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Immigration Law on the Line: Corpus Linguistics and the Commerce Clause

Garrett May¹

Since the foundation of this country, immigration has been a recurring and upsetting struggle that pulls at important American communal values. And now, like many times before, immigration has become one of the central issues of our society at large. In the heat of our mainstream political dialogues, the question of what *should* be done is the primary question of the debate. Perhaps we ought to instead pause and consider what *can* be done, as designated by the constitution of the United States of America.

Speaking as a descriptive voice, this paper will give evidence as to the absence of a constitutional textual establishment for federal control over immigration. We will argue, with the aid of corpus linguistics analysis, the following points. The Constitution as originally ratified² did not include a federal prerogative to regulate immigration. The original public meaning of the language of the Commerce Clause most likely made narrow reference to trade, and is therefore an insufficient legal justification for federal regulation. Thus, we contend that continued legislative action in the regulation of immigration, that solutions must still be sought out to amend or delegate regulation that meets both the legal bounds of the constitution and our contemporary need to manage immigrating peoples.

Part I will uncover the absence of an explicit constitutional basis for federal regulation of immigration. Part II will display the corpus linguistics research conducted to evaluate the implied sufficiency of the Commerce Clause. Part III will expound our findings, analysis, and subsequent claims. Part IV will offer our conclusion.

I. Constitutional Basis

A. Background

When the states united under the ratified Constitution in 1788,³ the concept of immigration was left open ended. The only clear reference to immigration in the Constitution is

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² We understand that the constitution as “originally” ratified was not technically the complete constitution that we have today, with specific elements like the Bill of Rights included and ratified later.

³ U.S. CONST.

the Migration and Importation Clause, stating that 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 [1808].”⁴ It is interesting to note that the only explicit mention of immigration is an imperative that it should not be prohibited. But this clause is generally understood to be more a principle of non-interference with the slave trade than an outright policy of immigration. After the restriction lifted in 1808, Congress began to pass legislation addressing terms of immigration, setting in motion the legal body that we now call immigration law.

In the decades succeeding the founding-era, the legislative branch, sustained by the judicial, has expanded the exercise of federal power over immigration. From the first legislation passed in the Page Act of 1875⁵ and the Chinese Exclusion Act of 1882,⁶ to the Supreme Court ruling in *Edwards v. California* in 1941,⁷ the exclusive, absolute, or plenary federal authority to regulate immigration has remained upheld.

Arguably, this increased power seems to have led to upsetting encounters for immigrating individuals and families in recent years. Regardless of political orientation, confusion persists on how to best legally address concerns such as the refugee crisis, the state of “Dreamers”, or the treatment of children of asylum seekers. It is at this intersection that we must reexamine the Constitution, the remarked absence of direction it gives in regards to immigration, and the contested sources within the text that Congress and the Supreme Court have settled upon to justify federal regulatory power. By taking a closer look through the aid corpus linguistics, we can more objectively question the original public meaning of the Foreign Commerce Clause (the only textual basis that, for reasons we will discuss later, is relevant to the argument herein) and the subsequent implications that it holds for the constitutionality of federal regulation of immigration.

B. Constitutional Justification

In order to prove our claim, we must acknowledge and refute all other constitutional sources that have been previously held as justification for exclusive federal-based regulation of immigration, much of which has been a focus of Professor Ilya Somin’s research.⁸ First, the Migration and Importation Clause. As previously explained, this specific reference in the text is generally accepted as an allusion to or euphemism for slavery.⁹ Moreover, even if we take the meaning of the text at face value, in its original context (a position we advocate), the clause is *prohibiting* Congressional power over immigration until the year 1808, not endorsing Congressional power after the year 1808. We agree that implicit in the clause’s prohibition is an

⁴ The actual text reads as “prior to the year one thousand eight hundred and eight.” U.S. CONST. Art. 1 § 9, cl. 2.

⁵ 28 U.S.C. § 141 (1875).

⁶ Chinese Exclusion Act, 42 U.S.C. §§ 47-126 (1882).

⁷ *Edwards v. California*, 314 U.S. 160 (1941).

⁸ Professor of Law at George Mason University Antonin Scalia Law School

⁹ Ilya Somin, *Rethinking the Scope of Federal Power Over Immigration*, 2018 23.

understanding that after the stated year Congress may have the power to regulate commerce. However, the constitution provides no more information about how much or what kind of power the government could be given. In short, we are left with an unclear restriction that makes the Migration and Importation Clause an unsatisfying source of federal empowerment.

The next possible textual basis in the Constitution for federal regulatory power is the Naturalization Clause, stating the power of Congress to “establish an uniform rule of naturalization.”¹⁰ To point to this section in the constitution when justifying immigration law is to compound the act of becoming a citizen and the act of entering the country; one might perform the latter with no intention of completing the former. This clause speaks only to questions of how someone becomes naturalized as an American, not how they become an immigrant moving into America.¹¹ We must also consider the Necessary and Proper Clause, which in this case, could be used as the door through which we open a whole host of federal powers. The term “necessary” has been defined in a way that is easily called upon for expanding federal powers, but so has “proper” been expounded as a constraining term.¹² This leaves a vagueness gap in which the ability to regulate immigration is difficult to place.

Another proposed basis for federal power over immigration comes not in the text of the Constitution, but rather in political theory of the 18th century and assumptions the Framers may have had about the state operating on inherent powers of sovereignty. This idea claims that the ability to secure borders and control the movement of peoples is a basic, foundational authority of any sovereign governing body, and that there would have been no need to write that in as part of the constitutional structure of the federal government.¹³ That kind of claim does not hold up when we consider other assumed state powers that the Constitution was written to explicitly include, such as the power to coin money, to declare war, etc. Despite the nature of these powers as basic, inherent rules of sovereignty, these were granted by enumeration - yet the power to regulate immigration was never given the same explicit treatment.

A similar argument is made that the power to regulate immigration resides in the inherent executive powers. Even when the Aliens Act of 1798¹⁴ gave the President power to exclude immigrants, the subsequent reaction was to narrow and dilute such broad, sweeping power.¹⁵ If the same generation that ratified the Constitution gave such pushback against legislation granting

¹⁰ U.S. CONST. Art. 1 § 1, cl. 1.

¹¹ *See also* *Arizona v. United States*, 567 U.S. 387 (2012); Ilya Somin, *Rethinking the Scope of Federal Power Over Immigration*, 2018 18.

¹² The debate over which generalized powers are and are not afforded by the Necessary and Proper clause exceeds the intent of this paper; we merely concede that although this clause is arguably a definite expansion of federal power, there is equal precedent that illustrates the restrictive nature of this clause.

See also *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹³ Ilya Somin, *Rethinking the Scope of Federal Power Over Immigration*, 2018 28.

¹⁴ Alien Friends Act, ch. 58, 1 Stat. 570, 571, § 1 (1798).

¹⁵ Ilya Somin, *Rethinking the Scope of Federal Power Over Immigration*, 2018 32.

an executive hold on regulating immigration, then it weakens the supposition that an implicit executive authority, not written into the text of the Constitution, was and is an acceptable point of federal power over immigration. We therefore reject the idea that the power to regulate was given as an implied authority of the executive position or of the sovereign state, and return to the binding text of the Constitution.¹⁶

Our claim resides in the case for the Commerce Clause as the constitutional source for federal power over immigration. Indeed, immigration can have far reaching effects on commerce: the increase or decrease in population in a given region affects supply and demand, market exchange, and economic distribution of wealth. In the 21st century, it's easy to read "commerce" as meaning *anything commercial* in nature or impact, including the movement of immigrating peoples. But to affirm or dispute the argument that federal power over immigration is set firmly in the text of the Commerce Clause, we need more than the logic, intuitions, or dialect of contemporary America English.

II. Corpus Analysis of the Commerce Clause

A. Corpus Linguistics

When discerning the meanings of words, corpus linguistics offers a method for viewing how and when words are used by speakers in context to find meaning that goes beyond prescriptive lexical definitions from dictionaries. By compiling digitized sources of text into a database, a corpus, searches can then be run for specific words or word pairs from that body of language. Users of the corpus can then evaluate the content being communicated through the context and usage in which the searched word(s) appear. As it applies to understanding ambiguous terms in the constitution, this methodology is particularly useful because of the temporal distance between our current language and that of the founding era. meanings of words change over time, this "linguistic drift," leaves our understanding of what an unclear word or phrase could have meant open to personal intuition and interpretation.¹⁷ Corpus linguistics takes the meaning of ambiguous words out of the hands of subjective individual experience and puts it back into original context, in large datasets, to yield more empirical conclusions about a word's ordinary meaning.

There have been many attempts made by legal scholars to understand the meaning of ambiguous text, both in statutory readings and in the constitution, with the aid of corpus linguistics. Justice Lee of the Utah Supreme Court has used corpus analysis in several cases

¹⁶ Id. at 28; *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 609 (1889).

¹⁷ Thomas R. Lee & James C. Phillips, *Data Driven Originalism*, 167 Pa. L. Rev. 35 (forthcoming 2019): "Because of the phenomenon of linguistic drift (or semantic shift), contemporary linguistic intuitions are not a reliable guide to the conventional semantic meanings of older provisions of the constitutional text."

when the meaning of a term was disputed.¹⁸ The Michigan Supreme Court used corpus linguistics in a majority decision in 2016.¹⁹ Justice Thomas of the United States Supreme Court cited corpora in an opinion last year.²⁰ Most recently, the Supreme Court faces a case questioning the meaning of establishment of religion, which may call on corpus linguistics for a more accurate description of disputed original and ordinary meaning of “establish.”²¹

For our concern about the federal power to regulate immigration, we will use corpus linguistics to look at “commerce” as an ambiguous word. There are, however, certain parameters that must be met in order for a corpus to accurately function and yield substantive results. We will return to this topic in the methodology section, and address the necessary criteria of our specific corpus research that oversteps the limitations of corpora,²² allowing us to make conclusions about the meaning of language based on observed data.

B. Methodology

Here we seek to resolve the linguistic question of whether or not “commerce”, as regulated in the commerce clause, carried an ordinary sense of immigration within the public meaning of commerce. A corpus, acting as a collection of texts rather than an isolated instance, affords broad, cross-section analyses of user and usage-based meaning. As mentioned earlier, corpus linguistics brings with it a set of inherent limitations.²³ In order for any corpus to qualify for reliable analysis to an acceptable degree, it needs to match criteria of representativeness,²⁴ searchability,²⁵ and query design.²⁶ In light of those considerations, the first step in our methodology is that of selecting a proper corpus, comprised of searchable, representative texts whose timeframe correlate the digitized documents and our target query.

Brigham Young University’s own Corpus of Founding Era American-English (COFEA) has been tailored to cover the linguistic range of the Constitution and the Founding Era, beginning with the rule of King George III in 1760 and ending with the death of George

¹⁸ See also *re the Adoption of Baby E.Z.*, 2011 UT 38, 687 UT (2011); *State v. Rasabout* 356 P. 3d 1258, 2015 UT 72, (2015).

¹⁹ *People v Harris*, 680 N.W. 2d 17, 261 Mich. App. 44 (2004).

²⁰ *Carpenter v United States*, 138 S. Ct. 2206, 585 (2018).

²¹ See Amy Howe, *Argument preview: Justices to consider constitutionality of cross-shaped war memorial on public land*, SCOTUSBLOG (Feb. 21, 2019, 1:37 PM), <https://www.scotusblog.com/2019/02/argument-preview-justices-to-consider-constitutionality-of-cross-shaped-war-memorial-on-public-land/>

²² the plural of corpus

²³ Stephen C. Mouritsen, *The Dictionary is Not a Fortress*, 2010 BYU L. Rev. 1915, 1969.

²⁴ *Id.* at 1956

²⁵ *Id.* at 1955

Thomas R. Lee & James C. Phillips, *Data Driven Originalism*, 167 Pa. L. Rev. 35 (2019) (forthcoming 2019).

²⁶ Stephen C. Mouritsen, *The Dictionary is Not a Fortress*, 2010 BYU L. Rev. 1915, 1957.

Washington in 1799.²⁷ Built from several combined online databases,²⁸ COFEA contains a spread of legal and non-legal records, with a multitude of genres ranging from letters to treaties that demonstrate a variety of syntactical and lexical constructions. This gives us a breadth of searchable material without confining the context of sources to only that of any particular document or circumstance, i.e. court cases or essays. Our last concern is that of an appropriate inquiry for the corpus, which will be a joint solution, combining our own original work to that of Lee and Phillips.²⁹

Having already utilized COFEA in an analysis of the term “commerce” through collocation, cluster recognition, and sense distribution,³⁰ Lee and Phillips present their results as suggesting that commerce is used most frequently in a sense³¹ of trade, with alternative senses of manufacture, market-based activity, and economic intercourse having a minimal frequency. This preliminary work prepares us to delve deeper into the original public meaning of commerce as it pertains to immigration. Our methodology will use the same operative senses established by Lee and Phillips, distinguished as senses 1 through 4 in the table below, and respond to their invitation that further research be done.³² We will add sense 5 and sense 6 to allow for other possible senses that will be disputed or indeterminate from our viewing, and narrow our search and sense distribution reading to only instances of “regulate commerce,” to use the exact language from the constitutional text as our keywords. By labeling the reported instances of our inquiry with the given sense distinctions, we can specify our findings to answer the driving question – was the enumerated power to regulate commerce originally and publicly understood as including the ability to regulate the immigration of individuals into the country?

C. Results

Our search in the corpus, looking for instances of “regulate commerce,” yielded 201 sources that contained those keywords in combination. From this set, reduced and adjusted to

²⁷ Corpus of Founding Era American English (COFEA), <https://lcl.byu.edu/projects/cofea> (last visited Jan. 24, 2019).

²⁸ Thomas R. Lee & James C. Phillips, *Data Driven Originalism*, 167 Pa. L. Rev. 35 2019. (forthcoming 2019); Corpus of Founding Era American English (COFEA), <https://lcl.byu.edu/projects/cofea> (last visited Jan. 24, 2019).

²⁹ Thomas R. Lee & James C. Phillips, *Data Driven Originalism*, 167 Pa. L. Rev. 35 2019. (forthcoming 2019): “Of course, further research could be done. One could look at the sense distribution just in the narrow context of when some version of the phrase ‘regulate commerce’ occur.”

³⁰ For defining and explanation of these terms, and the methods used, see *Id.* at 44-45.

³¹ Sense is used to represent the different meanings that a word can carry, separate from connotation; the different meanings of a word listed in the dictionary would be referred to as “senses.”

³² Thomas R. Lee & James C. Phillips, *Data Driven Originalism*, 167 Pa. L. Rev. 56 2019. (forthcoming 2019).

account for duplicates, we were able to look at the keywords in context (KWIC) for each source to distinguish which of the six senses (listed below) matched the way the keywords were used.³³

- Sense 1: the trading, bartering, buying, and selling of goods
(and the incidents of transporting those goods within the definition)
- Sense 2: the production of goods for trade; manufacturing
- Sense 3: any market-based activity having an economic component
(this would include trade, manufacturing, agriculture, labor, and services)
- Sense 4: all forms of social and economic intercourse between persons, including, but not limited to, traffic (i.e., trade)
- Sense 5: Other
- Sense 6: Indeterminate

By examining the KWIC of each source, we have come to the following totals of the instances of “regulate commerce” being used in each of the defined senses.

Sense 1 = used in 96 instances

Sense 2 = used in 3 instances

Sense 3 = used in 16 instances

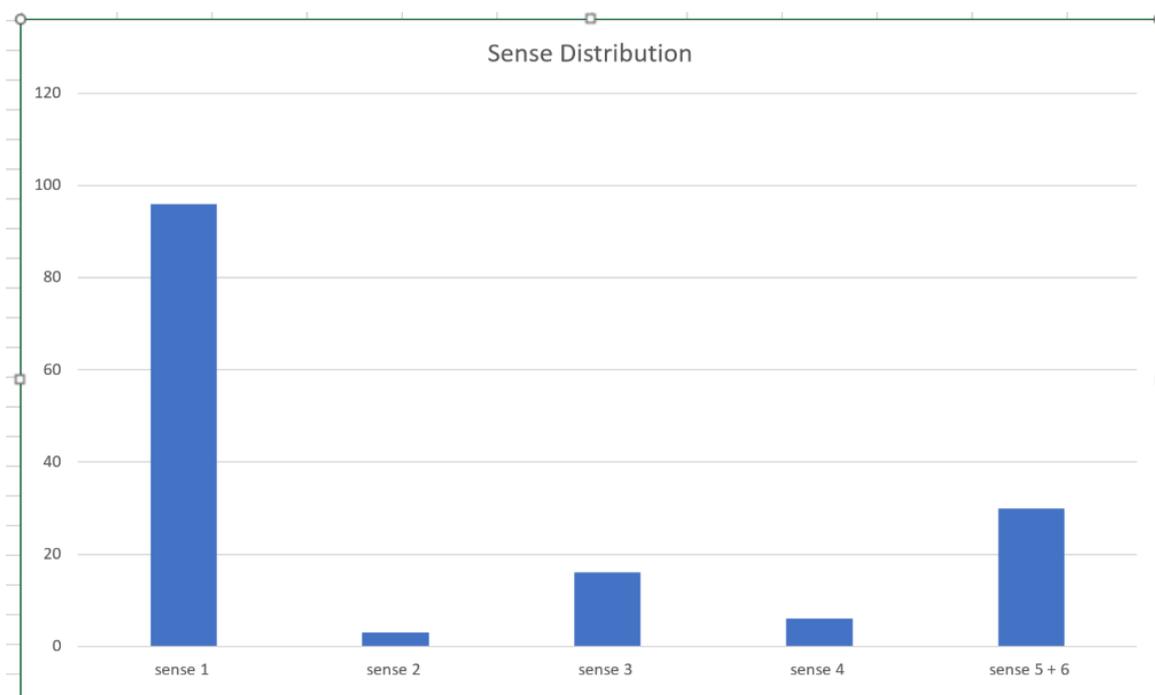
Sense 4 = used in 6 instances

Sense 5 + 6 = used in 30 instances

We also had 27 duplicates that we removed from the count, and 20 instances where the sense meaning was disputable.³⁴

³³ We also performed a search of the variations “regulating commerce” and “regulated commerce.” The supplemental results of this additional sense distribution will be posted in subsequent footnotes. Future work could still be done analyzing the variations “regulation(s) of commerce” or “commercial regulation(s).”

³⁴ 8 of these hits were disputed between the author or editor as whether or not they should be labeled as *sense 5: other* or *sense 6: indeterminate*, or vice versa. The remaining 12 were disagreements between the various senses.



From these sense distinctions, in 96 of the 171 usable hits where “regulate commerce” was used in context, we identified the use and meaning as that of *sense 1: trade*. The sense with the next highest frequency of usage was *sense 6: indeterminate*, where the meaning was still ambiguous. The remaining senses are fairly close together in terms of frequency, not standing out in any significant pattern.³⁵

III. Findings

A. Analysis

The results of our corpus search give an interesting look at the ordinary meaning of commerce. In addition to supporting the claims made by Lee and Philips, we can more confidently specify what sense of commerce was meant to be regulated. First, we can now make a strong case that commerce was spoken of in the founding era as referring generally to trade. This includes, as established by Lee and Philips, the trading, bartering, buying, and selling of goods, and the incidents of transporting those goods. We observed that in the sources from COFEA, to regulate commerce with this definition of trade, made reference to imports and exports, duties and tariffs, ports, harbors, navigation, and piracy.³⁶ Specifically, commerce is

³⁵ Adjusted for duplicates, “regulating commerce” had 82 viable hits, with the most frequent sense appearing as *sense 1: trade*, followed closely by *sense 5: other* and *sense 6: indeterminate*. “Regulated commerce” had only 3 usable hits from the corpus search, with mixed sense distribution.

deployed in context speaking about negotiating trade with foreign nations, or setting contracts and treaties with other countries.

It is also important to note, however, that some of the hits in COFEA for “regulate commerce” did involve in their context language of population increase, power over aliens, taxing immigrants, and deporting foreigners. This gives credit to the argument that commerce meant all things involved in commercial workings, with immigration being included as a large component of commerce that the government would need to regulate. With only 8 of the hits displaying this usage however, the frequency of this meaning is much smaller compared to distribution of the meaning of trade, and it is unlikely that this fraction of commerce used speaks to that sense as being the ordinary meaning of the term.

The corpus results have demonstrated for us that most often, in accessible public usage of the phrase “regulate commerce,” people used those terms to refer to actions involved in trading with outside sovereignties, deemed appropriate to regulate through Congress. This indicates that commerce, as a broad term, does not sustain an umbrella meaning of *any* activity that could have commercial or economic impact, and that immigration, as such an activity, is not covered by such an interpretation of commerce.

Before moving past the conclusions we’ve drawn from the corpus data and analysis, it is important to address the relatively small amount of instances of “regulate commerce” found in COFEA. Out of 119,799 texts, it can seem disproportionate that only 229 sources contained our searched terms. This might lead some to argue that any data or subsequent conclusions are inadmissible, because as the corpus clearly indicates, immigration and commerce were not discussed in the 18th century in the same way that they are now, as complex legal questions pressing the governing bodies. However, this is a generalization often levied against originalism that comes as an empty critique; if neither immigration nor commerce were frequent items of discussion at the time, are we then unable to apply our understandings of the workings of the constitution to those topics? We currently face other items of modernity that did not exist in the 18th century, and surely, we wouldn’t allow for that fact to prevent us from using constitutional law in decisions over vehicles, technology, or contemporary institutions. Unlike cars, smart phones, or corporations however, regulated commerce was an item of discussion of the founding era. Minimal though its representation in the corpus may be, it is represented, and our analysis of the sense of “regulate commerce” stands attested.

IV. Conclusion

In reviewing the specific instances of “regulate commerce” encountered in the corpus search, it seemed pertinent to include here an excerpt from a congressional floor debate, which concisely represents the argument put forth in this paper:

It has been declared...that this power over aliens is included in the power given to Congress to regulate commerce...But this bill [proposing regulation targeting aliens] is not intended for any commercial purposes; it is wholly of a political

nature, intended to effect political ends, and does not relate to aliens as merchants. If Congress has any power which they can exercise on the persons of aliens, it might relate only to merchants, to them as merchants—to their professions, not to their existence as men.”³⁷

This paper set out to test the foreign commerce clause as a constitutional basis for government power to regulate immigration. Through the arguments of Professor Somin, we have demonstrated that it is indeed the Commerce Clause, not the Migration and Importation Clause, or Naturalization Clause, or the inherent powers of the executive or sovereignty, that can, through legal precedent, serve as the grounds for this federal empowerment. Through the work of Lee and Philips, we have challenged the meaning of “commerce”, and with our own analysis, realized that any broad interpretation of “regulate commerce” is not strongly displayed in the corpus, with the narrow meaning of trade with foreign nations surfacing as the more probable, original, public meaning. This leaves the commerce clause as insufficient constitutional grounds for plenary power to regulate immigration.

We also understand that our conclusions herein can have implications for jurisprudence and federal power that go well beyond the realm of powers to regulate immigration.³⁸ We began this paper with the imperative that we stop and examine what we *can* do before we argue about what we *should* do. Our research has shown that the federal government should not exercise regulation of immigration, because nowhere in the Constitution is it enumerated that they may do so. If we want the federal government to continue to maintain this function, since that could be the most plausible and reasonable solution to the need to have some form of order at our borders, we must start by proposing adequate legislation - establishing what we the governed want the government to do in regulating immigration and how we want them to do it.³⁹ If in this discussion it becomes apparent that federal power must be drastically reduced or restricted, then constitutional amendment may be necessary.

³⁷ HEINONLINE,

https://heinonline.org/HOL/Page?collection=congreg&handle=hein.congreg/gredehi0007&id=41&men_tab=srchresults (last visited Feb. 28, 2019).

³⁸ Our concern is not the extent to which federal regulations, justified by the commerce clause, have been used in other areas of the law. We merely desire to make known that there is significant linguistic evidence to show that the understanding of the term ‘commerce’ and ‘regulate commerce’ as previously operated may be incorrect.

³⁹ We understand that our argument in this paper is not one of prescribing change, and we invite future research to seek out solutions to the problem described herein.