Police Power: Antebellum Antecedents in the Modern Immigration Conflict

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B.A. Global Liberal Studies, 2024 | New York University, New York
https://doi.org/10.33682/t0cd-6eu9

Abstract

This article examines the modern U.S. immigration conflict through the lens of nineteenth-century state-level immigration policy to show how Texas Governor Greg Abbott is reviving Antebellum concepts of state sovereignty to upend federal supremacy on immigration. Incorporating historical texts, case law, and newspaper articles, this article argues that Texas's new policies are a legal revival of police power—the ability to regulate the internal affairs of a state for the sake of general welfare—as it existed in the nineteenth century, when immigration could be legislated at the state level. With his busing program, increased criminalization, and citing an invasion, Governor Abbott is attempting to expand state police power to include immigration once again, just as it did in the Antebellum era. While the constitutionality of Texas S.B. 4—the bill which Texas's power expansion depends on—has yet to be ruled on at the time of writing this article, its passing would represent a complete overturning of the state-federal balance, in place since the end of the Civil War, when it comes to immigration.

Key Words

Immigration; Police Power; Federalism; Greg Abbott; U.S. Constitution; Sanctuary Cities; *New York v. Miln*; *Gibbons v. Ogden*; *Elkison v. Delies Seline*

Introduction

"Every state is a border state . . . It's ruining our communities, and it's taken a toll on our families. And it's time that something was done about this."[1]
Brian Kemp, Governor of Georgia

This is what just one of thirteen Republican governor speakers had to say at the Eagle Pass border rally held by Texas Governor Gregg Abbott in February 2024. Abbott has become somewhat of a leading voice for Republicans on the topic of immigration since the establishment of his "Operation Lone Star" in 2021, formed primarily to counteract locally any reversal of Trump-era immigration policies by the Biden administration. Since then, Abbott has stayed in the headlines with his infamous busing of thousands of migrants across the country to Democrat-led cities. He declared that "Texas communities . . . should not have to shoulder the unprecedented surge of illegal immigration caused by President Biden's reckless open border policies."[2] Since then, Texas has bused over 40,000 immigrants across the country and asserted a more powerful role over immigration policies.

In February 2024, Abbott held his rally in Quemado, Texas, right along the border, to make clear Texas's stance against the federal government. This gathering was a rallying call for Abbott as his border policies have continued to come in conflict with the federal government. Twenty-five other Republican governors have since declared their support. What is the source of this conflict, and why is this standoff building up to be something historic for our nation? Governor Abbott's crackdown on migrants in the context of what he considers to be "Biden's border crisis" gives a clear display of conflict of authority when it comes to immigration regulation. Disagreements between states and the federal government are certainly nothing new and are a key aspect of

[1] Rachel Monroe, "Greg Abbott's Anti-Migrant Standoff at The Border," *The New Yorker*, February 28, 2024.
[2] Office of the Texas Governor, *Governor Abbott Deploys More Buses to Border amid Migrant Surge*, September 22, 2023, https://gov.texas.gov/news/post/governor-abbott-deploys-more-buses-to-border-amid-migrant-surge.

American Federalism, but immigration has long been considered strictly under federal jurisdiction, since the end of the Civil War to be more exact. Furthermore, Abbott has now justified his new policies by invoking the U.S. Constitution, which states that no state "shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."[3] In Abbot's eyes, the overwhelming arrival of migrants at the southern border represents an invasion of unseen proportions, and Texas is within its rights to defend itself militarily. However, by citing the Constitution in this way, Abbott is attempting to infringe on federal supremacy and to broaden the powers granted to the states.

This justification comes alongside legislation in Texas, Senate Bill 4, which criminalizes all entries, including refugees, into the state outside of legal pathways.[4] The constitutionality of this law remains undecided—The Supreme Court seemingly sided with Texas on March 19, 2024 when it allowed the application of the law, pending the appellate court's own ruling (the court stopped short of deciding the bill's constitutionality). This was quickly reversed not even twelve hours later when the appellate court ruled the injunction will remain pending hearings on the bill's constitutionality. It would seem that even the country's own courts cannot agree on whether Texas's actions are unconstitutional, despite the fact that they so blatantly step on the federal government's immigration supremacy. This rally in Eagle Pass is a symbol for the South—a sign that Abbott is not alone in his contentions. Clearly, partisan interests are playing a strong role as other Republican states have already signaled their stance behind Abbott and are crafting laws that mirror Texas's new criminalization bill. What we are seeing is a revival of specific arguments against federal supremacy that have been virtually absent since the end of the Civil War. And as a result, in the vein of the historic overturning of *Roe v. Wade* in 2021, there is an ongoing bout of judicial whiplash between the Supreme Court, District Courts, and the Federal Appeals Court

[3] US Constitution, art. 2, sec. 3, cl 10.
[4] Texas S.B. 4, 88th leg., 4th sess., (2023). This bill was passed in the Texas legislature in December 2023, but current blocks by upper courts have kept the bill unenforceable.

around whether Texas's new legislation is constitutional.

At the founding of the Thirteen Original States, and prevalently during the Antebellum era, states were in control of immigration. This was not in the same way that the federal government has explicit power over admission and removal today, but simply that this federal precedent did not yet exist. Hence, at the state level, local governments implemented policies that restricted arrivals based on several factors: economic status, race, and even disease. These policies were possible under a particular notion of state police power. In *The Problem of Immigration in a Slaveholding Republic* Kevin Kenny explains this concept: "Under the Constitution, each state reserved substantial powers over their internal affairs, which they deployed to control public health, safety, and welfare and to promote what they saw as a well-regulated society based on the common good."[5] Under such broad definitions (and without federal regulation forbidding otherwise) states were able to determine who entered into their territories, tax them, and expel them. These policies, reserved as state power under the Tenth Amendment, are what are referred to here as police power.[6] Until the Civil War there was no federal supremacy on immigration, so state police power allowed for restrictions on migration that certainly would not be legal at the state level today. As will become clear, policies enacted and justified under a state's police power often came into conflict with federal power, as they were pure expressions of state sovereignty in an era when authority over commerce and the slave trade was a question of paramount importance. This tension between state police power and federal supremacy was eventually reconciled at the end of the Civil War with the explicit establishment of federal immigration policy.

In the modern immigration conflict, Abbott and his Republican supporters are reviving the exact arguments for state supremacy that were commonplace during the Antebellum era. With his

[5] Kevin Kenny, *The Problem of Immigration in a Slaveholding Republic: Policing Mobility in the Nineteenth-Century United States* (Oxford: Oxford University Press, 2023), 47.
[6] In this article, police power does not refer to the presence or power to create an internal police force, although such power does fall under the umbrella of police powers reserved to the states under the Tenth Amendment.

new policies criminalizing border crossings, the creation of a border force, makeshift walls along the border, busing migrants across the country, and citing an invasion, Governor Abbott is attempting to broaden his state's sovereignty to reach the nineteenth-century conception of police power, where regulation of migrants[7] at the state level is fair game as long as it is based on subjective factors like the moral health and general welfare of society. It is becoming more and more clear that this case of immigration conflict is about much more than a surge of migrants at the border—it is a historic battle over the very nature and form of American Federalism. And as Georgia Governor Brian Kemp's words made clear, states all across the South are behind him.

Nineteenth-Century Police Power as State Sovereignty

"The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on [commerce] to a considerable extent."[8]
Chief Justice John Marshall, 1824

The nineteenth century was host to several state-level policies on migration that were justified under the concept of police power, but it was deeper constitutional questions that let these policies stand. The Commerce Clause, found in Article 1 of the U.S. Constitution, gives Congress the power to "regulate commerce with foreign nations, among states, and with the Indian tribes."[9] One can imagine how, at the time of the Constitution's drafting, this clause was a huge source of contention for the Original Thirteen States, which feared centralized authority over anything else. Regardless, the Constitution was ratified in 1788 with the clause intact, and the federal government received explicit power over commerce. After this moment, the biggest question around the Commerce Clause was whether or not it granted power over immigration, or, in other words, whether immigration fell *under* commerce. As Kenny makes clear, due to the then thriving Atlantic

[7] Abbott's new policies are aimed at irregular immigration specifically, including asylum seekers, but not migrants already residing in the country legally.
[8] Gibbons v. Ogden, 22 U.S. 1 (1824).
[9] US Constitution, art. 1, sec. 8, cl. 3.

Slave Trade (and Southern states' deep reliance on it), the federal government avoided making any explicit decision on this immigration question until after the Civil War, when the status of enslaved people was no longer on the table.[10] And so, due to the controversy around slavery and the Commerce Clause, for much of the first century of the United States the question of authority over immigration went largely unanswered.

An optimistic myth constantly circulated about the United States holds that, prior to the Civil War, the borders were "open for all" and the country welcomed arrivals of all backgrounds. Even beyond the obvious reason of slavery, this claim is untrue. While there was no explicit federal power, jurisprudence existed at the state level which clearly indicated regulation over movement of people. Gerald Neuman explores this era of U.S. history in depth in "The Lost Century of Immigration Law" where he divides Antebellum immigration policies into 5 major categories: crime, poverty and disability, disease, race and slavery, and ideological restriction. Each of these policy areas was rooted in arguments around police power and state sovereignty, and several resulted in direct conflict with the federal government.[11]

There is a certain irony to American police power, the idea of enacting rules for the sake of general welfare, being modeled after European patriarchy. The basic idea was that just as men, as heads of households, had power to keep their household in check, so did monarchs have power over their kingdoms. The power to rule and order within the borders of an individual state and "its indefinability derives from the father's virtually unlimited discretion not merely to discipline, but to do what was required for the welfare of the household."[12] American police power was essentially rooted in the idea of the singular sovereignty of the monarch—a tenet contradictory to America's founding ideals. This concept of police power, seemingly so opposite from the idea of self-

[10] Kevin Kenny, "The Antislavery Origins of US Immigration Policy," *The Journal of the Civil War Era* 11, no. 3 (2021): 1.
[11] Gerald L. Neuman, "The Lost Century of American Immigration Law (1776-1875)," *Columbia Law Review* 93, no. 8 (1993): 1833–1901. https://doi.org/10.2307/1123006.
[12] Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government*, (New York: Columbia University Press, 2005) 82.

government, was the basis for antebellum state-level immigration policies.

Police power, at least its original discriminating flavor, was eventually limited by federal policy, specifically with the drafting of the Fourteenth Amendment, which prohibited the states from intruding on federally protected rights. Arguments for police power did not simply end then, as states always justified regulating internal affairs under the powers reserved under the Tenth Amendment. However, prior to the Civil War, police power was the main justification for migrant restriction at the state level.

Poverty and Disability

A large concern in the early United States was perceived laziness, or an inability to be self-supporting at the risk of becoming a burden on the rest of the general public. Local jurisdictions sought to regulate individuals that would become dependent on them through regulations known as poor or poverty laws. State legislation in 1794 Massachusetts, for example, included provisions for the removal of any individual deemed a "public charge" back to that individual's "place of lawful settlement by land or water, to any other state, or to any place beyond sea, where he belongs."[13] This was expanded further in 1837 with legislation requiring ship masters to provide a bond for any passenger presenting risk of "becoming a public charge, including those with mental and physical disabilities."[14] New York passed a similar statute in 1788 that required new arrivals to have proof of legal settlement within 12 months of arrival or else they could be considered a public charge and removed.[15]

Under the justification of pursuing "general welfare" the states sought ways to eliminate and/or regulate those that relied heavily on the municipality for support. For immigrants, this often could lead to deportation or removal out of state or even out of country, but the language of these

[13] Neuman, "The Lost Century," 1849-50.
[14] Neuman, "The Lost Century," 1849-50.
[15] Neuman, "The Lost Century," 1852.

poverty laws allowed even for U.S. citizens to be subject to forced relocation. Regulations specifically targeting arriving ships, referred to as *Passenger Laws*, did not go unchallenged by the federal government. In New York, a statute was passed in 1824 requiring ship captains from both foreign and out-of-state ports to deliver a complete manifest of the passengers aboard, as well as applying bonds on the ships to ensure low income passengers did not become a state burden.[16] This led to the case of *New York v. Miln* where the argument centered around federal supremacy over commerce, with a ship captain objecting to the state-level control of the passenger trade as an infringement on federal commerce. The State argued for its supremacy and justified the laws as measures to ensure the general good and welfare of the state citing its police power. Ultimately, it was decided that the policies regulated police, and not actual commerce between foreign ports, because the passengers were *persons* and not subjects of commerce.[17] In a victory for the State, the Court concluded that New York was especially "exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil."[18] It is clear here how a key distinction on the status of passengers was instrumental in allowing the legislation to stand, relying ultimately on a state's power to defend itself against the burden such passengers might bring.

This exact same logic is being utilized by Texas Governor Greg Abbott in his campaign against immigrants. Abbott justifies his new restrictive policies and increased policing by citing an "invasion" of never-before-seen proportions. By claiming that Texas is enduring a burden, a special burden unshared by state governments in the North, he is using the very same argument New York utilized in *New York v. Miln*, broadening his state's police power to its antebellum form by returning to the "states' rights" argument. A key difference worth noting is that the head

[16] *New York v. Miln*, 36 U.S. 102 (1837).
[17] *New York v. Miln*, 36 U.S. 102 (1837), This decision was made citing *Gibbons v. Ogden.*
[18] *New York v. Miln*, 36 U.S. 102 (1837).

tax at issue in *Miln* was meant to fund poor relief measures to better handle the influx of migrants to the city.[19] That is not to say that New York viewed immigrants more positively than Texas does today—the language of "evil of thousands of foreign emigrants" in 1837 certainly points to a biased preconceived notion of migrant intentions. It is the methods behind each regulation that sets them apart: While New York sought to better manage the influx of migrants, Texas is seeking to eliminate the migrant presence altogether.

Race and Slavery: Ideological Restrictions

Given the source of police power in the Tenth Amendment, where powers are not explicitly stated, states were able to expand what police power actually meant through the stretching of language and cultural standards. Restriction on the basis of health and economic means was stretched to include moral restrictions. "General welfare" could be furthered to include societal standards and expectations. Restrictions based on health contagions were broadened to include "moral" contagions, especially through state policies regulating Black people, both free and enslaved, in the North and South.

Throughout the Antebellum era, the question of authority over immigration was left unanswered because of slavery and the Atlantic Slave Trade. To the extent that slaves were considered a form of commerce, the federal control over commerce raised a huge potential conflict of authority with the Southern slaveholding states. It can already be seen in the previously discussed *New York v, Miln* how the federal government avoided establishing passengers as commerce, but several instances went further to solidify Southern sovereignty. In 1842 the Supreme Court affirmed in *Prigg v. Pennsylvania* that Southern slaveholders had the right to recapture their runaway slaves, and that Congress, therefore the federal government, had

[19] Kate Masur, "State Sovereignty and Migration before Reconstruction," *Journal of the Civil War Era* 9, no. 4 (2019): 595.

"exclusive" jurisdiction to enforce this law.[20] The Court thereby affirmed Southern states' sovereignty and ensured Northern "free" states were not able to protect fugitive slaves. At the same time, it clarified that while states could not violate federal law, neither could they be ordered to enforce that law. While it was a moment of establishing some federal authority, this ruling established a stronger control over the enslaved population by their Southern owners.

Free blacks, especially those coming from abroad, were also subject to restrictions on their mobility. Due to fears that free blacks would lead to a multiracial society or become a "public charge" as described before, several "free" states and territories either banned or restricted their entry.[21] This was the product of several concerns, namely fears of what black migration would do to the racial makeup of the North and of the ideological impact of having visible free Blacks intermixed in the population in the South. These measures were justified under the same police power concept—pursuing the general welfare of society.

The story of race and slavery does not just concern inter-state travel. Through the *Seaman Acts*, Southern states implemented quarantine requirements requiring that Black sailors coming from abroad, or from other states in the United States, remain aboard their vessels or in the local jail for the duration of their stay in the port.[22] These measures, too, were inspired by the fear that having free Blacks visible would inspire revolt in the slave population.

All of the previously discussed police regulations can find their source in the presence of the Atlantic Slave Trade and its repercussions across the country. The Supreme Court clearly avoided classifying passengers as subjects of commerce because doing so would step on state supremacy, which led the court to further defend state supremacy in both *New York v. Miln* and *Prigg v. Pennsylvania*.

Gibbons v. Ogden was one instance where the Supreme Court clarified federal supremacy

[20] Masur, "State Sovereignty," 589.
[21] Neuman, "The Lost Century," 1866.
[22] Neuman, "The Lost Century," 1874.

over commerce while still leaving police power ultimately untouched. The case, which was decided in 1824, saw a conflict between two steamboat operators, one with "exclusive right" to a specific route under New York licensing, and one licensed by the federal government. The New York Court found in favor of Ogden and the supremacy of his New York license, but the Supreme Court decided otherwise. In its decision, the court acknowledged that regulations, like health and poor laws, were justified under police power, so long as they did not regulate or intrude on commerce.[23] While the court did not restrict police power in this case, it set up a framework by which it could. By defining its limits by commerce, expressions of police power had to concede to federal supremacy to a degree. This certainly sparked concerns by slaveholding states as the question of classifying enslaved peoples as "imports" or "persons" was still up in the air.

Elkison v. Deliesseline was a similar case where the court affirmed federal supremacy. Under a South Carolina *Seaman Act*, a black sailor from Britain was detained solely on his identity as a Black man. While Justice William Johnson affirmed that the states were infringing on a federal power, there was an overall lack of enforcement and later Andrew Jackson's secretary of state affirmed that the treaty between the U.S. and Britain should be "abrogated" if they felt state laws violated its terms.[24] Justice Johnson recognized that interference with foreign trade directly stepped on the federal government's supremacy as far as the Commerce Clause was concerned. But actually, there was zero enforcement of his ruling. The executive branch itself contradicted the court through Andrew Jackson (a champion of states' rights). In this instance, the court attempted to limit police power, at least to some degree, but without executive backing they had no power to enforce the ruling. Several years later, U.S. Attorney General John Berrien spoke to the *Elkison* ruling, arguing that policies regulating Black individuals were a "justifiable

[23] Kenny, *The Problem of Immigration*, 54-55.
[24] Neuman, "The Lost Century," 1876.

exercise of the reserved power of the State . . . to regulate its own internal police"[25] even if they infringed on federal policies. Clearly, the arguments of the time regarded federal supremacy as void when concerning matters of internal police—even in the presence of judicial ruling, police power restrictions were able to continue.

The intersection of law and culture can be seen clearly through nineteenth-century legislation, like New York's taxation of migrants. At issue in *New York v. Miln* was a state law requiring bonds on passengers arriving at their ports to fund the state's handling of the migrant influx, particularly to combat migrant poverty. This measure was dependent upon the legal context (New York's police power under the Tenth Amendment) and cultural context (New York's disproportionate burden of migrant influx). The law itself does not make sense without the context of migrant arrival and the supposed "evil" being brought by their presence. This can be seen across nineteenth-century immigration legislation, perhaps most evidently in restrictions of free Black arrivals from abroad due to a deep cultural racism in America, which informed such restrictions in both the North and the South. These cultural factors (ideology, sentiment, and rhetoric) were clearly essential to such legislation, especially considering their basis in "public welfare," a concept that can be twisted to mean practically anything for a given population.

The arguments made by Abbott today are strikingly similar. They depend heavily on, and gain strength from, the cultural context. In its most basic form, this context is the pressure at the Texas border from the record high number of arrivals. But the phrasing used by Abbott and his Republican coalition further shapes the cultural factors and lends meaning to his "invasion" preparations. Like *New York v. Miln*, Abbott's arguments have no ground without this fearful perception of migrants and the idea of a disproportionate burden. The mere use of the word "invasion" in the context of migration at the southern border and the painting of migrants as

[25] Kenny, *The Problem of Immigration,* 57.

criminals and rapists are clearly intended to strike fear in the population and establish a legitimacy for Texas's new restrictive policies. Furthermore, the quote by Brian Kemp at the beginning of this article represents a redrawing of borders and an expansion of the meaning of "border state." By doing so, Southern states are essentially forming a Republican coalition against Democratic governments and declaring that they too will suffer from this "invasion." This is no accident. Expansion of language and cultural standards preceded expansion of the law in the Antebellum era in the same way. Police power (in both eras) thus relies on language and culture, and how they lend understanding and justification to a given legislation.

For the past 150 years the federal government has claimed supremacy over immigration, but before the Civil War that clearly was not the case. While the federal government intervened in certain areas concerning immigration, it ultimately left regulation of mobility up to the states as a reserved police power. By the 1830s, the legal status of passengers became a central question as indentured servitude from Europe was on the decline and other migration was increasing. Paradoxically, proslavery arguments depended on classifying migrants as "persons" rather than "imports" because to consider them under commerce would have led to federal control over slaves and further limit other expressions of police power.[26] In other words, in order for police power to continue being justified legally, it required very specific language and classification of migrants. This critical distinction represents the thin line between state and federal supremacy and makes clear how something as simple as language can be crucial in claiming power.

Police Power in Transition to Federal Supremacy

"It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate states."[27]
Anthony M. Kennedy, Supreme Court Justice

[26] Kenny, *The Problem of Immigration*, 61.
[27] *Arizona v. United States,* 597 US 387 (2012).

Even though immigration was omitted in the Constitution, federal supremacy over immigration actually reaches all the way back to the eighteenth century. Congress passed the first Naturalization Act in 1790, establishing a two-year residency requirement "for aliens who are free white persons of good moral character."[28] The waiting period was changed from two to five years in 1795, and from five to fifteen between 1798 and 1802. United States naturalization policy was comparatively "open" to white Europeans. The first truly national immigration law was passed in 1819—a congressional act that required shipmasters to deliver a complete manifest for all foreign passengers brought aboard the ship.[29] These federal policies, however, enacted alongside state-level police power, only focused on registration.

The controversy around the Commerce Clause to the side, this system was largely harmonious. The federal government set the standard requirements and registration of immigrants while the states restricted immigrants under their police power. Nevertheless, a deeper issue underlies this distinction. Why did the federal government initially care about immigration policy only when it came to citizenship? And why did it eventually curtail state-level police power regulations on immigration?

Immigration policy, whether at the local or the national level, always considers the ethnic and racial makeup of society. Federal supremacy on citizenship and naturalization has been long established, as it is granted explicitly in the Constitution.[30] The concept of state sovereignty was much more important in the earlier years of the nation, and authority over slavery was too big of an issue for Congress to address directly. But the federal government eventually acted when it felt that a core aspect of its supremacy, deciding citizenship, was under threat.

In the nineteenth century, when expanding the country westward to fulfill its "Manifest Destiny" was a key priority of the federal government, citizenship policies were very loose and

[28] Michael LeMay, "An Overview of Immigration to the United States: Founding to 1865," in *Transforming America: Perspectives on U.S. Immigration*, ed. Michael C. LeMay, vol 1. (Praeger, 2012), 2.
[29] LeMay, "An Overview of Immigration," 2.
[30] US Constitution, art. 1, sec. 8. cl. 4.

sweeping. Texas originally came into the picture at this point, when the looming war with Mexico led to its annexation into the Union in 1845. After the war ended in 1848, the Treaty of Guadalupe Hidalgo ceded a sweeping portion of North America to the United States and granted citizenship to all those remaining in the area that desired it.[31] Clearly, growth of the nation was a main priority at the time, and the federal application of citizenship shows that. At the state level, restrictions were ensuring that poor, unhealthy, Black, or otherwise unwanted individuals were not allowed entry. As naturalization requirements specifically required whiteness, these systems functioned together in a way that benefited the ideology of the Founders. This uneasy division of labor between the federal government and the states began to unravel as the controversy over slavery grew more intense. If anything, this is only further exemplified in *Dred Scott v. Stanford* (1857). Leading up to the Civil War, Northern states began implementing methods to protect fugitive slaves from being returned to slavery. By doing so, Northern states were effectively granting citizenship protections to fugitive slaves. But in *Dred Scott*, the Supreme Court ruled that people of African origin and descent, free as well as enslaved, were not considered "citizens'' in the context of the Constitution, adding that no individual state "has the right to grant a foreigner citizenship."[32] This decision was overturned by the Civil War and the passing of the Thirteenth and Fourteenth Amendments. Only with the abolition of slavery did the federal government finally act, and in this context jurisdiction over migration as well as citizenship came under federal control. While slavery was a core reason why this supremacy did not come before the Civil War, citizenship was a key factor why it came when it did. The transition began with the Northern states pressing notions of citizenship, but fear and prejudice towards new groups from abroad and their place in American society also gave rise to federal immigration policy.

As well as defining citizenship by birthright and naturalization, the Fourteenth Amendment established equal protection and due process for all persons within the jurisdiction

[31] LeMay, "An Overview of Immigration," 9-10.
[32] *Dred Scott v. Sandford,* 60 U.S. 393 (1856).

of the United States, including foreigners and those without citizenship, as well as setting forth naturalization for all American born migrants.[33] This amendment was a key instrument in limiting the Antebellum form of police power, as it prevented states from being able to disproportionately apply the regulations discussed above. With the federal government protecting guaranteed rights, the provisions of state poor laws, seaman acts, and even quarantine requirements were slowly but surely articulated into national power after the Fourteenth Amendment. In 1866, the first Civil Rights Act in U.S. history protected the ability of citizens to buy, sell, trade, and ultimately receive equal application of the law.[34] It was ultimately the moment that the Antebellum conception of police power disintegrated.

Return to Form

"I have already declared an invasion under Article I, § 10, clause 3 to invoke Texas's constitutional authority to defend and protect itself. That authority is the supreme law of the land and supersedes any federal statutes to the contrary."[35]
Greg Abbott, Texas Governor

Arguments against police power in the past criticized it the most when it intruded on federal power, as in *Gibbons v. Ogden*, which justified police power as long as it did not infringe on interstate commerce. Since then, immigration has been explicitly reserved to federal authority and jurisdiction. The present Texas law, if interpreted through the *Gibbons* framework, clearly represents an unjustified expansion of police power into the federal domain.

Governor's Abbott's justification of expanding his police power is that the United States, and especially Texas, is playing host to an "invasion" of migrants, and that the state has a right to

[33] US Constitution, amend. 14.
[34] Kenny, *The Problem of Immigration,* 165.
[35] Office of the Texas Governor, *Governor Abbott Issues Statement on Texas's Constitutional Right to Self-Defense*, January 24, 2024, https://gov.texas.gov/news/post/governor-abbott-issues-statement-on-texas-constitutional-right-to-self-defense#:~:text=For%20these%20reasons%2C%20I%20have,federal%20statutes%20to%20the%20contrary.%22.

defend itself when the federal government will not.[36] Abbott's new methods represent more than simply a broadening of language to justify his police power claims. The governor recently passed a new law (S.B. 4) criminalizing all arrivals at the border that occur outside of legal pathways, a policy Abbott himself referred to as "extreme" with the hope that "over 50 percent, maybe 75 percent of people coming over the border illegally will stop entering through the state of Texas."[37] While illegal crossings were already a crime under federal law, enforcement varied and typically gave leeway for asylum seekers. In Abbott's view, the federal government's lack of strict enforcement of this law is exactly why Texas is taking matters into its own hands. But with state officials handling arrivals, asylum seekers will not be processed as they would have under federal agents, and are much more likely to be turned away or criminalized for crossing the border. Also, federal agents typically do not prosecute migrants on their first offense, and generally allow entry for first-time crossers, particularly for vulnerable populations like women and children. With this new law, the first violation would consist of immediate return and the second would be considered a felony crime.[38]

There are two main takeaways from this increased criminalization. On the one hand, it shows the negative impact that expansive state police power can have—under the new law asylum seekers will not be as likely to have their claims approved or even heard, and local jails will certainly become overcrowded if it is applied on a large scale. On the other hand, we see how actual law goes together with language to increase police power. Combining his invasion claims and fear-based rhetoric with actual legislation and militarization, Abbott is able to lend credence to his expansion of power. This law is Abbott's main legal expansion of police power and is

[36] Mike Johnson et al. to United States Congress, "The United States Is Facing a New and Imminent Danger," Scribd, January 17, 2024, 3, https://www.scribd.com/document/701688597/Ex-FBI-officials-letter-to-Congress.
[37] J. David Goodman, "Abbott Signs Law Allowing Texas to Arrest Migrants, Setting Up Federal Showdown," *New York Times*, December 18, 2023.
[38] Goodman, "Abbott Signs Law."

essentially the core of the conflict with the federal government. It is blatant proof that Abbott is seeking to return to the nineteenth-century form of police power, where states *were* allowed to legislate on the arrival and expulsion of non-citizens.

In addition, Abbott's busing program has historic roots in the poverty laws. These policies were meant to reposition the burden that poor people placed on a given municipality back to their region of origin. The busing program is similar in that it is this supposed compromise between "open-border" policy and increased migrant fluxes, but rather than deporting them back to their homeland, they are sent to places where migrants are seen as "accepted" (i.e. Sanctuary Cities). Deportation of those likely to be deemed a "public charge" was a clearly justified form of police power in the nineteenth century, even if that meant removal to another state similarly to Abbott's busing program.

It is important to note that disagreement with federal immigration policy (and lack of cooperation) is not a one-sided story. Abbott seeks to move migrants to Sanctuary Cities because of their lax policies and sentiments against federal deportation. Sanctuary Cities are an interesting case when it comes to the question of immigration authority. These municipalities are generally defined as actively limiting cooperation with federal officials concerning immigration. This can take several forms and typically does not prevent federal officials from performing their duties. Sanctuary Cities may seem, on brief inspection, to be a rejection of federal supremacy similar to that of Texas, but they actually operate in compliance with federal law. The American Immigration Council has made this clear in their fact sheet on Sanctuary Cities, which gives insight into their legality. The main debate here sources from federal statute 8 U.S.C. § 1373, which provides that state and local governments cannot enact legislation that limits sharing of "information regarding immigration or citizenship status" with the Department of Homeland

Security.[39] Under this statute, several Sanctuary Cities were sued in 2017 and 2018 for noncompliance, but the cities countersued and it was found that the federal government cannot enforce local compliance with immigrant detainers.[40]

Furthermore, forcing states to enforce immigration would go directly contrary to the Tenth Amendment, which leaves certain internal issues to the states and prevents the federal government from demanding states to address specific problems.[41] In many ways, measures that assist and integrate migrants can be seen as an aspect of police power that remains intact, leaving internal problems to the state itself, and is justified by the fact that immigration admission and deportation has been established as solely federal territory, not something municipalities must enforce. While the federal government has complete authority over migration, they have limited say on how those migrants are handled once they enter the country. That jurisdiction lies with state and local governments. It is here that we can differentiate Sanctuary Cities from Texas. Sanctuary policies function legally under the logic that the federal government set forth when it established supremacy; Texas's policies, on the other hand, function to take that supremacy away, out of federal hands and into state hands.

Within this Sanctuary City debate it becomes clear how police power can function differently today than in the nineteenth century. Under the Tenth Amendment, states are able to implement policies for the sake of the general welfare of their population. In the case of Sanctuary Cities, migrants are seen as a part of that general welfare, and so policies are put in place to combat factors that would otherwise lead to their detainment or unethical deportation. Given that, under the Tenth Amendment, the federal government cannot force the implementation of federal regulatory programs, Sanctuary Cities are valid expressions of state police power. They would not,

[39] Communication between government agencies and the Immigration and Naturalization Service, US Code 8 (2011), § 1373.
[40] "Sanctuary Policies: An Overview," American Immigration Council, October 21, 2020, https://www.americanimmigrationcouncil.org/research/sanctuary-policies-overview.
[41] "Sanctuary Policies," American Immigration Council.

however, be able to implement anything that conflicts directly with that regulatory program (for example, preventing deportation of those with violent convictions).[42] In the nineteenth century, with federal supremacy over immigration absent, they certainly could, like in the *Elkison* case, where restrictions on black passengers from abroad directly conflicted with the United States treaty with Britain and yet went unchecked.[43] The latter is the form that Abbott strives to revive.

Judicial Whiplash

"Texas passed a law that directly regulates the entry and removal of noncitizens and explicitly instructs its state courts to disregard any ongoing federal immigration proceedings. That law upends the federal state balance of power that has existed for over a century, in which the National Government has had exclusive authority over entry and removal of noncitizens."[44]
Sonia Sotomayor, Supreme Court Justice

As this immigration conflict has intensified and Texas made more power grabs, it is no surprise that eventually the Supreme Court would have a role to play. President Trump's idea of building a wall along the southern border heightened the tensions. With the conflict at the border increasing, Texas has used whatever resources it has to install the wall. The first instance in this conflict to go to the Supreme Court concerned these makeshift walls, built mostly from scrap, shipping containers, and barbed wire. The issue here is that these informal barriers,

Figure 1. Shipping container border wall installed by the Texas Lone Star Border Force, Captured by Chris Stokes for the Texas Tribune.[45]

[42] "Sanctuary Policies," American Immigration Council.
[43] Neuman, "The Lost Century," 1876; Kenny, *The Problem of Immigration*, 57, 77.
[44] *United States v. Texas, et al*., 601 US (March 19, 2024).
[45] Uriel Garcia, "Texas Uses Shipping Containers to Create 'Steel Wall' next to International Bridge at Eagle Pass," *Texas Tribune*, November 18, 2021.

installed by state officials, are impeding federal agents' access to the border. A court of appeals originally ruled that the agentscould not remove the wire, but the Supreme Court overturned this—not prohibiting the installation of barbed wire by the state, but allowing federal border agents to remove it where necessary.[46] This ruling still left the main question unclear: Are Texas's actions constitutional? While the justices seemingly ruled in favor of the Biden administration in this 5-4 decision, the Court avoided the bigger question at hand for the time being, until it came up again in *United States v. Texas* (2024), when the Texas law, S.B. 4, was put to question.

United States v. Texas (2024), which criminalizes all illegal entries into the state, was stopped by the Fifth Circuit Court, which temporarily placed a stay on the bill but never made an official ruling. Essentially, the court set the case aside for further review. But in an emergency application to the Supreme Court, the United States motioned for an application to vacate the stay of the policy, seeking an official ruling to stop the bill. In a 6-3 decision, with Justice Barrett concurring, the Supreme Court denied the motion, making the law enforceable but returning it to the district court to decide.[47] This was a dramatic moment for the balance of federal-state power as it essentially validated the Texas law, albeit not permanently. The justices avoided the question of the constitutionality of the law when they referred it back to the lower court. In her dissenting opinion, Justice Sotomayor noted how the lower court already viewed the law as likely unconstitutional back in February when it entered the stay order.[48] And yet the question of the bill's constitutionality remained unanswered.

Not even twelve hours after the Supreme Court allowed the application of the law, the Court of Appeals delivered their decision. Before hearing oral arguments, the court agreed to let the stay order stand, once again preventing the law from being enforceable. This followed with a

[46] Adam Liptak, "Supreme Court Backs Biden in Dispute with Texas Over Border Barrier," *New York Times*, January 22, 2024.
[47] *United States v. Texas, et al*., 601 US (March 19, 2024), https://www.supremecourt.gov/opinions/23pdf/23a814_febh.pdf.
[48] *United v. Texas, et al*., 601 US (March 19, 2024).

decision by the Fifth Circuit Court on March 27, 2024, refusing to lift the stay on injunction, prohibiting the law from taking effect pending further hearings on its constitutionality. The constitutionality of the bill will likely remain uncertain for the time being. In March 2025, the Trump administration officially dropped the Department of Justice's challenge to the bill, which remains pending in the District Courts.[49] This bill will continue to be litigated, but the entire question of a state's jurisdiction when it comes to immigration legislation may become null and void under the second Trump administration.

This constant back and forth, described by University of Texas at Austin law professor Steve Vladeck as "Judicial Whiplash," has done nothing but further complicate the story.[50] It is unclear whether this stay will be indefinite; the case is set to return to the Supreme Court to finally determine its constitutionality. One thing that is certain is that we have not heard the last of Texas Senate Bill 4. How the Supreme Court eventually rules, will determine if Texas's attempts at expanding police power have been a success. If the courts rule in favor of Texas, they would not only disempower the federal government, but also their own standing. As Justice Sotomayor said in her dissenting opinion on March 19, 2024: "Today, the Court invites further chaos and crisis in immigration enforcement."[51]

Conclusion

When this research began, it started with a simple question of immigration and the Constitution: How can immigration, something so integral and controversial today, not have been mentioned in the founding document? The United States is a country founded by immigrants, with key symbols like Ellis Island and the Statue of Liberty exalting their importance. Such monuments

[49]Uriel Garcia, "Trump administration drops challenge to Texas law targeting people who illegally cross the border, *"Texas Tribune*, March 19, 2025.
[50] *United States v. Texas, et al*., 601 US (March 19, 2024).
[51] *United States v. Texas, et al*., 601 US (March 19, 2024).

build upon the myth that the United States has historically been "open-to-all." My senior thesis project began as an attempt to make sense of the intense immigration conflict today, given this historical rhetoric. What first became clear was that the federal government was not always solely in charge of immigration and the "open-to-all" rhetoric surrounding the nineteenth century is undoubtedly a myth. The states enacted several policies under their police power which clearly represent migrant restriction. It was here that the parallels to the present became clear.

At the time this research began, immigration was already becoming a hot topic, with Abbott's busing program and increasing numbers at the border. But then, the Texas governor's rally at Eagle Pass in 2024 made clear that this was not mere election politics at play. Abbott is attempting to expand Texas's power over immigration to a form reminiscent of the nineteenth century.

Police power is based on the states' reservation of certain powers, so it is not necessarily explicitly defined. But in the nineteenth century it provided the basis for states to enact restrictions on migrants. These were enacted on the basis of poverty, health, race, and ideology, and all justified behind this loose idea of "general welfare." This, of course, allowed for the policies to be applied indiscriminately, informed by the language and cultural standards of the time. These policies depended critically on the existence of slavery, as the question of whether migrants were "persons" or "imports" was the sole distinction between whether state restrictions infringed on federal commerce or not. With the end of slavery after the Civil War and the passing of the Fourteenth Amendment, these state level "police" policies on migration were limited and eventually folded into the federal government's immigration policy.

From this point onward, the federal government articulated its supremacy over immigration, and while police power as a concept never disappeared, restrictions on immigration were no longer in state hands. Of course, the discriminative nature of restrictive policies did not disappear, as resentment towards migrants increased alongside industrialization. Several federal

policies born out of this period closely resemble the state level policies, such as the general Immigration Act of 1882, the Chinese Exclusion acts, and even more so, the recent health policies born out of the COVID-19 pandemic. Generally though, the Fourteenth Amendment significantly equalized the treatment of migrants, even if only legally.

This federal supremacy has now been in place for over a century, but with an increasing crisis along the southern border, Texas governor Greg Abbott is attempting to upend this power balance. President Biden's policies did play a part in increasing pressures along the southern border. Governor Abbott, however, has expanded the meaning of migrant arrivals. By directly referencing the constitutional right of Texas to defend itself, Abbott has justified the installation of his militarized Operation Lone Star, a task force meant to handle migrant restriction at the state level. Furthermore, the governor pushed through S.B. 4, which criminalizes all migrant arrivals (even refugees) outside of legal pathways. By installing this state policy and creating his own military force, Abbott is attempting to return movement restrictions back to state police power as it was in the Antebellum era. His busing campaign was only a sign—a symbolic representation of state-controlled movement. Now, we are seeing its expansion and radicalization in real time.

This story is still playing out, despite a current stop on the bill the Supreme Court already signaled its position towards Texas. Pointing out the parallels to Antebellum precedents, this article serves as a warning against the instrumentalization of state police power for the purposes of immigration control, as exemplified by Governor Greg Abbott. This current conflict could play out to completely upend the nature of federalism as we know it today. Right now, it hinges on the fate of the Texas Bill, but Abbott is not alone in his contentions. States across the country, even non-border states, are behind him. Their infringement on federal supremacy rests on the same grounds as those of the slave states prior to the Civil War. We should all fix our attention to these Antebellum antecedents.

Acknowledgements

This thesis is a revised excerpt of my undergraduate senior thesis. I have the deepest gratitude for the support of Professor Gramer, my thesis advisor, who served as a guiding light in the research process, as well as Professor Kevin Kenny, who aided in editing the thesis and whose work served as a core basis from which my own argument arose. I would also like to thank the staff of *The Interdependent* for their work in the editing and publishing of this article.