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The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause

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ABSTRACT

The Supreme Court and constitutional commentators have long struggled to identify the provision in the Constitution, if any, that grants Congress authority to restrict immigration. This article demonstrates that authority to restrict immigration is included within the Constitution's grant of power to Congress to "define and punish . . . Offenses against the Law of Nations."[2]

KEYWORDS

Define and Punish Clause, U.S. Constitution and Immigration, Immigration restrictions, Law of nations, International law

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[2] U.S. Const. art. I, § 8, cl. 10.

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[3] *Bibliographical footnote*: This footnote brings together volumes cited more than once in this article.
Jean-Jacque Burlamaqui, Principles of Natural and Politic Law (Liberty Fund ed. 2006) (Thomas Nugent, trans.) [hereinafter Burlamaqui]
The Documentary History of the Ratification of the Constitution (John P. Kaminski et al. eds., 1976-2021) (40 volumes) [hereinafter Documentary History]
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Edwin Wolf II, The Book Culture of a Colonial American City (1988) [hereinafter Wolf, Book Culture]
Christianus L. B. de Wolff, Jus Gentium Methodo Scientifica Pertractatum (1759) [hereinafter Wolff]

> "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations."[4]

* * * *

I. Statement of the Problem

A. "It's in There Somewhere!"

The Define and Punish Clause provides that "The Congress shall have Power . . . To define and punish Piracies and Felonies Committed on the High Seas, and Offenses against the Law of Nations."[5] When the Constitution was written, "the law of nations" was the usual phrase for international law.

Because immigration is movement across national boundaries, the reference to "the Law of Nations" seems to invite consideration of whether the clause authorizes Congress to restrict immigration. Yet very few commentators have accepted that invitation. Those discussing the Define and Punish Clause almost invariably neglect to address immigration,[6] and those discussing immigration almost invariably overlook the Define and Punish Clause.[7]

A few commentators have contended that the Constitution does not grant the federal government any authority over immigration at all—that the subject is one reserved to the states.[8] However, Article I, Section 9, Clause 1 of the Constitution seems inconsistent with that view. It provides:

> The *Migration* or Importation of such Persons as any of the States now existing shall think proper to admit, *shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight*, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[9]

Although this provision usually is identified as a concession to the slave trade, the term "Migration" commonly was applied to free persons rather than slaves.[10]

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4 U.S. Const. art. I, § 8, cl. 10.

5 U.S. Const. art. I, § 8, cl. 10.

6 *Id*.

7 *E.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) (discussing the foreign affairs power without linking immigration to the Define and Punish Clause); Andrew B. Ayers, *Note, International Law as a Tool of Constitutional Interpretation in the Early Immigration Power Cases*, 19 Geo. Immig, L. J. 125 (2004); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. Rev. 965 (1993); James A.R. Nafziger, *The General Admission of Aliens under International Law*, 77 Am. J. Int'l L. 804 (1983).

8 *E.g.*, Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 Mich. L. Rev. 1419, 1426 (2022) (labeling the federal power to restrict immigration as "imaginary").

9 U.S. Const. art. I, § 9, cl. 1. (Italics added.)

10 *See* 20 Documentary History, *supra* note 3, at 318 in which James Iredell, a Federalist, explains to the North Carolina ratifying convention:

A free person migrating from France to New York State before 1808 was within the coverage of this clause: Congress could not prevent his immigration if New York State was willing to accept him. The necessary implication, however, is that beginning in 1808, Congress *could* prevent him from coming.[11] What specific constitutional provision granted Congress that authority?

Both the Supreme Court and commentators have cast about for an answer to that question.[12] In the 1875 case of *Chy Lung v. Freeman*,[13] the Court asserted that power to regulate immigration was latent in the Foreign Commerce Clause.[14] This conclusion is open to the objection that mere non-commercial travel is not "commerce" as the Constitution uses the term.[15] In 1889, in *Ping v. United States*, the court shifted ground, relying instead on the doctrine of inherent sovereign authority.[16] That doctrine, however, contradicts the text of the Tenth Amendment.[17] Thus, as commentators have observed, the court's rulings seem "untethered to any constitutional power."[18]

> The Committee will observe the distinction between the two words migration and importation. The first part of the clause will extend to persons who come into the country as free people or are brought as slaves. But the last part extends to slaves only. The word migration refers to free persons; but the word importation refers to slaves, because free people cannot be said to be imported.

See also James Wilson, *Remarks at the Pennsylvania Ratifying Convention*, 2 *id*. at 463 (pointing out that this clause gives Congress power only to impose duties on the importation of slaves, not on the migration of white people); Albany Federal Committee, *An Impartial Address*, c. Apr. 20, 1788, *reprinted in* 21 *id*. at 1388, 1393 (making the same distinction); The Federalist No. 42 (James Madison) (referring to "voluntary . . . emigrations"), *reprinted in* 15 *id*. at 427, 429.

11 This clause likely affected emigration as well, a process Founding-era sovereignties sometimes restricted. Vattel, *supra* note 3, at 220-25. Consider this scenario: Virginia has an anti-emigration statute, but a free Virginian nevertheless leaves his or her state for New York. New York is willing to receive that person. In that case, the clause permitted Congress, beginning in 1808, to adopt measures to reinforce state anti-emigration statutes. Before 1808, it could not do so.
However, the surrounding language and history rendered it probable that the drafters thought of the clause as applying only to immigration.

12 Christopher G. Blood, *The "True" Source of the Immigration Power and its Proper Consideration in the Elian Gonzalez Matter*, 18 B.U. Int'l L.J. 215, 226-28 (2000) (describing the judicial struggle).

13 92 U.S. 275 (1875); *see also* Edye v. Robertson, 112 U.S. 580 (1884).

14 92 U.S. at 280. The Foreign Commerce Clause reads, "The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . . " U.S. Const. art. I, § 8, cl. 3.

15 Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789 (2006); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 Chi. L. Rev. 101 (2001). *Cf*. United States v. Lopez, 514 U.S. 549 (1995) (holding that the Commerce Clause authorizes only regulation of economic activities).

16 130 U.S. 581 (1889).

17 U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

18 *Bowie & Rast*, *supra* note 8, at 1426. *See also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289 (2008):

Yet the Court's critics have done no better.[19] A few[20] have turned for guidance to the controversy over the Alien Act of 1798[21] for insights on the source of the immigration power. That controversy does not provide much guidance, though, because it did not center on a law that restricted immigration; the Alien Act merely authorized the President to expel certain foreigners who had arrived legally.[22] Moreover, during the debate over the law, leading Founders were divided.[23] Finally, because the controversy arose well after the Constitution was ratified, it tells us nothing about the ratifiers' understanding of the document.

Most commentators do agree that the federal government's power to regulate immigration is implied rather than express, but this still begs the question of its

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> Most recently, the Court has seemed uninterested in undertaking a substantive inquiry into the sources of the powers to exclude and expel. It has noted a number of sources of constitutional authority pertaining to immigration generally, including the naturalization powers, the foreign relations powers, and the war powers.

Id. at 306.

19 *E.g.*, *Bowie & Rast*, *supra* note 8 (expressing doubt as to the source of the Constitution's immigration power); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Alliances, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 81-83 (2002) (doubting whether the Constitution's framers contemplated a federal immigration power; adding, "The constitutional text does not expressly address authority to regulate immigration," and referring to some constitutional provisions as bearing on aliens, but concluding that "Otherwise, the Constitution is silent regarding governmental control over aliens."); Ilya Somin, *Migration and Self-Determination*, 18 Geo. J. L. & Pub. Pol'y 805, 815 (declaring that there is a "lack of any explicit statement" in the Constitution granting power to control immigration).
See also Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 Fordham L. Rev. 757, 775 (2013):

> It has long been noted that the Constitution lacks a clear textual basis for full congressional control over immigration. Some aspects of an immigration power may be implied from the Naturalization Clause, the war powers clauses, the Foreign Commerce Clause, or perhaps even the Migration and Importation Clause, but Congress regulates a vast array of immigration-related matters and not all can be easily implied from these other substantive powers.

See also Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 Am. U. L. Rev. 3, 12 (2019) (apparently "borrowing" Kent's precise phrasing):

> [T]he immigration laws lack clear textual support in the Constitution. Some aspects ... may be implied from the Naturalization Clause, the war powers clauses, the Foreign Commerce Clause, or perhaps even the Migration and Importation Clause, but Congress regulates a vast array of immigration-related matters and not all can be easily implied from these other substantive powers.

20 *E.g.*, *Markowitz*, *supra* note 18, at 326-27.

21 1 Stat. 570 (1798).

22 Except insofar as an alien expelled from the country under the Act was barred from returning. 1 Stat. 571 (1798).

23 *Supra* note 20.

ultimate source. On that issue, commentators divide: Some suggest "inherent sovereign authority,"[24] at least for purposes of criticism.[25] Some suggest the "law of nations," but in a manner unconnected to any specific constitutional grant.[26] Others favor combinations of constitutional provisions such as the Naturalization[27] and Foreign Commerce[28] Clauses.

For the most part, therefore, the only thing the Supreme Court and most commentators agree on is, "The power's in there somewhere!"[29] As often happens when writers fail to reconstruct the Constitution's original understanding, some blame the uncertainty on the framers' bad drafting.[30]

B. Plan of this Article

In 2000, Christopher Blood, a law student, wrote about the then-famous case of Elian Gonzalez, a child captured in a federal raid and deported.[31] Blood contended that the Define and Punish Clause was the source of the federal immigration power. However, he relied only on scanty evidence—most of it arising long before or long after the Constitution was adopted.[32] His Founding-era evidence was not extensive.[33]

This article musters additional evidence and applies Founding-era interpretive methods[34] to it. The evidence shows that Christopher Blood was correct: The Define and Punish Clause is the fount of the congressional power to restrict immigration. Most of this additional evidence consists of standard works on the law of nations

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24 *E.g.*, 1 Rotunda & Nowak, *supra* note 3, at 786.

25 *E.g.*, *Scaperlanda*, *supra* note 7 (criticizing the sweep of the sovereignty theory without offering any other constitutional basis for congressional regulation of immigration); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 Harv. C.R.-C.L. L. Rev. 1 (2010) (discussing and criticizing the "sovereignty" origins of the plenary power doctrine).

26 *E.g.*, Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective*, 15 Tex. Rev. L. & Pol. 61 (2010) (attributing the power to the law of nations, but not to the Define and Punish Clause).

27 U.S. Const. art. I, §8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . "); see *Kent, supra* note 19, at 775 (deriving some aspects of the immigration power from the Naturalization Clause).

28 *Id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ")

29 *Blood*, *supra* note 12, at 223 ("Indeed, a leading immigration law textbook cites no less than five potential sources of the immigration authority. These possible sources include the Commerce Clause, the Migration Clause, the Naturalization Clause, the War Clause, and 'implied' powers.")

30 *E.g.*, *Kent, supra* note 19, at 775 ("The immigration power and debate about unenumerated, inherent legislative authority provides another example of ways the foreign affairs Constitution was incomplete and poorly drafted . . . ")

31 *Blood*, *supra* note 12.

32 *Id.* at 232 (discussing practices in ancient Greece and Rome) & 234-36 (discussing matters arising long after the Constitution was ratified).

33 Blood offered a single citation (not really on point) to the work of Hugo Grotius, *id.* at 233; two to the work of Emer Vattel, *id.* at 229-30, one to a book by George Friedrich von Marten, *id.* at 230, and two to William Blackstone. *Id.* at 230 & 233-34. These individuals are discussed *infra* Part III.

34 Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 60 Ohio St. L. Rev. 1238, 1286 & 1305 (2007).

published before the thirteenth state, Rhode Island, ratified the Constitution on May 29, 1790. All these works were well-known and widely accepted in the United States. The evidence also includes two documents issued in 1791, but long in preparation and reflecting circumstances before 1791.

II. The Define and Punish Clause

The relevant portion of the Define and Punish Clause provides that Congress may "define and punish . . . Offenses against the Law of Nations."[35] The meaning of "Nation" has shifted somewhat since the Constitution was adopted. Today it almost invariably means a sovereign state. In the eighteenth century an older use still survived: A "nation" could be a large ethnic group, a people, a nationality.[36] Thus, in eighteenth-century discourse, the territory occupied by a "nation" was not necessarily coterminous with the boundaries of a sovereign state. A sovereign might rule over several nations or only part of one.[37] Modern analogues are the Arab nationality, which is spread over many sovereignties and the Maori nationality, which forms only a small minority within the single sovereign state of New Zealand.

The origin of the phrase *law of nations* reflects that older meaning of "nation:" The phrase is a direct translation of the Roman expression *ius gentium* (or *jus gentium*)—literally, "the law [or jurisprudence] of peoples"—that is, of peoples other than the Romans.

Consistently with the older meaning of "nation," the eighteenth century law of nations sometimes addressed the rights of sub-sovereign ethnic groups.[38] Nevertheless, most of it consisted of rules governing relationships among sovereigns. The 1778 edition of the *Encyclopaedia Britannica* stated:

> Sect. V. *Of offenses against the law of nations*.
>
> (1.) The *law of nations* is a system of rules, deducible by natural reason, and established by universal consent, to regulate the intercourse between independent states.
> (2.) In England, the *law of nations* is adopted in its full extent, as part of the law of the land.[39]

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35 U.S. Const. art. I, § 8, cl. 10.

36 Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver Univ. L. Rev. 201, 259 (2007) (providing dictionary definitions). Failure to understand this shift of meaning has engendered confusion in Indian law, where modern writers assume that when an eighteenth-century speaker applied the term "nation" to a tribe the speaker necessarily was conceding sovereignty. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 1012, 1033 n.105 (relying on a single usage without acknowledging dictionary definitions).

37 *E.g.* Vattel, *supra* note 3, at 210 (listing a chapter heading as "How a Nation may separate itself from the State of which it is a Member, or renounce its Allegiance to its Sovereign when it is not protected") & 210-11 (speaking of a "free nation becom[ing] subject to another state").

38 *Id.*

39 6 Encylopaedia Britannica 35 (2d ed., 1778) (Italics in original.)

Founding-era scholars divided the law of nations into two broad categories. The *necessary* law of nations was the product of natural law and, as such, was immutable. The *arbitrary* or *voluntary* law of nations consisted of treaties, customs, and other enactments consistent with the broad principles of the necessary law.[40]

Although the law of nations affected primarily sovereigns and ethnic groups, it also could impact individuals. The *Encyclopaedia Britannica* entry continued:

> (3.) Offences against this law are principally incident to whole states or nations; but, when committed by private subjects, are then objects of the municipal [i.e., internal] law.
> (4.) Crimes against the law of *nations,* animadverted on [punished] by the laws of England, are 1. Violations of *safe-conducts*. 2. Infringement of the rights of *embassadors* [*sic*]. Penalty, in both: arbitrary. 3. *Piracy*. Penalty: judgment of felony, without clergy [i.e., death].[41]

The rules impacting individuals primarily were imposed by local or "municipal" law.[42] Sovereignties "defined and punished" offenses against the law of nations to promote and secure concord with other sovereignties.[43]

The crimes listed in *Encyclopaedia Britannica* (infringements on safe-conducts and ambassadors, and piracy) were illustrative only. Individuals could offend against international law in other ways. For example, in 1781, the Confederation

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40 Burlamaqui, *supra* note 3, at 177-78 & 274. *Cf.* Wilson, *supra* note 3, at 529 & 546 (dividing the law of nations into necessary and arbitrary categories). The term *arbitrary* should be understood in its Latinate sense of being based on human judgment.
Vattel refined the classification scheme into (1) the *necessary* law, imposed by pure natural law principles; (2) the *arbitrary* law, which included (a) the *conventional* law (based on consent expressed in treaties and other enactments) and (b) the *customary* law (based on tacit consent through usage). Vattel added a category he called (3) the *voluntary* law, which was based on presumed but not actual consent. It encompassed concessions from the necessary law required by circumstances. Vattel, *supra* note 3, at 17 & 70-78.
It may help to understand Vattel's scheme to compare his three principal categories with three categories from our private common law: (1) the law of torts (which usually operates without regard to consent), (2) contracts (based on real consent, express or inferred ["implied"]), and (3) quasi-contract and other forms of restitution (based on fictional consent).

41 *Id.* (Italics in original).

42 *Cf.* 7 J. Cont. Cong. 134 (Feb. 20, 1777) (reproducing the notes of Thomas Burke of North Carolina on a congressional debate on whether certain proceedings should be held under the municipal law or the law of nations); *see also* 16 *id.* 62 (Jan. 15, 1780) ("And whereas trials by Jury in cases of capture, which are decided by the law of nations, and not the municipal laws of the land . . .").

43 1 William Blackstone, Commentaries *68:

> But where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war.

Congress formally recommended that the American states enact legislation punishing offenses against the law of nations. Congress recommended punishment for violations of safe-conducts and passports and infractions of the immunities of foreign diplomats (all itemized by *Britannica*), but also for acts of hostility against friendly aliens, and "infractions of treaties and conventions to which the United States are a party."[44]

The bifurcated aspect of the law of nations—general standards "defined" by more specific rules—occasioned a brief dispute at the 1787 Constitutional Convention. The delegates were drafting what became the Define and Punish Clause. The question arose as to whether they should apply the word "define" to the phrase "the Law of Nations." James Wilson, considering the law of nations as merely a statement of natural law, objected: "To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World," he said, "would have a look of arrogance that would make us ridiculous."[45] In response, Gouverneur Morris explained: "The word define is proper when applied to offences in this case; the law of nations being often too vague and deficient to be a rule."[46]

The convention agreed with Morris.[47]

III. The Founders' Authorities on the Law of Nations

A. The Committee's List

Whether Congress may "define" limits on immigration and "punish" infractions depends on whether the law of nations, as understood by the Constitution's ratifiers, encompassed immigration restrictions and whether a breach of those restrictions was seen as an "Offense" against the law of nations.

The migration rule of Article I, Section 9 demonstrates that Americans were conscious that restrictions on immigration might one day be imposed. However, that possibility provoked only slight notice during the ratification debates[48]—probably because the United States then had no such limits and, like other countries, sought security in higher populations.[49] In other words, Americans thought they needed

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44 21 J. Cont. Cong. 1136-37 (Nov. 23, 1781).

45 2 Farrand, *supra* note 3, at 615 (Sept. 14, 1787) (Madison).

46 *Id.*

47 *Id.* The Second Continental Congress previously had gone through the process of attempting to clarify one aspect of the law of nations. *E.g.*, 19 J. Cont. Cong. 116-17 (Feb. 5, 1781) (discussing the need to clarify the law of nations pertaining to foreigners paying taxes and imposts).

48 "Deliberator," Freeman's J., Feb. 20, 1788, *reprinted in* 33 Documentary History, *supra* note 3, at 902, stating with disapproval that under the Constitution

> Congress may, by imposing a duty on foreigners coming into the country, check the progress of its population; and after a few years they may prohibit altogether, not only the migration of foreigners into our country, but also that of our own citizens to any other country.

Id. at 905.

49 Burlamaqui, *supra* note 3, 450 (stating that immigration of screened individuals should

more immigrants, not fewer.[50] This sentiment rendered immigration restrictions unlikely in the immediate future, so discussion centered on more pressing issues.

During the Founding era, American knowledge of the law of nations was shaped by treaties and treatises. Treaties commonly addressed the topic of cross-border migration, but usually emigration rather than immigration.[51] However, treatises universally recognized as authoritative did discuss immigration.

One indication of whether the Founders considered a treatise authoritative is whether it appeared on a January 24, 1783 list of recommended books complied by a three-man committee of the Confederation Congress. The committee members were James Madison of Virginia, Hugh Williamson of North Carolina, and Thomas Mifflin of Pennsylvania—all three of whom were to serve among the Constitution's framers.

One section of the list was entitled "Law of Nature and Nations." It included (1) several works on natural law, (2) several on aspects of the law of nations not related to immigration (such as the law of the sea and rules pertaining to ambassadors), and (3) five works devoted specifically to the law of nations. The committee report listed those five as—

- "Wolfius's Law of Nature;"
- "Grotius' Law of Nature and Nations;"
- "Vattel's Law of Nature and Nations;"
- "Puffendorf's Law of Nature and Nations with notes by Barbeyrac;" and
- "Burlamaque's [*sic*] Law of Nature and Nations."[52]

In addition, the committee recommended that Congress acquire a sixth work relevant to the law of nations: William Blackstone's *Commentaries on the Laws of England*.[53] Blackstone's treatise was devoted mostly to the common law, but also contained an overview of international law.[54]

B. The Authorities on the Law of Nations

Among these authors, the earliest in time was Hugo Grotius, who lived from 1583 to 1645. "Hugo Grotius" is a Latinized version of his Dutch name, Huig de Groot.

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be encouraged to increase a country's military strength); Vattel, *supra* note 3, at 198 (stating that increasing the number of citizens is "one of the first objects that claim the attentive care of the state or its conductor.").

50 *E.g.*, "Marcus," *N.Y. Daily Advertiser*, Oct. 15, 1787, *reprinted in* 19 Documentary History, *supra* note 3, at 85 (presenting as an argument for ratification of the Constitution that "thousands in Europe, with moderate fortunes, will migrate to this country, if an efficient Government gives them a prospect of tranquility"); *cf.* Wilson, *supra* note 3, at 535 & 538-39 (referring to a country's need to attract people).

51 1 Collection of Treaties Between Great Britain and other Powers 472 (George Chalmers ed. 1790) (reciting, as a term in the Treaty of Paris of 1763, that the French inhabitants of Canada may emigrate freely for a period of eighteen months); *id*. at 480 (similar terms for inhabitants of Florida); 2 *id*. at 233 (similar terms in 1783 treaty with Spain for the retrocession of Florida).

52 24 J. Cont. Cong. 83-84 (Jan. 24, 1783).

53 *Id.* at 89.

54 *Infra* Part IV(I).

Grotius was endowed with an astonishing intellect. That intellect, and his conscientious application, made him one of the leading figures of his age.[55] In addition to law, his intellectual range included drama, philosophy, history, theology, and poetry—in Greek, Latin, and Dutch. Grotius also was a man of affairs and served in high office in the Netherlands. In 1618, however, he was caught in a political-religious dispute and illegally tried, convicted, and sentenced to life imprisonment. Two years later he escaped from his prison in a trunk, which, his wife assured the guards, contained only books and porcelain.[56]

The Netherlands never recalled Grotius from exile. He spent most of the remainder of his life in Paris. For many years he served the Swedish crown as its ambassador to France.

Grotius' most important literary production was the three-volume set identified by the congressional committee as "Law of Nature and Nations." It was published in 1625, initially in Latin, under the title, *De Jure Belli ac Pacis*. It established Grotius as the founder of modern international law.[57]

Despite the fact that Grotius' treatise was over 150 years old when the Constitution was written, members of the founding generation still consulted it. Particularly popular was the edition translated and annotated by the French academic, Jean Barbeyrac (1674–1744).[58]

Chronologically, the next author on the congressional committee's list was the German scholar Samuel von Pufendorf (1632-1694). (Americans of the founding generation usually spelled his name "Puffendorf.") Like Grotius, Pufendorf spent much of his life under the protection of the Swedish crown.[59] He served as a professor at the University of Lund and, subsequently, as royal historiographer. He returned to Germany a year before his death and was awarded a barony.[60]

The congressional committee referred to Pufendorf's most famous work as "Law of Nature and Nations with notes by Barbeyrac." Published in 1672, it was composed in Latin under the title *De Jure Naturae et Gentium*. A 1729 edition translated and annotated by Barbeyac became the standard.[61]

Chronologically, the next author on the committee's list was the German polymath Christian Wolff, who lived from 1679 to 1754. Wolff was a professor at the University of Halle. When forced to leave, he moved to the University of Marburg. Later he served as science adviser to Czar Peter the Great, and eventually returned in triumph to the University of Halle—as chancellor.[62]

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55 See generally Vreeland, *supra* note 3 (discussing the life of Grotius).

56 The story of Grotius' escape is riveting. Central to the narrative is the courage, loyalty, and cleverness of his wife, Maria van Reigersberg, and of a young servant woman named Elsje van Houweing. Vreeland, *supra* note 3, at 131-49.

57 *Id.* at 164-65 & 171-72.

58 *E.g.*, Anderson v. Winston, Jeff. 24, 28-20 (Va. Gen. Ct. 1736) (citing Barbeyrac's notes on both Grotius and Pufendorf).

59 *Samuel, baron von Pufendorf, German jurist and historian*, Encyclopaedia Britannica, https://www.britannica.com/biography/Samuel-Freiherr-von-Pufendorf.

60 *Id.*

61 *E.g.*, Anderson v. Winston, Jeff. 24, 28-20 (Va. Gen. Ct. 1736) (citing Barbeyrac's notes on both Grotius and Pufendorf); Tucker v. White, 1 N.J. L 94, 101 (1791) (argument of counsel, citing Barbeyrac's notes on Pufendorf).

62 *Christian, baron von Wolff, German philosopher*, Encyclopaedia Britannica, https://www.britannica.com/biography/Christian-baron-von-Wolff.

In 1749, Wolff published in Latin the *Jus gentium methodo scientifica pertractatum* ("The law of nations treated thoroughly according to scientific method"). The author's surname was Latinized (awkwardly) into "Wolfius"—hence the congressional committee's designation of his book as "Wolfius's Law of Nature."

Wolff was less known in America than Grotius or Pufendorf.[63]

Next on the list (again, in chronological order) was the book the committee described as "Burlamaque's Law of Nature and Nations." Jean-Jacques Burlamaqui (1694–1748) was a natural law professor at the Academy of Geneva. He published his *Principes du droit naturel* in 1747.[64] In 1751, three years after his death, some of his academic colleagues supplemented his work by arranging his lecture notes into the *Principes du droit politique*.

"Vattel's Law of Nature and Nations," as the congressional committee called it, originally was to be an elaboration on the Wolff's treatise,[65] but it metamorphosed into something far more. Emir de Vattel (1714 to 1767) was a Swiss lawyer and diplomat who studied under Burlamaqui.[66] Vattel served as a member of the privy council of the elector of Saxony and chief foreign affairs adviser to the Saxon government.[67]

Vattel published his work in French in 1758 under the title *Le Droit des Gens*. During the Founding-era, his was the most recent available work devoted exclusively to natural law and the law of nations and, at least among Americans, the most cited.[68]

Although not in the committee's list, one more international law scholar merits our attention. Georg Friedrich von Martens (1756-1821) was a professor at the University of Göttingen, in Germany. In 1789, Martens published *Précis du droit des gens modernes de l'Europe*. An English translation appeared six years later.[69]

Martens' work was not available in time for the constitutional debates, but his period of composition was exactly contemporaneous with those debates. His treatise therefore reflects international law as it stood precisely when the Constitution was written and ratified.[70]

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63 *Infra* Part III(D).

64 Burlamaqui, *supra* note 3, at 161-68.

65 Vattel, *supra* note 3, at 13; *Emerich de Vattel*, Encyclopaeda Britannica https://www.britannica.com/biography/Emmerich-de-Vattel.

66 Vattel, *supra* note 3, at x (editor's introduction). Vattel's first name often is given as "Emerich" or "Emmerich," but he was christened "Emer." *Id.* at ix, n. 1 (editor's introduction).

67 *Id*. at xi (editor's introduction).

68 *See, e.g.*, 17 J. Cont. Cong. 943 (Oct. 17, 1780); 31 *id.* 589 (Aug. 29, 1786) (reproducing documents citing Vattel). Richard Harison, a prominent New York lawyer, invoked Vattel when urging the state legislature to recognize the independence of Vermont. Richard Harison, *Remarks on an Act Recognizing the Independence of Vermont*, Mar. 28, 1787, Founders Online, at https://founders.archives.gov/documents/Hamilton/01-04-02-0067.

69 Martens, *supra* note 3.

70 I have omitted as an eighteenth-century authority Robert Ward, An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans, to the Age of Grotius (1795) (2 vols.). Ward's work was not published until 1795 and was limited to a discussion of the law before Grotius.

C. William Blackstone and the Legally-Literate American Public

Today most Americans would be hard pressed to identify any legal scholar. This was not as true during the Founding era, due to the extraordinary legal literacy of the American population. Edmund Burke commented on it in his famous *Speech on Conciliation with America*, delivered in Parliament on March 22, 1775:

> Permit me, Sir, to add another circumstance in our Colonies which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the [First Continental] Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the Plantations. The Colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. General Gage marks out this disposition very particularly in a letter on your table. He states that all the people in his government are lawyers, or smatterers in law . . . .[71]

Understanding this legal literacy enables us to reconcile two statements about the Constitution that otherwise might seem contradictory: (1) It contained many legal terms of art[72] and (2) it was designed to be understood (with some assistance from its sponsors) by the average, engaged eighteenth-century American.

William Blackstone (1723-1780), the author mentioned by Burke, was perhaps the most influential of all commentators on English law. He served as the first Vinerian Professor at Oxford University, as a Member of Parliament, and as a judge of the Court of Common Pleas.[73] The four volumes of his *Commentaries,* which were based on his Oxford lectures, were published in English between 1765 and 1769.

As Burke suggested, Blackstone was enormously popular in the America. Citizens without direct access to the works of Grotius, Pufendorf, Barbeyrac, Wolff, Burlamaqui, or Vattel more likely had access to Blackstone.[74]

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71 Edmund Burke, *Speech on Conciliation with America*, Mar. 22, 1775, *available at* https://www.fulltextarchive.com/book/Burke-s-Speech-on-Conciliation-with-America/.

72 Robert G. Natelson, The Original Constitution: What It Actually Said and Meant 34 (3d ed. 2015) (discussing the misunderstandings that can arise from unfamiliarity with the Constitution's legal terminology).

73 *Sir William Blackstone, English jurist*, Encyclopaedia Britannica, https://www.britannica.com/biography/William-Blackstone.

74 *Infra* note 79 and accompanying text; Wolf, Book Culture, *supra* note 3, at 156-59 (1988) (describing the success of Blackstone in Philadelphia).

D. The Influence of these Authors on the Founding Generation

During the eighteenth century, Grotius, Pufendorf, and Vattel all were regularly cited in and by American courts;[75] Wolff less so.[76] Contemporaneous citations to Blackstone are too numerous to list.[77]

Grotius's and Pufendorf's volumes were being sold in Philadelphia as early as the 1740s.[78] Surveys of American eighteenth-century libraries show that books by several of our authors were common holdings. Pufendorf's work was tied for the tenth most common holding among law books in libraries in colonial (i.e., pre-1776) Virginia.[79] A survey of the holdings in eighteenth century American libraries whose records are still extant (necessarily a limited set) identified no single law book owned by more than thirteen libraries. Blackstone's *Commentaries* was in ten, Vattel's *Law of Nations* in five, Grotius's *De Juri Belli ac Pacis* in three, and a shorter book by Grotius in five.[80]

Leading Founders relied freely on the authorities considered here. Thus, in the course of his 1774 essay defending the rights of the colonies against Great Britain,[81] John Dickinson cited Grotius, Pufendorf, and Burlamaqui.[82] John Adams' *Novanglus No. 6* cited Grotius, Pufendorf, and Barbeyrac.[83] James Wilson's *Collected Works* include pre-ratification references to Burlamaqui.[84] At the Pennsylvania ratifying

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75 *Grotius*: Anderson v. Winston, Jeff. 24, 28 (Va. Gen. Ct. 1736) (multiple citations); Robin v. Hardaway, Jeff. 109, 111 (Va. Gen. Ct. 1772) (argument of counsel); Brimley v. Avery, Kirby 22, 23 (Conn. Sup. Ct. Errors 1787); Hoare v. Allen, 2 U.S. 102 n.12 (Pa. S.Ct. 1789); Dulaney v. Wells, 3 H. & McH. 20, 25 (Md. Gen. Ct. 1790), *reversed* (Md. Ct. App. 1795); Tucker v. White, 1 N.J. L 94, 101 (1791) (argument of counsel).
Pufendorf: Anderson v. Winston, Jeff. 24, 28 (Va. Gen. Ct. 1736); Robin v. Hardaway, Jeff. 109, 111, 116, 121 & 122 (Va. Gen. Ct. 1772) (arguments of counsel); Harrison v. Sterett, 4 H. & McH. 540, 545 (Md. Prov. Ct. 1774) (argument of counsel); Respublica v. Sparhawk, 1 U.S. 357, 363 (Pa. 1788); Camp v. Lockwood, 1 U.S. 393, 395 (Pa. Ct. Com. Pl. 1788) (argument of counsel).
Vattel: Government v. McGregory, 14 Mass. 499 (Mass. 1780) (argument of counsel); Talbot v. Commanders & Owners of Three Brigs, 1 U.S. 95, 100 & 106 (Pa. High Ct. Err. & App. 1784); Bayard v. Singleton, 1 N.C. 5 (1787); Respublica v. Sparhawk, 1 U.S. 357, 362 (Pa. 1788) (argument of counsel). Dulaney v. Wells, 3 H. & McH. 20, 25 (Md. Gen. Ct. 1790), *reversed* (Md. Ct. App. 1795) (multiple citations); Tucker v. White, 1 N.J. L 94, 99 (1791) (argument of counsel).

76 *But see* Hoare v. Allen, 2 U.S. 102 n.12 (Pa. Sup. Ct. 1789) (citing Wolff).

77 Thirty-two citing cases were produced by an Aug. 20, 2022 Westlaw search of the relatively sparse reported pre-1791 American case law. The query "adv: DA(bef1791) & Blackstone" was entered in the Allstates database.

78 Wolf, Book Culture, *supra* note 3, at 135-36.

79 William Hamilton Bryson, Census of Law Books in Colonial Virginia xvii (1978).

80 Herbert A. Johnson, Imported Eighteenth-Century Law Treatises in American Libraries, 1700-1799 59 & 63 (1978). The work held in thirteen libraries was Knightly D'Anvers' *Abridgement*. *Id*. at 59. It was published in 1727, much earlier than either Blackstone or Vattel, and thus presenting a longer opportunity for acquisition.

81 1 The Political Writings of John Dickinson 329 (J. Dickinson ed. 1801).

82 *Id.* at 338 (Grotius), 340 (Burlamaqui), 339 (Pufendorf) & 341 (Pufendorf).

83 The Revolutionary Writings of John Adams 58-60 (C. Bradley Thompson ed. 2001).

84 1 Wilson, *supra* note 3, at 5n & 66-67. *See also* Ray Forrest Harvey, Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism 79-105 (1937) (documenting the dissemination of Burlamaqui's work in America); *id.* at 109 (describing

convention Wilson listed "Grotius and Puffendorf down to Vattel."[85] In his lectures on law, delivered shortly after the ratification, Wilson discussed all these authors at some length, including Wolff.[86]

References to these authorities also appear in the correspondence of John Adams,[87] Abigail Adams,[88] Alexander Hamilton,[89] Thomas Jefferson,[90] James Madison,[91] John Francis Mercer,[92] James Monroe,[93] and

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Burlamaqui's influence on the Revolutionary generation) & 142-65 (describing his influence on American constitutionalism).

85 1 Wilson, *supra* note 3, at 211.

86 *See, e.g*., *Of the General Principles of Liberty and Obligation*, 1 *id.* at 473-74, 475n, 479n, 485-90, 493n & 495n (all citing Pufendorf), 476n (Grotius), 478n (Barbeyrac), 481 (Wolff), 483 (Vattel), 490 (Burlamaqui).

87 John Adams to John Quincy Adams, Jan. 23, 1788, Founders Online, at https://founders.archives.gov/documents/Adams/04-08-02-0097 (stating "To Vattel and Burlamaqui, who you Say you have read you must Add, Grotius and Puffendorf and Heineiccius"); John Adams to John Quincy Adams, May 19, 1783, Founders Online, https://founders.archives.gov/documents/Adams/04-05-02-0088, James Lovell to John Adams, Jan. 1, 1778, Founders Online, at https://founders.archives.gov/documents/Adams/06-05-02-0229 (calling upon Adams' knowledge of "Grotius Puffendorf Vattel &c.") (recommending Barbeyrac).

88 Abigail Adams to Royall Tyler, Jul. 10, 1784, Founders Online, at https://founders.archives.gov/documents/Adams/04-05-02-0207 ("with pleasure have I seen your delight in the company, and Society, of Grotius, Puffendorf, Bacon, Vatel [*sic*] and numerous other writers cal[c]ulated to inform the mind and instruct the judgment"); Abigail Adams to Abigail Adams Smith, Aug. 11, 1786, Founders Online, at https://founders.archives.gov/documents/Adams/04-07-02-0118 (reporting seeing the statue of Grotius at Delft).

89 Alexander Hamilton, *A Letter from Phocion to the Considerate Citizens of New York*, Jan. 1-27, 1784, Founders Online, at https://founders.archives.gov/documents/Hamilton/01-03-02-0314 (referring to "Vatel" and Grotius).; Alexander Hamilton, *Second Letter from Phocion*, Apr. 1784 (exact date uncertain), Founders Online, at https://founders.archives.gov/documents/Hamilton/01-03-02-0347 (citing "Vatel"). *But see* Phillip W. Magness, *A Phony 'Phocion': Alexander Hamilton and the election of 1796*, https://philmagness.com/2016/08/a-phony-phocion-alexander-hamilton-and-the-election-of-1796 (contesting Hamilton's authorship of the "Phocion" essays).

90 Thomas Jefferson to James Madison, May 25, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0021 (stating that he would be sending from Paris books by "Wolfius" and Grotius); Thomas Jefferson to Walker Maury, Aug. 19, 1785, Founders Online, at https://founders.archives.gov/documents/Jefferson/01-08-02-0321 (cover letter with a shipment of books for his nephew, including works by Grotius and Pufendorf).

91 James Madison to Thomas Jefferson, Mar. 16, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0002 (suggesting purchase of "Wolfius"); James Madison to James Monroe, Nov. 27, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0083 (citing Vattel); James Madison to Thomas Jefferson, Jan. 7, 1785, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0122 (citing Grotius, Pufendorf, and Vattel); James Madison, *Notes on Ancient and Modern Confederacies* (1786), Founders Online, at https://founders.archives.gov/documents/Madison/01-09-02-0001 (citing Grotius on the "Belgic" [Netherlands] confederacy).

92 John Francis Mercer to James Madison, Dec. 23, 1786, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0114 (citing Vattel).

93 List of Books Sold to James Monroe, May 10, 1785, Founders Online, at https://founders.archives.gov/documents/Jefferson/01-07-02-0191 (purchase list including Barbeyrac, Vattel, and "Wolf").

Edmund Randolph.[94] These authorities also surfaced in the constitutional debates of 1787-90. Delegates to the Federal Convention cited Blackstone[95] and Vattel.[96] Participants in the subsequent ratification controversy, among them Alexander Hamilton,[97] cited Blackstone extensively.[98] Hamilton and Madison mentioned Grotius in Federalist Nos. 20 and 84,[99] several other debate participants cited him,[100] and a Rhode Island antifederalist wrote a public letter over the name of the great Hollander.[101]

Other participants in the ratification debates referenced Pufendorf[102] and, much more often, Vattel.[103] Some listed several of these scholars in one place—as when the Federalist author writing under the pseudonym "Margery" commended "a Constitution, which is the combined result of all the wisdom of Grotius, Puffendorf, Barbeyrac, and Burlamaqui."[104]

Several of these scholars also made their appearance in the state ratifying conventions and associated proceedings. As noted above, James Wilson cited Grotius, Pufendorf, and Vattel at the Pennsylvania convention.[105] At the Virginia convention, William Grayson, an antifederalist, asked, "If nine states give [navigation rights to the Mississippi] away, what will the Kentucky people do?

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94 Edmund Randolph to James Madison, Jan. 27, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-07-02-0213 (author's note describing Randolph's enclosure, indicating that he had consulted Vattel); Edmund Randolph to Thomas Jefferson, Jan. 30, 1784, Founders Online, at https://founders.archives.gov/documents/Jefferson/01-06-02-0377 (reporting his consulting Vattel).

95 1 Farrand, *supra* note 3, at 472 (Jun. 29, 1787) (Yates) (reporting a speech by Alexander Hamilton, 2 *id.* at 448 (Aug. 29, 1787) (Madison) (reporting comments by John Dickinson).

96 1 *Id.* at 437 & 438 (Jun. 27, 1787) (Madison) (reporting a speech by Luther Martin).

97 The Federalist No. 69, *reprinted in* 16 Documentary History, *supra* note 3, 387, 392-93 & No. 84, *reprinted in* 18 *id*. 127, 129.

98 For a list of references as recorded by the Documentary History, *supra* note 3, enter "Blackstone" at https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I.

99 The Federalist No. 20, *reprinted in* 13 Documentary History, *supra* note 3, at 410, 411; Federalist No. 84, *reprinted in* 18 *id*. 127, 136

100 *E.g.*, "An Impartial Citizen," *Letter V*," Petersburg (VA) Gaz., Feb. 28, 1788, *reprinted in* 8 Documentary History, *supra* note 3, at 428, 430 (referring to "Montesquieu, Grotius, and other writers on government and the law of nations"); "Examiner," *Letter II*," N.Y. J., Dec. 14, 1787, *reprinted in* 19 *id*. at 423 (referring to, among others, Grotius and Pufendorf); *Newspaper Report of House of Deputies and House of Magistrates Proceedings* (Rhode Island), Mar. 1, 1788, *reprinted in* 24 *id*. 129, 132 (reporting references to Grotius and Pufendorf during legislative debate on a bill to call a ratifying convention).

101 "Grotius," *Proposed Prefatory Resolutions to Instructions*, United States Chronicle (Providence), May 27, 1790, *reprinted in* 26 Documentary History, *supra* note 3, at 890.

102 *E.g.*, "Cincinnatus," *Letter V, To James Wilson, Esquire*, N.Y. J., Nov. 29, 1787, *reprinted in* 14 *id.* at 303, 308 (citing "Barbeyrac's Puffendorf"); *Extract of a letter from a gentleman in South Carolina, dated Jan. 30, 1788, to his friend at this place*, Poughkeepsie (NY) Country J., Mar. 11, 1788, *reprinted in* 20 *id*. 853, 856 (citing "Puffendorf," among others); see also sources cited *supra* note 99.

103 For a list of references as recorded by the Documentary History, *supra* note 3, *see* enter "Vattel" at https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I.

104 "Margery," Letter VIII, Mar. 20, 1788, *reprinted in* 34 Documentary History, *supra* note 3, at 1073, 1075. *See also* "Examiner," *Letter II*, N.Y.J., Dec. 14, 1787, *reprinted* in 19 *id.* at 423 (citing Grotius and "Puffendorf", among others).

105 *Supra* note 85 and accompanying text.

Will Grotius and Puffendorf relieve them?"[106] During the South Carolina legislative session leading to a convention in that state, Charles Cotesworth Pinkney cited Burlamaqui [107] and he and Rawlins Lowndes debated comments by Vattel.[108]

We can say with confidence, therefore, that the Founders considered these writers on the law of nations to be reasonably authoritative.

IV. Positions on Immigration

A. Summary of the Views of the Founding-era Authorities

Pufendorf, Barbeyac, Vattel, Martens, Blackstone, and—more obliquely, Grotius and Burlamaqui— all addressed limits on immigration when writing on the law of nations. These authors consistently recognized the prerogative of governments to impose immigration restrictions. That prerogative was qualified in cases of necessity (for example, a ship being driven by storm onto a foreign shore), and in the cases of exiles and fugitives. As to voluntary immigrants, however, all but Grotius—the earliest of the writers— recognized that the power to restrict was nearly absolute. Grotius made an exception for foreigners who wished to settle on barren lands. Later writers rejected that exception.

The remainder of this Part summarizes in more detail the positions of these seven authors.

B. Grotius

Hugo Grotius treated the issue of trans-border migration within his wider discussion of the law of nations. On the then-controversial subject of emigration, he wrote that the legal default position was that a person had a right to leave his homeland. However, he added, "[O]ne is not to go out of the State, if the Interest of the Society requires that he should stay in it."[109] The effect of that statement was to validate restrictions based on the sovereign's view of the interests of society.

In his discussion of immigration, Grotius did not set forth a default position explicitly, but assumed that, absent special circumstances, a person may not immigrate to a foreign nation without permission from the sovereign of that nation. Thus, he wrote, "To receive particular Persons as are willing to remove from one Prince's Territories into another's, is no Breach of Friendship; for this Liberty is not only natural, but has something favourable in it (as we have said elsewhere)."[110] Of course, if states were required to admit foreigners, the statement would be unnecessary because complying with a mandatory rule could not be a "Breach of Friendship."

Grotius did offer several qualified exceptions to the rule that immigration requires the permission of the receiving country. One exception applied to those who seek only a short sojourn "on account of their Health, or for any other just

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106 3 Elliot's Debates, *supra* note 3, at 350.
107 2 *Id.* at 280.
108 2 *Id.* at 279 (Pinckney) & 310 (Lowndes).
109 2 Grotius, *supra* note 3, at 554.
110 3 *Id.* at 1575.

Cause."[111] Such people could even erect a temporary shelter in which to stay.[112] Another exception applied to exiles, because "a fixed Abode ought not to be refused to Strangers, who being expelled from their own Country, seek a Retreat elsewhere."[113] His most controversial exception was as follows:

> And if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerned Jurisdiction, which always continues the Right of the antient People.[114]

As we shall see, none of the later authorities agreed with Grotius on that point.

C. Pufendorf

One modern commentator claims that, "Samuel Pufendorf . . . denied to the sovereign a right to exclude aliens, so long as they had lawful reasons, including economic ones, for seeking admission into states."[115] Another classifies Pufendorf's views on the power to restrict immigration as "ambiguous."[116]

Nothing could be further than the truth. Although Pufendorf commended the virtue of hospitality, he made it clear that in cases other than fugitives or exiles, whether a foreigner could immigrate was subject to the decision of the receiving nation. Speaking of travelers, Pufendorf wrote:

> The Case is somewhat like that of a private Man, who in his House or Gardens, possesses some rare Curiosity, or other valuable Sight; such an one does not apprehend himself tied freely to let in all Spectators; but whoever is thus gratified either rewards, or at least acknowledges, it as an extraordinary Favour.[117]

He then expanded the point to include permanent immigration as well as travel:

> And farther, it seems very gross and absurd, to allow others an indefinite Right of travelling and living amongst us, without reflecting either on their Number, or on the Design of their coming; whether supposing them to pass harmlessly, they intend only to take a short view of our Country, or whether they claim a Right of fixing themselves with us forever. And that he who will stretch the Duty of Hospitality to this extravagant Extent, ought to be rejected as a most unreasonable, and most improper judge of the Case.

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111 2 *Id.* at 446.
112 *Id.*
113 *Id.* at 447.
114 *Id.* at 448.
115 *Nafziger*, *supra* note 7, at 811.
116 *Cleveland, Powers*, *supra* note 19, at 83-84.
117 Pufendorf, *supra* note 3, at 245.

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> As to our main Question, it is look'd on by most as the safest way of resolving it, to say, That it is left in the power of all States, to take such Measures about the Admission of Strangers, as they think convenient; those being ever excepted, who are driven on the Coasts by Necessity, or by any Cause that deserves Pity and Compassion.[118]

Even in the cases of refugees and exiles, there were limits to hospitality:

> Humanity, it is true, engages us to receive a small number of Men expell'd their Home, not for their own Demerit and Crime . . . But no one will be fond of asserting, that we ought in some manner to receive and incorporate a great Multitude . . . Therefore every State may be more free or more cautious in granting these Indulgences, as it shall judge proper for its Interest and Safety.[119]

Pufendorf enumerated factors a state should consider in weighing whether to accept exiles and fugitives. Among these were the fertility of the country, the density of the existing population, whether the prospective newcomers were "industrious, or idle," and whether they could be located so as to "render them incapable of giving any Jealousy to the Government."[120]

Pufendorf's position was clear: A state should consider both interest and the duties of humanity, but exactly where it drew the line was a matter for its own discretion. There is no indication that he accepted Grotius' view that a state was obligated to accept immigrants willing to settle on unused ground.

D. Barbeyrac and the Edinburgh Commentator

Jean Barbeyrac's annotations of Pufendorf's immigration coverage revealed no objection to that author's positions. But Barbeyrac's annotations of Grotius's work sharply criticized Grotius's claim that a state must allow immigrants to settle on vacant land:

> I am not of our Author's Opinion on this Point; nor can I think the Reason here alledged [*sic*]solid. All the Land within the Compass of each respective Country is really occupied; tho' every Part of it is not cultivated, or assigned to anyone in particular: It all belongs to the Body of the People. The Author here reasons on a false Idea of the Nature of taking Possession . . . The Inundations of so many barbarous People, who under Pretense of seeking a Settlement in

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118 *Id.* at 245.
119 *Id.* at 246.
120 *Id.*

> uncultivated Countries, have driven out the native Inhabitants, or seized on the Government, are a good Proof of what I advance. See Pufendorf, *B*. III. *Chap*. III, § 10.[121]

Another commentator on Grotius also dissented from the master on this point. In 1707, the University of Edinburgh, Scotland published a "Compendium" (literally, "short cut"—an abridgement) of Grotius's *De Jure Belli ac Pacis* for student use.[122] The *Compendium*, which was published in Latin, consisted of successive extracts from Grotius's work, followed by unsigned commentary on each extract. The commentary on Grotius's view that foreigners have a right to settle in vacant territory generally follows Barbeyrac's position:

> However, to receive any and all migrants into the state is not only dangerous, but is not a position appropriate for any state; for the purpose of the state is the happiness of its citizens, which is obstructed by the indiscriminate receiving of all and the introduction of foreign customs. In this respect mercy must be tempered, lest we ourselves become objects of mercy to others. And it should be properly considered whether the productiveness of our soil is such as can support them comfortably, whether they are a skillful or lazy group of people who should be admitted, whether the newcomers can be so distributed and located so that they pose no threat to the state.
>
> If, moreover, some place is given by us to them for settlement, then it should be accounted an accommodation to them; from which it follows that they can't take any location they please or that they can occupy any place that happens to be vacant as if it were a matter of right—since no place within our territory can be reckoned without ownership by either private or universal public occupation. Therefore, whatever uncultivated and deserted land is found within the kingdom, then the decision of the authorities awards it to a person who desires it so that it is acquired by the possessors not by occupation but by assignment.[123]

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[121] 2 Grotius, *supra* note 3, at 448, n. 8 (notes by Barbeyrac). No doubt a premier example in Barbeyrac's mind was the fate of the Roman Empire, after its attempt to accommodate wave after wave of "barbarian" immigrants.

[122] Edinburgh Grotius, *supra* note 3,

[123] *Id.* at 67-68. The original is as follows:

> Quoslibet autem recipere peregrinos in civitatem non modo periculosum est, sed nec civitatis cujusq; status id admittit; finis enim ejus est Civium beatitudo, quae impeditur promiscua omnium receptione, & barbarorum morum introductione. Hinc misericordia ita est temperanda, ut nos ipsi aliis non fiamus miserabiles; & probe considerari debet an ea sit agri nostri fertilitas ut commode eos alere possit, solers an ignava turba, quae recipi debet, an advenae ita distribui possint & locari, ut nullum Civitati periculum immineat. Cum porro quicquid a nobis in tales fuerit collatum id beneficii loco ipsis imputare possimus; inde sequitur, ut non ipsi, quae

Again, the message is clear: As a matter of the law of nations, the extent to which a state must admit immigrants is for that state to decide.

E. Wolff

Christian Wolff also has been the victim of distortion by a modern commentator, who claims Wolff adopted "a principle of free movement, subject to several stipulated exceptions within the discretion of states . . . Wolff was instrumental in taking account of political realities by according limited regulatory powers to the sovereign to protect morals, religion, public safety, and public welfare, while maintaining the principle of free migration."[124]

Wolff's text tells a different story.[125] It emphasized that "No people, nor any private traveler, can appropriate to himself anything in foreign territory,"[126] for the territory is subject to the nation or ruler thereof.[127] Because no traveler could appropriate any right in foreign territory, one was not permitted to violate the sovereign's barrier to entry. This was true whether the person sought to enter for no reason or for a special business, "insofar as the prohibition extends."[128]

> placuerint sibi capere, aut si quid forte vacui loci apud nos jacuerit velut jure suo occupare possint: cum intra Territorium nullus Locus excogitari possit vacuus a proprietate, vel privata, vel publica occupatione universali. Itaq; quicquid inculti & deserti soli in Regno invenitur, id omne arbitrium superioris expectat cui id velit addictum, ut non occupatione sed assignatione possessoribus acquiratur.

124 *Nafziger*, *supra* note 7, at 811.

125 Wolff's Latin is dense and idiosyncratic. Although I tried to keep my translations literal, I had to compromise when a literal translation would be inscrutable.

126 Wolff, *supra* note 3, at 228: §293 ("*In territorio alieno Gens nulla, nec privatus ullus peregrinus, jus quoddam sibi arrogare potest.").*

127 *Id.* at 228:

> *Etenim territorium, cum in eo imperium habeat, atque dominium Gens, cujus est terra habitat, vel Rector civitatis juri proprio Gentis, vel Rectoris civitatis subbjecta [sic] est. Quamobrem cum vi juris proprii excludantur ceteri omnes, . . . in alieno quoque territorio Gens nulla, nec privatus peregrinus ullus jus quoddam sibi arrogare potest*.

That is:

> It follows if a nation (or people) should have ownership of a territory it occupies, it has governance over it, then it is deemed occupied land; or if the ruler of the state according to the rights of the nation or his own rights then it is deemed subjected land. For that reason all others may be excluded by the force of appropriate law. . . No nation or private traveler may assume for himself any private right in the territory of another.

128 *Id.* at 229:

Moreover, to ensure that a prohibition on entry had practical effect, the sovereign could devise penalties for disobedience.[129]

Like other writers, Wolff was somewhat more forgiving toward exiles. But even as to exiles he permitted denial of residence if there was good reason.[130] Good reasons included, among other factors, the convenience of the people, living space, prejudice to religion or culture, and the risk of admitting criminals.[131]

Ultimately, Wolfe's view was that access to a foreign country depended entirely on the will of that country's sovereign.[132]

F. Burlamaqui

Jean-Jacques Burlamaqui's work was more about natural and domestic law than about the law of nations, and his treatment of immigration was more oblique than the treatment by most of our other authors. In keeping with the spirit of the times, Burlamaqui believed that immigration should be encouraged:

> First then it is evident, that the force of a state, with respect to war, consists chiefly in the number of its inhabitants; sovereigns therefore ought to neglect nothing than can either support or augment the number of them.
>
> Among the other means, which may be used for this purpose, there are three of great efficacy. The first is, easily to receive all strangers of a good character, who want to settle among us . . . .[133]

> *Similiter quia nemo peregrinus jus quoddam sibi arrogare potest in territorio alieno; contra prohibitionem domini territorii nemine peregrino in idem ingredi licet, sive simpliciter, sive certi negotii causa, prouti tulerit prohibitio.*
>
> Similarly because no traveler can appropriate for himself any right in foreign territory, it is not permitted for any traveler to enter the same contrary to the prohibition of the ruler of the territory, whether on his own account or for any particular business, until the ban has been lifted.

[129] *Id.* at 230:

> *Quoniam contra prohibitionem domini territorii nemini peregrino in id ingredi licet . . . , prohibitionis vero effectus nulus [sic—should be "nullus"] est, nisi poenis ad non faciendum obligentur, qui quid facere prohibentur . . .*
>
> Granted that no traveler is permitted to enter against the ban of the lord of the territory, there really is no effect to the ban unless those who are prohibited from doing something are bound by a punishment for doing it.

[130] *Id.* at 118 ("*Exulibus perpetua habitatio a Gente in terris suis denegari nequit, nisi obstent rationes singulares*" — that is, "Perpetual Residence cannot be denied to exiles by a nationality in its own territory without specific reasons").

[131] *Id.* at 118 (listing "*plures . . . rationes, ob quas receptus denegari potest*"—that is, "very many reasons for which a reception can be refused").

[132] *Id.* at 231 ("*A dominii territorii voluntate unice dependet, sub qua lege accessum peregrinis permittere velit*."—that is, "It depends solely on the will of the lord of the territory, and that will is the law by which he permit access to travelers.")

[133] Burlamaqui, *supra* note 3, at 450.

Yet, an inference from this statement is that a sovereign could withhold permission to immigrate. The same inference follows from several other statements:

- a sovereign may prohibit the importation of foreign commodities;[134]
- a sovereign may refuse another country passage over its lands;[135] and
- once a person entered a foreign country, he is bound by the local laws—presumably including laws against his being there in the first place.[136]

Some confirmation comes from Burlamaqui's statements on *emigration*. Although Burlamaqui wrote that the right to emigrate "is a right inherent in all free people,"[137] in fact, he sharply qualified it in several ways. He concluded that "If the laws of the country have determined any thing in this point, we must be determined by them; for we have consented to those laws in becoming members of the state.[138]

G. Vattel

When the Constitution was written, Emer de Vattel's treatise was the most recently-published international law book freely available, and probably the most influential. For that reason—and because some modern commentators have suggested that Vattel's work does not support the power of a sovereign to restrict immigration[139]—we will examine his treatment of the subject in some detail.

Vattel's work comprised four books. Book I was entitled "Of Nations considered in themselves." A major theme of Book I was the derivation of rules of governance from natural law principles. Among his conclusions:

- "A nation or state has a right to every thing that can help to ward off imminent danger;"[140]
- nations may limit or ban imports;[141]
- nations may refuse to trade with others;[142]
- a nation may—indeed, in some cases, should—restrict emigration;[143] and
- nations may restrict immigration: "[I]t belongs to the nation

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134 *Id.* at 459-60.
135 *Id.* at 456.
136 *Id.* at 298.
137 *Id.* at 366.
138 *Id.* at 367.
139 *Nafzinger*, *supra* note 7, at 807 (claiming that the case for immigration restrictions based on Vattel's work was built from "highly selective snippets"); *Cleveland, Powers, supra* note 19, at 84 (claiming that Vattel was "ambiguous" on this subject).
140 Vattel, *supra* note 3, at 88.
141 *Id.* at 134.
142 *Id.*
143 *Id.* at 127 (arguing that useful workmen should be restrained from leaving the state); *cf. id.* at 221-225 (discussing when citizens should be permitted or restrained from leaving the country temporarily or permanently).

> to judge, whether her circumstances will or will not justify the admission of that foreigner."[144] Indeed, the nation "has a right, and is even obliged, to follow, in this respect, the suggestions of prudence."[145]

Vattel's belief that a state may restrict immigration influenced his definition of "inhabitants." That term included both citizens and "foreigners, *who are permitted* to settle and stay in the country."[146]

One might object that the title of Book I—"Of Nations considered in themselves"—suggests that it was devoted only to domestic, intra-state law. If so, one might contend, the immigration restrictions listed in Book I could be mere municipal regulations rather than part of the law of nations.

It is true that much of Book I addressed purely domestic questions, such as how legislation is adopted, how a sovereign should relate to its subjects, and rules of private and state property. Yet it also addressed transborder issues of the kind arising among sovereignties—that is, issues within the realm of international law. One usually can tell from the context whether the author was discussing an issue of municipal or international law.[147] Still, discussion of immigration restrictions in Book I does not prove that Vattel considered those restrictions to be matters of international law or that violations of those restrictions were "Offenses against the Law of Nations."

Book II was entitled "Of a Nation Considered in its Relation to Others," and was, in fact, devoted wholly to the law of nations. (The third and fourth books were about war and peace, respectively.) Book II leaves no doubt that immigration was a "law of nations" issue. Here is part of Book II's treatment of immigration:

> The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual.[148]

Vattel added that "the least encroachment on the territory of another is an act of injustice . . ."[149] Like other writers, he rejected Grotius's view that a sovereign must suffer immigrants to enter deserted territories under the control of the sovereign:

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144 *Id.* at 226.
145 *Id.* at 227.
146 *Id.* at 218. (Italics added.)
147 Thus, in Book I Vattel classified a rule among some European states denying citizenship to foreigners as part of the local "law of nations, established there by custom." VATTEL, *supra* note 3, at 224. If a rule pertaining to citizenship for foreigners was part of the law of nations, then immigration restraints would seem to fall into the same category *a fortiori*. (Vattel didn't like the custom of denying citizenship to foreigners, but that is beside the point.)
148 VATTEL, *supra* note 3, at 309.
149 *Id.* at 308.

> As every thing included in the country belongs to the nation,—and as none but the nation, or the person on whom she has devolved her right, is authorised to dispose of those things . . . ,— if she has left uncultivated and desert places in the country, no person whatever has a right to take possession of them without her consent. Though she does not make actual use of them, those places still belong to her: she has an interest in preserving them for future use, and is not accountable to any person for the manner in which she makes use of her property.[150]

The categorical right to exclude also implied the right to admit under conditions:

> Since the lord of the territory may, whenever he thinks proper, forbid its being entered . . . , he has no doubt a power to annex what conditions he pleases to the permission to enter. This, as we have already said, is a consequence of the right of domain.[151]

The law of nations also encompassed an individual duty to obey: "We should not only refrain from usurping the territory of others; we should also respect it, and abstain from every act contrary to the rights of the sovereign;"[152] and "[E]very one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual."[153]

Apparently, in Vattel's view, a sovereign that does not restrain its inhabitants from breaching another country's immigration laws also violates the law of nations: "If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation either in its body or its members, he does no less injury to that nation, than if he injured it himself."[154] Or, more specifically: "[T]here is another case where the nation in general is guilty of the crimes of its members. That is when by its manners and by the maxims of its government it accustoms and authorizes its citizens to plunder and maltreat foreigners, to make inroads into neighboring countries, &c."[155]

Like other international law writers familiar to the Founders, Vattel believed a sovereign had some obligation to consider admitting exiles and fugitives. However, those making the decision had to weigh the consequences, and could either deny refuge altogether or place conditions on it.[156]

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150 *Id.* at 306.

151 *Id.* at 312. On the same page, Vattel wrote that in making his decision on whether to permit entry, the ruler ought to "respect the duties of humanity." However, this statement was precatory only. Vattel left to "the following chapter the examination of the cases in which he cannot refuse an entrance into his territory." *Id.* In the following chapter, Vattel treated the exceptions mentioned by earlier scholars: cases of necessity, exiles, and refugees. *Id.* at 322-23.

152 *Id.* at 308.

153 *Id.* at 309.

154 *Id.* at 299.

155 *Id.* at 301.

156 *Id.* at 328-29.

H. Martens

Georg Friedrich von Martens was forthright on the power of a sovereign to exclude foreigners:

> From the moment a nation have taken possession of a territory in right of first occupier, and with the design to establish themselves there for the future, they become the absolute and sole proprietors of it, and all that it contains; and have a right to exclude all other nations from it, to use it, and dispose of it as they think proper . . . .[157]

Martens deduced several conclusions from this general proposition. One was that because foreigners could be excluded entirely, they also could be admitted on condition. Speaking of taxation, Martens wrote, "A foreigner enjoying the protection of the state, cannot, while he remains in it, expect to be entirely exempted from imposts. Besides, it may be made a condition of his admission . . . ."[158] For the same reason, a sovereign could admit foreigners on the condition that they sacrifice their inheritance to the state:

> From the right of excluding all foreigners from the territory is derived another right, the *Droit d'Aubaine*. In virtue of this right, the heritage [i.e., inheritance] of a foreigner, who dies without leaving heirs in the country, falls to the sovereign, or to the chief magistrate of the place where he dies, to the exclusion of the heirs that he may have out of the country.[159]

The fact that Martens included this material in a book on the "law of nations" precisely when the Constitution was being composed and debated strengthens the inference that the contemporaneous meaning of the "law of nations" included power to control, or even prohibit, immigration.

I. Blackstone

William Blackstone's work dealt principally with the common law of England, but he also outlined some general rules from the law of nations. One was that, with minor qualifications, a state had the right to exclude foreigners:

> Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states, to take such measures about the admissions of strangers, as they think convenient; those being ever excepted who are driven

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157 Martens, *supra* note 3, at 67.
158 *Id.* at 97.
159 *Id.* at 99-100.

> on the coasts by necessity, or by any cause that deserves pity or compassion.[160]

Clearly, Blackstone believed that the sovereign's prerogative to exclude was very extensive.

Conclusion

In my popular writing, I have identified a process, occurring primarily during the nineteenth century, in which constitutional writers lost the original meaning of certain constitutional provisions and phrases.[161] One reading the old property law standby, *Pierson v. Post* (1805),[162] witnesses the beginning of this process. In *Pierson*, the plaintiff was chasing a fox, but had not yet captured the animal when the defendant intervened and seized the creature for himself. The plaintiff sued, and the New York Supreme Court was faced with the question of whether the plaintiff's chase gave him sufficient property in the fox to justify a legal remedy.

The majority opinion, written by Daniel D. Tompkins (later Vice President of the United States) held that a person generally acquired a sufficient property right in a wild animal to maintain such a lawsuit only if he had reduced the animal to possession. Tompkins relied for this conclusion on works by, among others, Grotius, Pufendorf, and Barbeyrac.[163]

The dissent, penned by Brockholst Livingston (later associate justice of the U.S. Supreme Court), deprecated Justice Tompkins' appeal to traditional authority: "This is a knotty point," he wrote, "and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited."[164] Thus did a future U.S. Supreme Court justice urge Americans of the emerging nineteenth century to disregard the past.

It happens that many Americans, eager to leave the Old World behind and advance into the New, agreed with Livingston. I suspect most modern casebook writers and law professors would agree as well.

The late Alan Watson, the celebrated Scottish comparative law scholar, thought they were being unduly hasty. He sharply criticized a leading twentieth-century property law casebook that was as dismissive of historical authorities as Justice Livingston had been, Watson wrote:

> A second part of the answer is the great importance attributed to these works. Justinian's restatement of Roman law was—still is—regarded as the foundation stone of subsequent Western law. Puffendorf, who was much admired in the U.S. at the time, was attempting to set up on rational principles rules that ought to be

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160 1 William Blackstone, Commentaries *251.

161 Robert G. Natelson, *The Great Forgetting*, https://i2i.org/the-great-forgetting/.

162 3 Caines 175 (Sup. Ct. N.Y. 1805).

163 *Id.* at 177-79.

164 *Id.* at 181. Blackstone was cited by Pierson's lawyer, not by the court. *Id.* at 176. Neither the reported argument nor the opinion of the court mention Locke.

> valid everywhere in the civilized world, hence including New York. Naturally, in the circumstances of the time, these principles very much derived from the Roman law of Justinian. Fleta and Bracton give the English connection. Dukeminier and Krier [the casebook authors] do the student no service when they say the opinions "are peppered with references to a number of obscure legal works and legal scholars."[165]

I agree with Professor Watson. One can understand the desire to get on with things, but doing so heedlessly has cost us an understanding of parts of our own Constitution—the Define and Punish Clause representing one example. A similar lack of understanding plagues other sections of the document, particularly sections that populate the majority of the text disregarded in constitutional law courses.[166] The result is fruitless debate and endless uncertainty.

Fortunately, I have found that one often can resolve the uncertainty by a few hours' immersion in the legal and literary canon of the Founding era.[167] This turned out to be true for the Define and Punish Clause. The Founding era authorities leave little doubt that that constitutional provision is the source of Congress's power to restrict immigration.

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165 Alan Watson, *Introduction to Law for Second Year Students?* 46 J. Leg. Ed. 430, 438-39 (1996).

166 Several years ago, when choosing a constitutional law case book for my own students, I surveyed all such books on the market. Most of the Constitution received either summary coverage from them or none at all. On average, these case books devoted two-thirds of their coverage to two percent of the Constitution—the two percent being the First Amendment and Sections 1 and 5 of the Fourteenth Amendment. I do not think it is coincidental that those are the parts of the document most often at issue when a case involves pornography, sex, or race.

167 Many of my publications report the results of this immersion. *See, e.g.*, Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 Harvard J.L. & Pub. Pol. 1017 (2008) (resolving the dispute over whether Coinage Clause was understood to authorize paper money); *What the Constitution Means by "Duties, Imposts, and Excises"—and Taxes (Direct or Otherwise)*, 66 Case Western Res. L. Rev. 297 (2015) (resolving the dispute over the meaning of "direct tax," largely by exploring eighteenth century tax statutes); *New Evidence on the Constitution's Impeachment Standard: "high . . . Misdemeanors" Means Serious Crimes*, 21 Fed. Soc. Rev. 24 (2020) (determining that the phrase "high misdemeanor" was a Founding-era legal term designating a serious crime not requiring the death penalty).