Artl.S8.C18.8.5 Immigration Jurisprudence (1837–1889)

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

While there was little federal immigration regulation before 1875, the Supreme Court initially recognized state immigration powers before building tepidly to the conclusion that the Foreign Commerce Clause of Article I bestowed exclusive authority to regulate immigration on Congress. In the 1837 case *Mayor, Aldermen & Commonalty of City of New York v. Miln*, the Court upheld a New York statute requiring masters of vessels arriving from foreign or out-of-state ports to provide passenger manifests.[1] The Court reasoned that power over alien entry fell within the states' general police powers.[2] The opinion did not express a view as to whether the Federal Government also had power to exclude aliens.[3]

The 1849 *Passenger Cases*, however, chipped away at the state power recognized in *Miln* when the Court voted 5-4 to strike down as unconstitutional New York and Massachusetts statutes that imposed head taxes on foreign passengers arriving by sea.[4] The *Passenger Cases* did not produce a majority opinion.[5] The five Justices in the

majority, each writing separately, agreed that the state head tax statutes encroached impermissibly on federal policy to encourage immigration. But the Justices did not agree as to the source of the federal immigration power—the separate opinions pointed variously to the Commerce, Taxation, and Naturalization powers, the Importation and Migration Clause, and inherent principles of sovereignty—or about whether that power was exclusive.[6]

Finally, in the 1875 case *Henderson v. New York*, the Court overcame these earlier disagreements and embraced unanimously the Foreign Commerce Clause as the source of an exclusive federal immigration power.[7] "[T]he transportation of passengers from European ports to those of the United States," the Court reasoned, "has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders."[8] Accordingly, "[a] law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone [a] vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations."[9] *Henderson* and its companion case *Chy Lung v. Freeman* struck down New York, Louisiana, and California statutes that required vessel masters to post bond for some foreign passengers.[10]

Thereafter, the Court reaffirmed the principle that the Foreign Commerce Clause gives Congress, not the states, power to regulate immigration in the 1883 case of *New York v. Compagnie Generale Transatlantique*.[11] There, the Court struck down a New York statute

that imposed taxes on ship owners for the inspection of foreign passengers.[12] And in the 1884 *Head Money Cases*,[13] the Court upheld a federal statute that did much the same thing as the state statute invalidated in *Transatlantique*.[14] The *Transatlantique* and the *Head Money Cases* appeared to cement the Supreme Court's commerce-based immigration doctrine, but five years after the *Head Money Cases* the Court would alter course and hold in the *Chinese Exclusion Case* that the power was based instead on inherent principles of sovereignty.[15]

Footnotes

1. ^ 36 U.S. (11 Pet.) 102 (1837).
2. ^ *Id.* at 161 ("On the same principle by which a state may prevent the introduction of infected persons or goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers who will add to the burdens of taxation, or convicts who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease. The whole subject is necessarily connected with the internal police of a state.").
3. ^ *Id.*
4. ^ Smith v. Turner, 48 U.S. (7 How.) 283, 283 (1849).
5. ^ *Id.*
6. ^ *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 103–04 (2002).
7. ^ 92 U.S. 259, 270 (1875); *see generally* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 Ind. L.J. 653, 671 (2018).
8. ^ *Henderson*, 92 U.S. at 270.

9. ^ *Id.* at 271.
10. ^ *Id.*; Chy Lung v. Freeman, 92 U.S. 275, 276 (1875) (describing the statutes at issue in the two cases as follows: “[t]he statute of California, unlike those of New York and Louisiana, does not require a bond for all passengers landing from a foreign country, but only for classes of passengers specifically described, among which are ‘lewd and debauched women’”).
11. ^ 107 U.S. 59 (1883).
12. ^ *Id.* at 60 (“[S]uch a tax as this is a regulation of commerce with foreign nations, confided by the constitution to the exclusive control of congress.”).
13. ^ 112 U.S. 580 (1884).
14. ^ *Id.* at 596 (“We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for congress to impose this contribution on the ship-owner engaged in that business.”).
15. ^ *See* Ping v. United States, 130 U.S. 581, 589, 609 (1889).