

THE PLENARY POWER DOCTRINE AND THE
CONSTITUTIONALITY OF IDEOLOGICAL
EXCLUSIONS: AN HISTORICAL PERSPECTIVE

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I. INTRODUCTION

For over a century, it has been repeatedly but unsuccessfully argued that the First Amendment of the Constitution limits the federal government's plenary power to exclude or expel aliens from the United States.¹ Such arguments have persisted despite the Supreme Court having repeatedly determined that the First Amendment does not restrict such power.² Instead, the Court has upheld the federal government's plenary power to "forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory" regardless of whether its justification is based upon ideological or association grounds.³

Numerous commentators, scholars, and attorneys have attacked this rationale by arguing that the Bill of Rights limits the federal government's power to exclude or expel aliens.⁴ For instance, Karen Engle criticizes ideological and

1. See *Negusie v. Holder*, 129 S. Ct. 1159 (2009); *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 498 (1999); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952); *Bridges v. Wixon*, 326 U.S. 135, 160 (1945); *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 291 (1904); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 117 (2d Cir. 2009); *Hernandez-Caballero v. U.S. Att'y Gen.*, 250 F. App'x. 275 (11th Cir. 2007); *Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999); *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 940 F.2d 445–46 *opinion amended and superseded on denial of reh'g*, 970 F.2d 501 (9th Cir. 1991); *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989); *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988); *Abourezk v. Reagan*, 785 F.2d 1043, 1074–75 (D.C. Cir. 1986); *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992).

2. *Harisiades*, 342 U.S. at 592; *Turner*, 194 U.S. at 291.

3. *Turner*, 194 U.S. at 291.

4. See Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Steven J. Burr, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889 (1985); Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Richard F. Hahn, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights—The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 COLUM. HUM. RTS. L. REV. 521 (2000); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997); Philip Monrad, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CALIF. L. REV. 831 (1989); David Moyce, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1773–76 (1986);

association exclusion on the ground that it is impossible to separate bad aliens from good aliens on such grounds. She believes that the United States' power to "determine immigration policy does not mean that all state actions regarding immigration [should] necessarily go unchallenged."⁵ Berta Esperanza Hernández-Truyol believes ideological exclusion not only violates the First Amendment but also constitutes a "myriad [of] human rights violations . . . [including] racial, religious, ethnic, and national discrimination, as well as discrimination in the applications and enjoyment of the rights to free speech and association."⁶ Meanwhile, academics such as Steven R. Shapiro have argued that ideological and association exclusions "abridge" the "constitutional rights of American citizens."⁷ He writes that "in a nation premised on the notion that sovereignty flows from the popular will and that the popular will is determined by political debate, ideological exclusions cannot be justified."⁸

Commentators, such as these, often place the blame of ideological and association exclusions on the Supreme Court's dicta in the *Chinese Exclusion Case*.⁹ It is frequently argued that the Court "formulated the plenary power doctrine" without any supporting constitutional authority.¹⁰ Most recently, Matthew J. Lindsay wrote an extensive piece asserting that the plenary power doctrine was "borne" in the late nineteenth century of "an urgent sense of national peril."¹¹ Academic scholar Peter J. Spiro describes the

Stephen R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); W. Aaron Vandiver, *Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusion*, 55 EMORY L.J. 751 (2006); Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 787–91 (1971).

5. Engle, *supra* note 4, at 65.

6. Hernández-Truyol, *supra* note 4, at 559.

7. Shapiro, *supra* note 4, at 942.

8. *Id.* at 944–45.

9. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For criticism, see Akram, *supra* note 4, at 59, and James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 823–29 (1983) (citing the *Chinese Exclusion Case* as when the Court first established that congressional authority to exclude aliens was plenary).

10. Vandiver, *supra* note 4, at 773–75.

11. Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 6

plenary power doctrine as “a rights-subverting constitutional anomaly” which has “long been relegated to a sort of constitutional hall of shame.”¹² Meanwhile, Stephen Legomsky argues that the courts have based too much reliance upon early case precedent such as the *Chinese Exclusion Case*¹³ and its nineteenth-century predecessors.¹⁴ Legomsky asserts that the holdings and rationales for these cases provide no support for the plenary power doctrine.¹⁵

What all these commentators fail to address, however, is the legal and historical precedent supporting the plenary power doctrine. Not one of these commentators attempts to delve into the Anglo-American tradition or the early treatises on international law by which the plenary power doctrine was derived.¹⁶ Instead, they attack the plenary power doctrine by asserting that the First Amendment prevents the federal government from conditioning entry or settlement on ideological grounds—all the while without having a firm historical or contextual grasp on the subject. Granted, one may argue that ideological exclusions are morally repugnant to the people that view this nation as being founded on liberty for all. However, the plenary power doctrine is firmly rooted in the Anglo-American legal tradition. It should be emphasized that the determination to expel or exclude foreigners, whether they have already

(2010). Professor Lindsay correctly identifies that the principle of national “self-preservation” is what grants the federal government plenary authority over immigration. *Id.* at 31–46. However, Professor Lindsay incorrectly assumes this legal principle was created in the late nineteenth century. It existed well before then.

12. Spiro, *supra* note 4, at 340–41; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 118–38 (1996); Aleinikoff, *supra* note 4, at 862–71; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

13. *Chae Chan Ping*, 130 U.S. at 581.

14. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Nishimurra Ekiu v. United States*, 142 U.S. 651 (1892).

15. S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 199–218 (1987); *see also* Hahn, *supra* note 4, at 960–83; L. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858 (1987) (stating that the plenary power doctrine is subject to constitutional restraints); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE. L.J. 545 (1990) (explaining the ultimate “failure” of the plenary power doctrine).

16. James Nafziger provides the most detailed attempt to examine this history from a legal perspective. However, Nafziger only briefly touches upon the Anglo-American heritage of the plenary power. Nafziger, *supra* note 9, at 804–47.

lawfully settled or even begun the process of naturalization, is a political question and not a vested right absent congressional statutory acquiescence.¹⁷ The argument of moral repugnancy does not make exclusions based on association or ideological grounds unconstitutional. It is an issue that can only be placed into this nation's political discourse, where it has always and rightfully been.

Similar to other constitutional political questions, one must separate personal political beliefs from the law and history. Just as it may be argued that it is unconstitutional to exclude based upon ideological association, the same argument can be made for aliens that do not have sufficient property, are not properly educated, or have dangerous communicable diseases.¹⁸ Nevertheless, we exclude individuals based upon all these factors. Furthermore, it may be argued that those convicted of crimes should not be excluded, for it violates their right to due process.¹⁹ This

17. A recent article by James E. Pfander and Theresa R. Wardon asserts that the congressional plenary authority over immigration is limited in that Congress cannot prescribe retroactive legislation concerning naturalization and settlement to aliens that have lawfully settled. See James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of The Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 441 (2010). Pfander and Wardon argue,

Congress was not given untrammelled power to regulate (immigration and) naturalization but was required to 'establish a uniform rule.' Embedded in this provision were norms of prospectivity, uniformity, and transparency: Congress was to act by public law, creating a framework within which executive and judicial officers would administer naturalization law. Congress was neither to change the rules that apply to resident aliens, lawfully present in the United States, nor to exercise case-by-case control of naturalization decisions.

Id. As will be shown below, this interpretation of congressional power over naturalization and its intimate relation to immigration and foreign affairs cannot survive. The Founders understood these powers as significant to national self-preservation.

18. For a discussion against excluding aliens according to such factors, see Note, *Constitutional Limitations on the Naturalization Power*, *supra* note 4, at 791–809, and Hahn, *supra* note 4, at 985–92.

19. As it stands today, the only due process afforded to aliens applying for entry or seeking lawful admission into the United States can be prescribed by Congress. See *Landon v. Plasencia*, 459 U.S. 21, (1982); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). Due process also does not extend to aliens seeking admission at a port of entry with a valid immigrant visa or aliens that enter unlawfully because they do not have the “ties that go with permanent residence.” *Landon*, 459 U.S. at 32. Alexander Aleinikoff, however, argues that such aliens should have due process rights. See Aleinikoff, *supra* note 4, at 867–68. For other commentary questioning due process

begets the question, “Which factors are excludable and who is to determine them?” The answer is simple: the factors are to be determined by this nation’s elected federal representatives, including the President.²⁰

The purpose of this study is to correct the century-old assertion that the plenary power to expel or exclude aliens is subject to any limitations, except the powers delegated between the Legislative and Executive Branches by the Constitution. In particular, this Article sets forth the well-established, and often forgotten, doctrine of allegiance, the Anglo-American legal precedent for ideological exclusion and expulsion, the inherent authority of nations as understood by early international law commentators, how the Founding Fathers understood these doctrines, and the reasons this power resides with the federal government. The evidence demonstrates that ideological exclusion and expulsion are constitutionally permissible and are political questions to be determined by the people through their federal representatives.

II. THE ANGLO ORIGINS OF IMMIGRATION LAW, PLENARY POWER, AND EXCLUSION BASED UPON IDEOLOGICAL AND ASSOCIATION GROUNDS

Legal commentators have asserted that the *Chinese Exclusion Case* plenary power doctrine is a judicial creation²¹ or that the late nineteenth century perception of immigration law is fundamentally distinguishable from modern doctrine.²² These commentators fail to adequately examine the Anglo and international origins of ideological and association exclusion. One of the most detailed legal commentaries concerning these Anglo origins comes from

rights afforded to excludable aliens, see Ethan A. Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens’ Constitutional Rights in Immigration Processes*, 98 YALE L.J. 639, 658 (1989); Mocyne, *supra* note 4, at 1747, 1771–72; Note, *Constitutional Limitations on the Naturalization Power*, *supra* note 4, at 796 (“[A] resident alien’s interest in the deportation process . . . should be considered fundamental.”).

20. According to the commentators mentioned in this Article, the factors for exclusion should be limited by the provisions of the Constitution. There is no arguing that the Constitution limits the authority of the federal government, especially in its relation to citizens. However, there is no provision that expressly restricts the federal government regarding immigration.

21. See, e.g., Akram, *supra* note 4, at 58–59; Vandiver, *supra* note 4, at 773–75.

22. See, e.g., Nafziger, *supra* note 9, at 825–28.

James A. R. Nafziger, who concludes, “Before the late 19th century, there was little, in principle, to support the absolute exclusion of aliens.”²³ He believes the historical record supports the concept of free migration and even cites to the Magna Charta, which protected the freedom of merchants to travel “in accordance with ancient and lawful customs.”²⁴ Nafziger’s commentary, however, distorts the historical record and also interprets the Magna Charta too liberally, for, as the history will show, it was subject to “lawful customs,” or what was known as the Statutes of the Realm and the law of nations.

A. Early Origins of the Plenary Power and the Doctrine of Allegiance

The most prominent early international commentator on immigration law was Hugo Grotius (1583–1645).²⁵ Even today, his 1608 work, *The Rights of War and Peace*, gives great insight into the development of international law. Of particular interest to free migration advocates is Grotius’s section on refugees, as he may have been the first to write on the subject in detail:

[A] permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes ‘It is characteristic of barbarians to drive away strangers,’ says Strabo, following Eratosthenes; and in this respect the Spartans failed to gain approval. In the opinion of Ambrose, also, those who keep foreigners out of their city are by no means worthy of approval.²⁶

While much of the focus of this quote has been placed on Grotius stating that refugees should be granted asylum,²⁷

23. *Id.* at 809.

24. *Id.* at 810 (quoting the MAGNA CARTA).

25. Hersch Louterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L. L. 1 (1946).

26. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 201–02 (Francis W. Kelsey ed., 1925).

27. See Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT’L L. 1, 8 (1994); Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT’L & COMP. L. 219, 234 n.106 (2006); Luke

what is overlooked are the major preconditions Grotius identifies to such a grant: “provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes.”²⁸ This language is significant for two reasons. First, the language “submit themselves” is in reference to the ancient doctrine of allegiance which requires every entering alien to give temporary allegiance to the foreign jurisdiction. Second, this doctrine of allegiance is strengthened when Grotius states “observe any regulation.” Emphasis should be placed on the word “any,” for it illustrates that as early as the seventeenth century it was acknowledged that all aliens, refugees included, must comply with any laws respecting immigration in order to receive the legal and physical protections of the foreign jurisdiction in which they reside.

This interpretation of Grotius is affirmed when viewing his other sections discussing immigration. It illustrates that immigration was directly linked to a nation’s right of self-preservation, foreign affairs, and intertwined with the doctrine of allegiance. For example, in discussing the receiving of foreigners, Grotius writes, “[T]here ought to be no doubt that such a person tacitly binds himself to do nothing against that government under which he seeks protection.”²⁹ In another section, Grotius confirms that immigration is a matter of plenary authority and foreign relations when he describes the receiving of exiles as a matter of “friendship” between nations.³⁰

Of course, Grotius did not invent the concept of plenary power over immigration or the doctrine of allegiance. They existed well prior to him. Regarding the Anglo origins, the strength of the historical evidence rests in England’s Statutes of the Realm. From the inception of the Magna Charta to the early sixteenth century, the law generally did not require much of aliens.³¹ However, in 1529, the doctrine

T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT’L L. 532, 536 (1986); Nafziger, *supra* note 9, at 810–11; Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 292–96 (2004).

28. GROTIUS, *supra* note 26, at 201–02.

29. *Id.* at 857.

30. *Id.* at 819.

31. What these laws do reveal, however, is the legal distinctions between aliens and citizens. See 14 Ric. 2, c. 1 (1390) (Eng.) (requiring every alien “of what Degree

of alien allegiance was statutorily codified. It required aliens residing in London to:

[T]ake their othe [of allegiance] and be sworne upon in the Comon Halle or metyng place of the said craftes, and there to receyve and take their othe and be sworne upon the Holy Evangelyst before the Mayster and Wardeyns of their said craft, to be faythfull and trewe to the Kyng our Sovereigne Lorde and his heires Kynges of England and to be obedyent to hym and them and his and their Lawes . . .

.³²

All aliens outside of London, while immune from taking the oath, were still bound by the doctrine of allegiance itself. Section 4 of the statute required every alien “to be faithfull and trewe to us and our heyres Kynges of England, and to be obedyent to us and them and our and their Lawes and to all Actes Ordynaunces and Decrees made and confirmed by us and our Councill or by our Councill.”³³

or Condition that he be, that bringeth any Merchandize into England, shall find sufficient Sureties before the Customers . . . to the Value of Half the said Merchandises so brought”); 14 Hen. 6, c. 7 (1435) (Eng.) (discussing the capture of the goods of alien friends); 31 Hen. 6, c. 4 (1452–53) (clarifying that the King’s courts have jurisdiction and aliens have legal recourse for injuries done at sea); 14 & 15 Hen. 8, c. 2 (1523) (allowing the search of alien businesses in London for violations of the merchant laws); 22 Hen. 8, c. 8 (1530–31) (Eng.) (codifying the rule that aliens made denizens shall pay customs, tolls, and duties as before the change in their status); 32 Hen. 8, c. 14 (1540) (Eng.) (requiring aliens to ship all goods in English ships and imposing a duty if done by foreign ships); *see also* 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 473–74 (2d ed. 1966). Holdsworth notes,

The growing commercial importance of England the need for putting some restraint upon the piratical propensity of Englishmen, and the inefficiency of the court of Admiralty, added to the Statute Book some laws directed to safeguarding the interests of alien friends An Act of 1435 was passed to regulate the thorny subject of the goods of alien friends upon enemies’ ships. The statute recited that the immunity of such goods led to fraudulent practices, and therefore allowed the captors of such ships . . . to retain such goods. An Act of 1436 was passed to regulate certain abuses of some forms of safe conduct. In 1439 alien friends were prohibited from loading their goods in an enemy’s ship under penalty of forfeiture, unless the ship had a safe conduct. It is to these statutes that we must look for the germs of that part of the law of England which is directed to the enforcement of international obligations, and the regulation of the rights of foreigners. Up till the last century it was a very meager branch of English law; and this is due to the fact that it was a branch of law which fell outside the purview of the ordinary courts.

HOLDSWORTH, *supra*, at 473–74.

32. 21 Hen. 8, c. 16, § 1 (1529) (Eng.).

33. *Id.* § 4.

In 1540, Parliament passed another statute addressing the allegiance of aliens. It was passed because an

infinite n[umber] of Straungs and aliens of foren countries and nations whiche daily doo increase and multiplie within his Graces Realme and Dominions in excessive nombres, to the greate detriment hindaunce losse and empovishment of his Graces naturall true lieges and subjects of this his Realme and to the greate decay of the same . . .³⁴

Obedience was required not only of aliens but of denizens as well. The statute stipulated that letters of denization would be granted as long as the denizen “shalbe bounde and obedient by and unto all the forsaid act . . . and estatutes of this Realme.”³⁵ Regarding all other alien classes, the statute required “ev[er]y alien and straungier borne out of the Kinges obe[di]ance, not being denizen . . . [to be] bounden by and unto the lawes and statutis of this realme.”³⁶

Throughout this period, the sovereign possessed virtually unchecked plenary power over foreigners and foreign trade.³⁷ William Holdsworth describes the development of the plenary power of that era as follows:

As the controller of foreign affairs [the crown] had by virtue of the prerogative and by statute powers to enforce any treaties which it pleased to make; and these treaties often dealt with the conditions under which foreign trade could be carried on. . . . [M]edieval statutes recognized that a large discretion must be left to the crown in these matters. It was an idea which came naturally to an age which accepted the root principle of the mercantile system that all trade should be organized with a view to the maintenance of national power; and the claims made by the crown naturally grew larger as, with the rise of the

34. 32 Hen. 8, c. 16, § 1 (1540) (Eng.). According to Francis Bacon, the statute was passed because Parliament found that aliens “did eate the Englishmen out of trade, and that they entertained no Apprentizes, but of their owne Nation.” FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT 19 (1641).

35. 32 Hen. 8, c. 16, § 1 (1540) (Eng.).

36. *Id.* § 3. The plenary power to grant all privileges to aliens was vested with Parliament and the King. The statute stated, “it shalbe the Kinges moste gratiouse pleasure to graunte to any suche alyen any special liberties or privileges more or otherwise than is conteyned in the said estatutis.” *Id.* § 2.

37. 4 HOLDSWORTH, *supra* note 31, at 335.

modern state, trade rivalry tended to become simply a phase of national rivalry.³⁸

Also, at this time it was well-established that aliens were subject to rules of law which differed from the common law. Aliens could not claim the rights and liberties of the English subject, and the government was free to treat them as it pleased.³⁹ This power was exhibited in a 1557 statute during the reign of Phillip and Mary—4 & 5 P. & M., c. 6. It proclaimed that in order to ensure the sovereign had “suretie and preserva[ti]on” of the realm:

That all Frenchemen, and all and every other pson and psons . . . was under the Frenche Kinges Obeisance, not being Denizens, (other then suche as the King and Quenes Highnes...speciallye licence limit and appointe to remaine within this Realme,) shall departe out of this Realme and out and from the Dominions and Territories of the same, ther to remaine and continue without returne into this Realme, during the time and continuance of the Warres . . .

.40

The statute is significant because it was the first to exclude aliens based upon their nationality. It did, however, provide an exception to “suche Aliens and Strangers” whom the sovereign “shall licence to remain and tarrie in this Realme.”⁴¹ Similar to past precedent, aliens were required to be bound by the doctrine of allegiance.⁴²

Although the legal premise of 4 & 5 P. & M., c. 6 was exclusion based upon nationality, its underlying purpose was the exclusion of dangerous Catholics.⁴³ Therefore, French nationals were being excluded on two grounds—as alien enemies and for their ideological religious beliefs. Of course, the exclusion of alien enemies was common practice.

38. *Id.* at 336.

39. *Id.* at 335.

40. 4 & 5 P. & M., c. 6, § 1 (1557–58) (Eng.).

41. *Id.* § 2.

42. *Id.*; *see also* 32 Hen. 8, c. 16, § 1 (1540) (Eng.); 21 Hen. 8, c. 16, § 1 (1529) (Eng.) (stating that aliens should swear allegiance to the king).

43. *See* BACON, *supra* note 34, at 20–21 (discussing the long standing fear that Catholic France sought to subdue Protestant England).

The statutes of the realm distinguished between alien friends and alien enemies on a regular basis.⁴⁴

Expulsion based upon ideological grounds, however, had never been statutorily codified. Certainly, the government could expel or exclude individuals that it deemed dangerous. To expel an entire class of persons because their ideological beliefs were deemed dangerous to the nation, however, first came to legal prominence with 4 & 5 P. & M., c. 6. It would be the basis of future exclusions, expulsions, and rules of naturalization. For instance, in the early seventeenth century, when the fear of Catholic plots to overthrow the government was heightened, Parliament restricted naturalization to individuals who “have received the Sacrament of the Lordes Supper wthin one Moneth next before any Bill exhibited for that Purpose; and also shall take the Oath of Supremacy and the Oath of Allegiance in the Parliament Howse.”⁴⁵ In other words, not only did naturalizing foreigners have to take an oath of allegiance but they also had to be of the Protestant faith.

The entire basis of England’s early immigration and naturalization laws were intertwined with the doctrine of allegiance. When the King’s Bench decided *Calvin’s Case* it was determined that the “bond of allegiance,” said Lord Ellesmere, “of which we dispute is *vinculum fidei*; it bindeth the soul and conscience of every subject severally and respectively, to be faithful and obedient to the king.”⁴⁶ The effect that the doctrine of allegiance had on aliens was that it prescribed the legal structure by which they were naturalized and permitted to reside in the realm.⁴⁷ As Holdsworth observes, the entire development of immigration

44. 2 HOLDSWORTH, *supra* note 31, at 474; *see also* 14 Hen. 6, c. 7 (1435) (Eng.); 31 Hen. 6, c. 4 (1452–53) (Eng.); 22 Hen. 8, c. 8 (1530–31) (Eng.).

45. 7 Jac. 1, c. 2 (1609–10) (Eng.).

46. 9 HOLDSWORTH, *supra* note 31, at 82. Edward Coke described *Calvin’s Case* as follows:

And all Aliens that are within the Realm of England, and whose Sovereigns are in amity with the king of England, are within the protection of the king, and do owe a local obedience to the king, (are *homes* within this act) and if they commit High Treason against the king, they shall be punished as Traytors; but otherwise it is of an Enemy, whereof you may read at large

3 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 4 (4th ed. 1669).

47. 9 HOLDSWORTH, *supra* note 31, at 83.

law was “centered round the doctrine of allegiance, and of the rules which defined the position of the alien friend.”⁴⁸

Returning to *Calvin’s Case*, the King’s Bench addressed the doctrine of allegiance concerning the rights of aliens. The case presented the challenging of an alien juror because he was born out of the king’s allegiance. It did not matter that the alien had lived his entire life in England and had sworn allegiance to the king, for it was determined, “an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject.”⁴⁹

The development of the doctrine of allegiance in immigration matters would reach its height during the seventeenth century. In 1641, Francis Bacon stated that the “privilege of *Naturalization*, followeth *Allegeance*, and that *allegeance* followeth the *Kingdome*.”⁵⁰ Citing Sir Thomas Littleton’s 1481 treatise *On Tenures*,⁵¹ Bacon defined an alien as a person “which is born out of the allegiance of our *Lord the King*.”⁵² There were two degrees of aliens—alien friends and alien enemies. An alien friend was defined as a person “borne under the obeisance of such a *King* or *State*, as is confederate with the *King of England*, or at least not in war with him.”⁵³ However, even an alien friend “may be an *Enemy*,” therefore to this “person the Law allotteth . . . [a] benefit” that is “transitory.”⁵⁴

During the seventeenth century, differentiating between subjects and aliens, strangers, or denizens remained a

48. *Id.* at 72.

49. *Id.* at 92.

50. BACON, *supra* note 34, at 15. There was debate as to whether an alien’s allegiance was due to the sovereign, to Parliament, or to the kingdom itself. Bacon describes this debate, writing:

[F]or some said that allegeance hath respect to the Law, some to the Crowne, some to the Kingdome, some to the body politique of the King, so there is confusion of tongues amongst them, as it commonly commeth to passe in opinions, that have their foundations in subtilty, and imagination of mans wit, and not in the ground of nature.

Id. at 16.

51. For a modern copy, see LITTLETON’S TENURES IN ENGLISH (Eugene Wambaugh ed., 1908).

52. BACON, *supra* note 34, at 37.

53. *Id.* at 11.

54. *Id.* at 11–12.

prominent practice. The legality of this differentiation rested with allegiance. For instance, the *Acts of the Interregnum* reveal that “every Alien and Stranger born out of the Kings obeysance, as well as Denizens” had to pay “a proportion double” to subjects.⁵⁵ Allegiance, however, was not limited to taxes. It also appeared in an ordinance restricting aliens from inhabiting the counties of Norfolk, Suffolk, Essex, Cambridge, Hertford, and Huntington. The ordinance stipulated “that no stranger shall come in, or inhabit within the town of Cambridge or the Isle of Ely, without approbation . . . upon certificate of his or their good affections to the King and Parliament, and also that they bring [this] certificate under four[] Deputy-Lieutenants hands.”⁵⁶

The doctrine of allegiance also appeared in Interregnum ordinances concerning trade and commerce. In a 1644 ordinance, it was stated that in order for “Forreigners, and Strangers” to receive “incouragement for Trade, and commerce within the City of London and other Ports” they must “keep their fidelity to the King and Parliament” and pay the “customes and discharg[e] such duties as are due and accustomed.”⁵⁷ Coupled with the doctrine of allegiance, England’s entire immigration policy centered on the benefits that encouraging foreigners could afford trade, commerce, and wealth. The general philosophy was that foreigners would bring their commerce and individual wealth into England, thereby increasing the overall riches of the kingdom. Statutes that supported immigration were enacted in order to encourage trade. As Holdsworth has rightfully observed, aliens received statutory rights and privileges because “law which denies any rights to aliens will discourage trade.”⁵⁸

Individuals like Daniel Defoe supported immigration because of this very point. He thought the “Wealth and Trade of England would be greatly increased” by a general

55. For examples, see ACTS AND ORDINANCES OF THE INTERREGNUM, 1642–1660, at 85–100, 531–53 (1911).

56. *Id.* at 242–45.

57. *Id.* at 498–501.

58. 9 HOLDSWORTH, *supra* note 31, at 94.

naturalization of foreigners.⁵⁹ He viewed an increase of foreigners as raising the landed gentries' rent profits, providing "a greater consumption of the Native Product[s]," and bringing an increase of tax revenue.⁶⁰ Not to mention, Defoe saw an influx of foreigners as contributing to the security of the nation as well. The more foreigners that were naturalized increased the pool of men from which the government could impress into service.⁶¹ Meanwhile, in his 1693 tract entitled *A New Discourse of Trade*, Josiah Child also supported immigration because it would "tend to the advancement of Trade, and [i]ncrease . . . the value of the Lands of this Kingdom."⁶² Childs was cognizant of the criticism that foreigners came to England poor and destitute. He defended against such arguments, stating that "many [foreigners] have brought hither very good Estates, and hundreds more would do the like, and settle here for their Lives . . . if they had the same Freedom and Security here as they have in *Holland* and *Italy*."⁶³

Of course, not everyone viewed the admission of aliens, foreigners, and strangers as beneficial to trade. This is evidenced by a dozen instances of refusal by Parliament to pass a general immigration or naturalization bill from the Restoration to the early eighteenth century.⁶⁴ A short 1662 tract entitled *Reasons Against the General Naturalization of Aliens* argued that the wealth and prosperity of England would be disadvantaged should Parliament pass a new naturalization act.⁶⁵ The anonymous author felt that

59. DANIEL DEFOE, SOME SEASONABLE QUERIES, ON THE THIRD HEAD, VIZ. A GENERAL NATURALIZATION 1 (1697) [hereinafter DEFOE, SOME SEASONABLE QUERIES]. For a brief survey of Daniel Defoe's political and economic writings supporting immigration, see Daniel Statt, *Daniel Defoe and Immigration*, 24 EIGHTEENTH-CENTURY STUDIES 293, 293–313 (1991). See also DANIEL DEFOE, GIVING ALMS NO CHARITY (1704); DANIEL DEFOE, LEX TALIONIS, OR, AN ENQUIRY INTO THE MOST PROPER WAYS TO PREVENT THE PERSECUTION OF THE PROTESTANTS IN FRANCE (1698).

60. DEFOE, SOME SEASONABLE QUERIES, *supra* note 59, at 1, 2.

61. *Id.*

62. JOSIAH CHILD, A NEW DISCOURSE OF TRADE, WHEREIN IS RECOMMENDED SEVERAL WEIGHTY POINTS RELATING TO THE COMPANIES OF MERCHANTS 122 (1693).

63. *Id.* at 125. For other support, see AN HUMBLE ADDRESS WITH SOME PROPOSALS FOR THE FUTURE PREVENTING OF THE DECREASE OF THE INHABITANTS OF THIS REALM (1677); THE GRAND CONCERN OF ENGLAND EXPLAINED (1673).

64. See Statt, *supra* note 59, at 295; Daniel Statt, *The City of London and the Controversy Over Immigration, 1660–1772*, 33 HIST. J. 45, 45–61 (1990).

65. REASONS AGAINST THE GENERAL NATURALIZATION OF ALIENS 1 (1662).

“advancing aliens” would “impoverish[] the Native Subjects.”⁶⁶ English merchants would sustain losses in their exports, and the England’s markets would be flooded with merchandise thereby causing local merchants to lose valuable profits.⁶⁷

Other seventeenth-century political tracts made similar observations. The 1680 *The History of Naturalization* stated, “*Aliens* [are] ruinous to *English Trade* and [the] *English Merchant*” for “the *English Merchants* had many *Forei[g]n Commissions* very advantageous to them, which these *Aliens* now enjoy.”⁶⁸ A 1690 tract entitled *A Brief and Summary Narrative of the Mischiefs and Inconveniencies . . . Occassioned by Naturalizing of Aliens* argued that the aliens had caused the rise of imports to the point that “this Nation cannot consume all the Commodities Imported, which will occasion the price to fall.”⁶⁹ A 1694 publication of Sir John Knight’s speech against naturalization quoted him as stating that immigration hurts English manufactures because aliens drive down domestic wages, thus preventing poor Englishmen from “support[ing] their Families by their honest and painful Labour and Industry.”⁷⁰ Knight was for “send[ing] the Foreigners back” because “then the Money will be found circulating at Home, in such *Englishmens Hands*.”⁷¹

In addition to the argument that foreigners had a negative impact on commerce and trade, it was frequently asserted that foreigners should not be naturalized or permitted to settle due to allegiance conflicts between one’s nation of

66. *Id.*

67. *Id.*

68. THE HISTORY OF NATURALIZATION WITH SOME REMARQUES UPON THE EFFECTS THEREOF, IN RESPECT TO THE RELIGION, TRADE AND SAFETY OF HIS MAJESTIES DOMINIONS 2 (1680).

69. A BRIEF AND SUMMARY NARRATIVE OF THE MANY MISCHIEFS AND INCONVENIENCES IN FORMER TIMES AS WELL AS OF LATE YEARS, OCCASSIONED BY THE NATURALIZING OF ALIENS 1 (1690).

70. THE SPEECH OF SIR JOHN KNIGHT OF BRISTOL, AGAINST THE BILL FOR A GENERAL NATURALIZATION IN 1693, at 8 (1694). For other seventeenth century tracts on aliens, see SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS: WHEREBY THE ALLEGED ADVANTAGES THEREBY ARE CONFUTED, AND THE CONTRARY MISCHIEFS THEREOF ARE DETECTED AND DISCOVERED (1695), and A SUPPLEMENT TO SUNDRY REASONS AGAINST A GENERAL NATURALIZATION OF ALIENS (1696).

71. THE SPEECH OF SIR JOHN KNIGHT, *supra* note 70, at 5.

origin and England. For example, in the 1695 tract *Sundry Considerations Touching Naturalization of Aliens*, it was argued that the “Safety of States and Kingdomes is of too great” importance “to practice experiments” of immigration and naturalization.⁷² The tract queried, “What if Wars should arise between this Kingdom, and those Kingdoms from which the great resort of Aliens should come?”⁷³ The answer was “can any man reasonably think that they would not have respect to their Native Countries . . . or can we think they should wholly be distinct of their Allegiance [I]f not, then we have so many Enemies Incorporated to us, who may quickly . . . ruin our Peace and Kingdom.”⁷⁴

In the tract *The History of Naturalization*, it was argued that merchant aliens were “dangerous to the Government” because they “will not have their Affections changed, nor their Alliances extinguished by Naturalization.”⁷⁵ The tract elaborated on this point, stating foreigners, “like Summer Birds when they have filled their Pockets, or if trouble or War arise, they will not forget their Fathers Land” which will be to the “great inconvenience to His Majesty and His *Natural-born Subjects*.”⁷⁶

Even Daniel Defoe, who supported naturalization and immigration on commercial grounds,⁷⁷ referenced the significance of the doctrine of allegiance in admitting foreigners that supported the ideological beliefs of that nation. Defoe was not for encouraging all foreigners, but only “*Foreign Protestants*,” especially those who “hazarded their Lives to save our Liberties” during the 1688–1689 Glorious Revolution.⁷⁸ He rationalized that the “strength of England augmented by such a considerable Accession of zealous Protestants” would “be obliged to defend our Rights and Liberties, as their own.”⁷⁹

72. SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS, *supra* note 70, at 14.

73. *Id.* at 7.

74. *Id.*

75. THE HISTORY OF NATURALIZATION, *supra* note 68, at 2.

76. *Id.* at 3.

77. Statt, *supra* note 59, at 297–304.

78. DEFOE, SOME SEASONABLE QUERIES, *supra* note 59, at 3.

79. *Id.*

To truly understand seventeenth-century England, it should be emphasized that the Protestant religion was the ideological identity of English society. It was intimately intertwined with the lives, liberties, and property of English subjects. In other words, it was the basis of government itself. Similar to how today's Americans view the identity of the United States as being intertwined with the ideologies of democracy, individual freedom, and federalism, English subjects in the seventeenth and eighteenth centuries intertwined their ideological identity with the Protestant religion. This is significant because the history of seventeenth- and eighteenth-century England shows that the political branches saw it as their duty to protect that identity from foreigners whose ideals may conflict with its own. In short, it was within the power of the political branches of government to exclude or expel noncitizens whose ideological beliefs conflicted with the basis of English society.

In the late-seventeenth century, exclusion based on the grounds of ideological conflict may have been at its peak. In one political tract, it was argued that the increase of non-Protestant foreigners caused "Divisions in Religion."⁸⁰ It was important that the identity of the nation, the "Protestant Religion," be "kept pure and undefiled."⁸¹ Meanwhile, in another political tract it was argued that mingling "Men of all Religions" in government, society, and employments would be a "hazard and destruction not only of the Protestants, but of the Christian Religion it self."⁸²

Certainly not everyone agreed with the premise of ideological exclusion or requiring foreigners to take the Protestant sacrament. In the 1697 tract entitled *An Essay Concerning the Powers of the Magistrates and the Rights of Mankind in Matters of Religion*, Matthew Tindal saw such restrictions as tending to "discourage the Loyalty and Affection" of foreigners and impacting commerce.⁸³ What is

80. A BRIEF AND SUMMARY NARRATIVE OF THE MANY MISCHIEFS, *supra* note 69, at 1.

81. *Id.*

82. SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS, *supra* note 70, at 11.

83. MATTHEW TINDAL, AN ESSAY CONCERNING THE POWER OF THE MAGISTRATE, AND THE RIGHTS OF MANKIND IN THE MATTERS OF RELIGION 169, 169–76 (1697).

significant from Tindal's dissenting voice, however, is that ideological exclusions did exist and were in practice.

B. The Immigration Experiment of Queen Anne, 1709–1711

After the Restoration in 1660, only a few immigrants were naturalized, granted letters of denization, or were permitted to establish settlement in England.⁸⁴ However, in 1709, a Whig-dominated Parliament sought to promote immigration in the hopes of repopulating England and increasing commerce.⁸⁵ Following the advice of such economists as Josiah Child, Josiah Tucker, and John Houghton, it was believed that immigrants would be the answer to England's economic woes.⁸⁶ Thus, Parliament and Queen Anne put into force 7 Anne c. 5, which echoed this purpose and stated:

Whereas the Increase of People is a Means of advancing the Wealth and Strength of a Nation And whereas many Strangers of the Protestant or Reformed Religion out of a due Consideration of the happy Constitution of Government of this Realm would be induced to transport themselves and their Estates into this Kingdom if they might be made Partakers of the Advantages and Privileges which the natural born Subjects thereof do enjoy. . . .⁸⁷

Although the bill was welcomed to promote commerce,⁸⁸ it came with an ideological condition. In Parliament, Mr. Compton would only support the bill “should there be a clause interested in it for obliging foreigners, as should be willing to enjoy the benefit of it, to receive the sacrament.”⁸⁹ Thus, the requirement that naturalized foreigners receive “the Sacrament of the Lords Supper in some Protestant or reformed Congregation within this Kingdom of Great Britain” was placed within the bill.⁹⁰ In addition to the

84. Statt, *supra* note 64, at 46.

85. *Id.* at 47–48.

86. *Id.* at 48.

87. 7 Anne c. 5, § 1 (1708) (Eng.).

88. The economic influences in passing the bill cannot be stressed enough. The City of London supported the bill because it was believed Protestant refugees would bring two million sterling and their estates which could be inherited and transferred to England. See 6 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 782–83 (1810).

89. *Id.* at 780.

90. 7 Anne c. 5, § 2 (1708) (Eng.).

Protestant-ideological requirement, foreigners were required to take the oath of allegiance, given the concern that even foreign Protestants “owe allegiance to their respective princes, and retain a fondness for their native countries.”⁹¹

Despite these restrictions, 7 Anne c. 5 never achieved its objective of “advancing the Wealth and Strength of a Nation” and its provisions were short lived.⁹² Instead of attracting wealthy foreign Protestants, it attracted an estimated 10,000 poor Palatines. These Palatines had to be supported by government grants and private charity, thereby financially burdening the nation. Furthermore, the influx of poor foreigners caused friction between poor English natives and their foreign counterparts.⁹³ This explains why the 1711 repeal of the statute, 10 Anne, c. 9, stated: “[W]hereas divers Mischiefs and Inconveniencies have been found by Experience to follow from the same to the Discouragement of the natural born Subjects of this Kingdom and to the Detriment of the Trade and Wealth there of”⁹⁴

The House of Commons displayed similar feelings when it considered passing 10 Anne, c. 9. It was stated:

That the inviting and bringing over into this kingdom the poor Palatines, of all religions, at the public expence, was an extravagant and unreasonable charge to the kingdom, and a scandalous misapplication of the public money, tending to increase and oppression of the poor of this kingdom, and of dangerous consequence to the constitution in church and state.⁹⁵

C. The French Revolution, Ideological Exclusions, and the Precursor to the Alien and Sedition Acts

91. 6 COBBETT, *supra* note 88, at 780.

92. 10 Anne, c. 9 (1711) (Eng.).

93. H.T. Dickinson, *The Poor Palatines and the Parties*, 82 ENG. HIST. REV. 464, 474 (1967). Much of friction probably rested with financial assistance the foreigners were receiving. For instance, Queen Anne had employed several hundred to build a canal and tend to the royal gardens. *Id.* at 476. In addition to this, the ministry offered any parish a bounty of £5 for every Palatine received. Most parishes responded that they already had to deal with their own poor inhabitants and could not take on others. *Id.*

94. 10 Anne, c. 9 (1711) (Eng.).

95. 6 COBBETT, *supra* note 88, at 1000.

In 1793, Parliament passed an alien bill to protect England from the ideological beliefs of the French Revolution.⁹⁶ What is particularly interesting about the alien bill is that it may have been a legislative model for the 1798 Alien and Sedition Acts, for the justifications were based upon the same principles—allegiance and the right of self-preservation. As noted above, commentator James A. R. Nafziger has argued that before the nineteenth century “there was little, in principle, to support the absolute exclusion of aliens.”⁹⁷ Meanwhile, other commentators place this same assertion in a First Amendment paradigm by arguing that expulsion or exclusion cannot be based on ideological grounds.⁹⁸ These assumptions, however, are based on a minute examination of Anglo-American history and law.

The legal sources of the period up to 1792 all attest to the legality of plenary power doctrine, ideological exclusions, and the doctrine of allegiance. William Holdsworth provides the best legal summary leading up to 1793, writing:

As we might expect, this wide prerogative of controlling the movements of aliens was exercised in the sixteenth century. Its existence was not questioned either then, or in the course of the constitutional controversies of the first half of the seventeenth century. In these circumstances there can be no doubt that Jeffreys, C.J., was warranted in saying in 1684, “I conceive the King had an absolute power to forbid foreigners whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants, strangers, to come in, at all ages, and at his pleasure commanded them out again.” In 1705 Northey, the attorney-general, said that the Crown had power to exclude aliens; in 1771 the secretary of state directed that no Jews should be allowed to enter England except under certain conditions. Blackstone said that aliens “were liable to be sent home whenever the King sees occasion”; . . . during the greater

96. E.S. Roscoe, *Aliens in Great Britain*, 16 TRANSACTIONS OF THE GROTIUS SOC'Y 65, 66 (1930).

97. Nafziger, *supra* note 9, at 809.

98. See *supra* note 4. These commentators and scholars have argued that the Bill of Rights limits the federal government's power to exclude or expel aliens.

part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative either to exclude or to expel aliens; and, when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were got. In the third place, these statutes were passed to exclude aliens who, it was thought, might spread in England the ideas of the French Revolution. . . . [S]ince 1793, if the government wished to exclude aliens, it has had recourse to the Legislature. It is clear that, whether or not the Crown had power to exclude, this power is in effect superseded by the statutes which now regulate that power. In the second place, whether or not the King has the power to exclude, the alien excluded cannot, by taking legal proceedings, assert a right to enter the country. He is not a British subject, and he is not an alien resident in this country. Therefore any measures taken by the Crown to exclude him cannot give rise to any proceedings in an English Court because they are acts of state. . . . The better opinion would seem to be that the Crown has no general power to expel an alien; but that it may have a power to expel if an alien enters the country in contravention of a statute, or perhaps of a royal prohibition to enter, or if the Crown has this power by the law of a particular colony.⁹⁹

In summation, Holdsworth was stating that the authority of the English government over immigration matters was unquestionably plenary despite liberty charters such as the Magna Charta, 1689 Declaration of Rights, and the Act of Settlement. The only major debate over immigration matters concerned whether Parliament or the Crown had the absolute authority to exclude or expel aliens. What Holdsworth makes clear is that by 1793 the power over immigration had a concurrent structure. While this distribution of power is significant in determining the legality of an individual's exclusion or expulsion, what is of importance for this study is that the plenary power doctrine, ideological exclusion, and the doctrine of allegiance were all in full force and unquestioned.

English legal treatises of the eighteenth century illuminate this fact. For example, in John Comyns's *A Digest of the Laws of England*, the requirement that foreigners

99. 10 HOLDSWORTH, *supra* note 31, 395–98.

declare their allegiance by submitting to the laws is clarified when it states, “By the st. 32 H. 8. 16. s. 9. every alien shall be subject to the laws.”¹⁰⁰ Comyns also confirms the existence of the ideological aspects of immigration and naturalization, writing that “[b]y the st. 7 Jac. 2. no person shall be naturalized, unless he hath received the sacrament within a month before the bill exhibited, and take the oaths of supremacy and allegiance in the parliament house.”¹⁰¹ Of course, Comyns was not the only commentator to do so.

Wyndham Beawes’s *Lex Mercatoria Rediviva* also discusses the legal framework of immigration and naturalization law. Of interest is his analysis of the doctrine of allegiance as applying to Englishmen that settle in a foreign country. Beawes wrote, “If an *Englishman* shall go beyond Sea, and shall there swear Allegiance to any *foreign Prince or State*, he shall be esteemed an Alien, and shall pay the same position as they; but if he returns and lives in *England*, he shall be restored to his *Liberties*.”¹⁰² In Matthew Bacon’s *A New Abridgement of the Law*, the doctrine of allegiance is discussed in further detail. Bacon wrote:

An Alien is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance; and therefore the Policy of our Constitution has established several Laws relating to such a one; the Reasons whereof are, that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy; and that one Prince might not settle Spies in another’s Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another.¹⁰³

Even William Blackstone discussed the importance of the doctrine of allegiance and the legal requirement that all foreigners must submit to a nation’s laws as a requirement

100. 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 561 (Anthony Hammond ed., 5th ed. 1824); Comyns distinguishes between alien friends, alien enemies, and allegiance. *Id.* at 552, 560.

101. 1 COMYNS, *supra* note 100, at 555.

102. WYNDHAM BEAWES, *LEX MERCATORIA REDIVIVA: OR, THE MERCHANT’S DIRECTORY* 277 (6th ed. 1773).

103. 1 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* 76 (6th ed. 1793).

to enter or settle. He writes that allegiance “both express and implied, is the duty of all the king’s subjects” as is the case with aliens.¹⁰⁴ He defines an alien as “one who is born out of the king’s dominions, or allegiance.”¹⁰⁵ Regarding the plenary power of government over foreign affairs and immigration, Blackstone writes,

[B]y the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states to take such measures about the admission of strangers, as they think convenient. . . . Great tenderness is shown by our laws, not only to foreigners in distress . . . but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king’s protection; though liable to be sent home whenever the king sees occasion.¹⁰⁶

What Blackstone’s *Commentaries* makes abundantly clear is that immigration is a privilege, not a right. While he admits that the English statutes were generous to foreigners entering the realm, he conditions their entry and settling on “behav[ing] peaceably.”¹⁰⁷ Furthermore, Blackstone confirms that the sovereign authority has discretion to send foreigners home at any time.¹⁰⁸

Perhaps the most influential commentator on immigration law was Emer De Vattel. He was not of English origin, but Vattel’s work provides historians and legal commentators with an international context of immigration law, especially with respect to Western civilization. While his works were not translated into English until 1787, Benjamin Franklin’s correspondence proves that Vattel’s *Law of Nations* significantly impacted the legal thought of immigration law in England and the American colonies as early as 1775. In a December 9, 1775 letter to Charles Dumas, Franklin wrote,

104. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (1765).

105. *Id.* at 361.

106. *Id.* at 251–52.

107. *Id.* at 252.

108. *Id.*

I am much obliged by the kind present you have made us of your edition of *Vattel*. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly that copy which I kept (after depositing one in our own public library here, and sending the other to the college of Massachusetts's Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author.¹⁰⁹

Vattel undoubtedly influenced the late-eighteenth-century understanding of immigration and naturalization—such as who may obtain a country's rights, privileges, and immunities.¹¹⁰ First and foremost, Vattel viewed the admission of aliens as a privilege, not a right.¹¹¹ In exchange for permission to “settle and stay,” aliens were “bound to the society by their residence . . . subject to the laws of the state . . . and . . . obliged to defend it, because it grants them protection.”¹¹² These allegiances were required even though a permitted alien did “not participate in all the rights of citizens.”¹¹³ In other words, the law of nations made it clear that lawful aliens were viewed as “citizens of an inferior order, and . . . united to the society, without participating in all its advantages.”¹¹⁴

If lawful aliens were “citizens of an inferior order,” this begets the question: What rights, privileges, and immunities, if any, are granted to aliens who do not prescribe their allegiance to the laws? According to Vattel, the key to the answer rests as to whether an alien had *settled*. Aliens must first be permitted to *settle* before they may obtain the protection of the country and its laws. To accomplish this requirement, the alien must establish “a

109. BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834).

110. See generally *Prentiss v. Barton*, 19 F. Cas. 1276, 1277 (C.C.D. Va. 1819) (No. 11,284). John Marshall would even cite to Vattel when he defined “domicil of origin.” *Id.*

111. “The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country.” EMER DE VATTEL, THE LAW OF NATIONS § 213 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008).

112. *Id.*

113. *Id.*

114. *Id.*

fixed residence in any place with an intention of always staying there.”¹¹⁵ While one may view Vattel’s analysis as a broad allowance for any person to immigrate to any country in order to qualify, he makes it clear that a “man does not . . . establish his settlement . . . unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration.”¹¹⁶

In other words, eighteenth-century international precedent required aliens to inform the government of their intent to *settle*. This is a legal premise that has survived throughout the world, even today. Most importantly, it was a legal premise that Parliament would include in their 1793 Alien Bill¹¹⁷ and the American Founding Fathers would include in their first laws on naturalization.¹¹⁸ In fact, in 1822, the Committee of the Judiciary would reiterate this premise, stating that to “dispense with [the declaration of the intent to *settle*] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission” into the United States.¹¹⁹

Aliens that did not comport to a nation’s laws of *settlement*, according to Vattel, were *vagrants*—the eighteenth-century equivalent of what we refer today as “illegal” or “unlawful” aliens. They are individuals that “have no settlement.”¹²⁰ “[F]or to settle for ever in a nation,” wrote Vattel, “is to become a member of it, at least as a

115. *Id.* § 218.

116. *Id.*

117. 33 Geo. 3, c. 4 (1793) (Eng.).

118. The first law to establish a uniform rule of naturalization required the alien to show proof he resided in the United States for two years, had settled in a state where the court was located for at least one year, and to make “proof to the satisfaction of such court, that he is a person of good character, and taking the oath . . . to support the Constitution of the United States” to be “considered as a citizen of the United States.” An Act to establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103–04 (1790). The 1802 Naturalization Act similarly required aliens announce their intent to settle at least three years before the time applying to be admitted to become a citizen of the United States. An Act to establish an Uniform Rule of Naturalization, and to repeal the acts heretofore passed on the subject, ch. 28, 2 Stat. 153–54 (1802).

119. REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS TO THE RIGHTS OF CITIZENSHIP WHO RESIDED WITHIN THE UNITED STATES ONE YEAR PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (March 18, 1822).

120. VATTEL, *supra* note 111, § 219.

perpetual inhabitant, if not with all the privileges of a citizen.”¹²¹ Therefore, as Vattel makes clear, the law of nations required aliens to *settle* in order to obtain the “privileges of a citizen.” This is not to say that *vagrants* did not have any rights, privileges, or immunities.¹²² They were entitled to legal due process,¹²³ protection over their person,¹²⁴ and to maintain their personal property.¹²⁵

However, *vagrants* were not necessarily entitled to any other protections unless the law of the nation expressly grants them.¹²⁶ In reference to aliens, as a matter of law, they are only granted full protection upon legal entry or what Vattel describes as the “tacit condition, that [they] be subject to the laws.”¹²⁷ This includes laws “which have no relation to the title of citizen, or of the subject of the state”—the rules of naturalization and entry.¹²⁸ Aliens may be subjected to these extra requirements as a condition to the enjoyment of a nation’s rights and privileges because, as Vattel states, “the public safety, the rights of the nation . . . necessarily require” it.¹²⁹ In fact, aliens were not only required to submit to the laws of a nation but, Vattel writes, they “ought to assist [the nation] upon occasion, and contribute to its defence, as far as is consistent with [their] duty as [a] citizen” of the nation wherein they reside.¹³⁰ In

121. *Id.*

122. *Id.* During the 1790 debates over the rules of naturalization, James Jackson hoped to see the “title of a citizen of America as highly venerated and respected as was that of a citizen of old Rome.” Furthermore, Jackson was of the opinion, “that rather than have the common class of vagrants, paupers and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants.” 1 ANNALS OF CONG. 1114 (1790).

123. VATTEL, *supra* note 111, § 103.

124. “The state . . . cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject.” *Id.* § 108.

125. “The property of an individual does not cease to belong to him on account of his being in a foreign country; it still constitutes a part of the aggregate wealth of his nation.” *Id.* § 109.

126. These protections can be found in our federal and state constitutions or by legislation passed by Congress, the states, and localities. However, not even through the treaty power may aliens or foreigners be granted new or greater rights, privileges, and immunities than citizens of the United States.

127. VATTEL, *supra* note 111, § 101.

128. *Id.*

129. *Id.*

130. *Id.* § 105. Throughout nineteenth-century America, it was common practice that aliens were liable to do service in the militia, but this would end at the beginning of the twentieth century. See 2 JAMES KENT, COMMENTARIES ON

short, Vattel's *Law of Nations* is significant because it shows how the immigration laws were viewed in the eighteenth century. They were powers that were only limited by statute and had been traditionally bestowed with the sovereign government.¹³¹

This brings us to the 1792 Parliament debates over the Alien Bill. Upon the Bill's second reading, Lord Grenville immediately affirmed the government's plenary power over immigration and addressed the doctrine of allegiance:

The law . . . had always made a marked distinction between natural-born subjects and aliens The former owed a constant [allegiance], the latter only a local and transitory allegiance to the crown, and, on this account, the situation of both was, in the eye of the law, extremely different. It appeared to be part of the prerogative of the crown to forbid foreigners to enter or reside within the realm.¹³²

Like Grotius and Blackstone, Grenville agreed that asylum should be offered to Protestant refugees that have been expelled from their country.¹³³ However, he was sure to point out that asylum was a governmental allowance—not a right—for Grenville believed that the “safety of the state was not to be sacrificed to hospitality; and whatever was necessary to that safety, was not to be blamed.”¹³⁴ Grenville hoped to protect England from the ideological principles of the French Revolution,¹³⁵ and he was not alone. Lord

AMERICAN LAW 74 (1873). In the United States today, federal statute protects non-immigrant aliens from registering with the Selective Service. *See* 50 U.S.C. App. § 453 (2006).

131. 1 BLACKSTONE, *supra* note 104, at 362.

132. 30 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 156 (1817).

133. The Earl of Lauderdale sympathized with emigrant refugees, stating:

“The first description of emigrants mentioned by the noble lord were entitled to our utmost compassion, and even delicacy. Driven from other countries, they had come to this in hopes of being able to live in inoffensive retirement, and keep their names, their rank, and their misfortunes unknown to the world, till their native country should deem it safe to receive them.”

Id. at 159.

134. *Id.* at 157.

135. *Id.* at 158 (stating “that when anarchy was substituted in the room of government in France, some men of the most abominable principles, had, in different parts of that country, worked themselves into situations of power. . . .

Stormont described the Alien Bill as a “measure of self-defence.”¹³⁶ Secretary Dundas was concerned that an “influx of foriengers [that] had come from a country which had lately been the scene of very extraordinary transactions; where their constitution had been overthrown, and acts of the most dreadful enormity had been perpetrated”¹³⁷ were dangerous and considered the Bill “necessary to the safety of the state.”¹³⁸ Meanwhile, Edmund Burke gave his “most cordial support” for the Bill because it is “calculated to keep out of England those murderous atheists, who would pull down church and state; religion and God; morality and happiness.”¹³⁹

What is interesting about Burke’s speech concerning the Alien Bill is his reference to immigration and naturalization being a matter foreign policy. He believed that the “reciprocity of good dispositions between the people of two nations . . . was a serious fact[or] which deserved to be attended to” in considering the Alien Bill.¹⁴⁰ Burke, however, was not the first to make this argument. The 1695 tract entitled *Sundry Considerations Touching Upon the Naturalization of Aliens* had argued against inviting foreigners because of lack of reciprocity between nations. It stated, “We have never have the advantage to invite the English into the Foreign Parts of *Europe* or *Asia*, as they will have to invite them hither.”¹⁴¹

Of course, not everyone agreed with the Alien Bill. The Earl of Wycombe preferred extending the “benefits of our constitution” rather than restricting them.¹⁴² He saw “no ground for any alarm from disaffection to the constitution.”¹⁴³ Meanwhile, Mr. Taylor was concerned whether the expulsion and exclusion of aliens in the Bill would be extended to British subjects, thereby repealing the

People of that kind had been sent to England in the hope that they might be able to raise insurrection, and overthrow government.”).

136. *Id.* at 160.

137. *Id.* at 174.

138. *Id.* at 176.

139. *Id.* at 188.

140. *Id.* at 185.

141. SUNDY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS, *supra* note 70, at 13.

142. 30 COBBETT, *supra* note 132, at 195.

143. *Id.* at 195–96.

Habeas Corpus Act.¹⁴⁴ He was also concerned that the Bill “violated the rights of aliens” because it “entirely left them in the power of the king.”¹⁴⁵

The power of the Crown over the exclusion and expelling of aliens was always a matter of some debate, but the majority seemed to side with the Crown’s prerogative. For instance, Mr. Jenkinson cited Blackstone, stating, “that the king had an undoubted right to order any alien to depart this realm out of his own will and pleasure.”¹⁴⁶ Mr. Fox agreed, stating the “prerogative of the crown to send foreigners out of the kingdom . . . ought not to remain in doubt.”¹⁴⁷ Meanwhile, Mr. Hardinge was of the opinion that the Sovereign “had, by law, the right of sending aliens out of the kingdom for the public safety.”¹⁴⁸ And if the Sovereign did not have this power, Hardinge thought the Alien Bill even more necessary to protect the nation.¹⁴⁹

In the end, the Alien Bill passed. Mr. Fox supported the bill because he feared the “propagation of French opinions in this country.”¹⁵⁰ Mr. Hardinge viewed the bill as a “necessary evil because, without an indefinite power over aliens of all descriptions, the mischievous could never be separated from the good.”¹⁵¹ Lastly, Mr. Pitt threw in his support because he could see a scenario where Jacobins would carry out a similar overthrow of government in England.¹⁵² He viewed the Jacobin philosophy as “setting in defiance all regular authority” that has been “sanctioned by the laws of other countries.”¹⁵³ In other words, the Jacobin ideology of spreading anarchy was seen as a violation of the law of nations.¹⁵⁴

144. *Id.* at 194.

145. *Id.* at 195.

146. *Id.* at 206.

147. *Id.* at 226.

148. *Id.* at 203.

149. *Id.*

150. *Id.* at 220.

151. *Id.* at 202.

152. *Id.* at 230.

153. *Id.* at 233.

154. *Id.*

III. IMMIGRATION LAW, THE PLENARY POWER, AND EXCLUSION BASED UPON ASSOCIATION AND IDEOLOGICAL GROUNDS IN THE EARLY REPUBLIC

It is improperly assumed by contemporary legal commentators that the Founding Fathers viewed the international and Anglo tradition respecting the rights, privileges, and immunities of foreigners differently.¹⁵⁵ These commentators believe that the Bill of Rights, especially the First and Fifth Amendments respectively, restrict congressional authority to exclude or expel foreigners. Their argument rests on one important fact—that the Constitution does not expressly grant the federal government the power to regulate immigration.¹⁵⁶ While legal commentators generally do not argue that the power over immigration rests with the federal government, they believe the lack of an affirmative constitutional clause restricts immigration laws by the provisions in the Bill of Rights. A look into the historical record of the Early Republic reveals that these beliefs are unsupported, especially in regards to the First Amendment restricting ideological and association exclusions or expulsions.

The problem with these contemporary legal commentators' interpretation of the First Amendment restricting the exclusion and expulsion of foreigners is that they merely gloss over the history of the Early Republic as if it is insignificant. For instance, James A. R. Nafziger writes, "A laissez faire policy of unrestricted admissions prevailed for nearly a hundred years, with the exception of the notorious Alien and Sedition Acts of 1798."¹⁵⁷ From Nafziger's statement, one would assume that the Founding Fathers did not understand the law of nations respecting immigration, strangers, and foreigners. One may also assume that the 1798 Alien and Sedition Acts was nothing more than a

155. See Brandon E. Davis, *America's Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, 54 LOY. L. REV. 353, 354 (2004); Aubrey Glover, *Terrorism: Aliens' Freedom of Speech and Association Under Attack in the United States*, 41 DUQ. L. REV. 363, 368–69 (2003); Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1118 (1996); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 246, 306 (2004).

156. See *supra* notes 4, 19 and accompanying text.

157. Nafziger, *supra* note 9, at 835.

fleeting partisan aberration in the development of the federal government's authority to regulate immigration.¹⁵⁸ To the average reader of these recent commentaries, one would assume the Alien and Sedition Acts were nothing more than a mistake and do not have any value in understanding the scope of the federal government's immigration powers. Assumptions like these, however, are unwarranted.

A. The United States Constitution, the Law of Nations, and the Plenary Power Doctrine

It is frequently argued that the plenary power doctrine should be reexamined because the Constitution does not expressly grant the political branches plenary authority over immigration.¹⁵⁹ These arguments have little, if any, historical merit. In 1829, constitutional commentator William Rawle wrote, "Whoever visits or resides among us, comes under the knowledge that he is liable, by the law of nations, to be sent off"¹⁶⁰ should the binds of the doctrine of allegiance be violated.¹⁶¹ It was well-established by the Framers that the plenary power doctrine was derived from the law of nations and is essential to a nation's right of self-

158. Most commentators supporting the First Amendment restriction on immigration law do not even mention the Alien and Sedition Acts in passing, but those that do merely gloss over the Alien and Sedition Acts as "notorious" without examining their constitutional, philosophical, and international underpinnings. See Akram, *supra* note 4, at 756; Vandiver, *supra* note 4, at 755.

159. See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories & the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 81–82, 158–163 (2002) ("There is also little reason to believe that the Framers contemplated creating a federal immigration power."); Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 430 (2002) ("Nothing in the Constitution explicitly gives the government such [plenary] power.").

160. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 100 (1829).

161. The doctrine of allegiance was alive and well in early Republic thought, and a fact of which William Rawle took notice. See *id.* at 90–101. Moreover, in George Wythe's reported cases it makes mention of *Calvin's Case*, which was based upon the doctrine of allegiance as it respects foreigners. See GEORGE WYTHER, DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS 138–42 (1795).

preservation.¹⁶² To the contrary of contemporary legal commentators, the consensus among Early American historians is that the Constitution was adopted to correct the problems that the Articles of Confederation posed in relation to foreign policy and immigration.¹⁶³ For instance, historian Andrew C. Lenner writes that the law of nations was “an inherent attribute of sovereignty” and “constituted a vital source of federal power.”¹⁶⁴ The law of nations was significant because the Founders realized “Americans had to convince Europe that they were capable of effectively employing military force, enforcing their commercial sanctions, and keeping their promises (i.e., treaties).”¹⁶⁵

Indeed, well before the drafting of the Constitution, it is documented that the Founding Fathers were acutely aware of the tenets of international law.¹⁶⁶ In drafting the Declaration of Independence, the Founders were faced with prescribing to the law of nations in order to obtain an alliance with France.¹⁶⁷ Throughout the Revolutionary War, the Founders were forced to adopt articles of war that mirrored those of European nations.¹⁶⁸ Furthermore, the Founders were familiar with the law of nations when they

162. *Kansas v. Colorado*, 206 U.S. 46, 57 (1907) (“Self-preservation is the highest right and duty of a Nation”); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904). In *Turner*, the Court stated,

[R]ested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe

Turner, 194 U.S. at 290.

163. DANIEL GEORGE LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* 80–86 (1985); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 113–44 (1993); Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 *AMER. J. LEGAL HIST.* 254, 253–56 (1997).

164. Lenner, *supra* note 163, at 256.

165. *Id.*

166. PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* 229–335 (2008).

167. *Id.*

168. *See* PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 114–30 (2009) (discussing how the Founders had to dispense with their dissatisfaction with European rules of martial law in order to defeat the British); BARON DE STUBEN, *REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES* (Joseph Riling ed. 1966).

entered into the 1783 Treaty of Paris, which even addressed immigration matters when it distinguished between “real British subjects”¹⁶⁹ and American citizens based on the doctrine of allegiance.¹⁷⁰

By the summer of 1787, however, the members of the Constitutional Convention were aware of the failure of the existing system under the Articles of Confederation.¹⁷¹ Despite the 1783 Treaty of Paris and the Articles, England and other foreign nations were able to frustrate the United States’ diplomatic relations.¹⁷² Equally, the disparity between the laws of the respective states respecting the rights of citizenship was an influential factor in dispensing with the Articles of Confederation.¹⁷³ As early as April 1787, James Madison had written to George Washington about the importance of the federal government “fixing the terms of and forms of naturalization.”¹⁷⁴ Madison believed “it was a power that was ‘absolutely necessary’ to be placed with the federal government in order to avert the states from ‘harass[ing] each other with rival and spiteful measures’ and to prevent ‘the aggressions of interested majorities on the rights of minorities and of individuals.’”¹⁷⁵ The North Carolina Constitutional Convention supported such plenary power as important to avoid “disagreeable controversies with foreign nations” and as a “means of preserving the peace and tranquility of the Union.”¹⁷⁶ It was well known by the founding generation that the “encroachments of some states on the rights of others, and of all on those of the Confederacy, [on the rules of immigration and citizenship]

169. Treaty of Paris, U.S.-Gr. Brit., art. 5, Sept. 3, 1783.

170. James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AMER. J. LEGAL HIST. 208, 241 (1974).

171. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789–1815*, at 15 (2009).

172. ONUF & ONUF, *supra* note 163, at 94–95.

173. Kettner, *supra* note 170, at 224.

174. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 593 (Gaillard Hunt & James Scott eds., 1920).

175. Brief for Amicus Curiae Immigration Reform Law Institute in Support of Respondent at 22, *Flores-Villar v. United States*, No. 09-5801 (U.S. petition for certiorari filed Aug. 3, 2009) (quoting MADISON, *supra* note 174, at 593–94).

176. 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 19 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1907).

are incontestable proofs” of the weakness of the Articles of Confederation.¹⁷⁷

These issues were elaborated during the 1787 Constitutional Convention. Madison supported the Naturalization Clause because he viewed it as the power to “fix different periods of residence.”¹⁷⁸ However, Madison’s views were not shared by all. Many were concerned with the effect the granting of such power would have on foreigners who were already residing in the United States by the permission of the respective states.¹⁷⁹ These aliens had already established residency under the belief they would be permitted to remain and be admitted as citizens under state laws.¹⁸⁰ Roger Sherman addressed this concern, stating that “[t]he United States have not invited foreigners, nor pledged their faith that they should enjoy equal privileges with native citizens.”¹⁸¹ It was up to Congress to “make any discriminations [it] may judge requisite.”¹⁸²

James Madison agreed with this understanding of the Constitution’s Naturalization Clause. He proclaimed that the “states alone are bound” to the consequences of their former naturalization laws, not the United States.¹⁸³ This did not mean that the states would not ultimately impact the nation’s naturalization laws, for each state had stake in the Union. The states were parties to the Constitution, took part in passing legislation, and even had the power to offer amendments. More importantly, Madison felt if the states did not like the option of violating the “faith pledged to” foreigners, they could reject this provision of the

177. *Id.* at 20; see also RAWLE, *supra* note 160, at 85; ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION WITH SELECTED WRITINGS 197–98 (1999).

178. 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 176, at 398.

179. *Id.* at 412–13.

180. For instance, James Wilson was concerned that Pennsylvania had pledged to grant citizenship on two years residence. Wilson never denied the federal government would have the power to supersede this naturalization law. However, he hoped that the federal government would “maintain the faith thus pledged to her citizens of foreign birth” by appealing to the law of nations. Wilson thought to retract this promise would “deter” future foreigners from wanting to emigrate. *Id.* at 414.

181. *Id.* at 412–13.

182. *Id.* at 413.

183. *Id.*

Constitution altogether.¹⁸⁴ However, this did not happen and the Naturalization Clause was one of the least debated provisions of the Constitution.

James E. Pfander and Theresa R. Wardon paint a much different picture of the history of the Constitution, the Naturalization Clause, and the Framers' views on congressional authority over immigration. They assert that the legislative history of the United States' first naturalization laws provides that the Framers did not intend to "conceive of congressional power" that was "unbridled."¹⁸⁵ They argue that the "so-called plenary power doctrine"¹⁸⁶ is limited in that immigrants have vested rights upon lawfully settling, writing:

[T]he Framers of the Constitution and the members of Congress who applied its terms in the early years were strongly committed to norms of prospectivity, uniformity, and transparency. Congress can change the rules, on this account, but must respect the reliance interests of those who have established a residence in the United States and have complied with the rules in place at the time of their arrival.¹⁸⁷

Pfander and Wardon's argument rests on two flawed historical assumptions. First, they assume because Congress did not pass retroactive legislation concerning naturalization in the Early Republic that this forecloses Congress from passing retroactive legislation to aliens who have "established lawful residence in the United States" today.¹⁸⁸ Second, they qualify this restraint on their inaccurate reading of the word "establish" in the Naturalization Clause.¹⁸⁹ Pfander and Wardon believe that the Framers' use of the word "establish" in defining congressional power over naturalization "conveys a distinctive message of relative permanence and prospectivity" that prevents retroactive legislation.¹⁹⁰ To

184. *Id.*

185. Pfander & Wardon, *supra* note 17, at 370.

186. *Id.* at 413.

187. *Id.* at 370.

188. *Id.* at 413.

189. *Id.* at 385–93.

190. *Id.* at 388.

support this claim they urge that the Constitution's use of "establish" in the preamble and congressional power to "ordain and establish" the federal Judiciary "suggests a degree of permanence."¹⁹¹

This interpretation of congressional power over naturalization, and the plenary power doctrine altogether, does not comport with the Framers' intent in adopting the Naturalization Clause or their understanding of the law of nations. As to the former, the word "establish" was used to signify unfettered authority over naturalization and the granting of rights included in United States citizenship. Alexander Hamilton's notes from the 1787 Constitutional Convention unequivocally confirm this. Hamilton viewed congressional power over naturalization and the rules of citizenship as necessary to protect American government. He scribbled in his notes on the Convention, "The right of determining the rule of naturalization will then leave a discretion to the [federal] Legislature on this subject which will answer every purpose."¹⁹² Hamilton later confirmed congressional plenary authority over naturalization at the 1788 New York Convention.¹⁹³ In the discussion over the federal government's power to tax, Hamilton argued that the federal government's power to tax should be similar to "that of Naturalization That by Construction would give an Exclusive Right."¹⁹⁴

Hamilton's most expansive treatment concerning immigration, naturalization, and citizenship would come in 1802 under a string of numbered editorials entitled *The Examination*. They show that immigration and naturalization were issues of federal policy that could be changed at the will of the "common consent," which did not concern constitutional restraints such as prospectivity or retroactivity.¹⁹⁵ For instance, in *The Examination No. VII*, Hamilton questioned Jefferson's policy of abolishing all

191. *Id.* at 388–89.

192. 4 THE PAPERS OF ALEXANDER HAMILTON 234 (Harold C. Syrett ed., 1962).

193. 5 *id.* at 126.

194. *Id.* at 127.

195. WASHINGTON FEDERALIST (Washington, DC), January 15, 1802, at 2, col. 3; see also 25 THE PAPERS OF ALEXANDER HAMILTON 491–95 (Harold C. Syrett ed., 1977).

restrictions on naturalization and immigration.¹⁹⁶ He felt such a policy contradicted the social contract established by the Constitution and would lead to the destruction of American principles of government. He wrote:

The impolicy of admitting foreigners to an immediate and unreserved participation in the right of suffrage, or in the sovereignty of a Republic, is as much a received axiom as any thing in the science of politics, and is verified by the experience of all ages. Among other instances, it is known, that hardly any thing contributed more to the downfall of Rome, than her precipitate communication of the privileges of citizenship to the inhabitants of Italy at large.¹⁹⁷

In *The Examination No. VIII*, Hamilton again qualified that the “admission of foreigners” was a national political issue dependent upon a multitude of public policy considerations, writing:

The safety of a republic depends essentially on the energy of a common National sentiment; on a uniformity of principles and habits; on the exemption of the citizens from foreign bias, and prejudice; and on that love of country which will almost invariably be found to be closely connected with birth, education, and family.¹⁹⁸

To Hamilton, the first naturalization laws were “merely a temporary measure adopted under peculiar circumstances.”¹⁹⁹ He stressed that the “situation is now changed.”²⁰⁰ The old policy of mass immigration was beginning to “change and corrupt the national spirit,” to “divide the community and to distract our councils, by promoting in different classes, different predilections in favour of particular foreign nations,” and “compromise the

196. 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 491–95.

197. *Id.* at 494.

198. NEWPORT MERCURY (Newport, RI), January 26, 1802, at 1, col. 3; *see also* 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 495–97. For more on Hamilton’s opinion on immigration, naturalization, and the right of self-preservation, *see* THE REPUBLICAN OR ANTI-DEMOCRAT (Baltimore, MD), February 17, 1802, pg. 2 cols. 1–3 (The Examination No. IX); THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 500–06.

199. 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 195, at 497.

200. *Id.* at 496.

interests of our own country in favor of another.”²⁰¹ Hamilton was not advocating for closing off immigration or citizenship.²⁰² He was merely stating that liberal immigration and naturalization policies were proper at America’s infant stages. However, as of 1802, Hamilton knew that a revision of the naturalization laws needed to be adopted “between closing the door altogether and throwing it entirely open.”²⁰³ The laws must “enable aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit of a probability at least of their feeling a real interest in our affairs.”²⁰⁴

Just as Hamilton had expressed his opinion as to the “Exclusive Right” granted in the Naturalization Clause,²⁰⁵ James Madison similarly interpreted the clause as prescribing unfettered congressional authority over the privileges of citizenship and naturalization. According to Madison in *The Federalist* No. 42, the problem with the Articles of Confederation was not just with different rules of naturalization, which in turn granted “all the rights of citizenship.”²⁰⁶ The “inconsistent” state laws were as equally “obnoxious” concerning the “privileges of residence.”²⁰⁷ Clearly understanding the law of nations as it existed in the late-eighteenth century and how the differentiating state rules of immigration and naturalization impacted international affairs, Madison knew the United States had been fortunate in not causing an international incident.²⁰⁸ He wrote, “We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped.”²⁰⁹

Madison’s sentiments on congressional plenary authority in these areas of law can also be found in his personal

201. *Id.*

202. *See id.* at 497.

203. *Id.*

204. *Id.*

205. 5 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 192, at 126.

206. THE FEDERALIST NO. 42 (James Madison).

207. *Id.*

208. *Id.*; *see also* THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 19 (discussing the Naturalization Clause as necessary to prevent “disagreeable controversies with foreign nations.”).

209. THE FEDERALIST NO. 42 (James Madison).

papers where he defined the different “qualities of a citizen” and an alien.²¹⁰ He elaborated on some “general principles” of naturalization law, including the “established maxim that birth is a criterion of allegiance” and that place of birth “is the most certain criterion” and “is what applies in the United States.”²¹¹ What is particularly significant about Madison’s understanding of the Naturalization Clause is that he interpreted the power broadly so Congress may prescribe class distinctions concerning the rules of citizenship. For instance, during the 1794–1795 debates over a new naturalization bill, Madison supported a proposal making a “distinction” for “one class of emigrants over another, as to the length of time before they would be admitt[ed] citizens.”²¹² Madison made a similar distinction in 1819. Addressing the fact that some alien classes fostered firmer allegiance ties to the United States than other classes, he wrote: “I have been led to think it worthy of consideration whether our law of naturalization might not be so varied as to communicate the rights of Citizens by degrees, and in that way preclude the abuses committed by [different classes of aliens.]”²¹³

While Madison knew that these “restrictions would be felt it is true by meritorious individuals, of whom [he] could name some . . . this always happens in precautionary regulations for the general good.”²¹⁴ Thus, to Madison the words “establish” and “uniform” were to be interpreted broadly, not restrictively as Pfander and Wardon claim.

The early constitutional commentators were all in concurrence with this interpretation of the Naturalization Clause. St. George Tucker listed congressional power to prescribe the terms of citizenship as being “exclusively granted to the federal government.”²¹⁵ William Rawle understood the rules of naturalization under the paradigm of allegiance by conditioning residence on allegiances as

210. 12 THE PAPERS OF JAMES MADISON 179 (Robert A. Rutland ed., 1979).

211. *Id.* at 179.

212. 15 THE PAPERS OF JAMES MADISON 432 (Thomas A. Mason, Robert A. Rutland, & Jeanne K. Sisson, eds., 1985).

213. 8 THE WRITINGS OF JAMES MADISON 425 (Galliard Hunt ed., 1908).

214. *Id.*

215. TUCKER, *supra* note 177, at 129, 131.

defined by the federal government.²¹⁶ As Rawle articulated it, since naturalization is the “mode of acquiring the right” of citizenship and “is the factitious substitution of legal form for actual birth,” individuals born outside the United States owe due allegiance to rules of naturalization.²¹⁷

Justice Joseph Story similarly stated that Congress has plenary power to regulate naturalization and citizenship. He wrote that the naturalization power “must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments, which the uniform rule of the constitution was designed to remedy.”²¹⁸ He went on to write that the use of the language *establish*, which exists in the Naturalization Clause, must be given “the liberal interpretation of the clause.”²¹⁹ Story used the Congressional power to *establish* post offices and post roads as an example. The power to *establish* these, wrote Story, has been interpreted by some as merely a power to define “where post-offices shall be kept” and “designate, or point out, what roads shall be mail-roads, and the right of passage.”²²⁰ Such an interpretation, however, “has never been understood to be limited.”²²¹ Instead, he wrote that it has “constantly had to the more expanded sense of the word.”²²²

Not even the works of James Wilson, whom Pfander and Wardon cite as supporting their interpretation of the word “establish,”²²³ supports a limited interpretation of the Naturalization Clause. In one of his many lectures on the law delivered at the University of Pennsylvania, Wilson distinguished the rules concerning citizens and aliens.²²⁴ Citing to the works of Blackstone, Bacon, and Coke throughout his analysis, Wilson acknowledged that late-eighteenth-century public policy “liberally” granted aliens

216. For discussion *see* RAWLE, *supra* note 160, at 90–98.

217. *Id.* at 86. Allegiance must begin “with his residence among us” and will only be rendered “perpetual by his naturalization.” *Id.* at 94.

218. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1099 (1833).

219. *Id.* § 554.

220. *Id.* § 553.

221. *Id.* § 554.

222. *Id.*

223. Pfander & Wardon, *supra* note 17, at 389 n. 129, 391.

224. 2 COLLECTED WORKS OF JAMES WILSON 1038–52 (Kermit L. Hall & Mark David Hall eds., 2007).

the “private rights and privileges, of our country.”²²⁵ However, Wilson qualifies that only foreigners “of good character” could be admitted, “for numbers without virtue are not our object.”²²⁶

The “good character” of an individual or class of individuals is a determination that can only be made by the federal government through the uniform rules of naturalization and a determination that may retroactively change according to national interests. Pfander and Warden’s argument that Congress cannot retroactively change such rules conflicts with the entire purpose of the naturalization process—the acquiring of allegiance on the conditions prescribed by “We the people” through our representatives. As will be shown in the next section, such an attempt to limit this enumerated constitutional power would strip the federal government of its right of self-preservation and ultimately make the Necessary and Proper Clause nugatory. However, for the purposes of this section, it is worth noting that there is no substantiating evidence that the Framers sought to make each naturalization law prospective. The text, language, and conditions prescribed in the early naturalization laws were based on public policy and international considerations, not an interpretation of the Constitution.

In fact, the jurisprudence of three members of the first United States Supreme Court confirms that the founding generation was well informed of the “law of nations” concerning the rights of aliens and rules of citizenship. In 1790, Chief Justice John Jay delivered a charge to the grand jury on the importance of the “law of nations” in our constitutional jurisprudence: “We had become a nation—as such we were responsible to others for the observance of the *law of nations*; and as our national concerns were to be regulated by *national laws*, national tribunals became necessary for the interpretation and execution of them both.”²²⁷

225. *Id.* at 1051.

226. *Id.*

227. JOHN JAY, THE CHARGE OF CHIEF JUSTICE JAY TO THE GRAND JURIES OF THE EASTERN CIRCUIT 7 (1790) (emphasis added).

On November 23, 1798, Associate Justice William Cushing delivered a charge to a grand jury defending the Alien Act of 1798.²²⁸ The Act gave the Executive authority to expel any alien deemed dangerous to the public safety.²²⁹ Cushing began his charge by reminding the people that matters effecting international relations are left “to our representatives in Congress assembled” where “the constitution has lodged” such “power and discretion.”²³⁰ He further stated that the Bill of Rights was never intended to take away these powers inherent to national sovereignty, such as the removal of aliens, and that Congress had the authority “to make all necessary and proper laws for that purpose.”²³¹ Cushing elaborated on the “due process” afforded aliens until they obtain the rights of citizenship:

Can it be imagined, that the supreme authority of government . . . has no power to . . . remove aliens who belong to, and owe allegiance to a foreign state But it is suggested, that aliens cannot be touched in such case without the intervention of a jury, because it is provided in the 7th article of the amendments to the constitution . . . and in the 8th article of amendments There is no doubt but that any alien permitted to reside among us, committing any crime against the municipal laws of the country, is to be tried in the common way, by jury. But that no way touches the present case [of a nation’s power to remove aliens].²³²

Fellow Associate Justice James Iredell similarly defended the Alien Act of 1798 in a charge to a grand jury delivered in Philadelphia. Touching upon every alien’s right to residence or settlement in the United States, Iredell stated that the “law of nations undoubtedly is, when an alien goes into a foreign country, he goes under either an express or implied safe conduct.”²³³ A nation’s “liberality” concerning

228. The Honorable Judge Cushing, *A Charge Delivered to the Federal Grand Jury for the District of Virginia, on the 23d Nov. 1798: By the Honorable Judge Cushing, published by request of the Grand Jury*, THE EASTERN HERALD AND GAZETTE OF MAINE, January 21, 1799, Vol. XV.

229. Act of June 25, 1798, ch. 58, 1 Stat. 570, 571 (1798).

230. Cushing, *supra* note 230, at 1, cols. 2–3.

231. *Id.* at 2, col. 2.

232. *Id.*

233. CLAYPOOLE’S DAILY ADVERTISER (Philadelphia, PA), May 16, 1799, at 2, col. 2.

immigration was moot, for “it is always understood that the government may order away any alien whose stay is deemed incompatible with the safety of the country.”²³⁴ The same rule applied to those aliens who put their “faith in government” that they would be granted the privilege of citizenship.²³⁵ Iredell elaborated:

[T]here are certain conditions, without which no alien can ever be admitted, if he stay ever so long; and one is . . . he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. If his conduct be different, he is no object of the naturalization law at all, and consequently no implied compact was made with him Besides, any alien coming to this country must or ought to know, that this being an independent nation, it has all the rights concerning the removal of aliens which belong by the law of nations to any other; that while he remains in the country in the character of an alien, he can claim no other privilege than such as an alien is entitled to, and consequently, whatever risque he may incur in that capacity is incurred voluntarily, with the hope that in due time by his unexceptionable conduct, he may become a citizen of the United States.²³⁶

Thus, looking at the historical evidence in its entirety, it is difficult to ascertain where Pfander and Wardon gain support for their argument that the Founders adhered to “norms of prospectivity . . . on constitutional grounds” in drafting the early naturalization laws.²³⁷ If the 1790 naturalization debates reveal anything, it is the political and international nature of the issue. The politics of naturalization primarily concerned wealth and the advancement of commerce. Madison addressed this point when he described the naturalization laws as the means to “increase the wealth and strength of the community.”²³⁸

234. *Id.*

235. See Daniel G. Iles, *With a Little Help from my Friends: The Federal Government's Reliance on Cooperation from the States in Enforcing Immigration Policy*, 31 WASH. UNIV. J.L. & POL'Y 193, 201–02 (2009).

236. CLAYPOOLE'S DAILY ADVERTISER (Philadelphia, PA), May 16, 1799, at 2, cols. 3–4.

237. Pfander & Wardon, *supra* note 17, at 393.

238. 1 ANNALS OF CONG. 1150 (1790).

What the debates also reveal is that the drafters were well aware that immigration and naturalization were matters of national sovereignty and international law. Congressman Thomas Hartley addressed the international nature of the issue stating the current policy of “the old nations of Europe has drawn a line between citizens and aliens” that has existed “since the foundation of the Roman Empire.”²³⁹ Congressman John Page acknowledged the international nature of the issue, but hoped the United States would deviate by allowing a “more liberal system ought to prevail.”²⁴⁰ Theodore Sedgwick was concerned with admitting too many foreigners because they might deteriorate American republicanism.²⁴¹ Meanwhile, James Jackson viewed congressional authority over immigration and naturalization as akin to that of Parliament. Using Blackstone’s *Commentaries*, Jackson determined that the Constitution supports “progressive and probational naturalization.”²⁴²

The 1794–1795 debates do not deviate from the understanding that immigration and naturalization law were a political consideration. Naturalization, citizenship, and the privileges of residence were all legal and political issues that were based on the doctrine of allegiance.²⁴³ Such laws could always be changed and modified upon the consent of a congressional majority. For instance, a 1798 congressional committee saw no problems in recommending that the naturalization laws be amended to require a “longer residence” to obtain citizenship and establish further “precautions against the promiscuous reception and residence of aliens.”²⁴⁴ Nothing in the Committee Report can be construed as limiting the establishment of such laws on the premise of prospectivity.

A March 14, 1800 committee report illustrates this perfectly. It shows that principles of prospectivity were never intended to apply to the plenary power doctrine.

239. *Id.* at 1148.

240. *Id.*

241. *Id.* at 1117.

242. *Id.* at 1119.

243. 4 ANNALS OF CONG. 1005, 1053 (1793–95).

244. 1 AMERICAN STATE PAPERS: MISCELLANEOUS 180 (1834).

According to the report, a group of aliens sought to obtain relief by securing the “rights they would have received had they made the declaration required by” the Naturalization Act of 1795.²⁴⁵ The committee refused to interpret the naturalization laws as having a prospective affect, writing that “nothing . . . can warrant a deviation from the general rule.”²⁴⁶ The Committee thought the amendments to the naturalization laws “to be founded on fair and just principles” because the federal government has the power to make laws that are “safe or prudent . . . to repose that confidence in [aliens] which it must place in its own citizens.”²⁴⁷

Therefore, Pfander and Wardon’s interpretation of the Naturalization Clause simply cannot survive. As shown above, the Naturalization Clause was drafted to ensure that the rules of immigration and naturalization would apply uniformly in the broad and liberal sense—to prevent the states from “harass[ing] each other with rival and spiteful measures.”²⁴⁸ More importantly, it was intimately tied into the foreign affairs power and meant to prevent international incidents. As James Madison wrote to George Washington, federal “terms and forms of naturalization” were necessary to prevent the States from “violat[ing] treaties and the law of nations.”²⁴⁹ “Without this defensive power” being vested to the federal government, Madison feared that “every positive power” granted to it would be “evaded & defeated.”²⁵⁰ To be precise, parts of the Constitution were drafted to incorporate the law of nations as was understood by Congress. As historians Peter and Nicholas Onuf write, the federal Constitution was drafted so that the “American states . . . would be governed by a perfected law of nations”²⁵¹—a law of nations that was to be controlled by the plenary power of the political branches.

245. *Id.* at 208.

246. *Id.*

247. *Id.*

248. MADISON, *supra* note 174, at 593.

249. *Id.*

250. *Id.*

251. ONUF & ONUF, *supra* note 163, at 136–37.

B. *The Alien Act of 1798 and an Originalist Understanding of the Plenary Power Doctrine*

Despite frequent characterization as “notorious,”²⁵² the debates, political discourse, and print culture respecting the Alien and Sedition Acts provide great insight to the founding generation’s view of immigration law in the constructs of the Constitution and the law of nations.²⁵³ The historical evidence reveals that both Federalists and Republicans supported the Constitution as essential to America’s progression in the international sphere.²⁵⁴ Not to mention, the international legal thought of commentators such as S.F. von Puffendorf, Hugo Grotius, Emmerich de Vattel, William Blackstone, and others were prominent among the founding generation.²⁵⁵

In 1792, Edmund Randolph wrote how the Constitution did not change the “doctrine of alienage” for it “sprang” from the law of nations and is a “disability that must be born with man.”²⁵⁶ For evidence that the law of nations and the Constitution were seen as intertwined, one needs to look no further than the text of the Constitution itself. Article I, Section 8 prescribes that Congress has the power to “define” the “Offences against the Law of Nations.”²⁵⁷ However, the first Chief Justice of the Supreme Court, John Jay, would argue the law of nations applied absent this textual affirmation. In a 1793 charge to a grand jury delivered in Richmond, Virginia, Jay classified the “laws of the United States . . . under three heads or descriptions”:

252. Nafziger, *supra* note 9, at 835. See generally WOOD, *supra* note 171 (describing Alien and Sedition Acts as a justified mistake); Cleveland, *supra* note 159, at 84–98.

253. See generally LANG, *supra* note 163 (discussing the significance of the law of nations as impacting the framework and intent of the Constitution).

254. See Lenner, *supra* note 163, at 255–56.

255. *Id.* at 254, 259; see JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 188 (1978); ONUF & ONUF, *supra* note 163, at 138; Kettner, *supra* note 170, at 219; Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 406, 408 (1997). See generally THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN & SEDITION LAWS (Richmond, Davis, 1798); OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES (Washington, PA, Colerick, 1799); ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS RESPECTING THE ALIEN AND SEDITION LAWS (Richmond, 1799).

256. 27 THE PAPERS OF THOMAS JEFFERSON 826 (John Catanzariti ed., 1997).

257. U.S. CONST. art I, § 8.

- “1st. All treaties made under the authority of the United States.
 2d. The laws of nations.
 3d. The constitution and statutes of the United States.”²⁵⁸

Relying on Vattel, the “celebrated writer on the law of nations,”²⁵⁹ Jay stated the law of nations consists of “those laws by which nations are bound to regulate their conduct towards each other” and “those duties, as well as rights, which spring from the relation of nation to nation.”²⁶⁰ These laws undoubtedly included every nation’s right over aliens. Jay elaborated on this point, writing:

The respect which every nation owes to itself imposes a duty on its government to cause all its laws to be respected and obeyed; and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, than that all strangers admitted into a country are, during their residence, subject to the laws of it; and if they violate the laws, they are to be punished according to the laws . . . to maintain order and safety.²⁶¹

Although Chief Justice Jay viewed the power over aliens as an inherent right of national sovereignty through the law of nations, many eighteenth-century commentators relied on Article I, Section 8 of the Constitution. In fact, it would be this provision that was most often cited to support congressional authority to prescribe the rules of immigration in the Alien Act of 1798.²⁶² Other constitutional provisions that were used to support the constitutionality of the Alien and Sedition Acts include the Necessary and Proper Clause,²⁶³ Commerce Clause,²⁶⁴ Naturalization Clause,²⁶⁵

258. CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793, at 2, col. 1.

259. *Id.* at 2, col. 2.

260. *Id.* at 2, col. 1.

261. *Id.* at 2, col. 3.

262. See 1 AMERICAN STATE PAPERS MISCELLANEOUS 180 (1834); AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE 8 (Richmond, 1799); EVANS, *supra* note 256, at 18.

263. 8 ANNALS OF CONG. 1974 (1798); 1 AMERICAN STATE PAPERS: MISCELLANEOUS 180 (1834); COMMUNICATIONS FROM SEVERAL STATES, ON THE RESOLUTIONS OF THE LEGISLATURE OF VIRGINIA 11 (Richmond, 1800); EVANS, *supra* note 256, at 17–19.

and congressional power to provide for the common defense and general welfare.²⁶⁶ However, the most powerful argument was the right of federal government to invoke and protect its right of self-preservation.²⁶⁷ The preamble of the Constitution conveys the right of self-preservation, stating:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²⁶⁸

This sovereign right of self-preservation was universally recognized by the international legal treatises of the eighteenth century, to which the political pamphlets concerning the Alien and Sedition Acts all attest. In the pamphlet entitled *An Address to the People of Virginia, Respecting the Alien and Sedition Laws*, Thomas Evans believed in the constitutionality of the Alien Act on the grounds that it “attain[ed] the most important of all political ends, the *preservation of our national existence*.”²⁶⁹ He believed this power was properly vested with the President by the “laws of nations, which were pre-existent, and were therefore recognized as of existing obligation by the

264. 8 ANNALS OF CONG. 1974 (1798); OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 20–25.

265. 8 ANNALS OF CONG. 2020 (1798); EVANS, *supra* note 256, at 24–25; THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 441.

266. 8 ANNALS OF CONG. 1790, 1974, 1981, 1986 (1798); 1 AMERICAN STATE PAPERS MISCELLANEOUS 180, 182 (1834); REPORTS OF THE COMMITTEE IN CONGRESS TO WHOM WERE REFERRED CERTAIN MEMORIALS AND PETITIONS COMPLAINING OF THE ACTS OF CONGRESS, CONCERNING THE ALIEN AND SEDITION LAWS 3 (Richmond, Va., Nicolson, 1799); AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra* note 263 at 6–10; CHARLES LEE, DEFENCE OF THE ALIEN AND SEDITION LAWS 5–7 (Philadelphia, Fenno, 1798); THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 441; EVANS, *supra* note 256, at 28; OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 21–25.

267. This right can be traced back to Hugo Grotius and gained prominence during the 1642 English Civil War, the 1688–89 Glorious Revolution, and was used as a justification for the American Revolution. Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 26–27 (2010); *see also* 8 ANNALS OF CONG. 1984, 1986–87 (1798); EVANS, *supra* note 256, at 15; AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra* note 263, at 11; OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 6, 9, 13.

268. U.S. CONST. pmb1.

269. EVANS, *supra* note 256, at 15.

constitution.”²⁷⁰ Evans did not see anything “more dangerous to our *self-preservation* as a nation . . . than to have in the bosom of our country the materials of an hostile army.”²⁷¹

Of course, sovereignty and self-preservation were intertwined, for one could not exercise the latter without the former, and the former could not remain without the latter. This is why Charles Lee wrote, “There can be no complete sovereignty without the power of removing aliens; and the exercise of such a power is inseparably incident to the *nation*.”²⁷² Similarly, in the pamphlet entitled *Observations on the Alien & Sedition Laws of the United States*, an anonymous author defended a nation’s exercise of the right to self-preservation in reference to “Law concerning Aliens.”²⁷³ Paraphrasing Vattel, the pamphlet reads:

The sovereign may forbid the entrance of his territory, either in general to every stranger, or, in a particular case, to certain persons, or on account of certain affairs, according as he may find it most for the advantage of the state But even in countries where every stranger may enter freely, the sovereign is supposed to allow them access, only upon the tacit condition that they will be subject to the laws—to the general laws made to maintain good order, and which have no relation to the title of citizen or subject of the state. *The public safety and the rights of the nation necessarily suppose this condition*, and the stranger tacitly submits to it, as soon as he enters the country, and he cannot presume upon having access upon any other footing.²⁷⁴

Similar self-preservation arguments in favor of the Alien and Sedition Acts can be found in documents such as *An Address of the Minority of the Virginia Legislature*, which stated, “Government is instituted and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open

270. *Id.* at 16.

271. *Id.* at 19.

272. LEE, *supra* note 267, at 8–9.

273. OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES, *supra* note 256, at 9.

274. *Id.* at 10.

hostility.”²⁷⁵ The Massachusetts Legislature argued that Congress has “not only the right [of self-preservation], but [is] bound to protect [the nation] against internal as well as external foes.”²⁷⁶

The House debates of the Alien Act itself reveal more of the same. Harrison Gray Otis argued that the Constitution “might as well have never been made” if the federal government cannot exercise authority which is “necessary to its existence.”²⁷⁷ John Wilkes Kittera could not see how there was opposition to the exercise of the power to expel and exclude aliens on ideological or association grounds because the “power proposed . . . is exercised by every Government upon earth, whether despotic or democratic.”²⁷⁸ Kittera argued that if every man has the right to turn away individuals “dangerous to the peace and welfare of his family” that is was absurd to believe the federal government could not exercise similar discretion.²⁷⁹ Samuel Dana also made a self-preservation argument, stating, “There is one power . . . inherent and common in every form of Government . . . which is the power of preserving itself.”²⁸⁰ Meanwhile, William Gordon stated the power to expel and exclude foreigners for self-preservation was the “very existence of Government” itself. He knew the “sovereign power of every nation possesses it; it is a power possessed by Government to protect itself; and, in his opinion, ought now to be exercised.”²⁸¹

Perhaps the most telling analysis of the right of “self-preservation” and the constitutionality of congressional plenary authority over aliens was from a Pennsylvania judge named Alexander Addison. In his analysis on the Alien Act of 1798, he wrote that Congress may “receive [aliens], and admit them to become citizens; or may reject them, or

275. AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra* note 263, at 11.

276. REPORTS OF THE COMMITTEE IN CONGRESS, *supra* note 267, at 12.

277. 8 ANNALS OF CONG. 1987 (1798).

278. *Id.* at 2016.

279. *Id.*

280. *Id.* at 1969–70.

281. *Id.* at 1983–84.

remove them, before they become citizens.”²⁸² Addison argued that the “power over aliens is to be measured, not by internal and municipal law, but by external and national law.”²⁸³ He emphasized that congressional power over aliens is not judged by how it “affects . . . the people of the United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are.”²⁸⁴ Citing Vattel’s *Law of Nations*, Addison knew that “every government must be [the] sole judge of what is necessary to be done, for its own safety or advantage, within its own territory.”²⁸⁵ To be precise, only the law of nations bound Congress in determining whether laws respecting aliens were permissible.²⁸⁶ Addison elaborated on this point:

Nothing appears from the constitution, that can shew [sic], that the people of the United States meant to deny their own government any right, which, by the law of nations, any other sovereignty enjoys with respect to foreign nations: and the alien law affects only foreign nations. The limits of power of any government, towards its own subjects, were never meant to be applied as limits of power of that government towards the subjects of other governments. And the question, whether a government conducts itself well towards a subject of another government, is not a question of municipal, but of national law: it cannot arise between the subject of another government and the government of which he complains, but between this and his own government.²⁸⁷

282. ALEXANDER ADDISON, ON THE ALIEN ACT: A CHARGE TO THE GRAND JURIES OF THE COUNTRY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 11 (John Colerick ed., 1799).

283. ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 21 (Philadelphia, 1800).

284. *Id.*

285. ADDISON, *supra* note 282, at 2.

286. *See id.* at 3 (“[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular provisions of treaties made between the United States, and the government whose subjects or citizens the aliens severally are.”); *see also id.* at 11 (“The people of the United States therein limit the power of their government over themselves; but lay no restraint on the power of their government over aliens.”). For more on Alexander Addison and the Sedition Act, see Norman L. Rosenberg, *Alexander Addison and the Pennsylvania Origins of Federalist First-Amendment Thought*, 108 PA. MAG. HIST. & BIOGRAPHY 399 (1984).

287. ADDISON, *supra* note 283, at 26.

Addison's arguments in support of the Alien and Sedition Acts were so compelling that George Washington wrote to John Marshall that its contents were "flashed conviction as clear as the Sun in its Meridian brightness."²⁸⁸ Washington similarly wrote to his nephew, Bushrod Washington, that Addison's writings would "produce conviction on the minds" of the opposition.²⁸⁹ Lastly, Washington wrote to Addison himself of the "good example" he had set by acquainting the people with the "proper understanding" of the "Laws & principles of their Government."²⁹⁰

John Marshall agreed with Washington's sentiments and described Addison's work as "well written" and wished that "other publications on the same subject could be more generally read . . . to make some impression on the mass of the people."²⁹¹ Whether Marshall viewed the Alien Act as constitutional has been the subject of some debate.²⁹² When he was running for Congress, he was asked the questions, "Are you an advocate for the alien and sedition bills? or [sic], in the event of your election, will you use your influence to obtain a repeal of those laws?"²⁹³ Marshall replied:

I am not an advocate for the alien and sedition bills: had I been in congress when they passed, I should, unless my judgment could have been changed, certainly have opposed them. Yet, I do not think them fraught with all those mischiefs which many gentlemen ascribe to them. I should have opposed them, because I think them useless; and because they are calculated to create, unnecessarily, discontents and jealousies at a time when our very existence, as a nation, may depend on our union—I believe that these laws, had they been opposed on these principles by a man, not suspected of intending to destroy the government, or of being hostile to it, would never been

288. 3 THE PAPERS OF JOHN MARSHALL 531 (William C. Stinchcombe et al. eds., 1979).

289. 3 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES 303 (W.W. Abbot & Edward G. Lengel eds., 1999).

290. *Id.* at 407. For more on George Washington and the Alien and Sedition Acts, see Marshall Smelter, *George Washington and the Alien and Sedition Acts*, 59 AM. HIST. REV. 322 (1954).

291. 4 THE PAPERS OF JOHN MARSHALL 3 (Charles T. Cullen & Leslie Tobias eds., 1984).

292. See Kurt. T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 500–03 (2007).

293. 3 THE PAPERS OF JOHN MARSHALL, *supra* note 288, at 503.

enacted. With respect to their repeal, the effort will be made before I can become a member of congress. If it succeeds, there will be an end of the business—if it fails, I shall, on the question of renewing the effort, should I be chosen to represent the district, obey the voice of my constituents.²⁹⁴

Here, Marshall makes no reference to the Alien and Sedition Acts being unconstitutional. He simply stresses the historic fact that party politics have superseded the best interests of the Republic.²⁹⁵ However, it can be assumed that he supported the Alien Act as a proper exercise of the Constitution's Necessary and Proper Clause. The best evidence of this is Marshall's incorporation of Addison's analysis of the clause in two of his opinions—*United States v. Fisher*²⁹⁶ and *McCulloch v. Maryland*.²⁹⁷ This legal influence has been seemingly ignored by historians and legal scholars,²⁹⁸ but it is clear and convincing, for Addison was the only pre-Marshall commentator to use the phrase “choice of means” in describing the Necessary and Proper Clause.

Addison wrote that the Alien Act was constitutional, because Congress has “discretion of the choice of means, necessary or proper, for executing their powers.”²⁹⁹ He asserted that the “power over the end implies a power over the means; and a power to make laws, for carrying any power into execution.”³⁰⁰ Not only was Marshall familiar with Addison's work,³⁰¹ but in his 1805 opinion in *United States v. Fisher*, Marshall paraphrased Addison writing, “Congress must possess the choice of means, and must be

294. *Id.* at 505–06.

295. *Id.*; see also 4 THE PAPERS OF JOHN MARSHALL, *supra* note 291, at 3–4 (discussing that no matter the bill at issue, the Republicans “would have been attacked with equal virulence” and that the issue was “men who will hold power by any means rather than not hold it; & who would prefer a dissolution of the union to the continuance of an administration not of their own party.”).

296. 6 U.S. 358 (1805).

297. 17 U.S. 316 (1819).

298. Most scholars attribute the influence to Alexander Hamilton's *Arguments for the Creation of a National Bank*. See e.g., Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 769–70 (2000). There is little doubting this argument influenced Marshall in *McCulloch*, but Hamilton never used the language “choice of means.” Only Addison used this language.

299. ADDISON, *supra* note 284, at 39.

300. *Id.*

301. 3 THE PAPERS OF JOHN MARSHALL, *supra* note 288, at 505–06.

empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.”³⁰²

It should be emphasized that during the Alien Act debates, neither Federalists nor Republicans had qualms with whether the expulsion and exclusion of foreigners was constitutional. The disagreement was over where the power to expel and exclude “alien friends” rested.³⁰³ Generally, Republicans did not deny that government had a right to expel and exclude foreigners as it sees fit. The thrust of their argument rested with the belief, as Albert Gallatin stated it, that Congress “has not the power to remove alien friends, [and] it cannot be inferred” because “[n]o facts had appeared . . . which require these arbitrary means to be employed against them.”³⁰⁴

Not even James Madison, who disfavored the Alien Act, argued that the removal of aliens—friend or enemy—was unconstitutional but rather that “alien friends” were under concurrent federal and state jurisdiction.³⁰⁵ In fact, Madison was one of the strongest proponents for applying federal power over the law of nations and the doctrine of allegiance. In 1789, he wrote that “[i]t is an established maxim that birth is a criterion of allegiance.”³⁰⁶ Madison even adhered to the international principle that in order to be protected by a foreign government, “it is established that allegiance shall first be due to the whole nation.”³⁰⁷

Where Madison disagreed with the Federalists was that he thought it improper to subject alien friends to

302. *United States v. Fisher*, 6 U.S. 358, 298 (1805).

303. See TUCKER, *supra* note 256, at 10; Lenner, *supra* note 256, at 413.

304. 8 ANNALS OF CONG. 1980 (1798). Republican John Taylor viewed the right of self-preservation as being with the respective states. Lenner, *supra* note 256, at 406. Certainly, the Founding Fathers believed that the states retained the right of self-preservation within their respective borders or should the federal government usurp the sanctions of society. Charles, *supra* note 268, at 57–59. However, immigration is an issue that affected the entire Union, and the law of nations had always placed the power of admitting foreigners in the hands of the national government. The Founding Fathers understood this when they drafted the Constitution. Lenner, *supra* note 256, at 407–09.

305. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 546–60; see also Lenner, *supra* note 163, at 267 (“Republican opposition to Federalist measures, it should again be stressed, was neither doctrinaire nor opportunistic, but rooted in principled disagreements over federalism and state sovereignty.”).

306. 12 THE PAPERS OF JAMES MADISON, *supra* note 210, at 179.

307. *Id.* at 180.

“banishment by an arbitrary and unusual process, either under the one government or the other.”³⁰⁸ In other words, Madison felt that the power to expel an “alien friend” rested with the state and municipal governments respectively. It was within each state or municipal government’s due process protections to determine whether an “alien friend” was dangerous. This was essentially the entire basis of the state sovereignty argument.³⁰⁹ Throughout the debates and tracts, Republicans argued that “alien friends” suspected of being dangerous to government were entitled to a trial by jury as prescribed in the state or municipality in which the “alien friend” resided.³¹⁰

The problem with Madison and the Republicans’ argument was that a state or municipal government only had the power to expel an alien from its own jurisdiction, not from the United States. Harrison Gray Otis addressed the fallacy of the Republicans’ argument by stating that he could not see how state and municipal governments could have such power when they do not possess the authority over “peace and war, negotiations with foreign countries, the general peace and welfare of the United States . . . [and making] measures preparatory to the national defence.”³¹¹ Most importantly, for the Constitution to place such a power within the states would only displace dangerous aliens from one sub-national territory to another. Otis stated that dangerous aliens “stamped with infamy in their own country, and plotting treasons against ours, may [still] remain in some part of the . . . United States, while Congress has not the power to get rid of them until all the states concur in the same object.”³¹² Robert Goodloe Harper agreed with Otis because he did not see how the states can make such a determination, when they do not have “any

308. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 176, at 559.

309. Harrison Gray Otis correctly summed up the entire basis of the Republicans’ argument, stating, “[A]ll these objections . . . [are] founded on the right of a trial by jury.” 8 ANNALS OF CONG. 2018 (1798).

310. 8 ANNALS OF CONG. 1789–92 (1798); TUCKER, *supra* note 256, at 15, 18, 20. It is interesting that none of the Republicans argued that “alien enemies” should be afforded due process protection. In fact, St. George Tucker expressly stated that “alien enemies” do not enjoy it. TUCKER, *supra* note 256, at 18.

311. 8 ANNALS OF CONG. 1986 (1798).

312. *Id.* at 1987.

knowledge of what relates to our foreign relations, or the common defence of the Union.”³¹³

Not even the staunchest opponents of the Alien Act argued that the expulsion or exclusion of foreigners, who subscribed to the radical Jacobin ideology, violated the Constitution or the First Amendment.³¹⁴ This is especially telling, because the Alien Act and Sedition Act were often opposed together in the political tracts of the period. Repeatedly, opponents of the Sedition Act argued that it violated the protections afforded in the First Amendment,³¹⁵ and rightfully so. However, the Alien Act, which expelled and excluded foreigners on the basis of association and political ideology, was never viewed as a violation of the First Amendment. Thus, under an originalist approach, there exists a substantially stronger argument that the founding generation viewed the politics of expulsion and exclusion as unique and distinct from the First Amendment freedoms.

IV. *KLEINDIENST V. MANDEL*, THE FIRST AMENDMENT, IDEOLOGICAL EXCLUSIONS, AND THE PLENARY POWER DOCTRINE—SETTING THE RECORD STRAIGHT

Despite the well-established positions of the plenary power doctrine, in both law³¹⁶ and history, legal commentators have continued to argue that congressional

313. *Id.* at 1990.

314. James Ogilvie, one such opponent, made arguments similar to those in early eighteenth-century England pamphlets. He viewed the Alien and Sedition Acts as laws that would prevent “many unhappy & virtuous foreigners from emigrating to America and adding to our strength, and respectability, and resources.” JAMES OGILVIE, A SPEECH DELIVERED IN ESSEX COUNTY 4 (Richmond, Va., Jones & Dixon, 1798). He also viewed the laws as impeding commerce, agriculture, and the arts. *Id.* at 4.

315. See generally REPORTS OF THE COMMITTEE IN CONGRESS, *supra* note 267; TUCKER, *supra* note 256.

316. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien.”); *United States ex rel. John Turner*, 194 U.S. 279, 291 (1904) (“[It is] essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe); see also *Denmore v. Kim*, 538 U.S. 510, 521–22 (2003); *Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342, U.S. 580, 588–89 (1952); *Chuoco Tiaco v. Forbes*, 228 U.S. 549, 556–57 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

authority over immigration should be limited by the First Amendment and other constitutional provisions.³¹⁷ In making this argument, commentators often look to the Supreme Court holding in *Kliendienst v. Mandel*.³¹⁸ For instance, Susan M. Akram reads *Mandel* as inferring that the First Amendment can limit the plenary power doctrine.³¹⁹ Akram writes that “the Supreme Court would review and independently judge the validity of the Executive’s decisions concerning rights of aliens where freedom of speech and association are implicated even in cases of excludable aliens.”³²⁰ Akram asserts that the Supreme Court would do this because the *Mandel* Court rejected the government’s argument that the Attorney General’s decisions on admission should be subject to complete defeasance. Meanwhile, Hiroshi Motomura reads *Mandel* in a more limited context, stating the decision only “suggest[s] some outer limits to executive discretion that might not apply to direct congressional decisions.”³²¹

Commentators such as Vandiver and Monrad, however, read the *Mandel* decision liberally and assume too much.³²² A careful reading of *Mandel* does not even dent the chains that bind the plenary power doctrine. If anything, the decision affirms it, for the Court held the “plenary congressional power to make policies and rules for the exclusion of aliens has long been firmly established.”³²³ Furthermore, the Court’s analysis of the First Amendment was not the ground upon which the case was decided. This is supported in two portions of the majority opinion. First, the Court opened its analysis, stating, “Recognition that First Amendment rights are implicated . . . is not dispositive of our inquiry here.”³²⁴ Second, in summarizing the holding, the Court stated, “What First Amendment or other grounds may be available for attacking the exercise of discretion for

317. *See supra* notes 4, 15, 19.

318. *Mandel*, 408 U.S. at 753.

319. Akram, *supra* note 4, at 59.

320. *Id.*

321. Motomura, *supra* note 15, at 581.

322. *See* Monrad, *supra* note 4, at 867–73; Vandiver, *supra* note 4, at 765–66.

323. *Mandel*, 408 U.S. at 769–70.

324. *Id.* at 765.

which no justification whatsoever is advanced is a question we neither address nor decide in this case.”³²⁵

Despite the fact that *Mandel* affirmed the plenary power doctrine, some appellate courts have improperly applied the decision to analyze the sufficiency of immigration statutes under either the First Amendment or a modified rational basis test. It needs to be stressed that the *Mandel* Court was only reviewing whether the Executive Branch properly carried out the statutory powers granted by Congress. In particular, the question presented was whether a waiver procedure, provided in the statute, permitted the temporary admittance of a foreigner that was excluded on ideological grounds.³²⁶ In its analysis, the Court never questioned congressional authority to exclude or expel foreigners from the United States, including removal on associational or ideological grounds. In fact, the Court refused to address the issue because it was conceded by the parties that “Congress could enact a blanket prohibition against entry of all aliens falling into” a class prescribed by statute, and that “First Amendment rights could not override that decision.”³²⁷

The only manner in which the First Amendment was implicated in the *Mandel* decision was as the means by which a group of American citizens were given standing to challenge the statute in question.³²⁸ The primary plaintiff in the case was Ernest E. Mandel, a professional journalist from Belgium who described himself as a “revolutionary Marxist.”³²⁹ Mandel had been admitted to the United States twice before. However, unbeknown to Mandel, both times he was admitted in the United States it was at the Attorney General’s discretion. This admission was discretionary because the Immigration and Nationality Act of 1952 contained an ideological exclusion provision excluding aliens “who write or publish . . . [the] governmental doctrines of world communism.”³³⁰

325. *Id.* at 770.

326. *Id.* at 755, 767.

327. *Id.* at 767.

328. *Id.* at 759–65.

329. *Id.* at 756 (citing E. MANDEL, REVOLUTIONARY STRATEGY IN THE IMPERIALIST COUNTRIES (1969)).

330. *Id.* at 755–56 (citing 8 U.S.C. § 1182(G)(v) (2006)).

Given the fact that Mandel was not present within the territorial United States at the time he was refused entry, he did not have standing to bring a claim. It is here that the First Amendment was implicated in the case, for a group of university professors joined the complaint alleging violations of their freedom of speech.³³¹ To be precise, the professors alleged that by refusing Mandel's entry into the United States, the federal government had denied them the First Amendment freedom to hear Mandel's "views and engage him in a free and open academic exchange."³³² Thus, the First Amendment was not implicated as to whether an alien may be refused entry on ideological grounds but whether this exclusion violated the rights of United States citizens.

In *Mandel*, the Supreme Court, however, refused to "balance First Amendment rights against governmental regulatory interests."³³³ Many subsequent appellate courts have limited their interpretation of *Mandel* to U.S. citizens' standing to file sue. In *Abourezk v. Reagan*, the appellants had standing because they were United States citizens claiming that the exclusion of James Abourezk violated their First Amendment rights.³³⁴ The District of Columbia Court of Appeals affirmed the validity of association or ideological exclusions, stating that "[n]othing in our analysis inhibits the State Department from using a group affiliation to deny visas to members of terrorist groups, or organized crime syndicates" so long as the "organizations [are] specifically proscribed by the Act."³³⁵ The court, despite having no issue with Congress' ability to impose restraints, did have concerns regarding the Executive Branch's use of that power. The court elaborated on this point, stating:

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in

331. *Id.* at 759–60.

332. *Id.*

333. *Id.* at 765.

334. 785 F.2d 1043, 1047–49 (D.C. Cir. 1986).

335. *Id.* at 1058 n.18.

cases properly before them, to say where those statutory and constitutional boundaries lie.³³⁶

One may interpret the court's reference to "constitutional limitations" to include the Bill of Rights; however, an interpretation takes the court's decision out of context. The "constitutional limitations" on the power to admit, expel, and exclude foreigners clearly refers to the distribution of powers between the Legislative and Executive branches of government.³³⁷ In *Bustamante v. Mukasev*,³³⁸ the Court of Appeals for the Ninth Circuit conveyed a similar limited interpretation of *Mandel*, stating that the courts may only review the exclusion of an alien on First Amendment grounds when it "implicates the constitutional rights of American citizens."³³⁹ The Ninth Circuit went on to affirm that "Congress has plenary power to make policies and rules for the exclusion of aliens."³⁴⁰ However, when a "U.S. citizen raise[s] a constitutional challenge" to a foreigner's exclusion by the Executive Branch, it is within the court's power to determine whether such exclusion is "facially legitimate" under the constraints of the Executive authority granted by Congress.³⁴¹

However, not every appellate court has taken the proper limited interpretation of *Mandel*. For instance, while the First Circuit Court of Appeals accurately identified the standing requirement in *Mandel*, it improperly assumed the Supreme Court's holding was a form of First Amendment review.³⁴² The court held that, under *Mandel*, it can examine "the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien."³⁴³ The court went on to hold that First Amendment review

336. *Id.* at 1061.

337. *See* *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) (requiring Congress to choose "a constitutionally permissible means of implementing" its plenary power).

338. 531 F.3d 1059 (9th Cir. 2008).

339. *Id.* at 1061.

340. *Id.*

341. *Id.* at 1062. For other appellate courts that have interpreted *Mandel* properly, see *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 687 (6th Cir. 2002); *Gonzalez v. Reno*, 212 F.3d 1338, 1354 n.23 (11th Cir. 2000); *Garcia v. INS*, 7 F.3d 1320, 1327 (7th Cir. 1993); *Joseph v. INS*, 1993 U.S. App. LEXIS 11773 (4th Cir. 1993).

342. *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990).

343. *Id.* at 647.

required a “facially legitimate and bona fide reason” standard.³⁴⁴ Where exactly the First Circuit obtained this standard of review in *Mandel* is uncertain.

Of course, the First Circuit Court of Appeals is not the only circuit to misconstrue *Mandel* in this fashion. In *American Academy of Religion v. Napolitano*, the Second Circuit similarly held that *Mandel* permits a “limited judicial review of First Amendment claims” because the “First Amendment requires at least some judicial review of the discretionary decision of the Attorney General to waive admissibility.”³⁴⁵ These cases take *Mandel* out of context. The Supreme Court only held that the First Amendment provides citizens with the requisite Article III standing for their case to be reviewed. At no point did the *Mandel* Court state that its opinion was to be construed as a First Amendment analysis or a standard of review for immigration statutes. Instead, the Court in *Mandel* held that whatever “First Amendment or other grounds may be available for attacking [the] exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.”³⁴⁶

Another common mistake made by appellate courts in interpreting *Mandel* is the assertion that congressional immigration legislation is subject to a modified rational basis review. As shown above, in *Bustamante* the Ninth Circuit accurately applied *Mandel* in determining whether the Executive Branch properly exercised its statutory authority.³⁴⁷ However, just three years earlier in *Padilla-Padilla v. Gonzales*, the Ninth Circuit inaccurately applied *Mandel*’s “facially legitimate and bona fide reason” standard to Congress.³⁴⁸ The *Padilla-Padilla* court held that “so long as Congress legislates with ‘a facially legitimate and bona fide reason’ the courts will neither look beyond the exercise

344. *Id.* at 649. It is of note that the First Circuit had properly applied the *Mandel* standard just two years prior. See *Allende v. Schultz*, 845 F.2d 1111, 1114–16 (1st Cir. 1998).

345. *Am. Acad. Of Religion v. Napolitano*, 573 F.3d 115, 124–25 (2d Cir. 2009). It is important to note that neither *American Academy of Religion* nor *Adams* was petitioned for certiorari to the Supreme Court.

346. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

347. *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

348. 463 F.3d 972, 979 (9th Cir. 2006).

of that discretion, nor test it by balancing its justification.”³⁴⁹

Such language attempts to subvert the Supreme Court’s repeated affirmation of the plenary power doctrine and seemingly places immigration statutes under a modified rational basis test. The District of Columbia Court of Appeals took this approach in *Miller v. Christopher*, when it used the “facially legitimate and bona fide reason” test to determine whether immigration statute 8 U.S.C. § 1409 was constitutional.³⁵⁰ Acting upon its immigration power to prescribe who is a United States citizen when born outside the territorial United States, Congress drafted § 1409 to provide different standards of citizenship for children born overseas if only one of the parents was a citizen.³⁵¹ In writing its opinion, the Court of Appeals for the District of Columbia made sure to acknowledge “Congress’s plenary authority to prescribe rules for the admission and exclusion of aliens.”³⁵² However, the court improperly examined whether Congress had a “facially legitimate and bona fide reason” for adopting § 1409.³⁵³

In *Kamara v. Attorney General of the United States*, the Court of Appeals for the Third Circuit similarly applied the fictional “facially legitimate and bona fide reason” standard to determine the constitutionality of immigration statutes.³⁵⁴

349. *Id.* (quoting *Fiallo v. Bell*, 430 U.S. 787, 794–95 (1977)).

350. 96 F.3d 1467, 1470–71 (D.C. Cir. 1996). The Supreme Court granted certiorari in this case; however, it did not apply the “facially legitimate and bona fide reason” standard. *See Miller v. Albright*, 523 U.S. 420 (1998).

351. The Supreme Court has never answered this constitutional question, *see Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), but there is no evidence that the drafters of the Fourteenth Amendment intended to apply to the Equal Protection Clause to congressional plenary authority over the rules of naturalization. *See* 36 CONG. GLOBE 498 (1866) (“[W]e have a right to exclude . . . people . . . from becoming citizens, if we so choose.”); *id.* at 1266 (“I am inclined to think . . . that the word ‘naturalization’ may very properly, so far as legislative purposes are concerned, be construed in a larger and more liberal sense”); *id.* at 1832.

It is an exercise of authority which belongs to every sovereign Power, and is essentially a subject of national jurisdiction. The whole power over citizenship is intrusted to the national Government, which can make citizens of any foreign people as an exercise of sovereignty, or under the power, “to establish a uniform rule of naturalization.”

Id. at 1832.

352. *Miller*, 96 F.3d at 1470 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

353. *Id.* at 1471.

354. 420 F.3d 202, 217 (3d Cir. 2005).

Like the *Miller* court, the Third Circuit identified the significance of the plenary power doctrine,³⁵⁵ yet misapplied *Mandel* when it asserted that the Supreme Court “has applied a very lenient ‘facially legitimate and bona fide reason standard’ to constitutional challenges of immigration statutes.”³⁵⁶ Other appellate decisions have also misconstrued *Mandel* in this light,³⁵⁷ but these decisions should be ignored by future courts. As shown above, the *Mandel* decision stood for nothing more than determining whether the Executive Branch properly exercised its authority granted by Congress. Thus, to extend *Mandel*’s language to challenge the plenary power doctrine is to turn the decision on its head, for neither the Founding Fathers, the law of nations, or the Supreme Court has ever prescribed to the rule that congressional plenary authority over the admittance and settling of foreigners is restricted by the individual freedoms in the Constitution.

V. CONCLUSION

The history shows that the authority to admit, expel, and exclude foreigners is a political matter that is solely subject to the determination of the political branches as a means of self-preservation—an interpretation of the Constitution that the Supreme Court has always understood.³⁵⁸ The fact that citizens, advocacy groups, or attorneys may personally believe that certain foreigners are being denied First Amendment freedoms by being excluded on association or ideological grounds is irrelevant. It is a well-established

355. *Id.*

356. *Id.*

357. See *Leal Rodriguez v. INS*, 990 F.2d 939, 951 (7th Cir. 1993); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990); *Anetekhai v. INS*, 876 F.2d 1218, 1222 n.7 (5th Cir. 1989).

358. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“[It] is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien.”); *United States ex rel. Turner*, 194 U.S. 279, 291 (1904) (“[It is] essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”); see also *Demore v. Kim*, 538 U.S. 510, 521–22 (2003); *Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *Tiaco v. Forbes*, 228 U.S. 549, 556–77 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

tenet of the law of nations that the danger or threat foreigners pose is a determination to be made by the political branches of government based upon such factors as the doctrine of allegiance, and not by a court absent express authority through statute or treaty.³⁵⁹ As Sir Francis Bacon states, even an alien friend “may be an [*e*]nemy,” therefore to this “person the [l]aw allotteth . . . [a] benefit” that is “transitory” at the discretion of the sovereign government.³⁶⁰

Under *Mandel*, there is no denying that the courts may review the statutory authority that Congress grants the Executive Branch in excluding foreigners on association or ideological grounds. Such review, however, has not changed the plenary power doctrine one iota, for the Supreme Court has consistently held that Congress has plenary authority to exclude or expel foreigners on any grounds.³⁶¹ Exclusion is not limited by the First Amendment’s right to freedom of religion, association, or political beliefs. Congress has the power to exclude foreigners regarding a broad range of associational and ideological grounds, including anarchism, totalitarianism, communism, and terrorism. Generally, exclusions have not been based solely on a religious faith. This may change, however, for the twenty-first century has seen an expansion of politically active religious sects whose ideological purposes include the overthrow of democracy. Whether such religious exclusions will occur is unknown, but what is certain is that the plenary power doctrine has no bounds in order to achieve the congressional authority of self-preservation.

359. See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 67 (2001) (requiring that when determining an individual’s “ties and allegiances, it is for Congress, not this Court, to make that determination”).

360. BACON, *supra* note 34, at 11–12.

361. See *supra* note 358.