

## THE IMAGINARY IMMIGRATION CLAUSE

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*For the past century, the Supreme Court has skeptically scrutinized Congress’s power to enact healthcare laws and other domestic legislation, insisting that nothing in the Constitution gives Congress a general power to “regulate an individual from cradle to grave.” Yet when Congress regulates immigrants, the Court has contradictorily assumed that Congress has “broad, undoubted power” to do whatever it thinks necessary—even though no clause of the Constitution gives Congress any specific immigration power. The Court has explained this discrepancy with reference to the Chinese Exclusion Case, an 1889 decision in which it allegedly held that Congress possesses “sovereign” power to regulate immigrants beyond Congress’s ordinary enumerated powers. Absent this imagined Immigration Clause, the Court has offered no explanation for its anomalous review of Congress’s immigration laws.*

*This Article contests this traditional reading of the Chinese Exclusion Case as well as the consequences that have followed from it. Throughout the first century of congressional and judicial resistance to Congress’s power to regulate immigration, there was a broad consensus that Congress had no freestanding power to regulate immigrants beyond its ordinary powers to regulate everyone else. Far from disrupting this consensus, the author of the Chinese Exclusion Case adhered to it before, during, and after his opinion. It was not until the mid-twentieth century that the Supreme Court retroactively misread the Chinese Exclusion Case to authorize an extraconstitutional federal immigration power. Yet these misreadings have never explained why the Court invalidates ordinary domestic legislation even as it defers to federal immigration laws.*

*In contrast with scholars and immigration advocates who have sought to apply the Court’s ordinarily skeptical scrutiny to the immigration context, we argue that this history highlights the flaws of relying on judicial review to protect disenfranchised minorities from a hostile and overzealous Congress. This review has functioned to muffle the serious legislative debate that animated the resistance to the first century of federal immigration restrictions. Rather than ask the courts to limit federal immigration laws just as they limit federal*

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*healthcare laws, we therefore argue that Congress itself should rethink whether Article I permits the expanse of its immigration laws in effect today.*

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#### INTRODUCTION

The United States is a nation of immigrants whose Constitution, ironically, doesn't mention immigration.<sup>1</sup> The document has a Commerce Clause, a Taxing Clause, and even a Post Office Clause, but nothing like an Immigration Clause.<sup>2</sup> To be sure, the authors of the Constitution anticipated that many new people would soon arrive in the country. They allowed Congress to tax or ban the importation of enslaved people and to establish rules for how new residents could become naturalized citizens.<sup>3</sup> But while the Constitution gives the federal government many powers, it doesn't give the government any specific power to regulate immigrants.<sup>4</sup>

This constitutional omission has inspired many legal controversies since 1789. Yet Supreme Court opinions over the past century have dismissed the omission as little more than a drafting error. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," the Court wrote in 2012.<sup>5</sup> The Court has considered this

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1. The United States has also been a nation of enslaved people whose Constitution originally didn't mention slavery, and a nation of Native Americans, Alaskans, and Atlantic and Pacific Islanders whose Constitution doesn't mention colonialism. These omissions are all related. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1833–34 (2019); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7 (2002); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1882–83 (2019).

2. STEPHEN H. LEGOMSKY & DAVID B. THRONSON, *IMMIGRATION AND REFUGEE LAW AND POLICY* 110 (7th ed. 2019); see Kerry Abrams, Essay, *Plenary Power Preemption*, 99 VA. L. REV. 601, 612–14 (2013); Anne B. Chandler, *Why Is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMPAR. & INT'L L. 209, 210 (2008); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 24 (1984).

3. U.S. CONST. art. I, § 8, cl. 4; *id.* art. I, § 9, cl. 1.

4. This Article uses the term "immigrant" to describe people entering or inside the United States who are not citizens of the United States. We recognize that the term often describes something different from the legal term "alien" or the neologism "noncitizen": many U.S. citizens once immigrated to the United States, and many people who are not U.S. citizens enter the United States for purposes other than immigration. But in discussing the historical development of a constitutional power primarily used to restrict immigration, "immigrant" best captures the target of that power.

5. *Arizona v. United States*, 567 U.S. 387, 394 (2012).

power so obvious, so “sovereign,” that surely the authors of the Constitution had no need to list it among Congress’s powers to tax or to naturalize people.<sup>6</sup> In fact, the Court has declared that “[o]ver no conceivable subject is the legislative power of Congress more complete.’ Thus, ‘in the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’”<sup>7</sup> With this explicit blessing, a federal government that lacks judicial approval to exercise “[a]ny police power to regulate individuals as such”<sup>8</sup> has exercised what might be termed a secret police power over immigrants. The government has given border agents unreviewable discretion to exclude long-term residents returning home from abroad; allowed immigration agents to raid schools and courthouses to arrest children without warrants; required employers and public officials to deny immigrants the right to work, to vote, or to collect the benefits paid for by their income taxes; and permitted group trials to summarily separate immigrants from their families.<sup>9</sup>

The existence of this federal power over immigrants hasn’t always been so “undoubted.” When Congress passed its first immigration law in 1798, James Madison spoke for many of the Constitution’s authors when he accused the legislature of “exercis[ing] a power no where delegated to the federal government.”<sup>10</sup> The law, one of the Alien and Sedition Acts, authorized the president to deport any “alien” suspected of being dangerous to national security.<sup>11</sup> Madison and other critics described deportation as “among the severest of punishments,” denouncing the idea that the Constitution silently gave Congress the power to deport immigrants.<sup>12</sup> “The Constitution gives to Congress no power over aliens, except that of naturalization,” they added,<sup>13</sup> describing naturalization as a power that “neither authorized Congress to prohibit the migration of foreigners to any state, nor to banish them when admitted. It was a power which at most could only authorize Congress to give or withhold the

6. See *id.* at 394–95 (“This authority rests, in part, on the National Government’s constitutional power to ‘establish [a] uniform Rule of Naturalization,’ Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.”); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248–49 (2018) (Thomas, J., dissenting) (“[T]here is some founding-era evidence that ‘the executive Power,’ Art. II, § 1, includes the power to deport aliens.”).

7. *Reno v. Flores*, 507 U.S. 292, 305–06 (1993) (internal quotations omitted) (citation omitted) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

8. *Nat’l Fed’n. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012).

9. See generally, e.g., ELIZABETH F. COHEN, *ILLEGAL* (2020); CÉSAR CUAUHTÉMOC & GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON* (2019); S. DEBORAH KANG, *THE INS ON THE LINE* (2017); ERIKA LEE, *AMERICA FOR AMERICANS* (2019); JACOB SOBOROFF, *SEPARATED* (2020).

10. James Madison, *Virginia Resolutions* (Dec. 21, 1798), in 17 *THE PAPERS OF JAMES MADISON* 185, 189 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991).

11. *Alien Friends Act*, ch. 58, 1 Stat. 570 (1798) (expired 1800).

12. James Madison, *The Report of 1800* (Jan. 7, 1800), in 17 *THE PAPERS OF JAMES MADISON*, *supra* note 10, at 303, 319.

13. 9 *ANNALS OF CONG.* 3000 (1799) (statement of Rep. Albert Gallatin).

right of citizenship.”<sup>14</sup> Madison was joined by a “mighty wave of public opinion” that sank the Alien and Sedition Acts and swept their authors out of Congress.<sup>15</sup> For the next century, many politicians and historians would recall the deportation law as “unquestionably unconstitutional.”<sup>16</sup> Congress would not attempt another immigration restriction until 1875.<sup>17</sup>

This Article tells the story of how, from this inauspicious beginning, Congress’s power over immigration grew into its modern, undoubted form. Part I describes how for over a century after the perceived excesses of 1798, when members of Congress debated immigration laws, most members conceded that Congress was limited to tasks enumerated in the Constitution.<sup>18</sup> These included the power to declare war, make treaties, naturalize citizens, protect civil rights, and, most importantly, to “regulate Commerce with foreign Nations” and make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”<sup>19</sup> Part II follows Congress as it resumed regulating immigration in the nineteenth century after its members had concluded that the power to regulate “Commerce” included the power to regulate passengers on incoming ships.<sup>20</sup> The Supreme Court ratified this conclusion in 1884, calling the first federal immigration restrictions “the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration.”<sup>21</sup>

14. *Federal Legislature*, AURORA GEN. ADVERTISER (Phila.), June 13, 1798 (statement of Sen. Henry Tazewell).

15. Letter from Thomas Jefferson to Joseph Priestley (Mar. 21, 1801), in 33 THE PAPERS OF THOMAS JEFFERSON, at 393, 394 (Barbara B. Oberg ed., 2006).

16. I H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 142 (John J. Lalor & Alfred B. Mason trans., Chicago, Callaghan & Co. 1889) (1876); see, e.g., CONG. GLOBE, 33d Cong., 2d Sess. app. at 68 (1855) (speech of Rep. L.M. Keitt).

17. See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1883 (1993) (describing immigration regulation before 1875 as primarily driven by states, bolstered by federal diplomatic and executive action).

18. This Part complements the foundational works of Mary Sarah Bilder, Sarah Cleveland, Hidetaka Hirota, Gerald Neuman, Lucy Salyer, and other scholars who have richly chronicled the evolution of public officials’ perspectives on the source of the power to regulate immigration. See, e.g., HIDETAKA HIROTA, *EXPPELLING THE POOR* (2017); CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY* (1994); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); LUCY E. SALYER, *LAW HARSH AS TIGERS* (1995); Cleveland, *supra* note 1; Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996); Neuman, *supra* note 17; 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, 31, 47 (2010). As discussed below, we part company with these trailblazers in our interpretation of the *Chinese Exclusion Case* and its long-term effect on constitutional law.

19. U.S. CONST. art. I, § 8, cl. 3, 18; *id.* art. I, § 8, cl. 11–16 (war); *id.* art. II, § 2 (treaties); *id.* art I, § 8, cl. 4 (naturalization); *id.* amend. XIV, § 5 (civil rights).

20. Bilder, *supra* note 18, at 790–824.

21. *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 595 (1884); see also *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1876) (“[T]he transportation of passengers from

The identification of immigrant passengers with foreign commerce proved to be a capacious source of regulatory power. When the Supreme Court first interpreted the Commerce Clause in 1824's *Gibbons v. Ogden*, Chief Justice Marshall wrote that it had "always been understood, [that] the sovereignty of Congress, though limited to specified objects, is plenary as to those objects."<sup>22</sup> By "limited," Marshall meant that Congress's regulatory authority extended only to the powers conferred by the Constitution. By "plenary," Marshall meant that if a subject involved commerce across state or national boundaries, then Congress's power over that subject "acknowledges no limitations, other than are prescribed in the constitution."<sup>23</sup> Marshall conceded that Congress might abuse its "plenary" authority to regulate commerce, but observed that "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, . . . the sole restraints on which [the people] have relied, to secure them from its abuse."<sup>24</sup> In other words, Marshall argued that voters participating in the political process—not the federal judiciary—should prevent undisciplined regulations of commerce.

In the decades after Congress and the Supreme Court extended this "plenary" regulatory power to the subject of immigration, the Court repeated Marshall's observation that electoral politics should be the only restraint on Congress's discretion.<sup>25</sup> This restraint proved unbridled in practice, however, as domestic white voters increasingly urged Congress to exclude immigrants who had no countervailing influence at the polls.<sup>26</sup> Nevertheless, the Court maintained that "the authority of Congress over foreign commerce and its right to control the coming of aliens into the United States" was a "complete" and "plenary power."<sup>27</sup> Most notably, in the *Chinese Exclusion Case* of 1889, the Court upheld Congress's power to exclude a Chinese immigrant despite

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European ports to those of the United States . . . has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders.").

22. 22 U.S. (9 Wheat.) 1, 197 (1824).

23. *Id.* at 196.

24. *Id.* at 197.

25. For example, in *Oceanic Steam Navigation Co. v. Stranahan*, the Court wrote that Congress's power to regulate immigration was "not open to discussion" because of "the authority of Congress over foreign commerce and its right to control the coming in of aliens into the United States, and to regulate that subject in the fullest degree." 214 U.S. 320, 334 (1909). Although this sentence leaves it ambiguous whether the Court was referring to foreign commerce and the "right to control the coming in of aliens" as one "subject" of regulation or as two separate sources of power, the Court added in the next sentence: "Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries." *Id.* (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904)).

26. See *infra* text accompanying notes 310–316.

27. *Oceanic Steam*, 214 U.S. at 334, 343.

preexisting treaties and statutes that promised to admit immigrants in his situation.<sup>28</sup> Quoting a different Marshall opinion, the Court described Congress's powers to make treaties and regulate foreign commerce as "sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."<sup>29</sup> Because the power to exclude foreigners was "an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution," the Court held that the powers could not be "granted away or restrained on behalf of any one," much less a Chinese immigrant.<sup>30</sup> Instead, "the last expression of the sovereign will must control."<sup>31</sup>

At the time it was decided, the *Chinese Exclusion Case* was regarded as a relatively unimportant decision. From the perspective of the justice who authored the opinion,<sup>32</sup> the readers who first reported on it,<sup>33</sup> and the judges who first cited it,<sup>34</sup> the decision did little more than hold that no statute or treaty could prevent Congress from exercising its enumerated powers. The Court's use of the term "sovereignty" was no different from Marshall's use of the same language to describe the Commerce Clause and other enumerated powers. Decisions in the decades that followed the *Chinese Exclusion Case* continued to locate Congress's power to regulate immigration in enumerated powers like the Commerce Clause.<sup>35</sup>

In the early twentieth century, however, as the historical context surrounding the 1889 decision was forgotten, the Supreme Court began to interpret the *Chinese Exclusion Case* differently: as a turning point in the history of Congress's immigration power. Taking the "incident of sovereignty" language out of context, the Court cited the *Chinese Exclusion Case* as if it held that "the power to expel or exclude aliens [w]as a fundamental sovereign attribute . . . largely immune from judicial control."<sup>36</sup> Even in the context of domestic legislation, where no clause in the Constitution specifically authorized

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28. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889).

29. *Id.* at 604 (referencing Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)).

30. *Id.* at 609.

31. *Id.* at 600.

32. See *Juilliard v. Greenman (The Legal Tender Case)*, 110 U.S. 421, 467 (1884) (Field, J., dissenting); *Fong Yue Ting v. United States*, 149 U.S. 698, 746–50 (1893) (Field, J., dissenting).

33. See, e.g., Recent Case, *Constitutional Law—Chinese Exclusion Act—Treaty Rights*, 3 HARV. L. REV. 136, 136 (1889).

34. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); cf. *In re Florio*, 43 F. 114, 115 (C.C.S.D.N.Y. 1890) (considering Congress's power "to regulate the admission of alien passengers coming to this country" without reference to the *Chinese Exclusion Case*).

35. See, e.g., *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340 (1909).

36. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (citing *The Chinese Exclusion Case*, 130 U.S. at 581); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems

Congress to regulate immigrants, the Court imagined an Immigration Clause that gave Congress “power to order at any time the deportation of aliens whose presence in the country it deems hurtful.”<sup>37</sup> By the 1970s, Congress routinely regulated immigrants in a manner untethered to any constitutional power. For the Supreme Court, it became an uncontested premise that “[i]n the exercise of its broad power over naturalization *and immigration*, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>38</sup>

Today, judges and legal academics continue to debate the significance and the merits of the Supreme Court’s “plenary power” doctrine.<sup>39</sup> Yet there has long been a consensus that the doctrine began with the *Chinese Exclusion Case*.<sup>40</sup> This consensus is mistaken: through the 1880s and 1890s, when the *Chinese Exclusion Case* was decided, Congress and the Supreme Court consistently tied federal immigration laws to enumerated powers like the Commerce Clause and the Necessary and Proper Clause. This mistaken interpretation of the *Chinese Exclusion Case* has, in turn, produced two significant ongoing effects that plague judicial opinions and constitutional scholarship.

Part III of this Article deconstructs these two effects. First, the *Chinese Exclusion Case* has inspired Congress and the courts to abandon both the enumerated powers and explicit constitutional limits contained in the text of the Constitution—but *only* when Congress regulates immigrants. When Chief Justice Marshall wrote in *Gibbons* that elections must provide the sole restraint on abusive legislation, he was proposing a weak theory of legislative

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not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”).

37. Ng Fung Ho v. White, 259 U.S. 276, 280 (1922).

38. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (emphasis added).

39. See, e.g., Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 575–76 (2017); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 11 (1998); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 273; David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 39 (2015); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858, 863 (1987); Schuck, *supra* note 2, at 24. For scholarship denying the existence of the plenary power doctrine or its relationship to constitutional limits, see, for example, Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258 (2000); Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 60–63 (2015); Martin, *supra* at 39.

40. See, e.g., ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 34 (2020); Cleveland, *supra* note 1, at 129–30; NEUMAN, *supra* note 18, at 122; see also Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 27 (2010); Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485, 488 (2016); Lindsay, *supra* note 18, at 31, 47; James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804, 823–29 (1983).

constitutionalism. The strong version of this theory holds that in a representative democracy, it is up to voters and their elected representatives, not courts, to determine how best to interpret and apply the Constitution.<sup>41</sup> In the 1880s, the Court explicitly adopted the strong version of this theory when reviewing federal legislation that regulated immigrants—leaving it up to Congress to determine the constitutional scope of federal law.<sup>42</sup>

But at the same time that the Court reaffirmed this theory of legislative constitutionalism when reviewing federal regulation of people who were disenfranchised,<sup>43</sup> the Court repudiated it when reviewing federal regulation of white Americans. From the fall of Reconstruction to the rise of the *Lochner* Era, the Court led a “counter-revolution of property,” during which it invented a host of new doctrines to prevent Congress from disrupting the autonomy of white people and capitalists who resided at the top of America’s social hierarchy.<sup>44</sup> It held that Congress’s power to regulate commerce did not include intrastate activities outside the “stream of commerce”;<sup>45</sup> that Congress’s power to enact civil rights legislation did not include the power to regulate white civilians;<sup>46</sup> and that Congress’s power to tax did not include the power to tax the officers of states.<sup>47</sup> Many of these doctrines continue to animate the judicial review of federal legislation today, on the theory that the Court must monitor the exercise of Congress’s enumerated powers and ensure that all federal legislation is “necessary” and “proper” to the beneficial exercise of an enumerated power.<sup>48</sup> Yet the Supreme Court has deployed the language of “sovereignty” to avoid applying these same doctrines to Congress’s immigration laws.<sup>49</sup> And the result is that the Court skeptically scrutinizes laws that interfere with wealthy, white, Christian voters while deferentially accepting laws that interfere with disenfranchised people.

Second, and most notably, neither Congress nor the Supreme Court has ever cogently explained the inconsistency between Congress’s power over immigrants and its power to regulate citizens and businesses. Over much of the past century, a mere reference to the *Chinese Exclusion Case* has sufficed to explain this anomaly, on the theory that the case establishes a “sovereign” immigration power disconnected from the Constitution’s text. But Justice Field’s

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41. RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* 4 (2007).

42. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889).

43. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

44. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 476 (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007) (1935) (cleaned up).

45. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

46. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

47. *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), *overruled in part by* *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939).

48. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557–58 (2012).

49. See, e.g., *Arizona v. United States*, 567 U.S. 387, 398 (2012).

reference to “sovereignty” in the *Chinese Exclusion Case* cannot carry the weight of this discrepancy. And despite the Court’s gestures to the contrary,<sup>50</sup> any connection between our immigration laws and Congress’s power to conduct foreign relations cannot justify Congress’s extraordinary power over immigrants living within the United States.<sup>51</sup>

In Part IV, we argue for resolving this inconsistency in favor of legislative constitutionalism. In contrast with most scholars and immigration advocates who have sought to apply the Court’s ordinarily skeptical scrutiny to the immigration context, we argue that the history of federal immigration law highlights the promise of *legislative* solutions to the anomalies we identify.<sup>52</sup> Rather than protecting disenfranchised immigrants from a hostile and overzealous Congress, judicial review of Congress’s immigration law has functioned to entrench the plenary power doctrine, muffling the serious legislative debate that animated the resistance to the Alien Friends Act and the first century of U.S. immigration law. We therefore conclude that James Madison and other opponents of the first federal immigration restrictions were correct: only a “wave of public opinion” can sweep out bad laws.<sup>53</sup> Rather than turn to the courts to limit federal immigration laws just as they limit federal healthcare laws, we argue that Congress itself should rethink the expanse of its immigration laws in effect today. By treating immigration as a subject over which Congress has the same power as it has over everything else—instead of as an extraordinary exercise of sovereignty—we hope to disrupt the modern assumption, powerfully articulated by President Donald Trump, that “[a] nation without borders is not a nation.”<sup>54</sup> In its place, we join Mae Ngai and other historians who have sought to “detach sovereignty and its master, the nation-state, from their claims of transcendence and to critique them as products of history.”<sup>55</sup>

As a whole, this Article provides a critical legal history of a power that so pervades the modern constitutional landscape that it is often assumed to be a natural feature.<sup>56</sup> The goal of the Article is to denaturalize this power and to explain, in the words of the intellectual historian Quentin Skinner, “how far

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50. *E.g., id.* at 394–95.

51. *See infra* text accompanying notes 588–607.

52. *See infra* Section IV.A.

53. Letter from Thomas Jefferson to Joseph Priestly, *supra* note 15, at 394; *see also* Madison, *supra* note 12, at 319; *infra* Section I.C. As Mark Tushnet has written of Thomas Jefferson’s opposition to the Alien Friends Act of 1798, “Jefferson was a smart man and, for his times, a real democrat. He did not place his hopes in the Supreme Court.” Mark Tushnet, *Democracy Versus Judicial Review*, *DISSENT*, Spring 2005, at 59, 63.

54. Darren Samuelsohn & Michael Crowley, *Trump: U.S. Can’t Guard Its Interests Abroad If It Doesn’t Protect Prosperity at Home*, *POLITICO* (Dec. 18, 2017, 3:17 PM), <https://www.politico.com/story/2017/12/18/trump-foreign-policy-security-302242> [perma.cc/AR2M-V897].

55. MAE M. NGAI, *IMPOSSIBLE SUBJECTS* 12 (new paperback ed. 2014).

56. *See generally* Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 100–16 (1984) (explaining how critical legal scholars have used descriptive historical accounts to disrupt commonly held but ideologically inflected narratives about the origins of present-day doctrines).

the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds.”<sup>57</sup> As Skinner suggests, once we are equipped with “a broader sense of possibility, we can stand back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.”<sup>58</sup> In the same spirit, this Article contends that Congress’s immigration power is less a product of principled constitutional analysis than of intentional racism and an unintentional judicial game of telephone. And because its relationship to other legal and moral norms is contingent, the present generation has an obligation to imagine alternatives.<sup>59</sup>

## I. THE IMMIGRATION CLAUSE BEFORE 1876

### A. *The Political Context of Congress’s First Immigration Law*

In 1798, Moreau de St. Méry was astonished to learn that his name was on a list of “dangerous” immigrants whom the federal government planned to deport.<sup>60</sup> A refugee of the French Revolution, Moreau considered himself a respectable member of Philadelphia society.<sup>61</sup> He ran a bookstore in what was then the nation’s capital, distributing news and gossip to America’s growing population of French émigrés.<sup>62</sup> He had even exchanged books with John Adams, who went on to become president of the United States.<sup>63</sup> Puzzled by his inclusion on the list, Moreau dispatched a mutual friend to ask the president what he had done to merit deportation.<sup>64</sup> “Nothing in particular,” President Adams responded, “but he’s too French.”<sup>65</sup>

Anti-French sentiment was an epidemic in 1798, one as pervasive as the yellow fever that stalked America’s cities that summer.<sup>66</sup> Ever since the guillotine had debuted in Paris six years earlier, thousands of French people ducked their heads into ships bound for America’s calmer shores.<sup>67</sup> But many Amer-

57. QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 117 (Canto Classics ed. 2012).

58. *Id.*

59. See NGAI, *supra* note 55, at 12; JONATHAN GIENAPP, *THE SECOND CREATION* 3–4 (2018); RICHARD WHITE, *RAILROADED* 516 (2011).

60. See MOREAU DE ST. MÉRY’S *AMERICAN JOURNEY, 1793–1798*, at 253 (Kenneth Roberts & Anna M. Roberts eds. & trans., 1947) [hereinafter MOREAU].

61. See *id.* at xvi–xviii.

62. SIMON SCHAMA, *CITIZENS* 866–67 (1989).

63. MOREAU, *supra* note 60, at 253.

64. *Id.*

65. *Id.*

66. See Letter from Abigail Adams Smith to John Quincy Adams (Sept. 28, 1798), in 13 *ADAMS FAMILY CORRESPONDENCE* 243–45 (Sara Martin et al. eds., 2017); Letter from Abigail Adams to Mary Smith Cranch (Apr. 26, 1798), in 12 *ADAMS FAMILY CORRESPONDENCE* 529–33 (Sara Martin et al. eds., 2015).

67. See JAMES MORTON SMITH, *FREEDOM’S FETTERS* 22–23 (1956).

icans reacted to the influx with alarm, regarding France's revolution as a pestilence that needed to be quarantined.<sup>68</sup> This alarm grew louder when enslaved Africans in Saint-Domingue, the wealthiest colony in the world, liberated themselves in the name of *liberté, égalité, and fraternité*.<sup>69</sup> It grew to a roar when Napoleon Bonaparte's armies and fleets carried *La Marseillaise* as far as Egypt.<sup>70</sup> And it sounded like war drums after three French diplomats humiliated their American counterparts, turning one of them, John Marshall, into a *cause célèbre*.<sup>71</sup> "People acted as though a French invasion force might land in America at any moment," Moreau later wrote in his diary. "Everybody was suspicious of everybody else."<sup>72</sup>

Moreau found himself on a deportation list because leaders of the dominant Federalist Party warned that the American public "will think their present alarm is groundless, if Congress do not now take the lead of the People, and . . . eradicate every species of foreign influence *and* domestic faction."<sup>73</sup> Francis Dana, the chief justice of Massachusetts's highest court, spoke for many Federalists when he asked President Adams, "Why are not the most decisive measures adopted by Congress for ridding our Country instantaneously of all Aliens dangerous to its safety, especially *all Frenchmen . . . ?*"<sup>74</sup> A Philadelphia correspondent, sickened by the "French enemies in this city (daily eating the bread of our soil, and probably subsisting on the bounty of the state)," similarly pleaded with Congress to "free our soil from the polluted foot-steps of those base foreigners, and spurn from our bosoms the vipers we are cherishing!"<sup>75</sup> Partisan columnists blended this Francophobia with a broader xenophobia, complaining that "these United States have become the resting place of ninety-nine hundredths of the factious villains which Great Britain and Ireland have vomited from their shores."<sup>76</sup> Inhaling this noxious atmosphere, Senator Humphrey Marshall of Kentucky even published a poem, *The Aliens*,

68. *See id.*

69. *Id.*; *see, e.g.*, DETECTION OF A CONSPIRACY FORMED BY THE UNITED IRISHMEN (May 1798), *reprinted in* 8 WILLIAM COBBETT, PORCUPINE'S WORKS, 199–200 (London, Cobbett & Morgan 1801); THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA 11–12 (Richmond, Augustine Davis 1798). *See generally* C.L.R. JAMES, THE BLACK JACOBINS (Vintage Books ed. 1989) (discussing the Haitian Revolution).

70. *See* SMITH, *supra* note 67, at 5–8; *see, e.g.*, DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA 20 (Richmond, Nicholson 1798) [hereinafter VIRGINIA DEBATES]; *see also* ANDREW ROBERTS, NAPOLEON 151 (2014) (discussing the proposed invasion of Great Britain).

71. *See* SMITH, *supra* note 67, at 5–8.

72. MOREAU, *supra* note 60, at 252.

73. Letter from Francis Dana to John Adams (May 27, 1798), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-02-02-2508> [perma.cc/75B4-WNH6]; *see also* SMITH, *supra* note 67, at 7–10; Letter from Alexander Hamilton to Jonathan Dayton (Mar. 15, 1798), *in* 27 THE PAPERS OF ALEXANDER HAMILTON 14 (Harold C. Syrett ed., 1987); Letter from Alexander Hamilton to Jonathan Dayton (Mar. 30, 1798), *supra*, at 17.

74. Letter from Francis Dana to John Adams, *supra* note 73.

75. *See* AMERICANS, LOOK OUT!, PHILA. GAZETTE, Jun. 8, 1798, at 3.

76. DETECTION OF A CONSPIRACY FORMED BY THE UNITED IRISHMEN, *supra* note 69, at 223; *see also* Volney and Others, PORCUPINE'S GAZETTE, Jun. 22, 1798, at 2.

in which he called for new laws to “make haste, and arrest” the “malignant” stream pouring through America’s open doors.<sup>77</sup>

Congress responded to this call to arms by passing four laws, two of which quickly became the subject of a massive public outcry. One made it a federal crime for anyone to slander the Adams Administration.<sup>78</sup> This new Sedition Act gave the administration license to prosecute its political opponents despite the First Amendment’s protection of a free press. The other controversial law authorized the president “at any time . . . to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, . . . to depart out of the territory of the United States.”<sup>79</sup> This first federal immigration law became known as the Alien *Friends* Act after Congress passed another law, the Alien *Enemies* Act, which authorized further actions against immigrants whose home countries threatened to declare war against or invade the United States.<sup>80</sup> Because France never actually came close to invading the United States, President Adams invoked only the Alien Friends Act when he placed Moreau’s name on a list of “dangerous” aliens.

The Alien Friends Act terrified French immigrants. Moreau’s family soon joined a convoy of émigrés back to France.<sup>81</sup> Along with the Sedition Act, the Alien Friends Act also enraged the opposition party in Congress: the Democratic-Republicans. “[T]he highly coloured dangers we have heard from the residence of certain aliens among us, can be considered in no other light than a[s] a cloak for the usurpation of a power not constitutionally belonging to this government,” Senator Henry Tazewell of Virginia observed when he read a draft of the Alien Friends Act in Congress.<sup>82</sup> James Madison called the Alien Friends Act “a monster that must for ever disgrace its parents,”<sup>83</sup> while Thomas Jefferson wrote that it “assumes powers over Alien-friends not delegated by the constitution [and] is not law, but is altogether void & of no force.”<sup>84</sup> While the Democratic-Republicans opposed the Sedition Act as a violation of the First Amendment, their principal objection to the Alien Friends Act was that Congress’s power to pass legislation was limited to the ends spec-

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77. See H. MARSHALL, *THE ALIENS* 11, 17 (Philadelphia 1798).

78. See Sedition Act, ch. 74, 1 Stat. 596, 596–97 (1798) (expired 1801).

79. Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired 1800).

80. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24).

81. MOREAU, *supra* note 60, at 255; see Letter from Thomas Jefferson to James Madison (May 3, 1798), in 30 *THE PAPERS OF THOMAS JEFFERSON* 322 (Barbara B. Oberg ed., 2003); *Communication*, *AURORA GEN. ADVERTISER*, June 16, 1798, at 3.

82. *Federal Legislature*, *supra* note 14, at 2.

83. Letter from James Madison to Thomas Jefferson (May 20, 1798), *supra* note 81, at 358, 359.

84. Jefferson’s Draft (Oct. 4, 1798), *supra* note 81, at 536, 537.

ified in the Constitution. Yet nothing in the Constitution “authorized Congress to prohibit the migration of foreigners to any state, nor to banish them when admitted.”<sup>85</sup>

B. *The Federalist Defense of Congress’s Power to Deport*

Federalist politicians in Congress canvassed the Constitution in search of a source for Congress’s power to deport “alien friends” like Moreau. For the most part, they were happy to concede that Congress could pass only those laws authorized by the Constitution’s specific clauses. But one of those clauses, the Necessary and Proper Clause, authorized Congress to “make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States.”<sup>86</sup> Federalists like Alexander Hamilton had spent the previous decade refining their interpretation of this clause into an expansive source of implied powers, one that authorized Congress to read the Constitution’s other enumerated powers generously. Hamilton’s successful defense of Congress’s implied power to charter a bank in 1791 had since become a Federalist mantra: “[i]f the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.”<sup>87</sup>

Invoking Hamilton’s interpretation of the Necessary and Proper Clause, Federalists in 1798 contended that a deportation law was constitutional so long as it could be understood as a reasonable means of accomplishing one of the Constitution’s specified ends.<sup>88</sup> “[W]e must examine the whole paper, we must examine it fairly, but liberally,” a prominent group of Virginia Federalists wrote of the Constitution’s text, as they warned readers not to expect any explicit authorization of Congress’s deportation power.<sup>89</sup> “It is necessary, in

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85. *Federal Legislature*, *supra* note 14, at 2.

86. U.S. CONST. art. I, § 8, cl. 18.

87. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 97–134 (Harold C. Syrett ed., 1965). For the pervasiveness of this argument, see 12 THE PAPERS OF JOHN MARSHALL 519–20 (Charles F. Hobson ed., 2012).

88. See, e.g., 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed., Washington, 1836) [hereinafter ELLIOT’S DEBATES] (resolution of the Massachusetts legislature); 9 ANNALS OF CONG. 2986 (1799) (report of the House Select Comm. on the Alien Friends Act); VIRGINIA DEBATES, *supra* note 70, at 15 (statement of Del. George K. Taylor).

89. See THE ADDRESS OF THE MINORITY IN THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE 7 (1799) [hereinafter MINORITY ADDRESS]. For a persuasive attribution of the address’s authorship to Henry Lee, see 12 THE PAPERS OF JOHN MARSHALL, *supra* note 87, at 515. For an example of the address’s prominence and wide distribution, see Letter from Theodore Sedgwick to Alexander Hamilton (Feb. 7, 1799), *in* 22 THE PAPERS OF ALEXANDER HAMILTON 469, 469–72 (Harold C. Syrett ed., 1975) (mistakenly attributing the address to the future Chief Justice John Marshall).

pursuing this enquiry, to bear in mind that we are investigating a constitution which must unavoidably be restricted in various points to general expressions, making the great outlines of a subject, and not a law which is capable of descending to every minute detail.”<sup>90</sup> Soon enough, this approach would become the undisputed method of interpreting all of Congress’s constitutional powers.<sup>91</sup> But finding a clause that could be read “fairly, but liberally”<sup>92</sup> to justify the Alien Friends Act proved tricky.

### 1. The War Clauses

Pointing to Napoleon’s ongoing invasion of Egypt, the Federalists primarily defended Congress’s deportation power with the arsenal of constitutional provisions that permitted Congress to protect the nation. Article I of the Constitution empowered Congress to “declare War,” to “raise and support Armies,” and to “provide for calling forth the Militia to . . . suppress Insurrections and repel Invasions,”<sup>93</sup> while Article IV empowered the federal government to “protect each [State] against Invasion.”<sup>94</sup> Members of both parties agreed that these clauses collectively empowered Congress to authorize the bombardment of French soldiers in battle.<sup>95</sup> Federalists therefore considered it “absurd . . . [t]hat Congress may make war, but cannot do a less hostile act,”<sup>96</sup> such as preventing “the migration of a French army” or deporting French partisans before a war began.<sup>97</sup> “[T]hough there is no express authority to this effect, it is one of those things which is too evident to be doubted,” explained Representative Otis of Massachusetts. “[A]n army of soldiers would not be so dangerous to the country, as an army of spies and incendiaries scattered through the Continent.”<sup>98</sup>

This sentiment offered a compelling justification for the Alien *Enemies* Act, which allowed the president to deport citizens of any country that threatened to invade the United States. But the Alien *Friends* Act applied to any immigrant at any time, even when no war or invasion was being contemplated.<sup>99</sup> Democratic-Republicans stressed this distinction: it was only “[w]ith respect to aliens, who are not enemies, but members of nations in peace and amity with the United States, [that] the power assumed by the act of Congress, is denied to be constitutional,” explained James Madison.<sup>100</sup> Virginia legislator

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90. MINORITY ADDRESS, *supra* note 89, at 7.

91. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 421 (1819).

92. MINORITY ADDRESS, *supra* note 89, at 7.

93. U.S. CONST. art. I, § 8, cls. 11–15.

94. *Id.* art. IV, § 4.

95. *See* 8 ANNALS OF CONG. 1980 (1798) (statement of Rep. Albert Gallatin).

96. *Id.* at 1984 (statement of Rep. William Gordon).

97. *Id.* at 1960–61 (statement of Rep. Harrison Gray Otis).

98. *Id.* at 1961.

99. 9 ANNALS OF CONG. 2995 (1799) (statement of Rep. Albert Gallatin).

100. Madison, *supra* note 12, at 318.

Thomas Barbour added that if “no other reason could be assigned in favor of the alien [friends] law, than an idea so wild as the danger of admitting Buona-parté & his army, its supporters must be in pitiful distress.”<sup>101</sup>

Acknowledging the force of these criticisms, Federalists supplemented their position with more tenuous explanations for why Congress could treat peacetime immigrants as the equivalent of a wartime danger. Attorney General Lee spoke for many when he defended the Act as necessary to protect the nation from the “great number of alien Frenchmen dispersed in various parts of the United States”—twenty thousand according to his estimates—who were “capable of bearing arms . . . , employed to send intelligence of what was passing in our country . . . , [and] ready to join the French standard, whenever it should be erected on our land.”<sup>102</sup> Northern Federalists joined him in spreading rumors that “*Frenchmen, and their friends among us,*” were planning to burn American cities and “raise the exotic French interests on the ruins of America.”<sup>103</sup> Southern Federalists went even further in this direction, treating the Act as “particularly calculated for the protection of the southern states” because French immigrants would otherwise initiate a Haitian Revolution on American soil.<sup>104</sup> George K. Taylor, a Virginia legislator who President Adams would soon appoint as a federal judge,<sup>105</sup> described the “devastation and carnage [that] had been exhibited by Frenchmen in their own Island of Saint Domingo.”<sup>106</sup> He said similar attempts “had been already made, by French emigrants, to excite our slaves to insurrection.”<sup>107</sup> Taylor dramatically imagined Virginian “wives and daughters torn from their [family’s] arms, with naked bosoms, out-stretched hands and disheveled hair, to gratify the brutal passion of a ruthless negro.”<sup>108</sup> He then asked “how all that was to be prevented? By vesting the general government with that power to remove such Aliens.”<sup>109</sup>

Connecting all these threats back to Congress’s power to “protect each state from invasion,” Attorney General Lee cited the voluntary departure of immigrants like Moreau de St. Méry as evidence that the Alien Friends Act was already working to make a French invasion less likely.<sup>110</sup> “The probability of an invasion from [F]rance may be rated by the probability of the invaders receiving effectual aid and support in our country from Aliens and disaffected

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101. VIRGINIA DEBATES, *supra* note 70, at 53.

102. CHARLES LEE, DEFENCE OF THE ALIEN AND SEDITION LAWS 6 (Philadelphia, John Ward Fenno 1798); *see, e.g., The Alien Bill*, PORCUPINE’S GAZETTE, June 23, 1798, at 3.

103. *Capt. Duplex*, PHILA. GAZETTE, Aug. 4, 1798, at 3.

104. VIRGINIA DEBATES, *supra* note 70, at 22 (statement of Del. George K. Taylor).

105. 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 560 n.2 (1916).

106. VIRGINIA DEBATES, *supra* note 70, at 21.

107. *Id.* at 22.

108. *Id.*

109. *Id.*

110. LEE, *supra* note 102, at 7.

citizens,” he reasoned.<sup>111</sup> “So long as France shall be without reasonable hope of such support so long will it defer an invasion and no longer.”<sup>112</sup> Lee and other Federalists interpreted the War Clauses as if they permitted Congress “to take all reasonable measures with Aliens that tend to prevent an invasion”—even if the effect of such measures was to make an already remote threat marginally less likely.<sup>113</sup> “Invasion actually made is to be *repelled*, and for that purpose militia may be called out. But congress is to do more than merely to repel the actual invasion,” wrote Virginia’s Federalist state legislators.<sup>114</sup> “To *protect* against an evil, includes the right of taking proper and necessary steps for its prevention. Of these proper and necessary steps, the government possessed of the power must judge.”<sup>115</sup> Massachusetts’s legislature agreed. “It cannot be seriously believed that the United States should have waited till the *poniard* had in fact been plunged,” it resolved.<sup>116</sup>

## 2. Other Clauses

Nearly every other defense of Congress’s power to deport immigrants followed from the premise that the Constitution empowered Congress to “adopt any measures of prevention and precaution short of war.”<sup>117</sup> The most frequently cited example of Congress’s preventative power was the clause of Article I that empowered Congress to “grant Letters of Marque and Reprisal”: a form of diplomatic retaliation that authorized American ships to capture and seize foreign vessels.<sup>118</sup> “To make reprisals is a power distinct from, and which not unfrequently precedes war,” the Virginia Federalists wrote, adding that “reprisals may be made on the *persons* as well as the *property* of aliens.”<sup>119</sup> The Virginians therefore reasoned that “the removal of aliens [may] be considered as the exercise, in an inferior degree, of the general power of reprisal on persons.”<sup>120</sup>

With similar creativity, the Federalists invoked a reserve of other constitutional provisions that merely gestured toward national security. These included the Preamble’s declaration that the Constitution was intended to

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111. Letter from Charles Lee to John Adams (Nov. 1, 1798), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-02-02-3190> [perma.cc/TKT2-MNVA].

112. *Id.*

113. *Id.*

114. MINORITY ADDRESS, *supra* note 89, at 8.

115. *Id.*

116. 4 ELLIOT’S DEBATES, *supra* note 88, at 535.

117. EVANS, *supra* note 69, at 18.

118. U.S. CONST. art. I, § 8, cl. 11; *see* WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 34:6 (3d ed. 2011).

119. MINORITY ADDRESS, *supra* note 89, at 7.

120. *Id.*; *see also, e.g.*, EVANS, *supra* note 69, at 18–19.

“provide for the common defence”;<sup>121</sup> Article II’s statement that “The President shall be Commander in Chief of the Army and Navy”;<sup>122</sup> and a clause of Article I that empowered Congress to “define and punish . . . Offences against the Law of Nations.”<sup>123</sup> The last of these clauses allegedly authorized Congress to punish the international offense of living in a foreign country while conspiring “against the peace of the nation.”<sup>124</sup> But because Article III and the Sixth Amendment each prohibited Congress from punishing an offense absent an indictment and jury trial—which the Alien Friends Act did not provide for<sup>125</sup>—Federalists were as likely to invoke this clause as to retreat from it. A House select committee illustrated its uncertainty about the clause’s applicability when it resolved that “the removal of aliens, though it may be inconvenient to them, cannot be considered as a punishment inflicted for an offence,” because an “alien may be removed without having committed any offence, merely from motives of policy or security.”<sup>126</sup>

### 3. Structural Arguments

Turning beyond the text of Article I, Federalists seeking to defend the Alien Friends Act invoked *The Law of Nations*, a book by the eminent Swiss lawyer Emer de Vattel. First published in America two years earlier, the book was a descriptive account of the customs and expectations of eighteenth-century international law.<sup>127</sup> Vattel approvingly described a world of open borders, and he urged his readers to be hospitable to migrants. But Federalist politicians selectively excerpted passages describing the “sovereign” powers of exclusion and deportation to reinforce their interpretation of the Constitution’s War Clauses.

Considered as a whole, Vattel’s book was singularly unhelpful for a group of politicians seeking to hound French immigrants out of their country. Defining a *sovereign* as the supreme “political authority” that the people of each nation established “to order and direct what ought to be done,”<sup>128</sup> Vattel wrote that all sovereigns had a general duty to provide asylum to all migrants who wished to settle in the sovereign’s land.<sup>129</sup> Vattel added that all sovereigns had

121. U.S. CONST. pmbl.; *see, e.g.*, 4 ELLIOT’S DEBATES, *supra* note 88, at 536 (resolution of the Massachusetts legislature); VIRGINIA DEBATES, *supra* note 70, at 15 (statement of Del. George K. Taylor).

122. U.S. CONST. art II, § 1; *see, e.g.*, EVANS, *supra* note 69, at 17.

123. U.S. CONST. art. I, § 8, cl. 10.

124. VIRGINIA DEBATES, *supra* note 70, at 16 (statement of Del. George K. Taylor).

125. U.S. CONST. art. III, § 2, cl. 2; U.S. CONST. amend. VI; Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired 1800).

126. 9 ANNALS OF CONG. 2987 (1799).

127. M. DE VATTEL, THE LAW OF NATIONS (New York, Samuel Campbell 1796) (1758).

128. *Id.* at 59; *see also id.* at 59–60.

129. *See id.* at 169, 245, 249.

a related duty to treat resident foreigners equally under the same legal protections that applied to citizens.<sup>130</sup> Recognizing that almost every sovereign in the world acknowledged these duties “to allow a free passage through, and residence in his state,” Vattel encouraged all sovereigns to “give the kindest reception to foreigners, receive them with politeness, and on every occasion shew a disposition to serve them.”<sup>131</sup> Almost teasingly he added, “No nation is in this respect more worthy of praise than the French.”<sup>132</sup>

Needless to say, these were not the passages that interested the Federalists. Instead, the Federalists emphasized an extraordinary circumstance when even Vattel admitted that the duties of free passage and residence did not apply: when the duties conflicted with a sovereign’s “*right of security*,” or its “natural, and indispensable obligation” to preserve its citizens from injury.<sup>133</sup> Vattel explained that if a sovereign had “particular and important reasons” why the residence of certain foreigners would compromise its own ability to guarantee its citizens’ security, then a sovereign could, consistent with international law, forbid the entry of foreigners or “adopt, on their admission, every precaution that prudence can dictate.”<sup>134</sup> He illustrated the point with examples of ethical exclusions. “Thus a nation, whose lands are scarcely sufficient to supply the wants of the citizens, is not obliged to receive into its territories a company of fugitives or exiles. Thus it ought even absolutely to reject them, if they are infected with a contagious disease,” he wrote. “Thus also it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens, that they will create religious disturbances, or occasion any other disorder, contrary to the public safety.”<sup>135</sup> But Vattel reiterated that a sovereign needed “particular and substantial reasons” before it could “refuse even a perpetual residence to a man driven from his country. . . . [Its] prudence should be free from unnecessary suspicion and jealousy;—it should not be carried so far as to refuse a retreat to the unfortunate, for slight reasons, and on groundless and frivolous fears.”<sup>136</sup>

The defenders of the Alien Friends Act seized on Vattel’s description of national security as an “indispensable obligation.”<sup>137</sup> They reasoned that because the United States was “a sovereign and independent nation,” something in the Constitution necessarily gave the federal government power to deport

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130. *Id.* at 236–37. Vattel was not alone. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*360–62 (discussing limited exceptions for inheriting property and holding office).

131. VATTEL, *supra* note 127, at 171, 251.

132. *Id.* at 251.

133. *Id.* at 216.

134. *Id.* at 169–70, 184–85.

135. *Id.* at 108; see also *id.* at 174 (authorizing the detention of foreigners “in war time”).

136. *Id.* at 107–08; see also *id.* at 180 (“very important reasons”).

137. EVANS, *supra* note 69, at 18.

foreigners whose ideologies were both contagious and dangerous to the nation's security.<sup>138</sup>

Attorney General Lee illustrated the logical chain that connected Vattel's sovereign power of deportation with the Federalist interpretation of the Necessary and Proper Clause and War Clauses.<sup>139</sup> "The[re] can be no complete sovereignty without the power of removing aliens; and the exercise of such a power is inseparably incident to the *nation*," Lee wrote.<sup>140</sup> "If the terms of the constitution were less explicit than we find them in granting to Congress the power 'to protect each of the states from invasion,' on this principle it might reasonably be contended that the power was invested in Congress to remove aliens."<sup>141</sup> Lee insisted, however, that he was not arguing that Vattel's national-security principle gave the United States a freestanding sovereign power to remove aliens. Instead, Vattel's principle confirmed for Lee that deportation was a necessary and proper means of executing the protect-from-invasion language of Article IV.<sup>142</sup>

The most xenophobic Federalists took Lee's structural argument one step further, contending that because the states were individually incapable of protecting the nation from dangerous immigrants, necessity dictated that Congress have a deportation power regardless of what the Constitution said.<sup>143</sup> "It is only necessary to ask whether, without such a power vested in some department, any government ever did, or ever can, long protect itself," wrote Secretary of State Pickering, the member of the Adams Administration charged with enforcing the Alien Friends Act.<sup>144</sup> Pickering and other advocates of mass deportation suggested that the Constitution limited Congress's powers only when Congress legislated with respect to citizens—not when it passed laws that applied only to immigrants.<sup>145</sup> "It is absurd to say that in providing by law for their removal, the constitution is violated," Pickering wrote in a widely published open letter, "for he must be ignorant indeed who does not know that the constitution was established for the protection and security of American citizens, and not of *intriguing foreigners*."<sup>146</sup>

138. *Id.* at 14; *see also, e.g.*, 9 ANNALS OF CONG. 2986 (1799); *The Sedition Act Vindicated*, RUSSELL'S GAZETTE, Dec. 13, 1798, at 1, 2; LEE, *supra* note 102, at 5; *see also* VIRGINIA DEBATES, *supra* note 70, at 13–14, 17, 146 (statement of Del. George K. Taylor).

139. LEE, *supra* note 102, at 5, 8.

140. *Id.* at 8–9.

141. *Id.* at 9.

142. *See id.*

143. *See* 9 ANNALS OF CONG. 2986–87 (1799).

144. *See* Letter from Timothy Pickering to P. Johnson, Esquire (Sept. 29, 1798), in DAILY ADVERTISER, Oct. 12, 1798; James Morton Smith, *The Enforcement of the Alien Friends Act of 1798*, 41 MISS. VALLEY HIST. REV. 85, 90–91 (1954).

145. *See* Letter from Timothy Pickering to P. Johnson, *supra* note 144, at 2; *see also* 9 ANNALS OF CONG. 2987 (1799).

146. Letter from Timothy Picketing to P. Johnson, *supra* note 144; *see also* VIRGINIA DEBATES, *supra* note 70, at 106–07 (statement of Del. Cowan).

C. *The Democratic-Republican Opposition to Congress's Power to Deport*

Democratic-Republicans challenged the constitutionality of the Alien Friends Act as soon as the bill was introduced in Congress. Senator Tazewell of Virginia and Representative Gallatin of Pennsylvania—a naturalized citizen with a French accent—led the opposition.<sup>147</sup> Their basic argument was that the Act was “neither among the specific powers granted by the Constitution to the General Government, nor necessary to carry into effect any of those specific powers.”<sup>148</sup> Where many Federalists invoked the Necessary and Proper Clause as a general source of implied power, Gallatin stressed that the words “necessary and proper” had to require at least some reasonable connection to an enumerated power, or else Congress would have the “undefined discretion” to invoke even the most unrelated enumerated power in support of any law.<sup>149</sup> “[L]et gentlemen remember,” Gallatin implored his colleagues, “that it is necessary not only to assert in a vague manner that the authority contended for may be derived from some specific power.”<sup>150</sup> One must also “prove that, in the words of the Constitution, the present law is necessary and proper for carrying into effect some *one specific power* expressly given by the Constitution.”<sup>151</sup> Proceeding through the specific powers invoked by the Federalists, he concluded that the Act could be justified not “by any positive rule laid down by their charter,” but only by “suspicions, alarms, popular clamor, private ambition, and by the views of fluctuating factions.”<sup>152</sup>

1. The War Clauses

As passionately as the Federalists insisted that the Alien Friends Act was a necessary and proper prewar measure to “protect States against an invasion,” the Democratic-Republicans responded that the Act’s connection to foreign hostilities was too attenuated to qualify as an exercise of Congress’s war powers.<sup>153</sup> In contrast with the Alien Enemies Act, which applied whenever “any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States,”<sup>154</sup> the Alien Friends Act applied “at any time,”<sup>155</sup> including before any invasion was threatened and after “the alarms on that subject [were] to be completely at an end.”<sup>156</sup> The Democratic-

147. See *Federal Legislature*, *supra* note 14; Douglas Bradburn, *A Clamor in the Public Mind: The Opposition to the Alien and Sedition Acts*, 65 WM. & MARY Q. 565, 572 (2008).

148. 9 ANNALS OF CONG. 2993 (1799).

149. *Id.* at 2995–96.

150. 8 ANNALS OF CONG. 1974 (1798).

151. *Id.* (emphasis added).

152. 9 ANNALS OF CONG. 2996 (1799).

153. *Id.* at 2995.

154. Alien Enemies Act, ch. 66, 1 Stat. 577, 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24); see, e.g., Madison, *supra* note 12, at 318.

155. Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired 1800).

156. See Madison, *supra* note 12, at 318; 9 ANNALS OF CONG. 2995 (1799).

Republicans maintained that the Alien Friends Act was therefore unconstitutional to the extent it applied in situations where the Alien Enemies Act did not.<sup>157</sup> As Gallatin put the point, their argument was against the Act “which authorizes the President to remove . . . subjects of a nation which is *not* at war with the United States, and which has *not* perpetrated, attempted, or threatened any invasion or predatory incursion against the territory of the United States.”<sup>158</sup>

Gallatin, Madison and other Democratic-Republicans also stridently attacked the Federalist position that Congress had to have the power not only to *respond* to a threatened invasion but also to “*prevent* an invasion.”<sup>159</sup> On a factual level, they regarded the Federalist fearmongering about a French invasion as “the visionary phantoms of a disordered imagination.”<sup>160</sup> And even if French immigrants were up to no good, Gallatin observed that the Act applied broadly “against *Irish* emigrants and other subjects of Great Britain.”<sup>161</sup> He therefore concluded that the Federalists were acting “under pretence of preventing imaginary evils, . . . to introduce doctrines and innovations which would hereafter serve as a precedent to attack the liberties of the citizens themselves.”<sup>162</sup>

On a legal level, the Democratic-Republicans added that even if the evils apprehended by the Federalists were real, the Federalist claim of a power to prevent invasions relied on a logical fallacy that would “establish the omnipotence of Congress, and substantial despotism, on the ruins of our Constitution.”<sup>163</sup> As Madison explained, the Federalist position was “that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case.”<sup>164</sup> But, Madison insisted, “[s]uch a latitude of construction would render unavailing, every practicable definition of particular and limited powers.”<sup>165</sup> For example, if the Necessary and Proper Clause gave Congress a power to prevent war, then Congress could take virtually any action in the name of national security, including the “indiscriminate removal of all aliens.”<sup>166</sup> Madison and other Democratic-Republicans thought it “preposterous” that the War Clauses gave Congress such unlimited power.<sup>167</sup>

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157. See, e.g., ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS 8 (1799); see also *Federal Legislature*, *supra* note 14, at 2.

158. 9 ANNALS OF CONG. 2993 (1799) (internal quotations omitted).

159. Letter from Charles Lee to John Adams, *supra* note 111 (emphasis added); see *supra* text accompanying notes 110–115.

160. 9 ANNALS OF CONG. 3000–01 (1799).

161. *Id.* at 3001.

162. *Id.* at 3001–02.

163. *Id.* at 3001.

164. Madison, *supra* note 12, at 322.

165. *Id.*

166. *Id.* at 322–23.

167. 9 ANNALS OF CONG. 2994 (1799).

## 2. Other Clauses

The Democratic-Republicans also dismissed the relevance of two clauses that the Federalists rarely invoked but which would later become central to the federal government's immigration power: the Naturalization Clause, which permitted Congress to "establish an uniform Rule of Naturalization,"<sup>168</sup> and the Commerce Clause, which permitted Congress to "regulate Commerce with foreign Nations."<sup>169</sup> The Naturalization Clause, Senator Tazewell observed, "at most could only authorize Congress to give or withhold the right of citizenship."<sup>170</sup> Other Democratic-Republicans agreed, distinguishing *naturalization*, or the power to make someone a citizen, from *denization*, or the power to allow someone to reside in a particular territory.<sup>171</sup> "[A]lthough the individual states might, . . . have been willing to give up to congress the power of naturalization, it would have been very dangerous and impolitic to put it in the power of a majority of the states in the union, to prohibit emigration to the other states," wrote George Nicholas, the first attorney general of Kentucky.<sup>172</sup> Turning the Federalists' sovereignty argument on its head, he observed that "each state, as a sovereign and independent state, had an unquestionable right to declare, on what terms strangers should be permitted to come into the state, and what privileges they should be entitled to after they had emigrated to the state."<sup>173</sup>

The Democratic-Republicans considered the Commerce Clause an even more laughable ground on which to base the Alien Friends Act. The power to deport immigrants, explained Representative Gallatin, "cannot by any one be considered as a commercial regulation."<sup>174</sup> Gallatin added that even a commercial regulation of immigration would conflict with Article I, Section 9, which prohibited Congress from regulating the "migration or importation of such persons as any of the States shall think proper to admit . . . prior to the year 1808."<sup>175</sup> The Federalists stridently argued that Section 9's prohibition applied only to the slave trade and had nothing to do with "sending off, after their arrival, such emigrants . . . [found to be] dangerous to the peace or safety of the country."<sup>176</sup> But Gallatin cited the Federalists' distinction of *importation* from *deportation* as further evidence that "there does not exist any power

168. U.S. CONST. art. I, § 8, cl. 4.

169. *Id.* cl. 3.

170. *Federal Legislature*, *supra* note 14, at 2.

171. GEORGE NICHOLAS, A LETTER FROM GEORGE NICHOLAS, OF KENTUCKY, TO HIS FRIEND, IN VIRGINIA 9 (Philadelphia, James Carey 1799).

172. *Id.* at 8–9.

173. *Id.* at 7. For more arguments on these lines, see, for example, *Federal Legislature*, *supra* note 14, at 2. For arguments taking the other side, see, for example, TUCKER, *supra* note 157, at 16–17; Madison, *supra* note 12, at 319–20; THE FEDERALIST NO. 42 (James Madison).

174. 8 ANNALS OF CONG. 1974 (1798).

175. 9 ANNALS OF CONG. 2986–87 (1799).

176. *Id.* at 2986–87 (report of the H. Select Comm. on the Alien Friends Act); *see also* MINORITY ADDRESS, *supra* note 89, at 8–9.

granted to the General Government by the Constitution which can rationally serve as a pretence to claim an authority to remove emigrants generally.”<sup>177</sup>

### 3. Structural Arguments

The Democratic-Republicans finally responded to the idea broached by several Federalists that Congress could pass any law that was a necessary and proper incident of “sovereignty” as opposed to an enumerated power. Writing that he could not “pass by so portentous a claim” without noticing “the fatal tendencies with which it would be pregnant,” Madison and other opponents of the Alien Friends Act offered two arguments in response.<sup>178</sup>

First, they contended that such an idea was inconsistent with “the idea of limiting a government by constitutional rules.”<sup>179</sup> “By the constitution of the United States, the people of America intended to erect for themselves a general government over the union, with defined and limited powers,” the residents of New York’s Suffolk County explained in a petition. “They did not conceive it consistent with their political happiness, and the preservation of their liberties, that this general government should legislate in every possible case, and on every possible subject as it might judge most expedient.”<sup>180</sup> So while the Constitution vested Congress with certain “sovereign” powers—including the powers to declare war and naturalize citizens—it necessarily withheld other powers ordinarily possessed by sovereigns, such as the power to enact *ex post facto* laws.<sup>181</sup> It was therefore insufficient for the Federalists to contend that Great Britain and other sovereigns all had the power to deport immigrants.

Second, they observed that even if the power to deport immigrants were an inherent attribute of sovereignty, it did not follow that Congress was sovereign in this respect.<sup>182</sup> Since the revolution of 1776, it had become a maxim among American intellectuals that sovereignty was lodged not in Parliament, Congress, or any other supreme legislature, but in the people whose consent was necessary for those legislatures to function.<sup>183</sup> As St. George Tucker explained, “the federal government of the *United States*, is that portion, only, of the sovereign power, which is by the constitution entrusted to the public functionaries, who are to administer it, as the *agents* and *servants* of the people.”<sup>184</sup> In other words, while it might be necessary and proper for Congress to execute the sovereign powers actually delegated to it by the Constitution, all other sovereign powers were reserved to the states or to the people—as was evident from the Tenth Amendment. Gallatin reminded his colleagues of the many

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177. 9 ANNALS OF CONG. 2998 (1799) (statement of Rep. Albert Gallatin).

178. Madison, *supra* note 12, at 324.

179. VIRGINIA DEBATES, *supra* note 70, at 130.

180. *Memorial*, AURORA GEN. ADVERTISER, Jan. 30, 1799, at 3.

181. VIRGINIA DEBATES, *supra* note 70, at 129–130; Madison, *supra* note 12, at 323.

182. *Federal Legislature*, *supra* note 14, at 2.

183. See TUCKER, *supra* note 157, at 2.

184. *Id.* (cleaned up).

state immigration laws still in effect.<sup>185</sup> So even if the sovereign nation possessed “the power of removing aliens,” such a power was not “one of those granted by the nation to the General Government,” but rather “intrusted by the nation to the Governments of the individual States respectively.”<sup>186</sup>

Third, and finally, the Democratic-Republicans took issue with the claim that whatever limits applied to Congress with respect to citizens did not apply when Congress legislated as a sovereign with respect to foreigners.<sup>187</sup> Thomas Jefferson dismissed this distinction as something of a Trojan horse, writing that “the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow.”<sup>188</sup> Madison and other Democratic-Republicans took the argument seriously enough to respond with a broad claim that Congress was subject to the same constitutional rules no matter who was the subject of its legislation.<sup>189</sup> The Fifth Amendment, for instance, prohibited Congress from depriving any “person,” not just any citizen, of their right to life, liberty, or property, without due process of law.<sup>190</sup> For Madison, this meant that the federal government could not arrest an immigrant unless “some probable ground of suspicion be exhibited before some judicial authority; . . . the party may avoid being thrown into confinement, by finding pledges or sureties for his legal conduct sufficient in the judgment of some judicial authority,” and “he may have the benefit of a writ of habeas corpus, and thus obtain his release, if wrongfully confined.”<sup>191</sup> Similarly, a group of Democratic-Republican legislators in Pennsylvania objected that under the Alien Friends Act, an immigrant “may have invested his whole property in the lands and funds of this country, married himself or children into American families, or fled hither from civil or religious oppression, and yet, at the pleasure of ONE MAN, thus unprotected, may be banished without the privilege of a jury trial.”<sup>192</sup> Madison added that such an outcome violated the Sixth Amendment: “if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”<sup>193</sup> Moreover, Madison observed, if Congress could pass any law with respect to immigrants, then immigrants “might not only be banished, but even capitally punished, without a jury or the other incidents to a

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185. 8 ANNALS OF CONG. 1983 (1798).

186. 9 ANNALS OF CONG. 2994, 2999 (1799); see also VIRGINIA DEBATES, *supra* note 70, at 74 (statement of Del. Foushee).

187. See, e.g., *Federal Legislature*, *supra* note 14, at 2; VIRGINIA DEBATES, *supra* note 70, at 49 (statement of Del. Barbour).

188. Jefferson’s Draft, *supra* note 84, at 540.

189. See Extracts from the Address to the People (Jan. 23, 1799), *supra* note 88, at 531.

190. U.S. CONST. amend. V; see TUCKER, *supra* note 157, at 19.

191. Madison, *supra* note 12, at 318.

192. Nathan Boileau et al., *Dissent: On Address to the President*, CARLISLE GAZETTE, Feb. 6, 1799, at 2.

193. See Madison, *supra* note 12, at 319.

fair trial.”<sup>194</sup> Calling such an outcome absurd, Madison concluded that “although aliens are not parties to the constitution, it does not follow that the constitution has vested in Congress an absolute power over them.”<sup>195</sup>

#### D. *Aftermath of the Alien Friends Act*

In the end, even though congressional opponents of the Alien Friends Act were unable to stop the bill’s passage, they were quickly joined by legions of farmers, immigrants, and county lawyers who used the guerilla tactics of popular constitutionalism to undermine the Act’s perceived legitimacy.<sup>196</sup> While Attorney General Lee and Secretary Pickering entrenched themselves behind sophisticated legal defenses, this popular front spent the summer of 1798 erecting liberty poles and drafting petitions that bluntly quoted the Constitution.<sup>197</sup> “To the text then of the constitution we appeal,” petitioned the residents of Albemarle County, Virginia, after a fractious day of discussing the Alien Friends Act and its equally despised companion legislation, the Sedition Act, which banned publications that defamed the Adams Administration.<sup>198</sup> “[I]n all [the Constitution’s] parts we have examined it: in none do we read the delegation of an authority competent to the enactment of either of those laws.”<sup>199</sup>

These popular demonstrations reflected the political culture of early America, in which constitutional debates were resolved not by courts but by public opinion.<sup>200</sup> They gave power and a forum to Jefferson and Madison’s legal objections that the Act “assum[ed] power over alien friends not delegated by the Constitution.”<sup>201</sup> Together, they refined the growing movement against the Alien and Sedition Acts into a trenchant constitutional challenge that persuaded voters to support their party in the 1800 elections.<sup>202</sup>

Alexander Hamilton played little part in the debate over the Alien Friends Act, and he ultimately advocated for strict enforcement of the law. But as he read the Democratic-Republicans’ legal arguments and listened to the public outcry, he nonetheless wondered whether “laws of this kind passed merely to

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194. *Id.* at 320.

195. *Id.*

196. See Bradburn, *supra* note 147, at 567–72; LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 4–7 (2004).

197. Bradburn, *supra* note 147, at 567–78.

198. *Id.* at 569–71; *To the Senate and House of Representatives of the United States*, UNIVERSAL GAZETTE, Nov. 1, 1798, at 4.

199. *To the Senate and House of Representatives of the United States*, *supra* note 198, at 4; see also, e.g., *Virginia*, AURORA GEN. ADVERTISER, Nov. 20, 1798, at 2–3.

200. See Bradburn, *supra* note 147, at 590–91.

201. Resolutions Adopted by the Kentucky General Assembly (Nov. 10, 1798), *supra* note 81, at 550, 550–56.

202. See Bradburn, *supra* note 147, at 594.

excite odium and remain a dead letter.”<sup>203</sup> Indeed, the opposition to the Alien Friends Act helped inspire a “mighty wave of public opinion” that crushed the Federalist Party in the 1800 elections.<sup>204</sup> The victorious new president, Thomas Jefferson, soon promised French émigrés that the federal government would never engage in similar behavior again.<sup>205</sup> “[I]t is with heartfelt satisfaction that, in the first moment of my public action, I can hail you with welcome to our land . . . and disclaim the legitimacy of that libel on legislation which under the form of a law was for sometime placed among them,” he wrote in 1801.<sup>206</sup>

Jefferson’s party would not entirely uphold this promise. Although the Alien Friends Act expired in disgrace, the Alien Enemies Act survived unscathed. When the War of 1812 began during James Madison’s presidency, he enforced the Alien Enemies Act by requiring all British subjects in America to register with federal officials and relocate away from the eastern seaboard.<sup>207</sup> An incredulous John Adams scoffed at Madison’s apparent hypocrisy, but the Democratic-Republicans maintained that they always believed that Congress’s powers to wage a declared war were far broader than its powers merely to prevent an invasion.<sup>208</sup> Applying similar logic, future Congresses and presidents would exercise an implied “power to wage war successfully” by registering, relocating, detaining, and deporting citizens and immigrants alike, most notably with U.S. citizens of Japanese descent during World War II.<sup>209</sup>

The Democratic-Republicans would also enact their own federal legislation regulating the movement of people. For example, as the year 1808 approached during Jefferson’s second term, Congress enacted a bill to abolish the transatlantic slave trade. The year was constitutionally significant: Article I, Section 9 temporarily barred Congress from prohibiting “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit . . . prior to the Year one thousand eight hundred and

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203. Letter from Alexander Hamilton to Jonathan Dayton (1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 599, 604 (Harold C. Syrett ed., 1987).

204. Letter from Thomas Jefferson to Joseph Priestly, *supra* note 15, at 394–95.

205. *Id.*

206. *Id.* at 393–94.

207. See *Lockington v. Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8,448); *In re Lockington*, 5 AM. L.J. 92 (Pa. 1813).

208. See *supra* text accompanying note 159; Letter from John Adams to Thomas Jefferson (June 14, 1813), in 6 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 191, 191–93 (J. Jefferson Looney ed., 2009).

209. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (internal quotations omitted) (citation omitted); see also, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (relocation of U.S. citizens); *Ex parte Quirin*, 317 U.S. 1 (1942) (juryless tribunal of German saboteurs). This war power has since been expanded to apply during undeclared wars and “is not exhausted when the shooting stops.” *Ludecke v. Watkins*, 335 U.S. 160, 167–68 (1948) (citing *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70 (1869); *The Protector*, 79 U.S. (12 Wall.) 700 (1871); *McElrath v. United States*, 102 U.S. 426, 438 (1880); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 167 (1919)) (deportation of German national after World War II); see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detention of U.S. citizens during undeclared War on Terror).

eight.”<sup>210</sup> This language strongly implied that something in the Constitution permitted Congress to suppress the transatlantic slave trade *after* 1808. But in light of the party’s arguments against the Alien Friends Act a decade earlier, Democratic-Republicans thought it important to be precise about which clause in the Constitution empowered them to regulate the importation of enslaved people.

Congress’s power to “regulate Commerce with foreign Nations” was an appealing candidate.<sup>211</sup> But just as Gallatin had disparaged the idea that the Commerce Clause permitted Congress to deport people in 1798,<sup>212</sup> a House committee in 1807 feared that relying on the Commerce Clause would “sanction the principle that it was lawful for Congress to deal in human beings as an article of commerce—a principle abhorrent to humanity, and at war with our fundamental institutions.”<sup>213</sup> Ultimately, the supporters of the bill invoked the clause that permitted Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>214</sup> The final series of acts declared that anyone convicted of participating in the transatlantic slave trade would be “adjudged a pirate” and punished for committing an offence against the law of nations.<sup>215</sup>

Congress’s specificity about the source of its power to abolish the transatlantic slave trade illustrates how, like scar tissue, memories of the Alien Friends Act limited how flexibly subsequent Congresses exercised federal power. Over the next century, the defunct Alien Friends Act would be remembered as “a flagrant violation of the Constitution;”<sup>216</sup> an “insidious attack upon the freedom of the person;”<sup>217</sup> an “inva[sion of] the political rights and powers of the States;”<sup>218</sup> and a product of “that ‘reign of terror,’ which stands recorded, in such dark characters, upon the pages of our history.”<sup>219</sup>

210. U.S. CONST. art. I, § 9, cl. 1.

211. *Id.* § 8, cl. 3.

212. *See supra* note 174 and accompanying text.

213. 16 ANNALS OF CONG. 271 (1807).

214. U.S. CONST. art. I, § 8, cl. 10; *see* 16 ANNALS OF CONG. 271 (1807).

215. Act of May 15, 1820, ch. 63, §§ 4–5, 3 Stat. 600, 601; *see also* Act of Mar. 2, 1807, ch. 22, 2 Stat. 426; Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2227–50 (2021) (discussing prosecutions under these Acts).

216. 3 REG. DEB. 1269 (1827) (statement of Rep. William C. Rives).

217. 25 ANNALS OF CONG. 664 (1813) (statement of Speaker Henry Clay).

218. 9 REG. DEB. 288 (1833) (statement of Sen. George M. Bibb).

219. 3 REG. DEB. 1268 (1827) (statement of Rep. William C. Rives); *see also, e.g.*, *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 527 (1849) (Woodbury, J., dissenting) (observing that the Alien Friends Act “was generally denounced as unconstitutional, and suffered to expire without renewal”); CONG. GLOBE, 28th Cong. 2d Sess. app. at 243 (1845) (statement of Rep. Henry C. Murphy); ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* 227 & n.67 (Liberty Fund 1999) (1803); 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*137 n.24.

Yet the transatlantic slave trade ban also illustrates how even while Congress maintained fidelity to the Democratic-Republican arguments of 1798, it creatively exercised its enumerated powers to regulate the movement of people. Later Congresses similarly invoked specific provisions of the Constitution to regulate the movement of enslaved people<sup>220</sup> and to expel indigenous communities from their homes.<sup>221</sup> And while members of Congress long remained skeptical that Congress could regulate *people* as articles of commerce, they had no compunction about using the Commerce Clause to regulate *ships*, including ships bearing immigrant passengers.<sup>222</sup> Accordingly, beginning in 1819, Congress required all passenger ships to ensure that immigrants received sufficient water, provisions, and space to survive the voyage.<sup>223</sup> Congress later awarded these immigrants homesteads by invoking its power to “dispose of” federal territory.<sup>224</sup> And Congress protected these immigrants’ civil rights by invoking its power to make treaties and enforce the Fourteenth Amendment.<sup>225</sup>

The expiration of the Alien Friends Act therefore did not signal the end of federal immigration law. But the first century of federal immigration law was constructed in the shadow of the Act’s presumed unconstitutionality.<sup>226</sup> Indeed, when politicians intermittently proposed federal laws to discourage immigration, members of Congress rejected their proposals as “the old ‘alien law,’ under a thin disguise.”<sup>227</sup> Senator Benjamin Wade of Ohio even predicted in 1854 that “with the repeal of the odious *alien law*, these illiberal and unjust

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220. See, e.g., Bilder, *supra* note 18, at 790–822 (discussing the Commerce Clause and Territory Clause).

221. See, e.g., CLAUDIO SAUNT, UNWORTHY REPUBLIC 44, 239–49 (2020) (discussing the Commerce Clause and the war powers).

222. COX & RODRÍGUEZ, *supra* note 40, at 21 (calling these enactments “oft-overlooked in discussions of American immigration history”). For example, the second statute passed by the First Congress was an act that regulated customs duties for incoming commercial traffic, and subsequent Congresses passed laws regulating the coastal shipping trade without objection. Act of Jul. 4, 1789, ch. 2, 1 Stat. 24.

223. See, e.g., Act of Mar. 3, 1855, ch. 213, 10 Stat. 715; Act of Mar. 2, 1819, ch. 46, 3 Stat. 488, 489.

224. See, e.g., Act of July 4, 1864, ch. 246, 13 Stat. 385 (repealed 1868); Act of May 20, 1862, ch. 75, 12 Stat. 392 (repealed 1976).

225. See, e.g., Enforcement Act of 1870, ch. 114, 16 Stat. 140; Act of Feb. 9, 1869, ch. 24, 15 Stat. 269; Additional Articles to the Treaty Between the United States and China, of June 18, 1958, China-U.S., July 28, 1868, 16 Stat. 739, 740 [hereinafter Burlingame-Seward Treaty of 1868]; Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (repealed 1974).

226. See, e.g., 1 VON HOLST, *supra* note 16, at 142 (calling the Alien Friends Act “unquestionably unconstitutional” in 1876).

227. CONG. GLOBE, 33d Cong., 2d Sess. app. at 60 (1854) (statement of Rep. William Barry); see, e.g., 3 REG. DEB. 1268–69 (1829) (statement of Rep. William C. Rives) (describing the Alien Friends Act as “a flagrant violation of the Constitution” and “a reign of terror”); see also, e.g., CONG. GLOBE, 32d Cong., 1st Sess. app. at 832–33 (1852) (statement of Rep. Edson B. Olds); 9 REG. DEB. 287–88 (1833) (statement of Sen. George M. Bibb).

notions, prejudices, and practices passed away, I trust forever.”<sup>228</sup> Unfortunately, this prediction would prove to be wildly incorrect.

## II. THE IMMIGRATION CLAUSE AFTER 1876

In 1884, shortly before he returned home to California to launch a short-lived bid for the presidency,<sup>229</sup> Stephen Field wrote a blistering opinion for his day job on the Supreme Court of the United States. The Court had just suggested that Congress could exercise whatever financial powers are “inherent in the United States as a sovereign government,”<sup>230</sup> and Justice Field was enraged. Excoriating his colleagues for neglecting the “framers of the Constitution,” Field insisted “there is no such thing as a power of inherent sovereignty in the government of the United States.”<sup>231</sup> Instead, Field wrote, the United States was “a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it.”<sup>232</sup>

Field repeated his anti-sovereign sentiment a few years later in an 1893 immigration opinion. This time he observed that he was merely repeating James Madison’s arguments against the Alien Friends Act.<sup>233</sup> “When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed,” Field wrote.<sup>234</sup> “If it cannot be thus found, it does not exist.”<sup>235</sup>

Despite Field’s twin denunciations of “a power of inherent sovereignty” in 1884 and 1893, he allegedly reached the opposite conclusion in a fateful opinion in 1889: the *Chinese Exclusion Case*.<sup>236</sup> Although Field understood this 1889 opinion as a relatively insignificant discussion of Congress’s power to abrogate a treaty, his opinion would later be interpreted as if he were awarding Congress a novel, freestanding immigration power derived from the “sovereignty” of the United States rather than the text of the Constitution.<sup>237</sup> This interpretation of the *Chinese Exclusion Case* would profoundly transform immigration law long after Field’s death. Yet it is based on a misunderstanding.

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228. CONG. GLOBE, 33d Cong., 1st Sess. 1717 (1854).

229. See PAUL KENS, JUSTICE STEPHEN FIELD 234 (1997).

230. *Juilliard v. Greenman*, 110 U.S. 421, 440 (1884) (citing the General Welfare Clause, U.S. CONST. art. I, § 8, cl. 1).

231. *Id.* at 467 (Field, J., dissenting).

232. *Id.*

233. *Fong Yue Ting v. United States*, 149 U.S. 698, 746–50 (1893) (Field, J., dissenting).

234. *Id.* at 758.

235. *Id.*

236. 130 U.S. 581 (1889).

237. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (citing *The Chinese Exclusion Case*, 130 U.S. 581).

Field's intended meaning in the *Chinese Exclusion Case*, which continues to vex scholars and judges today, can be clarified by reading it in the context of his lengthy career on the bench. As a judge who served on the California Supreme Court for over fifteen years and then the Supreme Court of the United States, Field participated in the national trend of interpreting the Commerce Clause and the Treaty Clause to give the federal government "plenary" power over foreign shipping, including ships carrying immigrants.<sup>238</sup> The term *plenary* did not mean unlimited, unchecked, or extraconstitutional power. It merely signified that the Constitution established a "representative government[.]" and therefore when Congress exercised its enumerated powers within constitutional limits, the only things that could control Congress's discretion were the "[t]he wisdom" of its members, "their identity with the people, and the influence which their constituents possess at elections."<sup>239</sup> This meant that when Congress exercised its enumerated powers to *encourage* immigration, Field invalidated xenophobic state laws to the contrary.<sup>240</sup> And when federal legislation shifted after 1875 to *restrict* immigration,<sup>241</sup> Field and his judicial colleagues upheld Congress's power "to pass a law regulating immigration as a part of commerce of this country with foreign nations."<sup>242</sup>

Yet these newly restrictive federal laws often interfered with earlier laws and treaties that encouraged immigration, particularly immigration from China.<sup>243</sup> In the *Chinese Exclusion Case*, the Court addressed whether Congress's enumerated powers permitted the government to repudiate promises made in earlier treaties.<sup>244</sup> In a unanimous opinion, Field answered yes.<sup>245</sup> He explained that if China or any another nation could control Congress's discretion with a treaty, the United States would no longer be an independent "sovereign," in control of its own destiny.<sup>246</sup> Instead, Field held that the enumerated powers that permitted Congress to protect the nation—including its powers to regulate foreign commerce and to make treaties—were "all sovereign powers, restricted in their exercise only by the Constitution itself."<sup>247</sup>

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238. See, e.g., *In re Ah Fong*, 1 F. Cas. 213, 216 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 102).

239. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

240. See *In re Ah Fong*, 1 F. Cas. at 217–18.

241. See Neuman, *supra* note 17, at 1837 n.20 (describing "pervasive federal regulation" as "obviously absent prior to 1875").

242. *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 591, 600 (1884); see also *Henderson v. Mayor of N.Y.C.*, 92 U.S. 259, 270–71 (1876).

243. See *The Chinese Cannot Come*, S.F. CHRON., May 14, 1889, at 4; Brief for Appellant at 5–9, *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889) (No. 1446).

244. *The Chinese Exclusion Case*, 130 U.S. at 600; see also Brief for Respondent at 3, *The Chinese Exclusion Case*, 130 U.S. 581 (No. 1446) ("There is but one question before the Court, which is, as to the power of Congress to rescind the treaty.").

245. *The Chinese Exclusion Case*, 130 U.S. at 599–603.

246. *Id.* at 603–04.

247. *Id.* at 604.

He therefore concluded that no actions of any previous administrations could divest Congress of “an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution.”<sup>248</sup>

Field invoked the term “sovereignty” not to provide an extraconstitutional source of Congress’s power to exclude immigrants but to explain why Congress’s enumerated powers permitted exclusion and could not be restricted by another nation.<sup>249</sup> Contemporary readers understood this, describing the *Chinese Exclusion Case* as a case about “Treaty Rights.”<sup>250</sup> But since the early twentieth century, readers have mistakenly interpreted Field’s language as if “he believed . . . that every sovereign nation had inherent authority to exclude strangers from its territory.”<sup>251</sup> Even the Supreme Court began to cite the *Chinese Exclusion Case* as if Congress’s power to exclude immigrants were a power derived from its “sovereignty,”<sup>252</sup> not, as Field had written, an ordinary exercise of “those sovereign powers delegated by the Constitution.”<sup>253</sup> This misreading of the *Chinese Exclusion Case* has provided an extraconstitutional foundation for federal immigration law that neither the Supreme Court nor Congress has ever explained. The story of Field’s career and legacy therefore goes further toward answering where Congress’s power over immigration came from than does the Constitution itself.

#### A. *The State Police Power Versus the Federal Commerce Clause*

When Stephen Field joined the California Supreme Court in 1857,<sup>254</sup> he presided over a state whose legislature exercised virtually unchecked authority to exclude, deport, and otherwise regulate the residence of immigrants within its borders.<sup>255</sup> As in 1798, when opponents of the Alien Friends Act argued that immigration was a power reserved to the states by the Tenth Amendment, states across the country continued to treat immigration as an issue firmly within their control, like slavery.

States took advantage of this liberal legal regime to regulate immigration in a variety of ways. From Mississippi to Illinois, many state legislatures spent the early nineteenth century passing laws that excluded from their borders all new black people, whether enslaved or free.<sup>256</sup> Oregon’s 1857 constitution was

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248. *Id.* at 609.

249. *Fong Yue Ting v. United States*, 149 U.S. 698, 757–58 (1893) (Field, J., dissenting).

250. Recent Case, *supra* note 33, at 136.

251. COX & RODRIGUEZ, *supra* note 40, at 34; *see, e.g.*, Henkin, *supra* note 39, at 857–58 n.20.

252. *See, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 161 (1945).

253. *The Chinese Exclusion Case*, 130 U.S. at 609.

254. *Field, Stephen Johnson*, CQ PRESS, <https://library.cqpress.com/scc/document.php?id=bioenc-427-18166-979216&v=397d0887e8b70877> [perma.cc/P3Q7-PK3W].

255. COX & RODRIGUEZ, *supra* note 40, at 21–23.

256. *See HIROTA, supra* note 18, at 87; KATE MASUR, UNTIL JUSTICE BE DONE 71–72 (2021); *see, e.g.*, *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 497 (1841).

typical, requiring state officials to deport and punish any “free negro or mulatto, not residing in this state at the time of the adoption of this constitution.”<sup>257</sup> Even as they excluded black people, most states outside the Northeast were eager for white settlers, actively encouraging European immigration.<sup>258</sup> Many, like Oregon, even opened the franchise to “every white male of foreign birth” who lived in the state and “declared his intention to become a citizen of the United States.”<sup>259</sup>

By contrast, as ports of entry for the majority of European immigrants, New York and Massachusetts adopted restrictive codes that sought to exclude any immigrant considered too impoverished or criminal to sustain themselves peaceably.<sup>260</sup> The two states also began levying taxes and bonds on incoming arrivals and using the funds to pay for the relief of “the alien poor.”<sup>261</sup> By the mid-nineteenth century, a xenophobic political organization, the Know Nothing Party, emerged in New York and quickly dominated the politics of Massachusetts.<sup>262</sup> The hub of abolitionism adopted one of the first complex bureaucracies to exclude and expel allegedly inferior immigrants.<sup>263</sup>

California soon followed suit, adopting a policy of admitting white and black Americans but excluding immigrants.<sup>264</sup> In 1850, California prohibited “foreign miners” from working in the state unless they paid a steep license fee.<sup>265</sup> And over the next two decades, the state focused its anti-immigrant legislation against Chinese immigrants in particular.<sup>266</sup> In 1852, on the theory that all Chinese men belonged “to a class of Asiatics known as ‘Coolies,’ who are sent here . . . under contract to work,” California’s governor urged the legislature to suppress the “wholesale importation to this country, of immigrants from the Asiatic quarter of the globe.”<sup>267</sup> By purposefully conflating voluntary immigration with the involuntary “coolie trade,”<sup>268</sup> the governor treated Chi-

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257. OR. CONST. of 1857, art. I, § 35; see MASUR, *supra* note 256, at 264–66 (discussing congressional debate over Oregon’s provision).

258. COX & RODRÍGUEZ, *supra* note 40, at 20; HIROTA, *supra* note 18, at 86–87 & n.56.

259. OR. CONST. of 1857, art. II, § 2; see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 27–28 (rev. ed. 2009).

260. See LEE, *supra* note 9, at 70; HIROTA, *supra* note 18, at 58–59, 86 (referencing a third major port, New Orleans); Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 *LAW & HIST. REV.* 583, 591 (2001).

261. *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 316 (1849); see HIROTA, *supra* note 18, at 55–69.

262. HIROTA, *supra* note 18, at 95–96.

263. See LEE, *supra* note 9, at 69–70; HIROTA, *supra* note 18, at 75–83; Parker, *supra* note 260, at 611, 621–27.

264. See HIROTA, *supra* note 18, at 88.

265. See *People ex rel. Att’y Gen. v. Naglee*, 1 Cal. 232, 233, 240 (1850).

266. HIROTA, *supra* note 18, at 89–91.

267. Governor’s Message to the Senate and Assembly (Apr. 23, 1852), in *JOURNAL OF THE THIRD SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA* 373 (1852).

268. See Act of Feb. 19, 1862, ch. 27, 12 Stat. 340–41 (1862) (repealed 1974).

nese immigration as if it were as devastating as slavery to free labor and republican values.<sup>269</sup> And beginning in 1855, California's legislature adopted a half-dozen laws with names like "An Act to prevent the further immigration of Chinese or Mongolians to this State."<sup>270</sup>

California's business community challenged several of these laws in a court whose leader, Stephen Field, was sympathetic to the community's demand for cheap labor. Against the backdrop of a constitutional jurisprudence drafted by the Federalist chief justice of the United States, John Marshall, Justice Field used these cases to draw a firm boundary between Congress's power to regulate the entry of immigrants and states' power to "police" them after their arrival. Justice Field's understanding of Marshall's division between state and federal power provides us with a crucial backdrop both for Congress's late-twentieth century immigration laws and for the *Chinese Exclusion Case* itself.

### 1. Chief Justice Marshall and the Federal Commerce Clause

The courts were not the most intuitive place to challenge California's anti-Chinese laws before the Civil War. No provision of the U.S. Constitution expressly prohibited state immigration laws. But in a series of decisions between 1819 and 1849, the U.S. Supreme Court interpreted Congress's power to "regulate Commerce with foreign Nations, and among the several States,"<sup>271</sup> as an exclusive power that states could not exercise. Counterintuitively, these decisions would shape the trajectory of immigration laws in California and elsewhere for the entire nineteenth century.

These Supreme Court cases were initiated by Chief Justice John Marshall, a former member of John Adams's cabinet whose career on the bench survived long after the Democratic-Republican takeover of the federal government.<sup>272</sup> Bowing to his opponents' triumph, Marshall accepted their argument that Congress's power to enact legislation was limited only to laws that could be "implied as incidental to [its enumerated powers], or used as a means of

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269. See WHITE, *supra* note 59, at 298–300.

270. Act of Apr. 26, 1858, ch. 313, 1858 Cal. Stat. 295 ("An Act to prevent the further immigration of Chinese or Mongolians to this State"); Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 ("An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California"); Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330 ("An Act to prevent the kidnapping and importation of Mongolian, Chinese, and Japanese females, for criminal or demoralizing purposes"); Act of Mar. 31, 1866, ch. 505, 1866 Cal. Stat. 641 ("An Act for the suppression of Chinese houses of ill-fame"); Act of Mar. 18, 1870, ch. 231, 1870 Cal. Stat. 332 ("An Act to prevent the importation of Chinese criminals and to prevent the establishment of Coolie slavery"); Act of Feb. 7, 1874, ch. 76, 1874 Cal. Stat. 84 ("An Act to amend an Act entitled an Act for the suppression of Chinese houses of ill-fame").

271. U.S. CONST. art. I, § 8, cl. 3.

272. See HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835*, at 9, 53 (1997).

executing them.”<sup>273</sup> Yet he put a Federalist spin on this limited federal power by adding that the Constitution made Congress “supreme within its sphere of action,” giving it all “power appertaining to sovereignty . . . so far as it is calculated to subserve the legitimate objects of that government.”<sup>274</sup> In other words, Marshall conceded that the federal government did not possess all the powers held by other sovereigns; its “power appertaining to sovereignty”<sup>275</sup> existed only within a limited “sphere of action.”<sup>276</sup> But within that sphere, the Constitution permitted Congress to act like any other sovereign, with the exclusive power to decide how to achieve its “legitimate objects.”<sup>277</sup>

Marshall first applied this exclusive “sphere of action” idea to the Commerce Clause in a famous 1824 opinion, *Gibbons v. Ogden*. At issue were two conflicting laws: a New York law that prohibited certain steamship operators from running ferries to neighboring New Jersey and a federal law that permitted anyone with a federal license to engage in commerce along the Atlantic coast.<sup>278</sup> When New York enjoined a federal license holder from operating a ferry, the license holder complained that New York was interfering with Congress’s exclusive power to “regulate commerce with foreign nations, or among the several States.”<sup>279</sup> Marshall agreed. Defining “Commerce” broadly to refer to all shipping,<sup>280</sup> Marshall wrote that passenger shipping was part of the “commerce . . . among the several States.”<sup>281</sup> Because regulating interstate commerce fell within Congress’s exclusive sphere of action, Marshall concluded that no other government, including the New York legislature, could obstruct Congress’s judgment about who could engage in the transportation of passengers across state lines.<sup>282</sup>

Marshall’s description of Congress’s power to regulate commerce would later provide the vocabulary for judicial discussions of federal and state immigration law. Just as Marshall had earlier identified a constitutional sphere of action in which Congress could exercise “power appertaining to sovereignty,”<sup>283</sup> in *Gibbons*, he identified the Commerce Clause as one sector of this sphere.<sup>284</sup> So long as an issue reflected “commerce with foreign nations, and among the several States,” the issue fell within “the sovereignty of Congress” and was subject to Congress’s “plenary” power.<sup>285</sup> By the terms *sovereignty* and

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273. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405–06, 411, 421 (1819).

274. *Id.*

275. *Id.* at 411.

276. *Id.* at 405.

277. *Id.* at 411.

278. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 1–3 (1824).

279. See *id.* at 199–201.

280. *Id.* at 189–90.

281. See *id.* at 177.

282. *Id.*

283. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

284. *Gibbons*, 22 U.S. at 196–97.

285. *Id.* at 197.

*plenary*, Marshall did not mean Congress possessed limitless power. He cautioned that Congress remained subject to the “restrictions on the exercise of the power as are found in the constitution.”<sup>286</sup> Instead, he used the two terms to explain that when Congress exercised one of its enumerated powers, its power was as supreme as that of any other sovereign nation. In “all representative governments,” Marshall wrote, the only restraints on a legislature’s constitutional exercises of power were political, not legal.<sup>287</sup> These political restraints included “[t]he wisdom and the discretion of [legislators], their identity with the people, and the influence which their constituents possess at elections.”<sup>288</sup> These restraints did not, by contrast, include obstructions raised by New York, whose law therefore had to give way to federal supremacy.

An important implication of Marshall’s logic in *Gibbons* was that a jurisdictional boundary separated Congress’s exclusive sphere of action from the states’ power to “police” their internal affairs.<sup>289</sup> Within Congress’s sphere, Congress possessed “plenary” authority to impose whatever regulations that were consistent with constitutional limits and the tolerance of voters. States like New York were not permitted to enter this sphere. Yet Marshall also accepted that Congress’s sphere had to end somewhere. Before he died in 1835, Marshall drew the boundary of Congress’s exclusive sphere at the point where an article of commerce stopped traveling across state or international borders and “bec[a]me incorporated and mixed up with the mass of property in the [state].”<sup>290</sup> At that point—once the voyage ended and the article stopped moving—Congress’s power over it ceased, and the article instead became subject to the states’ “police power.”<sup>291</sup>

After Marshall’s death, a new generation of Supreme Court justices reevaluated his precedents and adopted a more limited vision of federal power. Yet the Court’s immigration cases drew the federal-state boundary in the same place he did—even as it inconsistently determined on which side of the boundary a particular law fell.<sup>292</sup> For instance, in 1837’s *City of New York v. Miln*, the Court considered a state law that required passenger ships to provide descriptions of their passengers so that municipal officials would know

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286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 203–04.

290. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441–43 (1827).

291. *Id.*

292. This inconsistency was attributable in part to slavery, as Marshall’s boundary threatened to undermine the dozens of state laws that regulated the admission of free or enslaved black people. *See, e.g.*, *The Cynosure*, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3,529) (striking down a state exclusion of free black people); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 505–07 (1841) (enslaved persons at issue) (upholding a Mississippi regulation of slavery); *id.* at 510 (Story, J., concurring) (“[T]he provision of the Constitution of the United States, which gives the regulation of commerce to Congress, did not interfere with the provision of the constitution of the state of Mississippi, which relates to the introduction of slaves as merchandise, or for sale.”).

who to scrutinize as “liable to become chargeable on the city.”<sup>293</sup> Like Marshall, the Court emphasized that Congress’s commercial power extended only to passengers “whilst on their voyage, and until they shall have landed.”<sup>294</sup> After landing—“when they have ceased to have any connexion [sic] with the ship”—people became subject to the exclusive regulation of state laws, “whose operation only begins when that of the laws of congress ends.”<sup>295</sup> On the theory that New York’s law applied only after the immigrants landed, the *Miln* Court determined that New York’s law was not “a regulation of commerce, but of police,” and was therefore valid.<sup>296</sup> In 1849, by contrast, in the *Passenger Cases*, a fractured Court invalidated a similar New York law that imposed a blanket tax on all immigrants before “the persons who may be brought as passengers have been landed.”<sup>297</sup>

## 2. Justice Field in California

After the *Passenger Cases*, the Supreme Court wouldn’t reconsider the constitutionality of a state or federal immigration law until 1876.<sup>298</sup> In the meantime, Stephen Field reviewed California’s anti-Chinese laws several times from his seat on the California Supreme Court. Even after he was elevated to the U.S. Supreme Court in 1863, Field continued to review anti-Chinese laws as he “rode circuit” in California and Oregon and spent much of his time sitting individually on federal trial courts.<sup>299</sup>

In decision after decision between 1857 and 1876, Field applied Marshall’s boundary line to hold that the Commerce Clause gave Congress the “exclusive power” to regulate “the transportation of passengers from foreign ports to the ports of the United States as a branch of commerce.”<sup>300</sup> He voted to uphold California’s laws only if they took effect after “foreigners become residents of [the] State.”<sup>301</sup> Because his decisions involved zero-sum interpretations of Congress’s power to regulate commerce, every time Justice Field limited California’s power to exclude Chinese immigrants, he necessarily implied that

293. See 36 U.S. (11 Pet.) 102, 104–05 (1837).

294. *Id.* at 138.

295. *Id.*

296. *Id.* at 132. In his dissent, Justice Joseph Story observed that the late Chief Justice Marshall personally thought the New York immigration law was unconstitutional for the same reasons as the New York monopoly law in *Gibbons* (and the Maryland law in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827)). *Id.* at 161 (Story, J., dissenting). The Court’s disagreement, therefore, was more over the application of Marshall’s rules than the rules themselves.

297. *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 410, 422 (1849) (Wayne, J., concurring).

298. See *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876). *But see* *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (considering a state transit tax).

299. KENS, *supra* note 229, at 93–98, 134–35, 202–06.

300. *Lin Sing v. Washburn*, 20 Cal. 534, 583–85 (1862) (Field, C.J., dissenting).

301. *Id.*

“recourse must be had to the federal government, where the whole power over this subject lies.”<sup>302</sup> The reverse was true, too: if he believed California had the power to regulate or deport people, it was only because “the power of Congress over them, as subjects within its commercial regulations, was exhausted.”<sup>303</sup> So even as Field steadily recognized Congress’s exclusive power to regulate the immigration of foreigners, he derived that power from the Commerce Clause—whose operation within a state’s borders he considered as limited as it had been during the 1798 debate over the Alien Friends Act. Eventually acceding to Justice Field’s widely shared interpretation of Marshall’s boundary line, even the California legislature accepted the premise that under the Commerce Clause, “[t]he [p]olice of the ocean belongs to Congress. The [p]olice of the land belongs to the States.”<sup>304</sup>

Field’s application of the federal Commerce Clause reached the U.S. Supreme Court in 1876. At issue was another California law that imposed a \$500 penalty on any ship that attempted to land any “lewd or debauched woman”—a crude euphemism for Chinese women.<sup>305</sup> Evaluating the law in 1874 while riding circuit, Field expressed his sympathy with the “very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither.”<sup>306</sup> But because the Commerce Clause gave Congress the exclusive power to regulate ongoing voyages, Field invalidated the law while urging white Californians to seek recourse with the federal government instead.<sup>307</sup> The rest of the U.S. Supreme Court unanimously affirmed Field’s ruling in *Chy Lung v. Freeman*.<sup>308</sup> The Court explained that the power to enact “laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations . . . belongs solely to the national government.”<sup>309</sup>

### 3. Congress Exercises the Commerce Clause to Exclude

Listening to Field and his colleagues repeatedly declare that only Congress could regulate the admission of foreigners, politicians in California began lobbying Congress to adopt their state’s immigration policies as federal

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302. *In re Ah Fong*, 1 F. Cas. 213, 217 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 102).

303. *Lin Sing*, 20 Cal. at 584.

304. *Id.* at 554.

305. *In re Ah Fong*, 1 F. Cas. at 215.

306. *Id.* at 217.

307. *Id.*

308. 92 U.S. 275, 281 (1876).

309. *Chy Lung*, 92 U.S. at 280; *see also* *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (invalidating a New York law the same day on identical grounds).

exercises of the Commerce Clause.<sup>310</sup> After Field invalidated California’s “debauched women” ban in 1874, Representative Page of California even quoted the entirety of Field’s opinion on the House floor.<sup>311</sup> “It appears by the opinion . . . that the Legislature of California have attempted to deal with this subject,” Page explained.<sup>312</sup> “But . . . in the opinion of the Federal courts, we find that the State Legislature has no power over the subject, and that it is entirely within the control of Congress.”<sup>313</sup> Page therefore proposed a federal bill to make it illegal to “import” into the United States “women for the purposes of prostitution.”<sup>314</sup>

Congress passed the Page Act of 1875—the first-ever federal restriction of immigration—after virtually no debate about the law’s constitutionality.<sup>315</sup> None was necessary: Field’s earlier interpretations of the Commerce Clause supplied Congress with sufficient constitutional justification to enact the law. And his opinions afterward continued to declare that “the treaty-making power and the power to regulate commerce with foreign nations” permitted Congress “to prescribe the conditions of immigration or importation of persons.”<sup>316</sup>

As California emerged as a critical swing state in the presidential election of 1876,<sup>317</sup> the national Republican and Democratic Parties each praised the Page Act and inserted planks into their platforms calling for “such legislation within constitutional limitations, as shall prevent further importation or immigration of the Mongolian race.”<sup>318</sup> For the next two decades, members of Congress noticed that “[a] campaign does not appear to be complete without some additional Chinese legislation”;<sup>319</sup> a new law arrived “every other year with the elections, and the writer searches the dictionary for words to surpass

310. The state Republican and Democratic parties supported federal action as early as 1869. See WINFIELD J. DAVIS, *HISTORY OF POLITICAL CONVENTIONS IN CALIFORNIA, 1849–1892*, at 293, 299–300, 307–08, 327 (Sacramento, Cal. State Libr. 1893). The California legislature itself began petitioning Congress for immigration restrictions in 1872. H.R. Misc. Doc. No. 43-204, at 1 (1874); see also CONG. GLOBE, 42d Cong., 2d Sess. 1556 (1872).

311. 3 CONG. REC. app. at 42–43 (1875) (statement of Rep. Horace Page).

312. *Id.* at 43.

313. *Id.*

314. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

315. See 3 CONG. REC. 1,113, 1,454, 1,599 (1875).

316. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (Field, Circuit Justice, C.C.D. Cal. 1879) (No. 6,546); see also *New York v. Compagnie Générale Transatlantique*, 107 U.S. 59 (1883).

317. Vincent Geloso & Linan Peng, *Postbellum Electoral Politics in California and the Genesis of the Chinese Exclusion Act of 1882* (Geo. Mason Univ., Working Paper in Economics No. 21-29, 2021).

318. THE REPUBLICAN CAMPAIGN TEXT-BOOK FOR 1884, at 187 (New York, Republican Nat’l Comm. 1884); ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 49 (Illini Books ed. 1991); see also DAVIS, *supra* note 310, at 341.

319. 19 CONG. REC. 7,698 (1888) (statement of Rep. O’Neill); see, e.g., S. REP. NO. 44-689 (1877) (calling for the restriction of Chinese immigration in a bipartisan 1,200-page report developed over the summer of 1876).

predecessors.”<sup>320</sup> Although skeptics condemned the federal government for adopting “a new governmental policy upon the basis of color . . . [predicated on] antipathy to the Mongolian race [that] is equal to that which was formerly entertained in the older States against the negro,”<sup>321</sup> none challenged the restrictionists’ certainty about their “unquestionable” authority to restrict immigration.<sup>322</sup>

Representatives from the largest swing state of all, New York, also clamored for Congress to federalize their own state’s immigration laws.<sup>323</sup> Congress listened in 1882, passing a general Immigration Act that authorized New York and other states to exclude certain immigrants and collect passenger taxes for those they admitted.<sup>324</sup> When a shipping company challenged the constitutionality of these new federal taxes in 1884, the Supreme Court unanimously upheld them. Citing a half-century of precedent applying Marshall’s boundary line, the Court declared in the *Head Money Cases* that “[t]he burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration.”<sup>325</sup>

#### B. *The Commerce Clause Versus the Treaty Clause*

After 1875, virtually no member of Congress contested the constitutional power of the federal government to exclude certain immigrants as an exercise of the Commerce Clause. But many politicians objected to the constitutionality of a federal law that violated a treaty. In contrast with ordinary legislation, a treaty could take effect only with supermajority support from the Senate.<sup>326</sup> It also represented a promise with a foreign nation that could lead to international trouble if repudiated.

The issue of treaties cast a shadow on Congress’s attempt to restrict Chinese immigration because in 1868, the United States entered into a treaty with China in which it promised to guarantee the “voluntary emigration” of Chinese immigrants.<sup>327</sup> When Congress passed the Page Act in 1875, it limited

320. 23 CONG. REC. 2,913 (1892) (statement of Rep. Hitt); *id.* at 3625 (statement of Sen. Sherman) (finding the progression of anti-Chinese legislation to reflect a “mere political race” between the two parties).

321. Sen. Misc. Doc. No. 45-20, at 3, 8 (1878) (statement of former Sen. Morton).

322. *Cf.* 8 CONG. REC. 797 (1879) (statement of Rep. Page).

323. HISTORICAL DICTIONARY OF THE GILDED AGE 387–88 (Leonard Schrup & James G. Ryan eds., 2003); ANNUAL REPORT OF THE COMMISSIONERS OF EMIGRATION, FOR THE YEAR ENDING DECEMBER 31, 1876, S. 100-21, 1st Sess., at 8 (N.Y. 1877); H. COMM. ON FOREIGN AFFS., THE REGULATION OF IMMIGRATION, H.R. REP. NO. 46-1, at 3 (1879).

324. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

325. *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 595 (1884).

326. See GIENAPP, *supra* note 59, at 248–86.

327. Burlingame-Seward Treaty of 1868, *supra* note 225, at 740.

itself to prohibiting the *involuntary* migration of Chinese laborers and prostitutes<sup>328</sup>—a limit that many members of Congress regarded as consistent with the treaty but insufficient to slow immigration.<sup>329</sup> By contrast, when Congress passed a bill in 1879 that prohibited incoming steamships from carrying more than fifteen Chinese passengers, President Rutherford B. Hayes vetoed the bill on the ground that it violated the treaty.<sup>330</sup> President Hayes argued that even though Congress had the constitutional power to unilaterally repeal an entire treaty by statute, the law of nations typically required the repealing nation to offer “some reason both of the highest justice and of the highest necessity”—neither of which he thought was evident.<sup>331</sup> Hayes worried that such a “casual infraction” would effectively repeal the treaty and lead to penalties against American merchants abroad.<sup>332</sup> He therefore urged Congress to wait for his administration to renegotiate the treaty, which he sent commissioners to accomplish in 1880.<sup>333</sup>

In China, Commissioner James B. Angell presented the Chinese commissioners with a proposal to authorize the United States to “regulate, limit, suspend, or prohibit” the “coming of Chinese laborers to the United States, or their residence therein.”<sup>334</sup> When the Chinese delegation objected that such language would authorize the United States to adopt blatantly discriminatory legislation, Angell’s team accepted a compromise.<sup>335</sup> The final version of the Angell Treaty of 1880 allowed the United States to “regulate, limit, or suspend” the entry of Chinese laborers, but not to absolutely prohibit it.<sup>336</sup> It also required any such limitation to be “reasonable” and to “apply only to Chinese . . . laborers, other classes not being included in the limitations.”<sup>337</sup> The treaty also declared that “Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord,” and that if any Chinese person in the United States received “ill treatment at the hands of any other persons,” then the federal government would “exert all its power to devise measures for their protection.”<sup>338</sup>

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328. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

329. See S. REP. NO. 44-689, at viii (1877).

330. 8 CONG. REC. 2,275–76 (1879).

331. *Id.* at 2276.

332. *Id.*

333. See *id.*; James Tobin, *Angell, China, and Opium*, UNIV. OF MICH. HERITAGE PROJECT, <https://heritage.umich.edu/stories/angell-china-and-opium> [perma.cc/H2X5-M3BF].

334. Letter from the United States Commission to Mr. Evarts (October 23, 1880), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 177–78 (Washington, Government Printing Office 1882).

335. See *id.* at 186–88.

336. Angell Treaty of 1880, China-U.S., Nov. 17, 1880, 22 Stat. 826, 826.

337. *Id.*

338. *Id.* at 827.

In 1882, after the Senate ratified the Angell Treaty, Representative Page of California proposed legislation to enforce it.<sup>339</sup> Over the objection of opponents who criticized Page's bill as racist and demeaning,<sup>340</sup> supporters maintained that Congress's power to enforce treaties was an unassailable implication of the Necessary and Proper Clause.<sup>341</sup> President Chester Arthur signed Page's bill into law as "An act to execute certain treaty stipulations relating to Chinese."<sup>342</sup> The new law—remembered today as the Chinese Exclusion Act but described at the time as the Chinese Restriction Act<sup>343</sup>—contained four main provisions. First, it suspended the immigration of Chinese laborers for ten years, authorizing federal customs officials to prohibit ships from landing Chinese miners or manual workers.<sup>344</sup> Second, it required incoming Chinese merchants, students, diplomats, and other nonlaborers to obtain certificates from the Chinese government identifying their occupation.<sup>345</sup> Third, it required Chinese laborers already in the United States to obtain certificates from the federal government if they wished to leave temporarily and return.<sup>346</sup> Finally, it authorized the president to remove "any Chinese person found unlawfully within the United States" after a federal court evaluated their legal status.<sup>347</sup>

Justice Field embraced the supporters' interpretation of the Act when he first reviewed it in 1882 while riding circuit in California. Observing that the Act "was framed in supposed conformity with the provisions of this supplementary treaty," he interpreted its provisions narrowly so as not to "go beyond the limitations prescribed by the treaty."<sup>348</sup> In one notable opinion, he even suggested that the Act applied only to immigrants from China and not to immigrants of Chinese descent from places not covered by the Angell Treaty, such as the British colony of Hong Kong.<sup>349</sup> Other judges followed his lead, declaring that the "only object" of the Act was to enforce the Angell Treaty,

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339. See H.R. REP. NO. 47-1017 (1882). The initial version of this bill was vetoed for being too restrictive in violation of the Angell Treaty. 13 CONG. REC. 2,551–52 (1882).

340. See, e.g., 13 CONG. REC. 3,265 (1882) (statement of Sen. Hoar); *id.* at 3264 (statement of Sen. Hawley); *id.* at 2177–83 (statement of Rep. Browne).

341. See, e.g., 13 CONG. REC. app. 54–55 (1882) (statement of Rep. Tucker); 13 CONG. REC. 3,408–09 (1882) (statement of Sen. Edmunds); *In re Low Yam Chow*, 13 F. 605, 607–11 (Field, Circuit Justice, C.C.D. Cal. 1882).

342. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); see H.R. REP. NO. 47-1017.

343. See, e.g., *United States v. Jung Ah Lung*, 124 U.S. 621, 625–26 (1888). See generally Beth Lew-Williams, *Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 26 (2014).

344. §§ 1, 15, 22 Stat. at 59, 61.

345. See *id.* §§ 6, 9, at 60.

346. *Id.* §§ 4–5, at 59–60.

347. *Id.* § 12, at 61.

348. *In re Low Yam Chow*, 13 F. 605, 608 (Field, Circuit Justice, C.C.D. Cal. 1882).

349. *Id.* at 609.

not to exercise some alternative power to restrict immigration from outside of China.<sup>350</sup>

Field adjusted course the following year, however, as Hong Kong became a major port of departure for Chinese immigrants to the United States. Predicting that “the island of Hong Kong would pour such laborers into our country every year in unnumbered thousands, unless they also were covered by the restriction act,” Field concluded that the Act’s authors must have “had a double purpose”: one to enforce the treaty with China, and a second to exclude “laborers of the Chinese race coming from any other part of the world.”<sup>351</sup> Field’s new interpretation of the Act was consistent with his personal views: he privately worried that the United States was made “for our race—the Caucasian race,” and that “everything connected with the Chinese prevent the possibility of their ever assimilating with our people.”<sup>352</sup> But it raised a constitutional problem: if the Chinese Restriction Act excluded immigrants whom the Angell Treaty did not cover, then the statute might conflict with treaties involving the United Kingdom, which controlled Hong Kong.<sup>353</sup>

In an 1883 case involving a Chinese immigrant from Hong Kong, *In re Ah Lung*, Field offered an explanation of the relationship between federal immigration laws and treaties—one he would revive several times over the next decade, including in the *Chinese Exclusion Case* six years later. Field began by observing that the Constitution treats both treaties and statutes as the supreme law of the land: an act of Congress “upon a subject within its legislative power is as binding upon the courts as a treaty on the same subject.”<sup>354</sup> Because neither a statute nor a treaty has “paramount authority over the other,” he continued, a court’s role in evaluating a conflict between them is simply applying whichever came later in time.<sup>355</sup> In this respect, Congress’s power to repeal an act passed by an old Congress was equivalent to Congress’s power to repeal a treaty ratified by an old Senate. So long as the new acts “relate to subjects which the constitution has placed under that legislative power,” then no prior Congress could forever bar a future Congress from exercising its legislative power.<sup>356</sup>

Applying this analysis to the situation before him, Field concluded that the Constitution permitted Congress to exclude Chinese immigrants from

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350. *United States v. Douglas*, 17 F. 634, 637–38 (C.C.D. Mass. 1883); *In re Moncan*, 14 F. 44, 45–46 (C.C.D. Or. 1882).

351. *In re Ah Lung*, 18 F. 28, 32 (Field, Circuit Justice, C.C.D. Cal. 1883).

352. Letter from Stephen J. Field to Professor J.N. Pomeroy (Apr. 14, 1882), in *Four Letters of Mr. Justice Field*, 47 YALE L.J. 1100, 1104 (1938).

353. See 15 CONG. REC. 3,761 (1884) (statement of Rep. R.R. Hitt).

354. *Id.* at 3762 (quoting *In re Ah Lung*, 18 F. at 29).

355. *In re Ah Lung*, 18 F. at 29–32.

356. *Id.* (quoting *Taylor v. Morton*, 23 F. Cas. 784, 786 (Curtis, Circuit Justice, C.C.D. Mass. 1855) (No. 13,799)).

Hong Kong even if a treaty with the United Kingdom said otherwise.<sup>357</sup> Field had already held that the exclusion of Chinese immigrants fell within Congress's power to regulate commerce.<sup>358</sup> He therefore wrote in *Ah Lung* that "[t]he immigration of foreigners to the United States, and the conditions upon which they shall be permitted to remain, are appropriate subjects of legislation as well as of treaty stipulation. No treaty can deprive congress of its power in that respect."<sup>359</sup> If the United Kingdom objected, Field continued, such an objection was not a constitutional problem but a diplomatic problem: it "may present its complaint to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects requires."<sup>360</sup>

The Supreme Court adopted Field's analysis the following year, in 1884. One of the issues in the *Head Money Cases*—the decision challenging the Immigration Act of 1882—was whether Congress's regulation of European immigration violated a treaty with Russia that called for open immigration.<sup>361</sup> Citing Field's opinion in *Ah Lung*, the Court held that a federal exercise of the Commerce Clause could be constitutional even if it conflicted with preexisting treaties.<sup>362</sup> "It is enough to say that, Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations, we see nothing . . . forbidden by any other part of the Constitution," the Court wrote.<sup>363</sup> Field added on behalf of the Court four years later that "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will."<sup>364</sup>

### C. *The Chinese Exclusion Case*

#### 1. The Chinese Exclusion Act

As Field and the Supreme Court gave Congress legal sanction to violate existing treaties, members of Congress became increasingly aggressive about restricting Chinese immigration further than the Angell Treaty allowed. In 1884, for instance, Congress codified Field's opinion in *Ah Lung* by amending the Chinese Restriction Act to apply to all Chinese laborers "from any foreign port or place."<sup>365</sup> But for members from California and other Western states, the Angell Treaty continued to pose three problems.

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357. *Id.* at 32.

358. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (Field, Circuit Justice, C.C.D. Cal. 1879) (No. 6,546).

359. *In re Ah Lung*, 18 F. at 29.

360. *Id.* at 29–30.

361. *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 597 (1884).

362. *Id.* at 598 (citing *In re Ah Lung*, 18 F. at 28).

363. *Id.* at 600.

364. *Whitney v. Robertson*, 124 U.S. 190, 195 (1888).

365. Act of July 5, 1884, ch. 220, 23 Stat. 115 (1884) (repealed 1943); H.R. REP. NO. 48-614, at 2 (1884).

First, the treaty explicitly required Congress to freely admit Chinese merchants, students, tourists, and people in transit.<sup>366</sup> As thousands of Chinese immigrants claimed to be members of these exempted classes, federal customs officials developed arbitrary and ultimately ineffective metrics to distinguish “laborers” from “merchants.”<sup>367</sup> Second, the treaty also protected the right of Chinese laborers already in the United States “to go and come of their own free will and accord.”<sup>368</sup> Although the Chinese Restriction Act instructed departing Chinese laborers to obtain a “certificate” as evidence of their U.S. residence,<sup>369</sup> the Secretary of the Treasury interpreted the treaty to allow any incoming Chinese immigrant to present evidence that they had once lived in the United States but had lost their certificate.<sup>370</sup> By 1887, over ten thousand Chinese immigrants entered the United States every year—far more than before the Act was first passed.<sup>371</sup>

Third, the treaty also required the United States to protect Chinese residents from “ill treatment at the hands of any other persons”<sup>372</sup>—a responsibility that each branch of the federal government shirked. When white lynch mobs in California began terrorizing Chinese residents, for example, the Supreme Court held over Field’s dissent that federal prosecutors had no power to protect them.<sup>373</sup> Yet the federal government’s reluctance to protect Chinese residents was not merely due to the law. Even when white people massacred their Chinese neighbors in the U.S. territory of Wyoming, President Grover Cleveland’s Administration blamed Chinese victims for choosing to live in such a “remote and unprotected region.”<sup>374</sup>

Beginning in 1886, as thousands of Chinese immigrants entered the United States only to face hostile vigilantes, the government of China offered to renegotiate the Angell Treaty.<sup>375</sup> In exchange for the United States’ payment

366. Angell Treaty of 1880, *supra* note 336, at 826.

367. See Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 *LAW & SOC’Y REV.* 249, 265 (2006).

368. Angell Treaty of 1880, *supra* note 336, at 827.

369. Chinese Exclusion Act, ch. 126, §§ 3, 6, 9, 22 Stat. 58, 59 (repealed 1943).

370. *United States v. Jung Ah Lung*, 142 U.S. 621, 634–35 (1888); see Circular from the Treasury, No. 124 (Oct. 25, 1882), in *SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT ON THE CONSTRUCTION OF THE TARIFF, NAVIGATION, AND OTHER LAWS FOR THE YEAR ENDING DECEMBER 31, 1882*, at 314, 315 (Washington, Government Printing Office 1883).

371. Lew-Williams, *supra* note 343, at 25.

372. Angell Treaty of 1880, *supra* note 336, at 686.

373. *Baldwin v. Franks*, 120 U.S. 678, 682, 704–05 (1887); *id.* at 707 (Field, J., dissenting).

374. Letter from T.F. Bayard to Mr. Cheng Tsao Ju (Feb. 18, 1886), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES* 158, 158–60 (Washington, Government Printing Office 1887).

375. Letter from Cheng Tsao Ju to T.F. Bayard (Feb. 15, 1886), *supra* note 374, at 154, 156; Telegram from Kwong Lun Hing & Co. to Cheng Tsao Ju (Feb. 11, 1886), *supra* at 156; Telegram from Lee Kim Wah to Cheng Tsao Ju (Feb. 13, 1886), *supra* at 157; Telegram from Mr. Owyang Ming to Mr. Cheng (Feb. 16, 1886), *supra* at 157; Telegram from Mr. Owyang Ming to Mr. Cheng (Feb. 18, 1886), *supra* at 158.; see *The Treaty with China: The Correspondence on the Convention*, N.Y. TIMES, Sep. 19, 1888, at 9.

of an indemnification to support the victims of anti-Chinese violence, China offered to allow the United States to prohibit the admission of all Chinese laborers, including former U.S. residents, with limited exceptions.<sup>376</sup> President Cleveland agreed to these terms in 1888, and the Senate ratified the Bayard–Zhang Treaty that spring.<sup>377</sup> As Congress waited for the Chinese government to ratify the treaty, it passed a statute known as the Chinese *Exclusion Act* “to carry into effect the provisions of the treaty . . . and to provide against the evasion of its provisions by the classes prohibited from entering the United States.”<sup>378</sup> The Act stated that it would take effect as soon as China ratified the treaty.<sup>379</sup>

Almost immediately after Congress passed the Chinese Exclusion Act in September 1888, however, rumors circulated that the Chinese government was having second thoughts about ratification.<sup>380</sup> The timing could not have been worse for the Cleveland Administration, as the presidential election was only two months away. With “a wink or a nod from the White House,” one of the president’s closest friends in Congress, Representative Scott of Pennsylvania, quickly proposed a backup bill in case the treaty fell apart.<sup>381</sup> His bill promised to prohibit the admission of all Chinese laborers—including residents returning home from abroad under the terms of existing treaties—regardless of whether China ratified the new treaty.<sup>382</sup>

The House unanimously passed Scott’s bill without debate,<sup>383</sup> and no senators doubted that the bill was “a regulation of commerce with foreign nations.”<sup>384</sup> But some senators expressed concern about the “injustice in the bill arising out of the provision which prohibits the coming into this country of any Chinese who have departed and have not returned at the time of the passage of the act.”<sup>385</sup> Even the bill’s supporters agreed that it violated the Angell Treaty’s protection of returning U.S. residents.<sup>386</sup>

But almost all of the bill’s supporters regarded its violation of existing treaties as a feature, not a bug, because it restored to the United States its sovereign power “to exclude any and every class of people who are supposed to

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376. Letter from Cheng Tsao Ju to T.F. Bayard (Nov. 30, 1886), *supra* note 374, at 101, 108; *see also* 19 CONG. REC. 7,694–95 (1888).

377. Lew-Williams, *supra* note 343, at 48.

378. 19 CONG. REC. 6,569 (1888) (statement of Sen. Dolph).

379. Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476 (repealed 1943).

380. Lew-Williams, *supra* note 343, at 48.

381. 19 CONG. REC. 8,365 (statement of Sen. Mitchell); 19 CONG. REC. 8,226 (statement of Rep. Scott); *see also* William L. Scott Dead, N.Y. TIMES, Sept. 21, 1891, at 5.

382. Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943).

383. 19 CONG. REC. 8,227 (1888).

384. *Id.*; *id.* at 8374 (statement of Sen. Hoar); *see also id.* at 8217 (statement of Sen. Sherman).

385. *Id.* at 8215 (statement of Sen. George); *see, e.g., id.* at 8219 (statement of Sen. Butler).

386. *Id.* at 8218 (statement of Sen. Mitchell).

be detrimental to the interests of the commonwealth.”<sup>387</sup> Senator Mitchell of Oregon, for example, urged his colleagues to repeal “all our treaties with China which restrict Congress and tie up its hands and prevent us from passing a law which would forever exclude all Chinese from this country.”<sup>388</sup> President Cleveland adopted similar reasoning when the Senate presented the bill for his signature.<sup>389</sup> Although the president mentioned the injustice of excluding returning residents currently “on their way” to the United States, he signed the Scott Act without waiting for an amendment by which they “may be permitted to land.”<sup>390</sup>

## 2. The Supreme Court’s Opinion

One of those returning residents was Chae Chan Ping, a Chinese resident of San Francisco who was on a ship in the Pacific when President Cleveland signed the Scott Act.<sup>391</sup> When Chae arrived in San Francisco days later, federal customs officials refused to allow him to disembark even though he had a return certificate authorized by the Chinese Restriction Act and Angell Treaty.<sup>392</sup> With the assistance of local counsel, Chae challenged the constitutionality of the Scott Act because it “divest[ed] a right indefeasibly vested under the treaties and laws.”<sup>393</sup> He contended that the certificate was, in effect, “a contract” that Congress had no power to breach by subsequent legislation.<sup>394</sup>

The federal circuit court summarily rejected Chae’s argument, citing the *Head Money Cases* and Field’s decision in *Ah Lung* for the proposition that Congress had the constitutional power to repeal or violate existing treaties by statute.<sup>395</sup> Chae appealed this decision to the Supreme Court, conceding in his briefing that “the power ‘to regulate commerce with foreign nations’ may authorize congressional legislation to prevent the *entry* of foreign subjects.”<sup>396</sup> But he argued that such a power didn’t authorize Congress “to prohibit the *return* to this country of the appellant. He had a *vested right* to return, which could not be taken from him by any exercise of mere *legislative power*.”<sup>397</sup>

G.A. Jenks, the U.S. solicitor general, defended the constitutionality of the Scott Act by arguing that if Chae’s theory were correct, then a treaty could

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387. *Id.* at 8217 (statement of Sen. Teller).

388. *Id.* at 8219 (statement of Sen. Mitchell).

389. Grover Cleveland, *The Chinese Barred Out*, N.Y. TIMES, Oct. 2, 1888, at 1.

390. *Id.* at 2.

391. *In re Chae Chan Ping*, 36 F. 431, 431 (C.C.N.D. Cal. 1888).

392. *Id.*

393. *Id.* at 433.

394. *Id.*

395. *Id.* at 433–35; see also Recent Case, *Constitutional Law—Chinese Exclusion Act of 1888*, 2 HARV. L. REV. 287 (1889).

396. Brief for Appellant, *supra* note 243, at 4.

397. *Id.*

forever deprive Congress of its sovereign powers to legislate. “Full legislative powers, in the United States, are committed to Congress,” Jenks wrote, citing the Commerce Clause, the Necessary and Proper Clause, and other enumerated powers.<sup>398</sup> Jenks therefore thought it absurd to suggest that Congress could not exercise one of these “full sovereign powers” because of a treaty with a foreign nation or a certificate given to an individual.<sup>399</sup> Nor did the law of nations require the United States to admit Chae: “International law fully establishes the right of a nation to exclude foreigners from its domain.”<sup>400</sup>

Justice Field wrote a unanimous opinion on behalf of the Supreme Court in Chae’s case, which was reported as the *Chinese Exclusion Case*. In light of Chae’s argument and the solicitor general’s defense, the primary question before the Court was whether Congress could exercise its legislative powers to nullify any right of return Chae possessed under the Angell Treaty of 1880 or the Chinese Restriction Act of 1882, both of which Chae regarded as a “contract.”<sup>401</sup>

Field began his opinion by conceding that “[a] treaty, it is true, is in its nature a contract between nations.”<sup>402</sup> But because a treaty was “only the equivalent of a legislative act,” it could be “repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.”<sup>403</sup> The Court had just decided this point in the *Head Money Cases*.<sup>404</sup> Field therefore dispensed with the suggestion that Congress could not abrogate the Angell Treaty.

Field spent far more time on Chae’s related argument that the Angell Treaty and his certificate gave him a “vested right” to return to the United States, a right that no statute could take away. He began his analysis by describing the power to exclude aliens as an “incident of every independent nation.”<sup>405</sup> Quoting Chief Justice Marshall, he wrote that a country’s “sovereignty” could be limited only by its own laws, not “from an external source” like a treaty with another nation.<sup>406</sup> But he did not end his analysis by concluding that because other nations could exclude people, so could Congress. Instead, he immediately turned to “our Constitution” and wrote that it empowered Congress alone to decide when to exercise all the sovereign powers that the document delegated to it.<sup>407</sup>

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398. Brief for the United States at 5, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (No. 1446).

399. *See id.*

400. *Id.* at 6.

401. *The Chinese Exclusion Case*, 130 U.S. at 589.

402. *Id.* at 600.

403. *Id.*

404. *Id.* at 600–03.

405. *Id.* at 603.

406. *Id.* at 604.

407. *Id.*

“While under our Constitution and form of government the great mass of local matters is controlled by local authorities,” he wrote, “the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.”<sup>408</sup> Like the solicitor general, he listed some of these powers: “[t]he powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship.”<sup>409</sup> He explained that these powers “are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.”<sup>410</sup> These “sovereign powers,” Field wrote, authorized Congress to conduct “our relations with foreign nations” and “give security against foreign aggression and encroachment,” including when such aggression came from “vast hordes of its people crowding in upon us.”<sup>411</sup> If Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security,” Field concluded, no contract, treaty, or condition of war or peace could prevent Congress from excluding them.<sup>412</sup> “The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution,” Field wrote.<sup>413</sup> “[T]he right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”<sup>414</sup>

#### D. *The Immediate Effect of the Chinese Exclusion Case*

##### 1. The Commerce Clause

Read in context, the *Chinese Exclusion Case* was a relatively straightforward, racist opinion that reaffirmed Congress’s sovereign power to legislate despite a contrary agreement. Field didn’t resurrect the old Federalist argument that because the United States was “sovereign,” it had an inherent power to exclude people—an argument that would not have resolved whether such a power belonged to Congress or to the states. Rather, he wrote that the Constitution delegated many powers to Congress, that those enumerated powers

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408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at 604, 606.

412. *Id.* at 606–09.

413. *Id.* at 609.

414. *Id.*

“are all sovereign powers,” and that Congress’s sovereign powers could be restricted “only by the Constitution itself and considerations of public policy,” not by treaty with China.<sup>415</sup>

Toward the end of the *Chinese Exclusion Case*, Field specifically distinguished the 1798 Act as “entirely different from the act before us.”<sup>416</sup> Unlike the sort of admission restriction law that the Court had recently upheld under the Commerce Clause, the 1798 Act was a deportation law. And in the years before and after the *Chinese Exclusion Case*, Field stridently declared that “there is no such thing as a power of inherent sovereignty in the government of the United States.”<sup>417</sup> Instead, he considered the United States “a government of delegated powers, supreme within its prescribed sphere but powerless outside of it. In this country, sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it.”<sup>418</sup>

Contemporary readers of the *Chinese Exclusion Case* adopted similar interpretations. The *Harvard Law Review* described the opinion as a case about “Treaty Rights” in which the Court declared that Chae’s certificate “conferred upon him no right to return to the United States of which he could not be deprived by a subsequent act of Congress.”<sup>419</sup> The *San Francisco Chronicle* praised the decision for rejecting “[t]he fine-spun argument of counsel for Chae Chan Ping that a return certificate constituted a contract with the outgoing Chinaman, by virtue of which the United States was legally bound to readmit him.”<sup>420</sup> When lower-court judges and members of Congress considered “[t]he question as to the power of congress to regulate the admission of alien passengers coming to this country,”<sup>421</sup> they typically cited Commerce Clause cases like the *Head Money Cases*. They cited the *Chinese Exclusion Case* only for the specific principle that Congress could abrogate treaties.<sup>422</sup>

Free to exercise the Commerce Clause’s power without worrying about the constitutionality of violating existing treaties, Congress steadily modified its immigration statutes after 1889 to secure “a stricter enforcement of the present laws, and for such amendments to be made as would more clearly define

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415. *Id.* at 604.

416. *See id.* at 610–11.

417. *Juilliard v. Greenman*, 110 U.S. 421, 467 (1884) (Field, J., dissenting); *see also* *Fong Yue Ting v. United States*, 149 U.S. 698, 746–50 (1893) (Field, J., dissenting).

418. *Juilliard*, 110 U.S. at 467 (Field, J., dissenting).

419. Recent Case, *supra* note 33, at 136.

420. *The Chinese Cannot Come*, *supra* note 243, at 4; *see also* *The Chinese Act Sustained*, BALT. SUN, May 14, 1889, at 1.

421. *In re Florio*, 43 F. 114, 115 (C.C.S.D.N.Y. 1890).

422. *See id.* at 115; *see, e.g.*, H.R. REP. NO. 52-255, at 4 (1892); *see also* *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (citing the *Chinese Exclusion Case* for the proposition that “the legislative power might pass laws in conflict with treaties”).

the desirable from the undesirable immigrants.”<sup>423</sup> Beginning in 1890, for example, Congress began appropriating money for “the appointment of suitable officers to enforce the laws” rather than relying exclusively on state immigration officials and federal customs collectors.<sup>424</sup> In 1891, it added to what would become a long list of excludable immigrants, including “persons likely to become a public charge,” “polygamists,” “idiots,” and “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”<sup>425</sup> Because so many immigrants like Chae Chan Ping challenged their exclusion in time-consuming federal court proceedings,<sup>426</sup> Congress declared in 1891 that the decisions of immigration officials “shall be final,” “subject to review [only] by the Secretary of the Treasury.”<sup>427</sup> Congress also began codifying the specific procedure by which federal immigration officials could evaluate whether an immigrant was excludable—including by authorizing officials to temporarily detain immigrants on shore and strip search them before deciding whether they could enter the country.<sup>428</sup>

When the Supreme Court considered these statutes, it upheld virtually all of them either by citing the *Chinese Exclusion Case* and other pre-1890 precedents or by invoking the Commerce Clause.<sup>429</sup> In describing Congress’s discretion to regulate immigration, the Court borrowed heavily from Chief Justice Marshall’s discussion in *Gibbons* that the clause gave Congress a “plenary” power in which its “sovereignty” was limited only by the Constitution and electoral politics.<sup>430</sup> Yet where Chief Justice Marshall used this language to prohibit New York from interfering with Congress’s discretion, Justice Field and the rest of the Court used this language to prohibit China and the

423. H.R. REP. NO. 51-3472, at viii (1891); e.g., Act of May 5, 1892, ch. 60, 27 Stat. 25 (amended 1943) (extending Chinese exclusion by ten years); Act of Apr. 29, 1902, ch. 641, 32 Stat. 176 (repealed 1943) (making Chinese exclusion permanent); Act of Apr. 27, 1904, ch. 1630, 33 Stat. 394, 428 (repealed 1943) (reenacting provisions after expiration of treaties with China).

424. Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 387; see H.R. REP. NO. 50-3792, at 4 (1889) (calling for the federalization of the general immigration laws); Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (federalizing the general immigration laws).

425. § 1, 26 Stat. at 1084.

426. See H.R. REP. NO. 51-4048, at ii–iii (1891).

427. § 8, 26 Stat. at 1085; see also Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390 (repealed 1943) (extending finality to Chinese immigrants).

428. § 8, 26 Stat. at 1085; Wong Kai Kah, *A Menace to America’s Oriental Trade*, 178 N. AM. REV. 414, 422 (1904); see also Act of Mar. 3, 1893, ch. 206, 27 Stat. 569; Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565–67 (repealed 1943). For early justifications of temporary onshore detention, see H.R. DOC. NO. 59-847, at 10 (1906); C.S. Fairchild, *Immigrants—Landing and Examination of*, in SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT ON THE CONSTRUCTION OF THE TARIFF, NAVIGATION, AND OTHER LAWS FOR THE YEAR ENDING DECEMBER 31, 1885, at 359, 359 (Washington, Government Printing Office 1886).

429. See, e.g., *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 334 (1909).

430. *Id.* at 334–35, 342–43.

Court itself from interfering with Congress's discretion.<sup>431</sup> In 1892's *Nishimura Ekiu v. United States*, for example, the Court upheld the constitutionality of an immigration law that authorized federal officials to detain and summarily exclude immigrants without a court hearing.<sup>432</sup> The Court opened its opinion by invoking "an accepted maxim 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."<sup>433</sup> This maxim was relevant not because "inherent . . . sovereignty" was the source of Congress's power to exclude people.<sup>434</sup> Rather, it was relevant because it explained why the Court was bound to defer to exercises of the Necessary and Proper Clause, the Treaty Clause, the Naturalization Clause, and other "statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States."<sup>435</sup> Similarly, in 1909, the Court declared that "over no conceivable subject is the legislative power of Congress more complete" than "the authority of Congress over foreign commerce and its right to control the coming of aliens into the United States, and to regulate that subject in the fullest degree."<sup>436</sup> Yet as broad as this language was, it was not a declaration of unlimited legislative power, but rather a judicial unwillingness to question the method by which Congress exercised a power that the Court had already upheld.<sup>437</sup> Indeed, the Court was careful not to formally abandon the idea that it could review the constitutionality of Congress's immigration laws, even as it stridently deferred to Congress's judgments.<sup>438</sup>

## 2. The Necessary and Proper Clause

Even though the *Chinese Exclusion Case* didn't make any doctrinal changes, it did help to reopen a source of immigration power that had been

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431. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889).

432. 142 U.S. 651, 660 (1892).

433. *Id.* at 659.

434. *Id.*

435. *Id.*

436. See *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 334, 339 (1909); see also *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904).

437. See, e.g., *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 546–47 (1895); *Lees v. United States*, 150 U.S. 476, 480 (1893).

438. See, e.g., *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920); *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915); *Low Wah Suey v. Backus*, 225 U.S. 460, 475–76 (1912); *Chin Yow v. United States*, 208 U.S. 8, 13 (1908); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *United States v. Wong Kim Ark*, 169 U.S. 649, 653, 694 (1898); *In re Tom Yum*, 64 F. 485, 489 (N.D. Cal. 1894); see also *Recent Case, Chinese Exclusion Acts—Exclusion of Chinaman Claiming Citizenship*, 19 HARV. L. REV. 58, 60–61 (1905).

closed to Congress since 1798: the Necessary and Proper Clause. This reopening began a few years earlier, when the Supreme Court first invited Congress to regulate immigrants under the Commerce Clause.<sup>439</sup> Accepting this invitation, members of Congress concluded that it was necessary and proper for Congress to ensure that no immigrants “evaded” its regulations.<sup>440</sup> Accordingly, the year before the *Chinese Exclusion Case*, Congress began appropriating funds to facilitate the arrest and deportation of immigrants “within the period of one year after landing or entry.”<sup>441</sup> At the same time, federal courts also began authorizing officials to detain immigrants on shore instead of in their ships, a practice that expanded into formal detention centers on Angel Island in California and Ellis Island in New York.<sup>442</sup>

Even after the Supreme Court decided the *Chinese Exclusion Case*, the shadow of the Alien Friends Act continued to loom large. Many members of Congress remained skeptical about federal immigration officers—preferring instead to rely on state immigration officials.<sup>443</sup> But nativist labor leaders, from Samuel Gompers to Terence Powderly, remained frustrated with the number of contract and Chinese laborers they believed were illegally entering the United States.<sup>444</sup> And a House immigration committee investigating contract labor issues argued “that the enforcement of all acts designed to regulate immigration should be intrusted to the Federal Government and not to the States. The regulation of immigration is a matter affecting the whole Union, and is pre-eminently a proper subject for Federal control.”<sup>445</sup>

In 1890, Congress accepted this criticism and hired the first federal officers dedicated to enforcing immigration laws.<sup>446</sup> The following year, with the

439. See, e.g., *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 594–96 (1884). The very first domestic immigration regulations were enacted to enforce federal treaties. See, e.g., Chinese Exclusion Act, ch. 126, § 12, 22 Stat. 58, 61 (1882) (repealed 1943). But Congress did not, at first, appropriate funds toward arrests or deportations away from ports of entry. See *Li Sing v. United States*, 180 U.S. 486, 488 (1901); Charles Foster, Circular—Exclusion of Chinese, in 1 SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT AND BOARD OF U.S. GENERAL APPRAISERS ON THE CONSTRUCTION OF THE TARIFF, NAVIGATION, AND OTHER LAWS, FOR THE YEAR ENDING DECEMBER 31, 1892, at 541, 541 (Washington, Government Printing Office 1893).

440. H.R. REP. NO. 52-255, at 1 (1892).

441. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565–67; see also H.R. 10896, 50th Cong. (1888); H.R. EXEC. DOC. NO. 50-396, at 3 (1888).

442. E.g., *In re Cummings*, 32 F. 75 (C.C.S.D.N.Y. 1887); *United States v. Craig*, 28 F. 795, 799 (C.C.E.D. Mich. 1886); *In re Day*, 27 F. 678, 680 (C.C.S.D.N.Y. 1886); see also CUAUHTÉMOC & HERNÁNDEZ, *supra* note 9, at 24–32.

443. See ADAM GOODMAN, THE DEPORTATION MACHINE 11–21 (2020); see, e.g., 23 CONG. REC. 3,623 (1892) (statement of Sen. Call); *id.* at 3,878 (statement of Sen. Palmer).

444. See, e.g., H.R. REP. NO. 51-3472, at 104–05 (1891) (statement of Samuel Gompers, President, American Federation of Labor); *id.* at 235–36 (statement of T.V. Powderly).

445. H.R. REP. NO. 50-3792, at 4 (1889).

446. See Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 387; C.S. Fairchild, Circular—Assignment of Duties Under Acts Relating to Alien Contract-Labor and Exclusion of the Chinese, in SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT ON THE CONSTRUCTION OF THE

Immigration Act of 1891, Congress completely federalized all immigration enforcement.<sup>447</sup> And in 1892, when the Chinese Restriction Act of 1882 was due to expire, Congress enacted the Geary Act, named for Representative Geary of California. The Act declared that any Chinese laborers who failed to obtain a certificate of residence by May 1893 “shall be deemed and adjudged to be unlawfully within the United States, and may be arrested [by certain federal officials] . . . , and taken before a United States judge.”<sup>448</sup> The Act then required the judge to order the Chinese person’s imprisonment and deportation.<sup>449</sup> If an arrested person claimed to be entitled to live in the United States without a certificate, he could earn his release only if he could “establish clearly to the satisfaction of said judge, . . . and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act.”<sup>450</sup>

The Geary Act of 1892 was one of the first immigration laws since 1798 that faced serious constitutional objections in Congress.<sup>451</sup> Members furiously decried its “provisions of savagery rare in legislation”<sup>452</sup> as “harsh and cruel,”<sup>453</sup> “unquestionably an act of barbarous legislation,”<sup>454</sup> “beyond the power of Congress,”<sup>455</sup> and “far beyond any bill that probably was ever introduced into the Congress of the United States.”<sup>456</sup> Senator Sherman of Ohio doubted that anyone in Congress would think it constitutional to accost “the English, Irish, Scotch, and French who come here, . . . and require them to show their certificates wherever they went to any officer who might demand it at any time whatever, upon the penalty of being deported.”<sup>457</sup> Senator Palmer agreed that he had “never imagined a time would come in this country when our condition would render it necessary to place it within the discretion, the absolute discretion, of that horde of [federal] officers, more or less, all or any of them, to arrest any human being.”<sup>458</sup>

Within months of the Geary Act’s passage, Chinese advocacy organizations raised tens of thousands of dollars to challenge the Act as a resurrection of “[t]he hated Alien and Sedition Laws, whose *unconstitutionality will*

TARIFF, NAVIGATION, AND OTHER LAWS, FOR THE YEAR ENDED DECEMBER 31, 1889, at 144, 144–45 (Washington, Government Printing Office 1890).

447. See Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

448. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25, 25–26 (amended 1943).

449. *Id.*

450. *Id.*

451. See 23 CONG. REC. 2,913–14 (1892) (statement of Rep. Hitt); see also *id.* at 3,524 (statement of Sen. Chandler).

452. 23 CONG. REC. 2,914 (1892) (statement of Rep. Hitt).

453. *Id.* at 3,481 (statement of Sen. Sherman).

454. *Id.* at 3,877 (statement of Sen. Call).

455. *Id.*

456. *Id.* at 3,480 (statement of Sen. Sherman).

457. *Id.* at 3,871.

458. *Id.* at 3,878.

scarcely be questioned by any one to-day.”<sup>459</sup> By the time the Act took effect on May 5, 1893, over 85 percent of Chinese residents in the United States had refused to register.<sup>460</sup> On May 6, three Chinese residents of New York—Fong Yue Ting, Wong Quan, and Lee Joe—initiated test cases against the Act.<sup>461</sup> One of them reported that he could not produce a white witness as the Act required, leading a federal judge to order him deported.<sup>462</sup>

Although the lawyers for Fong Yue Ting cited the *Chinese Exclusion Case* and *Nishimura Ekiu* as Commerce Clause cases,<sup>463</sup> they also anticipated that the solicitor general might defend the Geary Act as an “incident of sovereignty.”<sup>464</sup> They therefore strenuously objected “that there is no such thing as an inherent power of sovereignty resting in Congress, that is not conferred upon it by the Consti[tu]tion.”<sup>465</sup> Citing Justice Field’s opinions rejecting the idea of inherent powers, the lawyers observed that “Congress has never been upheld in the attempt to exercise any power as an inherent power of government, but only as it may have been given to it by the Constitution or the amendments thereto.”<sup>466</sup> Canvassing the rest of the Constitution, they concluded that there were only two occasions when Congress could deport a U.S. resident: “Congress has the same power to expel a friendly alien resident as a punishment for a crime as it has to expel a citizen as a punishment for a crime,” and “Congress has power under the Constitution, as an incident to the power to declare war, to expel an alien enemy.”<sup>467</sup>

Defending the Geary Act, Solicitor General Aldrich ignored Fong Yue Ting’s lawyers’ bait and refused to justify the statute as an exercise of sovereignty alone. Instead, as in the *Chinese Exclusion Case*, he cited international lawyers to argue that “there is a sovereign power somewhere, either in the Congress, the States, or the people, to prevent the intrusion of objectionable strangers into the country, and to remove them from it.”<sup>468</sup> To prove that this power resided in Congress, he then turned to the one enumerated power Fong Yue Ting’s lawyers had ignored: the Necessary and Proper Clause. “That the

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459. Brief on behalf of the Petitioners at 47, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (No. 1345) (quoting 1 H. VON HOLST, *THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA* 40 (John J. Lalor & Alfred B. Mason trans., 1887) (1876)); *The Six Companies Will Fight: They Are Ready to Contest the Geary Law’s Constitutionality*, N.Y. TIMES, Mar. 18, 1893, at 1.

460. H.R. REP. NO. 53-70, at 2 (1893).

461. Brief on behalf of the Petitioners, *supra* note 459.

462. *Id.* at 4–5.

463. *Id.* at 37.

464. *Id.* at 18–19.

465. *Id.* at 19.

466. *Id.* at 20–21.

467. *Id.* at 17.

468. Brief for the Respondents at 30, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (No. 1345).

United States have all powers necessary and proper to carry the granted powers into effect is a principle of constitutional interpretation too well established to require argument," he wrote.<sup>469</sup>

Conceding that resident immigrants were not literally in commerce, the solicitor general cited the *Chinese Exclusion Case* for the proposition that the Necessary and Proper Clause permitted Congress to make its regulations of commerce more effective.<sup>470</sup> In fact, he argued, by listing all the other enumerated powers that gave Congress "complete control . . . over our foreign relations," the *Chinese Exclusion Case* gave Congress wide latitude to determine what counted as necessary and proper.<sup>471</sup> "Any person reading this opinion will see that the conclusion is based upon the implications necessary to sustain the express and delegated powers considered as a whole," he explained.<sup>472</sup> "It seems sufficient to say that in the exercise of the enumerated powers of the Constitution, and those implied powers necessary to carry the express powers into effect, the Federal Government is sovereign, supreme, and [can properly express its will] through laws of Congress."<sup>473</sup>

In *Fong Yue Ting v. United States*, also known as the *Chinese Removal Case*, the Supreme Court agreed with the solicitor general, delivering an opinion that heavily excerpted from his brief.<sup>474</sup> Justice Gray divided his majority opinion into three parts: "principles of international law, . . . the Constitution and laws of the United States, and . . . the previous decisions of this court."<sup>475</sup> As a matter of international law, Justice Gray had no difficulty concluding that at least one government within the United States could deport any immigrant that it considered a threat to its welfare.<sup>476</sup> "The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation," he declared.<sup>477</sup>

Justice Gray next turned to "whether the manner in which Congress has exercised this right . . . is consistent with the Constitution."<sup>478</sup> He began by observing that the Constitution vested the federal government "with the entire control of international relations[,] and with all the powers of government necessary to maintain that control *and to make it effective*."<sup>479</sup> He then para-

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469. *Id.* at 34.

470. *Id.* at 35–36 (quoting *The Chinese Exclusion Case*, 130 U.S. 581 (1889)).

471. *Id.* at 36–37.

472. *Id.* at 36.

473. *Id.* at 34.

474. 149 U.S. 698 (1893).

475. *Id.* at 732.

476. *Id.* at 704–711.

477. *Id.* at 711.

478. *Id.*

479. *Id.* at 711 (emphasis added).

phrased the list of enumerated powers from the *Chinese Exclusion Case*, including the Necessary and Proper Clause.<sup>480</sup> Quoting Alexander Hamilton and John Marshall's famous definition of the Necessary and Proper Clause, he declared that if "the end be legitimate," then Congress could enact "all means which are appropriate, which are plainly adapted to that end."<sup>481</sup> In this case, the obvious "end" was Congress's power to exclude. "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power," Justice Gray wrote.<sup>482</sup> He concluded that when the *Chinese Exclusion Case* itself upheld Congress's exclusion laws, it authorized Congress "to take all proper means to carry out the system which it provides."<sup>483</sup>

Although the solicitor general and Justice Gray relied heavily on the *Chinese Exclusion Case*, the author of that opinion, Justice Field, strongly dissented from *Fong Yue Ting's* "extraordinary doctrines."<sup>484</sup> From Field's perspective, there was "a wide and essential difference" between his opinion upholding an exclusion law and this opinion upholding a deportation law, the latter of which he regarded as unnecessary, improper, and "severely denounced" by James Madison in 1798.<sup>485</sup> Not only did Field "utterly dissent" from the majority's willingness to condone the Geary Act as a necessary and proper exercise of Congress's sovereign powers, but he also warned of "a great deal of confusion in the use of the word 'sovereignty.'"<sup>486</sup> He presciently anticipated that the majority's discussion of "inherent and inalienable" sovereign rights might soon be interpreted to give Congress an "unlimited and despotic power so far as aliens domiciled in the country are concerned."<sup>487</sup>

As Justice Field predicted, *Fong Yue Ting's* interpretation of the Necessary and Proper Clause—combined with the *Chinese Exclusion Case's* interpretation of the Commerce Clause—invited Congress to enact far more restrictive legislation than anyone would have guessed permissible in 1875. So long as Congress called its legislation necessary and proper to enforce its exclusion laws, it appeared that the Court would uphold the regulations.<sup>488</sup> "Given the power to exclude, [Congress] has a right to make that exclusion effective," the

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480. *Id.* at 712.

481. *Id.* at 713 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)).

482. *Id.*

483. *Id.* at 714.

484. *Id.* at 744 (Field, J., dissenting).

485. *Id.* at 746–50, 759.

486. *Id.* at 757.

487. *Id.* at 755–57; *see also id.* at 760 ("The decision of the court and the sanction it would give to legislation depriving resident aliens of the guaranties of the Constitution fills me with apprehensions.").

488. *See, e.g., Caminetti v. United States*, 242 U.S. 470, 491 (1917); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 289–91 (1904).

Court unanimously affirmed later that year.<sup>489</sup> In the name of making its exclusion laws effective, Congress spent the next twenty years appropriating unprecedented sums for raiding, arresting, detaining, and summarily deporting “all Chinese persons found to be unlawfully in the United States”—a precedent it expanded to include other immigrants as well.<sup>490</sup>

#### E. *The Long-Term Effect of the Chinese Exclusion Case*

Although Congress’s immigration legislation dramatically expanded in scope in the twenty years after the *Chinese Exclusion Case*, both Congress and the Supreme Court continued to evaluate the constitutionality of federal immigration laws with reference to Congress’s enumerated powers—just as opponents of the Alien Friends Act had done a century earlier. The main doctrinal difference between 1798 and 1898 was that Congress had begun invoking the Commerce Clause and the Necessary and Proper Clause. These references to enumerated powers began to disappear in the early twentieth century, however, as Congress passed increasingly aggressive domestic immigration laws that went well beyond enforcing its exclusion legislation. To uphold these laws, Congress and the Court embraced two new justifications, the last of which read the *Chinese Exclusion Case* as if it recognized a plenary and unlimited Immigration Clause.

The shift began in 1907, when Congress enacted a law to prohibit immigrants from engaging in prostitution for “three years” after their arrival.<sup>491</sup> As interpreted by the Supreme Court, the Commerce Clause permitted Congress to impose this sort of temporary condition on anyone who wanted to voyage into the country.<sup>492</sup>

In 1910, however, Congress repealed the “three years” language, thereby *permanently* prohibiting immigrants from engaging in prostitution.<sup>493</sup> For a woman like Helen Bugajewitz, who had immigrated to the United States long before there were any federal bans on prostitution, this 1910 amendment had the effect of imposing a new restriction on her domestic conduct that could not be justified under existing doctrine.<sup>494</sup> Because the prostitution ban did not exist when she first entered the United States, it could not be described as a regulation of her voyage into the country. Nor could it be described as necessary to make Congress’s entry conditions effective—at least with respect to immigrants already in the United States.

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489. *Lees v. United States*, 150 U.S. 476, 480 (1893).

490. *See, e.g.*, Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390 (repealed 1943) (emphasis added).

491. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 899.

492. *See Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 97–99 (1903).

493. Act of Mar. 26, 1910, ch. 128, § 3, 36 Stat. 263, 264–65 (repealed 1917).

494. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

Federal officials soon attempted to deport Bugajewitz for engaging in prostitution after the 1910 amendment took effect.<sup>495</sup> Faced with a deportation that could not be upheld as a condition on entry, the Supreme Court impatiently upheld the deportation anyway. “It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful,” the Court wrote, citing *Fong Yue Ting*.<sup>496</sup> In a similar case the following year involving a woman named Anna Lapina, the Court defended this theory by citing the *Chinese Exclusion Case*.<sup>497</sup> “The authority of Congress over the general subject-matter is plenary,” the Court wrote; “it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into *or remain* in this country.”<sup>498</sup>

Neither *Bugajewitz* nor *Lapina* offered any doctrinal rationale for this new theory of congressional power that relied on Congress’s “plenary” authority. They simply treated the theory as an application of prior cases, particularly the *Chinese Exclusion Case* and *Fong Yue Ting*. But by authorizing Congress to regulate the conditions not only of an immigrant’s *entry* but also of their *residence*, the Court massively expanded the federal government’s domestic power with respect to immigrants.<sup>499</sup> The Court did not defend the 1910 immigration law as a regulation of foreign commerce or necessary to enforce such regulations. Rather, it declared that Congress’s authority over the entire subject of immigration—exclusion, deportation, *and* residence—was “plenary.”<sup>500</sup>

This definition of “plenary” power differed from how the *Chinese Exclusion Case* or any immigration case previously used the term. In *Gibbons v. Ogden*, Chief Justice Marshall wrote that when Congress exercised one of its enumerated powers, Congress’s authority was “plenary” in the sense that neither New York nor any other government could restrain that authority if it were within constitutional limits.<sup>501</sup> Justice Field reached a similar conclusion in the *Chinese Exclusion Case*, adding that if Congress acted within constitutional limits, then the Court would defer its exercises of discretion.<sup>502</sup> Neither decision invited Congress to regulate anyone whose presence in the country it deemed hurtful, regardless of whether the Constitution authorized such regulation.

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495. *See id.* at 590–91.

496. *Id.* at 591.

497. *Lapina v. Williams*, 232 U.S. 78, 88 (1914).

498. *Id.* (emphasis added).

499. *See* Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 *YALE L.J.* 262, 263–69 (1959) (discussing the significance of this development); Brief of the Nat’l Laws. Guild as Amicus Curiae at 8–9, *Niukkanen v. McAlexander*, 362 U.S. 390 (1960) (No. 130) (same).

500. *Lapina*, 232 U.S. at 88; *see also Bugajewitz*, 228 U.S. at 591.

501. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

502. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889).

Nevertheless, it did not take long for Congress to take advantage of the Court's new plenary power doctrine. Summarizing *Lapina* in 1916, the Senate Committee on Immigration giddily reported that the Court "emphatically and distinctly" upheld Congress's power to deport any "undesirable" immigrants it wanted—and at any time.<sup>503</sup> After "labor[ing] earnestly in its efforts to keep out the most undesirable of those coming to our shores," Congress passed the Immigration Act of 1917.<sup>504</sup> The Act authorized the deportation of several new groups of people, including "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy."<sup>505</sup> The federal government soon enforced this law to suppress the Industrial Workers of the World and other leftist organizations whose members Congress pilloried as "revolutionary radicals, convicted criminals, individuals with long police records, anti-American propagandists, and individuals known to be, or reasonably suspected of being, enemy agents."<sup>506</sup> A 1920 law even paralleled the Alien Friends Act, giving the secretary of labor unreviewable authority to deport a number of detained immigrants if he considered them to be "undesirable residents of the United States."<sup>507</sup>

After over a century in which judges and members of Congress rejected the premise that sovereignty permitted Congress to exercise powers that the Constitution itself failed to authorize, the Court cited the *Chinese Exclusion Case* and *Fong Yue Ting* as if they held that the sovereignty of border control alone was sufficient to justify any legislation.<sup>508</sup> When the Supreme Court in the 1950s cited these decisions, it interpreted them as holding that "[t]he exclusion of aliens is a fundamental act of sovereignty," for which enumerated powers and the judicial restraints imposed on ordinary domestic legislation were basically irrelevant.<sup>509</sup> Although the Court insisted that it was doing nothing more than confirming "the traditional power of the Nation over the alien . . . [,] leav[ing] the law on the subject as we find it,"<sup>510</sup> it in fact cited the *Chinese Exclusion Case* to justify a new, unexplained "power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."<sup>511</sup>

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503. S. REP. NO. 64-352, at 15 (1916).

504. See H.R. REP. NO. 64-95, at 7 (1916); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952).

505. § 19, 39 Stat. at 889.

506. S. REP. NO. 66-283, at 2 (1919); see also SALYER, *supra* note 18, at 234; H.R. REP. NO. 66-504, at 4 (1919).

507. Act of May 10, 1920, ch. 174, 41 Stat. 593; see also S. REP. NO. 66-283 (1919).

508. *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 722 (1893)); *Ng Fung Ho v. White*, 259 U.S. 276, 278 (1922).

509. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); see also *Harisades v. Shaughnessy*, 342 U.S. 580, 587-89 (1952).

510. *Harisades*, 342 U.S. at 588.

511. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (citing *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889)).

Invoking this power in subsequent cases, the Court has invited Congress to regulate immigrants however it wants—even where a law could not be justified as an exercise of one of Congress’s enumerated powers.

Federal immigration law transformed, then—not because of the *Chinese Exclusion Case* in 1889—but because of the *memory* of the *Chinese Exclusion Case* decades later. In stark contrast to their predecessors—who sought to trace the power to deport back to the Constitution—legislators began to point to Congress’s “sovereign” powers to conclude that “[t]he United States has plenary power . . . to exclude an alien at any time for a good reason, for a bad reason, or for no reason at all.”<sup>512</sup> Once Senators concluded that procedurally rigorous deportation proceedings were “thwart[ing]” the “sovereign power of this Nation,” Congress began to provide for the lengthy detention of immigrants in federal facilities.<sup>513</sup> And by mere reference to the federal government’s undoubted power to “control its own borders,”<sup>514</sup> Congress authorized aggressive warrantless immigration raids and arrests throughout the country,<sup>515</sup> created an expansive federal immigration law enforcement agency,<sup>516</sup> punished domestic employers who hired undocumented immigrants,<sup>517</sup> and denied immigrants public benefits.<sup>518</sup> Even though many of these laws *could* be justified as exercises of the Commerce Clause or Necessary and Proper Clause, immigration is often treated as if a distinct Immigration Clause justified Congress’s actions and permitted regulations that might exceed the scope of Congress’s ordinary powers.

The 1986 Immigration Reform and Control Act (IRCA)<sup>519</sup> provides a useful illustration of the disconnect between Congress’s modern immigration laws and its nineteenth-century theory of enumerated powers. With the IRCA, Congress made it unlawful for domestic employers to hire, recruit, or refer undocumented immigrants for employment.<sup>520</sup> The Act also required all

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512. 86 CONG. REC. 8,345 (1940) (statement of Sen. Ashurst); *see also* *Deportation and Detention of Aliens: Hearings on H.R. 10 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Cong. 6 (1949) (statement of Watson B. Miller, Comm’r of Immigration and Naturalization) (referencing *Fong Yue Ting* for the proposition that the United States has an “inherent and inalienable right” to exclude and expel immigrants).

513. *See, e.g.*, H.R. REP. NO. 76-397, at 1 (1939).

514. *See* 131 CONG. REC. 23, 324–25 (1985) (statement of Sen. Grassley).

515. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *see also id.* at 279 (Powell, J., concurring).

516. *See* COHEN, *supra* note 9, at 18.

517. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in part at 18 U.S.C. §§ 921–922, 925); *see also* 132 CONG. REC. 29,984 (1986) (statement of Rep. Rodino).

518. *See, e.g.*, S. REP. NO. 104-249, at 6 (1996) (noting the “compelling [f]ederal interest” in “reduc[ing] any additional incentive for illegal immigration provided by easy availability of welfare and other taxpayer-funded benefits”).

519. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

520. *Id.* § 121(a)(1)–(2).

employers, regardless of size, to collect and inspect specific documentation for all new hires.<sup>521</sup> By all accounts, IRCA marked an unprecedented expansion of federal immigration law, shifting the focus of legislation away from the border and toward the interior.<sup>522</sup> It also, for the first time, required domestic employers—as opposed to transportation companies<sup>523</sup>—to assist in enforcement.<sup>524</sup>

Yet rather than mentioning a power under Article I or relating employment regulations to the Commerce Clause, Congress justified the IRCA by sole reference to congressional power at the border. “The authority of Congress—indeed its responsibility—to regulate immigration derives from a source even higher than the Constitution,” Representative Mazzoli explained.<sup>525</sup> “In fact, the Supreme Court has stated on numerous occasions that the control of immigration is an inherent power arising out of national sovereignty and existing without regard to any constitutional grant.”<sup>526</sup> Drawing on this “inherent power,” Congress imposed these employment laws as a means of dissuading Central American immigrants from crossing the border—an issue that Senator Simpson argued was stifling the country’s ability to “perform the most basic function of a sovereign nation, which is to control the entry of aliens across its borders.”<sup>527</sup> The House Report accompanying the bill explained that “[e]mployment is the magnet that attracts aliens here illegally” and that limiting employment prospects would thus “deter aliens from entering.”<sup>528</sup> The federal government has relied on the closely related theory of “Prevention Through Deterrence” to expand the domestic deportation and detention infrastructure,<sup>529</sup> drawing on the notion that fewer immigrants will enter the country if they must confront the risks of arrest,<sup>530</sup> of separation

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521. *Id.* § 121(b).

522. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1583 (2008).

523. *See supra* Sections II.A.1, II.A.2.

524. Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 564 (2012).

525. 132 CONG. REC. 29,988 (1986) (statement of Rep. Romano Mazzoli).

526. *Id.*

527. 131 CONG. REC. 23,316 (1985) (statement of Sen. Simpson); *see also id.* at 23,324 (statement of Sen. Grassley) (“[T]he United States has lost one of the cardinal attributes of sovereignty—it no longer controls its own borders.”).

528. H.R. REP. NO. 99-682, at 46 (1986); *see also* 132 CONG. REC. 29,984–85 (1986) (statement of Rep. Rodino); 142 CONG. REC. 7,300 (1996) (statement of Sen. Kennedy). For a helpful explanation of this “magnet” theory, *see* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1112–13 (2009).

529. *See* JASON DE LÉON, *THE LAND OF OPEN GRAVES* 29–37 (2015).

530. *See* U.S. DEP’T OF HOMELAND SEC., *ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012* (2003) (arguing that increasing the probability of domestic apprehension will deter future border crossings).

from their minor children,<sup>531</sup> and of encountering deadly obstacles while crossing the border.<sup>532</sup>

A similar disconnect was on display ten years after the passage of IRCA, when the Senate first considered a bill to prohibit non-citizens from voting in federal elections.<sup>533</sup> When introducing the bill, its proponents failed to mention the scope of Congress's power under the Elections Clause<sup>534</sup> or the fact that the "power to disenfranchise ha[d] traditionally been seen as a power belonging to the states alone."<sup>535</sup> This novel extension of congressional power was passed with remarkably little debate and by simple reference to the plenary power doctrine: "[T]he Supreme Court has made such extraordinary statements over the years," Senator Simpson explained.<sup>536</sup> In fact, "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."<sup>537</sup> The Court has "explicitly recognized" that federal legislation can favor citizens in the interest of encouraging naturalization,<sup>538</sup> Simpson added. By this logic, abandoning the enumerated-powers constraint has given Congress essentially inscrutable power to do anything that limits the appeal of immigrating to the United States or that heightens the appeal of becoming a citizen.

To be clear, no Supreme Court decision has directly cited the *Chinese Exclusion Case* since 2001.<sup>539</sup> Instead, the Court often ties Congress's immigration laws back to the powers "[t]o establish [a] uniform Rule of Naturalization" and "[t]o regulate Commerce with foreign Nations."<sup>540</sup> Yet, in stark contrast with its typically skeptical review of Congress's legislation,<sup>541</sup>

531. See U.S. DEP'T OF HOMELAND SEC., MEMORANDUM FOR THE SECRETARY (Apr. 23, 2018). See generally SOBOROFF, *supra* note 9.

532. See DE LÉON, *supra* note 529, at 29–37 (describing the idea that more arduous and dangerous border crossings will reduce the number of people willing to attempt entry).

533. This law eventually became 18 U.S.C. § 611.

534. See H.R. REP. NO. 104-469, pt. 1 (1996); U.S. CONST. art. I, § 4, cl. 1 (granting Congress the power to "make or alter" regulations pertaining to federal elections).

535. Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 450 (2017); see also H.R. REP. NO. 104-469. Although the Supreme Court "has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause," *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973), it has never suggested that Congress has the power to disenfranchise noncitizens. The distinction between states and Congress is significant because the theory of enumerated powers in the U.S. Constitution has never applied to states.

536. 142 CONG. REC. 8,665 (1996) (statement of Sen. Simpson).

537. *Id.* (statement of Sen. Simpson) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)).

538. *Id.*

539. Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 752 (2017).

540. *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (quoting U.S. CONST. art. I, § 8, cl. 3–4); see Cleveland, *supra* note 1, at 160–61 ("[T]he Court has reformulated [Congress's immigration] power as arising to some degree from the Constitution's enumerated provisions.").

541. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557–58 (2012).

the Court eschews detailed analysis of *how* a particular immigration law relates to naturalization or foreign commerce.<sup>542</sup> These nominal references to the enumerated powers are supplemented by continued reference to the federal government's "inherent power as sovereign to control and conduct [foreign] relations"—a power that gives Congress "undoubted" jurisdiction over immigrants.<sup>543</sup> The Court does exercise "some level of constitutional judicial review" over immigration laws,<sup>544</sup> but has "firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."<sup>545</sup> The modern plenary power doctrine has therefore made it possible for Congress to exercise exclusive and broad power to exclude, arrest, detain, regulate, and deport immigrants.<sup>546</sup>

### III. THE MODERN LEGACY OF THE *CHINESE EXCLUSION CASE*

Judges, practitioners, and academics have increasingly contested both the breadth and validity of the Supreme Court's "plenary" power over immigrants. A chorus of scholars have urged the Court to apply the Constitution's explicit limits—particularly the Due Process Clause—to congressional regulation of immigration.<sup>547</sup> Others have critiqued the idea that the nation's "sovereignty" and its powers over foreign relations can sustain the breadth of

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542. See, e.g., *Toll*, 458 U.S. at 10.

543. *Arizona v. United States*, 567 U.S. 387, 387, 395 (2012) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

544. *Fields*, *supra* note 539, at 757 (emphasis added); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 60–63 (2015).

545. *Demore v. Kim*, 538 U.S. 510, 522 (2003) (citing *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)); see also Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 27 (2015); Martin, *supra* note 39, at 39; Matthew J. Lindsay, *Disaggregating "Immigration Law"*, 68 FLA. L. REV. 179, 193–94 (2016).

546. The historical and conceptual connection between the source of Congress's immigration powers and the application of constitutional *limits* has become somewhat muddled in contemporary academic discourse. Indeed, some scholars have argued that powers "inherent in sovereignty"—including the federal government's immigration powers—could seamlessly be limited by the Bill of Rights. See, e.g., Legomsky, *supra* note 39, at 273–75; Victor C. Romero, *Elusive Equality: Reflections on Justice Field's Opinions in Chae Chan Ping and Fong Yue Ting*, 68 OKLA. L. REV. 165 (2015). But the chronic misinterpretation of the *Chinese Exclusion Case* sits at the root of both the Court's reluctance to identify the source of Congress's immigration power and its unexplained deference to immigration regulations, even in the face of explicit constitutional commands. At least some scholars have recognized that limited judicial review is integral to the idea of so-called "sovereign" powers. See, e.g., Cleveland, *supra* note 1; Susan Bibler Coutin, Justin Richland & Véronique Fortin, *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 99 n.11 (2014). And as Professor Don Herzog explains, a truly "sovereign" power—at least in the classical sense—would be "unlimited," "undivided," and "unaccountable," and thus constrained by neither the text of Article I nor the Constitution's implied and external limits. DON HERZOG, *SOVEREIGNTY, RIP*, at xi (2020).

547. See sources cited *supra* note 39.

modern immigration laws.<sup>548</sup> And the Court itself has begun to supplement its references to “sovereignty” by mentioning certain enumerated powers as the basis of Congress’s regulatory power.<sup>549</sup> Despite these developments, the *Chinese Exclusion Case* continues to loom large. Most judges, legislators, and scholars take for granted that the plenary power doctrine originated with the decision accepting that even if “the precise source of the exclusive congressional power to regulate immigration is far from clear, it is nonetheless well-established.”<sup>550</sup>

The misreading of the *Chinese Exclusion Case* as a source of Congress’s plenary immigration power continues to have two lasting effects on immigration doctrine and scholarship. First, it has invited courts and Congress to abandon enumerated powers with respect to immigration laws. By contrast, since the end of the nineteenth century—right when the Court began to firmly disavow judicial review of Congress’s immigration laws—the Court developed a number of new doctrines that allowed it to closely scrutinize congressional regulation of business owners and white citizens, prohibiting Congress from invoking Article I to “regulate an individual from cradle to grave.”<sup>551</sup> Second, and more crucially, the misreading of the *Chinese Exclusion Case* has allowed Congress and the Court to avoid offering a cogent explanation for the anomaly between Congress’s immigration power and its other powers. Neither the history of the *Chinese Exclusion Case* nor the relationship between immigration and foreign affairs can support the weight of these discrepancies.

#### A. *The Inconsistency Between the Regulation of Immigrants and Citizens*

Throughout most of the nineteenth century, the Supreme Court adopted a general posture of deference toward all of Congress’s legislation. As Chief Justice Marshall declared in *Gibbons v. Ogden*, “the sovereignty of Congress, though limited to specified objects, [was] *plenary* as to those objects.”<sup>552</sup> The Court generally declined to scrutinize Congress as it exercised its enumerated powers, save for ensuring compliance with the limits “prescribed in the constitution.”<sup>553</sup> Beyond that, any attempt to cabin the exercise of congressional power would have to be effected via “the influence which . . . constituents possess at elections.”<sup>554</sup> Yet notwithstanding the Court’s deferential review, both the Supreme Court and Congress justified federal immigration legislation as

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548. See, e.g., Cleveland, *supra* note 1, at 278; NEUMAN, *supra* note 18, at 121, 136–37; Lindsay, *supra* note 545, at 199–204, 217–18.

549. See, e.g., Arizona v. United States, 567 U.S. 387, 394 (2012) (quoting U.S. CONST. art. I, § 8, cl. 4) (referencing the power to “establish a uniform rule of naturalization”).

550. Schuck, *supra* note 2, at 24.

551. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 557–58 (2012).

552. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (emphasis added).

553. *Id.* at 196.

554. *Id.*

an exercise of Article I—first as an exercise of the war powers<sup>555</sup> and later as “necessary and proper” to the regulation of foreign commerce.<sup>556</sup>

*Gibbons* adopted a weak version of *legislative constitutionalism*, an idea that political processes—not judicial review—are the most legitimate and effective method of resolving disagreements about the source of Congress’s powers.<sup>557</sup> This theory made sense in contexts like *Gibbons*, in which Congress regulated voters who could oppose abusive laws by electing politicians who shared their views.<sup>558</sup> It was demonstrated in practice by the Alien and Sedition Acts, which were repealed not by the Supreme Court but by voters who rallied around the Democratic-Republicans and wielded their “influence . . . at elections.”<sup>559</sup>

But in the late nineteenth century, Justice Field and his colleagues distorted this call for legislative constitutionalism in two striking ways, both of which contributed to the legal toleration of white supremacy. First, during the same decades when the Supreme Court deferred to Congress in the *Chinese Exclusion Case*, the Court abandoned Marshall’s judicial deference when Congress regulated white citizens and politically powerful domestic business interests. Second, the Court retained Marshall’s judicial deference *only* in contexts when Congress regulated disenfranchised people, such as immigrants, Native Americans, and territorial residents. The result was a selective application of judicial deference: one in which the Court invented new protections for white voters while inexplicably leaving Congress alone to regulate everyone else.

### 1. Diverging Doctrinal Paths

From the end of Reconstruction through the rise of the *Lochner* era, the Supreme Court adopted a number of novel doctrines that limited Congress’s power to regulate domestic capitalism and white citizens. This project began with the imposition of *implied* limits on Congress’s legislative powers. In *Collector v. Day*,<sup>560</sup> the Supreme Court intervened to protect state officers and governments from federal income taxation.<sup>561</sup> Although there was “no express provision in the Constitution that prohibit[ed] the general government from taxing the means and instrumentalities of the States” or their governments, the Court concluded that the exception could be read by “necessary implica-

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555. See *supra* text accompanying notes 95–100.

556. See *supra* text accompanying notes 433–474.

557. See BELLAMY, *supra* note 41, at 4, 91 (describing this as *political* constitutionalism). We refer to legislative constitutionalism strictly in the context of judicial review of federal legislation, not state legislation.

558. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

559. *Id.* at 197.

560. 78 U.S. (11 Wall.) 113 (1871), *overruled in part by* *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939).

561. *Id.* at 128.

tion” from the structural relationship between the states and the federal governments.<sup>562</sup> The political checks that were so central to the Court’s analysis in *Gibbons* were nowhere to be found in *Day*.

The idea that the Supreme Court must protect the states from congressional overreach animated the continued narrowing of Congress’s powers after the fall of Reconstruction. Responding to state-sanctioned violence against black Americans throughout the South after the ratification of the Reconstruction Amendments,<sup>563</sup> Congress had enacted a series of “enforcement acts” designed to entrench the right to vote, to suppress the power of the Ku Klux Klan, and to prohibit racial discrimination by white business owners and citizens.<sup>564</sup> But when white citizens started challenging these enforcement acts, the Supreme Court read Congress’s power narrowly, concluding that Congress lacked the power to enforce the Fourteenth Amendment against individuals.<sup>565</sup> The Fourteenth Amendment did not “invest Congress with power to legislate upon subjects which are within the domain of State legislation” or “to create a code of municipal law for the regulation of private rights.”<sup>566</sup> And in the *Civil Rights Cases*, the Court made clear that Congress’s powers under the Reconstruction Amendments were not “plenary,” unlike its power to regulate “commerce with foreign nations, among the several States, and with the Indian tribes.”<sup>567</sup>

Notwithstanding this distinction between the Commerce Clause and the Fourteenth Amendment, the Court quickly narrowed Congress’s supposedly “plenary” power to regulate interstate commerce. When Congress passed novel antitrust<sup>568</sup> and labor<sup>569</sup> laws at the turn of the century, the Supreme Court concluded that Congress could only regulate those activities that “directly” affected interstate commerce.<sup>570</sup> By contrast, Congress could not pass labor laws that only “indirectly” impacted commerce: Congress’s power would otherwise extend to “every conceivable subject” and “obliterate all the limitations of power imposed by the Constitution.”<sup>571</sup>

By the beginning of the twentieth century, the Court had firmly adopted two irreconcilable visions of judicial review. When Congress expanded the

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562. *Id.* at 127.

563. *Id.*; ERIC FONER, *THE SECOND FOUNDING* 143–44 (2019).

564. See Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, 18 Stat. 335, *invalidated in part by* *United States v. Stanley* (The Civil Rights Cases), 109 U.S. 3, 25 (1883).

565. See *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1876); *United States v. Harris*, 106 U.S. 629, 638 (1883).

566. *The Civil Rights Cases*, 109 U.S. at 11.

567. *Id.* at 18.

568. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209.

569. *E.g.*, Employers’ Liability Act of 1906, ch. 3073, 34 Stat. 232.

570. See, *e.g.*, *Swift & Co. v. United States*, 196 U.S. 375 (1905); *The Employers’ Liability Cases*, 207 U.S. 463 (1908).

571. *The Employers’ Liability Cases*, 207 U.S. at 502.

scope of its power to deport and detain immigrants, the Court entrusted constitutional interpretation to a supposedly benevolent Congress.<sup>572</sup> The Court adopted a similar approach when reviewing federal statutes regulating so-called unincorporated territories and Native American tribes. The power to legislate over the “islands and their inhabitants” must be “entrusted to Congress,” the Court wrote in *Downes v. Bidwell*.<sup>573</sup> Plenary authority over the tribal relations of the Indians . . . has always been deemed a political one, not subject to be controlled by the judicial department of the government,” the Court explained two years later.<sup>574</sup> Echoing Chief Justice Marshall’s refrain in *Gibbons*, the justices emphasized that any possible redress would have to be sought by an appeal to Congress itself,<sup>575</sup> notwithstanding the fact that those most affected by this legislation were largely disenfranchised from the political process. The “influence which . . . constituents possess at elections”—designed to check congressional excesses in light of the Court’s deferential posture<sup>576</sup>—was largely illusory when Congress regulated immigrants, tribes, and “unincorporated” territories. By contrast, the Court opened its doors to constitutional claims by wealthy white business owners and state officials—exactly those individuals most likely to have a voice both in Congress’s chambers and at the ballot box.

## 2. Persistent Inconsistencies

These inconsistent theories of congressional power persist in the Court’s review of federal legislation today. When evaluating laws that regulate domestic business interests, the Court has continued to monitor the exercise of Congress’s enumerated powers closely. The Commerce Clause, the Court has clarified, “requires a distinction between what is truly national and what is truly local.”<sup>577</sup> And despite the broad language of the Necessary and Proper Clause, the Court has required that all “necessary” legislation be “convenient, or useful,” “narrow in scope,” and “incidental” to the beneficial exercise of an enumerated power.<sup>578</sup> To be “proper,” a law must also be “consist[ent] with

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572. See, e.g., *Mahler v. Eby*, 264 U.S. 32, 39 (1924).

573. 182 U.S. 244, 283 (1901).

574. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); see also *Cleveland*, *supra* note 1, at 71–73 (discussing *Lone Wolf* and its relationship to inherent powers).

575. *Lone Wolf*, 187 U.S. at 568; *Downes*, 182 U.S. at 283 (concluding that legislation dictated by Congress’s “selfish interests” would surely receive “quick rebuke at the hands of the people”).

576. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824).

577. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

578. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559–60 (2012) (internal quotations omitted).

the letter and spirit of the constitution”<sup>579</sup> and cannot compromise “essential attributes of state sovereignty . . . by the assertion of federal power.”<sup>580</sup>

The reflexive resort to “sovereignty” as the basis of immigration laws has allowed the Court to avoid applying these same doctrines to the regulation of immigrants. The federal government has assumed a nearly unlimited body of legislation over immigrants, including in traditional state realms.<sup>581</sup> Yet the Court has not required that these laws be “narrow in scope” or considered their relationship with the “essential attributes of state sovereignty.”<sup>582</sup>

Perhaps most strikingly, Congress has granted the federal government the broad authority to arrest, detain, and deport immigrants without warrant, long after their entry into the country.<sup>583</sup> This regulatory regime is exceptional when viewed in light of the Court’s modern Commerce Clause doctrine. The Court has affirmed that Congress’s power over interstate commerce extends to the regulation of people traveling in interstate commerce,<sup>584</sup> and goods that previously traveled in interstate commerce remain subject to federal regulatory jurisdiction even after they have concluded their journey across state lines.<sup>585</sup> But in no other context has the Court asserted that just because a *person* has crossed a state or international border, Congress retains indefinite power to regulate her pursuant to the Commerce Clause. Outside of the immigration context, the Court has written that the Commerce Clause “is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”<sup>586</sup>

### B. *The Missing Explanation for the Existing Regime*

Neither Congress nor the Supreme Court has ever explained *why* Congress can enact immigration laws without reference to Article I and without the same federalism or enumerated-power limits the Court typically imposes on congressional legislation. Throughout the past century, a mere reference to the *Chinese Exclusion Case* was sufficient—on the theory that Justice Field’s opinion supports a “sovereign” immigration power disconnected from the text of the Constitution. Yet that case simply cannot carry the weight it has

579. *Id.* at 559 (internal quotations omitted); cf. Samuel L. Bray, “Necessary AND Proper” and “Cruel AND Unusual”: *Hendiads in the Constitution*, 102 VA. L. REV. 687, 721–22 (2016).

580. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 560 (quoting *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring)); see also John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 54–55 (2014) (discussing the federalism limitations that characterize the Court’s “proper” inquiry).

581. See Stumpf, *supra* note 522, at 1582.

582. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 560 (internal quotations omitted).

583. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973).

584. See, e.g., *Hoke v. United States*, 227 U.S. 308, 323 (1913) (sustaining a prohibition on crossing state lines with a woman for the purpose of prostitution).

585. See, e.g., *Barrett v. United States*, 423 U.S. 212, 225 (1976) (upholding a prohibition on receipt or possession of firearms that previously traveled “in interstate commerce”).

586. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 557.

been assigned: as discussed in Part II, the reference to “sovereignty” merely reaffirmed Congress’s power to employ its “sovereign” Article I powers.<sup>587</sup> The Court has also not justified its deferential stance toward immigration law as an outgrowth of an earlier tradition of legislative constitutionalism expressed by Chief Justice Marshall in *Gibbons*—especially in light of the widespread disenfranchisement of immigrants and the Court’s departure from legislative constitutionalism in reviewing Congress’s domestic regulation.

### 1. The Relationship Between Foreign Affairs and Immigration

When courts have endeavored to justify plenary immigration power beyond a mere reference to the *Chinese Exclusion Case*, they most frequently cite the close relationship between immigration and foreign relations. Because immigration laws implicate the country’s diplomatic relationships and its standing on the world stage—the argument goes<sup>588</sup>—the judicial doctrines designed to limit congressional power and protect state interests are inapposite to Congress’s immigration power. Yet the connection between immigration and foreign relations cannot justify the anomalous status of Congress’s immigration powers.

The idea that the nation’s immigration policy implicates Congress’s powers over foreign affairs is not new. A century before the *Chinese Exclusion Case* was decided, Henry Lee invoked this rationale in defense of the Alien Friends Act, writing that “[w]ith respect [to immigration], America is one nation.”<sup>589</sup> But the foreign affairs rationale did not form the basis of a plenary power doctrine at the time: rather, Lee invoked the “one nation” idea to conclude that “state governments are restrained from interfering” in the federal government’s deportation laws.<sup>590</sup> In this vein, he argued that the power to admit immigrants was properly located in Congress, which had been granted authority to regulate immigration in various clauses of Article I, including the Necessary and Proper Clause.<sup>591</sup> This same notion pervaded the nineteenth-century cases striking down state immigration laws: regulating the entry of immigrants was “a subject which concern[ed] our international relations,”<sup>592</sup> which is why it was “confided exclusively to the discretion of Congress by the Constitution” in the Foreign Commerce and Treaty Clauses.<sup>593</sup>

Yet as the federal immigration infrastructure expanded throughout the course of the twentieth century, the Court began to categorize prostitution

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587. See *supra* text accompanying notes 402–414.

588. See, e.g., *Arizona v. United States*, 567 U.S. 387, 394–95 (2012); Balkin, *supra* note 40, at 28. For further discussion of the relationship between immigration and foreign affairs, see NEUMAN, *supra* note 18, at 136; T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 11–12 (1990).

589. MINORITY ADDRESS, *supra* note 89, at 6.

590. *Id.*

591. *Id.* at 7.

592. *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876).

593. *Id.* at 271; see also Lindsay, *supra* note 18, at 26.

and other laws that regulated immigrants—not just those touching on admission and removal—as the exclusive domain of the federal government.<sup>594</sup> “[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations,” the Court wrote in 1952.<sup>595</sup> The Court began to strike down a broad swath of state laws regulating immigrants, noting that immigration policy “can affect trade, investment, tourism, and diplomatic relations for the entire Nation” and that “[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.”<sup>596</sup> Because even domestic regulation concerning registration cards<sup>597</sup> and welfare benefits<sup>598</sup> might implicate the United States’ relationship with foreign countries, the federal government alone had to be given broad power to regulate immigrants.

On this account, the plenary power doctrine exists out of necessity: if Congress were confined to legislate pursuant to the enumerated powers and subject to the Court’s stringent judicial review under the Commerce and Necessary and Proper Clauses, it could neither effectively manage its foreign relations<sup>599</sup> nor preempt state laws that interfere with them.<sup>600</sup> Yet as Professor Legomsky has clarified, the Court is decidedly not selective in its application of the foreign affairs rationale to immigration laws<sup>601</sup>: even where it concludes that foreign relations are not necessarily implicated, the Court draws on the connection with foreign affairs to grant Congress broad deference.<sup>602</sup> This approach is also fundamentally out of step with the Court’s approach to foreign relations law beyond the immigration context. Justice Sutherland’s pronouncement in *United States v. Curtiss-Wright*<sup>603</sup> that the limits of enumeration did not apply to foreign affairs<sup>604</sup> has never been read to grant Congress plenary power domestically.<sup>605</sup> Congress presumably could not draw on its “foreign affairs” powers to preempt state criminal laws simply because they

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594. See Lindsay, *supra* note 545, at 199–204, 211 & n.176, 217–18.

595. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (emphasis added).

596. *Arizona v. United States*, 567 U.S. 387, 395 (2012) (citing *Harisiades*, 342 U.S. at 588–89).

597. See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

598. See *Mathews v. Diaz*, 426 U.S. 67 (1976).

599. See Fields, *supra* note 539, at 750 (“Immigration is one of the nation’s many policy tools in the foreign arena . . .”).

600. See Balkin, *supra* note 40, at 28.

601. Legomsky, *supra* note 39, at 262. *But see* Lindsay, *supra* note 545, at 237 (describing the Court’s rejection of a foreign affairs rationale in *Zadvydas v. Davis*, 533 U.S. 638 (2001)).

602. See Legomsky, *supra* note 39, at 262 (describing this phenomenon in *Fiallo v. Bell*, 430 U.S. 787 (1977)).

603. 299 U.S. 304 (1936).

604. *Id.* at 315–16.

605. It is also worth noting that the Court has largely abandoned the foreign affairs exceptionalism espoused in *Curtiss-Wright*. See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1919–35 (2015).

spark controversy with the nation's allies.<sup>606</sup> Yet this is precisely how the Court treats Congress's immigration laws.

Despite the Court's pronouncement to the contrary in *Arizona v. United States*, Congress does not need an unenumerated "foreign affairs" power to protect immigrants from discrimination by state governments.<sup>607</sup> The Supreme Court has long scrutinized state immigration laws more searchingly under the Equal Protection Clause than their federal counterparts.<sup>608</sup> *State* "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny," the Court wrote in *Graham v. Richardson*.<sup>609</sup> And Congress can continue to exercise its authority under the Fourteenth Amendment and the Commerce Clause to bar states from discriminating against immigrants.<sup>610</sup> Neither the Court's foreign affairs doctrine nor the necessity of preemption can coherently explain the anomalous status of immigration law.

## 2. Assessing Congress's Power

Ultimately, neither the *Chinese Exclusion Case* nor Congress's authority to conduct foreign relations can sustain the idea that Congress's immigration powers "derive[] from a source even higher than the Constitution."<sup>611</sup> Denaturalizing Congress's "plenary" immigration power in this way offers us the opportunity to assess our modern immigration laws as an exercise of Congress's Article I powers. Within this framework, it is difficult to justify understanding the Commerce Clause as two fundamentally different grants of power, which modulate in accordance with the subject of Congress's regulation. Applied domestically, the same clause cannot grant Congress the power to pass nearly *any* law regulating the daily lives of non-citizens while denying Congress the power to mandate health insurance coverage for all residents.<sup>612</sup> And if Congress has the power to enact any law that would improve the United States' relationship with its allies, then it is incoherent for the Court to invalidate ordinary domestic legislation that might do so while upholding only immigration restrictions.

## IV. TOWARD A LEGISLATIVE CONSTITUTIONALISM

Once we recognize that the anomalous place of immigration law is neither historically predetermined nor doctrinally defensible, two possible paths for resolution are available. Many scholars and activists have urged the Court to

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606. See Legomsky, *supra* note 39, at 264.

607. *Arizona v. United States*, 567 U.S. 387, 395 (2012).

608. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976); Stumpf, *supra* note 522, at 1582.

609. 403 U.S. 365, 372 (1971) (footnotes omitted).

610. See, e.g., Enforcement Act of 1870, ch. 114, 16 Stat. 140.

611. 132 CONG. REC. 29,988 (1986) (statement of Rep. Romano Mazzoli).

612. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557–58 (2012).

subject Congress's regulation of immigrants to its ordinary skeptical review.<sup>613</sup> Under this approach, the Supreme Court might consider whether Congress's immigration laws align with its Commerce Clause precedents, curtailing the scope of Congress's power to regulate immigrants from the "cradle" to the "grave"<sup>614</sup> and carefully evaluating whether certain immigration laws compromise "essential attributes of state sovereignty."<sup>615</sup>

Yet denaturalizing the plenary power doctrine does not require a resort to the Supreme Court or to a cabined vision of congressional power. Indeed, we argue that the history of Congress's immigration powers makes clear that *legislative* solutions—inspired by the tradition of legislative constitutionalism that animated the first century of federal immigration law—are far more promising in the fight toward a more just immigration framework. Rather than intervening to protect immigrants from an overzealous Congress, the Supreme Court has powerfully entrenched the plenary power doctrine in the congressional and public psyche. This version of judicial review has stifled serious legislative debate about the constitutional scope and policy merits of Congress's immigration powers over the past century. And as elsewhere, the Court has largely declined to serve as a meaningful counter-majoritarian check on congressional power over disenfranchised immigrants. Drawing from these conclusions, this Part argues that rather than turn to the courts to impose a restrictive version of Article I on Congress's immigration regulations, we should encourage legislators to rethink whether the Constitution—and our political morality—permit the expanse of immigration laws in effect today.

#### A. *Legislative Constitutionalism Modeled After 1798*

The history of Congress's immigration power reveals the promise of a legislative solution to the immigration anomaly. In the century before the emergence of the modern plenary power doctrine, legislators and executive branch officials engaged in fierce and contested debate about the constitutional scope of Congress's immigration powers.<sup>616</sup> In 1798 and beyond, Democratic-Republicans mounted a vigorous campaign against the constitutionality of the Alien Friends Act, arguing that the Act was "neither among the specific powers granted by the Constitution to the General Government, nor necessary to carry into effect any of those specific powers."<sup>617</sup> Even after the epidemic of anti-French sentiment swept the Alien Friends Act into legal effect, citizens and legislators deployed the tactics of popular constitutionalism to highlight

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613. See, e.g., Condon, *supra* note 39; Legomsky, *supra* note 39; Pillard & Aleinikoff, *supra* note 39; Henkin, *supra* note 39; Schuck, *supra* note 2.

614. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557–58.

615. *Id.* at 559–60 (quoting *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring)).

616. See *supra* Sections I.B., I.C.

617. 9 ANNALS OF CONG. 2993 (1799); see *supra* text accompanying notes 147–152.

the Act's unconstitutionality and undermine its legitimacy.<sup>618</sup> These constitutional challenges—presented in town squares and in the halls of Congress—helped inspire “a mighty wave of public opinion” that swept the Federalist Party out of power<sup>619</sup> and left the Alien Friends Act to expire in infamy.<sup>620</sup>

That the Democratic-Republicans framed their opposition to the Alien Friends Act in constitutional terms inspired the Federalists to canvass Article I in search of a source for Congress's power to deport both immigrant “friends” and “enemies.”<sup>621</sup> The Federalists persuasively argued that the War Clauses allowed Congress to exclude and expel immigrants from countries that had threatened to invade the United States.<sup>622</sup> Yet the Democratic-Republicans successfully convinced the public that neither the War Clauses nor any other clause in Article I supported Congress's ability to deport so-called alien *friends*.<sup>623</sup> This constitutional back-and-forth had a powerful, lasting effect on Congress's understanding of its own powers, as the Alien Friends Act was memorialized as “a flagrant violation of the Constitution”<sup>624</sup> while the Alien Enemies Act survived unscathed.

Though framed in constitutional terms, this debate required legislators to carefully advance a normative justification for each extension of congressional power over immigrants. When Congress assessed its power to remove “alien friends,” it considered not only whether the War Clauses *objectively* allowed for such legislation but also the normative implications of reading a broad power to prevent invasion into Article I. If the Necessary and Proper Clause gave Congress the power to deport immigrants in the interest of merely *preventing* war, legislators argued, Congress would be able to justify almost any action in the name of national security,<sup>625</sup> including “attack[ing] the liberties of the citizens themselves.”<sup>626</sup> Rather than waiting for the Supreme Court to do so, members of Congress assumed responsibility for assessing both the constitutional source of their power and the normative implications of exercising it.

The legislative constitutionalism of 1798 extended throughout much of the nineteenth century. Even as a renewed wave of anti-immigrant sentiment swept from the port states of California and New York to Congress in the 1880s, legislators continued to interpret the scope of their constitutional authority. They considered the extent of Congress's power to enforce treaties under the Necessary and Proper Clause<sup>627</sup> and to regulate immigration under

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618. See *supra* text accompanying notes 196–202.

619. See *supra* text accompanying note 204.

620. See *supra* text accompanying notes 216–219.

621. See discussion *supra* Sections I.B, I.C.

622. See *supra* text accompanying notes 93–100.

623. See *supra* text accompanying notes 154–206.

624. 3 REG. DEB. 1268–69 (1829) (statement of Rep. William C. Rives).

625. See *supra* text accompanying note 166.

626. 9 ANNALS OF CONG. 3000–01 (1799); see *supra* text accompanying notes 159–162.

627. See *supra* text accompanying note 341.

the Commerce Clause,<sup>628</sup> over the objections of their colleagues who denounced the injustices arising from hasty and restrictive exclusion laws.<sup>629</sup> And when Congress sought to expand its domestic powers over immigrants in 1892, legislators decried the Geary Act as “barbarous” and “beyond the power of Congress.”<sup>630</sup>

Yet once the Supreme Court began to read the *Chinese Exclusion Case* as the basis of Congress’s “plenary,” “sovereign” power over immigrants, this constitutional discourse started to dry up.<sup>631</sup> When Congress sought to “purg[e] [the] body politic of poisonous elements”<sup>632</sup> through new sedition laws and registration requirements in 1940,<sup>633</sup> select few legislators contested the bill’s constitutionality, arguing that it was a “new alien and sedition bill” incompatible with “our constitutional principles.”<sup>634</sup> But rather than respond to these critiques on their constitutional merits—as the Federalists had in 1798<sup>635</sup>—proponents of harsher detention and deportation laws could recite the common refrain that the “Supreme Court of the United States has repeatedly held that the right to exclude or expel is an inherent and inalienable right of every sovereign and independent nation,” and therefore both Article I and political morality were irrelevant.<sup>636</sup>

By the end of the twentieth century—when Congress proposed new ways to deter undocumented immigrants from crossing the border—any remnants of this constitutional debate had dissipated from legislative discourse. Relying on the Supreme Court’s precedents, legislators simply urged Congress to “exercise its sovereign right—and its sovereign responsibility—to control its borders.”<sup>637</sup>

One of the only recent legislative debates framed in constitutional terms concerned—tellingly—the scope of the Supreme Court’s decision in *Plyler v. Doe*.<sup>638</sup> In *Plyler*, the Supreme Court struck down a Texas law that denied undocumented children access to public education, concluding that this policy was “difficult to reconcile . . . with the framework of equality embodied in the Equal Protection Clause.”<sup>639</sup> More than a decade later, members of the U.S.

628. See *supra* text accompanying notes 382–384.

629. See *supra* text accompanying notes 385–386.

630. See *supra* text accompanying notes 451–458.

631. See GOODMAN, *supra* note 443, at 23; 23 CONG. REC. 3,623 (1892) (statement of Sen. Call); *id.* at 3,878 (statement of Sen. Palmer).

632. 87 CONG. REC. 9,032 (1940) (statement of Rep. Hobbs).

633. Alien Registration (Smith) Act of 1940, Pub. L. No. 76-670, 54 Stat. 670.

634. 84 CONG. REC. 10,361 (1939) (statement of Rep. Celler).

635. See *supra* Section II.B.

636. H.R. REP. NO. 76-397, at 1 (1939); see also *Deportation and Detention of Aliens: Hearings on H.R. 10 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Cong. 6 (1949) (statement of Watson B. Miller, Comm’r of Immigration and Naturalization).

637. 132 CONG. REC. 29,988 (1986) (statement of Rep. Romano Mazzoli).

638. 457 U.S. 202 (1982).

639. *Id.* at 222.

House of Representatives introduced a legislative amendment that would have given the states express permission to deny undocumented children access to state benefits such as public education.<sup>640</sup> Supporters of the amendment argued that the *Plyler* decision left open the possibility of *federal* intervention on the issue—even as *states* could not deprive immigrant children of public education on their own initiative.<sup>641</sup> But the amendment was swiftly rebuked. Legislators urged their colleagues to recognize the policy as “unconstitutional” and “morally repugnant.”<sup>642</sup> Representative Green of Texas noted that if the amendment passed, “we would see [this] come back to the Supreme Court, and they would probably rule the same way they did [in *Plyler v. Doe*].”<sup>643</sup>

The terms of this debate underscore how far we have diverged from the constitutionalism that characterized the first century of U.S. immigration law. Substantive engagement with the constitutionality of Congress’s immigration laws is now the exception rather than the norm. And even where members of Congress mount constitutional objections to immigration laws,<sup>644</sup> the debate more closely resembles an exercise in predictive judgment about whether the Supreme Court will think the law is constitutional—rather than a sincere inquiry into the scope of Congress’s powers.

The evolution of immigration legislation in the wake of the plenary power doctrine is a powerful illustrator of the way in which judicial review can distort both legislative outcomes and legislative discussion.<sup>645</sup> As Professor Tushnet describes, “[c]ourts may design some doctrines to reflect their sense of their own limited abilities, not to reflect directly substantive constitutional values.”<sup>646</sup> Yet legislators attach themselves to these competency-oriented doctrines and begin to consider the “constitutional implications of what they were about to do in the same terms.”<sup>647</sup> This dynamic is palpable in the interplay between Congress and the Court on the subject of immigration. The Supreme Court ostensibly adopted the plenary power doctrine to extract itself from continuous review of immigration statutes. Yet Congress has marshaled this same doctrine to avoid discussing the constitutional implications of its own legislation.<sup>648</sup> And despite growing political will to resist and curtail the breadth of federal immigration enforcement over the past decade, the robust

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640. 142 CONG. REC. 5,651 (1996).

641. *Id.* at 5651–52 (statement of Rep. Elton Gallegly); *id.* at 5652 (statement of Rep. Margaret Roukema); *id.* at 5654 (statement of Rep. Randall H. Cunningham).

642. *Id.* at 5654 (statement of Rep. William L. Clay).

643. *Id.* at 5655 (statement of Rep. Gene Green).

644. *See supra* text accompanying notes 642–643.

645. For broader discussion of this phenomenon beyond immigration law, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 58–60 (1999).

646. *Id.* at 60.

647. *Id.*

648. *Cf.* KRAMER, *supra* note 196, at 233 (characterizing judicial review as a “device to deflect and dampen the energy of popular constitutionalism”).

policy debates occurring in state legislatures, in town hall meetings,<sup>649</sup> and in the press<sup>650</sup> have barely made their way into Congress's chambers.

### B. *Judicial Supremacy and Counter-Majoritarian Politics*

Rather than considering the constitutional basis of its own immigration laws, Congress has handed the Supreme Court the power to police the boundaries of the federal government's immigration powers. This allocation of responsibility aligns to some extent with the idea—articulated by the Court in *United States v. Carolene Products Co.*<sup>651</sup>—that searching judicial review is most warranted where legislation affects religious, national, or racial minorities who lack the power to assert their interests through the political process.<sup>652</sup> The Supreme Court's insulation from partisan politics, the argument proceeds, allows it to evaluate our laws for “prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>653</sup> Within this framework, laws regulating disenfranchised immigrants are prime candidates for robust judicial review.

Yet the history of federal immigration law undermines the expectation that the courts will intervene to protect vulnerable minorities from hostile and repressive legislation.<sup>654</sup> To the contrary, as Congress enacted increasingly aggressive and xenophobic deportation laws throughout the late-nineteenth and early-twentieth century, the Supreme Court morphed its constitutional law doctrines to authorize these novel powers. When Congress began to extend the scope of its immigration laws from the border to the interior, the Court decided that Congress possessed extensive power to “make [its] exclusion[s] effective” via domestic regulation.<sup>655</sup> Eventually, confronting deportations

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649. See, e.g., NAT'L IMMIGR. L. CTR., IMMIGRANTS' RIGHTS GAIN GROUND IN THE STATES (2019), <https://www.nilc.org/wp-content/uploads/2019/12/Immigrants-Rights-Gain-Ground-in-the-States-2019-12-11.pdf> [perma.cc/AK82-3RDX]; Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1721–22 (2018).

650. See, e.g., Felipe De La Hoz, *Why ICE Cooperation Is Dangerous Even with Biden in the White House*, APPEAL (Mar. 25, 2021), <https://theappeal.org/politicalreport/cooperation-with-ice-after-biden-guidelines> [perma.cc/L3P6-V43X].

651. 304 U.S. 144 (1938).

652. *Carolene Prods.*, 304 U.S. at 152 n.4. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135–180 (1980); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

653. *Carolene Prods.*, 304 U.S. at 152–53 n.4.

654. Cf. Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 118–19 (“[T]he Court has ruled in favor of just one African American plaintiff mounting an equal protection challenge in recent decades.”); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1742–43 (2021).

655. *Lees v. United States*, 150 U.S. 476, 480 (1893); see *supra* note 488 and accompanying text.

that could not be sustained under any previous constitutional theory, the Supreme Court abandoned the Constitution altogether and allowed Congress to pass virtually any law as long as it regulated immigrants.<sup>656</sup> Even during the political frenzy of wartime emergencies—circumstances invoked most frequently to justify judicial oversight of legislative majorities—the Court has seamlessly permitted the federal government to arrest and detain supposedly suspicious ethnic and religious minorities.<sup>657</sup>

In this sense, the historical trajectory of immigration law illustrates the notion that courts are “regularly . . . more or less in line with what the dominant national political coalition wants.”<sup>658</sup> As Professor Spann has powerfully contended, “[t]he formal safeguards of life tenure and salary protection, which are designed to insulate the judiciary from external political pressures, are not designed to guard against the majoritarianism inherent in a judge’s own assimilation of dominant social values.”<sup>659</sup> That judges and justices might not suffer immediate political consequences of a counter-majoritarian decision will not ensure their willingness to controvert majoritarian political and social consensus in favor of minority rights, especially when their confirmation process is explicitly designed to favor alignment with majoritarian politics.<sup>660</sup> Indeed, even beyond immigration law, there have been few examples over the past 250 years of the Supreme Court intervening in a timely fashion to curtail Congress’s racist or xenophobic impulses.<sup>661</sup>

As Professors Bell and Klarman have argued, the Court’s willingness to protect minorities is in fact highly contingent on majoritarian social and political opinion.<sup>662</sup> The Court’s decision in *Brown v. Board of Education*, Bell argues, “cannot be understood without some consideration of the decision’s value to whites” and to “the economic and political advances at home and abroad” resulting from the decision itself.<sup>663</sup> And as Klarman illustrates, the Supreme Court’s decision invalidating the Defense of Marriage Act in *United States v. Windsor*<sup>664</sup>—though seemingly counter-majoritarian in nature—was

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656. *Lapina v. Williams*, 232 U.S. 78, 82–83, 88 (1914); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). For further discussion of this shift, see *supra* text accompanying notes 493–499.

657. *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Ziglar v. Abbasi*, 137 S. Ct. 1834 (2017).

658. TUSHNET, *supra* note 645, at 153.

659. GIRARDEAU A. SPANN, RACE AGAINST THE COURT 19 (1993).

660. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1404 (2006) (“A practice of judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights.”).

661. See Stephanopoulos, *supra* note 654, at 118.

662. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); Michael J. Klarman, Comment, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 130, 160 (2013).

663. Bell, *supra* note 662, at 524.

664. 570 U.S. 744, 775 (2013).

only conceivable because of the rapid evolution of public opinion that preceded the decision.<sup>665</sup> In the four years before the Court's decision, President Obama, the Democratic Party, half of United States senators, and voters in numerous states publicly expressed their support for gay marriage.<sup>666</sup>

Yet this account also suggests that lasting legislative solutions to the immigration anomaly will require giving immigrants more power in the political process. When the Democratic-Republicans were contesting Congress's power to enact the Alien Friends Act in 1798, most immigrants were eligible to become United States citizens eventually—and thus voters—after a certain period of living in the country.<sup>667</sup> But by the time Congress turned its ire against Chinese immigrants, many Chinese Americans had been forever deprived of U.S. citizenship<sup>668</sup>—and were thus unable to exercise the same kind of political influence in response to increasingly harsh deportation laws. To the extent that the current exceptionality of Congress's immigration power *relies* on the permanent disenfranchisement of immigrants most affected by Congress's laws, the denaturalization of the plenary power doctrine must walk hand in hand with the widespread efforts of advocates to give immigrants more political power<sup>669</sup> and to create more pathways to citizenship.<sup>670</sup>

Notwithstanding the political and structural obstacles to meaningful legislative solutions, the story of Congress's immigration powers reminds us that turning to the *courts* to invalidate xenophobic legislation can backfire even when the specific decision leads to favorable outcomes.<sup>671</sup> Over the past several decades, litigants have asked the Supreme Court to strike down xenophobic state laws on the grounds that Congress—and not the states—is entrusted with the exclusive power to regulate immigrants.<sup>672</sup> Yet the Supreme Court has responded to these cases by reaffirming Congress's “undoubted” and “sovereign” immigration power<sup>673</sup>—a conclusion that makes it nearly impossible

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665. Klarman, *supra* note 662, at 130.

666. *Id.* at 134.

667. The Naturalization Act of 1795 set this residency requirement at five years, Naturalization Act of 1795, ch. 20, 1 Stat. 414 (superseded by statute 1798), but Congress increased this to fourteen years in 1798, Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802).

668. *See* Naturalization Act of 1870, ch. 254, 16 Stat. 254 (repealed 1952).

669. Historically, much of this advocacy has focused on organizing immigrant workers, *see* GOODMAN, *supra* note 443, at 138, 140–43, and expanding the franchise to immigrants, *see* KEYSSAR, *supra* note 259, at 83–89.

670. *See, e.g.*, American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021).

671. *Cf.* TUSHNET, *supra* note 645, at 142 (“Lawyers ought to be careful in articulating their legal claims, so that if the court adopts their arguments the long-term prospects for change will not be impaired by the ideological implications of the *way* in which the legal claims were made.”).

672. Abrams, *supra* note 2, at 612–14 (describing the relationship between the plenary power doctrine and robust preemption).

673. *Arizona v. United States*, 567 U.S. 387, 394–95 (2012); *cf.* TUSHNET, *supra* note 645, at 143–46 (critically evaluating whether *Brown v. Board of Education* actually made a meaningful difference in securing civil rights).

to challenge xenophobic immigration policy when the *federal* government is the entity implementing it. And as we describe above, Congress's reliance on the Court as the sole arbiter of constitutional meaning has allowed Congress to abdicate its own responsibility to interpret and support the Constitution.<sup>674</sup>

#### CONCLUSION

Just as Native American organizers and territorial residents have long ago abandoned judicial supremacy and turned to Congress to “mitigate the artifacts of American colonialism,”<sup>675</sup> advocates and legislators should encourage Congress to robustly evaluate the wisdom and constitutionality of its broad immigration laws and to disavow the idea that Congress's power to regulate immigrants is extraordinary or extraconstitutional.<sup>676</sup> Inspired by the Democratic-Republican resistance to the Alien Friends Act, Congress should return to carefully considering the constitutional source of its power to regulate immigrants; assess the political and legal consequences of grounding its laws in any particular provision of Article I; and enact more robust civil rights protections for immigrants under its broad power to regulate interstate commerce.<sup>677</sup>

As Mark Tushnet has written of Thomas Jefferson's opposition to the Alien Friends Act, “Jefferson was a smart man and, for his times, a real democrat. He did not place his hopes in the Supreme Court.”<sup>678</sup> Instead, Jefferson helped to organize ordinary people to restore the government to “its true principles.”<sup>679</sup> Reimagining Congress's immigration power today will similarly happen not with new legal arguments, but only with a new “wave of public opinion.”<sup>680</sup>

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674. Cf. Waldron, *supra* note 660, at 1393.

675. See Blackhawk, *supra* note 1, at 1824, 1840, 1847–48.

676. Doerfler & Moyn, *supra* note 654, at 37 (lauding the “legislated rights frame” of the civil rights acts as having done more “than any judicial decision to confront exclusions based on race, gender, or disability,” and noting that the legislature might “be seen as the first and most important defender and propagator of rights”).

677. *Id.*

678. Tushnet, *supra* note 53, at 63.

679. *Id.*

680. See *supra* note 15 and accompanying text.