

Artl.S8.C18.8.3 Colonial Period, Constitutional Convention, and Immigration

Article I, Section 8, Clause 18:


[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

At the Constitutional Convention, James Madison, in a debate on a length of citizenship requirement for the House of Representatives, described immigration as essential to the new country's prospects: "He [Madison] wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity. That part of America which had encouraged them most had advanced most rapidly in population, agriculture, and the arts."¹ Madison's open attitude towards immigration has been taken as representative of the Framers' "general feeling at the time."² But the Constitution that they produced did not contain any provision explicitly addressing the Federal Government's power to admit, exclude, or expel aliens (unless one counts the compromise over delayed prohibition of the slave trade reflected in the Migration or Importation Clause contained in Article I, Section 9).³

During the colonial period, the laws of some colonies had restricted the entry of particular categories of immigrants, including paupers and criminals.⁴ England had power to override these restrictions, however, and engaged in a consistent practice of transporting convicts to the American colonies over colonial protest.⁵ That practice resulted in the transportation of 50,000 convicts from England to the United States between 1718 and 1775, accounting for one quarter of all British immigrants during that period.⁶ In 1788, after the Constitutional Convention but before ratification, the Congress of the Confederation recommended by resolution that the individual states enact laws to prohibit the transportation of convicts from foreign countries into the United States.⁷

Footnotes

1. ^ JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 411 (Elliot ed., 1845).
2. ^ S. Doc. No. 61-758, pt. 21, at 5 (1911); *see also* MADISON, *supra* note 1, at 233 (statement of Charles Pinckney) (“[I]n a new country, possessing immense tracts of uncultivated lands, where every temptation is offered to emigration, and where industry must be rewarded with competency there will be few poor”); *id.* at 389 (“Col. [George] MASON was for opening a wide door for emigrants; but did not choose to let foreigners and adventurers make laws for us and govern us. Citizenship for three years was not enough for ensuring that local knowledge which ought to be possessed by the representative.”); *but see id.* at 310 (statement of Elbridge Gerry) (“There was a rage for emigration from the Eastern States to the western country, and [Gerry] did not wish those remaining behind to be at the mercy of the emigrants. Besides, foreigners are resorting to that country, and it is uncertain what turn things may take there.”).

3. ^ See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 15, 81–82 (2002); see also *Arizona v. United States*, 567 U.S. 387, 422 (2012)  (Scalia, J., concurring in part and dissenting in part) (arguing that because of the acceptance of exclusion power as an incidence of sovereignty at the time of the framing, “there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States’ similar power, subject to federal abridgment) was contained in” the Migration or Importation Clause).
4. ^ Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841 (1993); EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965*, at 396–404 (1981).
5. ^ See 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, 323–25 (2008); Neuman, *supra* note 4, at 1841–43.
6. ^ Markowitz, *supra* note 5, at 323–24.
7. ^ Neuman, *supra* note 4, at 1842.