

RECLAIMING THE IMMIGRATION CONSTITUTION OF
THE EARLY REPUBLIC: PROSPECTIVITY, UNIFORMITY,
AND TRANSPARENCY

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WITH some justification, the scholarly consensus holds that the modern era of federal immigration law in the United States began in 1875.¹ That was, after all, the year in which Con-

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¹ See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1626 (1992); see also Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the*

gress enacted general restrictions on the ability of foreigners to enter the country,² although restrictions at the state and local level had been around for much longer.³ Convention also dates the origin of the federal constitutional law of immigration to roughly the same period. In the *Chinese Exclusion Case*, announced at the height of the nativism of the 1880s, the Supreme Court upheld the power of Congress to restrict entry by Chinese nationals.⁴ Identifying the nation's power to control its borders as an inherent incident of sovereignty under the law of nations, the Court found that this power to exclude aliens seeking entry was not subject to any constitutional restriction.⁵ Thus was born the plenary power doctrine. In relatively short order, the Court extended the plenary power doctrine to encompass Congress's power to provide for the deportation of previously admitted resident aliens as well.⁶

As with their view of its nineteenth-century origins, scholars today also agree that the plenary power doctrine provides a poorly theorized framework for immigration constitutionalism.⁷ Under the

Removal of Aliens, 98 Colum. L. Rev. 961, 1004 (1998) [hereinafter Neuman, Habeas Corpus] (dating the modern period of federal immigration regulation to 1875).

² See Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477–78 (excluding prostitutes and convicts from admission to the United States).

³ As Professor Neuman shows, restrictions had long been around at both the state and local levels. See Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 19–43 (1996) [hereinafter Neuman, *Strangers*] (noting the myth that the nation's borders were open until the 1870s and recounting the various forms of legislation, often at the state and local level, that served to exclude alien criminals, paupers, the diseased, and people of color). Federal laws adopted before 1875 also excluded slaves, “coolies,” and perhaps some free people of color to the extent already barred by state law. *Id.* at 34–41.

⁴ See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

⁵ *Id.*

⁶ See *Fong Yue Ting v. United States*, 149 U.S. 698, 723–24 (1893). We discuss *Chae Chan Ping*, *Fong Yue Ting*, and the origins of the plenary power doctrine at greater length in Part IV. For comprehensive treatment of the plenary power doctrine, see Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 181 (1987) (tracing the origins of plenary power to the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849)); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Power*, 1984 Sup. Ct. Rev. 255, 256–57 [hereinafter Legomsky, *Plenary Power*].

⁷ See Legomsky, *Plenary Power*, *supra* note 6, at 260–78 (criticizing as inadequate a series of possible justifications for the plenary power doctrine); see also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 885–86 (1987) (arguing that the Court's rec-

plenary power doctrine, Congress enjoys what the Supreme Court has sometimes described as essentially unfettered power over the treatment of aliens. In its baldest formulation, the plenary power doctrine holds that certain categories of aliens must accept whatever rights Congress chooses to confer or withhold.⁸ At the same time, the Court has often subjected the removal or deportation of aliens and other features of immigration law to some of the rigors of procedural due process analysis.⁹ Perhaps most dramatically, the Court held in 2001 that aliens were entitled to a presumption against retroactivity and to judicial review of removal decisions despite the efforts of Congress to impose a different dispensation.¹⁰ The Court framed its approach to the legislation in terms of the need to avoid the serious constitutional question that would arise from foreclosure of all review.¹¹ Subsequent decisions, including those growing out of challenges to detention at Guantanamo Bay,

ognition of unfettered power in Congress was contrary both to norms of limited constitutionalism and to the human rights commitments that defined our highest national aspirations); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. Rev. 97, 105–06 (1998) (arguing that substantive due process principles should limit Congress's ability under the plenary power doctrine to impose retroactive changes in immigration law); Motomura, *supra* note 1, at 1626–32 (arguing for an alternative set of constitutional norms, drawn from special rules of statutory interpretation and from the rules of procedural due process that the Court has grudgingly made available to aliens seeking to resist removal); cf. Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1018–19 (2006) (exploring the nineteenth-century development of the presumption in favor of prospective legislation as it applied to public and private rights).

⁸ See *Galvan v. Press*, 347 U.S. 522, 530–32 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–90 (1952); *Fong Yue Ting*, 149 U.S. at 713–14; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping*, 130 U.S. at 609; see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (declaring that any procedure Congress chooses “is due process as far as an alien denied entry is concerned”).

⁹ See *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982) (extending procedural protections to a resident alien who was excluded upon his return to the United States after a short trip abroad).

¹⁰ See *INS v. St. Cyr*, 533 U.S. 289, 314–20 (2001) (concluding that Congress had not clearly stated its intention to preclude review of certain removal issues through habeas corpus).

¹¹ See *id.* at 300–05. We discuss *St. Cyr* in Part IV below.

have strengthened the Court in its view that constitutional guarantees provide aliens with some assurance of judicial review.¹²

Complicating matters further, the Court has sometimes suggested that immigration matters fall within the scope of something called the “public rights” exception to Article III.¹³ The well-known terms of Article III vest the judicial power of the United States in federal courts, supreme and inferior, staffed by life-tenured and salary-protected judges.¹⁴ Under the public rights exception as sometimes articulated, Congress has the power to allow non-Article III tribunals to adjudicate and resolve disputes between individuals and the federal government. If rigorously applied, the public rights doctrine would seemingly authorize Congress to assign the adjudication of immigration matters to executive branch agencies and to immunize agency decisions from judicial review. Strong statements of the public rights exception to Article III draw strength from the plenary power doctrine but conflict with the Court’s reliance on procedural due process and habeas corpus as complementary tools with which to preserve judicial oversight.¹⁵

Scholars have called attention to the puzzles presented by the Court’s distinction between constitutional substance and constitutional procedure and the complicating niceties of the public rights doctrine. Professor Daniel Meltzer, writing in the wake of the immigration reforms of the mid-1990s, described the uneasy world that the Court had created with its deference on matters of substance and its closer attention to issues of procedure. How did it

¹² See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that Congress unconstitutionally suspended writ of habeas corpus in restricting judicial review of a Guantanamo Bay detention).

¹³ See *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (including immigration among matters “involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper” (quoting *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 284 (1855))).

¹⁴ On the power of Congress to assign matters within the judicial power of the United States to non-Article III tribunals, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *Harv. L. Rev.* 643, 649–51 (2004); cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 *Harv. L. Rev.* 915, 916–18 (1988) (arguing that Article III requires federal courts to conduct appellate review of legislative court judgments and administrative agencies).

¹⁵ We criticize the plenary power doctrine in Part IV below.

happen, Professor Meltzer wondered, that the federal government came to be bound by the Fifth Amendment's due process clause in dealing with aliens but not by the same Amendment's equal protection component?¹⁶ Similarly, Professor Hiroshi Motomura has ruminated at some length about the Court's distinction between substance and procedure. Describing what he called a procedural due process exception to the plenary power doctrine, Professor Motomura viewed procedural protections as surrogates for the substantive constitutional rights that the Court has so far largely declined to recognize.¹⁷

The case of the Uighurs, long detained at Guantanamo Bay, illustrates some of the perplexing consequences of our substantively thin and procedurally thick immigration Constitution. The Bush administration detained the Uighurs after learning that some may have received military training at camps run by the Taliban in Afghanistan. Eventually it appeared that at least some of the Uighurs, an ethnic minority in China, secured this training not to attack the United States but to defend themselves against the Chinese government. Through the ups and downs of habeas litigation, counsel for the Uighurs eventually established the elements of a claim for release from detention at Guantanamo Bay.¹⁸ Despite the efforts of a federal district judge who viewed their continued detention as unjustifiable, the government successfully argued that the Uighurs had no right to admission to the United States.¹⁹ The constitutional

¹⁶ See Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 *Geo. L.J.* 2537, 2578–79 (1998).

¹⁷ See Motomura, *supra* note 1, at 1632–35. Taking a slightly different tack, Professor Nancy Morawetz has argued that substantive due process may limit Congress's ability to impose retroactive changes in immigration law. Morawetz, *supra* note 7, at 105–06.

¹⁸ For an account of the events up to and including the district court's order to release the Uighurs into the United States, see *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008).

¹⁹ *Kiyemba v. Obama*, 555 F.3d 1022, 1025–29 (D.C. Cir. 2009) (concluding that Uighurs cannot claim release from custody, despite the government's admission that they do not qualify for continued detention as enemy combatants), cert. granted, 130 S. Ct. 458 (Oct. 20, 2009). Various developments may moot the Kiyemba litigation before its anticipated judicial resolution in June 2010. See Order in Pending Case, *Kiyemba v. Obama* (08-1234) (Feb. 12, 2010).

invalidity of their confinement at Guantanamo Bay did not translate into a constitutional right to enter the United States.²⁰

This Article offers a new account of the nation's immigration Constitution. Instead of building on the plenary power doctrine of the 1880s, the Article focuses on the little-known body of federal immigration and naturalization law that arose during the early Republic of the 1790s. Although it has for a variety of reasons attracted little attention from scholars, the constitutional law of the early Republic recognized that Congress was to have broad (substantive) power to fashion immigration policy but was required to act in accordance with norms of procedural regularity. In particular, while Congress was free to define the classes of persons who were entitled to seek naturalized citizenship, the Constitution requires Congress to act in accordance with norms of prospectivity, uniformity, and transparency. Embedded in the naturalization clause, which empowers Congress to "establish an uniform rule of Naturalization,"²¹ these values of procedural regularity formed the core of the early Republic's immigration Constitution and can do much to complement the procedural protections found in the due process clause.

A range of factors explains why this body of constitutional law has escaped sustained attention. To begin with, the constitutional law of the early Republic was largely applied in the halls of Congress, rather than in the federal courts. Early federal laws implementing the requirement of a uniform rule of naturalization produced little in the way of reported decisions that would shed light on the judiciary's role in the process or on the constitutional framework within which Congress was to operate.²² Like much of the early Republic's administrative law, the application of immigration and naturalization law was hidden in the discretionary actions

²⁰ During June 2009, the Obama administration secured asylum for the Uighurs in such disparate countries as Bermuda, Palau, and elsewhere. See William Glaberson, 6 Guantánamo Detainees Are Released to Other Countries as Questions Linger, N.Y. Times, June 12, 2009, at A6.

²¹ U.S. Const. art. I, § 8, cl. 4.

²² In one little known case, *Ex parte Fitzbonne* (1800) (unreported), the Supreme Court held that citizens of France were entitled to naturalization, notwithstanding a provision of federal law barring naturalization of citizens of a country at war with the United States. For an account, see 8 The Documentary History of the Supreme Court of the United States, 1789–1800, at 389–90 (Maeva Marcus ed., 2007).

of government officers, mainly judges and magistrates.²³ Apart from its being invisible to an eye trained to examine judicial decisions, the early constitutional law was built around the naturalization clause, a seemingly unlikely source for the development of a constitutional law of immigration. The clause itself occasioned little debate at the Philadelphia Convention that would shed light on its important procedural features. In addition, the clause does not obviously extend beyond issues of citizenship to govern issues of immigration. Scholars who date federal immigration law to 1875 correctly identify general congressional restrictions on entry; early citizenship rules did not bar anyone from entering the country.²⁴

But two factors—the practical reality of trans-Atlantic migration and the rules of property ownership—combined to make naturalization virtually synonymous with the immigration policy of the early Republic.²⁵ The trans-Atlantic voyage to the United States

²³ On the sources of antebellum administrative law, see William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* 9–12 (1996). Rarely would the published judicial record reveal the factors that influenced citizenship decisions; rarely did first-instance decisions occasion appellate review; and rarely did the courts record their legal interpretations in passing on naturalization petitions. For instance, naturalization decisions of the district court of New York simply recite the facts and declare the petitioner to be a naturalized citizen. See *infra* note 155.

²⁴ Chief Justice Taney, dissenting from the invalidation of state restrictions on the entry of aliens, gave voice to the intuitive distinction between citizenship and immigration. See *Passenger Cases*, 48 U.S. (7 How.) 283, 483 (1849) (Taney, C.J., dissenting) (explaining that the “nature of our institutions under the Federal government made it a matter of absolute necessity that [the naturalization] power should be confided to the government of the Union, where all the States were represented, and where all had a voice; a necessity so obvious that no statesman could have overlooked it. The article has nothing to do with the admission or rejection of aliens, nor with immigration, but with the rights of citizenship. Its sole object was to prevent one State from forcing upon all the others, and upon the general government, persons as citizens whom they were unwilling to admit as such.”).

²⁵ For the view that the length, cost, and difficulty of the trans-Atlantic voyage ensured that it was “almost always a one-way trip,” see Raymond L. Cohn, *Mass Migration Under Sail: European Immigration to the Antebellum United States* 1, 10 (2009). Cohn observed that later in the nineteenth century, steamship travel shortened the trip from months to some ten days and sharply reduced its cost. *Id.* at 1, 12, 125, 223–26. The change in the cost and mode of travel may have changed the nature of immigration. While immigrants in the age of sail could not practically consider anything but permanent relocation, the steamship enabled immigrants to come and go. William J. Bromwell, *History of Immigration to the United States* 18 (1856) (reporting that the emigration of Chinese to America was inconsiderable until 1854, when some 13,000 Chinese laborers arrived, and noting that a growing number of immigrants

from Europe was difficult, expensive, and time consuming. Immigrants spent anywhere from six weeks to three months on board a ship, paid substantial fees to book the passage, and did not expect to return to their countries of origin.²⁶ Scholarship on immigration during the founding period thus makes clear that those sailing to the new world were (almost invariably) making a permanent decision to relocate.²⁷ The rules of property ownership explain why those contemplating a one-way trip to the United States would have paid close attention to naturalization rules in making their decision. At common law, in England and in the colonies, and newly independent states of North America, aliens could not obtain a fee simple title to real property.²⁸ While there were various ways to temporize—aliens could obtain “denizen” status, for example, and the right to hold a life estate in real property—the common law barrier to land ownership played a central role in immigration calculus.²⁹ Inasmuch as the prospect of owning cheap fertile land was central to the pre-industrial American dream of economic advancement, immigrants to British North America during the second half of the eighteenth century would know that their future property ownership rights depended on their ability to secure naturalized citizenship.³⁰

came with the intention of returning to their country of origin rather than residing permanently in the United States).

For an account of common law property ownership rights in England, see 2 William Blackstone, *Commentaries on the Laws of England* *356–57. On the way prevailing conceptions of property rights affected aliens in colonial America, see Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 *Am. J. Legal Hist.* 152, 159 (1999) (noting that aliens could not inherit land from others and could not pass good title to their children upon death; even their ownership of property during their lifetimes was subject to attack by way of escheat, a state-initiated legal process that triggered the forfeiture of title to the state).

²⁶ See *supra* note 25.

²⁷ See *id.*

²⁸ See *id.*

²⁹ On the nature of alien property disabilities and the Crown’s practice of denization, see 2 Blackstone, *supra* note 25, at *356–57 and *infra* notes 73–80 and accompanying text.

³⁰ See Bernard Bailyn, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution* 26 (1986). Bailyn emphasizes both the comparatively vast scale of immigration in the years between 1760 and 1775 and the way in which the pre-industrial immigration of the eighteenth century differed from its nineteenth-century counterpart. As Bailyn explains, immigration was not, “in its main impact, an

For the Framers, then, the law of naturalization played a central role in structuring the incentives and decisions of prospective immigrants.³¹ We can see the connection between property ownership, naturalization policy, and immigration in a variety of sources, including the population grievance in the Declaration of Independence. In complaining that the King had acted to prevent the population of the United States, Congress first identified acts that were said to have obstructed “the Laws for Naturalization of Foreigners.”³² Without the promise of naturalized citizenship, in short, America could not attract immigrants to the new world. Connected to this interference with the states’ control over naturalization, the Crown had made it more difficult for new settlers to secure “Ap-

urban phenomenon” but was one in which European artisans and laborers were settling on the land in America. Id. By Bailyn’s count, over 125,000 immigrants arrived from the British Isles alone in the fifteen years preceding the Revolution, an average rate of 15,000 per year (or roughly the total estimated population of Boston in that day). Id. Thousands of German-speaking immigrants from the Rhine valley were also entering through the port of Philadelphia. Scholars estimate that some 90,000 to 100,000 such immigrants arrived over the course of the eighteenth century. See Georg Fertig, *Transatlantic Migration from the German-Speaking Parts of Central Europe, 1600–1800: Proportions, Structures, and Explanations*, in *Europeans on the Move: Studies in European Migration, 1500–1800*, at 192, 201–02 (Nicholas Canny ed., 1994); cf. David Hawke, *The Colonial Experience* 364 (1966) (reporting that German immigration “dried up” with the outbreak of the Revolution).

³¹ In suggesting a connection between naturalization rules and immigration choices, this Article adopts a view comparable to that explored in Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. Pa. L. Rev. 341, 361–62 (2008) (suggesting that rules governing the treatment of aliens after they arrive in the United States will shape their decisions to enter the country). Obviously the rule of naturalization was not the only factor that influenced immigration decisions. Immigrants were influenced by a range of factors, including the prospects for financial gain in the new world and strength of the cultural and social connections they would expect to find upon arrival. See Marianne Wokeck, *Harnessing the Lure of the “Best Poor Man’s Country”: The Dynamics of German-Speaking Immigration to North America, 1683–1783*, in *“To Make America”: European Emigration in the Early Modern Period* 204, 205–06 (Ida Altman & James Horn eds., 1991) (explaining that a full account of emigration to British North America must take account of both factors that pushed migrants away from Europe and pulled them toward the new world). Yet settlement on the land played an important role in the pre-industrial immigration calculus and rules of naturalization were central to land ownership and to full membership in the community. Cf. Robert J. Steinfeld, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 *Law & Hist. Rev.* 645, 650–51 (2001) (suggesting that citizenship-based property ownership rules in the colonial period, including the alien property disability, would operate effectively as a rejection of immigration).

³² The Declaration of Independence para. 9 (U.S. 1776).

propriations of Land.” In suggesting a linkage between naturalization policy, land ownership, and immigration, the Declaration simply recited the conventional wisdom of the day.³³

The naturalization law of the early Republic has a variety of lessons to teach us about the scope of congressional power over immigration law, not all of them welcome. To begin with, Congress exercised broad power to define which classes of persons were entitled to citizenship. In 1790, Congress limited naturalized citizenship to “free white person[s],” thereby excluding aliens of color.³⁴ If the Constitution broadly defined Congress’s substantive authority (in ways that anticipate the plenary power doctrine), it took a much narrower view of the *manner* in which Congress was to legislate. Thus, the naturalization clause required Congress to establish a nationally uniform rule and to do so through public laws of general applicability. This was a pro-immigration stance: by ruling out private bills (a form of naturalization common both in England and in some colonies),³⁵ the Framers required Congress to adopt public laws that would place the administration of naturalization law in the hands of the executive and judicial branches of government. Particularly when read against the backdrop of the restrictive and shadowy world of legislative naturalization practices,³⁶ public laws were understood to simplify the process of naturalization, to make it more transparent, to make it less expensive, and, as a practical

³³ Similar links appear in the debates over naturalization in the First Congress and in the revealing comments of James Madison, which we discuss in Part III.

³⁴ An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) [hereinafter 1790 Act]. Such a restriction on access to citizenship reveals several things about the early Republic. Southern states obviously viewed slavery as central to the preservation of their plantation economies; subjugation of people of color was seen as essential to the preservation of the institution of slavery. The North’s willingness to accept such restrictions reflected the same spirit of compromise that underlay its willingness to frame a Constitution that acknowledged and supported Southern slavery. Perhaps most significantly for our purposes, the provision illustrates the perceived breadth of Congress’s substantive control over the definition of rights to citizenship.

³⁵ Legislative petitions were a prominent means by which individuals sought naturalization in England (and in the colonies) during the eighteenth century. See 2 Frederick Clifford, *A History of Private Bill Legislation* 725 (Frank Cass and Co. Ltd. 1968) (1887).

³⁶ See *infra* notes 81–95 and accompanying text.

matter, to provide for the naturalization of more applicants for citizenship.³⁷

More generally, the requirement of an established rule of naturalization was understood to foreclose retroactive changes in the terms on which individuals were to be admitted to citizenship. This Article identifies, both in the drafting of the Constitution and in its early congressional implementation, a strong commitment to legislative prospectivity in naturalization law. The requirement of prospectivity reflected the perception that those who immigrated to the United States were entitled to rely on the rules of naturalization that governed admission to citizenship at the time of their arrival. Thus, when Congress changed the rules, it was careful to create exceptions for aliens who already resided in the United States and could claim citizenship under the earlier rules.³⁸ Even in the development of the restrictive and short-lived naturalization law of 1798, a measure shaped by the urgent nationalism that arose during the quasi-war with France, the Federalist Congress took steps to moderate the law's retroactive features.³⁹ Jeffersonians fully restored the norm of prospectivity in the naturalization act of 1802, where it remained until Congress's ill-conceived decision in 1839 (fifty years after the first naturalization act) to adopt a private bill in response to an individual petition.⁴⁰

The constitutional law of the early Republic provides a framework for evaluating the power of Congress and the role of the federal courts that can help to solve some modern immigration puzzles. Today's plenary power doctrine finds a measure of support in the broad authority of Congress to fashion rules of naturalization. Congress has the power to decide who can pursue naturalized citizenship, and on what terms; the power to regulate entry into the United States for those seeking naturalized citizenship, or some lesser status, would seem to follow. But those responsible for im-

³⁷ Congress has failed to heed this admonition, with predictable consequences: arbitrary and inconsistent results, favoritism to the well-connected, and corruption. In the FBI's 1980 ABSCAM sting operation, members of Congress were convicted of accepting bribes in exchange for agreeing to push private naturalization bills. See Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 227, 230–31 (1997).

³⁸ See *infra* Section III.B.

³⁹ See *infra* notes 216–18 and accompanying text.

⁴⁰ See *infra* notes 178 (private bill), 219–25 (1802 Act).

migration policy in the early Republic did not conceive of congressional power as unbridled. In particular, the Framers of the Constitution and the members of Congress who applied its terms in the early years were strongly committed to norms of prospectivity, uniformity, and transparency. Congress can change the rules, on this account, but must respect the reliance interests of those who have established a residence in the United States and have complied with the rules in place at the time of their arrival.

These early Republic constitutional norms provide an important set of limits on Congress's authority over immigration law. By ruling out retrospective changes in the rules, the naturalization clause qualifies the plenary power doctrine and bolsters the Court's result in *INS v. St. Cyr*.⁴¹ In addition, the naturalization clause calls into question the power of Congress to adopt private naturalization bills. This rejection of congressional case-by-case management of citizenship issues provides support for Justice Powell's conclusion in *INS v. Chadha*.⁴² It also calls into question the continued viability of the public rights exception for disputes between aliens and the federal government over the application of immigration and naturalization law. Lacking power to exercise case-by-case control over the grant or denial of naturalized citizenship, Congress must establish public laws of general applicability and leave the application of standards to executive and judicial branch officials. Congress's inability to claim discretionary control over individual cases distinguishes immigration law from other areas of law (the distribution of monetary benefits and public lands) to which the public rights doctrine applies.⁴³

In exploring the elements of the early Republic's immigration and naturalization Constitution, this Article proceeds in four parts. Part I explores the eighteenth-century origins of the naturalization clause, concentrating on the practical reality of immigration and the way naturalization rules shaped migration decisions. Part II

⁴¹ 533 U.S. 289 (2001).

⁴² 462 U.S. 919, 960 (1983) (Powell, J., concurring) ("When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.").

⁴³ In Part IV, we distinguish the Constitution's broad grant of congressional power over spending and property from its requirement that Congress establish a uniform rule of naturalization.

looks specifically at the framing of the naturalization clause and the way it (in turn) framed immigration policy during the early Republic. Not only does the text of the naturalization clause rule out the adoption of private naturalization bills, but also it requires Congress to act prospectively in making changes to the law. Part III explores early congressional practice. Early legislators were well aware of the importance of prospective lawmaking in naturalization matters and consciously avoided private legislation and retroactive changes in the rules governing resident aliens.

Part IV of the Article applies the lessons of the early Republic's immigration Constitution to current problems in immigration law. Perhaps most significantly, the requirement that Congress establish a uniform rule narrows the plenary power doctrine. Congress cannot alter the rules and make them retroactively applicable to aliens who have lawfully established residence in the United States. Part IV also calls into question broad versions of the public rights doctrine. While Congress has power to assign discretionary decisions to executive branch officers, it cannot reserve that discretion to itself (as it attempted to do in *INS v. Chadha*). Nor can Congress insulate immigration and naturalization decisions from the oversight of the federal courts. Like some expansive conceptions of plenary power, the public rights doctrine must yield to ensure the enforcement of constitutional limits on Congress's authority. A brief conclusion follows.

I. PRELUDE: IMMIGRATION POLICY IN NORTH AMERICA BEFORE 1787

Looking back on the growth of British North America, those who met in Philadelphia in 1787 to form a more perfect union did not envision a need for a restrictive immigration policy.⁴⁴ The colo-

⁴⁴ Two prominent members of the Philadelphia Convention, Alexander Hamilton and James Wilson, came to America from elsewhere in the British Empire. Hamilton arrived in 1772 from the British West Indies. Broadus Mitchell, *Alexander Hamilton: Youth to Maturity, 1755–1788*, at 34–35 (1957). Wilson arrived from Scotland in 1765. Charles Page Smith, *James Wilson: Founding Father 20–21* (1956). As native-born members of the British Empire, both Hamilton and Wilson were entitled to the rights of Englishmen in colonial North America. Both were free, moreover, after the Declaration of Independence, to choose either British or American allegiance and both chose America and the cause of independence.

nies had welcomed immigration; indeed, they competed with one another to recruit émigrés from the British Isles and the continent.⁴⁵ Elite opinion held that immigration was a source of national wealth, as new arrivals broadened the productive capacity of the nation and expanded the domestic demand for consumer goods. Great Britain shared this view; indeed, it had worked hard to stem the tide of emigration to its North American colonies in the years just prior to the Revolution in the belief that the loss of population threatened the mother country.⁴⁶ Mercantile theory called for the hoarding of resources, and people (especially the skilled workers and farmers who were leaving the great estates in droves) were among the resources to be hoarded.⁴⁷

The growing tension between the colonies and Great Britain over immigration policy was nicely captured in the Declaration of Independence. Among its grievances was the contention that the King

[H]as endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreign-

⁴⁵ Before the Constitution's ratification, the colonies and the newly independent states competed with one another to attract new immigrants. See *infra* text accompanying note 117 (quoting Pinckney's description of differing immigration policies of the newer and older states). See Hawke, *supra* note 30, at 371–72 (reporting that Massachusetts for a time required only a one-year residence for naturalization and that Pennsylvania required only two years). Short waiting periods in the colonies contrasted with the seven-year residency requirement of the 1740 Act of Parliament. Colonial naturalization, however, did not necessarily confer rights good throughout the Empire. *Id.*

⁴⁶ See Daniel Statt, *Foreigners and Englishmen: The Controversy over Immigration and Population, 1660–1760*, at 49 (1995) (“[T]he more people the more trade; the more trade, the more money; the more money, the more strength; and the more strength, the greater the nation.” (quoting article by Daniel Defoe circa 1709)).

⁴⁷ For an account of the importance of national population to European thinkers, see Henry Steele Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* 97–99 (1977) (contrasting the concern in Europe over shrinking populations with the perception that numbers were growing in America); see also Statt, *supra* note 46, at 49 (describing the preoccupation with population as the “common intellectual currency” of early modern Europe); cf. Benjamin Smith Baron, *Observations on the Progress of Population, and the Probabilities of the Duration of Human Life in the United States of America* (1791), *quoted in* Commager, *supra* at 99 & n.21, 100 (“[N]umbers of people constitute . . . the strength and riches of a state; that country, whose population is rapidly advancing, may fairly be said to be increasing in both these concomitants of national prosperity, with proportionable celerity.”).

ers; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.⁴⁸

Both in its general thrust and in its bill of particulars, this grievance tells us much about the immigration policy of the day. We hear no complaints that Great Britain had been foisting off unwholesome immigrants (convicts and paupers) on its colonies, although it indeed had such a policy.⁴⁹ Instead, the grievance focused on measures—specifically, naturalization rules—that had impeded the “population of these States.” This emphasis shows that the United States embraced new immigrants, in large part for the wealth they would bring or generate on their arrival.

To account for the American embrace of new immigration and to see why naturalization played a central role in immigration policy, one must understand the way the market structured immigration decisions in the pre-industrial world of the eighteenth century. Everyone who came to America from Europe (and Africa) arrived on board a sailing ship. The voyage took anywhere from six weeks to three months, and it cost a good deal of money.⁵⁰ Most accounts of the price of a passenger ticket agree that the going rate ranged from £3–5, a figure approaching the average annual wage of many tenant farmers and laborers in the British Isles.⁵¹ Only those who

⁴⁸ The Declaration of Independence para. 9 (U.S. 1776).

⁴⁹ For an account of Parliament’s decision in 1717 to encourage the transportation of convicts to North America through indentured servitude, see Bailyn, *supra* note 30, at 292–95. Some colonies adopted measures to limit the influx of convicts. *Id.* at 55. In the years just prior to the Revolution, around 960 transported convicts were arriving each year. *Id.* at 295.

⁵⁰ Emigration from Europe to North America was available only to the relatively well-to-do until credit and labor markets developed the contract of indentured servitude to finance the voyage. Wokeck, *supra* note 31, at 204–05, 217.

⁵¹ Professor Cohn reports that most sailing ships specialized in carrying cargo, not passengers. Cohn, *supra* note 25, at 60. As a result, passenger space was in short supply and quite expensive. As late as the period from 1810–1820, a ticket from Liverpool to New York cost £7–12, a figure that would virtually exhaust the estimated £10–15 annual income of an Irish farmer before the potato famine. *Id.* Others identify similar price ranges. See, e.g., Bailyn, *supra* note 30, at 166 (reporting a fare from Britain to North America in the mid-eighteenth century of £3–4 for an adult); Fertig, *supra* note 30, at 216 (reporting that fares remained relatively constant at £5–6 per passenger to travel from Rotterdam to Philadelphia for the period 1720–1770); see also Simone A. Wegge, Occupational Self-Selection of European Emigrants: Evidence from Nineteenth Century Hesse-Cassel, 6 *Eur. Rev. Econ. Hist.* 365, 386 (2002)

could afford passage to the new world could become immigrants. Not only was the voyage itself expensive, but the time immigrants spent on board ship was unavailable for more productive pursuits. Immigrants paid both for their passage and for the food they consumed on board; if they failed to pack enough supplies for the long voyage, they were forced to purchase food from the captain at inflated prices.⁵²

The financial and temporal demands of the voyage thus prevented many of the poorest, least skilled, and least desirable from making the trip to the new world.⁵³ But immigration was not solely or primarily a pursuit of the well-to-do. (Obviously, the financially and socially secure had little reason to relocate.) Historians agree that thousands of the middling sorts—farmers, artisans, servants, and laborers—were among those immigrating to British North America.⁵⁴ These immigrants paid for their passage by entering into contracts of indentured servitude, the terms of which varied with the skills of the individuals involved.⁵⁵ In some instances, passen-

(concluding that it would have cost laborers in Germany anywhere from one to two years of wages to immigrate to North America).

⁵² See Cohn, *supra* note 25, at 152–53.

⁵³ Thus, only the wealthy could immigrate to the new world before the indenture and labor credit markets developed. See Wokeck, *supra* note 31, at 204–05. Even later, when indentured service made the passage affordable to a broader range of immigrants, scholars have shown that German immigrants had higher rates of literacy than the folks back home. See Fertig, *supra* note 30, at 232 (contrasting a literacy rate of seventy-one percent among German immigrants with a literacy rate in Germany of only fifty-five percent). In keeping with such findings, others have shown that a disproportionate share of German immigrants were skilled artisans rather than unskilled laborers. See Wegge, *supra* note 51, at 378, 382–83 (suggesting that the cost of immigration kept laborers from immigrating in numbers proportional to their representation in the labor market).

⁵⁴ Bailyn, *supra* note 30, at 26 (describing the mix of workers coming from the British Isles just prior to the Revolution).

⁵⁵ Scholars agree on the significance of the contract of indenture in expanding the flow of immigrants. See Bailyn, *supra* note 30, at 243 (reporting that half of the immigrants from the British Isles settled in North America as indentured servants); Fertig, *supra* note 30, at 216 (identifying the development of an indentured servant market as crucial to the expansion of immigration); Wokeck, *supra* note 31, at 217 (noting the role of indentured servitude in facilitating German immigration to North America). See generally David W. Galenson, *White Servitude in Colonial America: An Economic Analysis* (1981). Galenson reports that the length of the period of indentured service and the amount of “freedom dues” varied with the skill level of the individual. *Id.* at 102–03. Contracts for indentured servitude were bought and sold, often while the servant was still on board the ship in the harbor. *Id.* at 97.

gers contracted directly with the captain of the vessel; these contracts were sold when the voyage ended in America. On other occasions, labor entrepreneurs would recruit particular workers, entering into indentures and paying the passage themselves. Either way, the arrangements depended on the existence of relatively well-established labor markets in America, where captains or recruiters could reliably dispose of the contracts of indentured servants. Historians estimate that indentured servitude, although essentially defunct by the early nineteenth century,⁵⁶ accounted for something approaching half of all immigration to America in the eighteenth century.⁵⁷

Judging from the sentiments expressed in the Declaration of Independence, the arrival in America of thousands of relatively impecunious indentured servants did not pose a social problem. In many cases, the market for indentured servitude would operate to prevent new immigrants from becoming a public charge. Indentures required the master to provide the servant with food and lodging throughout the term of the contract. After the period of servitude ended, moreover, the contract typically called for the master to provide the servant with a cash stipend with which to start a new life.⁵⁸ In a growing economy, with expanding labor markets and cheap land available on the frontier, Americans viewed themselves as having little to fear and much to gain from the arrival of masses of indentured servants.

In addition to indentured servants, another stream of immigrants headed more or less directly to the land, either buying property outright or taking up a grant under a land scheme promoted by speculators. Bernard Bailyn speaks of “an extraordinary flood of immigration” to America in the 1760s and 1770s, and of a closely

⁵⁶ On the demise of indentures to finance passage to North America, see Wegge, *supra* note 31, at 371 (reporting that use of indentures had all but ended by 1830).

⁵⁷ See Bailyn, *supra* note 30, at 166, 243 (reporting that indentured servants and redemptioners accounted for approximately forty-eight percent of all immigrants from the British Isles in the years immediately preceding the Revolution).

⁵⁸ The freedom dues, as they were known, varied in accordance with the skills of the servant. Early practice in colonial Virginia was to provide the indentured servant with fifty acres of land upon conclusion of the period of servitude. See Galenson, *supra* note 55, at 11. Galenson reports that colonial law often fixed the amount of freedom dues, *id.* at 253 n.17, but skilled laborers could bargain for shorter terms of indenture and “encouragements of another nature.” *Id.* at 207 (quoting 1 Lewis Cecil Gray, *History of Agriculture in the Southern United States to 1860*, at 364–65 (1958)).

associated “sudden and immense spread of settlement in the back-country of the coastal colonies and in the trans-Appalachian west.”⁵⁹ His account of how this immigration occurred identifies a range of players, including the large (absentee) landowners in British North America (Lord Fairfax in Virginia; the Earl of Granville in North Carolina); the enterprising middlemen and speculators; the merchants and captains who arranged the passage of would-be landowners; and the local notables in England, Scotland, and Ireland, who put together groups of emigrating farmers.⁶⁰ Package deals (through which emigrants would obtain title to land and passage across the sea) attracted relatively well-established farmers and their families, who sought to escape from rising rents and enclosures to an independent life in the new world.⁶¹

While direct immigration to farming settlements in North America was possible for subjects of the Crown living anywhere in the British Isles, foreigners could not quite so confidently settle directly on the land. At common law throughout the British Empire, aliens could not hold title to real property.⁶² For the sizable stream of Swiss-, French-, and German-speaking immigrants, many of whom entered North America through the port at Philadelphia, land ownership was not possible until they secured naturalized citizenship or some form of denization (a status conferred by the Crown that empowered aliens to hold a life estate in real property). Like their British counterparts, these continental Europeans often paid for their passage to North America by signing contracts of indenture. Such contracts would necessarily require immigrants to spend some time in servitude, establishing residency and learning the ways of America. Many speculative land settlement schemes, moreover, included provisions whereby colonial gover-

⁵⁹ Bailyn, *supra* note 30, at 3.

⁶⁰ On large landholders, see *id.* at 356. As for enterprising middlemen, Bailyn describes the efforts of John Witherspoon, President of what became Princeton University, to recruit immigrants from Scotland. *Id.* at 390–92. As for local notables, Bailyn tells the story of James Hogg, an energetic Scotsman who immigrated to North Carolina along with his family and a large group of neighbors. *Id.* at 506–07.

⁶¹ Bailyn reports that many provincial emigrants left the north of England, Scotland, and Ireland and headed directly to the land. *Id.* at 203. These rural emigrants tended to be older, more likely to travel as part of a family, and more likely to pay their own way. *Id.* Emigrants from London, by contrast, tended to be young, male, and single, and financed the trip by agreeing to indentured servitude. *Id.* at 202.

⁶² See *infra* notes 73–80 and 96–99 and accompanying text.

nors would provide new arrivals both a land grant and a form of denization status.⁶³

The Crown sought to contain the migration of the population to the frontier. Not only was the rage for speculation and land ownership de-populating the tenant farms in Ireland, northern England, and Scotland,⁶⁴ but much of the new settlement was taking place beyond the Proclamation Line of 1763 in the trans-Appalachian region that the Crown had promised to reserve for Native Americans.⁶⁵ To stem the tide, the Crown hit upon three policies, all of which found their way into the Declaration's population grievance. First, the Crown took steps to countermand colonial programs that were designed to attract new settlers from the British Isles. In 1731, South Carolina established a program of bounties and benefits to attract emigrants from Ireland. Other colonies had followed suit.⁶⁶ But in 1767, citing the need to control British emigration, the Crown vetoed a Georgia bill that sought to attract new immigrants. A North Carolina act of 1771 met the same fate.⁶⁷ These vetoes exemplified the Declaration's charge that the Crown had refused to adopt laws "to encourage . . . migrations hither."⁶⁸

Second, the Crown sought to end the issuance of large, speculative land grants. In April 1773, the Privy Council prohibited Crown governors from granting any more land in America pending the development of a comprehensive policy.⁶⁹ Behind this temporary stay was the perception that emigration from Britain had been too greatly encouraged by the delusional schemes of unscrupulous land

⁶³ See James H. Kettner, *The Development of American Citizenship 1608–1870*, at 89–96 (1978); see also *supra* notes 58–61 and accompanying text.

⁶⁴ The alarm in England over the loss of tenant farmers and artisans had become quite general by the 1760s. Tours of the countryside produced gloomy reports of wholesale emigration, and leading politicians called for measures to restrict emigration. See Bailyn, *supra* note 30, at 55–56.

⁶⁵ For an account, see D.W. Meinig, 1 *The Shaping of America: A Geographical Perspective on 500 Years of History: Atlantic America, 1492–1800*, at 284–88 (1986) (explaining that the Proclamation Line of 1763, defined as the top of the Appalachian Mountains, reserved the interior to Native Americans). Yet with the end of the French and Indian War, and the absence of French opposition in the interior, British settlers quickly pushed beyond this boundary. See *id.* at 287–88, 296.

⁶⁶ See Bailyn, *supra* note 30, at 55; Kettner, *supra* note 63, at 113.

⁶⁷ See Bailyn, *supra* note 30, at 55.

⁶⁸ The Declaration of Independence para. 9 (U.S. 1776).

⁶⁹ See Bailyn, *supra* note 30, at 55–56.

jobbers. Later, in February 1774, the Crown announced its new policy. Instead of land grants in bulk, all public lands were to be surveyed and sold in small lots (100 to 1000 acres) at well-publicized public auctions.⁷⁰ This policy was expected both to ensure actual settlement on the land (thus guaranteeing that the Crown would receive its quit rents) and to combat profiteering and cronyism on the part of colonial governors and their circle.⁷¹ From the colonists' perspective, as expressed in the Declaration, the new Crown policy effectively "rais[ed] the conditions of new Appropriations of Lands" and made emigration less attractive.⁷²

The third and final element of the population grievance focused on colonial naturalization policy. Under the rules of common law, birthright citizenship extended to all subjects born in the realm under allegiance to the monarch.⁷³ On this view, those born in the British colonies of North America enjoyed birthright citizenship and were subjects of the Crown.⁷⁴ By contrast, those born within, and owing allegiance to, other nations were aliens,⁷⁵ and suffered from a variety of disabilities, including the inability to own land in England and the British dominions.⁷⁶ The Crown could obviate these disabilities of alienage to a limited degree by granting deniza-

⁷⁰ Id. at 56.

⁷¹ Id.

⁷² The Declaration of Independence para. 9 (U.S. 1776).

⁷³ *Calvin's Case*, (1608) 77 Eng. Rep. 377, 406 (K.B.) ("Every one that is an alien by birth, may be, or might have been, an enemy by accident: but Calvin could never at any time be an enemy by any accident; *Ergo*, he cannot be an alien by birth."); 1 Blackstone, *supra* note 25, at *356–57. For an in-depth analysis of *Calvin's Case*, see Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 *Law & Hist. Rev.* 439, 454–58 (2003); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 *Yale J.L. & Human.* 73 (1997). See generally Kettner, *supra* note 63, at 29.

⁷⁴ See 1 Sir John Comyns, *A Digest of the Laws of England* 410–12 (London, Strahan, Samuel Rose ed., 4th ed. 1800). An important statute, adopted in 1700, conferred birth-right citizenship on the children of aliens born in the colonies. See A.H. Carpenter, *Naturalization in England and the American Colonies*, 9 *Am. Hist. Rev.* 288, 292 (1904).

⁷⁵ 1 Blackstone, *supra* note 25, at *354; see also 1 Comyns, *supra* note 74, at 409 ("An alien is one who is born out of the ligeance of the king.").

⁷⁶ *Calvin's Case*, 77 Eng. Rep. at 399; 1 Comyns, *supra* note 74, at 413, 415; see also 1 Clifford, *supra* note 35, at 382 ("One of the chief reasons for naturalization was that aliens could not hold real estate."). For additional information on land rights of naturalized subjects and denizens, see 1 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 438 (1953).

tion;⁷⁷ a denizen could acquire a life estate in real property but could not always pass title to his heirs.⁷⁸ In addition, Parliament could confer full citizenship through the passage of legislation naturalizing the alien.⁷⁹ For much of seventeenth century, private acts of Parliament offered the principal means by which aliens sought naturalization.⁸⁰

The private bill process had a number of serious problems, especially for those of modest means who were hoping to acquire land in the new world.⁸¹ Private bills were quite expensive to obtain. Parliament, like virtually all government bodies of the day, operated on a fee-based payment system.⁸³ Fees were payable at various

⁷⁷ 1 Comyns, supra note 74, at 418 (“The king only has the prerogative to make any alien to be a denizen. And cannot grant this prerogative to any other. The usual manner of a denization is by letters patent.” (internal citations omitted)); see also Kettner, supra note 63, at 30 (“Denization came to be seen as ‘a high and incommunicable branch of the royal prerogative,’ a grant of the king’s grace by which some, but not all, privileges of natural-born subjects were conferred.”). For a short period in the late seventeenth century, the Crown established a liberal denization policy that led to a sharp spike in the number of such grants conferred. See Statt, supra note 46, at 35.

⁷⁸ 1 Comyns, supra note 74, at 418 (stating that title could be passed to “issue” born after denization, but not before); Kettner, supra note 63, at 29–30 (“Until about the fifteenth century no such distinction between naturalization and denization had existed. Rather the king and Parliament worked together in bringing outsiders into the community of subjects. A foreigner who wished to acquire the status and privileges of an Englishman would petition Parliament, which would then authorize him to obtain a grant of royal letters patent under the great seal.”); see also id. at 31 (“The formal grant of letters patent of denization removed some of the disabilities of alienage restricting property rights.”).

⁷⁹ 1 Comyns, supra note 74, at 411 (“Naturalization can only be by parliament.”); see also Kettner, supra note 63, at 29, 33–34. In *East India Company v. Sandys*, counsel observed in argument that rights and freedom of citizens “ought not to be granted to aliens, not by the king under his great seal, without the consent of the Lords and Commons, the representatives of the subjects in parliament.” Id. at 32 (quoting *East India Co. v. Sandys*, (1863–1865) 10 S.T. 371, 499).

⁸⁰ 1 Clifford, supra note 35, at 378–83.

⁸¹ See Kettner, supra note 63, at 67–69; see also Crosskey, supra note 76, at 488 (asserting that the Framers inserted the uniformity clause in the Constitution in order to thwart state use of private acts of naturalization which made naturalization “the result of favoritism and political influence, if not of anything worse”).

⁸² See Statt, supra note 46, at 34 (describing private bills in Parliament as “slow, expensive, and risky” and citing a House of Commons report that reckoned the cost of a bill of naturalization at £63, a price “outside the reach of all but the richest of immigrants”).

⁸³ 2 Clifford, supra note 35, at 717 (quoting the letters patent that conferred the office of under clerk as requiring the payment of £10, lawful money of Great Britain, payable half-yearly at the Exchequer, “together with all other rewards, dues, rights,

stages along the way: upon introduction of the bill, on its official entry in the rolls, on issuance of a favorable committee report, on ultimate adoption, and so forth.⁸⁴ Fees were even charged to have the bill carried from the House of Commons to the House of Lords.⁸⁵ The Speaker of the House and the Chancellor (who served as the speaker of the House of Lords) both earned enormous incomes from the collection of these fees.⁸⁶ Lesser figures, including clerks, scribes, and tipstaffs also received a portion of such fees.⁸⁷ The cost of private legislation made it a practical solution only for individuals of fairly substantial means.

Parliament experimented with a more affordable (and hence democratic) mode of naturalization.⁸⁸ In 1709, Parliament adopted an “Act for naturalizing Foreign Protestants,” and thus created a relatively cheap and streamlined, if religiously exclusive, mechanism for conferring naturalization.⁸⁹ The Act required that the individual seeking naturalization make an oath of allegiance to the Crown of England, disavow the Catholic doctrine of transubstantiation, and offer proof of recent (Protestant) religious observance.⁹⁰ The proceeding was conducted in open court, and cost only one shilling.⁹¹ Afterward, applicants were regarded as natural-born subjects and their names were entered in the court’s records.⁹² Tory opposition to this more streamlined mode of naturalization quickly

profits, commodities, advantages and endowments whatsoever to the said office, after what manner soever, or however, now or heretofore, anciently appertaining, incident, accustomed, incumbent, or belonging”); *id.* at 716–17 (noting the requirement that those seeking a private bill pay fees to both clerks and high officials and describing the system as “continually abused by excessive charges”).

⁸⁴ *Id.* at 716–18.

⁸⁵ *Id.* at 719–20.

⁸⁶ *Id.* at 725 (noting that officials in both Houses “had always derived considerable fees” from naturalization bills).

⁸⁷ *Id.* at 717–18.

⁸⁸ *Id.* at 725.

⁸⁹ An Act for Naturalizing Foreign Protestants, 1708, 7 Ann., c. 5, § 3 (Eng.). For an account, see Statt, *supra* note 46, at 35–37 (compiling figures that reveal a significant increase in the number of naturalizations under the Act of 1709 and attributing the low number of naturalizations in other periods to the “difficulty and expense involved”).

⁹⁰ An Act for Naturalizing Foreign Protestants, 1708, 7 Ann., c. 5, § 2 (Eng.); see also Kettner, *supra* note 63, at 70.

⁹¹ Kettner, *supra* note 63, at 70.

⁹² *Id.*

emerged. The Act would, according to its opponents, encourage immigrants to vote, hold office, intermarry, and eventually, “extinguish the English race.”⁹³ Tories favored a return to the private bill process so the Parliament could limit naturalization to those aliens of “individual merit.”⁹⁴ Such a shift would necessarily limit naturalization to the well-to-do and restore the fee revenue associated with private legislation. Sure enough, in 1712, when the Tories recaptured Parliament, they repealed the public act and returned to the costly and restrictive private bill system.⁹⁵

The return to private legislation posed a problem for the colonies of British North America. Before acquiring land in the new world, aliens of the “middling sort” were in theory required to obtain either denization or naturalization, a status they could ill afford to pursue in London.⁹⁶ Understandably, then, land speculators approached the colonial governors and assemblies to secure the sort of denizen or citizen status they needed to attract immigrants. Governors granted denization for a time, and colonies developed their own naturalization policies, subject to a degree of oversight by the Crown and Privy Council, as part of a predictable form of competition for new settlers.⁹⁷ Growth and settlement naturally increased the wealth of the colonies and, not incidentally, lined the pockets of colonial governors, who received fee payments themselves for denizations and from settlers who took up new land

⁹³ Id. at 70–71.

⁹⁴ Id. at 71.

⁹⁵ Id. at 72.

⁹⁶ Cora Start, *Naturalization in the English Colonies in America*, in *Annual Report of the American Historical Association for the Year 1893*, at 319–20 (1894); see also Kettner, *supra* note 63, at 66–67.

⁹⁷ Kettner, *supra* note 63, at 76. As Kettner explains:

By the end of the seventeenth century the colonial governments, acting on dubious legal authority, had already established a variety of procedures for incorporating aliens into the local communities. In contrast to the restrictive policies favored in London, the acts passed by colonial legislators granted aliens extensive rights and benefits. The American governments gave little attention to theoretical limitations on naturalization and denization—indeed, their actions often displayed either an extensive ignorance of or a blatant disregard for those limitations. Survival, population growth, and economic expansion—not doctrinal consistency—dictated the course of colonial policy.

Id. at 78.

grants.⁹⁸ With competition for settlers came some slackening of standards; some colonies refused to recognize other colonial grants of citizenship and denization, and the Privy Council overrode certain colonial naturalization procedures.⁹⁹

Parliament responded to the demand for a system of naturalization with the passage of a second public act in 1740.¹⁰⁰ Designed to provide a public mechanism for naturalization, the Act of 1740 imposed a uniform rule throughout the British Empire.¹⁰¹ Applicants were required to reside for at least seven years in their colony, prove that they were religiously observant Protestants, and have their names entered in local court records.¹⁰² The Act prescribed a uniform fee for naturalization, which was no more than two shillings, and further provided for the issuance of certificates of naturalization that entitled the new British subjects to the “rights of Englishmen” throughout the realm.¹⁰³ In 1773, at the same time the Crown was tightening the rules for the transfer of public lands and vetoing laws to encourage emigration from Britain, Parliament clarified that the Act of 1740 was meant to be exclusive. By declaring the exclusivity of the 1740 Act, Parliament effectively banned naturalization under the more lenient colonial naturalization laws and practices.¹⁰⁴ It was the Act of 1773 that gave rise to the naturalization grievance in the Declaration of Independence, which described the Crown as having obstructed “the Laws for Naturalization of Foreigners.”¹⁰⁵

⁹⁸ *Id.* at 83, 119–21 (observing that Pennsylvania colonial proprietors successfully opposed legislation that would have deprived them of the fee revenue associated with re-grants of land to survivors of aliens whose land escheated to the Crown upon their death).

⁹⁹ *Id.* at 119; see also Start, *supra* note 96, at 320 (describing “two species [of naturalization] in the colonies—naturalization as prescribed by English law and naturalization by the colonists, by methods of their own adoption”).

¹⁰⁰ An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, as Are Settled, or Shall Settle, in Any of His Majesty’s Colonies in America, 1740, 13 Geo. II, c. 7 (Eng.); see also Kettner, *supra* note 63, at 74.

¹⁰¹ Kettner, *supra* note 63, at 74.

¹⁰² *Id.*

¹⁰³ *Id.* at 75.

¹⁰⁴ An Act Amending the Act for Naturalizing Foreign Protestants, 1773, 13 Geo. III, c. 21 (Eng.).

¹⁰⁵ The Declaration of Independence para. 9 (U.S. 1776); see Kettner, *supra* note 63, at 105.

Following the conclusion of hostilities and the negotiation of the 1783 Treaty of Peace, naturalization policy fell to the states and they responded with a profusion of approaches meant to attract new immigrants from Europe.¹⁰⁶ Thus, the Pennsylvania Constitution allowed any foreigner “of good character” who was willing to swear an oath of allegiance to purchase land in the Commonwealth. After one year, the newly arrived Pennsylvanian became a free denizen, with most of the rights of a natural-born citizen, and a full citizen one year later.¹⁰⁷ Similarly liberal provisions appeared in the constitutions of Vermont and North Carolina.¹⁰⁸ Many states—including Maryland, Virginia, South Carolina, and Georgia—defined the rights of naturalization by statute, with more and less liberal provisions.¹⁰⁹ The southern states tended to require longer residency periods, invariably limited the right of naturalization to “free white persons,” and sometimes imposed limits on admission to full rights of citizenship.¹¹⁰ In South Carolina, for example, full citizenship required the adoption of a private bill.¹¹¹ New England states, which had refrained from encouraging immigration from European countries other than England, similarly relied on private legislation and failed to adopt any general or public law of naturalization.¹¹²

Interstate mobility inevitably put pressure on the states’ ability to maintain restrictive views of citizenship.¹¹³ After the Articles of

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 215.

¹¹⁰ Kettner, *supra* note 63, at 215–16. Virginia passed an act in 1779 admitting all “white persons born within the territory and all who had resided there for the two years preceding” as citizens of the state. *Id.* at 215. Aliens could attain citizen status by public oath or affirmation. *Id.*

¹¹¹ *Id.* at 215–16.

¹¹² See Start, *supra* note 96, at 325 (“The colonists in attempting naturalization drew from their English models. Denization was the first form adopted in the colonies, the letters patent being issued by the governor, under the mistaken opinion that such power was his as the King’s deputy. It is found in New York, Pennsylvania, Virginia, and continued until its prohibition at the end of the seventeenth century. The cost of denization was greater than other forms of naturalization. Lord Bellemont complained in 1699 that he could obtain but 12 shillings for his denizations, while his predecessor in New York, Governor Fletcher, received £10 for himself and £5 for the attorney general. Fees for naturalization in general ranged from 2 to 50 shillings.”).

¹¹³ See Kettner, *supra* note 63, at 110.

Confederation were ratified in 1781, the “free inhabitants” of every state (aside from paupers and vagabonds) were entitled to move freely throughout the United States and to enjoy the “privileges and immunities” of free citizens in the several states.¹¹⁴ No less a figure than James Madison found the confusion of language in this provision remarkable. It effectively permitted an alien to seek naturalization in a state with permissive naturalization practices and then move to a state with tighter restrictions, and still be entitled to all the incumbent rights of naturalized citizens in the second state.¹¹⁵ But whatever privileges newly admitted citizens and denizens might claim under this provision, which included civil rights but perhaps not full political rights, there was little doubt that foreigners might tend to choose the state with the most liberal admis-

¹¹⁴The Articles of Confederation provided that:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction, shall be laid by any State, on the property of the United States, or either of them.

Articles of Confederation art. IV. There was no provision in the Articles dealing with naturalization, thus leaving regulation of the matter to the states.

¹¹⁵The Federalist No. 42, at 285–86 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]hose who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled in every other State to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State; so that it may be in the power of a particular State, or rather every State is laid under a necessity, not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself; but upon any whom it may allow to become inhabitants within its jurisdiction. . . . The very improper power would still be retained by each State, of naturalizing aliens in every other State. In one State residence for a short term confers all the rights of citizenship. In another qualifications of greater importance are required. An alien therefore legally incapacitated for certain rights in the latter, may by previous residence only in the former, elude his incapacity; and thus the law of one State, be preposterously rendered paramount to the law of another, within the jurisdiction of the other.”).

sion policy and then move to another state after establishing a form of legal status.¹¹⁶

The combined effect of competition among states and interstate mobility created a sort of de facto national citizenship that laid the foundation for a national constitutional standard. As early as 1782, James Madison argued for the creation of a uniform rule of naturalization. Charles Pinckney (from the restrictive state of South Carolina) made a similar argument at the Philadelphia Convention, noting that “[t]he younger States will hold out every temptation to foreigners, by making the admission to office less difficult in their Governments, than the older,” and that “a foreigner, as soon as he is admitted to the rights of citizenship in one, becomes entitled to them in all.”¹¹⁷ Because “in some States, the residence which will enable a foreigner to hold any office, will not in others intitle him to a vote,” the only way to “render this power generally useful [is to place it] in the Union, where alone it can be *equally exercised*.”¹¹⁸ Widespread acceptance of the argument for a national standard made the transfer of naturalization power to the new federal government one of the least controversial features of the new Constitution.¹¹⁹

II. FRAMING THE CONSTITUTION’S NATURALIZATION CLAUSE

Perhaps as a result of the lack of controversy over the proper locus of naturalization authority, the debates at the Philadelphia Convention provide little direct insight into the meaning of the naturalization clause. The provision did not appear in the Virginia Plan, and so did not occasion any debate in the early days of the Convention, when the delegates acted through the Committee of

¹¹⁶ See Kettner, *supra* note 63, at 116–17 (recounting successful efforts of two prospective citizens to sidestep restrictive practices of Rhode Island by securing citizenship in New York and Massachusetts).

¹¹⁷ 3 The Records of the Federal Convention of 1787, at 120 (Max Farrand ed., 1911) [hereinafter Farrand].

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ The principle of free movement of people has similarly produced pressure to harmonize national asylum and immigration laws in the European Union. See Lauren Gilbert, National Identity and Immigration Policy in the U.S. and the European Union, 14 *Colum. J. Eur. L.* 99, 119–26 (2007) (describing the push toward harmonization in light of disparate approaches to immigration in Great Britain, France, and Germany).

the Whole. Later, with the introduction of the New Jersey Plan on June 15, 1787, naturalization made its first appearance in the formal record of the Convention in the form of a declaration that the “rule for naturalization ought to be the same in every State.”¹²⁰ The Convention did not take any special notice of the provision at that time but simply submitted it to the Committee of Detail in late July along with the amended terms of the Virginia Plan. On August 6, the naturalization clause as reported by the Committee of Detail was approved by the delegates without controversy or recorded debate.¹²¹ Moreover, it was included in the final text of the Constitution in virtually the same terms that the Committee of Detail had proposed, with only minor adjustments by the Committee of Style.¹²²

If the debates and drafting history tell us little, we can nonetheless learn much from the text itself and from the assumptions that influenced the drafting process. By empowering Congress to establish a uniform rule for naturalization throughout the United States, the naturalization clause first carries an implication of relative permanence: the uniform rule contemplated in the Constitution was to be “establish[ed]” by Congress.¹²³ To “establish” a single uniform rule of naturalization was to put in place a relatively permanent system. Such an established system would not be fixed in perpetuity, of course; Congress could alter the rules over time with changes in circumstances. But an established system was one that immigrants could depend upon in making the decision to come to the United States. We propose to give content to this notion of relative stability by viewing the “establish” requirement as creating a norm of prospectivity: once established, the rule of naturalization was to control until changed through prospective legislation.

¹²⁰ 1 Farrand, *supra* note 117, at 242, 245.

¹²¹ 2 Farrand, *supra* note 117, at 182.

¹²² When the Committee of Style presented its report on September 12, 1787, the naturalization and bankruptcy clauses were finally joined, granting Congress the power “[t]o establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.” *Id.* at 595; cf. *id.* at 569 (draft in Committee of Detail).

¹²³ U.S. Const. art. I, § 8, cl. 4. The use of the word “establish” marked an important change from a previous draft, which sought to grant Congress the power to “regulate” naturalization. See *infra* note 128.

Along with this norm of relative permanence, Congress was authorized to establish a single “uniform rule” throughout the United States.¹²⁴ This demanding requirement of uniformity was meant to displace the state-to-state variability that had characterized life under the Articles of Confederation.¹²⁵ Under a uniform system, im-

¹²⁴ U.S. Const. art. I, § 8, cl. 4. The Supreme Court has never engaged in an extensive interpretation of the uniformity clause in the immigration context. See Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. Rev. 1696, 1697–98 (1999). Early cases assumed that uniformity had similar meanings in both bankruptcy and naturalization, and that such uniformity required only uniform application. Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. Rev. 22, 35–40 (1983). More recently, and in response to scholars’ prodding, the Supreme Court has suggested that the naturalization clause demands a strict form of uniformity and leaves little room for state modification. See Bennett, *supra*, at 1705–20; cf. *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (dictum) (“Congress’ power is to ‘establish a uniform Rule of Naturalization.’ A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.”). Such arguments have arisen in relation to state regulation of welfare benefits for non-citizens and in relation to the definition of deportable offenses. Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. Rev. 591, 633–36 (1994) (arguing that Congress cannot incorporate state law into application of the naturalization power); Michael T. Hertz, *Limits to the Naturalization Power*, 64 Geo. L.J. 1007, 1017–18 (1976). Two lower court decisions dealing with uniformity in naturalization concluded that geographic uniformity was the Framers’ aim. See *Kharaiti Ram Samras v. United States*, 125 F.2d 879, 881 (9th Cir. 1942) (holding that uniformity relates to geographic uniformity and not racial uniformity); *Petition of Lee Wee*, 143 F. Supp. 736, 738 (S.D. Cal. 1956) (finding constitutional a statute which made a gambling offense proof against good moral character for immigration purposes, even though the underlying offense would not have been gambling in another city).

¹²⁵ What little debate surrounded the naturalization clause tended to focus on the need for an end to state-to-state disparity in naturalization procedures. James Madison, in an unpublished draft written toward the end of his life, recalled the “defects, the deformities, the diseases and the ominous prospects, for which the Convention were [sic] to provide a remedy.” 3 Farrand, *supra* note 117, at 549. One such “defect[] which had been severely felt” was “that of a uniformity in cases requiring it, as laws of naturalization, bankruptcy, a Coercive authority opperating [sic] on individuals and a guaranty of the internal tranquility of the States.” *Id.* at 548. Madison issued a similar call for uniformity in a letter written to Edmund Randolph in 1782: “the intrusion of obnoxious aliens through other States, merit[s] attention. [This] subject has, on several occasions, been mentioned in Congress, but, I believe, no committee has ever reported a remedy for the abuse. A uniform rule of naturalization ought certainly to be recommended to the States.” Letter from James Madison to Edmund Randolph (Aug. 27, 1782), in 1 *The Writings of James Madison* 226–27 (Gaillard Hunt ed., 1900), *cited in* Hertz, *supra* note 124, at 1009.

migrants would confront the same requirements for citizenship no matter where they settled in the United States. Such uniformity would limit state competition for new immigrants and would prevent immigrants from seeking citizenship under one state's regime and then transferring their newly acquired citizenship to another state under the privileges and immunities clause. More subtly, the rule of uniformity would necessarily extend beyond formal citizenship to reach those awaiting naturalization as denizens (or what we would today call "lawful permanent residents").

Two important structural implications follow from the demand for a uniform rule of naturalization and denization. First, from a federalism perspective, the demand for a uniform rule eliminates the states' role in prescribing the rules that govern naturalization. Uniformity can be achieved only through the specification of rules at the national level, although the system may tolerate some incorporation of state law by reference. Second, the requirement of an established and uniform rule imposes important limitations on the manner in which Congress regulates naturalization. Uniformity rules out the use of private bills, which were understood to admit aliens to citizenship on a case-by-case basis. Such private legislation not only produced unacceptable variation in the terms of naturalization but also made naturalization more expensive, more elitist, and more prone to corruption.

A variety of evidence supports this understanding of the requirement that Congress establish a uniform rule for naturalization. As for the claim that the word "establish" conveys a distinctive message of relative permanence and prospectivity, the Constitution itself supplies confirmation. The Constitution uses the word "establish" rather sparingly, and in contexts that suggest not absolute inflexibility but relative permanence. The preamble proposes to "ordain and establish" the Constitution, and thus to put in place a government structure based on higher law that was immune from change except through the process of amendment. One goal of the preamble, "to establish Justice," also conveys a message of relative permanence; it connects to Congress's power in Article III to "ordain and establish" a system of lower federal courts that have been a permanent part of the government since their "establish[ment]" in the Judiciary Act of 1789. Like these grants of

power, Congress's power to establish a system of naturalization suggests a degree of permanence.¹²⁶

The papers of the Committee of Detail confirm the significance of the Framers' decision to require Congress to establish a uniform rule. An early draft places the naturalization power in Article I, empowering Congress "to regulate naturalization."¹²⁷ A later draft returns to the language of the New Jersey Plan, specifying that "the Rule for Naturalization ought to be the same in every State."¹²⁸ A final draft returns the clause to its eventual place in Article I, empowering Congress "*to establish an uniform Rule for Naturalization throughout the United States.*"¹²⁹ We can thus see the clause evolving in Committee from an initial grant of relatively unbridled power to Congress, to a provision focused on inter-state comity, and finally to a provision that ultimately both empowers and constrains Congress. The drafting history nicely contrasts the early grant of plenary power to regulate naturalization and the more constrained power conferred in the final text.

Debates over qualifications for election to the House and Senate provide important insights into the Framers' view of prospectivity

¹²⁶ The Framers' choice of the term "establish" to define and limit congressional power was not inadvertent, but reflected a rejection of an early draft that would have empowered Congress more broadly to "regulate" naturalization. See *infra* note 129 and accompanying text. Other power grants in Article I have been framed to confer broad power on Congress. Congress's seemingly unbridled power to "lay and collect taxes" has been regarded as quite broad, empowering Congress to impose taxes on transactions and events that have already occurred. Similarly, Congress's power to "make rules" for the government of the military, to "regulate" commerce, and to "make all laws" under the necessary and proper clause convey broad power.

¹²⁷ 2 Farrand, *supra* note 117, at 144 (Committee of Detail, IV). See generally Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 263–84 (2005). In his article, Professor Colby argues that "uniform" encompasses both "uniform rules" and "uniform treatment." Uniform rules "signify a single set of regulations that are generally applicable nationwide, in service of the goal of economic efficiency" or, more or less, "uniform laws." *Id.* at 263. In contrast, uniform treatment implies a system that is applied equally and fairly. *Id.* at 264.

¹²⁸ 2 Farrand, *supra* note 117, at 158 (Committee of Detail, VII); see *id.* at 157 n.15 (noting that this draft's language was likely taken from the New Jersey Plan).

¹²⁹ *Id.* at 167 (Committee of Detail, IX); see *id.* at 163 n.17 (language "to establish an uniform Rule for Naturalization throughout the United States" was an addition by Wilson). Wilson's role in crafting the language that limited Congress's authority bears notice, both in light of his Scottish origins and in light of the views he expressed on the need for prospectivity in the debate over qualifications for national office. See *infra* note 140 and accompanying text.

as an essential element in the establishment of a system of naturalization.¹³⁰ The issue arose in connection with the consideration of a proposal to require citizenship for a minimum of seven years as a condition of election to the House of Representatives.¹³¹ The proposal would disqualify newly-naturalized citizens, including those who had not been subject to any such disability at the time of their admission to citizenship.¹³² The disqualification was relatively mild; naturalized citizens would qualify as soon as the seven-year period had passed.¹³³ Still, delegates to the Convention reminded one another that the nation had invited new immigrants to join the community with an unqualified promise of citizenship; to impose a qualification now that would degrade them to the status of second-class citizens (if only for a specified period of time) would breach the public faith, and would impose an improperly retroactive change in the naturalization system.¹³⁴ Roger Sherman, a delegate from Connecticut, rejected this breach of faith claim; he argued that the United States might establish rules for the future that differed from the rules (and promises) that the states had made in the past.¹³⁵ Sherman did not deny that a retrospective change in the rules was problematic; instead, he argued that as a new polity the

¹³⁰ Those debates began with a motion by Gouverneur Morris to require senators to have been citizens for at least fourteen years, a period long enough to have disqualified all foreigners naturalized since the Declaration of Independence. *Id.* at 235. Madison, Franklin, Wilson, and others decried Morris's approach as injecting "illiberality" into the Constitution. *Id.* at 235–37.

Interestingly, Britain had acted in 1773 to extend full political rights to those naturalized under the Act of 1740. These rights included the right to take any "Office or Place of Trust, either Civil or Military" and to take "any Grant of Lands, Tenements, and Hereditaments." Kettner, *supra* note 63, at 77.

¹³¹ 2 Farrand, *supra* note 117, at 268.

¹³² Morris started the debate over retroactivity by proposing a proviso that would have made it clear that the disqualification of recently naturalized citizens would not apply to anyone who had been naturalized when the Constitution took effect. *Id.* at 270. According to another Convention attendee, "[i]t was necessary . . . to prevent a disfranchisement of persons who had become Citizens under the faith (& according to)—the laws & Constitution (from) being on a level in all respects with natives." *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 270–71.

¹³⁵ *Id.* at 270 ("The U. States have not invited foreigners nor pledged their faith that they should enjoy equal privileges with native Citizens. The Individual States alone have done this. The former therefore are at liberty to make any discriminations they may judge requisite.").

United States was not necessarily bound by the promises of its constituent members.¹³⁶

Sherman's contention triggered a defense of the principle of prospective lawmaking and an exploration of the nature of the public faith as it applied to the states and the nation. Nathaniel Ghorum of Massachusetts simply "doubted . . . the propriety of giving a retrospective force to the restriction."¹³⁷ Madison offered a more subtle contention, which rested on the notion that the states could not rid themselves of their obligations under prior acts of naturalization by "repealing the law under which foreigners held their privileges."¹³⁸ This strong affirmation of the norm of prospectivity laid the foundation for the rest of Madison's contention: lacking power to repeal their laws, the states should not shed the obligations owed to citizens they previously naturalized by imposing retroactive restrictions through the Constitution.¹³⁹ Madison thus viewed prospective lawmaking as an essential element of the naturalization power. James Wilson, himself a citizen of Pennsylvania who had emigrated from Scotland, also regarded a retrospective change as a breach of public faith. He pointed both to the naturalization laws of Pennsylvania and to the Articles of Confederation in contending that Pennsylvania had pledged to her citizens of foreign birth "all the rights whatsoever of Citizens," including citizenship in all the states.¹⁴⁰ Others joined the chorus against retroactive restrictions on rights of naturalized citizens, although some still cautioned against a rule that would admit foreigners too readily into the nation's public councils.¹⁴¹

In the end, by a narrow vote of 5-6, the Convention rejected the proposal to exempt previously naturalized citizens from the seven-year citizenship requirement for election to the House of Representatives.¹⁴² But the vote should not be read as rejecting prospectivity as an appropriate feature of the nation's immigration policy. For one thing, the delegates were later to adopt a regime of

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 270-71.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 272.

¹⁴¹ *Id.* at 271-72 (George Mason (Virginia)).

¹⁴² *Id.* at 270-72.

prospectivity in defining qualifications for the office of the presidency.¹⁴³ Thus, naturalized citizens at the time of the Constitution's adoption were eligible to the presidency on the same footing with natural-born citizens, even though the Constitution disqualified citizens naturalized in the future.¹⁴⁴ The provision makes sense only as a bow to arguments for prospectivity. For another thing, the states that voted against the House qualifications motion (Massachusetts, New Hampshire, Delaware, North Carolina, South Carolina, and Georgia) were those with the most restrictive immigration laws.¹⁴⁵ One member of a restrictive state delegation, Charles Pinckney of South Carolina,¹⁴⁶ explained the logic of his state's negative vote because the "laws of the States had varied much the terms of naturalization in different parts of America . . . the U.S. could not be bound to respect them on [this] occasion."¹⁴⁷ Despite widespread support for honoring the interests of new citizens, Pinckney argued that the lack of uniformity among the states would prevent any citizen naturalized under the Articles of Confederation from legitimately expecting full political rights throughout the country.

Pinckney's argument highlights the connection between uniformity and prospectivity in defining the operation of the naturalization clause. If the lack of uniformity in the past might justify a degree of retroactivity in defining qualifications for members of the House, such arguments would carry little force as a justification for

¹⁴³ See *id.* at 536.

¹⁴⁴ The presidential qualification requirement declares that no person shall be eligible to the office of the President, except for "a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution." U.S. Const. art. II, § 1, cl. 5. Thus, while citizens naturalized after the Constitution took effect were excluded from the highest office, those whose naturalization had taken effect before its adoption were eligible. This provided the very prospectivity that the Convention had rejected in connection with the qualifications for membership in the House. In addition, the fourteen-year residency requirement was framed, like the age requirement, to apply to all candidates, including both natural-born and naturalized citizens. Somewhat curiously, in light of the debate over the qualifications of the House and Senate, the presidential qualification provision was adopted without recorded debate or controversy. See 2 Farrand, *supra* note 117, at 536.

¹⁴⁵ 2 Farrand, *supra* note 117, at 272.

¹⁴⁶ As we have seen, South Carolina took the position that a private bill was necessary to admit naturalized citizens to the full rights of political participation in that state. See Kettner, *supra* note 63, at 86.

¹⁴⁷ 2 Farrand, *supra* note 117, at 271.

retrospective lawmaking under the new Constitution. The whole point of the naturalization clause was to eliminate state-to-state variation and to encourage Congress to fashion a single uniform rule throughout the country.¹⁴⁸ Thus, the two elements of the naturalization clause—the uniformity requirement and the requirement that Congress establish a relatively stable system of naturalization—operate in tandem to ensure a measure of respect for the reliance interests of those seeking citizenship. Pinckney, and the delegates who found his argument persuasive, were not so much rejecting prospectivity as suggesting that it await the creation of a nationally uniform system under the new Constitution.¹⁴⁹

III. NATURALIZATION POLICY IN THE EARLY REPUBLIC

If the Framers of the Constitution subscribed to norms of uniformity and prospectivity in naturalization law, members of Congress studiously adhered to these norms during the Federalist era. This Part reviews the legislative debates that led to the adoption of the naturalization laws of 1790, 1795, and 1798. As we show, members of Congress were careful to observe norms of prospectivity and refused, apparently on constitutional grounds, to take action on petitions for favorable private naturalization laws. Equally revealing, they regarded the formation of naturalization rules as tantamount to the construction of an immigration policy for the new nation.

A. The Naturalization Act of 1790 and the Refusal of Congress to Proceed by Private Bill

Acting “to establish an uniform Rule of Naturalization,”¹⁵⁰ Congress adopted legislation in 1790 that imposed a limited set of qualifications for admission to citizenship. Aliens were eligible for citizenship if they were “free white person[s]” who “shall have resided” for at least two years “within the limits and under the juris-

¹⁴⁸ See *id.* at 235.

¹⁴⁹ For the suggestion that relatively uniform and stable rules have a stronger claim to immunity from retroactive changes, see Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 *Harv. L. Rev.* 1055, 1105–06 (1997).

¹⁵⁰ 1790 Act, *supra* note 34, at 103.

diction of the United States.”¹⁵¹ Aliens were also required to show good character and to promise, by oath or affirmation, to support the Constitution.¹⁵² The proceedings on the alien’s application were to be held in “any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least.”¹⁵³ Contrary to some accounts,¹⁵⁴ this formulation apparently empowered both state and federal courts to entertain naturalization petitions.¹⁵⁵ Finally, the Act provided that “the clerk of such court shall record such application, and the proceedings thereon.”¹⁵⁶ From that point, the person was to “be considered as a citizen of the United States.”¹⁵⁷

This provision followed its British predecessor in specifying a uniform rule of naturalization for administration by common law courts of record.¹⁵⁸ The Act made citizenship uniformly available throughout the United States on relatively generous terms, at least for free white persons, and ensured the creation of a record to memorialize the new status. In contrast to the seven-year residency required in Parliament’s Act of 1740 and in some state provisions, the Act of 1790 required only two years’ residence in the country

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *Tutun v. United States*, 270 U.S. 568, 576 (1926) (dating the performance of the function of naturalization by the federal district courts to the “Act of January 29, 1795” rather than to the 1790 Act); cf. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 90 (1997) (noting that the 1790 Act did not specify that federal courts were to hear naturalization petitions, did not confer jurisdiction on them to do so, and would present Article III difficulties to the extent that it enlisted the federal courts in *ex parte* proceedings).

¹⁵⁵ The minute book of the federal district court in New York, for example, includes naturalization entries that date from shortly after the 1790 Act took effect. See *Minutes and Rolls of Attorneys of the U.S. District Court for the Southern District of New York, 1789–1841, Roll 1, Target 1, Slide 36* (Nov. 2, 1790), *microformed on* Nat’l Archives of the United States, M886 (Nat’l Archives Microfilm Publ’n) (recording the conclusion of Judge James Duane that one Philip Dubey had resided in the United States for two years and in New York City for at least one year and was “a person of good character” and was entitled to take the oath for admission to citizenship, which “was administered to the said Philip Dubey accordingly”). By giving Dubey credit for periods of residence that pre-dated the passage of the 1790 Act, the court gave the statute the prospective effect that its drafters apparently contemplated. See *infra* note 196.

¹⁵⁶ 1790 Act, *supra* note 34, at 103–04.

¹⁵⁷ *Id.* at 104.

¹⁵⁸ See Kettner, *supra* note 63, at 74.

and one year's residence in the state in which application for citizenship was made.¹⁵⁹ By placing the determinations in courts of record, moreover, the Act ruled out any private role for legislative assemblies, with one minor and quite revealing exception.¹⁶⁰ The Act provided that aliens previously "proscribed" by act of the state assembly could not apply for citizenship under the national system until they first secured a reversal of their proscription.¹⁶¹ One can understand this proviso as a limited accommodation of the norm of prospectivity: individuals that the state assemblies had banished for disloyalty during the Revolution could not reclaim their citizenship until the state banishment was overturned. Apart from this role in

¹⁵⁹ Compare An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, as Are Settled, or Shall Settle, in Any of His Majesty's Colonies in America, 1740, 13 Geo. II, c. 7 (Eng.), with 1790 Act, *supra* note 34.

¹⁶⁰ The process of admission to citizenship entailed a genuine review of the record and could result in a denial of the petition. This is illustrated by the denial of Peter Vauttes's citizenship petition:

At a special District Court of the United States held for the New York District at the City of New York on Tuesday the Fifteenth Day of January 1799 at 11 O'Clock

PRESENT

The Honorable John Hobart Esquire
Judge of the District

The Court was opened by Proclamation

Joseph King at present of the City of New York but late of Great Britain Shoe manufacturer age thirty-eight years and John Dawson at present of the same City and late of Great Brian wine and Peter Vauttes aged twenty seven years severally came into court and applied to be admitted to become Citizens of the United States of America pursuant to the Directions of the acts of Congress of the said United States entitled "An Act to establish an uniform Rule of Naturalization and to repeal the Act heretofore passed on that Subject" and said Joseph King, and John Dawson having thereupon severally produced to the Court such evidence and made such Declaration and Renunciation by the said Act is required.

It is considered by the Court that the said Joseph King and John Dawson be and they are hereby respectively admitted to be Citizens of the United States of America.

Minutes and Rolls of Attorneys of the United States District Court for the Southern District of New York, 1789-1841, Roll 1, Target 3, Slide 21 (Jan. 15, 1799), *microformed on* Nat'l Archives of the United States, M866 (Nat'l Archives Microfilm Publ'n).

¹⁶¹ 1790 Act, *supra* note 34, at 104. The Act referred to state legislative measures adopted during the Revolutionary War that proclaimed the disloyalty of certain persons, named in the acts, and provided for the confiscation of their property.

removing previous state proscriptions, however, state assemblies were excluded from the naturalization process.¹⁶²

Debates leading up to the adoption of the first naturalization bill reveal much about the perceived connection between naturalization, land ownership, and immigration policy. Representative Laurance (New York) summarized these connected ideas well: “The reason of admitting foreigners to the rights of citizenship amongst us, is, the encouragement of emigration, as we have a large tract of country to people.”¹⁶³ Like his colleagues, Laurance assumed that only citizens could own land and that, by defining the right to acquire citizenship, Congress would effectively be establishing an immigration policy for the new nation. The recognized link between immigration and the land did not settle every question. Members debated how long a residency period to require and whether to establish gradations of citizenship that would admit aliens to progressively greater privileges over time. In other words, members sought to calibrate citizenship requirements with a view toward attracting “worthy” immigration. But nothing suggested that the essential identity between rules of naturalization and rules of immigration was questioned by the Framers.

James Madison recognized the connection in urging a middle way on immigration matters. The goal of the naturalization rule

¹⁶² However, there remained confusion over the states’ role in naturalization. “What the discussions and act of 1790 did not clarify was whether Congress’s control over naturalization was now to be exclusive or whether it was merely to supplement state acts.” Kettner, *supra* note 63, at 238–39. The statute “did nothing to settle questions respecting the spheres of authority of the state and national governments, and many states continued to administer their own naturalization laws.” *Id.* at 239. As Kettner explains:

It was the considered opinion of the judges of the federal circuit court of Pennsylvania that the Constitution’s clause was designed “to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship.” The individual states could not exclude those adopted by the United States, but they could adopt citizens on easier terms than those which Congress “may deem it expedient to impose.”

Id. (quoting *Collett v. Collett*, 2 U.S. (2 Dall.) 294, 296 (C.C.D. Pa. 1792)). That confusion has since been resolved. See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (holding that states “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens”).

¹⁶³ Cong. Reg. (Feb. 3, 1790) (remarks of Rep. Laurance (New York)), reprinted in 12 Documental History of the First Federal Congress of the United States of America: Debates in the House of Representatives 148 (Helen E. Veit et al. eds., 1994) [hereinafter 12 DHFFC].

was to “hold out as many inducements as possible, for the worthy part of mankind to come and settle amongst us.”¹⁶⁴ The aim was “[n]ot merely to swell the catalogue of people [but] to [i]ncrease the wealth and strength of the community.”¹⁶⁵ It was not enough that aliens take an oath to reside in the country, as an early draft of the legislation had proposed.¹⁶⁶ Rather, it was necessary to “require residence as an essential.”¹⁶⁷ This would help to ensure that everyone who gained the privilege of citizenship would be “a real addition to the wealth or strength of the United States.”¹⁶⁸ Madison worried in particular about the possibility of absentee landowners, those who might take the oath and gain citizenship but later “return to the country from which they came.” An actual residence requirement would reduce the anti-republican threat of absentee landlords, like the large landowners in Ireland who had chosen to live in England.¹⁶⁹

Just as the drafters of the bill sought to foreclose absentee landownership through a somewhat more demanding residency requirement, they also worried about welcoming the impoverished and insecure. By limiting naturalization to “free” persons, the Act

¹⁶⁴ Id. (remarks of Rep. Madison (Virginia)).

¹⁶⁵ Id.

¹⁶⁶ The initial draft would have provided rights of citizenship for those who gave oaths of allegiance to, and of residence in, the United States, and who had actually resided in the country for one year. The draft went on to declare that naturalized citizens would gain the additional right to hold office under the state or general government after a residence of two additional years. See *id.* at 146. The draft was controversial for its relatively short terms of residence, its progressive definition of the rights of citizens, and its treatment of the right of naturalized citizens to hold office, particularly at the state level.

¹⁶⁷ Id. at 149.

¹⁶⁸ Id.

¹⁶⁹ This was no mere hypothetical possibility. In January 1790, just before debating the naturalization law, the House considered a petition from one H.W. Dobbyn, an Irish landowner, who sought a land grant of 50,000 acres and citizenship in the United States. See *infra* notes 179–82 and accompanying text. Dobbyn planned to sell the land to his tenant farmers, relocating them from Ireland to the frontier. Madison may have seen Dobbyn as an absentee landlord in the making. During debate on the petition, Roger Sherman wanted to know if the petitioner “intended coming here to settle.” 12 DHFFC, *supra* note 163, at 49. Later in the debate over the naturalization law, one member argued that absentee ownership might deserve consideration if only to facilitate foreign investment secured by mortgages on land in the United States. See *id.* at 164 (remarks of Rep. Clymer (Pennsylvania)). But see *id.* at 165 (remarks of Rep. Jackson (Georgia)) (arguing that allegiance and land ownership go together and opposing Clymer’s notion of absentee ownership).

precluded indentured servants from gaining admission to citizenship. Obviously, this barrier to citizenship would end with the expiration of the term of indentured servitude set forth in the contract, often a period of four to five years (or with freedom in the case of slaves). By then, the former servant would have satisfied the residency requirement and would qualify for admission to citizenship. Some members of the House also wished to avoid extending an invitation to “the common class of vagrants, paupers, and other outcasts of Europe.”¹⁷⁰ To strike the proper balance, the applicant for citizenship should spend time on probation and then “bring testimonials of a proper and decent behaviour.”¹⁷¹ If such a rule dissuaded “bad men” from immigrating, so be it; the nation would be better off “keep[ing them] out of the country, than admit[ting] them into it.”¹⁷² In contrast to those who demanded good behavior, others favored easy terms of naturalization “in order to people our country”; these supporters of easy admission believed that criminal laws would suffice “to restrain and regulate the conduct of an individual.”¹⁷³ Although they differed on the particulars, in short, members of the House agreed that whatever rule of naturalization they adopted would operate in effect as a rule of immigration.

Two other features of the law deserve notice. First, unlike its English precursor, it contains no religious test for admission to citizenship; as Representative Page (Virginia) explained, “[i]t is nothing to us, whether Jews, or Roman Catholics, settle amongst us; . . . neither their religious [nor their] political opinions can injure us.”¹⁷⁴ Members of the First Congress not only excluded state assemblies from the naturalization process, but they also viewed themselves as having little role to play once the law was in place. For the first several decades of its existence, Congress refrained from adopting

¹⁷⁰ *Id.* at 151 (remarks of Rep. Jackson (Georgia)); see also *id.* at 155 (remarks of Rep. Burke (South Carolina)) (expressing a desire to interdict the “convicts and criminals which they pour out of British jails”); *id.* at 147 (remarks of Rep. Sherman (Connecticut)) (expressing concern with emigrants who were likely to become “chargeable,” or impoverished).

¹⁷¹ *Id.* at 151 (remarks of Rep. Jackson (Georgia)).

¹⁷² *Id.* at 151–52 (remarks of Rep. Jackson (Georgia)).

¹⁷³ *Id.* at 153 (remarks of Rep. Laurance (New York)).

¹⁷⁴ *Id.* at 147.

private naturalization bills.¹⁷⁵ This absence of congressional involvement did not reflect a blanket refusal to adopt private legislation; indeed, private bills were a routine fact of life in the early years of the Republic.¹⁷⁶ Congress handled an enormous range of such legislation in other areas, passing on such matters as claims for losses suffered during the Revolutionary War, claims by disabled veterans for pensions, and claims for losses associated with invasions of property rights or breaches of public faith.¹⁷⁷ But strikingly, none of these early private bills operated to confer citizenship on an alien.¹⁷⁸

What accounts for the failure of Congress to adopt private naturalization bills? The evidence suggests that members viewed the Constitution as foreclosing that form of naturalization.¹⁷⁹ One can see this posture reflected in a variety of actions taken by Congress

¹⁷⁵ See generally Maguire, *supra* note 37. Indeed, John Quincy Adams publicly declared that private bill practice was incompatible with separation of powers principles. *Id.* at 1. Of the nine private bills in the First Congress, none dealt with naturalization. *Id.* at 1, 10.

¹⁷⁶ *Id.*; see *infra* note 177.

¹⁷⁷ See William C. diGiancomantonio, *Petitioners and Their Grievances: A View from the First Congress*, in *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development* 29, 47 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) (noting that the “overwhelming majority” of petitions in the First Congress were “direct by-products of the War for Independence”); see also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic* (unpublished manuscript), available at <http://www.law.harvard.edu/faculty/faculty-workshops/faculty-workshops.html> (describing the use of private legislation to indemnify government officers held liable in tort for trespassory wrongs); Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* 81–83, 109–12 (1971) (unpublished dissertation, on file with the Virginia Law Review Association).

¹⁷⁸ It was not until 1839, fifty years after the first public naturalization act, that Congress adopted its first private naturalization bill. Maguire, *supra* note 37, at 10, app. D1, at 261. Even so, the private bill did not in terms confer citizenship on the petitioner, but provided him with relief from a time bar that would have otherwise prevented the district court of Maryland from updating the 1804 record of his naturalization to correct its statement of his name. See *An Act for the relief of Dr. John Campbell White, of Baltimore, in the state of Maryland*, ch. 23, 6 Stat. 750, 750–51 (1839).

¹⁷⁹ Private bills were certainly under consideration, both in connection with the Dobbyn petition, and in comments from Rep. Huntington (Connecticut), who reminded his colleagues that no person in his state can be naturalized “but by an act of the legislature.” 12 DHFFC, *supra* note 163, at 158. Although Huntington invited the House to leave the naturalization of foreigners to state legislatures, no one took the suggestion seriously.

in its early years. For starters, the First Congress considered a petition from one H.W. Dobbyn, an Irish landlord, who sought a grant of 50,000 acres of land from the public domain and the right to sell the land to his former tenants.¹⁸⁰ The House tabled the petition after hearing from members that naturalization and land sales ought to be governed by general laws. Thus, Representative Smith (South Carolina) explained that

The applicant was avowedly an alien; now, by the laws of this country, it was generally understood, that an alien cannot hold real estate; they may hold it as trustees, [but it would be a mistake] to encourage or countenance the holding of land by such a tenure. It ought also to be considered, that a committee is appointed who will probably report in a short time, the plan of uniform naturalization; now it would be impossible for the house at this time to judge whether an alien, holding lands in America, would be able to conform in all respects to such a law.¹⁸¹

A member of the House responded by suggesting that the House could overcome the difficulty by inserting a provision about citizenship in the bill, but Representative Stone (Maryland) rejected the idea. It was simply not “proper, in his opinion, to make a naturalization act to apply to an individual.”¹⁸²

Members of the House returned to this theme in debates over changes to the naturalization law in 1795. Adopted late in Washington’s second term, while Chief Justice Jay was negotiating the treaty that bears his name and the United States was struggling to maintain neutrality in the face of European convulsions,¹⁸³ the Act of 1795 primarily operated to lengthen the required term of resi-

¹⁸⁰ See 8 Documentary History of the First Federal Congress of the United States of America 196–98 (Kenneth R. Bowling et al. eds., 1998) [hereinafter 8 DHFFC] (reporting that Dobbyn had sold his estate in Ireland and wished to settle in America “with a large body of his former tenants”). For the discussion of Dobbyn’s petition, see *The Daily Advertiser* (Jan. 21, 1790), reprinted in 12 DHFFC, supra note 163, at 40.

¹⁸¹ See Cong. Reg. (Jan. 20, 1790), reprinted in 12 DHFFC, supra note 163, at 49.

¹⁸² *Id.*

¹⁸³ See Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788–1800*, at 388–431 (1993) (describing the British attack on Americans who were trading with French interests, the growing rancor towards Great Britain in 1794, the controversial terms of Jay’s treaty, and the treaty’s eventual ratification).

dence from two to five years and tighten the oath requirement. In the course of debates, members of the House considered how to treat those who had expatriated themselves from the United States and now sought to reclaim their citizenship. Following the approach of the Act of 1790, Representative Giles recommended that expatriates be required to obtain a special act of state legislature to obtain reinstatement. Representative Tracy (Connecticut) worried that such an approach would make repatriation too easy; he proposed requiring expatriates to obtain a private bill from Congress as well.¹⁸⁴

Although the *Annals of Congress* do not record the ensuing debate in detail, it appears that members raised constitutional objections to the proposed reliance on private legislation:

[Representative Tracy's] motion was afterwards considered in several points of view, as blending State and Continental legislation, as interfering with the Legislative rights of the State by some, and as operating in the same manner in respect to the right reserved by the Constitution to the General Government, which is authorized to pass uniform laws of naturalization by others.¹⁸⁵

One can see a variety of concerns reflected in this summary: concerns grounded in federalism and the need to protect the role of State legislatures as well as concerns based on the prospect that state legislation would interfere with the paramount role of the general government. Critics apparently questioned as well the suggested reliance on private legislation as inconsistent with the requirement of a uniform law.¹⁸⁶

Comments of John Quincy Adams at roughly the same time suggest that doubts about the constitutionality of legislative acts of naturalization were entertained both in and out of Congress. Commenting on a proposed treaty that would have given the citizens and subjects of the United States and England reciprocal exemptions from all disabilities of alienage, Adams recognized that

¹⁸⁴ See 4 *Annals of Cong.* 1005 (1794).

¹⁸⁵ *Id.*

¹⁸⁶ See Frank George Franklin, *The Legislative History of Naturalization in the United States* 51 (1906) (noting that Tracy withdrew his motion, after constitutional objections were raised, and noting that his proposal “[c]ertainly . . . conflicted with the constitutional requirement of uniformity”).

such an arrangement would encourage trade and commerce but might be difficult to put in place. Adams indicated that such a proposal would require an act of Parliament and would face a “more material obstacle” grounded in the Constitution.¹⁸⁷ Adams was apparently referring to the naturalization clause and its requirement of uniformity; indeed, he later raised constitutional objections to the Louisiana Purchase on the ground that “[i]t naturalizes foreign nations in a mass.”¹⁸⁸ Adams’s concern offers important insights into early Republic thinking about the role of the legislature in naturalization proceedings. First, and most obviously, it suggests that Congress was limited to the adoption of public laws of general applicability and could not selectively naturalize aliens, either alone or in a group. Second, and more subtle, Adams obviously believed that the power of Congress to confer status short of full citizenship was encompassed within the naturalization clause and regulated by its uniformity requirement. Neither the English proposal nor the treaty underlying the Louisiana Purchase would confer formal citizenship but Adams viewed both of the lesser forms of status as controlled by the Constitution’s uniformity rule.

Having apparently concluded that the Constitution barred private bills relating to citizenship, Congress acted to address instances of perceived unfairness through the adoption of curative statutes that applied to everyone in the relevant class. Consider a telling piece of curative legislation, adopted in 1804.¹⁸⁹ The legislation first responded to the problem of those who were residing in the United States between 1798 and 1802, at a time when Congress required a declaration of intent five years prior to their application for citizenship.¹⁹⁰ This five-year declaration rule would have delayed admission to citizenship for some aliens who were otherwise qualified under the five-year residency and three-year declaration rules of the Act of 1802.¹⁹¹ Congress addressed the problem by sim-

¹⁸⁷ *Id.* at 9 (quoting Adams’s diary).

¹⁸⁸ *Id.* at 10 (quoting 5 *Memoirs of John Quincy Adams* 401 (Charles Francis Adams ed., 1875)). The Louisiana Purchase required that former French citizens of New Orleans enjoy the same privileges and immunities as citizens of the United States, even before Louisiana was admitted to statehood. See Pfander, *supra* note 14, at 712–14.

¹⁸⁹ See Act of Mar. 26, 1804, ch. 47, 2 Stat. 292 [hereinafter 1804 Act].

¹⁹⁰ For a description of the law, see *infra* notes 191–93 and accompanying text.

¹⁹¹ See Franklin, *supra* note 186, at 110–15 (explaining that Congress passed the 1804 remedial legislation in order to address the frequent private naturalization petitions it

ply eliminating the declaration requirement for the class of 1798–1802.¹⁹² The legislation also responded to the problem of an alien who, though qualified for citizenship, had died before taking the oath that would have conferred formal citizenship status on him and his wife and minor children. The Act of 1804 addressed the problem by extending rights of citizenship to the widow and children of the deceased, provided they took “the oaths prescribed by law.”¹⁹³ In both instances, the Act sought to protect individuals from the unfair application of existing law, but did so by adopting rules of general application rather than special relief legislation.¹⁹⁴

B. Early Congressional Adherence to the Norm of Prospectivity

Apart from its refusal to adopt private bills, Congress acted on the principle that the Constitution required prospective legislation in the field of naturalization law. Interestingly, the concern with prospectivity arose during debates over the nation’s first naturalization act in 1790. One might assume that the legislation creating the nation’s first system would not occasion such concerns. But recall that a number of aliens had been drawn to the United States by the rules of naturalization that were in place in the states in which they had taken up residence. Representative Smith (South Carolina) called attention to the issue: “What is to become of those inchoate rights of citizenship, which are not yet completed? Can the Government, by an *ex post facto* law, deprive an alien of the advantage of such an inchoate right?”¹⁹⁵

The *Annals* do not quote any direct answer to Smith’s query, although the Act was drafted to address the concern. First, the two-year residency requirement in the federal law was framed to credit aliens with any time they had spent as residents of the United

received from those people unduly burdened because they came to the United States when the 1798 Act was in force).

¹⁹² 1804 Act, *supra* note 189, at 292–93.

¹⁹³ *Id.* at 293.

¹⁹⁴ Congress’s refusal to adopt private naturalization bills continued well into the nineteenth century. One Peter Jackson sought relief by petition, describing his arrival in the United States as a minor child, his marriage to a U.S. citizen, his service in the War of 1812, and his recent ejection from civil office on the basis that he was not a citizen. The House Judiciary Committee considered his petition but resolved that it should not be granted. For an account, see Franklin, *supra* note 186, at 169–70.

¹⁹⁵ 1 *Annals of Cong.* 1123 (Joseph Gales ed., 1834).

States *before* the law took effect.¹⁹⁶ By giving aliens credit for earlier periods of residency, the Act would lessen any retrospective effect. Second, by establishing a relatively short term of residency, the law provided easier terms of admission than those in place in many of the states, again moderating any retrospective effect.

Subsequent legislative practice during the early Republic helps to cement our claim about the Framers' commitment to prospective lawmaking. In January 1795, Congress adopted a second act to establish a uniform rule of naturalization.¹⁹⁷ The legislation came at a time when the divisions between the Federalists and the Democratic-Republicans, including spats over citizenship, had grown sharper.¹⁹⁸ Federalists spoke in terms of the importance of assuring that new immigrants were properly attached to republican principles; their concern was made all the more urgent by their recognition that newly naturalized citizens were likely to vote for the Democratic-Republican party.¹⁹⁹ The solution was to extend the period of required residency from two to five years and to demand a clearer oath or affirmation in support of the Constitution and a clearer renunciation of any titles of nobility and lingering allegiance to their former country.²⁰⁰

Despite the decision to tighten the standards for admission to citizenship, however, the drafters of the new legislation were careful to make these changes prospectively. Section 1 contained the new five-year residency requirement.²⁰¹ Section 2 declared that, for immigrants residing in the United States on January 29, 1795 (the

¹⁹⁶ The statute extended the privilege of citizenship to any alien "who shall have resided within the limits and under the jurisdiction of the United States for a term of two years." 1790 Act, *supra* note 34. Had the Act referred to aliens who "shall reside" in the United States, it might have been construed as giving aliens credit only for periods of residence that came after the Act's effective date; by referring instead to aliens who "shall have resided," the Act gave aliens credit for pre-Act periods of residence.

¹⁹⁷ See Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 [hereinafter 1795 Act].

¹⁹⁸ See, e.g., Robert J. Steinfeld, Subjectship, Citizenship, and the Long History of Immigration Regulation, 19 *Law & Hist. Rev.* 645, 648–49 (2001).

¹⁹⁹ *Id.* See generally Douglas M. Bradburn, "True Americans" and "Hordes of Foreigners": Nationalism, Ethnicity and the Problem of Citizenship in the United States, 1789–1800, 29 *Hist. Reflections* 19, 26 (2003) (explaining the Federalist worry "about a flood of [French] revolutionaries").

²⁰⁰ 1795 Act, *supra* note 197, at 414.

²⁰¹ *Id.*

effective date of the Act), naturalization was to be available if they had resided for two years in the country and one year in the state of application.²⁰² This was the same rule that had been established in the 1790 Act.²⁰³ Similarly, the Act of 1795 included a new requirement, obliging candidates for citizenship to declare their intent to become citizens after three years' residence.²⁰⁴ Yet again, the provisions of Section 2 governing those already in the country contained no such prior-declaration requirement.²⁰⁵ Congress thus took care to maintain public faith not only with those who had gained citizenship under the earlier law but also with those non-citizens who were residing in the United States in circumstances that entitled them to claim the benefit of the 1790 standards. As Nathan Dane explained in his popular abridgment, the provision assured that if an alien were "resident in the United States when this act was passed, he was admissible on the terms of the former act."²⁰⁶

Congress continued to adjust the rule for naturalization and, with one important exception, honored its established practice of making only prospective changes in the law. The exception occurred in 1798, at a time when hostilities with France led the Federalists to adopt a series of war measures over Jeffersonian objec-

²⁰² *Id.* at 415.

²⁰³ See 1790 Act, *supra* note 34, at 103–04.

²⁰⁴ 1795 Act, *supra* note 197, at 414. The record of James Pollock's appearance before the United States District Court for the Southern District of New York illustrates the practical impact of the declaration requirement:

James Pollock now of the City of New York but late of _____ in the Kingdom of Ireland Merchant, aged forty eight years came in to Court and pursuant to the direction of the act of Congress of the United States of America entitled "an Act to Establish an uniform Rule of Naturalization and to Repeal the act heretofore passed on that subject" made oath that it is Bona Fide his intention to become a citizen of the United States and to Renounce forever all allegiance and fidelity to any foreign Prince, Potentate, Sate or Sovereign whatever and particularly to the King of Great Britain to whom he is a subject.

Thereupon

It is ordered by the Court that the oath or affidavit to made by the said James Pollock be subscribed by him and filed with the Clerk of the Court.

Minutes and Rolls of Attorneys of the United States District Court for the Southern District of New York, 1789–1841, Roll 1, Target 2, Slide 300 (August 1, 1798), *microformed on* Nat'l Archives of the United States, M866 (Nat'l Archives Microfilm Publ'n).

²⁰⁵ 1795 Act, *supra* note 197, at 415.

²⁰⁶ 4 Nathan Dane, *A General Abridgment and Digest of American Law* 710 (1824).

tions.²⁰⁷ As part of this package, the naturalization act of June 18, 1798 took a number of drastic steps. It limited naturalization to those who had resided for *fourteen* years in the United States and for five years in the state of application.²⁰⁸ It also required aliens who wished to secure citizenship to make a declaration to that effect at least five years before applying for naturalization.²⁰⁹ Furthermore, the Act created a central record-keeping system by obliging local courts to transmit a copy of naturalization records to the Secretary of State.²¹⁰ Finally, the Act required all aliens who either arrived, or continued to reside, in the country after the effective date of the Act to register as such with a federal officer.²¹¹

Those opposing the retroactive features of the law put forward two arguments. The first, advanced by Representative Smith, was squarely based on the Constitution:

To adopt the resolution as reported would be, he believed, to agree upon an *ex post facto* regulation. It could not be intended, he should suppose, to prevent persons who had resided in this country two or three years, under the expectation of becoming citizens at the end of five years, from that privilege.²¹²

In addition, members of the House appealed to fairness and a sense of justice. Representative Gallatin (Pennsylvania) observed that many aliens had sought naturalization under the terms of state law, mistakenly assuming that such a mode remained lawful.²¹³ He

²⁰⁷ See generally Steinfeld, *supra* note 198, at 648–49. On the quasi-war with France, and the politics that produced the Alien and Sedition Acts, see Elkins & McKittrick, *supra* note 183, at 590–93. On the connection between fears of French influence and the naturalization law, see 8 Annals of Cong. 1453 (1798) (remarks of Rep. Sitgreaves (Pennsylvania)) (noting the “number of French citizens in our country” and the real possibility of war with France); see also Bradburn, *supra* note 199, at 28–29 (describing the Federalist effort to define more narrowly the concept of American citizenship).

²⁰⁸ See Act of June 18, 1798, ch. 54, 1 Stat. 566, 566 [hereinafter 1798 Act].

²⁰⁹ *Id.*

²¹⁰ *Id.* at 567.

²¹¹ *Id.* at 567–68.

²¹² 8 Annals of Cong. 1569 (1798) (remarks of Rep. Smith (Maryland)). Smith’s remarks pre-dated *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), in which the Supreme Court concluded that the prohibition against *ex post facto* laws applied only to those that imposed retroactive criminal liability. *Id.* at 390–91.

²¹³ See, e.g., *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 259–61 (1817) (recounting that one John Chirac, a French citizen, first invoked the Maryland naturalization proce-

argued against retroactive changes by urging Congress to give aliens resident before the passage of the 1795 Act, and those who had made the declaration required in 1795, a limited opportunity to seek naturalization under its provisions.²¹⁴ Representative Craik (Maryland), although inclined to foreclose new immigration altogether, agreed that retrospective changes in the rules governing resident aliens were “unjust.”²¹⁵

The arguments of Reps. Smith, Gallatin, and Craik prevailed, resulting in a significant moderation of the retroactive features of the law. For aliens who established residence before the 1795 Act became law, citizenship was to be available *without a declaration* upon proof of five years’ residence; aliens were given one year to take advantage of this saving clause.²¹⁶ For those who established residence in the United States after the effective date of the 1795 Act, and were entitled under those provisions to naturalization after five years’ residency and a proper declaration, the 1798 Act permitted them to seek naturalization on the basis of five years’ residency for a period of four years from the date of their declaration.²¹⁷ In both respects, then, even the relatively harsh terms of the 1798 Act were significantly moderated in response to arguments that the Constitution permitted only prospective rule changes in the naturalization arena.²¹⁸

dure in 1795 and then subsequently petitioned for naturalization under the laws of the United States in July 1798, shortly after the restrictive naturalization law of that year took effect).

²¹⁴ Representative Gallatin argued that many aliens believed themselves to have been lawfully naturalized, because they were naturalized under state laws (apparently in contravention of norms of federal exclusivity). See 8 Annals of Cong. 1776–79 (1798). He found it unfair that such aliens would have “no opportunity” to become naturalized under the proposed Act. Franklin, *supra* note 186, at 86. Accordingly, “[h]e would give a limited period during which these might still have the benefit of the existing law.” *Id.*

²¹⁵ 8 Annals of Cong. 1779 (1798) (Rep. Craik (Maryland)) (expressing the view that the proposed retroactive operation of the law to bar resident aliens from securing naturalized citizenship “would be very unjust” and agreeing with Gallatin that “a large class of persons” had either failed as yet to seek naturalization or had mistakenly sought it under the laws of Maryland and Virginia); Franklin, *supra* note 186, at 87.

²¹⁶ See 1798 Act, *supra* note 208, at 566–67.

²¹⁷ *Id.*

²¹⁸ To the extent that the 1798 Act retained a flavor of retroactivity, one might view the provisions as the product of some political gamesmanship; the Federalists no doubt recognized that many of the aliens whose citizenship was complicated by these

Despite these moderating features, the 1798 Act was quickly countermanded when the Jeffersonians took control of Congress. The Act of April 14, 1802 repealed the 1798 provisions, and substituted a new regime that was to last, with minor adjustments, for the remainder of the nineteenth century.²¹⁹ Under the new rules, an alien was required to reside in the United States for five years and to reside in the state of application for one year.²²⁰ Moreover, the alien was required to declare an intent to seek citizenship at least three years prior to making an application for naturalization.²²¹ Together, these two provisions returned the rules of naturalization to those that had prevailed in 1795.²²² Finally, aliens arriving after the effective date of the act were required to register with a federal officer.²²³ By thus limiting the registration requirement to new arrivals, the Act made clear that those already residing in the United States in 1802 owed no such obligation. In effect, then, by repealing the prior law, the Act granted amnesty to all the individuals who

maneuvers would, if naturalized, have likely voted for the Democrat-Republicans in the 1798 mid-term elections. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 163 (1997) (arguing that Federalist nativism had driven immigrant voters to Jefferson's Republican Party). Jefferson shared the view that naturalization policy was driven at least in part by political considerations. See Letter from Thomas Jefferson to Elbridge Gerry (May 18, 1797), *reprinted in* Letters and Addresses of Thomas Jefferson 116 (William B. Parker & Jonas Viles eds., 1905) (arguing that the British were influencing American politics by securing naturalized citizenship, such that these "foreign and false citizens now constitute the great body of what are called our merchants, fill our sea ports, are planted in every little town and district of the interior country, sway everything in the former places by their own votes, and those of their dependents"). One might also view this statutory provision as a reflection of common law notions of the restricted rights of alien enemies during wartime. See Neuman, *Strangers*, *supra* note 3, at 58 (noting that "Madison viewed as fundamental the distinction between alien enemies and alien friends . . . [and] [a]s to alien enemies, the Constitution's grant of the war power gave Congress the usual authority under the law of nations"). Importantly, the Act applies to all applicants for naturalized citizenship, not just to those from France. See 1798 Act, *supra* note 208, at 566-67.

²¹⁹ See Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 [hereinafter 1802 Act]. See generally Kettner, *supra* note 63, at 246 (describing the 1802 Act as the "last major piece of legislation" on the subject of naturalization during the nineteenth century).

²²⁰ See 1802 Act, *supra* note 219, at 153-54.

²²¹ See *id.* at 153.

²²² The *Kentucky Palladium* reported that the object of the 1802 bill was to repeal the Act of 1798 and go back to the terms of 1795. See Franklin, *supra* note 186, at 106-07.

²²³ See 1802 Act, *supra* note 219, at 154.

had failed to comply with the registration requirement of the 1798 legislation.²²⁴ The Act also took pains to eliminate the retroactive features of prior law.²²⁵ Thus, for the class of 1790–1795, the Act restored the two-year residency requirement (even though, as a practical matter, many members of this class could have satisfied the five-year term specified in the 1798 law). For much of the remainder of the nineteenth century (with the notable exception of legislation in the 1880s that led to *Chae Chan Ping* and *Fong Yue Ting*), Congress continued to emphasize prospectivity in its immigration legislation, frequently employing savings clauses to preserve rights conferred under earlier laws.²²⁶

C. *The Scope of Congress's Naturalization Power*

Early legislation also resolved some uncertainty over the extent to which the exercise of federal power over naturalization was thought to exclude any concurrent role for the states in defining the rights of aliens. While early decisions of the courts took somewhat conflicting views of the exclusive character of Congress's naturalization authority,²²⁷ Congress addressed the issue in the 1802 Act. The focus of section 4 of the Act was on the citizenship status of the children of those naturalized under earlier laws.²²⁸ The Act declared minor children citizens of the United States if their par-

²²⁴ Franklin, *supra* note 186, at 108–09.

²²⁵ See 1802 Act, *supra* note 219, at 154.

²²⁶ See *United States v. Menasche*, 348 U.S. 528, 531 (1955) (noting that savings clauses that involved broad inclusive provisions had been employed since 1906 and “manifested an intention on the part of Congress to save rights which had accrued under prior laws”).

²²⁷ Compare *Collet v. Collet*, 2 U.S. (2 Dall.) 294, 295–96 (C.C.D. Pa. 1792) (states retain right to naturalize), and *Portier v. LeRoy*, 1 Yeates 371 (Pa. 1794) (same), with *United States v. Villato*, 2 U.S. (2 Dall.) 370, 372 (C.C.D. Pa. 1797) (states lack power to naturalize). See also Neuman, *Strangers*, *supra* note 3, at 44–49. Neuman argues that well into the nineteenth century, states continued to regulate immigration. Rather than expressly regulating immigration, states exercised their police power to limit the type of immigrants who could enter the state. Pointing to the majority's dicta in *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), in which the opinion states that it was “competent and . . . necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts,” *id.* at 142, Neuman concludes that the Supreme Court generally approved of such legislation, as long as it did not interfere with Congress's foreign commerce power. Neuman, *Strangers*, *supra* note 3, at 45–48.

²²⁸ See 1802 Act, *supra* note 219, at 155.

ent(s) had been duly naturalized “under any of the laws of the United States” or under the laws “of any one of the said states.”²²⁹ But naturalization under state law counted only if it took place “previous to the passing of any law on that subject, by the government of the United States.”²³⁰ State naturalizations were thus effective only until Congress adopted the Act of 1790, and were invalid thereafter. As Dane explained, this provision “tends to settle the long agitated question, whether a State government has any power to naturalize aliens, since Congress passed laws on the subject.”²³¹ (The legislation, declaring federal power exclusive of the states, recalls the 1773 Act of Parliament declaring Britain’s naturalization regime exclusive of those in the colonies.)

Early legislative practice sheds light on one final puzzle about the breadth of Congress’s power over naturalization policy. An early draft of the 1790 naturalization law specified gradations of citizenship: Aliens could own property after one year but would have to wait two years before they could stand for election to state and federal offices.²³² During debates over these provisions, some took the position that Congress’s power was limited to conferring citizenship and did not extend to the definition of gradations of citizenship.²³³ Others took quite the opposite position, urging that

²²⁹ *Id.*

²³⁰ *Id.* Congress may have attempted to resolve the issue in the 1795 Act, declaring that an alien may be admitted as a “citizen of the United States, or any of them, on the following conditions, and not otherwise.” 1795 Act, *supra* note 197, at 414. One can read the provision as an attempt by Congress to preempt state control of the field of naturalization.

²³¹ 4 Dane, *supra* note 206, at 711; see also *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817) (Marshall, C.J.) (proclaiming a consensus that Congress has sole power to naturalize). The consensus doubtless emerged in the nineteenth century; we have a great deal of evidence that state naturalizations continued through the 1790s. See, e.g., Franklin, *supra* note 186, at 84–90 (explaining that the difficulty in complying with federal naturalization requirements resulted in many aliens turning to state procedures for naturalization); see also *supra* notes 213–14 and accompanying text (Rep. Gallatin recounting the continuing efforts of immigrants in Pennsylvania to seek naturalization under state law).

²³² In particular, the bill would have conferred all rights of citizenship, including property ownership, to those who took the oath and resided in the United States for a single year. The right to hold public office would ripen after two years. See Cong. Reg. (Feb. 3, 1790), *reprinted in* 12 DHFFC, *supra* note 163, at 146.

²³³ See *id.* at 151 (remarks of Rep. White (Virginia)) (once an alien attains citizenship, the power of Congress ceases to operate); see also *id.* at 148 (remarks of Rep. Laurance (New York)) (questioning Congress’s power to specify the rights of a new

all incidents of the status of resident aliens and new citizens were subject to federal regulation.²³⁴ Ultimately, Congress decided to drop the gradation provisions in favor of a rule that simply specified the terms on which citizenship was to be conferred. But one cannot conclude from the omission of gradations that Congress reached a considered conclusion that its power did not extend so far. To the contrary, the degree of state-to-state variability on issues relating to property ownership and political rights would have made the task of framing a uniform rule quite daunting.²³⁵ Many may have concluded that, whatever the scope of federal power, it was better to leave the issue to the states. Thus, William Maclay's diary records his view that Congress possessed the power in question, but that the interests of Pennsylvania would be better served if federal law did not define alien property rights.²³⁶

citizen to stand for state election); cf. *id.* at 149 (remarks of Rep. Madison (Virginia)) (noting that the ability of Congress to admit an alien to rights "step by step" poses questions "of some nicety"). Madison had earlier taken the position that Congress would have power to establish gradations of citizenship.

²³⁴ See *id.* at 153 (remarks of Rep. Tucker (South Carolina)) (expressing "no doubt" as to Congress's power to provide for progressive admission to citizenship); *id.* at 155–56 (remarks of Rep. Stone (Maryland)) (supporting the claim that Congress can admit to citizenship "step by step"); *New-York Daily Gazette*, Feb. 4, 1790, *reprinted in id.* at 156 (remarks of Rep. Jackson (Georgia)) (citing Blackstone's discussion in support of the progressive admission to rights of citizenship).

²³⁵ *Cong. Reg.* (Feb. 3, 1790), *reprinted in id.* at 150 (remarks of Rep. Smith (South Carolina)) (noting that the proposed grant of political rights to the newly arrived might cause "great uneasiness" in some "neighborhoods").

²³⁶ See William Maclay, *Diary* (Mar. 8, 1790), *in* 9 *Documentary History of the First Federal Congress of the United States* 214–15 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter 9 DHFFC] (noting the introduction of the naturalization bill and recounting his efforts to authorize aliens to own lands before becoming citizens); William Maclay, *Diary* (Mar. 9, 1790), *in* 9 DHFFC, *supra*, at 215–16 (recounting his opposition to the two-year residency requirement as too restrictive and contrasting the willingness of those in Pennsylvania to "rec[eive] and adopt[] strangers" with the reluctance of those in New England); William Maclay, *Diary* (Mar. 12, 1790), *in* 9 DHFFC, *supra*, at 217 (noting that Pennsylvania has been "very liberal on the subject of admitting strangers to citizenship" and that "we have benefited by it [and] still do benefit"); William Maclay, *Diary* (Mar. 15, 1790), *in* 9 DHFFC, *supra*, at 218–19 (recounting his view that others wish to deprive Pennsylvania of the benefit of "[im]migration" as a "source of population" and thus linking naturalization with immigration policy); William Maclay, *Diary* (Mar. 17, 1790), *in* 9 DHFFC, *supra*, at 220–21 (recounting Ellsworth's argument that power to hold lands was a feature of naturalization and was not properly extended to aliens until they were naturalized); William Maclay, *Diary* (Mar. 18, 1790), *in* 9 DHFFC, *supra*, at 222 (noting a division between senators as to whether federal authority under the naturalization clause

Despite its failure to confer explicit rights on resident aliens short of full citizenship, Congress clearly took the view that the reliance interests of such resident aliens deserved protection against retroactive legislation. As we have already seen, the comments of Representative Smith and the language of the 1790 Act both express some solicitude for the interests of those who had come to America in reliance on the naturalization provisions of state law.²³⁷ The first naturalization act, moreover, left the decision to seek citizenship or remain as a resident alien in the hands of the immigrant. Thus, the statute prescribed the conditions that would qualify an alien for citizenship: race, residency, good character, and an oath to support the Constitution. But the statute did not require that the alien get in line for citizenship by filing a declaration to that effect as a condition of his entry into the country.²³⁸ Nor did the statute establish a period of limitations that would foreclose citizenship for those who had lived in the country for a time without having taken steps to secure citizenship. In other words, the statute contemplated that aliens might live for years in the United States as denizens, domiciliaries, or permanent residents, entitled to citizenship if they chose to pursue it but not required to do so as a condition of continued residence.²³⁹

In addition, it was this group of prospective or “inchoate” citizens that Congress sought to protect from retrospective legislation in its second naturalization law. The statute adopted in 1795 altered the rules significantly, extending the residency period to five

embraced the power to define property ownership rights of aliens and noting that Ellsworth and Strong both took a broad view of federal power); William Maclay, *Diary* (Mar. 19, 1790), in 9 DHFFC, *supra*, at 223 (concluding that since the Pennsylvania senators could not “get the rights of [aliens to hold] property fully acknowledged, it is best that the Naturalization bill say nothing about it”).

²³⁷ See *supra* notes 155, 195–96 and accompanying text.

²³⁸ Thus, the 1790 Act contained nothing that would require the alien to register or declare an interest in citizenship and nothing that foreclosed citizenship to aliens who had waited too long before petitioning for naturalization.

²³⁹ Denizens were aliens who were admitted to some, but not all, of the privileges of citizenship through the issuance of the King’s letters patent. Blackstone explained the matter as follows: “A denizen is an alien born, but who has obtained . . . letters patent to make him an English subject. . . . A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them.” 1 Blackstone, *supra* note 25, at *374; see also *Craw v. Ramsay, Vaughan* 274, 124 Eng. Rep. 1072, 1074 (1670) (“[A] denizen of England by letters patents for life, in tayl, or in fee, whereby he becomes a subject in regard of his person.”).

years and requiring a declaration of intent to seek citizenship after three years. These changes would have no impact on those that had already gained citizenship under the 1790 law. As we have seen, however, the 1795 legislation allows denizens or lawful permanent resident aliens already in the country to pursue citizenship on the same terms that had previously applied to them. Only those aliens who entered the country after the effective date of the statute were subject to the new dispensation. The statute thus recognizes a useful distinction between Congress's plenary power over the rules of naturalization that apply to newly admitted aliens and its obligation to preserve the rules applicable to those who had already moved to the United States and established a residence here in reliance on an earlier approach.

To summarize the lessons of this Part of the Article, the framing of the Constitution proceeded on the assumption that Congress was to establish a single uniform rule of naturalization throughout the United States. Members of the early Congresses understood the constitutional requirement of uniformity both as obliging Congress to adopt public laws of general applicability on the subject, and as ruling out private bills. Moreover, Congress took the position that uniformity disables the states from administering their own separate or concurrent system of naturalization. Finally, the clause, requiring Congress to establish a uniform rule, suggests the foreclosure of retrospective changes in the rules. Congress viewed the trigger for the assurance of prospectivity as beginning when an alien established lawful residence in the United States. At that point, Congress viewed itself as bound to refrain from making retroactive changes in the rules that govern the alien's status and eventual admission to citizenship.

IV. RECLAIMING THE IMMIGRATION CONSTITUTION OF THE EARLY REPUBLIC

We think these underappreciated features of the early Republic's approach to immigration issues have important implications for current debates over immigration law. In this Part, we develop three related ideas. First, we contend that the requirement of an established rule of naturalization provides additional support for imposing limits on some kinds of retroactive legislation and some features of the so-called plenary power doctrine. Scholars have

couched arguments against retroactive legislation in due process terms; we think our interpretation of the naturalization clause bolsters these arguments and provides a firm constitutional foundation for a requirement of prospective lawmaking by Congress.²⁴⁰

Second, we argue that the requirement of an established and uniform rule forecloses the adoption of private bills. We view the rise of private legislation as an unfortunate feature of modern immigration and naturalization policy. Members of Congress have sometimes adopted harsh general measures to govern most citizenship applicants and have simultaneously supported private bills that would set aside these harsh measures in specific cases. We think legislative lenity can play an appropriate role in the process of naturalization (as the curative legislation of the Jeffersonian era reveals), but it should apply across the board to all aliens in the same situation. Indeed, we see a connection between the two developments: once Congress came to view itself as enjoying the power to address citizenship issues in particular cases, it was but a short leap to the abandonment of the commitment to prospectivity that had characterized its early legislation.²⁴¹

Finally, we think that the limits of plenary power and the prohibition on private bills also shed light on the propriety of treating immigration and naturalization issues as matters of “public right” to be shunted off to executive tribunals and immunized from judicial review. Properly understood, the public rights doctrine does not provide *carte blanche* to Congress in regulating matters between the government and individual aliens. Instead, as we show, the doctrine should come into play only where Congress retains control over the distribution of government largesse, as in the case of its control over government benefits under the property or appropriations power. Congress has no case-by-case control over naturalization that can provide a foundation for the denial of a judicial role.²⁴²

²⁴⁰ See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process Limits on Congress’s Control of Federal Jurisdiction*, 86 *Geo. L.J.* 2481, 2482 (1998) (“Not coincidentally, the most extreme restrictions the 1996 Congress enacted fell on the doubly disadvantaged, noncitizens who have been convicted of crimes.”).

²⁴¹ See Act of Feb. 13, 1839, ch. 23, 6 Stat. 750, 750–51 (granting relief to a Baltimore-based physician, Dr. John Campbell White).

²⁴² We find confirmation of our suggestion that the public rights doctrine does not undercut the right of aliens, who are resident in the United States, to secure judicial

Our proposed revival of early Republic constitutionalism has its risks and drawbacks. One cannot always readily translate the norms of the eighteenth century into a body of constitutional rules for today. But in the case of immigration law, the developments of the early Republic have important lessons to teach us. Rather than viewing the plenary power doctrine through the lens of the nation's restrictive attitude toward new immigration in the late nineteenth century, the experience of the early Republic helps us to locate a constitutional history in which leading statesmen welcomed the idea of national growth through immigration. To be sure, the Framers had quite limited ideas about the sort of immigrants they expected to naturalize: only white European immigrants were welcome. But within those boundaries, the Framers established and administered a system of naturalization rules that displayed a striking degree of solicitude for the rights of resident aliens.

A. Understanding the Relevance of the Naturalization Clause

Before we turn to specific arguments, however, we address a more general question of interpretive theory. We propose to apply the limits on congressional power encompassed in the naturalization clause to all issues of immigration and naturalization law, including matters that do not directly implicate citizenship. One might object on methodological grounds to the proposed reliance on eighteenth-century naturalization law as a source of modern constitutional limits on the role of Congress in immigration law. Apart from objections based on concerns with originalist methodology, one might take the view (common among students of immigration law) that immigration and naturalization comprise two fundamentally different compartments of law. If one accepted this categorical view, it might seem to follow that the constitutional limits on Congress's naturalization power do not apply to immigration issues. Thus, one might conclude that Congress faces textual re-

review of removal decisions in the Court's recent decision *Kucana v. Holder*, No. 08-911 (U.S. Jan. 20, 2010). Citing separation-of-powers concerns, the Court invoked its presumption in favor of judicial review of administrative action and rejected a suggested limit on the power of the federal courts to review petitions to reopen removal proceedings.

strictions when legislating in the exercise of its naturalization power, but confronts fewer limits when it regulates immigration.

We offer several responses. First, at the time of the framing, naturalization rules essentially exhausted the category of immigration policy.²⁴³ As we have seen, during the eighteenth century, market factors, including the cost and length of the voyage, ensured that immigrants were making a permanent commitment to the nation.²⁴⁴ The desire of aliens to hold property would encourage speedy naturalization among those who expected to seek their fortunes on frontier farms; the rules of naturalization, which determined the speed and manner in which the rights of citizenship, including the right to own property, accrued, in turn, would effectively control immigration. Only later in the nineteenth century, when the steamship drove down the price of the voyage and new immigrants entered an industrial workforce, would it become possible to envision a national immigration law that applied to individuals who could not, or may not desire to claim access to naturalized citizenship.²⁴⁵ Even today, much of what we think of as immigration policy—regulating who may come into the country, who may stay, and for what duration—simply ensures that certain immigrants cannot enjoy the benefits of naturalization without going through the procedures established by Congress.

Second, the breadth of the Framers' conception of naturalization suggests that we should view Congress's immigration power as a subset of its naturalization authority, rather than as a separate category. We think the failure to perceive this derivative quality of immigration underlies the Court's invention of the plenary power doctrine in *Chae Chan Ping*.²⁴⁶ The law excluding Chinese nationals was said to apply both to new arrivals and to those like the peti-

²⁴³ Scholars recognize the need to translate grants of power to take account of technological change. While the Constitution does not expressly empower Congress to establish an Air Force, one might derive authority for such a modern undertaking from its power to raise and support an Army and Navy (the two branches of the armed forces known to the Framers). See Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165, 1203 (1993).

²⁴⁴ See *supra* note 25.

²⁴⁵ See *id.* At risk of belaboring the obvious, Africans brought to the United States as slaves came against their will and could not later claim citizenship under rules that limited naturalization to free white persons.

²⁴⁶ See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

tioner who had established residence in the United States and had obtained a certificate entitling them to re-enter the country.²⁴⁷ While he was out of the country in reliance on the certificate, the petitioner's right to re-enter was legislatively curtailed.²⁴⁸ In *Fong Yue Ting*, by contrast, new legislation required all resident Chinese laborers to register within one year of the Act's adoption.²⁴⁹ The petitioners were arrested for having failed to register and were subjected to deportation proceedings.²⁵⁰

In both cases, the Court upheld the application of these rules, despite their retroactive effect. Although the Court spoke with unanimity in *Chae Chan Ping*, the decision in *Fong Yue Ting* was more closely divided.²⁵¹ The majority began where it left off in the earlier case, by denying that the petitioners had acquired any right to remain in the country except on whatever terms Congress chose to specify.²⁵² Without a right, the aliens were subject to Congress's plenary control.²⁵³ The majority then turned to the terms of the

²⁴⁷ Id. at 582. The Act prohibited Chinese laborers from entering the United States if they had departed before the passage of the Act, even if they had obtained a certificate under a previous act entitling them to return. Id. The petitioner challenged the Act as violating existing treaties between the United States and China and the rights vested under those treaties through previous acts. Id. at 599–600. Notably, petitioner did not challenge the Act on equal protection grounds. See Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting*, in *Immigration Stories* 7, 15 (David A. Martin & Peter H. Schuck eds., 2005) (noting that such a challenge would have failed since the Fifth Amendment had not yet been interpreted to prohibit Congress from discriminating on the basis of race).

²⁴⁸ *Chae Chan Ping*, 130 U.S. at 582.

²⁴⁹ *Fong Yue Ting v. United States*, 149 U.S. 698, 699 n.1 (1893).

²⁵⁰ Id. at 699–704.

²⁵¹ Id. at 732 (Brewer, J., dissenting); id. at 744 (Field, J., dissenting); id. at 761 (Fuller, C.J., dissenting).

²⁵² Id. at 707 (“The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

²⁵³ See id. at 713 (“The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.”); id. at 713–14 (“The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers, or Congress may

Constitution to determine whether anything foreclosed deportation for failure to register.²⁵⁴ Here, the Court reached the crucial conclusion that a deportation proceeding was not criminal and did not, therefore, trigger the application of the usual panoply of constitutional protections.²⁵⁵ Scholars view *Chae Chan Ping* and *Fong Yue Ting* as a reflection of the racism and xenophobia of the day.²⁵⁶

We agree with that assessment. But we believe the Court was also influenced by its perception that the individual petitioners were not entitled to naturalized citizenship under applicable law.²⁵⁷ In *Fong Yue Ting*, the Court drew an analogy between deportation and exclusion that seemed to emphasize the importance of naturalization: “The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their en-

call in the aid of the judiciary to ascertain any contested facts on which an alien’s right to be in the country has been made by Congress to depend.”).

²⁵⁴ *Id.* at 711–14. While the legislation in *Chae Chan Ping* operated with clear retroactive effect, that in *Fong Yue Ting* may present a closer question. One can argue that the Chinese laborers, having chosen to remain in the United States after the promulgation of the registration law, became fairly subject to the rule imposing deportation as a remedy. Yet the aliens in *Fong Yue Ting* were not involved in acts of continuing illegality. Cf. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44–46 (2006) (interpreting statute as imposing a permissibly prospective, if somewhat harsher, rule of deportation for undocumented aliens who chose to continue their illegal presence in the United States after the new regime was enacted).

²⁵⁵ See *Fong Yue Ting*, 149 U.S. at 730 (“He has not, therefore, been deprived of life, liberty or property, without due process of law, and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”). As noted below, subsequent cases have relied on the non-criminal conception of deportation in concluding that the ex post facto clause does not restrict Congress’s authority to impose deportation on a retroactive basis.

²⁵⁶ Morawetz, *supra* note 7, at 98, 123 & n.115.

²⁵⁷ At the time that *Chae Chan Ping* and *Fong Yue Ting* were decided, the law foreclosed individuals of Chinese descent from seeking naturalized citizenship. See Lucy E. Salyer, *Wong Kim Ark: The Contest over Birthright Citizenship*, in *Immigration Stories*, *supra* note 247, at 57–58 (reporting that, by 1882, the federal courts had held, and Congress had decreed, that individuals of Chinese descent were not “white persons” for purposes of qualifying for naturalized citizenship). One might attack this denial of access to naturalized citizenship as itself retroactive if not for the fact that the “white person” requirement had been part of the naturalization law since the Founding.

trance into the country.”²⁵⁸ On this view, Chinese laborers were admitted at Congress’s “sufferance,”²⁵⁹ were not entitled to naturalization, and gained no rights upon establishing residence in the United States.²⁶⁰ Just as Congress could exclude new Chinese laborers from the country, so too could it exclude those who returned to the country or deport those who remained or failed to register.

The centrality of naturalization issues in *Chae Chan Ping* and *Fong Yue Ting* highlights an important but often overlooked truth. The decision to uphold the power of Congress was influenced by the Court’s perception that Chinese laborers did not qualify to claim naturalized citizenship. The absence of any prospect of naturalization explains why the Court treated all Chinese laborers as a group, lumping together those who had never been to the country with those who had established a residence in the United States and secured a certificate enabling them to return. The Court apparently took the view that residence, without any prospect of naturalized citizenship, left the Chinese subject to Congress’s power to exclude. The dissenting Justices apparently recognized that the petitioners’ inability to secure naturalized citizenship was doing some of the work for the majority; Justice Field expressed doubt that the Court would uphold similar treatment of resident aliens from England, Germany, France, and Ireland,²⁶¹ aliens who were presumptively entitled to naturalization.

We do not believe that the Court’s unspoken premise can withstand careful scrutiny: Congress simply cannot escape the constraints of the naturalization clause by creating a class of individuals to whom the protections of the clause do not apply. We reach this conclusion for two reasons. First, as a logical matter, the decision of Congress to deny Chinese nationals access to naturalized

²⁵⁸ *Fong Yue Ting*, 149 U.S. at 707; see also *id.* at 724 (describing petitioners as aliens who have “taken no steps toward becoming citizens” and are “incapable of becoming such under the naturalization laws”).

²⁵⁹ *Id.* at 723–24.

²⁶⁰ See *id.* at 716 (“Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.”).

²⁶¹ *Id.* at 750 (Field, J., dissenting); see *id.* at 743 (Brewer, J., dissenting); see also Brief for the Respondent at 49, *United States v. Fong Yue Ting*, 149 U.S. 698 (1893) (No. 1345) (describing the “obnoxious subjects of China”).

citizenship is itself an exercise of power conferred in the naturalization clause. To the extent that the naturalization clause (or another provision of the Constitution) limits congressional power, it would make little sense to conclude that Congress can evade constitutional limits by excluding certain individuals from the protection of the clause. Second, we note that the natural-born children of Chinese nationals (and other aliens present in the United States) are themselves regarded as citizens of the United States.²⁶² The citizenship of children born to aliens resident in the United States offers an additional reason to regard residence as a factor that triggers limits on congressional power to exclude.²⁶³ Everyone who establishes a lawful residence in the United States, whether on the immigration track or the naturalization track, should thus enjoy the assurances of prospectivity and uniformity embedded in the naturalization clause.

Finally, we note that the issues of law posed by resident aliens, even the illegal or undocumented, do not fall into categorically separate bodies of immigration and naturalization law.²⁶⁴ Consider the representative example of Jagdish Chadha, the alien whose case led to the invalidation of the one-House veto.²⁶⁵ Mr. Chadha came to the United States on a student visa, an immigration status that assumes he would return to his home in Kenya to practice dentistry. But Mr. Chadha overstayed his visa, hoping to establish a dental practice in the United States. Although he was put in line for deportation, the Attorney General determined that Chadha deserved discretionary relief and the opportunity to switch to the naturalization track and secure a permanent resident visa. It was

²⁶² See *Wong Kim Ark v. United States*, 169 U.S. 649, 693 (1898).

²⁶³ To be sure, the federal courts have long rejected the argument that deportation of the alien parent operates as a *de facto* deportation of the citizen child. For a summary and critique, see Sonia Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 *Berkeley J. Int'l L.* 213, 259–60 (2003). Yet arguments for the preservation of an intact family continue to inform immigration policy toward the alien parents of citizen children.

²⁶⁴ One can make two responses to the argument against the extension of naturalization precepts. First, as a practical matter, the lines of separation between immigration and naturalization may not be quite so hard and fast as some assume. Even today, most resident aliens on the immigration track, assuming they have played by the rules, remain eligible to switch to the naturalization track. Much immigration law thus influences the choices of prospective candidates for naturalized citizenship.

²⁶⁵ *INS v. Chadha*, 462 U.S. 919 (1983).

that grant of discretionary relief that was restored when the Supreme Court invalidated the one-House veto.²⁶⁶ Chadha's case illustrates the fluid boundary between the rules of immigration and naturalization and shows that lawful residence in the United States, on whatever terms, should trigger the application of the rules of prospectivity, uniformity, and transparency that the Framers embedded in the naturalization clause. We now propose to define those rules more formally.

B. No Retroactive Changes in the Law

Among other lessons, the text and early history of the naturalization clause demonstrate that the Framers of the Constitution meant for Congress to establish a public and relatively stable regime for the integration of new citizens into the country. Not only did the Framers display consistent concern with ensuring the prospective development of rules of naturalization, but the members of Congress in the early Republic consistently acted as if norms of prospectivity were guiding their legislative work.²⁶⁷ Both with the establishment of the first naturalization law in 1790 and with the changes adopted in 1795 to lengthen the required period of residence, Congress took care to protect those already residing in the country. This solicitude for resident aliens reflects a general understanding that those who immigrated to the country under a particular naturalization regime were entitled to the benefit of existing law. The only legislation in which an early Congress departed from a strict regime of prospectivity—adopted during the crisis of 1798—was ameliorated after an appeal to the Constitution's prospectivity requirement and was repealed when cooler heads prevailed and norms of prospectivity were restored.

We view the requirement of an established rule, operating in favor of the reliance interests of resident aliens, as providing the basis for a challenge to certain features of the so-called plenary power

²⁶⁶ In the end, Mr. Chadha became a naturalized citizen and recently won an award for his contributions to the field of dental education from Louisiana State University. District Reports, *The Key* (Int'l Coll. of Dentists), 2006, at 50, 73, available at http://www.usaicd.org/information/theKEY/The_Key_2006web.pdf; Lena Williams, *Faces Behind Famous Cases*, N.Y. Times, June 19, 1985, at C1.

²⁶⁷ See *supra* Section III.B.

doctrine. Under the terms of this much-criticized doctrine,²⁶⁸ the Supreme Court has recognized that Congress has broad power to rework the rules of immigration and naturalization.²⁶⁹ This power corresponds to the Framers' perception that Congress was to have broad authority over immigration and could foreclose certain classes of aliens from access to naturalized citizenship. In addition, the Court has upheld the application of new immigration rules on a retrospective basis.²⁷⁰ In this section, we sketch the evolution of the plenary power doctrine and show that it conflicts with the requirement of prospectivity that inheres in the obligation that Congress establish a rule of naturalization.

Following the conclusion in *Chae Chan Ping* and *Fong Yue Ting*, the non-criminal characterization of deportation proceedings has played a crucial role in denying resident aliens the benefit of norms of prospectivity. Thus, in *Galvan v. Press*, the Court confronted a law that made membership in the Communist Party a basis for deportation proceedings.²⁷¹ At the time of the alien's membership in the Party, such affiliation was not forbidden; indeed, he had left the Party before the new Party-member deportation provision took effect.²⁷² In an opinion by Justice Frankfurter, the Court appeared to acknowledge strong arguments in favor of reading some assurance of prospectivity into the Constitution.²⁷³ In the end, though, the

²⁶⁸ See Neuman, Strangers, *supra* note 3, at 134–37 (noting the uncertainty in defining the plenary power doctrine and scholars' critique of the doctrine); see also Moto-mura, *supra* note 1, at 1626 (explaining that “[c]ourts have been reluctant to apply constitutional norms and principles to test the validity of subconstitutional immigration law” because of the “judicially created plenary power doctrine, under which Congress and the executive branch have broad and often exclusive authority in immigration matters”); Michael Scaperlanda, Polishing the Tarnished Gold Door, 1993 Wis. L. Rev. 965, 965 (criticizing continued reliance on the plenary power doctrine).

²⁶⁹ Nancy Morawetz notes that the landmark cases establishing the plenary power doctrine in immigration were issued within years of *Plessy v. Ferguson*, 163 U.S. 537 (1896). These cases “built on the idea that race could be determinative of a group's ability to assimilate as Americans.” See Morawetz, *supra* note 7, at 98 n.9 (referring to *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) and *Fong Yue Ting v. United States*, 149 U.S. 698, 743 (1893)); see also Legomsky, Plenary Power, *supra* note 6, at 288–89.

²⁷⁰ See Gerald L. Neuman, Discretionary Deportation, 20 Geo. Immigr. L.J. 611, 615–16 (2006); see also *infra* notes 271–74.

²⁷¹ See *Galvan v. Press*, 347 U.S. 522, 523 (1954).

²⁷² *Id.* at 523–24.

²⁷³ *Id.* at 530–31 (noting that “[i]n light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power,

Court concluded that the “slate [was] not clean” and that the “whole volume” of history supporting the plenary power of Congress over immigration required reaffirmation of the “unbroken rule of this Court that [the *ex post facto* clause] has no application to deportation.”²⁷⁴

One can fairly ask how much of *Galvan v. Press* remains good law. Although members of the Court continue to cite the case as support for the plenary power doctrine,²⁷⁵ others have taken pains to avoid interpretations of the law that would produce retroactive deportation effects. In *INS v. St. Cyr*,²⁷⁶ the Court considered challenges to provisions of two important immigration reform laws of the 1990s. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), subjected many aliens, including lawful permanent residents (LPRs) to deportation for crimes committed before the legislation was passed.²⁷⁷ The Immigration and Naturalization Service (INS, now the Department of Homeland Security) took the position that 440(d) of AEDPA eliminated discretionary waiver from deportation for commission of certain offenses under 212(c).²⁷⁸ Advocates challenged this determination on both statutory and due process grounds.²⁷⁹

much could be said for the view, were we writing on a clean slate, that the due process clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation” (internal citations omitted)).

²⁷⁴ *Id.* at 531.

²⁷⁵ See, e.g., *Negusie v. Holder*, 129 S. Ct. 1159, 1180 n.2 (2009) (Thomas, J., dissenting); *Demore v. Kim*, 538 U.S. 510, 547 n.9 (2003) (Souter, J., concurring in part and dissenting in part).

²⁷⁶ 533 U.S. 289 (2001).

²⁷⁷ See Morawetz, *supra* note 7, at 99 (citing Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.) [hereinafter AEDPA] and Pub. L. No. 104-208, Div. C, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546 (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA]).

²⁷⁸ Memorandum from David A. Martin, General Counsel, Immigration and Naturalization Service to all Regional Counsels and District Counsels (Apr. 26, 1996), *cited in* Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Deportation Laws*, *in* *Immigration Stories*, *supra* note 247, at 279, 283 n.11.

²⁷⁹ Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Deportation Laws*, *in* *Immigration Stories*, *supra* note 247, at 279,

The Supreme Court considered two elements of this challenge. First, the Court evaluated the government's argument that the 1996 amendments foreclosed federal courts from exercising habeas jurisdiction to review the statutory bar to discretionary relief.²⁸⁰ Invoking the doctrine of constitutional doubt, the Court held that the statute failed to contain the requisite clear statement of congressional intent to repeal habeas jurisdiction.²⁸¹ Second, the Court addressed the substantive question of whether the amendments could be applied retroactively, thus depriving the petitioner of discretionary 212(c) relief that had been available when he committed and pled guilty to his deportable offense.²⁸² Citing the interpretative canon that presumes Congress does not intend retroactive application of its laws,²⁸³ the Court held that the law did not bar discretionary review.²⁸⁴ Yet the Court was quick to note that there was no constitutional prohibition against retroactive laws, as long as Congress spoke with the requisite clarity.²⁸⁵

While *St. Cyr* limits retroactive application of laws to some degree, it does little to protect aliens' reliance interests from a deter-

284–97 (describing the methods used to challenge the transitional and permanent rules under AEDPA and IIRIRA).

²⁸⁰ *St. Cyr*, 533 U.S. at 292–93.

²⁸¹ *Id.* at 298–99. Congress responded by enacting an Act with such a clear statement. The REAL ID Act of 2005 “foreclose[s] the use of 28 U.S.C. § 2241 to obtain review of removal orders and their implementation.” *Medellin-Reyes v. Gonzales*, 435 F.3d 721, 722 (7th Cir. 2006); see also *Jaber v. Gonzales*, 486 F.3d 223, 230 (6th Cir. 2007). In any case, interpretation of the amendments as a bar to judicial review of pure questions of law, such as that presented by *St. Cyr*, might give rise to constitutional questions. *St. Cyr*, 533 U.S. at 300–01 (suspension clause might be implicated if the Court interpreted the amendments to strip habeas jurisdiction).

²⁸² *St. Cyr*, 533 U.S. at 293.

²⁸³ *Id.* at 316 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1993) (“[This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.” (internal quotation marks and citations omitted))).

²⁸⁴ *Id.* at 326.

²⁸⁵ *Id.* at 316 (quoting *Landgraf*, 511 U.S. at 272–73) (“Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”).

mined Congress. Scholars have structured arguments against retroactive application of immigration laws on due process grounds.²⁸⁶ Our suggested reading of the naturalization clause complements this scholarship, but bases its rejection of retroactivity on the requirement that Congress establish a uniform rule. This suggested reformulation of the plenary power doctrine permits Congress to change the law as applied to aliens, so long as it complies with norms of prospectivity. It thus corresponds to the best reading of the naturalization clause and to the distrust of retroactive legislation that informed the immigration law of the early Republic and the late nineteenth century.²⁸⁷

Such a reformulated doctrine might better explain certain features of the constitutional law of immigration and naturalization. To begin with, the Court's decisions provide some support for the proposed reading of the naturalization clause as a source of qualified power over aliens. Thus, in *INS v. Chadha*, the Court characterized the clause as providing Congress with "unreviewable authority" over the regulation of aliens, subject to the requirement that Congress choose a "constitutionally permissible means of implementing that power."²⁸⁸ Our view of the naturalization clause helps to give content to these constitutionally permissible means. In addition, by drawing on the naturalization clause, the Court could identify limits on retroactivity without questioning its earlier conclusion that deportation was a non-criminal proceeding to which the ex post facto clause does not apply. Such an approach would occasion less doctrinal dislocation. Finally, the suggested approach would provide a firmer foundation for some results that courts have been reaching in other ways. For instance, in assessing

²⁸⁶ See generally Morawetz, *supra* note 7.

²⁸⁷ See *Chew Heong v. United States*, 112 U.S. 536, 559–60 (1884) (invoking the presumption against retroactivity, among other considerations, in refusing to give retroactive effect to a requirement that Chinese nationals obtain a certificate to gain re-entry into the country); *United States v. Jung Ah Lung*, 124 U.S. 621, 633–34 (1888) (applying *Chew Heong*); see also *United States v. Menasche*, 348 U.S. 528, 535 (1955) ("The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws."); cf. *Lau Ow Bew v. United States*, 144 U.S. 47, 61–62 (1892) (noting that aliens domiciled in the United States enjoy some citizenship-like privileges and immunities).

²⁸⁸ *INS v. Chadha*, 462 U.S. 919, 940–41 (1983).

whether an individual had qualified for derivative citizenship, the Second Circuit has applied the law in effect as of the date of the alien's completion of the last step necessary to qualify.²⁸⁹ Our suggested understanding of the naturalization clause provides an entirely straightforward basis for such results.

Perhaps most intriguingly, our approach suggests an alternative basis for the commonplace, but nonetheless puzzling, conclusion that the Constitution's protections do not apply to aliens without property or presence in the United States. One sees this conclusion frequently stated in territorial terms, as if the Constitution applies only to immigration matters that take place inside the territory of the United States.²⁹⁰ One also sees it reflected in the cases that afford resident aliens greater rights to contest deportation than non-resident aliens have to contest their exclusion from the United States.²⁹¹ Yet such a territorially restrictive view of the Constitution has become increasingly difficult to square with the Court's recent decision that the habeas non-suspension clause applies to aliens detained at Guantanamo Bay. In *Boumediene v. Bush*, the Court invalidated congressional restrictions on the right of aliens to seek habeas review of their confinement, despite the fact that the detention occurred outside the sovereign territory of the United States and the aliens in question lacked any property or presence in the United States.²⁹² If constitutional limits apply to the government when it imposes detention overseas (as one of us has argued previously),²⁹³ then it may be difficult to contend that the Constitution's

²⁸⁹ See *Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005) ("To determine whether Ashton obtained U.S. citizenship as a result of his mother's naturalization, we apply the law in effect when Ashton fulfilled the last requirement for derivative citizenship."); see also *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007) (holding that law eliminating suspension of deportation for aliens who had been convicted of certain crimes did not apply to alien who sought naturalization and suspension before the act took effect).

²⁹⁰ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 274-75 (1990).

²⁹¹ Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 *Tex. L. Rev.* 1661, 1670-71 (2000) [hereinafter Neuman, *Immigration Law*] (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 544 (1950)).

²⁹² *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

²⁹³ See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 *Cornell L. Rev.* 497, 499 (2006).

protections apply only to aliens with some presence in the country.²⁹⁴

Rather than thinking of constitutional protections in territorial terms (and as presumptively inapplicable to government activity outside the United States), it may be more fruitful to evaluate the rights of aliens in terms of the residential trigger of the prospectivity assurances in the naturalization clause. As we have seen, the Framers regarded the norm of prospectivity as applying to aliens who had established a physical residence in the United States in reliance on an existing framework for admission to citizenship. The focus on residence reflected historical practice; under every public law of naturalization with which the Framers were familiar, a specified period of residence was required before the alien could apply for access to citizenship.²⁹⁵ Once a residential presence was established, retroactive changes in the framework for obtaining citizenship were viewed as inconsistent with the nation's obligations under the Constitution. Building on these views of the Framers, one can fashion a fairly straightforward distinction between the rights owed to aliens who establish a residential presence here and those, outside the country, who have yet to make their way to the United States. Non-resident aliens would appear to fall into a group to which Congress owes no obligation of prospectivity under the naturalization clause. Yet the same group might well claim rights under the habeas non-suspension clause or other constitutional provisions that protect individuals from government conduct overseas. By grounding its analysis in the residential focus of the naturalization clause, the Court could justify a territorial distinction between the duties owed to resident and non-resident aliens and avoid the anomalies of viewing other rights-protective provisions of the Constitution as territorially restricted.

²⁹⁴ To be sure, the Court limited its decision to a conclusion that the habeas non-suspension clause has full effect in Guantanamo Bay. See *Boumediene*, 128 S. Ct. at 2262. But it remains uncertain what weight to give to this limitation; after all, the Court had no reason to consider other provisions of the Constitution. For a characteristically rich and insightful exploration of these issues, see Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259 (2009) [hereinafter Neuman, *Extraterritorial Constitution*].

²⁹⁵ As explained in Parts I and II, residence played a role in Parliament's naturalization act of 1740, in the laws adopted by the newly independent states, and in Congress's naturalization act of 1790.

C. No Private Naturalization Bills

Complementing the ban on retroactive legislation, the Framers' decision to empower Congress to "establish an uniform rule of naturalization" forecloses private naturalization bills. While the private bill system, coupled with denization by the Crown, was an acknowledged feature of colonial systems of naturalization, the Framers specifically rejected the exercise of case-by-case legislative control.²⁹⁶ As we have seen, such case-by-case naturalization decisions, like other forms of legislative adjudication, were associated in the minds of the Framers with the payment of exorbitant fees and the production of inherently arbitrary and discriminatory results.²⁹⁷ We think the Framers rejected this system in favor of naturalization pursuant to a public law of general applicability. Such a transparent and uniform model of naturalization would best give effect to the Framers' goal of "peopling" North America through relatively liberal immigration policies. Moreover, such an interpretation best accounts for the Framers' decision to drop an early version of the clause, which empowered Congress simply to regulate, and to adopt a later draft that specifically required the establishment of a uniform rule.

In contending that the naturalization clause forecloses private bills, we draw support from the action of early Congresses. As we have seen, the First Congress deliberately rejected a petition for the adoption of a private naturalization bill, apparently on constitutional grounds. Later Congresses held to this position. Despite a flood of petitions, decrying the unfairness of the 1798 naturalization law, Congress declined to adopt private bills.²⁹⁸ Rather, as we have seen, Congress chose to repeal the harsh 1798 law, and to adopt curative legislation of general applicability that would provide relief across the board to all deserving applicants.²⁹⁹ Congress

²⁹⁶ One sees evidence of the rejection of case-by-case administration in the Constitution's requirement that Congress adopt public and uniform laws of general application and in the rejection of naturalization petitions by the members of the First Congress. See *supra* notes 175–82 and accompanying text.

²⁹⁷ See *supra* p. 388. On the abuses inherent in private legislation, see Comment, *The Constitutionality of Private Acts of Congress*, 49 *Yale L.J.* 712, 714–15 (1940) (noting maladministration and widespread abuses at various times in the nation's history).

²⁹⁸ For an account of the petitions to Congress in the late 1790s and early 1800s, see Smith, *supra* note 177, at 112 (describing the flow of petitions as a "minor flood").

²⁹⁹ See *supra* notes 189–93 and accompanying text.

refrained from adopting any private legislation until 1839, a full fifty years after the founding. Even then, the bill simply corrected the naturalization record of the petitioner to state his name correctly; it did not actually confer citizenship on the petitioner.³⁰⁰ Perhaps as a consequence, the congressional record from the date of the Senate's passage of the bill does not reflect any debate about its constitutionality.³⁰¹

Today, Congress plays a more active role in the consideration and adoption of private immigration and naturalization laws. These bills generally operate like the decrees of a court of equity, relieving the petitioner from the perceived harshness of the general rule.³⁰² The form of relief can vary; some laws waive the application of a quota and admit a particular immigrant to the country while others directly confer citizenship.³⁰³ One student of the legislative process highlights its similarity to the practice of a court of equity by emphasizing the importance of identifying a precedent for relief among congressional records.³⁰⁴ While the number of petitions for such legislation has ebbed and flowed over time, recent years have witnessed a general downward trend from 7293 petitions in the 90th Congress (1967–1968) to 2866 in 1972 to 194 in the 100th Congress (1987–1988). Of the petitions received, only twenty-one private bills were adopted in the 1987–1988 period.³⁰⁵

Whatever the constitutional justification for private naturalization bills,³⁰⁶ it seems unlikely that they could be successfully chal-

³⁰⁰ See An Act for the relief of Dr. John Campbell White, ch. 23, 6 Stat. 750 (1839).

³⁰¹ See Cong. Globe, 25th Cong., 3d Sess. 143 (1839).

³⁰² See 117 Cong. Rec. 10,143 (1971) (remarks of Rep. Peter Rodino (New Jersey)) (describing private bills as providing an “extraordinary remedy” for those facing “unusual hardship”).

³⁰³ Congress conferred citizenship unconditionally as early as 1912. See An Act for the relief of Eugene Prince, 37 Stat. 1346 (1912). See generally Maguire, *supra* note 37, at 3 (describing types of naturalization bills).

³⁰⁴ See Maguire, *supra* note 37, at 3–4.

³⁰⁵ *Id.* at 7.

³⁰⁶ One commentator argues that the uniformity requirement applies only to geographic uniformity and thus neither requires uniform treatment of individual petitioners nor rules out private bills. See Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1685 (1966) (viewing private bills as “necessary and proper” to the effectuation of congressional power over naturalization). But note that the clause in question refers to a single uniform rule, made applicable to all prospective citizens. Even if uniformity primarily addressed state-to-state variability, the requirement of a single rule seemingly forecloses the disparate treatment of similarly situated candidates. See

lenged in federal court. For starters, when Congress confers a private benefit on individual petitioners, one has difficulty identifying a party that would have standing to challenge the benefit so conferred.³⁰⁷ Justiciability doctrines thus bar most conceivable challenges.³⁰⁸ Even if a court were inclined to hear such a case, private naturalization bills almost invariably operate to provide *relief* to the petitioner. Courts might understandably prefer to dodge litigation that seeks to challenge the conferral of such congressional benefits. From the perspective of private litigants, then, private bills may appear to constitute a victimless constitutional infringement and a necessary safeguard against harsh results. Indeed, some argue that private bill practice encourages the submission of petitions that help to inform Congress about needed legal reforms.³⁰⁹

Crosskey, *supra* note 76, at 487 (arguing that the textual requirement of a “uniform rule” was unnecessary if the Framers simply wanted to ensure that naturalization laws were the same throughout the states); see also Hertz, *supra* note 124, at 113–15.

³⁰⁷ For a summary of standing doctrine and the requirement that individual litigants suffer some concrete personal injury, see James E. Pfander, *Principles of Federal Jurisdiction* 30–34 (2006).

³⁰⁸ To be sure, a congressional grant of naturalized citizenship might be contested in the context of a dispute over rights in real property. So long as common law alien property disabilities remain intact, a party might challenge the right of an improperly naturalized citizen to secure or convey good title to land. In addition, one alien might argue for judicial relief from some aspect of the law by pointing to the passage of private legislation on behalf of another alien in the same situation. It seems highly unlikely that a court would grant relief on such a basis. See *INS v. Pangilinan*, 486 U.S. 875, 876 (1988) (rejecting equal protection-based naturalization claims of Filipino veterans of World War II, despite fact that others in a similar situation had gained naturalization rights).

³⁰⁹ For an argument that the private bill system benefits immigrants, see Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 *Geo. Immigr. L.J.* 273, 274 (2004) (contending that private bills serve an “informational” purpose by highlighting “necessary changes to rigid or unintended aspects of the public law”); see also Maguire, *supra* note 37, at 5. Yet a congressional refusal to adopt private bills would not deprive Congress of the information supplied by private petitions for relief; the nation’s early experience with curative legislation reveals that Congress can respond to claims of unfair application of the law by adopting rules of lenity that apply across the board, instead of doing so case by case. For evidence that widespread petitioning persisted in the early Republic despite Congress’s refusal to adopt private bills, see Franklin, *supra* note 186, at 169–70 (describing petitions to Congress in 1824 and the adoption of curative legislation in response); Michael J. Wishnie, *Immigration and the Right to Petition*, 78 *N.Y.U. L. Rev.* 667, 697–711 (2003) (describing petitions to Congress in the period 1798–1804); cf. Griffith, *supra*, at 293 (quoting Rep. Barney Frank’s ac-

Accepting that arguments can be made for private bills, their benign appearance may mask a more malignant reality. The losers in a private bill process are those who qualify for relief on the same basis as the beneficiaries of private legislation but lack the clout or connections necessary to secure their own bill. The Framers sought to ensure that the benefits of naturalization were available on an equal basis to all similarly situated persons and for this reason required Congress to establish a uniform rule. The passage of private legislation undercuts the goal of transparency and uniformity in favor of the deal-making and log-rolling of the legislative process. Perhaps it comes as no surprise, given the history of private naturalization bills in England, that seven members of Congress in the ABCAM scandal were convicted of accepting bribes in exchange for an agreement to push private naturalization bills.³¹⁰ Congress should end the practice; indeed, some hopeful evidence suggests that Congress has increasingly assigned the exercise of discretion to executive branch officials and has moved to limit the number of private bills.³¹¹

Even if the federal courts will have no occasion to invalidate private naturalization bills, our interpretation of the naturalization clause has a role to play in understanding the separation of powers doctrine in the immigration context. Indeed, our account of the limited legislative role dovetails nicely with Justice Powell's concurring opinion in *INS v. Chadha*, a case best known for invalidating the one-House veto.³¹² Powell's opinion offers a useful summary of the concerns that gave rise to the prohibition of congressional adjudication and private legislation in the naturalization context. Powell noted that "[o]ne abuse that was prevalent during the Confederation was the exercise of judicial power by the state legisla-

knowledge that a class of cases can be better dealt with through "[public] legislation" than through a private bill).

³¹⁰ See Griffith, *supra* note 309, at 302.

³¹¹ On the transfer of congressional discretion to the executive branch, see *INS v. Chadha*, 462 U.S. 919, 954 (1983); Griffith, *supra* note 309, at 278–79 (tracing the transfer of discretionary authority from Congress to the executive branch). Griffith reports that, as of 2004, only one person had obtained relief from the relatively harsh provisions of AEDPA. *Id.* at 276, 293.

³¹² *Chadha*, 462 U.S. at 919. As noted above, Chadha sought judicial review of the agency's decision to give effect to the House's determination. See *supra* notes 265–66 and accompanying text.

tures,” and that the Framers were familiar with the dangers of such a practice.³¹³ In order to avoid such dangers, the Framers had created a tripartite system dependent on a separation of the powers of the three branches.³¹⁴ In addition to these structural protections, Powell noted that the bill of attainder clause, Article I, Section 9, also lent support to the “Framers’ concern that trial by legislature lacks the safeguards necessary to prevent the abuse of power.”³¹⁵ In the end, Powell concluded that congressional exercise of an adjudicatory role lacks the sort of checks that “prevent it from arbitrarily depriving [aliens] of the right to remain in this country.”³¹⁶

Although his account of the Framers’ distrust of legislative adjudication attracted some sympathy, the other Justices leveled an important criticism at Justice Powell’s approach. Powell based his conclusion on general separation-of-powers principles, arguing that such principles foreclosed Congress from playing an adjudicatory role.³¹⁷ But as the majority and dissent alike observed,³¹⁸ the federal courts often lacked statutory authority to review certain discretionary decisions of the Attorney General relating to relief from deportation. The absence of any judicial role raised doubts about Powell’s assertion that Congress had arrogated to itself a function that was inherently judicial. But Powell could have sidestepped that concern by deploying the naturalization clause. The clause forecloses Congress from exercising case-by-case authority in immigration matters, quite without regard to whether such individual decisions can best be conceptualized as administrative or judicial in character. On this view, the Constitution would require Congress to delegate the application of standards to other branches, thus barring Congress from performing the work itself or retaining a power to review the work of other branches (as it did in *Chadha*).

³¹³ *Chadha*, 462 U.S. at 961 (Powell, J., concurring) (noting that “Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and ‘[t]hey have accordingly in many instances *decided rights* which should have been left to *judiciary controversy*’” (quoting *The Federalist* No. 48, at 336 (James Madison) (J. Cooke ed., 1961) (quoting Thomas Jefferson, *Notes on the State of Virginia* 196 (London ed. 1787)))).

³¹⁴ *Chadha*, 462 U.S. at 962.

³¹⁵ *Id.*

³¹⁶ *Id.* at 966.

³¹⁷ *Id.* at 962.

³¹⁸ *Id.* at 957 n.22; *id.* at 1001–02 (White, J., dissenting).

D. No Public Rights Doctrine

Our criticisms of the plenary power doctrine and the adoption of private legislation lead us to question the application of the “public rights” doctrine to issues of immigration and naturalization law. In general, the public rights doctrine holds that Congress may assign disputes involving the federal government to Article I tribunals, the judges of which lack the salary and tenure protections required by Article III.³¹⁹ In a leading discussion, albeit one not essential to its holding, the Supreme Court in *Crowell v. Benson* included immigration issues on the list of disputes in the public rights category.³²⁰ In doing so, the Court relied upon plenary power cases from the nineteenth century.³²¹ In other words, the Court has taken the position that Congress’s plenary power over issues of immigra-

³¹⁹ An elaborate jurisprudence now governs the power of Congress to assign federal claims to non-Article III courts. For descriptions and criticisms of the doctrine, see Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Federal Power* 53–82 (2d ed. 1990); Richard B. Saphire & Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. Rev. 85 (1988). The Court first gave voice to the public rights exception in 1855, upholding the power of Congress to provide for the issuance of a distress warrant on the basis of executive branch, rather than judicial branch, determination of the factual predicate for a claim that an individual owed money to the federal government. See *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 284 (1855) (identifying “matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper”). Thus, the doctrine refers to the “public right” to recover money owed to government.

³²⁰ See *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932). The *Crowell* Court included the following within the public rights category: “interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.” *Id.* at 51.

³²¹ In justifying the inclusion of immigration cases within the public rights doctrine, see *id.* at 51 n.13, the Court’s accompanying footnote referred to *United States v. Ju Toy*, 198 U.S. 253, 263 (1905). In *Ju Toy*, the Court refused to order a judicial determination of a claim of citizenship by one detained at the border. *Ju Toy*, in turn, relied on *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), and *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893), two plenary power cases. The application of the public rights doctrine thus grows out of the Court’s conception that Congress has plenary power over immigration matters. Professor Richard Fallon has identified an explicit link between the plenary power doctrine and the view that immigration issues present matters of public right that can be consigned to non-Article III tribunals, although he questions the persuasiveness of that conclusion. See Fallon, *supra* note 14, at 967.

tion and naturalization law includes a power to assign the final resolution of disputes over the application of the rules to non-Article III tribunals and curtail the federal judicial role.

Relying on the public rights/plenary power decisions, Congress has assigned the determination of a broad range of immigration matters, including initial entry and removal decisions, to administrative agencies. Immigrants seeking judicial review of these agency determinations face the usual sorts of constraints imposed by administrative law.³²² Congress sometimes goes further, as it did in the AEDPA and IIRIRA, curtailing all judicial review by giving binding effect to the agency's determination.³²³ The perceived absence of any substantive constitutional constraints on Congress's power over immigration matters contributes to the perception that Article III courts have no distinctive role to play.³²⁴ Or, to put it a slightly different way, if Congress can deny entry into the country and citizenship altogether, then perhaps it can confer these privileges on whatever terms it chooses, and limit access to judicial review.³²⁵ One version of this idea was captured in the Court's notion that whatever Congress prescribes "is due process as far as the alien denied entry is concerned."³²⁶

Yet despite occasional assertions to the contrary, the public rights doctrine provides little justification for the curtailment of ju-

³²² For an overview of the administrative law issues in immigration and asylum cases, see Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 *Stan. L. Rev.* 413 (2007).

³²³ For a description of the jurisdictional curtailment in AEDPA and IIRIRA, see Stephen H. Legomsky, *Deportation and the War on Independence*, 91 *Cornell L. Rev.* 369, 380–84 (2006). See generally Neuman, *Immigration Law*, *supra* note 291, at 1695 (noting, among other things, the restrictions on judicial review of orders for removal of deportable aliens in the two laws).

³²⁴ As Professor Daniel Meltzer observed, it seems odd to suggest that aliens may lack substantive constitutional rights but possess a right to judicial review. Meltzer, *supra* note 16, at 2571.

³²⁵ See Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 *Harv. C.R.-C.L. L. Rev.* 1, 30 n.162 (2002) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2 (1938)), "which characterized deportation as 'revocation of a privilege voluntarily granted'"; Milton M. Carrow, *The Background of Administrative Law* 21, 62 (1948), which characterized immigration issues as involving the loss of government privileges or benefits; J. Roland Pennock, *Administration and the Rule of Law* 163 (1941), which concluded that immigration cases have received only limited judicial review because they fall into the broad category of "suits arising out of gratuities or favors granted by the government."

³²⁶ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

dicial review in the immigration arena.³²⁷ Although we often think of the public rights doctrine as a monolithic reference to any litigation that involves the federal government as a party,³²⁸ the doctrine actually consists of two separate strands. In one strand, individuals pursue claims for the payment of government benefits, such as the invalid pension claims that troubled the circuit courts in *Hayburn's Case* and the social security claims that many disabled Americans file today.³²⁹ In a second strand, exemplified by *Murray's Lessee v. Hoboken Land and Improvement Co.*,³³⁰ individuals seek to recoup the losses they suffer through the allegedly unlawful conduct of the government: taxes wrongly collected, property wrongly taken, government contracts breached, search or arrest warrants improperly executed, persons wrongly detained or imprisoned.³³¹ These matters may give rise to litigation with the federal government or with its individual agencies or officers depending on the forms of action and jurisdictional grants available to the federal courts.

These two strands of the public rights doctrine rest on different foundations and provide different justifications for the exercise of congressional control. In the case of government benefits, Congress, exercising its appropriations power, has the power to retain for itself the task of distributing funds.³³² Alternatively, Congress can transfer the decision about the distribution of government largesse to a government agency, as it did, for example, with the dis-

³²⁷ Recent cases find that the judicial role has survived legislation that appears to have been designed to immunize agency decisions from federal judicial oversight. See *Zadvydas v. Davis*, 533 U.S. 678, 687–88 (2001); *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

³²⁸ The Court has suggested that the public rights doctrine may extend to certain kinds of private litigation that take place in the shadow of a complex regulatory scheme. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985).

³²⁹ See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). For an account of the litigation, see Pfander, *supra* note 14, at 699–704.

³³⁰ 59 U.S. (18 How.) 272 (1856).

³³¹ In each of these exemplary cases, the individual could claim an invasion of life, liberty, or property, the traditional common law triggers of judicial review.

³³² Thus, during the early Republic, Congress considered private money claims against the United States through its committees and adopted an appropriations bill to pay well-founded claims. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 *La. L. Rev.* 625, 626–27 (1985).

tribution of public lands.³³³ Finally, Congress can give authority to the federal courts to hear the matter, provided it has made provision for the courts to act with the finality that Article III demands. If Congress wishes to preserve a measure of control, then it can assign the decision to a legislative court or non-Article III tribunal and oversee the benefit determinations of that body. The story of veteran benefits in the early Republic follows this pattern; Congress initially empowered the War Department to adjust the claims and then transferred them to the courts, albeit without sufficient finality to enable the courts to proceed.³³⁴ Eventually, Congress called upon commissioners to make the initial determination, followed by administrative and legislative review.³³⁵ The treatment of these benefit determinations might provide a predicate for the denial of judicial review over immigration and naturalization matters.

Along with the benefit strand, the Court has invoked the public rights doctrine of *Murray's Lessee* as the basis for Congress to bypass judicial review.³³⁶ But one can question the analogy. The famous dictum in *Murray's Lessee* does not uphold any power in Congress to sidestep judicial review altogether (although Congress has no obligation to open the courts to a claim against the government). Rather, it was a question of timing; judicial review could occur at the threshold, if the government brought suit to collect the

³³³ On the use of executive officers to distribute public lands, see Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 566, 577–80 (2007).

³³⁴ See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 *Mich. L. Rev.* 1, 35–40 (2008).

³³⁵ Today, in the areas of social security and veteran's benefits, Congress has given agencies the power to make final benefit decisions, thereby clearing the way for judicial review. See Pfander, *supra* note 14, at 747 n.492.

³³⁶ For the dictum, suggesting that Congress may grant or withhold a judicial forum, see *supra* note 319. To understand the dictum, one must understand that the statutory scheme empowered the government to distrain or seize an individual's property to satisfy a government debt and it gave the government good title to the property on the date of the seizure. (This gave the government priority in a race to the debtor's assets; the other creditors had to obtain a judgment first and then seize the property in satisfaction.) If the debtor wished to contest the seizure of property on the ground that no debt was owed, the common law would furnish a remedy in the form of a suit against the marshal. But instead of relying on that common law remedy, the statute in question allowed the debtor to post a bond for the value of the property and file suit against the government to restrain the seizure and return the property. Thus, the seizure (or bond) would secure the government's financial interest during orderly litigation over the legality of the alleged debt. The Court recognized that Congress could control the timing, but not the existence, of judicial review.

debt, or it could occur after the seizure of property at the suit of the debtor. The true lesson of *Murray's Lessee*, then, is one of respect for common law remedies as the bedrock source of the right to judicial review, coupled with a recognition that Congress necessarily has discretion over the nature and timing of such review. The Court tried to make this clear, stressing that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law."³³⁷ Note that *Murray's Lessee* involved the seizure of property, the sort of government activity that traditionally gave rise to common law remedies in trespass. Other classic common law remedies include the assumpsit action to challenge the wrongful exaction of taxes, the mandamus proceeding to compel government action, and the habeas remedy for wrongful imprisonment or detention.³³⁸ As to all of these government interactions, *Murray's Lessee* suggests that common law remedies define the constitutional minimum, even in cases involving litigation with the government or its officers that fall squarely within the traditional understanding of the public rights doctrine.

Yet the *Murray's Lessee* dictum has been misunderstood by those who assume that the Court meant to recognize Congress's authority to control not just the timing of judicial review, but also its ultimate availability. The Court's summary of the public rights doctrine in *Crowell v. Benson* provides a good example of the confusion. The *Crowell* dispute itself involved a matter of private rights and the Court took pains to preserve judicial review. Yet in summarizing the scope of the public rights doctrine, the *Crowell* majority explained that public rights were matters that Congress could reserve to itself, delegate to executive officials, or commit to

³³⁷ *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *Yale L.J.* 524 (2005) (tracing the common law origins of the duty of government to provide a right to redress).

³³⁸ On the use of suits against government officers to challenge invasions of life, liberty, and property, see David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 *U. Colo. L. Rev.* 1 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 *Case W. Res. L. Rev.* 396, 399 (1987). On the special role of habeas corpus litigation in securing review of the legality of custody in immigration, see Neuman, *Habeas Corpus*, *supra* note 1.

judicial tribunals.³³⁹ In support of that proposition, the Court cited a case in which the Court concluded that the court of customs appeals was to be regarded as an Article I court to which the judicial power of the United States did not extend.³⁴⁰ The Court went on to list the proceedings that came within the scope of the public rights doctrine, including disputes over immigration, taxation, public lands, and veteran benefits.³⁴¹ The discussion thus mixed the two strands of public rights cases together as if they all entailed the same measure of congressional control.

In regulating immigration and naturalization, Congress cannot exercise untrammelled control of judicial review under either strand of the public rights doctrine. Under the first strand of the doctrine, one might argue that Congress can distribute the benefits of immigration as it sees fit, granting or withholding the privilege of entry and citizenship, transferring discretion to the executive branch, or providing for judicial determination of such matters. But recall that Congress does not enjoy the power, under the naturalization clause, to grant or withhold the privileges of naturalization on a case-by-case basis. Rather, the requirement that Congress establish a uniform rule precludes such discretionary determinations and bars Congress from either adjudicating immigration claims or passing private bills to confer rights on particular immigrants. As we saw in Part II, early Congresses respected these limits: they refrained from passing private legislation and delegated the determination of discretionary matters to the courts. The 1790 Act called for common law courts of record to decide, essentially as a matter of discretion since no statutory criteria existed, if the applicant was a person of “good moral character.”³⁴² While Congress has broad power over immigration, in short, it lacks the sort of power to make discretionary decisions that it enjoys over the appropriation of government revenues and distribution of government property (such as public land).³⁴³ Congress can create a framework for the

³³⁹ See *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

³⁴⁰ See *id.* at 50–51 (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

³⁴¹ *Id.* at 51.

³⁴² See *supra* note 152.

³⁴³ The contrast in constitutional language confirms this conclusion. Compare U.S. Const. art. I, § 8, cl. 4 (providing for Congress to establish a uniform rule of naturalization), with *id.* at art. I, § 8, cl. 1 (empowering Congress to collect taxes to “pay the Debts . . . of the United States”), and *id.* at art. IV, § 3, cl. 2 (empowering Congress to

resolution of immigration matters, and can place certain responsibility for the decisions in the executive branch, but cannot diminish the judicial role by invoking its own authority to do as it sees fit.

The second strand of the doctrine holds that Congress can substitute for, but not displace, common law remedies against government officials. We can begin by acknowledging that aliens cannot claim a right, at common law, to citizenship by virtue of extended residence or good behavior. The common law did not recognize a right to citizenship by adverse possession. Yet aliens who established a lawful residence in the United States were entitled to the benefit of existing naturalization rules, free from any retrospective changes. Judicial intervention may be required to enforce these constitutional limits on congressional control. Moreover, in the course of administering immigration rules, the federal government often takes individuals into custody, either to prevent their entry into the country or in connection with deportation proceedings.³⁴⁴ Individuals subject to custody imposed by executive decree, rather than through judicial process, have long enjoyed the right at common law to test the legality of their confinement by filing a petition for the writ of habeas corpus.³⁴⁵ Viewed within the framework of *Murray's Lessee*, this common law right to habeas corpus suggests that Congress may substitute alternative forms of judicial review but cannot foreclose access to Article III courts for an evaluation of the legality of custody.

Much the same conclusion emerges from the non-suspension clause, which prohibits suspension of the privilege of the writ of habeas corpus except in times of invasion or rebellion. As the Court explained in *Boumediene v. Bush*, the non-suspension clause operates to guarantee the privilege of the writ of habeas corpus or an equally effective alternative mode of judicial review.³⁴⁶ Congress

“dispose of” and make “all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”). Thus, while the naturalization clause requires Congress to establish a uniform rule, the spending and property clauses impose no restrictions.

³⁴⁴ See Neuman, *Extraterritorial Constitution*, supra note 294, at 286 (exploring the importance of custody as a predicate for judicial review).

³⁴⁵ See Neuman, *Habeas Corpus*, supra note 1, at 985.

³⁴⁶ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008). For an account of the implications of *Boumediene* for the extension of constitutional doctrine overseas, see Neuman, *Extraterritorial Constitution*, supra note 294, at 268–74.

violates the non-suspension clause when it eliminates the habeas remedy and substitutes a constitutionally inadequate alternative form of relief. Important elements of the Court's opinion extend to the immigration context.³⁴⁷ While the statute at issue in *Boumediene* provided for review of legal issues in federal appellate court, it did not offer detainees an opportunity to supplement the record and obtain a full airing of the facts.³⁴⁸ Accordingly, the Court invalidated the restrictions on habeas jurisdiction set forth in the Military Commissions Act ("MCA").³⁴⁹ In so doing, the Court acknowledged that the need for searching review was most pressing when an individual was confined pursuant to an executive order, rather than through the usual processes of criminal law.³⁵⁰ That reasoning can—and should—be extended to the immigration context.

CONCLUSION

Much has changed since the Constitution was framed in 1787. In the pre-industrial world of the early Republic, ownership of land was central to the promise of life in the new world and, for immigrants, naturalized citizenship was central to the ownership of land. Today, by contrast, immigrants are drawn to educational opportunities and well-paying jobs in an industrial economy; ownership of land no longer exerts the same attraction, and access to naturalized citizenship no longer fully defines the scope of the nation's immigration policy. Immigrants may come for jobs or for an education with every expectation that they will return to their countries of origin without seeking naturalized citizenship. Changes in the nature of mobility and work have driven a wedge between the rules that govern immigration and those that regulate naturalization.

³⁴⁷ The *Boumediene* Court first concluded that the constitutional privilege of seeking habeas review extended to Guantanamo detainees. *Boumediene*, 128 S. Ct. at 2262. Next, the Court considered whether the review that Congress had made available, in the D.C. Circuit, served as an adequate substitute for the habeas review that it had curtailed. *Id.* at 2262.

³⁴⁸ *Id.* at 2272.

³⁴⁹ *Id.* at 2274.

³⁵⁰ *Id.* at 2277. Accordingly, the Court found that any substitute for habeas must have the means to correct errors in the Combatant Status Review Tribunal ("CSRT") proceeding, to assess the sufficiency of the government's showing, to consider relevant exculpatory evidence, and to allow the petitioner to supplement the record on review. *Id.* at 2270.

Yet despite the modern gap that now separates immigration and naturalization law, the constitutional experience of the early Republic has lessons to teach us. Framed at a time when the nation welcomed (white) immigrants as prospective citizens, the naturalization Constitution of the early Republic refutes the broadest claims of plenary congressional power. Congress was not given untrammelled power to regulate (immigration and) naturalization but was required to “establish a uniform rule.” Embedded in this provision were norms of prospectivity, uniformity, and transparency: Congress was to act by public law, creating a framework within which executive and judicial officers would administer naturalization law. Congress was neither to change the rules that apply to resident aliens, lawfully present in the United States, nor to exercise case-by-case control of naturalization decisions.

These conclusions call into question three features of modern immigration law, including the much-criticized plenary power doctrine. While Congress does enjoy broad power to define the requirements for admission to naturalized citizenship and to limit entry into the country, the plenary power doctrine wrongly translates this control into unlimited authority over those who have already established a residence in the United States. As we have seen, the Framers of the Constitution and the drafters of the nation’s first naturalization law did not share this view. The early Republic also rejected the use of private bills as a mode of conferring naturalized citizenship. While the Framers were familiar with this form of naturalization, they rejected the practice of private legislation (and the inconsistency and corruption such practice encourages) in favor of requiring Congress to adopt public laws of general applicability.

These conclusions leave little room for the operation of a special public rights doctrine as a predicate for the restriction of judicial review over immigration and naturalization matters. Congress can certainly assign immigration matters to non-Article III tribunals for initial adjudication, subject to the usual rules that govern judicial review. Congress surely has broad power to regulate and channel the exercise of judicial oversight. But neither the plenary power doctrine nor the nature of Congress’s regulatory authority provides a foundation for curtailing the oversight role of the federal courts.