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The Libertarian Case for Immigration (and Against Trump)

By Peter Margulies Thursday, July 16, 2020, 3:58 PM

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A Review of “Free to Move: Foot Voting, Migration, and Political Freedom” by Ilya Somin (Cato Institute Book, Oxford University Press, 2020)

To hear President Trump tell it, “open borders” is a mantra of the radical Left. In his new book, “Free to Move: Foot Voting, Migration, and Political Freedom,” the always engaging and resourceful Ilya Somin, a professor at the Antonin Scalia Law School at George Mason University, proudly claims the “open borders” ground from a different end of the political spectrum. Somin offers a compelling and ingenious justification for free global movement, from the standpoint not of politics, let alone the “radical” Left, but instead from a libertarian, small-government perspective.

Recent events have also made Somin’s book more timely than ever. Immigration took center stage, for example, in the Supreme Court’s June 2020 decision invalidating the Trump administration’s attempted rescission of President Obama’s Deferred Action for Childhood Arrivals (DACA) program (see my *Lawfare* analysis here). And immigration law could soon be heading for a new chapter. A potential change in control of the White House and the Senate in the wake of the November elections could jump-start legislative immigration reform to help the “Dreamers” currently benefiting from DACA protections, as well as the rest of the United States’s estimated 12 million undocumented noncitizens.

I favor changes stemming from a moderate reformist perspective that relies principally on the political branches, checked by judicial review where appropriate. Somin’s bracing prescription, by contrast, is ultimately unduly strong medicine.

However, Somin makes a powerful argument for a broader right to free movement less dependent on the vicissitudes of politics—an argument with moral, political, economic and legal facets.

In keeping with Somin’s consistent approach to libertarian ideas, “Free to Move” champions international migration and critiques the economic, law enforcement and sovereignty rationales for immigration restrictions. Somin argues that people should be free to move across borders if they choose. Moreover, they should be free to do so for a range of reasons, including economic self-interest and the search for more responsive governance. According to Somin, free movement will enhance economic, social and political well-being. While most defenses of immigration restrictions cite economic and law enforcement concerns with open borders, Somin pushes back on these justifications for limits on immigration.

Somin also counters the sovereignty-based case for immigration curbs. The sovereignty position, as refined by the political philosopher Michael Walzer in his classic study, “Spheres of Justice,” holds that political and social entities must have the power to regulate the entry of free riders who would consume resources without contributing labor in return. Moreover, participants in self-government have the right to control the “character” of the entity that they govern. Walzer’s “character” does not necessarily mean a narrow focus on culture, and the theorist acknowledges that a state has a duty to admit refugees at risk of harm elsewhere.

“Character” in Walzer’s sense may extend to population density; residents may believe that a more dispersed population is more conducive to habits of leisure or a more relaxed pace of life. They may choose lower levels of immigration to preserve this attribute. Of course, there are responses to each of these character-based arguments. But Walzer would argue that a sovereign state must have the power to *choose* its own character after deliberating about its options.

Although Somin’s probing of all three rationales is salutary, he is ultimately more successful, as I’ll explain, on the economy and law enforcement fronts than on the more basic question of sovereignty’s role in immigration restrictions.

Somin’s title—“Free to Move”—captures his theme: the virtues of people “voting with their feet” for a better life and better institutions. The phrase “voting with your feet” entails expressing a preference for particular goods, services or approaches by choosing to buy or otherwise support them instead of their rivals. People can also vote with their feet for particular political or economic systems. In Somin’s book, “voting with your feet” describes the choice of immigrants to leave one country for a better life in another. For example, as Somin recounts, he and the rest of his Jewish family suffered from anti-Semitism in the former Soviet Union. After suffering for too long under the U.S.S.R.’s oppressive regime, Somin and his family managed to vote with their feet for greater liberty in the United States. Somin explains that Soviet officials feared that large-scale foot voting would highlight the profound flaws in the Soviet system. That is one reason they limited would-be foot voters’ exit from Russia.

For Somin, “foot voting” often bests its more familiar counterpart, ballot box voting. Ballot box voters are subject to manipulation—both foreign and domestic. Moreover, each has only a small voice in selecting political representatives and the policies those representatives enact. In contrast, foot voters can often make a decisive and immediate change for the better. They can do this by leaving countries dominated by despotic and corrupt regimes and relocating to countries with more responsive institutions. Somin suggests that foot voting can act as a positive force in destination countries, bringing new experiences and initiative. In addition, foot voting can be a force for positive change in immigrants’ countries of origin.

Somin is most compelling in deflating the economic rationales for immigration restrictions. As Somin notes, immigrants generally spur employment and increase economic activity. Free movement across borders would allow people to select a spot to call home that would maximize their productivity. Unfortunately, many countries all over the world suffer from oppressive governments and pervasive corruption. These ills act as a tax on individual effort and creativity, stifling economic development and human flourishing. Able to set up shop in a country with better institutions, an immigrant can leverage her skills, acquire new skills and capabilities more readily, and boost the economic vitality of her destination country. Relying on other advocates for free movement across borders, Somin refers to the value added to individuals’ efforts when they relocate to countries with better governance as the “place premium.” Somin argues persuasively that this “place premium,” replayed in the lives of multiple eager newcomers to the United States, will exponentially increase both national and global wealth.

These economic gains are realized not only by destination countries but also by sending countries. Immigrants send back remittances that lift the economies of their countries of origin. Moreover, communication by immigrants with friends, relatives, and entities in sending countries exposes countries to new political and economic ideas. That exposure can impel political, social and economic change in immigrants’ countries of origin. In this way, freer immigration can also ultimately reduce the “push” factors of ineffective governance and static economies that drive immigration in the first place.

Foot voting also serves the ends of justice. Without foot voting, persons at risk of persecution will have far more limited remedies. Although the United States is part of international refugee agreements that provide asylum for persons with a “well-founded fear of persecution,” U.S. refugee protections have marked gaps. U.S. asylum officers are in the main dedicated and capable, but judicial review of asylum decisions at the U.S. border is exceedingly limited—limits that the Supreme Court upheld on June 25 in *Department of Homeland Security v. Thuraissigiam* (2020) (see Aditi Shah’s analysis here). Modifying these curbs, as Somin would advocate, would ease obstacles for persons at risk. Moreover, Somin makes an intriguing case for including economic refugees under asylum protections, arguing that economic want is often a symptom of oppressive and corrupt institutions.

Somin also argues that two concerns frequently raised by immigration opponents—crime and terrorism—are not convincing reasons for immigration restrictions. As Somin notes, immigrants are generally more law-abiding than U.S. citizens. In addition, since Sept. 11, 2001, terrorist acts by domestic sources, including white supremacist groups, have far exceeded terrorism on U.S. territory by noncitizens. President Trump’s favorite targets—so-called sanctuary cities—are actually *safer* than their counterparts with more restrictive policies. In outlining this information, Somin provides a valuable antidote to slogans that seek to polarize the debate and demonize immigrants.

Somin’s well-aimed arguments would make a difference on pressing immigration issues. As Chief Justice John Roberts noted in his opinion for the Supreme Court in the DACA case, immigrants are productive and are already part of us—interwoven in positive ways with U.S. families, workplaces, educational institutions and other stakeholders. Forcibly removing people with such strong U.S. ties diminishes the rest of us and disrupts our way of life. It is self-defeating in the clearest sense of the term. For similar reasons, Somin’s argument supports comprehensive immigration reform that would allow the other 11 million people here without a lawful status to stay in the United States.

The justice reasons Somin outlines also support admitting far more refugees—at least 100,000 annually per his recommendation—compared with the paltry 18,000 that President Trump and his restrictionist immigration adviser, Stephen Miller, have grudgingly permitted. Admitting refugees saves lives and promotes freedom. It also sends a strong signal that the rest of the world should do the same. In contrast, the Trump administration has modeled fear, insecurity and intolerance, setting a sorry global example. (Similar damage stemmed from recently announced curbs on international students keeping their student visas while taking online courses during the coronavirus pandemic; thankfully, on July 14 the Trump administration rescinded those limits.)

If the Supreme Court had adopted Somin’s argument that the U.S. Constitution’s bar on intentional discrimination should also apply to immigration, *Trump v. Hawaii* (2018) would have ended with a different result. In that case, the Supreme Court upheld President Trump’s travel ban directed primarily at majority-Muslim countries. Somin singles out the travel ban for special disdain, pillorying the scant justifications the administration offered and the Supreme Court accepted.

Despite Somin's intrepid invitation, substantially increased immigration might cause problems. To his credit, Somin doesn't blink at these risks. Instead, he suggests fixes that he calls "keyhole" solutions. For example, suppose a society was concerned that substantially greater immigration would be a drain on public benefits programs. Somin asserts that the government would have the right to limit immigrants' access to such programs, at least temporarily. Indeed, this is largely what the United States currently does. A country worried about electoral volatility caused by a significant infusion of immigrants could limit the franchise to citizens. Of course, this is also U.S. policy.

More controversially, Somin suggests that such worries could justify an extreme keyhole solution: keeping immigrants as perpetual guests by barring *any* pathway to citizenship. Here, Somin arguably makes a concession that is inconsistent, if not incompatible, with U.S. values and recent history. Since 1952, all U.S. lawful permanent residents have been eligible for naturalization. Until then, Japanese immigrants to the United States could not become U.S. citizens. A return to those shameful days of permanent tiered participation in the American polity would be calamitous, not just for immigrants, but for the United States's self-conception and its standing in the world. Even an exponential rise in foot voting would not justify such ignominious exclusions. A sovereign state should have the right to restrict immigration to some degree—there's a middle ground between draconian curbs that Somin rightly opposes and Somin's prescription, which entails accepting both unrestricted immigration and a limited range of fixes that violates basic values.

Although Somin critiques the position that the power to restrict immigration is a necessary element of state sovereignty, the intrusive keyhole measures that Somin views as permissible undercut his discounting of sovereign interests. Only very potent sovereign interests would justify permanent tiered participation and denial of the franchise.

Somin's critique of sovereignty argues against the restrictionist views of Trump and Miller but does not rebut the case for measured immigration limits.

Somin and nonlibertarian champions of open borders such as the political philosopher Joseph Carens are correct that immigration status is an "accident of birth." Carens elaborates on liberal philosopher John Rawls's concept of the "veil of ignorance." Under this view, the criteria for allocating goods are just if all people would freely choose to be governed by those criteria in a case where they did not *already know* what goods the criteria would grant to them. This original position of ignorance would guarantee fair chances to all.

Building on this foundation, Carens points out that no one "earns" being born in the United States, the United Kingdom, or Germany, as opposed to a country with a more corrupt and despotic regime. At the same time, this arbitrary aspect of immigration mirrors the allocation of other goods such as parental wealth, connections and expertise. A child does not choose her parents, but we do not require the state to separate families to winnow out the advantages that a child accrues from her parents' status and achievements. In addition, a child does not earn the wealth she may eventually inherit from her parents. Progressive social theory supports inheritance taxes, at least for the super rich. But libertarians like Somin oppose confiscatory inheritance taxes, thus allowing that particular accident of birth to perpetuate inequality. Somin and other libertarian immigration theorists pick and choose which accidents are worth correcting for. This inconsistent treatment of accidents of birth undermines Somin's critique of immigration restrictions.

Ultimately, Somin's accident-of-birth critique does not undercut the sovereignty-based case for the power to restrict immigration. Somin's critique may well inform efforts to temper restrictions through measures such as DACA and comprehensive immigration reform. However, Somin's argument leaves substantial uncertainty about the future effects of uncontrolled immigration. A sovereign state could reasonably wish to hedge against that uncertainty.

Uncertainty about the effects of uncontrolled immigration is pervasive because no significant state currently allows free movement across its borders. As a result, available data is quite limited on the effects of an open-borders policy. In this sense, the economic and other benefits Somin cites from relatively controlled immigration do not constitute solid evidence that like benefits would flow from unbounded movement.

Truly uncontrolled immigration could cause substantial disruptions, at least in the short run. For example, even if immigration to the U.S. increases by a relatively small fraction of the hundreds of millions of people who wish to enter prosperous democracies such as the United States, that increase would roil the budgets of "gateway" areas, such as New York, Florida, Texas, and California. In the short run, these gateway areas would have to foot the bill for the education of immigrant children and other public services, without sufficient aid from the federal government. In fact, that is already the case, albeit to a smaller degree. The strain on the budgets of gateway areas would require wrenching budgetary choices. A sovereign state should have the power to limit the frequency of such dilemmas. Perhaps some states would choose to gamble that the favorable economic results that Somin cites from today's controlled immigration would yield equally favorable outcomes for uncontrolled immigration. However, neither law nor ethics should *require* states to make that gamble.

Political theorist Sarah Song, elaborating on Michael Walzer's theory of sovereignty, views control over immigration as central to democratic self-determination. For Song, people of a state practicing self-government can choose to be risk averse and impose moderate limits on immigration. They can decide to steer clear of both open borders and draconian immigration curbs—again, as with Walzer, subject to the duty to admit refugees. Song views the power to make that choice as a necessary incident of self-government.

While Somin critiques Song's view, that critique is the least convincing portion of "Free to Move." At bottom, Somin tries to pile ever more weight onto the already burdened accident-of-birth position. But that hoary argument cannot bear the load. Somin fails to acknowledge that his more extreme keyhole solutions, including precluding a path to citizenship, would install a two-tier model of political participation antithetical to current U.S. values. In viewing tiered participation as a small price to pay for foot voting, Somin underestimates tiered participation's costs for a democratic polity's underlying values. Those costs thus make the case for an alternative to Somin's—a moderate regime that combines measured restrictions with ample refugee protections, judicial review, and the availability of comprehensive immigration reform to legalize the undocumented population.

This objection is, however, a minor point when weighed against Somin's sophisticated and spirited alternative to a restrictionist system urged by Trump, Miller and other champions of reduced immigration. Somin's arguments for foot voting skewer the economics and law enforcement tropes that make restrictionism rhetorically attractive to many in America today. The book's combination of rigorous thought and engaging argument makes "Free to Move" a must-read for those interested in the future of immigration law and policy.

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