' rights.

A broad congressional power to give commercial rights to non-citizens dispels that worry by justifying Congress's power to prohibit both public and private discrimination against non-citizens. Congress has used that power most prominently in the partial extension of the Civil Rights Act of 1866 to non-citizens in 1870[19] and in the prohibition of private employment discrimination against non-citizens in 1986.[20] These

12. *See* Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021) (en banc), *cert. granted*, 142 S. Ct. 1205. For an earlier case posing but not resolving these issues, see Adoptive Couple v. Baby Girl, 570 U.S. 637, 658–60, 665–66 (2013) (Thomas, J., concurring).

13. *See generally* Slaughter-House Cases, 83 U.S. 36 (1873).

14. *See* Munn v. Illinois, 94 U.S. 113, 125–32 (1877) (noting that under "some circumstances[,]" but not all, price regulations may violate substantive due process, and looking to common law to clarify exactly when).

15. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("[T]he equal protection of the laws is a pledge of the protection of equal laws.").

16. *See Slaughter-House Cases*, 83 U.S. at 100–01 (Field, J., dissenting).

17. *See generally, e.g.*, Christopher Green, *Our Bipartisan Due Process Clause*, 26 GEO. MASON L. REV. 1147 (2019).

18. *See, e.g.*, United States v. Vaello Madero, 142 S. Ct. 1539, 1551 n.4 (2022) (Thomas, J., concurring).

19. *See* Force Act of May 31, 1870, § 16, 16 Stat. 140, 144 (codified at 42 U.S.C. § 1981).

20. *See* Immigration Reform and Control Act of 1986, § 102, 100 Stat. 3359, 3374 (codified at 8 U.S.C. § 1324b(a)(1)(B)).

are exercises of the foreign commerce power, not the Fourteenth Amendment Section Five enforcement power. Therefore, Congress has discretion to give non-citizens the right to make contracts, but also to allow states to make rules on non-citizens' ownership of land.[21] Understood as the enforcement of a rule generally banning discrimination against non-citizens, this discrepancy is incoherent, but it makes perfect sense as the exercise of the foreign commerce power.

Finally, this reorientation of antidiscrimination law in terms of citizenship, coupled with general federal power to protect non-citizens even in their local commerce, explains several anomalies in current law. The federal government may take account of citizenship in ways that states may not.[22] Tribal classifications are distinguished from the sorts of racial distinctions disfavored by the Fourteenth Amendment.[23] States may reserve certain governmental functions for citizens.[24] All of these can be justified if, like the second Justice Harlan, we see the rule on state discrimination against non-citizens as a matter of federal pre-emption rather than the Fourteenth Amendment,[25] and if we see the federal government as subject to an equal-citizenship principle, but one that does not apply to non-citizens.[26]

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21. *See* 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . ."); Act of May 31, 1870, 16 Stat. 140, 144 § 16 (same, and requiring uniformity in any state taxes on immigrants); *id.* § 18 (re-enacting Civil Rights Act of 1866); 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."); Act of April 9, 1866, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1981–82).

22. *See* Mathews v. Diaz, 426 U.S. 67, 84–85 (1976).

23. *See* Morton v. Mancari, 417 U.S. 535, 551–55 (1974).

24. *See* Foley v. Connelie, 435 U.S. 291, 297–300 (1978).

25. *See* Graham v. Richardson, 403 U.S. 365, 376–80 (1971) (pre-emption rationale for rule); *id*. at 383 (Harlan, J., joining only this portion of the rationale).

26. *See* Gary Lawson, Guy I. Seidman, & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 174 (2010); GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 151–71 (2017); Ethan J. Leib, David L. Ponet, & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 708–09 (2013) ("The notion that government keeps power in trust for its citizenry dates back to Plato, Aristotle, and Cicero . . . . The Constitution was . . . designed as 'the fiduciary law of public power,' delimiting governmental authority and directing it to the benefit of the citizen-beneficiaries." (quoting TAMAR FRANKEL, FIDUCIARY LAW 279 (2011))); Osborn v. Bank of the U.S., 22 U.S. 738, 827–28 (1824) ("A naturalized citizen . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights."); United States v. Vaello Madero, 142 S. Ct. 1539, 1544–52 (2022) (Thomas, J., concurring). *But see* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1522–32 (2020) (criticizing

Part II explains the individual-foreigner and individual-tribal-member view of the Commerce Clause in more detail, noting its adoption by the Court in 1866, while also taking into consideration its rejection by the Court in 1853 and by Justice Thomas in 2013, and summarizes some of the reasons to adopt the view. Part III considers the textual questions about the three key terms: "tribes," "nations," and "states." Part IV looks at the history of the tribal commerce power. Part V considers the history of the foreign commerce power. Finally, Part VI looks at the implications of this view: federal power to control immigration, to protect non-citizens and tribal members, and to make citizenship-based or tribal distinctions, and a shift in doctrine about state discrimination against non-citizens.

II. SPLITTING THE COMMERCE-POWER ATOM

A. The Thesis

This Article proposes the recovery of a lost distinction among the three parts of the Commerce Power: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[27] The idea is that "Nations" and "Tribes" refer to people: individual non-citizens. Non-citizens' trade with American citizens—say, the sale of a cup of coffee to a non-citizen—counts as "Commerce with foreign Nations" or "Commerce . . . with the Indian Tribes," even though, because the sale is local, it would not count as "Commerce . . . among the several States." Because land stays in a single state, its sale cannot be interstate commerce. But if it involves tribal members or foreign citizens, land transactions can be commerce with foreigners or tribal members.

The Supreme Court explained just this distinction among the commerce powers in a little-remembered 1866 case, *United States v. Holliday*, upholding a ban on the sale of alcohol to tribal members that applied even off-reservation:

> Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with the Indian tribes means commerce with the individuals composing those tribes . . . . The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic or the locality of the tribe or of the

Lawson and his co-authors' inferences from the fiduciary nature of the Constitution as rooted in political morality rather than law).

27. U.S. CONST. art. I, § 8, cl. 3.

> member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the Indian tribes.[28]

Note the two key points: for foreign and tribal commerce powers, "The locality of the traffic can have nothing to do with the power," but this would not be true for commerce that "originated and ended within the limits of a single state." Ten years later, the Court quoted *Holliday*'s citizenship-based reading of the foreign commerce power in *Henderson v. Mayor of New York*, striking down complicated regulations on passenger ships,[29] but thereafter, *Holliday*'s reading was largely forgotten. Its reading of the tribal and foreign commerce powers and their distinction from a more limited interstate commerce power was swept away in the 1880s with the invention of unenumerated sovereign plenary power over foreign affairs and Native Americans, and then in 1937 by the nearly-all-encompassing New Deal view of the interstate commerce power.[30]

In addition to having relatively little doctrinal influence today, the *Holliday* evidence from 1866 is also of limited utility as a guide to the commerce power's original meaning because the Court contradicted it in 1853 in *Veazie v. Moor*. In that case, the Court rebutted a dormant-commerce-clause challenge to Maine's grant of a franchise on the entirely-in-state Penobscot River. The Court said, "'[c]ommerce with foreign nations' must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extraterritorial."[31] This conflict between *Veazie* and *Holliday*, however, allows a simple statement of this Article's thesis: *Holliday*'s insistence that the foreign commerce power covers all commerce with members of foreign nations "as individuals" fits the meaning expressed by the text in its original

28. United States v. Holliday, 70 U.S. 407, 417–18 (1866).

29. Henderson v. Mayor of N.Y., 92 U.S. 259, 270 (1876).

30. *See* discussion *infra* notes 82–85, 151–59 and accompanying text.

31. Veazie v. Moor, 55 U.S 568, 573 (1853). While *Veazie* was not discussed in *Holliday*, this sentence from *Veazie* was quoted, but qualified, in *Lord v. Steamship Company*. In that case, the Court stated that Congress:

> [H]as nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State, and do not affect other nations or States or the Indian tribes.

Lord v. Steamship Co., 102 U.S. 541, 543 (1881). The implication here is that even if commerce is exclusively within the "territory of [a] State," it might be regulated by Congress if it does "affect other nations . . . or the Indian tribes." *Id.*

context better than *Veazie*'s insistence that such commerce itself "must be extraterritorial."

Besides *Veazie*, another clear opponent of this Article's thesis is Justice Thomas. In attacking the Indian Child Welfare Act ("ICWA"), Justice Thomas claimed, "The [Tribal Commerce] Clause does not give Congress the power to regulate commerce with all Indian persons any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States."[32] To the contrary, on the reading here of "Tribes" and "Nations," the commerce power includes exactly those two powers.

The Supreme Court's interpretation of the interstate commerce power has also jumped between an emphasis on territory and an emphasis on citizenship. In 1869, Justice Field explained for the Court, in *Paul v. Virginia*, why Virginia was allowed to regulate out-of-state insurers. Insurance was a local transaction, not one involving the territory of more than one state, though it might involve citizens of different states.[33] Ten years later, however, Justice Miller in the *Trademark Cases* explained interstate commerce for the Court in terms of diversity of citizenship.[34]

Reading two of the three commerce powers in terms of individuals lies halfway between the current Supreme Court and William Winslow Crosskey. The Supreme Court has not talked about interstate or foreign commerce powers in terms of individuals since the late nineteenth century. Recently, however, the Court described the tribal commerce power in terms of individual Native Americans: "the Constitution . . . entrusts Congress with the authority to regulate commerce with Native Americans."[35] Crosskey, for his part, famously read all three commerce

32. Adoptive Couple v. Baby Girl, 570 U.S. 637, 660 (2013); *see also id.* at 656 ("The term 'commerce' did not include economic activity such as 'manufacturing and agriculture,' . . . let alone noneconomic activity such as adoption of children.")

33. *See* Paul v. Virginia, 75 U.S. 168, 183 (1869) (insurance contracts "are not commodities to be shipped or forwarded from one State to another, and then put up for sale" and do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce"), *overruled by* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); *see also* The Daniel Ball, 77 U.S. 557, 565 (1871) (interstate commerce power excludes "that commerce which is carried on entirely within the limits of a state").

34. *See* Trade-Mark Cases, 100 U.S. 82, 96 (1879). There, the Court stated:

> While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

Id.

35. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

powers in terms of the citizenship of individuals, as well as reading (quite implausibly) "among the several States" in the interstate commerce power to refer to any commerce between American citizens, even those in the same state. Crosskey thought it obvious, though, that "foreign Nations" and "the Indian Tribes" were composed of people. His term for a citizenship-based reading of these commerce powers was "multitudinal"; Crosskey reasoned from these cases to the "among the several States" case. Whatever Crosskey's errors in his construction of the interstate commerce power, his citizenship-based explanation of the other two powers is sufficiently clear to be worth quoting at length:

> Beyond these considerations, there is the similar character, already pointed out, of the other two words with which "States" is found in the Commerce Clause. These two other words—"Tribes" and "Nations"—were quite as multitudinal in meaning, in the eighteenth century, as the word "States" was; and both "tribe" and "nation" are still multitudinal in meaning today. The word "States," in the Commerce Clause, occurs between these two other multitudinal nouns; the multitudinal sense is started by the word "Nations" and finished by the word "Tribes"; and since, to the mind of 1787, "States" was also vividly and unreflectively multitudinal, it is not at all likely that the men of that day were thrown off into any interterritorial vagaries by that particular word. Instead, it seems certain that the clause, as a whole, was read in a consistently multitudinal sense. This means it was read as a simple and exhaustive catalogue of all the different kinds of commerce to which the people of the United States had access: commerce, that is, *with the people* of foreign nations, commerce *with the people* of the Indian tribes, and commerce *among the people* of the several states.[36]

The chief reason[37] to adopt a limited reading of the interstate commerce power, contrary to Crosskey, is well-known: there must be something the federal government cannot do, if "powers not delegated to the United States by the Constitution" in the Tenth Amendment refers to something, as it surely must.[38] The big example, as always, is slavery. It

36. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 76–77 (1953).

37. One subsidiary reason to reject Crosskey's reading of "among" is that even the early republic's biggest fans of federal power, like Alexander Hamilton, described "commerce . . . among the several states" as interstate commerce. See 21 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 772, 786 (1791) [hereinafter DHFFC] (Hamilton's bank opinion: "trade between the States"); Carl N. Degler, *A New Effort to Rewrite the Constitution*, 7 W. POL. Q. 75, 80–82 (1954) (evidence from other Federalists).

38. There is, of course, a large recent literature defending and criticizing the historical merits of an omnipotent or nearly-omnipotent federal government that cannot be canvassed in detail here. *See generally, e.g.*, John Mikhail, *The Necessary and Proper*

was quite well-understood at the Founding that the federal government had no power to prohibit domestic slavery. The 20-year protection for the slave *trade* in Article I section 9 clause 1[39]—a clause specifically made unamendable in Article V[40]—would make no sense at all if Congress could prohibit slavery itself under the domestic commerce power. Accordingly, a general federal power over labor conditions that merely affects interstate commerce—as slavery did from the very beginning of the republic[41]—goes beyond the original commerce power, *NLRB v. Jones & Laughlin Steel*[42] and *United States v. Darby*[43] notwithstanding. *Hammer v. Dagenhart*[44] and *Carter v. Carter Coal*[45] get this issue right, however unpleasant that fact might be.[46] If the affecting-interstate-

Clauses, 102 GEO. L.J. 1045 (2014); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE CONSTITUTION IN THE FOUNDING ERA 66–70, 364–66 (2018) (following Mikhail); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014); Kurt Lash, *"Resolution VI": National Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123 (2013); Kurt Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J. F.180 (2014).

39. Article I section 9 clause 1 states:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

U.S. CONST. art. I, § 9, cl. 1.

40. "Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article." U.S. CONST. art. V.

41. At the Philadelphia Convention, for instance, John Rutledge noted the obvious economic benefit to the North from slavery in terms of lower prices. *See infra* note 92.

42. *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

43. *See generally* United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act).

44. *See generally* Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down ban on interstate commerce in goods produced by child labor). Note that *Hammer* rests not merely on a limited reading of the commerce power to reach commerce-affecting local labor conditions, but hostility to the regulation of uncontroversial instances of interstate commerce based on earlier modes of production. If an antebellum ban on interstate commerce in the products of slave labor were unconstitutional, it would be on this sort of ground. *Cf.* McCulloch v. Maryland, 17 U.S. 316, 423 (1819). In *McCulloch*, the Court stated:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id.

45. *See generally* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act).

46. Only ten more ratifications, though, would be required to overrule *Hammer* by means of the Child Labor Amendment, approved in 1924. *See Child Labor Amendment*, WIKIPEDIA, http://bit.ly/3YMa2qs (last visited Feb. 12, 2023).

commerce power is turned back into a mere interstate-commerce power, though, it will be important to recognize the full scope of the foreign and tribal commerce powers. Even if it is not—i.e., even if the federal government remains allowed to do very nearly anything—a recognition of the breadth of the foreign commerce power will help us better understand other aspects of the Constitution, especially the Fourteenth Amendment—the re-establishment of whose original meaning might be closer at hand.

B. A Sketch of the Argument

This Article's argument begins in Part III with a detailed look at the central textual issue: whether "tribes," "nations," and "states" in the Commerce Clause refer to people, territory, or governments. The "nation of France" could be understood as its government in Paris, its hexagonal land mass, or its roughly 67 million people. Likewise, the "state of New Hampshire" could refer to the artificial entity that litigates in court,[47] or to its approximately-20-70-90-right-triangular land mass, or—though the usage has grown less common today—to its approximately one-and-a-third million people. Usage of the term "tribe" is more limited. The "Cherokee tribe" can refer to the approximately 400,000 Cherokee or to its government, the Cherokee Nation.[48] "Tribe" does not, however, offer the same territorial linguistic range that "Nation" and "State" do. Driving across the border with Vermont on I-89 is one way to enter New Hampshire, and driving through the Chunnel is one way to enter France, but traveling to northeastern Oklahoma is not a way to enter the Cherokee tribe.

Governmentally-based understandings of any of these three terms, moreover, do not match their context at all. Federal power was plainly meant to extend further than buying and selling by foreign, tribal, or state governments. That leaves the individual-members interpretation of the tribal commerce power as the only plausible one. Establishing the broad view of the foreign commerce power requires a bit more history, but text alone comes quite close to showing a broad view of the tribal commerce power.

This analysis of the meaning conveyed by the term "tribes" is confirmed by the history of the tribal commerce power. A tribal-members-based commerce power over trade makes the best sense of Articles-of-Confederation congressional power over "trade with the Indians"—universally understood to continue under the Constitution—

47. *See generally, e.g.*, New Hampshire v. Piper, 470 U.S. 274 (1985).

48. *See* CHEROKEE NATION, http://bit.ly/3DYpMhN (last visited Feb. 12, 2023) ("The Cherokee Nation is a sovereign tribal government.").

and of the instability of the boundary of tribal lands. Congress clearly had power over commerce with tribal members as individuals, not just commerce that took place on their land. From the beginning, Congress's regulation of Native Americans has covered trade with individuals as well as organized groups conducting commerce. Justice McLean's opinion on circuit in *United States v. Bailey* in 1834[49] and the unanimous Supreme Court in *United States v. Holliday* in 1866[50] treat a tribal-member-based view of the tribal commerce power as obvious; the Court has described the tribal commerce power that way as recently as in *McGirt v. Oklahoma*.

The early history of the foreign commerce power is much more complicated, but there are many bits of history that favor the citizenship-based view. Federal Farmer 11 defined commerce with foreign nations as "trade and commerce between our citizens and foreigners," with no restriction on location.[51] So did Elbridge Gerry responding to the Quakers' antislavery petition in 1790, and Thomas Jefferson and Edmund Randolph attacking the Bank in 1791.[52] Randolph is particularly important because he drafted the initial version of the commerce clause with a slave-trade exception in the Committee of Detail and discussed its relationship to the 1808 provision at the Virginia convention. He explained that the power over commerce with "foreign nations" includes power over "them and their commodities."[53] The context is compressed, but it is plain that "foreign nations" consist of people, not territory. Martens's 1788 international-law treatise explained "commerce . . . with foreign nations" as including "power over the foreigners living in its territories."[54] An individual-based commerce power over foreign citizens and subjects makes the best sense of the federal power over "migration" as acknowledged in Article I section 9 clause 1 and understood to be part of the foreign commerce power, especially in places like Federalist 42, published less than two weeks after Federal Farmer 11.[55]

Treaties like the Jay Treaty of 1794 explicitly labeled themselves as regulations of commerce with other nations, and covered the regulation of land-ownership rights under that label.[56] It is true that the Jeffersonian

49. *See* United States v. Bailey, 24 F. Cas. 937, 939 (C.C.D. Tenn. 1834) (No. 14,495).

50. *See* United States v. Holliday, 70 U.S. 407, 417–18 (1866).

51. 17 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 309 (1788) [hereinafter DHRC]; *see also* 20 DHRC, *supra* note 51, at 1019 (same essay in New York collection).

52. *See infra* notes 128–31 and accompanying text.

53. *See infra* note 129 and accompanying text.

54. *See infra* note 88 and accompanying text.

55. *See infra* notes 124–1255 and accompanying text.

56. *See infra* notes 132–33 and accompanying text.

Republicans launched a barrage of arguments against both the Jay Treaty and the 1798 Alien Act, with some arguing that there was no general federal power to give rights to non-citizens or to take them away.[57] But in both cases, the Republicans contradicted themselves. Their complaint that the Jay Treaty regulated foreign commerce as only Congress could do legislatively—a process that would require the participation of the Republican-controlled House—undermined the objection that states had exclusive power over land ownership.[58] Likewise, given the universal understanding at the Founding that the migration-or-importation clause limited the foreign commerce power, the claim that it shielded states' powers to admit migrants until 1808 undermined the complaint that there was no federal power over non-citizens at all.[59] Finally, an individually-focused foreign commerce power makes the best sense of *Gibbons v. Ogden*,[60] Justice Wayne's opinion in the *Passenger Cases*,[61] and the tribal cases *Bailey* and *Holliday*.

III. "NATIONS," "STATES," AND "TRIBES"

"Commerce" appears only once in the Commerce Clause; this Article relies on other scholars who have argued compellingly that the term refers only to trade and transportation incident to trade.[62] But what do "Nations," "States," and "Tribes" mean? A corpus-linguistic analysis of how "tribes," "nations," and "states" were used when paired with the other language in the Commerce Clause might well shed more interpretive light, but such analysis is beyond the scope of this Article. Instead, this Article only briefly reviews the major dictionaries of the time. Sovereign or semi-sovereign entities need three ingredients: *people*, in a *territory*, under a *government*. The word "nation" can easily refer to any of the three.[63] The same is true for the word "state."[64] "Tribes," by

57. *See infra* notes 136–40 and accompanying text.

58. *See infra* notes 1388–41 and accompanying text.

59. *See infra* notes 141–43 and accompanying text.

60. *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824).

61. *See* Passenger Cases, 48 U.S. 283, 416 (1849).

62. Not everyone agrees, of course. But Randy Barnett seems to get the word "commerce" in the context of the Constitution right. *See generally* Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy Barnett, *New Evidence of the Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); *see also* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006).

63. *See* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1349 (1755) (defining "nation" as "[a] people distinguished from another people; generally by their language, original, or government."); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792) (defining "nation" as "a people distinguished from another people"); JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) (defining "nation" as "a considerable number of people inhabiting a certain extent of ground, and under the same government; a government or kingdome"); WILLIAM PERRY,

contrast, can refer either to people or to their governmental structure, but not as readily to tribal land; entering tribal *territory* is not entering the *tribe*, except in the most metaphorical way.[65]

Territory is out for tribes, then. The governmental interpretations of "nation," "state," and "tribe," moreover, make no sense in the historical context of the commerce powers. The point of the commerce powers was to establish federal power to stop trade wars among the states, or to wage trade wars with other countries. But power to regulate trade by state, tribal, or foreign governments would mean little if those powers could not somehow also deal with individuals' commerce. This then leaves only one plausible meaning for "the Indian Tribes": tribal members. Either a territorially- or individually-based interpretation of "foreign Nations" and "the several States" can, however, fit this basic aspect of the commerce-power context.[66]

ROYAL STANDARD ENGLISH DICTIONARY 304 (1788) (defining "nation" as "a distinct people of any country"); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1781) (defining "nation" as "a kingdom or large extent of ground and people living under the particular government of a single magistrate or crowned head, whether king or emperor").

64. *See* JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755), *supra* note 63, at 1931 (defining "state" as "[t]he community; the publick; the commonwealth . . . A republic; a government not monarchical"); PERRY, *supra* note 63 (defining "state" as "a republic."); JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792), *supra* note 63 (defining "state" as "[t]he community; the publick; the commonwealth. A republic; a government not monarchical"); DYCHE & PARDON, *supra* note 63 (defining "state" as "the policy or government of a nation, &c., and sometimes the nation itself"); BARCLAY, *supra* note 63 (defining "state" as "the community or public; a government"); Texas v. White, 74 U.S. 700, 720 (1870). In *Texas*, the Court stated:

> [T]he correct idea of a State . . . describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times, it represents the combined idea of people, territory, and government.

Id.

65. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755), *supra* note 63, at 2095 (defining "tribe" as "[a] distinct body of the people as divided by family or fortune, or any other characteristick"); PERRY, *supra* note 63 (1788) (defining "tribe" as "[a] certain generation of people"); JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792), *supra* note 63 (defining tribe as "[a] distinct body of the people as divided by family or fortune or any other characteristick"); DYCHE & PARDON, *supra* note 63 (defining "tribe" as "the particular descendants or people springing from some noted head, or a collective number of people in a colony, &c."); BARCLAY, *supra* note 63 ("Tribe, in Antiquity, was a certain quantity or number of persons, when a division was made of a city or people into quarters or districts.").

66. Thinking carefully about "with" in the Commerce Clause reveals a host of additional interpretive puzzles that this footnote will raise but not answer. That so much can be packed into a preposition shows just how compactly the Clause is written. Commerce between France and Germany is "commerce with foreign nations" from their

This consideration undermines the idea that "Indian Tribes" in the Commerce Clause refers to tribal governments. It must instead refer to individual tribal members. The history of the tribal commerce power is

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perspective, but of course not ours. *Cf.* Ball v. Nippon Yusen, 253 N.Y.S. 260, 262 (City Ct. 1931). In *Ball*, the court stated:

> The original transaction giving rise to the cause of action is not between a citizen of the United States and a citizen of some other nation, but is a transaction between citizens of foreign nations. The transaction itself does not, therefore, constitute a commerce with foreign nations. It might better be characterized as a transaction involving foreign commerce or commerce between citizens of foreign nations over which Congress has no regulatory control. To hold that foreign commerce or commerce between citizens of foreign nations comes within the power of Congress to regulate would be crediting to Congress power over matters having no relation to the United States or citizens of the United States.

Id. For a comprehensive consideration of the foreign-commerce-power issues overseas, see generally Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework*, 65 FLA. L. REV. 1139 (2013). Thomas Tudor Tucker complained during the debate over the Quaker petition about the overseas use of the foreign commerce power:

> The constitution declares, that "Congress shall have power to regulate commerce with foreign nations;" which can only mean betwixt this country and foreign countries. It could not extend to a controul over the citizen when abroad. The power of regulating commerce, said he, consists in declaring on what conditions vessels or goods may be permitted to enter into our ports, and on what conditions vessels or goods may be permitted to go out. The owners, on clearing out, may be required to give bond for the performance of those conditions, and, in case of neglect, the penalty will be forfeited. But shall we require every citizen, on his departure, to give security for his good conduct whilst absent? Certainly this does not come within the idea of regulating commerce. Shall we say that no person shall be concerned in a trade betwixt England and France? that no person shall enter as a sailor, or as an adventurer on board of a foreign ship, when he is in a foreign country? If we can do this, our powers are extensive indeed; and the same doctrine will necessarily lead us so far, that we may with equal propriety enact, that no person shall, when in a foreign country, buy himself a shirt or a coat: for if the regulation of commerce implied a controul over the conduct of the individual, in the manner proposed by the motion, the same principle would of course go all the length he had mentioned.

12 DHFFC, *supra* note 37, at 798–99 (New-York Daily Gazette, 26 March 1790).

"With" embeds an implicit American perspective in some sense. But what sort of perspective? Commerce *in America*, or commerce *with Americans*? Or both? Or either? "Commerce with" in our tribal and foreign commerce powers might mean commerce between anyone *in* America and tribal members or foreigners, but it also might mean commerce between American citizens and tribal members or foreigners. May Congress under the foreign commerce power pass rules about what Americans purchase in France and consume abroad? An individual-based understanding of "with" would allow such regulation, but a territorially-based understanding would not. On the other hand, understanding "with" territorially would sometimes make the Commerce Power broader than interpreting it in terms of American citizenship. Commerce between foreign citizens and Indians would be "commerce with foreign nations" or "commerce . . . with the Indian tribes," or both, if one or both of the uses of "with" were understood in terms of American territory; a purely-American-citizenship-based interpretation of "with" in both clauses would exclude it.

relatively straightforward and confirms this interpretation as well.[67] The history of the foreign commerce power is more complicated, but the best evidence of original meaning supports a citizenship-based reading rather than a territorially-based one.[68]

IV. TRIBAL COMMERCE POWER HISTORY

As noted above, the non-territorial meaning of "tribes" plus the very basic stopping-and-waging-trade-wars historical context is enough to establish this Article's thesis with respect to the tribal commerce power. The more specific tribal-commerce-power history also confirms it. While a big motivation for the Constitutional Convention was the lack of interstate or foreign commerce powers in the Articles of Confederation, the Articles did contain a tribal commerce power. It was written, however, unambiguously in terms of individuals, speaking of "Indians" rather than "the Indian Tribes" as in the Constitution:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.[69]

At the convention, the Committee of Detail's report on August 6 initially left tribes out entirely; its draft mentioned only a power "to regulate Commerce with foreign Nations & amongst the Several States."[70] Madison proposed on August 18 to refer to the Committee on Detail a power "[t]o regulate affairs with the Indians, as well within as without the limits of the United States."[71] Four days later, Rutledge reported that the Committee of Detail had agreed to add to their proposed commerce power some language fairly similar to the Articles: "and with

67. *See infra* Part IV.

68. *See infra* Part V.

69. ARTICLES OF CONFEDERATION, art. IX, para. 5. Native Americans were also mentioned in paragraph 5 of Article VI, a predecessor to the Constitution's prohibition on state war-making:

> No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted.

Id.; *cf.* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

70. 1 DHRC, *supra* note 51, at 264.

71. 2 THE RECORDS OF THE FEDERAL CONVENTION 321 (Max Farrand ed., 1911) [hereinafter Farrand].

Indians, within the limits of any state, not subject to the laws thereof."[72] On September 4, this language became simply "and with the Indian tribes."[73]

Madison noted in Federalist 42—the most extended discussion of the commerce powers during the ratification debate—that the tribal commerce power was helpfully broader than the Articles of Confederation. He applauded the fact that because the Articles' special solicitude for the "legislative right of any State within its own limits" had been discarded, and "Indian tribes" in the proposed Constitution was broader than "Indians, not members of any of the States." Madison explained:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits."[74]

The change from "Indians" to "Indian tribes" evidently took the place of the "membership" and "legislative right" aspects of the Articles, but without changing the basic nature of the power: a power over commerce with individuals because of those individuals' identity, not because of the location or nature of the commerce.

The Indian Nonintercourse Acts, the first of which was enacted in July 1790, regulated commerce with tribes by establishing a monopsony (i.e., single-purchaser arrangement) in the federal government as the only one permitted to buy such land. These Acts governed the "sale of lands made by any Indians, or any nation or tribe of Indians within the United States."[75] The language clearly encompassed sales by both individuals and groups, with no restriction as to the location of the lands at issue. If an individual Native American had acquired land anywhere in a state, the Acts would still apply. Seen as a use of the tribal commerce power,[76] the

72. *Id*. at 367.

73. *Id.* at 569.

74. 15 DHRC, *supra* note 51, at 430–31.

75. Nonintercourse Act, ch. 33, 1 Stat. 137, 138 (1790). If land sales are a marginal case of commerce, it would explain Congress's failure to discuss the foreign commerce power in March 1790 when they discussed giving land-ownership rights to non-citizens, as well as the failure to give land-ownership rights to non-citizens in 1870, two issues discussed below. The Nonintercourse Act and the discussions of the relationship of the Jay Treaty land-ownership provisions to the foreign commerce power in 1796 presuppose, however, that land transactions are in fact commerce.

76. Rob Natelson creatively argues that the Nonintercourse Act was an exercise of the treaty power, rather than the tribal commerce power. *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DEN. U. L. REV. 201, 250–56 (2007). However, Nicholas Quinn Rosenkranz argues compellingly that non-self-

Nonintercourse Acts strongly support this reading. One issue in the background is whether land is an object of commerce at all. One observer complained about the Nonintercourse Act in December 1790, stating that "Congress determined to immortalize themselves by a *coup de main*, and so passed an act, declaring land to be an article of trade and commerce. They must allow it is not a very portable one."[77] This is not quite fair: land transactions can be "commerce" without land being an *article* of commerce. If "article of commerce" suggests portability, calling land an *object* of commerce might be more felicitous. The Nonintercourse Act also broadly banned crimes against tribal members, suggesting that the regulation of commerce could encompass prohibitions on non-consensual interactions. Preventing violence against tribal members—violent substitutes for commerce—is essential to protecting the tribes' commercial rights. The Nonintercourse Act promised to make tribal commerce regular by (1) centralizing it in the federal government, and (2) making it consensual by prohibiting violence against tribal members.

Two nineteenth-century opinions define the tribal commerce power clearly in terms of individuals, rather than territory. Because they express this Article's thesis so clearly, they are worth setting out at length. The power does not cover commerce involving non-Indians just because it occurs on Indian land, but it does cover commerce outside such land, as long as it involves tribal members. Justice McLean confronted the first issue while riding circuit in *United States v. Bailey* in 1834. He held that the murder of a non-Indian by a non-Indian on Indian territory within a state lay outside federal power. He defined both the tribal and foreign commerce powers in terms of persons, rather than territory:

> Agents and other persons are permitted to reside among them [Native Americans] for the advancement of their prosperity; and to facilitate our commercial intercourse with them. The persons of these agents are protected from violence and injustice; and our own citizens are punished for committing violence upon the persons or property of the

executing treaties may not delegate additional powers to Congress, i.e., that *Missouri v. Holland*, 252 U.S. 416 (1920), is wrong. *See generally* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005). Treaties may themselves create binding law, but not give Congress additional power to create binding law. *Cf.* Bond v. United States, 572 U.S. 844, 873–896 (2014) (Scalia, J., concurring in judgment) (following Rosenkranz). Further, Natelson cites no direct evidence of any early interpreters describing the Nonintercourse Acts as based on the treaty power, and just below this article quotes a contemporary critic who ascribed it to the tribal commerce power. Natelson himself notes that Justice McLean assumed that the Nonintercourse Acts' prohibitions on anti-Indian violence were based on the tribal commerce power in his concurrence in *Worcester v. Georgia*, 31 U.S. 515, 592 (1832), and as discussed below, McLean's *Bailey* opinion on circuit two years later did the same.

77. Investigation II, 4 December 1790, 22 DHFFC, *supra* note 37, at 1215.

> Indians. All these provisions come clearly within the scope of the power to regulate commerce with the Indian tribes; and substantially the same power has been exercised in regulating commerce with foreign nations. . . . Our agents abroad are protected, and we punish depredations committed by our own citizens on the persons or property of a foreign people, with whom we are at peace. Thus far it would seem the power may be exercised by congress, both as it relates to foreign nations and our Indian tribes. But the act under consideration asserts a general jurisdiction . . . over the Indian territory . . . . [T]he power of congress is limited to the regulation of a commercial intercourse, with such tribes of Indians that exist, as a separate community, governed by their own law . . . .[78]

As noted earlier, the Court in *United States v. Holliday* in 1866 upheld a prohibition on alcohol sales to Native Americans, even though the sales had nothing to do with the tribe's exercise of control over its territory. An 1834 law had been limited to "Indian country," but the limit was taken out in 1862, and the Court said that was fine. Because Justice Miller explained the people-not-territory view of the tribal and foreign commerce powers so clearly, it deserves another quotation:

> Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with the Indian tribes means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provision . . . . [I]f commerce, or traffic, or intercourse, is carried on with an Indian tribe or with a member of such tribe, it is subject to be regulated by Congress although within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic or the locality of the tribe or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the Indian tribes.[79]

Note especially here that the commerce might be local, and so outside the interstate commerce power: "[t]he locality of the traffic can have nothing to do with the power." It is particularly interesting that the Court reasons to an individual-based view of the tribal commerce

78. United States v. Bailey, 24 F. Cas. 937, 939 (C.C.D. Tenn. 1834) (No. 14,495).
79. United States v. Holliday, 70 U.S. 407, 417–18 (1866).

power—textually, a much easier lift—from its similar view of the foreign commerce power. The *Holliday* Court relied on the passage in *Gibbons v. Ogden* discussed above, particularly Marshall's statement that the foreign commerce power "'does not stop at the jurisdictional limits of the several states.'"[80] This has a very easy rationale if "tribes" and "nations" are composed of people who cross jurisdictional limits.

As previously explained, ten years after *Holliday*, the Court quoted its understanding of the foreign and tribal commerce powers in a Dormant Commerce Clause case, *Henderson v. New York*,[81] and in 1879, the Court gave a citizenship-based reading of both the foreign and interstate commerce powers in the *Trademark Cases*. However, in 1886, in *United States v. Kagama*, the Court cast aside the Indian Commerce Power as the exclusive basis for punishing a crime between two Native Americans. The Court said that only a "very strained construction of this clause" could allow a full criminal code for "Indians living peaceably in their reservations."[82] The Court's conclusion, however, was not to find such a code outside federal power, but to derive such power from the general nature of the union.[83] Rather than straining to find federal power over intra-tribal crime, the Court should instead have limited itself to the text. Textually, the tribal commerce power is the only power over tribes, though of course the Territories Power[84] would give ample power outside the states, or in areas ceded by states to the federal government. Once *Kagama*'s reliance on inherent federal authority over tribes was established, however, there was never again a need to rely on the *Bailey-Holliday* interpretation of "tribes" as consisting of their members. In *Kagama*, *Holliday*'s distinction between territorially-based and individual-based conceptions of the commerce power was thus largely cast into the dustbin of our constitutional history.[85] It should be taken back out.

80. *Id*. at 417 (quoting Gibbons v. Ogden, 22 U.S. 1, 195 (1824), but substituting "limits" for "lines").

81. *See* Henderson v. Mayor of N.Y., 92 U.S. 259, 270 (1876).

82. United States v. Kagama, 118 U.S. 375, 378–79 (1886).

83. *Id*. at 383–85.

84. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV § 3, cl. 2.

85. *Holliday* has not been entirely forgotten with respect to its specific holding regarding the commerce of off-reservation tribal members, but the Court has muddied its reasoning by adding territorial elements. *See* United States v. Mazurie, 419 U.S. 544, 554 (1975) ("This Court has repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country.").

V. FOREIGN COMMERCE POWER HISTORY

While the any-commerce-with-tribal-members interpretation of the tribal commerce power is relatively straightforward, more work is required to establish the any-commerce-with-foreign-nationals interpretation of the foreign commerce power. That power was mentioned in the Declaration of Independence: "these United Colonies are, and of Right ought to be Free and Independent States . . . . [A]s Free and Independent States, they have full Power to . . . establish Commerce, and to do all other Acts and Things which Independent States may of right do." The "establishment of commerce" was, however, not given specifically to Congress under the Articles of Confederation; it was exercised only by *treaties* of commerce. Paragraph 1 of Article IX provided, "[N]o treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." The regulation of foreign commerce was thus decentralized. Centralizing it was obviously one of the main goals of the Pennsylvania Convention.

In 1785, the Boston Independent Chronicle published petitions of a group of "citizens of Philadelphia" seeking "full power in Congress, over the commerce of the United States." They explained this in terms of the power to regulate the commerce of *individual subjects* of foreign powers: "reciprocity of advantages and benefits in trade, ought to be secured, by treaties of commerce between the citizens of the United States and the subjects of those powers with whom they have commercial intercourse, so as to render our commerce with other nations beneficial to our country."[86] Note the equation here of "commerce with . . . subjects" and "commerce with other nations."

The broader tradition and international law of treaties of commerce—frequently including "amity" or "navigation" alongside "commerce"—offer an important source of information about the scope of a power to "regulate commerce with foreign nations." The textual parallels in one case are quite striking indeed. In 1788, Georg Friedrich von Martens of the University of Göttingen published a treatise (in French; an English translation by William Cobbett was published in 1795) summarizing the law of nations based both on recent state practice and on earlier writers on international law. His discussion of commercial treaties uses the same language as the Constitution. Here is the very first

86. WILLIAM HILL, THE FIRST STAGES OF THE TARIFF POLICY OF THE UNITED STATES 144 (1893) (quoting Boston Independent Chronicle, July 14, 1785 (reprinting resolutions of June 29, 1785)).

sentence of his chapter 3, "Of Commerce," and its first section, "Of commerce in general": "[t]he commerce carried on with foreign nations being one of the most efficacious means of augmenting the ease, the riches, and even the power of a nation, it is of the first importance to examine with are the rights of nations with respect to it."[87] The antecedent of "it" is the very phrase in our Constitution: "commerce . . . with foreign nations." What did "commerce with foreign nations" encompass for Martens? Among other things, power over any foreign nationals in one's country: "as long as there is no treaty existing, every state retains its natural right, to lay on such commerce whatever restriction it pleases. A nation is, then, fully authorized . . . to exercise freely its sovereign power over the foreigners living in its territories."[88] This is powerful evidence that the language of the Constitution would have been understood to cover the power to make rules for even the local commerce of foreign citizens in America. The most important early treaty after the Constitution was adopted—the Jay Treaty of 1794—used very similar language, and Justice Wayne in the *Passenger Cases* of 1849 quoted this language from Martens as stating the extent of the foreign commerce power. But that is getting ahead of the story chronologically. First, let us look at the discussion of the constitutional language itself when it was adopted.

As noted above, at the convention, a commerce power lacking any reference to Indian tribes, but otherwise the same as our actual commerce power, was reported by the Committee of Detail on August 6 and approved unanimously on August 16. The Committee of Detail's provision for state control of "migration or importation of . . . persons"—i.e., immigration and the slave trade—was then perpetual: "[n]o tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited."[89] In his draft for the Committee of Detail, Randolph had initially framed this restriction quite explicitly as a limit on the commerce power; Congress was in that draft given power "[t]o regulate commerce (both foreign and domestic)," but with the slave-trade provision listed as one of several "Exceptions": "no prohibition on (such) (ye) Importations of (such) inhabitants (or people as the sevl. States think proper to admit)."[90]

87. GEORG FRIEDRICH VON MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 145 (William Cobbett trans. 1795).

88. *Id*. at 148–49.

89. 1 DHRC, *supra* note 51, at 265.

90. *See* Farrand, *supra* note 71, at 143.

The provision was discussed at the end of Tuesday, August 21. Luther Martin, later an Antifederalist, proposed allowing "a prohibition or tax on the importation of slaves," noting that it was "inconsistent with the principles of the revolution and dishonourable to the American character to have such a feature in the Constitution."[91] Rutledge and Ellsworth, the South Carolina and Connecticut representatives on the Committee of Detail, defended their work. Rutledge noted that slave labor lowered prices,[92] while Ellsworth noted, "Let every state import what it pleases. The morality or wisdom of slavery are considerations belonging to the states themselves."[93] The next day, another future Antifederalist, George Mason, echoed Martin in urging federal power over the slave trade, calling it "infernal traffic," one of our "national sins" that would bring "the judgment of heaven." [94] He memorably summarized, "Every master of slaves is born a petty tyrant."[95] Ellsworth, echoing fellow Connecticut representative Roger Sherman,[96] responded that states would gradually abolish slavery without federal pressure.[97] Both Pinckneys of South Carolina defended the slave trade,[98] and the issue was briefly discussed by several delegates, though they discussed only the slave trade, not immigration.[99] The provision was then "committed" to the committee of eleven (as it happens, just a short time before Rutledge reported back from the Committee of Detail a new provision adding Indian tribes to the commerce power).[100] On Friday, August 24, the committee of eleven reported a provision similar to the eventual slave-trade provision, but lasting only until 1800, rather than 1808, and with a slightly different rule on taxation in the interim.[101] On Saturday, August 25, the change to 1808 was made on Charles Cotesworth Pinckney's motion.[102] Just after this change, Gouveneur Morris seemed to allude to the issue of "migration." He wanted to limit the provision to the "importation of slaves" because it "would avoid the ambiguity by which, under the power with regard to naturalization, the

91. *Id.* at 364.

92. *See id.* ("If the Northern States consult their interest, they will not oppose the increase of Slaves which will increase the commodities of which they will become the carriers.").

93. *Id.*

94. *Id.* at 370.

95. *Id.*

96. *See id.* at 369–70.

97. *See id.* at 370–71.

98. *See id.* at 371–72.

99. *See id.* at 372–74.

100. Farrand, *supra* note 71, at 374. For the appointment of the committee of eleven, see *id.* at 375.

101. *See id.* at 396 (Journal); *id.* at 400 (Madison).

102. *See id.* at 408–09 (Journal); *id.* at 415 (Madison).

liberty reserved to the states might be defeated."[103] Morris's idea seemed to be that if Congress made new citizens, states would no longer have full freedom to decide which "migration" to allow. Morris withdrew his proposal, and a similar suggestion by John Dickinson to take out "migration" was defeated.[104] The interim taxation rule was then changed to its current $10-per-person limit.[105] Gouverneur Morris again seemed to allude to "migration," noting that "it implies that the legislature may tax freemen imported."[106] Mason answered Morris: "[t]he provision, as it stands, was necessary for the case of convicts, in order to prevent the introduction of them."[107]

During the ratification debates, it is striking how relatively little was said about the commerce power. Antifederalists frequently complained that the federal government would become omnipotent or nearly so. They mentioned this particularly regarding the power to tax and spend.[108] None of them, however, seems to have seized upon the commerce power as the gateway to a nearly omnipotent federal government. This "Silver Blaze" evidence—i.e., a non-barking dog—strongly suggests the commerce power was seen as small; the post-1937 interstate commerce power would certainly have caused a stir. But a general power over commerce with non-citizens would not have been so shocking. Indeed, the migration-or-importation provision, even while it presupposes a large power over foreign subjects coming to America, also presupposes a limited interstate-commerce power over domestic slavery itself. If Congress could regulate domestic labor conditions directly, shielding only the slave trade (even to the point of entrenching it against Article V) would make no sense at all. Taken as a limit on a general commerce power that would exist after 1808, article I section 9 thus supports both the pre-1937 regime of *Hammer v. Dagenhart*[109] and *Carter v. Carter Coal*[110] and a general federal immigration power.

What little discussion of the commerce power that there was, however, repeatedly linked the migration-or-importation clause with the foreign commerce power. The Pennsylvania ratifying convention discussed the "migration or importation" provision on December 3,

103. *Id.* at 415.
104. *Id.* at 416.
105. *See id.* at 417.
106. *Id.* at 416–17.
107. *See id*. at 417.
108. *See, e.g.*, 19 DHRC, *supra* note 51, at 107 ("[T]he authority to lay and collect taxes is the most important of any power that can be granted; it connects with it almost all other powers, or at least will in process of time draw all other after it.").
109. *See* Hammer v. Dagenhart, 247 U.S. 251, 251 (1918).
110. *See* Carter v. Carter Coal Co., 298 U.S. 238, 238 (1936).

1787.[111] The delegates all spoke of "migration" as referring to the normal migration of freemen, and they all assumed that Congress would have power over it. Iredell at the North Carolina convention spoke of federal power over voluntary migration.[112] He stated that "[t]he word *migration* refers to free persons; but the word *importation* refers to slaves, because free people cannot be said to be imported. The tax, therefore, is only to be laid on slaves who are imported, and not on free persons who migrate."[113] Wilson made an identical point in Pennsylvania. Migrants, then, were free from federal taxation until 1808. After that, of course, all bets were off; Congress could either prohibit migration altogether or allow it subject to a fee. Madison and Randolph in Virginia explicitly said that Article I section 9 clause 1 was an exception to the commerce power.[114] After Tyler complained that the slave trade should be prohibited explicitly, and that Congress had no explicit power over it even after 1808, Madison replied, "As to the restriction in the clause under consideration, it was a restraint on the exercise of a power expressly delegated to Congress; namely, that of regulating commerce with foreign nations."[115] Randolph said the same thing:

> [E]very exception here mentioned is an exception, not from general powers, but from the particular powers therein vested. To what power in the general government is the exception made respecting the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given them of regulating commerce.[116]

Luther Martin's letter to the Maryland convention noted that the "migration or importation" provision obviously covered free migrants, though he thought the taxation-on-importation clause did too:

> [T]he clause is so worded as really to authorize the general government to impose a duty of ten dollars on every foreigner who comes into a state to become a citizen, whether he comes absolutely free, or qualifiedly so as a servant; although this is contrary to the design of the framers, and the duty was only meant to extend to the importation of *slaves*.[117]

111. *See* 2 DHRC, *supra* note 51, at 462–65.

112. *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 100–02 (Jonathan Elliot ed., 2d ed. 1827) [hereinafter Elliot's Debates].

113. *Id.* at 102.

114. *See* 3 Elliot's Debates, *supra* note 112, at 455, 464.

115. *Id.* at 455.

116. *Id.* at 464.

117. 1 Elliot's Debates, *supra* note 112, at 373.

One group of antifederalists described Congress's "power relative to the migration or importation of foreigners."[118]

Power over migration under the commerce power seems, then, to have been widely assumed, though the textual explanation was sometimes left incomplete. The only pre-ratification evidence that explicitly addresses the competing interpretations of "foreign Nations" assumes the diversity-of-citizenship interpretation. On January 10, 1788, Federal Farmer 11 described the foreign commerce power in terms of individuals' citizenship, rather than territory. The argumentative context was not an objection to the scope of the foreign commerce power itself, but a suggestion that because the foreign commerce power overlapped with the treaty power, legislation would be required to implement treaties. "[C]ommerce with foreign nations" was restated as "commerce between our citizens and foreigners."[119]

While Federal Farmer has long been assumed to be Richard Henry Lee of Virginia, recent scholarship suggests it is Melancton Smith, a prominent moderate who ultimately led the capitulation of the key bloc of New York's Antifederalists and supported ratification after Virginia became the tenth ratifying state and the New York convention proposed a slew of amendments.[120] Smith's probable authorship lends particular credibility to Federal Farmer's analysis of the foreign commerce power in terms of citizenship. In 1786, Smith was part of a committee reporting on a proposal to give Congress "powers to prohibit any goods, wares or merchandize from being imported into or exported from any of the States, in Vessels belonging to or navigated by the Subjects of any power with whom these States shall not have formed treaties of Commerce."[121]

118. 4 JOEL MUNSELL, THE ANNALS OF ALBANY 338 (1853) (reproducing the Albany Antifederal Committee's circular published on April 10, 1788); *see also* 21 DHRC, *supra* note 51, at 1381 (2005).

119. 17 DHRC, *supra* note 51, at 309 ("By the first recited clause [i.e., the commerce power], the legislature has the power, that is, as I understand it, the sole power, to regulate commerce with foreign nations, or to make all the rules and regulations respecting trade and commerce between our citizens and foreigners."); 20 DHRC, *supra* note 51, at 1019 (2004). Republicans in the House complaining about the Jay Treaty will pick up this theme in 1796, deploying "as I understand it, the sole power" from the Federal Farmer essay as an argument against the president and Senate's treaty-making power over the subject.

120. *See* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 398 (Michael P. Zuckert & Derek A. Webb eds., 2009) (relying on an analysis of Smith's thought as well as a linguistic comparison by John Burrow of the Federal Farmer essays with other writings of Smith: "The outcome of several trials strongly favored Melancton Smith's authorship of the texts in question and disfavored the claims of [Robert] Yates and [Richard Henry] Lee.").

121. 31 J. CONT'L. CONG. 907 (John C. Fitzpatrick ed., 1934) (1786).

He was a leading expert, then, on the difference between territorial and citizenship-based aspects of foreign commerce.[122]

Madison's Federalist 42, published 12 days after Federal Farmer 11, on January 22, 1788, was the lengthiest discussion of the commerce powers during ratification, but he did not explicitly say how he understood "foreign nations." Madison grouped the foreign commerce power with other foreign-relations powers, and associated it with the migration-or-importation limit: "to regulate foreign commerce, including a power to prohibit after the year 1808, the importation of slaves."[123] After discussing other foreign-policy powers, he returned to commerce, but mostly gave reasons not to say more: "[t]he regulation of foreign commerce," he said, "has been too fully discussed to need additional proofs here" of the propriety of federal power over it.[124] He then expressed regret that the migration-or-importation limit did not end earlier than 1808, adding,

> Attempts have been made to pervert this clause into an objection against the Constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another, as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer, for they deserve none; but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.[125]

A bit more of an answer from Madison in 1788 would, alas, have been quite helpful. Ilya Somin has pointed to Madison's disavowal of the idea that the migration-or-importation rule was "calculated to prevent voluntary and beneficial emigrations" as a "specific denial[] that the Migration or Importation Clause implies the existence of a general power to restrict migration."[126] But that is an overreading of Federalist 42. Madison does not specifically deny the existence of a general power to restrict migration. Instead, he merely denies that the commerce power or its migration-or-importation limit were calculated to prevent beneficial

122. It is also interesting that a search for the phrase "between our citizens and foreigners" in the Documentary History of the Ratification of the Constitution turns up, besides Federal Farmer 11, only one other hit: Federal Farmer 3's discussion of diversity jurisdiction and the issue of concurrent state and federal authority over the same areas. Federal Farmer 3, October 10, 1787; *see also* 19 DHRC, *supra* note 51, at 203 (beginning of the Federal Farmer essays), 218 (beginning of Federal Farmer 3), 229 (using this phrase).

123. 15 DHRC, *supra* note 51, at 427.

124. *Id.* at 428–29.

125. *Id.* at 429.

126. Ilya Somin, *Does the Constitution Give the Federal Government Power Over Immigration?*, CATO UNBOUND (Sept. 12, 2018), http://bit.ly/3XCr7lU.

emigrations. Other reasons other than the lack of an immigration power are not hard to imagine, however, for that conclusion. Americans at the Founding, for instance, generally understood how much the country's future prosperity would improve if more free labor came to America. It would not have been unreasonable to trust Congress to recognize the benefits of new migrants, even if it possessed the power to bar them. The most straightforward way to understand the migration-or-importation clause, read as an exception to the foreign commerce power, is to think that Congress would possess the general power to prevent migration after 1808. Nothing in Federalist 42 detracts from this chain of reasoning.

Discussions of the commerce powers during the First Congress were rare.[127] In early 1790, discussing the Quakers' petition asking Congress to do whatever it could to oppose slavery, Elbridge Gerry described the foreign commerce power in terms of "foreigners": "the general power of regulating trade with foreigners, given to Congress by the constitution, was qualified with a single restriction, that prior to the year 1808 that power should not extend to the prohibition of importation of slaves."[128] The earliest extended discussions of the meaning of the

127. A search of the Documentary History of the First Federal Congress for the exact constitutional phrase—"commerce with foreign nations"—produces only 11 hits. The first three (relevance-ranked by repetition of the words nearby) are Jefferson, Randolph, and Hamilton's bank opinions. None of the other discussions are extensive.

In March 1790 the Congress considered and passed the Naturalization Act, an early version of which granted certain non-citizens the right to own land. The very title of the act was initially, "A Bill to establish a uniform Rule of Naturalization, and to enable Aliens to hold Lands under certain Restrictions." No one in the recorded discussion mentioned the foreign commerce power as a possible basis for the proposal, and this does supply some Silver-Blaze-style (i.e., non-barking-dog) evidence against the commerce-with-foreign-citizens-and-subjects view. Senator William Maclay concisely summarized the Senate debate:

> It was alleged that the disability of an alien to hold lands arose from the common law, and was separable from the rights of naturalization, as in the case of denization in England, where the Crown could confer the right of giving, receiving, and holding real property. When an alien, therefore, was enabled to hold real estate, it was in reality by repealing part of the common law with respect to him; not by giving a power, but by taking away a disability. It, therefore, strickly speaking, rested with the respective States whether they would repeal the common law with respect to aliens touching the point of holding property, and, being a pure State concern, had no occasion to be made any mention of in the Naturalization act, but must remain to be settled by the different States by law, as well as the rights of elections, etc. We of Pennsylvania contended hard to have a clause for empowering aliens to hold, etc., but the above reasoning prevailed, and we lost it.

William Maclay, Journal Entry (Mar. 17, 1790), *in* JOURNAL OF WILLIAM MACLAY 215–16 (Edgar S. Maclay ed., 1890). The House debate was recorded at length, but this article leaves a full canvass of its details, and so an assessment of the strength of its non-barking-dog evidence, for another time.

128. 12 DHFFC, *supra* note 37, at 796 (committee discussion reported by New-York Daily Gazette, 23 March 1790).

foreign commerce power, during the bank debate of February 1791, strongly support the diversity-of-citizenship reading. The three Cabinet opinions—Edmund Randolph and Thomas Jefferson against the constitutionality of the First Bank of the United States, and Alexander Hamilton in favor—all explained the commerce powers in terms of citizenship. On February 12, Randolph set out the three commerce powers in considerable detail:

> Congress have also power to regulate commerce with foreign Nations, among the several states, and with the Indian tribes.
>
> The heads of this power with respect to foreign nations, are;
>
> 1. to prohibit them or their commodities from our ports.
>
> 2. to impose duties on them, where none existed before, or to increase existing Duties on them.
>
> 3. to subject them to any species of Custom house regulations: or
>
> 4. to grant them any exemptions or privileges which policy may suggest.
>
> The heads of this power with respect to the several States are little more than to establish the *forms* of commercial intercourse between them, and to keep the prohibitions, which the Constitution imposes on that intercourse, undiminished in their operation: that is, to prevent taxes on imports or Exports; preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another.
>
> The heads of this power with respect to the Indian Tribes are
>
> 1. to prohibit the Indians from coming into, or trading within, the United States.
>
> 2. to admit them with or without restrictions.
>
> 3. to prohibit citizens of the United States from trading with them; or
>
> 4. to permit [the trade] with or without restrictions.[129]

Notice several aspects of Randolph's tripartite description that favor a citizenship-based understanding of the commerce powers. The analyses of the foreign and tribal commerce powers are each set out in several parallel branches and treated as distinct in kind from the interstate

129. 21 DHFFC, *supra* note 37, at 772. Because Hamilton used Randolph's opinion as the basis for a point-by-point response, it also appears in 8 PAPERS OF ALEXANDER HAMILTON 46–49 (Harold C. Syrett ed., 1965).

commerce power. The description of the foreign commerce power distinguishes "them"—i.e., foreign individuals—from "their commodities." "Foreign nations," for Randolph, consisted of people, and Congress had a power to prevent their migration to America. Also note the generality of Randolph's reference to a power to give foreign subjects "any exemptions or privileges which policy may suggest." A general power to give commercial rights to non-citizens, even in local transactions, is in view. Finally, in the discussion of tribes as well as the discussion of foreigners, Randolph mentions migration as well as trade as such.

Jefferson was much more concise three days later, distinguishing the "internal regulation of the commerce of a state"—i.e., "commerce between citizen and citizen"— from the commerce subject to federal control, which was "external commerce only, that is to say, its commerce with another state, or with foreign nations or with the Indian tribes."[130]

Hamilton's response to Jefferson and Randolph, presented to the President on February 23, quoted the foreign-nations part of Randolph's outline. Hamilton gave no indication that Randolph's explanation went too far in favor of federal power, though he thought it did not go far enough; Hamilton chiefly complained about Randolph's failure to mention exports.[131]

In 1791, then, it seems that both the Jeffersonian Republicans and Hamiltonian Federalists agreed with a broad, citizenship-based approach to foreign and tribal commerce powers. By the time of the Jay Treaty and Alien Act, however, the Jeffersonians had shifted their positions in several ways. These two disputes threw the scope of the foreign commerce power into sharp relief. In 1795 and 1796, Federalists and Republicans disagreed sharply over the Jay Treaty, and in 1798, they disagreed even more sharply over the Alien Act.

The Jay Treaty of 1794 with Great Britain, described as "a Treaty of Amity, Commerce and Navigation," spoke of its aims in language similar to the foreign commerce power, but it added an explicit reference to the people of the two countries. The U.S. and Britain aimed "to regulate the Commerce and Navigation between Their respective Countries, Territories and People, in such a manner as to render the same reciprocally beneficial and satisfactory."[132] Commerce between U.S.

130. 21 DHFFC, *supra* note 37, at 778–79; 19 PAPERS OF THOMAS JEFFERSON 275–82 (Julian P. Boyd ed., 1974) (replacing Jefferson's "it's" with the modern "its," which came to be used after "'tis" grew obsolete as a contraction of "it is").

131. *See* 21 DHFFC, *supra* note 37, at 796–97; 3 PAPERS OF ALEXANDER HAMILTON, *supra* note 129, at 97–134.

132. The Jay Treaty, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116.

citizens and British subjects was at issue, not just commerce between the U.S. and Britain territorially. Article 9 of the treaty dealt with land:

> It is agreed, that British Subjects who now hold Lands in the Territories of the United States, and American Citizens who now hold Lands in the Dominions of His Majesty, shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives; and that neither they nor their Heirs or assigns shall, so far as may respect the said Lands, be and the legal remedies incident thereto, be regarded as Aliens.[133]

Goods in transit between America and Britain are not at issue here; this is not "Commerce . . . between Their respective . . . territories," but "Commerce . . . between Their respective . . . People." We might see the Jay Treaty as the precursor to the sorts of bilateral investment treaties that became common in the mid-twentieth century.[134] Regulation of foreign investment and ownership, even regarding goods that never cross borders, has long been a staple of the regulation of commerce with foreign nations, considered as peoples rather than as mere territories.

The 4th Senate, exactly two-thirds of whose members were Federalists, ratified the treaty on a party-line vote in 1795.[135] The Republicans' defeated resolution against ratification, however, made clear that they did not approve of federal power to make law concerning British land-ownership rights: "the rights of individual States, are, by the ninth article of the Treaty, unconstitutionally invaded."[136] It is not clear what constitutional restraints might limit the power of the president and Senate to adopt a treaty, but the reference to states' rights would make no sense if the foreign commerce power extended to non-citizens' local commerce in America. The Senate Republicans opposing the Jay Treaty in 1795 therefore rejected the view defended here; like *Veazie* in 1853, they are this Article's opponents. The Senate Federalists, however, are its allies, to the extent that they thought the treaty exercised the sort of power Congress also had under the commerce power, which the similarity of language suggests, though it does not demand it.

133. *Id.*

134. The first modern BIT was signed between Pakistan and Germany in 1959 but built on the treatment of such subjects in treaties of commerce, amity, and navigation. Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 573 (1994).

135. 4 ANNALS OF CONG. 862 (1795).

136. *Id.*

More importantly than the support of the Senate Federalists, though, the House Republicans a year later are unequivocal allies. Republicans in the House, including Madison, continued to complain about the Jay Treaty into 1796. But their arguments contradicted the Republican arguments in the Senate the year before. To say that the foreign commerce power required the House to participate in approving restrictions like those in the Jay Treaty undermined the claim of exclusive state power over the subject. Seeing this distinction in arguments is absolutely critical for assessing congressional power over territorially-local commerce with foreign subjects. If the Jay Treaty was an infringement of *states'* rights, then the regulation of non-citizens' land ownership lies outside the foreign commerce power. But if the treaty was an infringement of *Congress's* rights, then such regulation is within it. Republicans in the House in 1796 made the second argument. Others had done so the year before; the eighteenth complaint of a group of "Boston Citizens" who wrote to Washington in July 1795 said that the Jay Treaty "limits the powers of Congress, delegated to them by the Constitution, 'to regulate our Commerce with foreign nations' by prescribing Conditions, & creating impediments to the exercise of that power."[137] In 1796, Representative Richard Brent actually quoted Federal Farmer 11's diversity-of-citizenship interpretation of the foreign commerce power in support of the need for the House to be involved.[138] Representative John Page claimed that there was no need to have the Senate approve treaties outside the congressional exercise of the foreign commerce power because "giving a power to Congress to regulate commerce . . . would answer every purpose of Commercial Treaties."[139] If Page was right, then the foreign commerce power obviously covered local commerce with foreigners.

In 1798, the Federalists restricted the rights of foreign nationals in the Alien Act. Many Republicans argued during the debate that they did not think the federal government had power over immigration at all. However, as with Republican opposition to the Jay Treaty, their arguments were not consistent. The Kentucky resolutions, authored by Jefferson, complained both that the federal government had no power over non-citizens and that the Alien Act was barred by the migration-or-importation clause.[140] Madison's Virginia resolutions, for their part, left

137. *To George Washington From Boston Citizens, 13 July 1795*, NAT'L ARCHIVES: FOUNDERS ONLINE, http://bit.ly/3ZJptR3 (last visited Mar. 13, 2023).

138. *See* 5 ANNALS OF CONG. 581 (1796).

139. *Id.* at 558.

140. See *Kentucky Resolutions of 1798*, *reprinted in* 4 Elliot's Debates, *supra* note 112, at 541 (resolution 4 complaining that the Alien Act "assumes powers over alien friends not delegated by the Constitution," and resolution 5 relying on the migration-or-importation clause and arguing "that to remove them [i.e., migrants], when migrated, is

out the migration-or-importation argument.[141] Thus, Madison was more consistent on the assumption—made by many people, Madison included, during ratification—that the migration-or-importation limit was a limit on the foreign commerce power that Congress would otherwise possess.[142] If the migration-or-importation clause governed restrictions on non-citizens' rights while in the country, as Jefferson claimed, then the only problem for the Alien Act was that it was passed before 1808, not that it lay beyond the foreign commerce power. Further, as Prakash points out, the 1808 limit would make no sense merely as a confirmation of the lack of power over migration: "[t]he provision was not enacted out of abundance of caution, because there would be no need to mention a specific year if the Drafters did not recognize that Congress could generally ban foreign commerce in the first instance."[143]

The debates over the Jay Treaty and the Alien Act were quite extensive and detailed, and a full analysis would take this Article far afield. It is worthwhile, however, to highlight two of the Federalists defending the Alien Act, Samuel Sewall and Harrison Gray Otis, who read the foreign commerce power to support detailed restrictions on how non-citizens behaved in America. They both associated the commerce power with the migration-or-importation restriction and thought the post-1808 federal commerce power over the rights of migrants was very clear and extended to minute restrictions on non-citizens' activities. Here is Sewall:

> It being admitted that Congress has the power to regulate commerce with foreign nations, and foreigners who come here generally coming for commercial purposes, Congress has of course power to make regulations with respect to them, unless this power can be supposed to be taken away by the first article of the 9th section, which he could not believe.[144]

Otis first denied that non-citizens could "claim equal rights and privileges with our own citizens," insisting instead that "power was expressly given to Congress to decide on what terms foreigners should become entitled to the immunities of citizens."[145] He then summarized his view of the power to which Article I section 9 made an exception:

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equivalent to a prohibition of their migration, and is, therefore, contrary to the said provision of the Constitution").

141. *See Virginia Resolutions of 1798*, *reprinted in* 4 Elliot's Debates, *supra* note 112, at 528 (complaining merely that the Alien Act "exercises a power nowhere delegated to the federal government" and that it gives legislative and judicial power to the executive).

142. See *supra* notes 115–16 and accompanying text.

143. Prakash, *supra* note 6, at 1161 n.30.

144. 8 ANNALS OF CONG. 1958 (1798).

145. *Id.* at 2018.

> The sovereign authority of a nation may, undoubtedly, forbid the entrance of foreigners, and, consequently, prescribe the conditions of admission, the duration of their residence, and even the part of the country where they shall be permitted to reside. This authority would have belonged to the National Government as incidental to the power of regulating commerce, and of making war and defending the country, in its full extent, but for the restriction imposed by the Constitution, until the year 1808.[146]

In 1824, *Gibbons v. Ogden* offered a couple of thoughts friendly to a commerce-with-foreign-citizens approach to the foreign commerce power. It is therefore not a surprise that *Holliday*, which set such a view out very clearly in 1866, relied centrally on *Gibbons*, as did Justice Wayne in the *Passenger Cases* in 1849. What of *Gibbons* itself? First, Marshall relied on an analogy between the foreign-commerce and interstate-commerce powers to show that navigation was covered by the latter. He said,

> [I]n regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.[147]

Later in the argument, Marshall said the following about the migration-or-importation clause:

> The section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting

146. *Id.*
147. Gibbons v. Ogden, 22 U.S. 1, 195 (1824).

> men, who pass from place to place voluntarily, and to those who pass involuntarily.[148]

The conclusion to Justice Wayne's separate opinion in the *Passenger Cases* gushed about *Gibbons*, calling it "a high and honorable proof of the American bar of that day . . . ."[149] He used Martens's treatise to construe the foreign commerce power, which gave the United States a general "sovereign power over the foreigners living in its territories . . . ."[150] As noted above, both *Bailey* in 1834 and *Holliday* in 1866 reasoned from a foreign commerce power over all foreign citizens anywhere in America to a tribal commerce power over all tribal members anywhere in America; *Henderson* in 1876 and the *Trademark Cases* of 1879 set out such a view as well.

The last gasp of a foreign-citizens approach to the foreign commerce power came in the *Head Money Cases* of 1884, which stated clearly that the power over immigration was an exercise of the foreign commerce power, citing *Henderson* and noting the congressional power to modify treaties like the Jay Treaty. The commerce power could be used to modify a treaty's "provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other," such as the "rights of property by descent or inheritance, when the individuals concerned are aliens."[151] However, just as the rise of the inherent-power-over-Indians doctrine in *Kagama* in 1886 rendered a tribal-members interpretation of the tribal commerce power superfluous,[152] the Court announced an inherent-power-over-immigration doctrine in the *Chinese Exclusion Case* of 1889 and its progeny. This invention obviated the need for the Court to construe "foreign Nations" with particular care.[153] The Court said, speaking through Justice Field:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.[154]

At the time, it would be possible to construe this statement of federal power as merely referring to the foreign commerce power, but

148. *Id.* at 216–17.
149. Passenger Cases, 48 U.S. 283, 437 (1849).
150. *Id.* at 416.
151. Edye v. Robertson, 112 U.S. 580, 598 (1884).
152. *See supra* notes 82–83 and accompanying text.
153. The Chinese Exclusion Case, 130 U.S. 581, 603 (1889).
154. *Id.*

later cases made clear, as *Kagama* did with respect to relations with Native Americans, that the power would exist even without a Commerce Clause. Though he authored the *Chinese Exclusion Case*, Field dissented in 1893 against the Court's description in *Fong Yue Ting v. United States* of "[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace" as "an inherent *and inalienable* right of every sovereign and independent nation."[155] Field quoted the Tenth Amendment, saying quite sensibly, "When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist."[156] Field was, however, on the losing side of this patch of constitutional history. Taken seriously, the majority's reference to "inalienable" immigration power meant that even if the Union had wanted to give such power back to the states by means of the Tenth Amendment, it lacked the power to do so. By *United States v. Curtiss-Wright* in 1936, the Court had thrown off the idea of constitutionally-enumerated-foreign-policy power entirely:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[157]

The Court included "the power to expel undesirable aliens" in its list of powers "none of which is expressly affirmed by the Constitution," but which "nevertheless exist as inherently inseparable from the conception of nationality."[158] For fans of limited federal power, a return to the text—to thinking about the meaning of "foreign Nations" rather than nationality as such—is clearly in order.

155. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (emphasis added). Field's nephew, Justice Brewer, who grew up in Ottoman-Empire Smyrna as a child of missionaries, added bitterly, "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?" *Id*. at 744 (Brewer, J., dissenting).

156. *Id.* at 758 (Field, J., dissenting).

157. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

158. *Id.*

VI. IMPLICATIONS

A. Federal Immigration Power

The nineteenth-century collapse of careful parsing of the foreign commerce power is a good segue into the first application of this Article's thesis: a robust immigration power has no need to rely on control over non-citizens as part of the Declaration-of-Independence-asserted power to do "all other Acts and Things which Independent States may of right do."[159] Field was right; after the Tenth Amendment, any national powers that came into being at the time of the Declaration of Independence but were not expressed in the text of the Constitution reverted to the states. "The powers not delegated to the United States *by the Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[160]

Ilya Somin, a critic of the post-1937 expansion of the interstate commerce power, argues that a narrow domestic power over commerce requires that we abandon federal power over immigration altogether:

> But at the time of the Founding and for many decades thereafter, the dominant interpretation of the Commerce Clause was that it merely gave Congress the power to restrict interstate trade and other commercial transactions, not to forbid movement as such. The Commerce Clause also gives Congress the power to regulate interstate as well as international commerce. The Constitution literally uses the same phrase to cover both, giving Congress the power to "regulate Commerce with foreign Nations, and among the several States." Yet few if any eighteenth and nineteenth century jurists would have argued that Congress therefore had the power to forbid Americans from moving from one state to another.[161]

It is, of course, true that the word "Commerce" appears only once in the Constitution, but "with foreign Nations" need not be read as precisely analogous to "among the several States." Citizens' right to move from one state to another can, moreover, be rooted in Article IV: "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several States."[162] For instance, in *Corfield v. Coryell* in 1825, Bushrod Washington held that the provision covered "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ."[163]

159. *Id.* at 316 (asserting that such a foreign-relations power persists).
160. U.S. CONST. amend. X.
161. Somin, *supra* note 126.
162. U.S. CONST. art. IV, § 2, cl. 1.
163. Corfield v. Coryell, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1825).

Independent of this Article IV limit on the interstate commerce power as applied to citizens, it is not right to say that the Constitution uses "the same phrase" to cover both the interstate and foreign commerce powers. "Among the several states" and "with foreign nations" can refer to very different things, even if the word modified by the phrases, "commerce," consistently means trade and transportation incident to it. Further, the very same migration-or-importation clause that suggests a broad federal commerce power to control migration simultaneously undermines the plausibility of an interstate commerce power broad enough to prohibit slavery or otherwise regulate labor conditions.

Even if travel counts as "commerce" only if it uses some sort of vehicle or ship, and therefore foot travel across a border is not directly part of "commerce with foreign nations,"[164] a person-based view of "foreign nations" would give Congress near-complete control over immigrants while they are in America. A foreign-nationals-based power over "commerce with foreign nations" need not stay near the border. Even after a border crossing, congressional power follows non-citizens anywhere they work for hire or purchase food, clothing, or housing. And if Congress has power to entirely prevent non-citizens' participation in the American commercial economy, it would be quite odd if it could not, as an incident of that power, simply forbid their entry. This is perfectly consistent with adhering to pre-1937 precedents limiting congressional control over citizens' labor conditions in cases like *Hammer v. Dagenhart*[165] and *Carter v. Carter Coal*.[166] The local purchase of services in one place is not territorially-conceived commerce among the several states, but, if purchased from foreign citizens, it is commerce with foreign nations.

Nikolas Bowie and Norah Rast, accepting the criticism of the immigration power that Madison offered in 1798, argue that it is anomalous to view the interstate-commerce power narrowly but allow for a broad power over immigrants: "in no other context has the Court asserted that just because a *person* has crossed a state or international border, Congress retains indefinite power to regulate her pursuant to the Commerce Clause."[167] A continuing power over foreign citizens and

164. One might imagine, though, that purchasing (or receiving as a gift) a temporary easement to walk across someone else's land could be seen as commerce, and therefore that prohibiting the involuntary usage of such an easement—i.e., trespassing—could be part of a scheme to make commerce regular.

165. *See generally* Hammer v. Dagenhart, 247 U.S. 251 (1918).

166. *See generally* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

167. Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1487 (2022). They appeal to the Court's statement in *NFIB v. Sebelius*, that the Commerce Clause "is not a general license to regulate an individual from cradle to

subjects even within the United States, however, need not be based simply on the fact that they have crossed a border. If "foreign Nations" consist of people, then commerce with foreign citizens and subjects in America is "commerce with foreign Nations," whatever the relation of that commerce to the border itself. The present identity of non-citizens, not their past border crossing, is critical.

Amid the Court's abandonment of careful textual analysis of the foreign commerce power in the late-nineteenth- and early-twentieth centuries, it also limited federal power in ways it need not have. One instance is *Keller v. United States*, which in 1909 struck down (over the dissent of Justices Harlan, Holmes, and Moody) a prosecution for harboring a foreign prostitute.[168] Congressional power over citizens' dealings with non-citizens is an odd thing for the Court to use as a reductio ad absurdum, given its embrace of plenary power over immigrants during the same era. At any rate, if this Article is right, "all the [commercial] dealings of our citizens with resident aliens" are indeed part of the foreign commerce power.

B. ICWA

The Indian Child Welfare Act ("ICWA"), challenged in *Brackeen v. Haaland*, imposes a set of complicated restrictions on the transfer of custody of tribal members. [169] Does the tribal commerce power extend to it? Justice Thomas argued in 2013 that is does not, both because he disagrees with this Article's citizenship-based view of the tribal commerce power and because child custody transfers are not "commerce": "[t]he term 'commerce' did not include economic activity such as 'manufacturing and agriculture,' . . . let alone noneconomic activity such as adoption of children."[170]

The termination of the slave trade, however, required the regulation of involuntary transfers of custody, including the transfers of custody of children, even when those transfers did not involve the payment of money. As previously explained, Congress's power over migration and the importation of slaves after 1808 was explained as an exercise of the foreign commerce power. Thinking about the transfer of custody

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grave, simply because he will predictably engage in particular transactions." NFIB v. Sebelius, 567 U.S. 519, 557 (2012).

168. Keller v. United States, 213 U.S. 138, 148 (1909) ("But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the national government of an almost unlimited body of legislation.").

169. *See* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), cert. granted, 142 S. Ct. 1205 (2022).

170. Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring).

involved in the slave trade can help us see how its regulation—and the regulation of custody—fall under the power to regulate commerce.

Imagine that ICWA was instead an Alien Child Welfare Act. Could Congress regulate the transfer of the custody of non-citizens' children under the foreign commerce power? It seems that it could. If a group of migrants had a custom of selling their children, even the antebellum Congress could demand that they not indulge in that custom in America. The migration-or-importation clause, taken as a limit on the foreign commerce power, makes clear that transfers of the custody of people are sometimes subject to congressional control. The enslavement of those from Africa did not begin with commerce, but with kidnapping,[171] and the foreign commerce power would therefore allow Congress to suppress such transfer of custody even if there was no actual trade involved at any point in the process. After 1808, Congress could prevent Americans from coercively obtaining labor from other countries, rather than paying for it.[172] And if, as argued here, "foreign nations" included non-citizens anywhere in America, then Congress even before the Thirteenth Amendment could likewise prevent the enslavement of non-citizens, or of non-citizens' children, anywhere in the country. And the commerce power is not limited to such extreme deprivations as enslavement; custody of children destined for freedom and custody of those destined for bondage are indistinguishable for newborns.

In 1883, however, the Court in *People v. Compagnie Generale Transatlantique* took a contrary reading of the migration-or-importation clause while rebutting the idea that a tax on migrants might be justified as "absolutely necessary for executing its inspection Laws" under the Constitution's Article I section 10 clause 2, which allows "Duties on Imports or Exports" in such cases. [173] The argument failed, the Court said, because free people could not be "imported":

> We know of nothing which can be exported from one country or imported into another that is not in some sense property—property in regard to which some one is owner, and is either the importer or the exporter. This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children. The language of Sect. 9, art. 1, of the Constitution, which is relied on by counsel, does not establish a different construction: "The migration or importation of such persons as any of the states now existing shall think proper to

171. *See* Melburn N. Washburn, *Kidnapping as a Military Offense*, 21 MIL. L. REV. 1, 6 (1963) (some of earliest kidnapping statutes directed at slave trade).

172. *See* An Act to Prohibit the Importation of Slaves, 2 Stat. 426, 426 § 1 (March 2, 1807) (extending prohibition to importing Africans "with intent to hold," i.e., not merely to be sold in commerce), *id.* § 2 (forbidding "procuring" slaves, not merely purchasing them).

173. People v. Compagnie Generale Transatlantique, 107 U.S. 59, 61–62 (1883).

> admit, shall not be prohibited by the Congress prior to the [year 1808], but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words "migration" and "importation" refer to the different conditions of this race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports or exports, within the meaning of the Constitution.[174]

The Court's conclusion that free migrants are not "imports" may seem correct, but the idea that there had "never been any doubt that this clause had exclusive reference to persons of the African race" is absurd. Those at the Founding thought "migration" referred to migrants generally; in 1798, Republicans applied it repeatedly to immigrants from France.[175] Further, the distinction between migration and importation would blur for sufficiently young children. It is easy to imagine someone traveling with a newborn, born to an enslaved mother, who had not decided yet whether (1) to *manumit* the child, or (2) apply the usual "*partus sequitur ventrem*" rule enslaving the children of enslaved mothers. Imagine Thomas Jefferson returning from France with Sally Hemings and one of her children. Is that migration or importation? The owner/custodian might not even know the answer himself. At any rate, a Congress with the power to control migration clearly has power over the transfer of custody of children not yet at an age to be meaningfully distinguished as slave or free.

Power over the importation of children too young to work is, then, simply a power over child custody. Any foreign commerce power robust enough to allow Congress to regulate when and where non-citizens may work and obtain clothing, food or shelter would therefore necessarily also allow Congress to regulate the transfer of custody of non-citizens' children. Providing food, housing, and clothing for children inevitably means engaging in commerce on their behalf. If this is right, and if all the same rules apply to the tribal commerce power, then there is a straightforward way to defend ICWA against the charge of the lack of federal power. "Tribes" simply consist of individual Native Americans, and even local commerce with them, or on their behalf, counts as "commerce . . . with the Indian tribes." Congress may therefore regulate the process of transferring responsibility for engaging in commerce on behalf of—i.e., parenting—Native American children.

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174. *Id.*

175. *See supra* note 140 and accompanying text.

This is not to say, of course, that ICWA survives other constitutional objections: commandeering state administrators, delegating legislative power to tribes, or engaging in unjustified racial classifications of citizens of the United States, to name a few of the other objections raised in *Brackeen v. Haaland*.[176] It is also possible that the ordinary process of adoption could be deemed to have severed children's tribal membership. But if such children are still deemed to be part of "the Indian Tribes," the tribal commerce power encompasses ICWA.

C. 1870, Land, and Contracts

Kurt Lash argued that the partial extension of the Civil Rights Act of 1866 to non-citizens in 1870 vindicates his view that the Civil Rights Act, though it initially referred only to citizens, was constitutionalized by the provisions of the Fourteenth Amendment dealing with persons (the Due Process and Equal Protection Clauses), rather than the provision dealing with citizens (the Privileges or Immunities Clause).[177] John Harrison has pointed to the limits to that extension—particularly the exclusion of land-ownership rights, especially as Senator William Stewart explained that exclusion—as a reason to prefer the Privileges or Immunities Clause as a justification.[178] Others have agreed with Harrison.[179] But there is one problem with the argument: why was Congress permitted to extend the right to make contracts to non-citizens?

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176. *See* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), cert. granted, 142 S.Ct. 1205 (2022).

177. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1457 (2018):

> The lack of such an objection [that the 1870 extension went beyond Congress's Section Five power] is all the more significant in light of the Enforcement Act's extension of most of the Civil Rights Act to *all persons.* Neither the Citizenship Clause nor the Privileges or Immunities Clause authorizes a guarantee of equal rights to *noncitizens.* These were the rights of life, liberty, and property—the natural rights of all persons originally protected by the Fifth Amendment's Due Process Clause, and now guaranteed against state abridgement by the Fourteenth Amendment's Due Process Clause . . . .

See also Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 643 (2019).

178. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1444–47 (1992).

179. *See* Ilan Wurman, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 93–103 (2020); Randy Barnett & Evan Bernick, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 117–155 (2021); Randy Barnett & Evan Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 562–66 (2019); Christopher Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 268–69 (2009); Christopher Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 121 (2015).

The right to enforce contracts, once legally made, was part of the "protection of the laws" as Harrison and others interpret the phrase. But the right to make contracts is distinct from the right to enforce them. As Chief Justice Marshall and Justice Story saw things, for instance, the Contracts Clause covered only the right to enforce contracts that were legal when made, not the right to make them in the first place.[180] This is an important distinction.

The exclusion of non-citizens' real-estate rights from the 1870 re-enactment is a problem for those who think that the Fourteenth Amendment's person-based clauses generically prohibit discrimination with respect to rights in the Civil Rights Act of 1866.[181] But the inclusion of non-citizens' right to make contracts is also a problem for (proper) readings of "protection of the laws" and "process of law" that do not extend to contractual freedom. Where does equal contractual freedom for non-citizens, then, fit into the Fourteenth Amendment? It does not. But it does fit easily into the foreign commerce power. While Stewart did not explain the basis of his legislation in great detail, on the same page that he highlighted the exclusion of land-ownership rights from his bill, he mentioned the *Passenger Cases* in explaining why an accompanying provision banning discriminatory taxation of non-citizens would not prevent New York's immigration regulations.[182] There is no need to shoehorn equal contractual freedom into the person-based clauses of the Fourteenth Amendment to salvage the 1870 Civil Rights Act extension. Beyond the process-and-protection-of-law floor, Congress has power to give non-citizens some of the rights covered by the Privileges or Immunities Clause for citizens while withholding others. Reconciling equal contractual freedom with the lack of equal land-ownership rights is difficult or impossible as a matter of constitutional principle, given that none of our Fourteenth Amendment text can easily be made to fit that distinction. However, it is easy under a robust foreign commerce power: Congress has discretion to grant non-citizens some rights but not others.

180. *See* Ogden v. Saunders, 25 U.S. 213, 335 (1827) (Marshall, C.J., dissenting) (right to enforce contracts only "if it be not illegal"); *id*. at 347 ("The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised."); *id*. at 348 ("If the legislative will be, that certain agreements shall . . . assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make and which do not come within the restrictions of the Constitution, because they do not impair the obligation of the contract."); *id*. at 354 ("[T]he right of government to regulate the manner in which they [contracts] shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability after they have been formed.").

181. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 18 (2d ed. 1997).

182. *See* CONG. GLOBE, 41st Cong., 2nd Sess. 1536 (1870).

Congress's 1986 prohibition on private alienage discrimination in employment[183] is even less defensible from a Fourteenth Amendment perspective because such discrimination might have nothing to do with the state. The foreign commerce power, though, has no state-action limit; even local private American employers dealing with non-citizens are engaged in "commerce with foreign Nations," and Congress may regulate them. This would be true even if the Court were to return to *Hammer v. Dagenhart* and *Carter v. Carter Coal* and hold that the interstate commerce power does not extend to labor conditions.[184]

D. Justice Harlan Vindicated Again

Returning antidiscrimination law to equal citizenship would, of course, end Fourteenth Amendment strict scrutiny for non-citizens. However, there is another route to the same result. A thread of exclusive federal power over immigration has run through the Supreme Court's cases dealing with non-citizens' Fourteenth Amendment rights since the very beginning. If reinforced by the version of the foreign commerce power defended here, that thread can support most of current non-citizens'-rights law even if it is decoupled from the Fourteenth Amendment. If Fourteenth Amendment antidiscrimination and basic-rights law shifted, as they should, to the Privileges or Immunities Clause, non-citizens would not be left out in the cold.[185] The foreign commerce power allows Congress to exercise collective hospitality on behalf of America as a whole, and it has in fact exercised that power to vindicate non-citizens' occupational freedom.[186] As with incorporation, unenumerated rights, and political rights, the second Justice Harlan's approach to alienage classifications fits the Fourteenth Amendment's original meaning better than the Court's approach. The Fourteenth Amendment's central guarantee, the Privileges or Immunities Clause, is a broad, imprecise guarantee of the equal civil rights of similarly-situated citizens:[187] not political rights,[188] not just the rights of the Bill of

183. *See* 8 U.S.C. § 1324b(a)(1)(B).

184. *See supra* notes 165–66 and accompanying text.

185. Justice Ginsburg has worried about this issue, for instance in the oral argument in *Timbs v. Indiana* on incorporation of the Excessive Fines Clause. *See* Transcript of Oral Argument at 6, Timbs v. Indiana, 139 S. Ct. 682 (No. 17-1091). She later wrote the opinion of the Court without mentioning the Privileges or Immunities Clause, though Justices Gorsuch and Thomas mentioned the issue in their concurrences. *See Timbs*, 139 S. Ct. at 691. The general ban on alien discrimination in cases like *Graham v. Richardson* is a simple answer to her question, but one which will not do for those who (rightly) think that antidiscrimination doctrine, not just incorporation of the Bill of Rights, should also be moved the Privileges or Immunities Clause.

186. *See supra* notes 19–20 and accompanying text.

187. *See supra* notes 178–79 and accompanying text.

188. *See* Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

Rights,[189] not necessarily everything in the Bill of Rights,[190] and not rights for non-citizens.[191] Non-citizens get a ban on deprivations of their life, liberty, or property outside traditional judicial proceedings,[192] the enforcement of the law,[193] and whatever commercial rights Congress requires states to give them.

The Supreme Court has never had to confront the issue of what rights the Fourteenth Amendment would guarantee to non-citizens in the absence of congressional action; the relevant statutes have been around longer than the Court's non-citizen-protective jurisprudence itself. If references to non-citizens' Fourteenth Amendment rights were pared back to their proper size, some disentangling would be required. But congressional foreign commerce power is strong enough to hold the immigrants'-rights garment together.

The first few cases on the relationship of federal power and non-citizens' rights to work came from the trial courts in the west. In 1876, in *Chapman v. Long*, Judge Deady held that the right to enter the country, founded on the Burlingame Treaty of 1868, invalidated a state-constitutional restriction on Chinese immigrants working in mines: "[t]he right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers." [194]

In 1879, Justice Field, riding circuit, relied in *Ho Ah Kow v. Nunan* on the 1870 extension of the Civil Rights Act of 1866 in his invalidation of San Francisco's "queue ordinance," an anti-Chinese-migrant rule that required anyone in jail to have their hair cut.[195] Field first recited some reasons for hostility towards such migrants, but said the proper remedy came only from the federal government, not states. The foreign

189. *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (stating "this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights"); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring in the judgment) (endorsing the Harlan dissent in *Poe v. Ullman* and stating "[t]he Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom").

190. *See* Roth v. United States, 354 U.S. 476, 503–07 (1957) (Harlan, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 678–82 (1961) (Harlan, J., dissenting); Gideon v. Wainwright, 372 U.S. 335, 349–52 (1963) (Harlan, J., concurring); Malloy v. Hogan, 378 U.S. 1, 21–27 (1964) (Harlan, J., dissenting); Pointer v. Texas, 380 U.S. 400, 408–09 (1965) (Harlan, J., concurring); Washington v. Texas, 388 U.S. 14, 23–25 (1967) (Harlan, J., concurring); Duncan v. Louisiana, 391 U.S. 145, 173–82 (1968) (Harlan, J., dissenting); Benton v. Maryland, 395 U.S. 784, 808–09 (1969) (Harlan, J., dissenting); Williams v. Florida, 399 U.S. 78, 128–34 (1970) (Harlan, J., concurring).

191. *See* Graham v. Richardson, 403 U.S. 365, 383 (1971) (Harlan, J., joining only the pre-emption portion of the Court's opinion).

192. *See generally* Green, *supra* note 17.

193. *See generally* Harrison, *supra* note 178.

194. Chapman v. Long, 5 F. Cas. 497, 500 (C.C.D. Or. 1876).

195. Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255–56 (C.C.D. Cal. 1879).

commerce power, he said, included the power to "determine what aliens shall be permitted to land within the United States and upon what conditions . . . whether they shall be restricted in business transactions to such as appertain to foreign commerce . . . or whether they shall be allowed to engage in all pursuits equally with citizens." [196] Note especially Field's acknowledgment that federal power could be exerted not merely in "business transactions [that] appertain to foreign commerce," but in vindicating the right of the Chinese to work *beyond* that field. For Field, there was no need for commerce itself to be foreign to come within the foreign commerce power, as long as it was commerce with part of a foreign nation, i.e., an individual immigrant.

Later in 1879, in *Baker v. City of Portland*, Judge Deady held again that the right to enter entailed the right to work:

> [T]he treaty . . . impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make the proffered right of residence a mere mockery and deceit.[197]

Leaving the Ninth Circuit and returning to the Supreme Court, we find a thread of reliance on federal power going back to the very beginning of the Supreme Court's work. In 1886, *Yick Wo v. Hopkins* noted famously, if illogically,[198] that "the equal protection of the laws is a pledge of the protection of equal laws."[199] Less famous is the next sentence in the case, pointing to the 1870 extension of the Civil Rights Act of 1866 to non-citizens: "[i]t is accordingly enacted by [the 1870 Act] that 'all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts.'"[200] Congressional action on behalf of non-citizens' rights was an important prop for *Yick Wo*, not just the Fourteenth Amendment. *Truax v. Raich* held in 1915, striking down state laws reserving certain

196. *Id.* at 256.

197. Baker v. City of Portland, 2 F. Cas. 472, 474 (C.C.D. Or. 1879).

198. Alfred Avins compares this linguistic transition here to that from a "pair of alligators" to an "alligator pear," or from a "horse chestnut" to a "chestnut horse." *See* Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y. L. F. 385, 386 (1967).

199. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

200. *Id.*

numbers of jobs for American citizens, "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases, they cannot live where they cannot work."[201]

Takahashi v. Fish & Game Commission tied a lack of state power over immigration to the 1870 Act in its vindication of non-citizens' fishing rights in 1948:

> State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid. Moreover, Congress, in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization, has broadly provided [as in the 1870 Act.][202]

Graham v. Richardson similarly associated the 1870 Act with pre-emption in preventing Arizona from excluding non-citizens from welfare in 1971:

> Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. Rather, it has broadly declared [as in the 1870 Act] . . . . State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.[203]

The second Justice Harlan would have used this pre-emption rationale alone, rather than relying on the Fourteenth Amendment, as the Court did earlier in the opinion.[204]

Several later cases note the same rationale, though not at as great length. *Sugarman v. Dougall*, in 1973, rested its invalidation of civil-service alienage discrimination on the Fourteenth Amendment, but noted the discussion of federal pre-emption in *Graham*, explaining that it need not reach that issue.[205] *Examining Board v. Flores de Otero*, invalidating in 1976 a restriction on alien engineers, relied briefly on pre-emption as well: "[o]nce an alien is lawfully admitted, a State may not justify the restriction of the alien's liberty on the ground that it wishes to control the

201. Traux v. Raich, 239 U.S. 33, 42 (1915).
202. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).
203. Graham v. Richardson, 403 U.S. 365, 377–78 (1971).
204. *See id*. at 383.
205. *See* Sugarman v. Dougall, 413 U.S. 634, 646 (1973).

impact or effect of federal immigration laws."[206] *Nyquist v. Mauclet*, in 1977, striking down a limit on educational financial aid for non-citizens, reasoned as *Sugarman* did; its Fourteenth Amendment holding undermined the need to deal with exclusive federal power. [207] The Court did note in passing, however, that "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."[208]

A few weeks before *Nyquist v. Mauclet*, the Court decided another alien-discrimination case without any reference to the Fourteenth Amendment. The facts and reasoning in *Douglas v. Seacoast Products* were very like those in *Gibbons v. Ogden*. Just as Chief Justice Marshall in *Gibbons* decided that a federal license under the Act of 1793 was enough to trump New York's steamboat monopoly,[209] Associate Justice Marshall in *Douglas* decided that an American-flag ship, even one owned by a foreign-controlled corporation, was entitled to harvest "menhaden" ("an inedible but commercially valuable species of fin fish") free of state discrimination. [210] While the lower court had relied in part on the Fourteenth Amendment, the Supreme Court itself said nothing further about it. [211]

In sum, the Court has never retreated from the claim that Congress's exercise of the immigration power has impliedly also guaranteed non-citizens' occupational freedom, whether the Fourteenth Amendment gives such rights to non-citizens. Returning the bulk of Fourteenth Amendment doctrine to the Privileges or Immunities Clause, and thereby returning the Due Process and Equal Protection Clauses to their original relatively limited scope, need not portend disaster for non-citizens' rights. Pre-emption can fill the gap.

E. The Crazy Quilt of Non-Citizens' Occupational Freedom: A Better Basis for Foley *and* Ambach

Turning from the rationale for *Graham* to its scope, we find more problems that a federal foreign commerce power could solve (or dissolve). The Supreme Court has allowed exemptions from *Graham* scrutiny for limits on non-citizen police officers,[212] hunting guides,[213]

206. Examining Bd. v. Flores de Otero, 426 U.S. 572, 605 (1976).
207. Nyquist v. Mauclet, 432 U.S. 1, 7–10 (1977).
208. *Id.* at 10.
209. *See* Gibbons v. Ogden, 22 U.S. 1, 220–21 (1824).
210. Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 269 (1977).
211. *Id.* at 271 (summarizing the District Court's finding that "the residency restriction of § 60 [the statute at issue] violated the Equal Protection Clause of the Fourteenth Amendment").
212. *See* Foley v. Connelie, 435 U.S. 291, 295 (1978).
213. *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

school teachers,[214] and probation officers,[215] but not non-citizen lawyers,[216] engineers,[217] notaries,[218] or students receiving financial aid.[219] The line of cases allowing imposition on non-citizens' occupational rights began long before the 1970s: states were allowed to limit non-citizens' fishing rights[220] and participation in public works,[221] but not their running pool halls,[222] laundering,[223] working with too great a concentration of other non-citizens,[224] pawnbrokering,[225] Chinese-language bookkeeping,[226] or working in a hospital,[227] and the Court reversed course on fishing as well.[228] States or other lower courts had allowed limits on non-citizens working as lawyers,[229] selling liquor,[230] peddling,[231] piloting,[232] participating in public works,[233] fishing,[234] hunting,[235] auctioneering,[236] bus driving,[237] running billiard halls,[238] trash

214. *See* Ambach v. Norwick, 441 U.S. 68, 75 (1979).

215. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982).

216. *See In re* Griffiths, 413 U.S. 717, 721 (1973).

217. *See* Examining Bd. v. Flores de Otero, 426 U.S. 572, 603 (1976).

218. *See* Bernal v. Fainter, 467 U.S. 216, 226 (1984).

219. *See* Toll v. Moreno, 458 U.S. 1, 17 (1982); Nyquist v. Mauclet, 432 U.S. 1, 12 (1977).

220. *See* McCready v. Virginia, 94 U.S. 391, 397 (1877); Patsone v. Pennsylvania, 232 U.S. 138, 145–46 (1914).

221. *See* Heim v. McCall, 239 U.S. 175, 193–94 (1915).

222. *See* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1927).

223. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

224. *See* Truax v. Raich, 239 U.S. 33, 42–43 (1915).

225. *See* Asakura v. Seattle, 265 U.S. 332, 343 (1924).

226. *See* Yu Cong Eng v. Trinidad, 271 U.S. 500, 527–28 (1926).

227. *See* Jordan v. Tashiro, 278 U.S. 123, 129–30 (1928).

228. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421 (1948); Douglas v. Seacoast Prod., 431 U.S. 265, 286 (1977).

229. *See Ex parte* Thompson, 10 N.C. (3 Hawks) 355, 363–64 (1824); *In re* O'Neill, 90 N.Y. 584, 587 (1882); *In re* Chang, 24 P. 156, 165 (Cal. 1890); *In re* Admission to Bar, 84 N.W. 611, 612 (Neb. 1900); *In re* Yamashita, 70 P. 482, 483 (Wash. 1902); State v. Rosborough, 94 So. 858, 858 (La. 1922).

230. *See* Hoy's License, 3 Montg. Co. 188 (Pa. 1887); Tragesser v. Gray, 20 A. 905, 908 (Md. 1890); DeGrazier v. Stephens, 105 S.W. 992, 994 (Tex. 1907); *In re* Trimble's License, 41 Pa. Super. 370, 382 (1909); Bloomfield v. State, 99 N.E. 309, 312 (Ohio 1912).

231. *See* Commonwealth v. Hana, 81 N.E. 149, 151–52 (Mass. 1907).

232. *See* State v. Ames, 92 P. 137, 138–39 (Wash. 1907).

233. *See* People v. IM Ludington Sons, 131 N.Y.S. 550, 560 (1911); Lee v. City of Lynn, 111 N.E. 700, 701–02 (Mass. 1916); Rok v. Legg, 27 F.Supp. 243, 246–47 (S.D. Cal. 1939).

234. *See* State v. Kofines, 80 A. 432, 444 (R.I. 1911).

235. *See* Bondi v. McKay, 89 A. 228, 231 (Vt. 1913).

236. *See* Wright v. May, 149 N.W. 9, 9–10 (Minn. 1914).

237. *See* Morin v. Nunan, 103 A. 378, 379 (N.J. 1918); Gizzarelli v. Presbrey, 117 A. 359, 360 (R.I. 1922).

238. *See* State ex rel Balli v. Carrel, 124 N.E. 129, 130 (Ohio 1919); *see* Anton v. Van Winkle, 297 F. 340, 342 (D. Or. 1924).

collecting,[239] selling soft drinks,[240] or selling insurance,[241] while other lower courts struck down limits on non-citizens in public works,[242] working for a corporation,[243] fishing,[244] laundering,[245] working outside a particular geographic area,[246] working without paying a special tax,[247] peddling,[248] working without inoculation,[249] barbering,[250] street paving,[251] running hotels and restaurants,[252] newsdealing,[253] fishmongering,[254] selling soft drinks,[255] running a seaside sanitarium,[256] working in a hospital,[257] running a lodging house,[258] working without a heightened showing of residence,[259] selling low-alcohol beer,[260] union organizing,[261] veterinary work,[262] and pharmacy work.[263]

It would, of course, be difficult to reconcile any significant fraction of these holdings, let alone their reasoning. A closer look at two of the cases, however, gives the flavor of the sort of approach that would result if the Fourteenth Amendment were removed from these cases in favor of the foreign commerce power. A 1915 case by then-Judge Cardozo (affirmed by the U.S. Supreme Court later that year in a companion case

239. *See* Cornelius v. Seattle, 213 P. 17, 21–22 (Wash. 1923).

240. *See* Miller v. Niagara Falls, 202 N.Y.S. 549, 550–51 (1924).

241. *See* Bobe v. Lloyds, 10 F.2d 730, 734 (2d Cir. 1926).

242. *See* Baker v. Portland, 2 F. Cas. 472, 474–75 (C.C.D. Or. 1879); People v. Warren, 34 N.Y.S. 942, 945 (1895); Glover v. People, 66 N.E. 820, 822 (Ill. 1903); Chicago v. Hulbert, 68 N.E. 786, 793 (Ill. 1903); City St. Improvement Co. v. Kroh, 110 P. 933, 942 (Cal. 1910); Purday & Fitzpatrick v. State, 456 P.2d 645, 658 (Cal. 1969).

243. *See In re* Tiburcio Parrott, 1 F. 481, 520 (C.C.D. Cal. 1880).

244. *See In re* Ah Chong, 2 F. 733, 739 (C.C.D. Cal. 1880).

245. *See In re* Tie Loy (The Stockton Laundry Case), 26 F. 611, 615–16 (C.C.D. Cal. 1886); *In re* Yot Sang, 75 F 983, 985 (D. Mont. 1896).

246. *See In re* Lee Sing, 43 F. 359, 360 (C.C.D. Cal. 1890).

247. *See* Fraser v. McConway & Torley Co., 82 F. 257 (C.C.D. Pa. 1897); Ade v. Cnty. Comm'rs, 7 Pa. D. 199 (1898).

248. *See* State v. Montgomery, 47 A. 165 (Me. 1900).

249. *See* Wong Wai v. Williamson, 103 F. 1 (C.C.D. Cal. 1900); Jew Ho v. Williamson, 103 F. 10 (C.C.D. Cal. 1900).

250. *See* Templar v. Mich. State Bd. of Exam'rs of Barbers, 90 N.W. 1058 (Mich. 1902).

251. *See* Ex Parte Case, 116 P. 1037 (Idaho 1911).

252. *See* Borden v. Brockton, 94 N.E. 558 (Mass. 1911).

253. *See* State v. Sinchuk, 115 A. 33 (Conn. 1921).

254. *See* Poon v. Miller, 234 S.W. 573 (Tex. App. 1921).

255. *See* George v. Portland, 235 P. 681 (Ore. 1925).

256. *See* State v. Tagami, 234 P. 102 (Cal. 1925).

257. *See* Tashiro v. Jordan, 256 P. 545 (Cal. 1927).

258. *See* Carvallo v. Cooper, 239 N.Y.S. 436 (App. Div. 1930).

259. *See* Arrowsmith v. Voorhies, 55 F.2d 310 (E.D. Mich. 1931).

260. *See* Kalra v. Minnesota, 580 F. Supp. 971 (D. Minn. 1983).

261. *See* Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987).

262. *See* Kirk v. New York Dep't of Educ., 562 F. Supp. 2d 405 (W.D.N.Y. 2008).

263. *See* Adusumelli v. Steiner, 740 F. Supp. 2d 582 (S.D.N.Y. 2010); Dandamundi v. Tisch, 686 F.3d 66 (2d Cir. 2012).

to *Truax*[264]) explained that citizens are the beneficiaries of the state, and as such, state governments are perfectly entitled to limit their resources to them. Cardozo's style deserves a few extended quotations:

> The people, viewed as an organized unit, constitute the state. The members of the state are its citizens. Those who are not citizens, are not members of the state. Society thus organized, is conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state. It is the people, *i.e.*, the members of the state, who are contracting or expending their own moneys through agencies of their own creation. Certain limitations on the powers of those agencies result from the nature of the trust. Since government, in expending public moneys, is expending the moneys of its citizens, it may not by arbitrary discriminations having no relation to the public welfare, foster the employment of one class of its citizens and discourage the employment of others. It is not fettered, of course, by any rule of absolute equality; the public welfare may at times be bound up with the welfare of a class; but public welfare, in a large sense, must, none the less, be the end in view. Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest, and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.[265]

Cardozo went on,

> The statute has been frankly defended at our bar as a legitimate preference of citizens, not to promote the efficiency of the work, but to promote the welfare of the men preferred; and from that aspect, it will be frankest and safest for us to view it. To concede that such a preference was intended, is not to condemn the statute as invalid. The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made

264. *See* Crane v. New York, 239 U.S. 195 (1915).
265. People v. Crane, 108 N.E. 427, 429 (N.Y. 1915) (citations omitted).

> dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.[266]

Among citizens, though, things are different:

> In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state. We do not hold that it may discriminate among its citizens on the ground of faith or color.[267]

Cardozo's explanation of the state's ability to prefer its beneficiaries to outsiders fits hand-in-glove with the fiduciary explanation of antidiscrimination law defended by Gary Lawson and his co-authors.[268] Citizens are the Constitution's beneficiaries. Others may obtain its benefits, but they lie outside the equal-citizenship rule of the most robust aspects of antidiscrimination law.

Historically, one important state-law argument in favor of non-citizens' rights is likewise put in terms of the interests of U.S. citizens, who are generally better off when non-citizens may sell their labor freely because consumers can get more services at a lower price. While competitors are unhappy with lower prices, society avoids a deadweight loss.[269] Here is the 1824 argument along that line in *Ex parte Thompson*,

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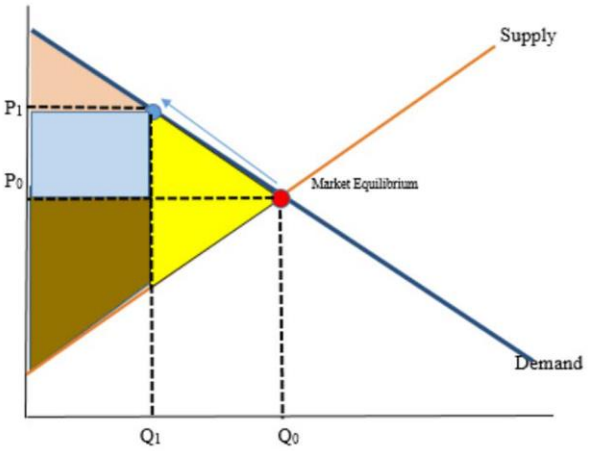
266. *Id.* at 430.

267. *Id.* at 431 (citation omitted).

268. *See supra* note 26.

269. The yellow triangle in the familiar deadweight-loss diagram represents the societal loss from lower-quantity output, while the light-blue rectangle represents the transfer of utility from consumers to sellers from higher prices if supply is restricted (assuming, of course, that the supply/cost curve is free of externalities that might cause the U.S. to *want* lower output):



for instance, in favor of allowing non-citizens to work as lawyers (a losing argument in the case, as it happened):

> It is against the policy of the state to exclude foreigners from our bar. The laws of the United States and of this state, receive foreigners with hospitality: we require no oath of allegiance until the alien demands political rights. Divines, physicians, merchants, artisans, are all permitted to bring hither their science, their talents, skill and capital, and apply them in the generous contest for wealth and distinction, and each contributes his share to the revenue and to the power of the state. There is no policy excluding lawyers. He and his clients are exposed to the inconvenience which may result from a war with his native country; but this must be provided for by him, or submitted to; it is an extreme case, and should not, therefore, exclude aliens from license.[270]

If it were sufficiently clear that there is no externality that can justify output restrictions, this sort of argument could be used as the basis of an equal-citizenship argument in favor of non-citizens' rights. Restricting non-citizens' commercial rights might be seen as improper favoritism for sellers over consumers, i.e., an improper preference for citizens who want to stifle non-citizens' competition over citizens who want cheaper goods and services. Even without such clarity in the policy stakes, this is the sort of economic argument about the value of foreign commerce that Congress has the power to accept on behalf of the entire country. Just as we can best reconcile non-citizens' equal right to contract with their lack of land-ownership rights by ascribing doctrine to congressional discretion rather than constitutional principle, we can do the same with respect to citizen preferences in largesse described and defended by Cardozo. Benefits for non-citizens are granted by states, as supervised by Congress, as a matter of discretionary hospitality and Americans' pursuit of mutual commercial advantage. Those benefits therefore need not be perfectly consistent. Congress could, of course, be more explicit about exactly what sorts of occupational restrictions by states are permitted; the 1870 right to make contracts is very general, as is the 1986 prohibition on private alienage employment discrimination. But Congress has never retreated from its general position in favor of higher output and lower prices that immigrant labor and commerce make possible. Those allowed in the country are also allowed to work, hostility by states or employers notwithstanding.

270. *Ex parte* Thompson 10 N.C. (3 Hawks) 355, 357 (1824).

F. A Better Basis for Mathews *and Possibly* Mancari

Finally, if the citizenship-classification branch of antidiscrimination law is something imposed by Congress on states as a matter of its discretionary foreign commerce power, then it does not apply to Congress itself. Accordingly, even in a world in which *Bolling v. Sharpe*[271] and *Adarand v. Peña*[272] can be justified as the application of fiduciary principles of evenhandedness to the federal Constitution,[273] we can defend the federal exemption for alienage classifications in *Mathews v. Diaz*.[274] The constitutional beneficiaries to whom federal officers owe their trust are citizens.[275] As a matter of sound economic thinking, freedom for citizens and subjects of other nations will generally promote American well-being. But as with the wisdom of other forms of protectionism, this judgment is for Congress to make.

The Court's approval of tribal classifications in *Morton v. Mancari*[276]—seeing them as political classifications rather than racial—can be improved with reasoning along the same lines, though with some complications. Native American tribal nations, like their foreign counterparts lying outside American territorial pretensions, were outsiders to the process that produced the Constitution. As with the foreign commerce power, the tribal commerce power was written in the hope of ultimately fostering mutually advantageous trade. But the Constitution vested power in the hands of those charged with promoting U.S. citizens' side of the ledger. On the other hand, evenhanded promotion of all citizens' interests would also not preclude sometimes giving special opportunities to non-citizens, unavailable to citizens, to foster a more general harmony with native tribes. Equal citizenship precludes special privileges for similarly situated citizens, but not always for non-citizens with special burdens and responsibilities and a different relationship to the American project.

A *Mathews v. Diaz*-style exemption from antidiscrimination law for federal tribal policies, however, runs into the problem of tribal citizenship, which Congress imposed in 1924.[277] Individual Native

271. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954).

272. *See generally* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

273. *See supra* note 26.

274. *See generally* Mathews v. Diaz, 426 U.S. 67 (1976).

275. *Cf. supra* notes 145–46 and accompanying text (Otis's defense of Alien Act).

276. *See generally* Morton v. Mancari, 417 U.S. 535 (1974). Morton was a frequent litigant—the Secretary of the Interior—so the case is abbreviated *Mancari*.

277. *See* Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) ("[A]ll non-citizen Indians born within the territorial limits of the United States . . . are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.").

Americans have long been able to become citizens by marriage or other means. The Brothertown and Stockbridge tribes were assimilated to citizenship—and the privileges and immunities of citizenship—in 1839[278] and 1843.[279] If citizenship is the marker of those subject to antidiscrimination requirements, then special privileges for such Native Americans after their naturalization would seem to run afoul of the requirement stated by Chief Justice Marshall in *Osborn v. Bank of the United States*:

> A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.[280]

While Congress in 1924 explicitly reserved natives' tribal property,[281] it is not entirely clear that this reservation is consistent with *Osborn*'s denial that Congress may create multiple tracks of citizenship. The Court has since repeated the same idea: "[c]itizenship obtained through naturalization is not a second-class citizenship."[282] This Article does not, however, further probe the extent of the naturalization power. Prior to 1924, *Mancari* would have been on very firm footing.

VII. CONCLUSION

The tribal-members interpretation of the tribal commerce power, as explained by the Supreme Court in 1866, is the only interpretation that can fit both its text and context. A diversity-of-citizenship interpretation

278. *See* Act of Mar. 3, 1839, ch. 83, 5 Stat. 349, 351 (Brothertown tribe naturalized and entitled to "all the rights, privileges, and immunities of [citizens of the United States]").

279. *See* Act of Mar. 3, 1843, ch. 101, 5 Stat. 645, 647 (same treatment of Stockbridge tribe).

280. Osborn v. Bank of the U.S., 22 U.S. 738, 827–28 (1824).

281. See *supra* note 277 ("*Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.").

282. Knauer v. United States, 328 U.S. 654, 658 (1946).

of the foreign commerce power was adopted by the Federal Farmer, Elbridge Gerry, Thomas Jefferson, Edmund Randolph, and Alexander Hamilton, and fits how international law treats commerce between nations. Adopting these two views would make better sense of federal immigration power, the Tenth Amendment, ICWA, the 1870 expansion of the 1866 Civil Rights Act, and several aspects of antidiscrimination law.