Artl.S8.C18.8.4 Early Federal Laws on 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.*

From ratification of the Constitution until 1875, Congress took little action with respect to immigration.[1] However, one major outlier to Congress's inactivity during this period—contained in the group of laws enacted in 1798 commonly known as the as the Alien and Sedition Acts—generated intense debate over whether the Constitution gave Congress power to regulate immigration.[2] The Alien Friends Act empowered the President "to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."[3] The Naturalization Act of 1798 imposed registration requirements on "all white aliens residing or arriving" in the United States.[4] Federalist proponents of these laws defended their constitutionality by drawing from the law of nations literature to argue that inherent principles of sovereignty gave Congress power to regulate immigration, including by providing for the expulsion of aliens.[5] The party of John Adams and Alexander Hamilton, the Federalists, pointed to various constitutional provisions, including the Article I provision giving

Congress power to declare war, that they argued incorporated the sovereignty principles into the constitutional system.[6] Opponents of the laws, Thomas Jefferson and James Madison among them, argued that the power to expel aliens did not fit within any of Congress's enumerated powers, that Congress did not possess any unenumerated or inherent powers, and that the law of nations (to the extent it was relevant) only permitted the expulsion of enemy aliens.[7] The federal judiciary never resolved the constitutionality of the laws.[8] The Alien Friends Act expired on its own terms in 1800; its registration requirements, which appear not to have been enforced, were repealed in the Naturalization Act in 1802.[9]

Aside from the short-lived deportation and registration provisions in the Alien and Sedition Acts, few federal statutes pertained to immigration before 1875.[10] During this period, however, some state laws following in the colonial tradition provided for the exclusion or expulsion of convicts, paupers, and people with contagious diseases.[11] Some states, primarily but not exclusively in the South, also provided for the exclusion and in some cases expulsion of free Blacks, regardless of their national origin.[12] A subset of these laws required that Black seamen be detained or quarantined while their vessels were in port.[13] Yet state immigration restrictions during this period did not impose numerical limits on immigration and, as such, did not resemble the regime of limited immigration that has existed under federal law since 1921.[14]

Footnotes

1. ^ 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, 99 (2002) ("Federal legislation was adopted [in 1799, 1816, and the 1840s] to ensure the health and safety of passengers and to grant duty-free admission to their personal and professional possessions. No meaningful federal restrictions on immigration were imposed [during the pre-Civil War period].") (footnotes omitted); Edward P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 45–46 (1981) (reviewing all immigration-related federal legislation in the pre-Civil War era, including naturalization and steerage laws, and explaining that "Congress was not yet ready to take action" on "complaints about the coming of foreign paupers, criminals, and other undesirables"); *cf.* Steerage Act of 1819, ch. 46, 3 Stat. 488 (restricting the number of passengers an owner of a vessel could carry on board without being subjected to fines and other penalties). On naturalization—in contrast to immigration—Congress established a federal system from the outset. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (providing that "free white persons" who resided in the United States for at least two years could be granted citizenship if they showed good moral character and swore allegiance to the Constitution). Decades later, in 1870, Congress extended naturalization eligibility to "aliens of African nativity and to persons of African descent." Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254.

2. ^ *See* Cleveland, *supra* note 1, at 15, 87–98; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1880–82 (1993).

3. ^ *Compare* Alien Friends Act ("An Act Concerning Aliens"), ch. 58, § 1, 1 Stat. 571 (1798) *with* Alien Enemy Act ("An Act respecting Alien Enemies"), ch. 66, § 1, 1 Stat. 577 (1798) (applicable only in wartime and providing that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies"). The Alien Friends Act was modeled after a 1793 English law that "similarly gave the King unfettered discretion to expel aliens as he 'shall think necessary for the publick Security.'" Sessions v. Dimaya, No. 15-1498, slip op. at 7 (U.S. Apr. 17, 2018) (Thomas, J., dissenting) (citing 33 Geo. III, ch. 4, § 18, *in* 39 Eng. Stat. at Large 16).

4. ^ Act of June 18, 1798, ch. 54, § 1,1 Stat. 566. The Act also extended the minimum residence requirement for naturalization from five to fourteen years. *Id.*
5. ^ Cleveland, *supra* note 1, at 89–92.
6. ^ *Id.*
7. ^ *Id.* at 93–97.
8. ^ *Id.* at 98.
9. ^ *Id.*; Neuman, *supra* note 2, at 1881–83.
10. ^ HUTCHINSON, *supra* note 1, at 45–46.
11. ^ *See generally* Neuman, *supra* note 2, at 1841–65; HUTCHINSON, *supra* note 1, at 397–401 ("[T]he dominant concern of the [state] legislators was that immigrants would add to the burden of poor relief, and there was strong suspicion at the time that Europe was deliberately exporting its human liabilities."); *see also Sessions*, No. 15-1498, slip op. at 10 (Thomas, J., dissenting) (noting that "[t]he States enacted their own removal statutes" during the 1800s).
12. ^ *See* Neuman, *supra* note 2, at 1866–73; Cleveland, *supra* note 1, at 98–99.
13. ^ *See* Neuman, *supra* note 2, at 1873–74.
14. ^ *See id.* at 1834 ("Neither Congress nor the states attempted to impose quantitative limits on immigration [before the 1870s and 1880s].").