

Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law

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I. INTRODUCTION

In 1867, Judge Timothy Farrar published the first edition of the treatise entitled *Manual of the Constitution of the United States of America* (the Manual).¹ A former law partner of Daniel Webster, judge of the New Hampshire Court of Common Pleas, and president of the New England Historical and Genealogical Society, Farrar was a well respected legal figure in the nineteenth century.² Charles Sumner described Farrar's treatise as correcting "false interpretations" of the Constitution and was convinced that the treatise would be "generally accepted."³ Upon his death, an obituary claimed that Farrar's treatise

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1. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (1867).

2. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 84 n.158, 85 (1993); Samuel Lee, Timothy Farrar, LL.D., 29 THE NEW ENGLAND HIST. GENEALOGICAL REG. 225, 231 (Henry Fitz-Gilbert Waters ed., 1875) (noting that government officials of the day called on Judge Farrar for aid in activities such as drafting legislation and responding to publications critical of the government).

3. Lee, *supra* note 2, at 231 (quoting Charles Sumner).

was what he was “best known” for as a jurist.⁴ Another stated it was “now an accepted text book.”⁵ Meanwhile, an obituary published in the *Boston Daily Advertiser* described it as being “regarded by jurists and lawyers as the most exhaustive work on the principles and intent of the Constitution.”⁶

In fact, Farrar’s constitutional treatise was so well read that Ohio Representative William Lawrence cited it “to defend the constitutionality of the 1866 Civil Rights Act.”⁷ It even received nation-wide acclaim in the press. For instance, the *Philadelphia Inquirer* reported that Farrar’s treatise was “exceedingly useful . . . at the present time; one that no student of the Constitution, no lawyer and, above all no legislator should be without.”⁸ The *Daily Evening Bulletin* described it as “ably written,” “pervaded by a spirit of candor,” and proclaimed that there “was never a time when there was more need of an intelligent study of the great charter of our Republic.”⁹ The *Cincinnati Daily Gazette* thought it “especially timely,” “a crushing refutation of State right theories,” and a “well nigh exhaustive treatise on Constitutional Law.”¹⁰

The Manual is of particular significance in our constitutional jurisprudence because it was one of the first treatises to analyze the Fourteenth Amendment contemporaneous with its adoption. It was a work made to be “accessible and useful to the multitudes.”¹¹ As the *American Presbyterian Review* reported, Farrar was “[w]idely known as a sound lawyer” and his treatise was intended for “popular use, and not almost addressed exclusively to the members of [the legal profession].”¹² While legal scholars and historians have generally

4. N.Y. HERALD, Oct. 30, 1874, at 7, col. 6. The New York Herald had published a much shorter obituary the day prior. See N.Y. HERALD, Oct. 29, 1874, at 7, col. 4.

5. THE FARMER’S CABINET (Amherst, N.H.), Nov. 11, 1874, at 2, col. 5.

6. BOSTON DAILY ADVERTISER, Oct. 29, 1874, at 1, col. 10.

7. Aynes, *supra* note 2, at 85 (citing CONG. GLOBE, 41st Cong., 3d Sess. 1244 (1871) and CONG. GLOBE, 43rd Cong., 1st Sess. 413 (1874)). For other notable mentions to Farrar’s treatise in support of constitutional arguments, see THE CINCINNATI GAZETTE, Feb. 13, 1871, at 1, col. 2 (arguing that Congress has power to create railroads).

8. THE PHILA. INQUIRER, Sept. 9, 1867, at 2, col. 2.

9. DAILY EVENING BULL., (San Francisco, Cal.), Oct. 19, 1867, at 1, col. 3.

10. THE CINCINNATI DAILY GAZETTE, Oct. 23, 1867, at 1, col. 3; see also N.H. SENTINEL (Keene, N.H.), Apr. 3, 1873, at 1, col. 2 (describing Farrar’s treatise as a “valuable work”). For the most detailed review, see 26 NEW ENGLANDER 725–40 (New Haven, Conn.), Oct. 1867. Of course, not all reviews of Farrar’s treatise were positive. See 9 AM. LITERARY GAZETTE AND PUBLISHERS’ CIRCULAR 268 (Phila., Pa.), September 16, 1867 (describing Farrar’s treatise as “the anti-state-right doctrine”); 87 CHRISTIAN EXAMINER 99–104 (N.Y., N.Y.), July 1869 (recommending John Pomeroy’s AN INTRODUCTION TO CONSTITUTIONAL LAW IN THE UNITED STATES over Farrar’s treatise).

11. THE AM. PRESBYTERIAN REV. 459, 467 (Phila., Pa., July 1870).

12. *Id.*

focused on Farrar's interpretation of the Fourteenth Amendment's Privileges or Immunities Clause,¹³ his interpretation of the Amendment's Apportionment Clause has seemingly gone overlooked. Also known as Section 2, the clause reads, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each State, excluding Indians not taxed."¹⁴ Farrar described Section 2 as follows: "The whole number of persons in each State cannot mean everybody on the soil at the particular time, nor exclude everybody who may happen not to be on it at the same time, and of course should be authoritatively construed by the law-making power."¹⁵

To paraphrase, Farrar understood that neither the Constitution nor the Fourteenth Amendment required an apportionment of every individual in the United States. He knew the constitutional text "*persons in each State*" could be quantified by Congress dependent upon such factors as whether "persons" were "temporary or permanent, strangers, aliens, Indians, &c."¹⁶ However, legislation concerning which classes of persons were to be excluded from apportionment was never proposed in the late nineteenth century, thus leaving the issue to "the preference of the executive officers."¹⁷ While historians and legal scholars can only speculate as to why the Reconstruction Congress never proposed legislation defining "persons in each State," such speculation does not disparage the fact that Farrar and the drafters of the Fourteenth Amendment thought such legislation was constitutionally permissible.

Naturally, the absence of contemporaneous legislation by the Reconstruction Congress leaves many constitutional questions

13. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 229-34 (2009); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1321-22 (2009); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 396 (2009); Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1172 n.345 (1993); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1470-72 (1998); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 31 (2007).

14. U.S. CONST. amend. XIV, § 2.

15. FARRAR, *supra* note 1, § 450, at 403. Farrar did not change his interpretation of the Fourteenth Amendment's Apportionment Clause in subsequent editions. See TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 403 (2d. ed., 1869); TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 403 (3d. ed., 1872).

16. FARRAR, *supra* note 1, § 449, at 402.

17. *Id.* § 132, at 158.

unanswered. Who did the drafters intend to qualify as “persons in each State”? What classes, if any, could be excluded from the federal apportionment? What were the constitutional and legal grounds for excluding these classes from the federal apportionment?

With the 2010 census nearly complete, the answers to these questions are once again as important as they were in 1866.¹⁸ This is due to the fact that many Americans see the counting of unlawfully present aliens in the federal apportionment as politically unfair. While many states and municipalities implement legislation as a means to deter unlawful immigration, there are many others that pass legislation to circumvent the federal immigration laws by acting as sanctuaries for unlawful immigrants.¹⁹ In other words, many states and municipalities are benefitting from encouraging unlawful immigration.

One of these benefits includes an increase or shift in congressional representation. Just this past year, Louisiana Senator David Vitter offered an amendment to fix this perceived political injustice by excluding unlawfully present aliens from the federal apportionment. In particular, the amendment mandated that the Census Bureau inquire about the status of a person’s citizenship.²⁰ Vitter’s amendment failed, however, which leaves us to wonder whether such an amendment or similar legislation would have even been upheld as constitutional. Perhaps more importantly, it raises issues of federalism and whether state and municipal governments can take matters into their own hands by excluding non-citizens from their respective apportionment bases.

The constitutionality of excluding non-citizens from the federal apportionment base has been a matter of scholarly discourse for some time.²¹ Unfortunately, the debate is often based on contemporary politics and the mischaracterization of constitutional history, especially

18. Richard Greener & George Kenney, *Census Nonsense*, L.A. TIMES, May 29, 2010, available at <http://www.latimes.com/news/opinion/commentary/la-oe-adv-kenney-census-20100529,0,6672071.story>; Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/2010/05/30/congress-should-reapportion-representatives-only-on-the-basis-of-citizen-populations/> (May 30, 2010, 1:46 EST).

19. See 2010 Ariz. Sess. Laws. 113.

20. The Vitter Amendment, S. A. 2644, 111th Cong. (2009), available at <http://thomas.loc.gov> (search “Bills Summary and Status” for “S. A. 2644”).

21. See April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 ASIAN PAC. AM. L.J. 163 (1996); Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C. L. REV. 1283 (2001); Timothy Mark Mitrovich, *Political Apportioning Is Not a Zero-Sum Game: The Constitutional Necessity of Apportioning Districts to Be Equal in Terms of Both Total Population and Citizen Voter-Age Population*, 77 WASH. L. REV. 1261 (2002); Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL’Y 521 (1994); Charles Wood, *Losing Control of America’s Future-The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465 (1999).

Section 2 of the Fourteenth Amendment. For example, it has been suggested that “whole numbers of persons in each State” is meant to be construed as the term “inhabitants,” thus “persons” was only meant to include individuals “who have their principal residence in the state, and whose residence there has more than some minimum degree of permanence and stability.”²²

While lawful resident aliens certainly qualify under this standard, it is argued that unlawfully present aliens do not.²³ As Charles Wood writes, “[T]here is no indication that for [apportionment the Fourteenth Amendment’s drafters] distinguished between illegal and legal aliens.”²⁴ Wood comes to this conclusion because he believes that aliens, up to the Reconstruction Era, were never in “an unlawful status that made them subject to deportation from the United States at any time.”²⁵ Thus, he believes Congress could remove unlawfully present aliens from the apportionment base.²⁶

It is unfair to claim there were not any legal hurdles placed on aliens that made them “unlawful” or “illegal” and subject to removal or excludable from the apportionment base up to the Reconstruction Congress.²⁷ Returning to the commentary in the Manual, Judge Timothy Farrar asserted that the phrase “other persons” in Article I Section 2 only included aliens that were “legally admitted, or otherwise constituted as such.”²⁸ It was these “legally admitted” aliens who were “a part of the ‘people of the State,’ to whom the [congressional] representation is assigned, and on whose numbers it is apportioned.”²⁹ The reasoning for this restriction on apportionment was that the Constitution’s “persons” did not “mean everybody, without regard to anything but their humanity and personality.”³⁰ “Persons” meant that individuals “must bear some relation to the State in which they are enumerated.”³¹ In other words, Farrar was rightfully claiming that the ancient doctrine of allegiance could control apportionment “exclusions.”³²

22. Wood, *supra* note 21, at 487.

23. *Id.* at 490.

24. *Id.*

25. *Id.* at 490–91.

26. *Id.* at 491.

27. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1846–59 (1993); E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 13–16 (1981); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 6–7 (1978).

28. FARRAR, *supra* note 1, § 205 at 214.

29. *Id.*

30. *Id.* § 240, at 237.

31. *Id.*

32. *Id.*

Furthermore, Wood's conclusion on the nineteenth century ignores the rich legal history that aliens could be subjected to different treatment regarding the privileges and rights of the host nation,³³ especially political privileges such as voting and apportionment.³⁴ Naturally, such privileges and rights were conditioned on their allegiance to just government and submission to laws.³⁵ This study sets forth to address this history by focusing on the constitutionality of excluding undocumented aliens from the federal apportionment base. What is of particular significance is the intent of the Reconstruction Congress, for it sheds light on who was to be apportioned and why. More importantly, it gives weight to Charles Wood's and Timothy Farrar's assertions that Congress could pass a law limiting apportionment to classes of aliens.

While history is significant as to determining the constitutionality of excluding unlawfully present aliens from federal apportionment, the federal government cannot be compelled to exclude undocumented aliens from the apportionment base. Legislation concerning the apportionment of unlawfully present aliens has been a non-justiciable political question that the courts cannot remedy. Thus, the following study first addresses this subject, as well as the political means by which the people—through their respective state and municipal governments—can lobby Congress to act. This requires an examination and understanding of apportionment at the state and municipal level. Apportionment legislation at this level is significant because it can equally distribute the power to vote among citizens. Furthermore, it seems to be the best vehicle by which the people can urge Congress to act on the federal apportionment issue.

Second, this study provides a detailed history of the Fourteenth Amendment's Apportionment Clause, and concludes that Congress has the authority to exclude unlawfully present aliens from the apportionment base absent a constitutional amendment. This authority rests with the ancient and longstanding doctrine of allegiance, which the Reconstruction Congress repeatedly discussed as being important to the granting of many of the Constitution's enumerated rights.³⁶

33. Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: A Historical Perspective*, 15 TEX. REV. L. & POL., at 10 (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618976. See also 1 ANNALS OF CONG. 1109-25 (1790) (debates of the first Naturalization act discussing the powers of the federal and State governments to prescribe different privileges for aliens and citizens).

34. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 977 (2002); *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (“[I]t is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions.”).

35. Charles, *supra* note 33, at 17-23.

36. Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1834-37 (2009); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV.

II. USING “ONE-PERSON, ONE-VOTE” TO BRING CONGRESSIONAL APPORTIONMENT TO THE FOREFRONT OF IMMIGRATION REFORM

As we have seen with the passing of the recent Arizona immigration law, the politics of unlawfully present aliens is a topic of heated debate at both the federal and state levels.³⁷ Known as SB 1070, the Arizona law aids the federal government in the enforcement of immigration law. While the enforcement of immigration law at the state level is quite common,³⁸ opponents of these laws consistently claim violations of equal protection, or privacy, or that such legislation is constitutionally preempted.³⁹ Naturally, the constitutionality of the Arizona law is part of this debate. However, whether one supports the arguments for or against its constitutionality, SB 1070 has brought immigration reform to the political forefront. Perhaps part of this reform will include fixing congressional apportionment, which currently takes into account unlawfully present aliens. If not, the people through their respective state and municipal governments can push for reform by pushing for the exclusion of non-citizens from apportionment at the local level.

For those unfamiliar with apportionment law in the constraints of the Constitution, the exclusion of non-citizens from state and municipal government apportionment is known as the “one-person, one-vote” principle. It gives states and municipalities discretion to apportion according to a multitude of citizen population formulas. The “one-person, one-vote” principle has been upheld by the Supreme Court multiple times. For instance, in *Wesberry v. Sanders* the Court held it is well-established that it is within the power of each state to

J.L. & PUB. POL’Y 1095, 1127–28 (2002); Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015, 1029–30 (2008). See generally Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 34–43 (2009) (discussing the allegiance for protection doctrine); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008).

37. See Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.B. 2152, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

38. See *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999) (state trooper was not preempted from arresting individual solely on the fact that he was an illegal alien); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301, 1301 n.3 (10th Cir. 1984) (state officers may “make a warrantless arrest [upon probable cause of a] violation of the immigration laws” and have “general investigatory authority to inquire into possible immigration violations”); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (state and local officers were not preempted from enforcing federal immigration laws), overruled on other grounds by, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

39. See ACLU of Arizona Section by Section Analysis of SB 1070 “Immigration; Law Enforcement; Safe Neighborhoods” as Amended by HB 2162, (May 3, 2010) (on file with author).

ensure “one [person’s] vote in a congressional election is to be worth as much as another’s.”⁴⁰ The *Wesberry* Court went on to clarify that it “would defeat the principle . . . [of] equal representation . . . to give some voters a greater voice in choosing Congressman than others.”⁴¹

Numerous federal courts have also upheld state and municipal governments’ discretionary authority to ensure their respective citizens’ voting power is not diluted by non-citizen numbers. For instance, in *Barnett v. City of Chicago*, the Seventh Circuit Court of Appeals held “[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens.”⁴² Similarly, in *Meza v. Galvin*, the Federal District Court of Massachusetts denied a challenge to a municipal apportionment plan based on citizenship and not total population.⁴³ The court held “[b]ecause non-citizens by definition cannot vote, it makes little sense to consider them for purposes of determining whether the particular remedial scheme proffered by plaintiffs would adequately remedy the alleged vote dilution.”⁴⁴

Naturally—absent a legislative or constitutional device requiring apportionment based on citizenship—state and municipal governments cannot be compelled to apportion their districts according to the “one-person, one-vote” standard. It is purely a political question. In *Burns v. Richardson*, the United States Supreme Court elaborated on this legal point, holding that while states and municipal governments may exclude non-citizens in determining their respective district apportionment, the “decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.”⁴⁵

To be precise, only through the elective franchise, the right to petition, and the legislative process can state legislatures and municipal governments be made to apportion according to citizenship. However, such encouragement starts with the citizens themselves, for only in response to their voice and opinion will state and municipal governments take action. In exercising this voice, it should be emphasized that not only does apportionment according to citizen

40. 376 U.S. 1, 7–8 (1964); *see also* *Reynolds v. Sims*, 377 U.S. 533 (1964).

41. *Wesberry*, 376 U.S. at 14.

42. 141 F.3d 699, 704 (7th Cir. 1998).

43. 322 F. Supp. 2d 52 (D. Mass. 2004).

44. *Id.* at 60.

45. 384 U.S. 73, 92 (1966).

interests ensure that every citizen's voting power is equal, but it serves as a vehicle for petitioning Congress to remedy the Census Bureau's counting of unlawful aliens for apportionment purposes.

Despite state and municipal governments having great latitude in apportioning their respective voting districts, there is one federal statutory limitation that must be complied with—42 U.S.C. § 1973. Otherwise known as the Voting Rights Act, 42 U.S.C. § 1973 provides guidelines to ensure state and municipal governments do not minimize minority voting power.⁴⁶ The Voting Rights Act, however, only limits state and municipal governments from affecting the rights representation of minority voting citizens. Non-citizens do not have to be taken into account in forming voting districts.

This begets the question, “What data may state and municipal governments use in determining their respective voting districts?” The answer to this question is a bit complex. What is certain, though, is that state and municipal governments do not have to take into account the total population numbers accrued by the Census Bureau. In *Burns v. Richardson*, the Supreme Court elaborated on this point, stating that “the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured.”⁴⁷ In other words, while state and municipal governments have traditionally taken total population⁴⁸ into account in conducting their respective apportionments, the federal courts have not precluded state and municipal governments from using statistics⁴⁹ such as voting-age population (VAP), citizens of voting-age population (CVAP),⁵⁰ or registered voting-age population (RVAP).⁵¹

46. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Grove v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980).

47. *Burns*, 384 U.S. at 91.

48. For an argument in favor of population-based apportionment which includes non-citizens, see Chung, *supra* note 21, at 182.

49. See Estrada, *supra* note 21, at 1294 (noting that Act of Dec. 23, 1975, Pub. L. No. 94-171, 89 Stat. 1023 (codified as amended at 13 U.S.C. § 141 (1994)) requires the Census Bureau to provide data such as “population by race and ethnicity, and population 18+ and population 18+ by race and ethnicity”).

50. CVAP is calculated by dividing the number of eligible citizens into the number of Spanish surnamed voters. Spanish surnamed voters are determined by matching a list of the most common Spanish surnames against the voter registration list. Unlike statistics on citizenship, Spanish surname voter registration can be updated during the decade. *Id.* at 1294 n. 51. CVAP is considered to be “the most accurate estimate of potential voters while having the fewest possible concerns.” Mitrovich, *supra* note 21, at 1278.

51. In *Garza v. County of Los Angeles*, 918 F.2d 763, 773–74 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), the Ninth Circuit acknowledged that neither the Supreme Court nor the restraints of the Equal Protection Clause require States to use total population. However,

While the Supreme Court has not weighed in on which statistics are constitutionally permissive, Justice Clarence Thomas has opined that state and municipal governments may use CVAP so long as the “maximum deviation is allegedly anywhere between 20% to 32.5%.”⁵² In other words, Thomas agreed with the lower courts that the choice to use total population, voting-age population, or citizens of voting-age population is a choice left to the political process.⁵³

To further ensure compliance with the Voting Rights Act and the “one-person, one vote” principle, the bright line rule is that state and municipal governments should not apportion their districts with a

the *Garza* court held that “California state law requires districting to be accomplished on the basis of total population.” *Id.* at 774 (citing Cal. Elec. Code § 35000 (repealed 1994)). In addition to this, the *Garza* court weighed the fact that “[r]esidents of the more populous districts [would] have less access to their elected representative[s].” *Id.* Thus, the *Garza* court weighed Fourteenth Amendment considerations in determining a county’s districting plans. The court reasoned that “basing districts on voting population rather than total population . . . would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative.” *Id.* at 775. Such a holding blurs the lines between political and civil rights, and an article by Scot A. Reader has shown the court’s conclusion—that people have a right to equal access to their elected representative—to be unsupported. Reader, *supra* note 21, at 530–42.

The Fourth Circuit examined the *Garza* court’s holding in great detail. *See* *Daly v. Hunt*, 93 F.3d 1212, 1222–28 (4th Cir. 1996). Particular attention was paid to Justice Kozinski’s dissent, *id.* (citing *Garza*, 918 F.2d at 778–88 (Kozinski, J., dissenting)), wherein he asserted that “the proportion of eligible voters serves the principle of electoral equality.” *Garza*, 918 F.2d at 781 (Kozinski, J., dissenting). The Fourth Circuit disagreed, holding “that representational equality is at least as important as electoral equality in a representative democracy.” *Daly*, 93 F.3d at 1227. The Fourth Circuit did not affirmatively state that State and municipal governments cannot take into consideration VAP. *Id.* at 1228. It merely held that it did not see VAP as being a superior benchmark in determining apportionment or districting. *Id.* The Fourth Circuit made it clear that issues of “electoral equality and representational equality . . . should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.” *Id.* at 1227 (citing *Burns*, 384 U.S. at 92).

The Fifth Circuit also disagreed with the *Garza* majority and dissent. *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000). The court stated:

While hardly determinative, our review of the history of the [Fourteenth] amendment cautions against judicial intrusion in this sphere—either for or against either particular theory of political equality. . . . We reject the conclusions of both the dissent in *Garza* and any reading of the majority opinion in that case that would mandate the use of total population figures on equal protection grounds.

Id. The Fifth Circuit also stated, “While it does appear that the numerical weight of references is on the side of electoral equality, it is difficult to attach controlling significance to this fact.” *Id.* at 525. The court did not rule out CVAP as a measuring device for apportionment. *Id.* at 523–25. *See also* *Chen v. City of Houston*, 532 U.S. 1046, 1048 (2001) (mem.) (Thomas, J., dissenting). For a summary of this issue see *In re* *Petition of Maria Frica Tudela Pangelinan*, 2008 MP 12, 36–43.

52. *Chen*, 532 U.S. at 1048 (mem.) (Thomas, J., dissenting).

53. *Id.* Regarding RVAP, the United States District Court for the Eastern District of North Carolina has upheld its constitutionality. In *Cannon v. Durham County Bd. of Elections*, 959 F. Supp. 289, 298 (E.D. N.C. 1997) (citing *Daly*, 93 F.3d at 1224), the court stated “unless the selected population base somehow yields unacceptable results, the court will not second-guess the measures employed to assist in redistricting,” which included the use of registered voter population for apportionment purposes.

population deviation over ten percent.⁵⁴ Any plan with disparities over ten percent automatically creates a prima facie case of discrimination that must be justified by the state.⁵⁵ Naturally, complying with the ten percent rule does not ensure that a redistricting plan is completely insulated from attack. Instead, complying with the ten percent rule serves as a *de minimis* threshold for allocating the burden of proof in a “one-person, one vote” case.⁵⁶ Other than this restriction, all that is required is that a state or municipality make a “good-faith effort to achieve precise mathematical equality.”⁵⁷

III. PLACING THE CENSUS CLAUSE IN HISTORICAL CONTEXT: THE LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT’S APPORTIONMENT CLAUSE

Just as state and municipal governments cannot be compelled to institute the “one-person, one-vote” principle, neither Congress nor the Census Bureau can be compelled to exclude unlawfully present aliens from the census and the federal apportionment base. In the 1980s, multiple lawsuits were brought forward in an attempt to do so.⁵⁸ However, the courts in these cases found that the plaintiffs did not have Article III standing to bring their claims. For example, in *Ridge v. Verity* the court could not find an injury because it viewed the evidence of illegal immigration as inconclusive in showing “where the alleged injury will fall [because the plaintiffs] are unable to

54. See *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977). In *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), the Court held that “minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State[s].” Similarly, in *White v. Regester*, 412 U.S. 755, 764 (1973), the Court stated, “we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.”

55. *Daly*, 93 F.3d at 1218 (“[T]here is a level of population disparity beyond which a state can offer no possible justification.”). The Supreme Court has not defined what this “upper level is, but has stated in dictum that a maximum deviation of 16.4% ‘may well approach tolerable limits.’” *Id.* (quoting *Mahan v. Howell*, 410 U.S. 315, 329 (1973)).

56. *Daly*, 93 F.3d at 1220; *Gaffney*, 412 U.S. at 751 (“State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment.”).

57. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). The *Kirkpatrick* Court understood that, “The extent to which equality may practicably be achieved may differ from State to State and from district to district.” *Id.* at 530. In *Swann v. Adams*, 385 U.S. 440, 445 (1967) (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)), the Court stated, “[T]he fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. ‘What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case.’”

58. *E.g.*, *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980).

establish how many illegal aliens will be present in the United States” in a forthcoming census or “to what extent the illegal population will come forward to be counted in the 1990 census.”⁵⁹ Similarly, in *FAIR v. Klutznick* the court determined the plaintiffs could “do no more than speculate as to which States might gain and which might lose representation.”⁶⁰

For argument’s sake, even if the plaintiffs in either *Ridge* or *FAIR* had met the standing requirements, the history of the failed Apportionment Amendment and the Fourteenth Amendment itself show the cases would have ultimately failed. What is abundantly clear from this history is the Fourteenth Amendment’s constitutional purpose. It was expressly drafted to ensure that the former slave states would not receive an increase in apportionment if they continued to treat the Freemen as second-class citizens.⁶¹ As it was stated in Congress:

[The Apportionment Clause] is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States. The proposed constitutional amendment would simply say to those States, while you refuse to enfranchise your black population you shall have no representation based on their numbers; but admit them to civil and political rights and they shall at once be counted to your advantage in the apportionment of Representatives.⁶²

What would essentially become the Fourteenth Amendment’s Apportionment Clause underwent numerous amendments and changes.⁶³ It began on December 5, 1865, the day after Congress ordered a Joint Committee on Reconstruction to address representation of the Confederate states in Congress,⁶⁴ when Thaddeus Stevens submitted an amendment to the Constitution that would base congressional apportionment according to each state’s “respective legal voters.”⁶⁵ The Stevens Amendment limited legal voters to those who

59. *Ridge*, 715 F. Supp. at 1316.

60. *Klutznick*, 486 F. Supp. at 570.

61. For a popular understanding, see N.Y. HERALD TRIBUTE, Jan. 23, 1866, at 4, col. 2; DAILY ST. REG. (Des Moines, IA), June 26, 1867, at 2, cols. 1–2.

62. CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866).

63. See BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 37–53, 79–103 (Negro Univs. Press 1969) (1914).

64. *Id.* at 37.

65. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (“Representatives shall be apportioned among the States which may be within the Union according to their respective legal voters: and for this purpose none shall be named legal voters who are not either natural-born citizens or

are either “natural-born citizens or naturalized foreigners.”⁶⁶ The purpose behind it was simple. The Republicans hoped to limit Southern representation in Congress to those whom were given the privilege to vote.

Under the Constitution’s Census Clause, congressional apportionment was determined “according to [the states’] respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”⁶⁷ However, with the adoption of the Thirteenth Amendment, slavery no longer existed, thus making the Three-Fifths Compromise moot. The freed slaves, known as Freedmen, would now be counted as whole persons and would give the Southern states a larger congressional base without requiring them to respect the Freedman’s civil or political rights.⁶⁸

Naturally, the Republicans hoped to prevent this by limiting apportionment to “legal voters.” This would ultimately encourage the Southern states to give Freedmen the right to vote while limiting the intrusion upon states’ rights to grant that privilege. Although the Stevens Amendment technically achieved this goal, it ultimately failed because there was general concern it overrode the “true basis of representation”—total population.⁶⁹ James G. Blaine expressed this point, stating, “[W]omen, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”⁷⁰ This would not be his only concern.

Blaine also worried that such an amendment would cause an influx of voters to gain a larger congressional apportionment. Blaine stated:

There would be an unseemly scramble in all the States . . . to increase by every means the number of voters, and all conservative restrictions, such as the requirement of reading and writing now enforced . . . would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils.⁷¹

He saw scenarios where “[f]oreigners would be invited to vote on a mere preliminary ‘declaration of intention [to settle],’ and the ballot,

naturalized foreigners.”).

66. *Id.*

67. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

68. CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866).

69. *Id.*

70. *Id.*

71. *Id.*

which cannot be too sacredly guarded . . . would be demoralized and disgraced everywhere.”⁷² To be precise, Blaine was adamantly against Stevens’ amendment. Blaine thought a better amendment could be put in place, one that will “prevent the one evil” of overrepresentation by the South “without involving others of greater magnitude.”⁷³

To fix this “evil” Blaine proposed the following:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers which shall be determined by taking the whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color.⁷⁴

Blaine thought this substitute reached “the result aimed at without embarrassment to any other question or interest.”⁷⁵ Most importantly, it left “population as heretofore the basis of representation, does not disturb . . . the harmonious relations of the loyal States, and . . . conclusively deprives the southern States of all representation in Congress on account of the colored population so long as those States” choose to deprive Freemen of political and civil rights.⁷⁶ In the end, however, neither of the proposals was accepted and the issue was turned over to the Joint Committee on Reconstruction.⁷⁷

A. The Joint Committee on Reconstruction and the Apportionment Amendment

Similar to the 1865 apportionment proposal, the journal of the Joint Committee on Reconstruction gives insight into the intent of what would become Section 2 of the Fourteenth Amendment, especially what the phrase *whole numbers of persons* was meant to encompass. On January 9, 1866, Thaddeus Stevens made his first joint resolution. It read almost verbatim to his December 5, 1865 proposal, stating, “Representatives shall be apportioned . . . according to the number of respective legal voters; and for this purpose none shall be considered as legal voters who are not either natural born or naturalized citizens of the United States, of the age of twenty-one

72. *Id.*

73. *Id.*

74. *Id.* at 141–42.

75. *Id.* at 142.

76. *Id.*

77. The proposals were initially sent to the Committee on the Judiciary on December 5, 1865. *Id.* at 9; *see also* H.R. Doc. No. 39-4 (1865).

years.”⁷⁸ The difference between this resolution and its 1865 predecessor was that the current resolution required “legal voters” to be twenty-one years of age.⁷⁹

The motion was agreed to, but George Williams, Justin Morrill, Roscoe Conkling, and George Boutwell all proposed alternatives just two days later, indicating a change of heart. Morrill was for apportionment “according to their respective numbers of persons, deducting therefrom all of any race or color, whose members . . . are denied any of the civil or political rights.”⁸⁰ What makes Morrill’s proposal unique is that it would have only deducted from apportionment those races that were discriminated against. Certainly, the unfettered discretion of states to discriminate against some races and not others must have led to the proposal’s demise.

George Williams proposed a more specific resolution that similarly apportioned “according to . . . respective numbers,” but expressly excluded “negroes, Indians, Chinese, and all persons, not white, who are not allowed the elective franchise by the Constitutions of the States in which they respectively reside.”⁸¹ Meanwhile, Roscoe Conkling⁸² and George Boutwell⁸³ both proposed alterations that would apportion according to the number of citizens. None of these resolutions were ever voted on. However, when Reverdy Johnson resubmitted a proposal that apportionment should be according to the “respective numbers of legal voters” the resolution was voted on and denied.⁸⁴

Given the Committee could not come to an agreement as to the basis for congressional apportionment, a two man sub-committee consisting of Thaddeus Stevens and William Fessenden was appointed “to which shall be referred the various propositions submitted by members of this [Joint] Committee.”⁸⁵ On January 12, the sub-committee came to terms on two alternative propositions. Known as “Article A,” the first read:

Representatives and direct taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State; and all provisions in

78. KENDRICK, *supra* note 63, at 41.

79. *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865).

80. KENDRICK, *supra* note 63, at 43.

81. *Id.* at 43–44.

82. *Id.* at 44 (“Representatives and direct taxes shall be apportioned . . . according to their respective numbers, counting the whole number of citizens of the United States.”).

83. *Id.* (“Representatives and direct taxes shall be apportioned . . . according to their respective number of citizens of the United States in each State.”).

84. *Id.* at 45 (“yeas 6, nays 8, absent and not voting 1”).

85. *Id.* at 46.

the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.⁸⁶

Known as “Article B,” the second proposition read:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to the respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.⁸⁷

Out of these two propositions, Article B moved forward.⁸⁸ However, Article B’s language would be short lived because Conkling immediately proposed to remove the phrase “citizens of the United States in each State” and substitute it with “persons in each State, excluding Indians not taxed.”⁸⁹ The amendment passed with ease,⁹⁰ and the resolution was sent to Congress.⁹¹

B. Congressional Debate of the Apportionment Amendment

On January 22, 1866, Thaddeus Stevens presented to Congress the Joint Committee on Reconstruction’s first draft of what would become Section 2 of the Fourteenth Amendment.⁹² He opened by stating that it “proposes to change the present basis of representation to a representation upon all persons, with the provis[ion] that wherever any State excludes a particular class of persons from the elective franchise,” that class of persons shall not be counted for

86. *Id.* at 50.

87. *Id.* at 50–51.

88. *Id.* at 51 (“yeas 11, nays 3, absent and not voting 1”).

89. *Id.* at 52.

90. *Id.* (“yeas 11, nays 3, absent and not voting 1”).

91. This final resolution passed with “yeas 13, nay 1, absent and not voting 1.” *Id.* at 53. Jacob Howard and Henry Grider reserved their “right to support . . . some proposition more in accordance with their views, should they deem it advisable to do so.”

92. The amendment as it was sent to the House read:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to the respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation.

Id.

apportionment purposes.⁹³ Stevens made it clear that the amendment was not intended to invade upon each respective state's right to regulate the elective franchise. It simply conditioned apportionment upon the admittance of voting classes. He provided the following example, "If you exclude from the right of suffrage Frenchmen, Irishmen, or any particular class of people, none of that class of persons shall be counted in fixing your representation in this House."⁹⁴

At this time, some interpreted Stevens' characterization as implying that if a state excluded settled foreigners from the right to vote, that such settled foreigners would not be included for apportionment purposes.⁹⁵ However, to characterize Stevens' statement in this light is to take him out of context. As the *New York Herald Tribune* reported, the apportionment clause could be summed up as follows:

[Section 2 requires] only that each [State] shall abide by its own decision, and not count as the basis of political power in the Union such portion of its population as it shall deprive of power and exclude from the body politic. In other words, it says: "Account your Blacks men or brutes; but, if you account them brutes, do not ask either States to regard them as men."⁹⁶

Additionally, when one takes the Fourteenth Amendment debates in their entirety, and in context, it is clear that the rights of states to exclude settled foreigners from voting without excluding them for apportionment purposes was well established.⁹⁷ This constitutional precedent was reiterated over and over as members of the House submitted amendments that would limit apportionment to either "legal voters" or "qualified electors."⁹⁸ Andrew Rogers elaborated on this point, stating:

When the Constitution of the United States was made, our [founding] fathers . . . embodied in it the doctrine that representation should not be based upon the voting population of the country, but that it should be solely and wholly based upon the numbers of the people, without

93. CONG. GLOBE, 39th Cong., 1st Sess. 351 (1866).

94. *Id.*

95. The Jamestown Journal reported something to this effect. See JAMESTOWN J. (Jamestown, N.Y.), Feb. 9, 1866, at 2, col. 1.

96. N.Y. HERALD TRIBUTE, Jan. 23, 1866, at 4, col. 2.

97. DAILY ST. GAZETTE (Trenton, NJ), Jan., 30, 1866, at 2, col. 1 ("In most States aliens are not permitted to vote.")

98. CONG. GLOBE, 39th Cong., 1st Sess. 352 (1866).

regard to sex or color, adding to those who were persons and citizens⁹⁹

Any question about whether settled foreigners are included as “numbers of people” is removed upon the following discourse that took place. It began when Rogers made the following statement:

Every man in this House knows perfectly well in the several States a person under the age of twenty-one years cannot vote, *unnaturalized citizens* cannot vote, and the whole class of females, constituting nearly one half of the population of this country, cannot vote; yet for these persons the States are entitled to representation.¹⁰⁰

Mr. Kelley replied that he did not see why the Freedmen should be included in the apportionment.¹⁰¹ He differentiated Freedmen from “male minor[s]” and the “unnaturalized foreigner,” arguing that Freedmen “can never vote [and] should not be counted among voters and possible voters in fixing the basis of suffrage.”¹⁰² Meanwhile, the “unnaturalized foreigner[s]” and “male minor[s]” were different in that they would eventually acquire the right to vote.¹⁰³ Rogers quickly corrected Kelley’s understanding of the Constitution by reminding him that the States may also “allow to the negroes the same political *status*” that “may be allowed to the man under twenty-one and the unnaturalized foreigner.”¹⁰⁴

To be precise, this political exchange shows that the drafters of the Fourteenth Amendment adhered to the constitutional principle that settled foreigners were part of the apportionment base. Roscoe Conkling summed up this constitutional principle nicely, stating, “The political disability of aliens was not for [representation purposes to be] counted at all against them, because it was certain to be temporary, and they were admitted at once into the basis of apportionment.”¹⁰⁵

99. *Id.* at 353. Rogers also queried:

What is there more democratic and republican in the institutions of this country than that the people of all classes, without regard to whether they are voters or not, white or black, who make up the intelligence, wealth, and patriotism of the country, shall be represented in the council of the nation?

100. *Id.* (emphasis added).

101. *Id.* at 354.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 356. Although Conkling’s interpretation of the Census Clause was correct, his interpretation was influenced by his desire to ensure that the 390,456 “unnaturalized foreigners” settled in New York were counted for apportionment purposes. ALBANY EVENING J. (Albany, N.Y.), Feb. 7, 1866, at 1, col. 7. Conkling estimated “unnaturalized foreigners” contributed to “three Representatives and a fraction of a fourth.” *Id.* Meanwhile, Conkling supported excluding

Conkling also commented on the issue, stressing that foreigners were to be included in the apportionment base because “the number of aliens in some States is very large, and growing larger now.”¹⁰⁶ Conkling reminded his fellow delegates that the proposed amendment substituted “persons” in favor of “citizens of the United States”— “[p]ersons, and not citizens, have always constituted the basis” of apportionment.¹⁰⁷

The popular print culture of the era renders a similar interpretation. The different amendments proposing to substitute voting population in lieu of “persons” received differing opinions. The Albany Evening Journal supported the change to “voters” because it “holds out the very strongest inducement for the several States to liberalize the suffrage.”¹⁰⁸ Although this “application . . . [would] work unequally upon some of the Northern States, where there is always a large alien population in the process of becoming voters,” the Albany Evening Journal thought “this slight injustice will be overbalanced an hundred fold by the greater good which will result from it when practically applied in all the States.”¹⁰⁹

Other newspapers, however, did not support such a change. For instance, the *Daily State Gazette* thought a change to voter apportionment required a more “mature deliberation” by Congress.¹¹⁰ It foresaw a drastic change in America’s voting system should voter apportionment be adopted, for it would “offer a constant and powerful inducement to an increase of the number of voters.”¹¹¹ This increase of voters would have to include aliens who were generally “not permitted to vote” in order for states to maintain their representation.¹¹² The *Daily State Gazette* thought such a constitutional change was too drastic, would “interpose[s] peculiar difficulties” among the states, and was a “waste [of] paper” since it would not acquire the constitutionally required “three-fourths of the States.”¹¹³

The *Macon Weekly Telegraph* and the *Macon Daily Telegraph* expressed similar dissatisfaction with voter apportionment.¹¹⁴ They

Freedmen from voting in New York because they comprised only 49,005 persons, thus their “number is too small to take away a single Representative, and too small to add one should all the blacks be counted.” *Id.*

106. CONG. GLOBE, 39th Cong., 1st Sess. 359 (1866).

107. *Id.*

108. ALBANY EVENING J. (Albany, N.Y.), Mar. 12, 1866, at 2, col. 2.

109. *Id.*

110. DAILY ST. GAZETTE (Trenton, N.J.), Jan. 30, 1866, at 1, col. 1.

111. *Id.*

112. *Id.*

113. *Id.*

114. See MACON DAILY TELEGRAPH (Macon, Ga.), Feb. 9, 1866, at 2, col. 1; MACON WKLY. TELEGRAPH (Macon, Ga.), Feb. 12, 1866, at 4, col. 2.

described a constitutional change to “*legal voters*” as “political heresy” and a “crying injustice.”¹¹⁵ The Macon newspapers felt that “[r]eason, justice, philosophy, and the entire spirit of government” required apportionment according to the “great body of people who come under the jurisdiction of government.”¹¹⁶ They elaborated on this point, writing:

In all free governments, representation is an inherent right in all the governed. It proceeds upon the principle, always held as vital in republics, that those who are controlled by the laws and pay their money for the support of government, whatever be their age, sex, or condition, have a right to be heard in that government through duly appointed agents.¹¹⁷

It must be emphasized that the main purpose of the Apportionment Amendment was to encourage states to grant Freedmen access to the ballot by conditioning congressional apportionment on said access. However, aliens and unnaturalized foreigners were also central to the debate for four important reasons. First, aliens and unnaturalized foreigners that are “controlled by the laws”¹¹⁸ fall into the category of what the Republic was intended to constitute. Second, any amendment that limited apportionment to “legal voters” would essentially remove not only women and children from apportionment, but aliens and unnaturalized foreigners too. Third, the majority of the Thirty-Ninth Congress thought it was outside the bounds of logic to allow aliens and foreigners to be counted for apportionment purposes while excluding Freedmen. Lastly, it was feared that limiting apportionment to “legal” or “qualified” voters would encourage states to widen its voting base to include unnaturalized foreigners and aliens—classes that were generally excluded from voting to prevent foreign influence on America’s political structure. Addressing this point, Conkling stated:

If voters alone should be made the foundation of representation, the actual ratio would vary infinitely among different States. One State might let women and minors vote. Another might—some of them do—give the ballot to those otherwise qualified who have been residents for ten days. Another might extend suffrage to aliens. This would lead to a strife of unbridled suffrage.¹¹⁹

115. MACON DAILY TELEGRAPH (Macon, Ga.), Feb. 9, 1866, at 2, col. 1.

116. *Id.*

117. *Id.*

118. *Id.*

119. CONG. GLOBE, 39th Cong., 1st Sess. 357 (1866).

Conkling went on to emphasize the fear that “legal voter” apportionment would extend suffrage to aliens, stating, “[I]f an amendment to the Constitution basing representation upon ‘qualified voters’ merely should be adopted, a State might enlarge its apportionment by allowing aliens to vote California may let her Chinese and half-breeds vote, Oregon her Indians, and any State its aliens.”¹²⁰ For historical context, it should be emphasized that what would become Section 2 did not propose to strip the States of the power to grant political privileges; each state still had “sole control, free from all interference, of its own interests and concerns.”¹²¹ Section 2 merely provided a penalty to those states that chose to discriminate against *citizens* according to race or class.¹²²

In the end, however, this first attempt to fix the apportionment dilemma was unsuccessful, for the Apportionment Amendment was rejected by President Andrew Johnson. As a result, the Joint Committee on Reconstruction would reconvene to draft a new proposal—the Fourteenth Amendment.

C. The Joint Committee, Apportionment, and Section 2 of the Fourteenth Amendment

On April 21, 1866, the Joint Committee on Reconstruction reconvened to propose another joint resolution to the Constitution “to provide for the restoration to the states lately in insurrection of their full political rights.”¹²³ Initially, the new joint resolution read drastically different than the Amendment that was vetoed by President Johnson. Regarding apportionment, the new joint resolution read:

Until the fourth day of July, one thousand eight hundred seventy-six, no class of persons, as to the right of any whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.¹²⁴

120. *Id.*

121. *Id.* at 359.

122. The amendment left every State perfectly free to decide for itself, not only who shall vote, but who shall belong to its political community in any way, and thus to say who shall enter into its basis of representation and who shall be shut out. What the States decide for themselves in their own affairs they decide for themselves in their national affairs. *Id.* at 357. For another account of the history of the Apportionment Amendment, see Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 819–29 (2009).

123. KENDRICK, *supra* note 63, at 83.

124. *Id.* at 84.

This new language was short lived. On April 28th the apportionment provision was entirely substituted by George Williams to read:

Representatives shall be apportioned among the several States which may be included within this Union according to the respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.¹²⁵

The substitution was approved by the overwhelming majority of the committee. While the first half of the substituted provision reads almost verbatim to the Committee's vetoed amendment, the second half fixed any concerns about including women or minors to the elective franchise. More importantly, it adequately articulated that states could continue to prescribe differentiating rules of law concerning non-citizens, women, and citizens under the age of twenty-one years. No further changes were made by the Committee, and Williams' substitution was submitted to Congress as Section 2 of the Fourteenth Amendment.

D. Congressional Debate Over the Fourteenth Amendment's Apportionment Clause

On May 23, 1866, the Joint Committee on Reconstruction presented its second draft of the Fourteenth Amendment. Senator Jacob Howard stated the Amendment's "basis of representation is numbers, whether the numbers be white or black."¹²⁶ He was clear to point out that the Constitution had always required apportionment "according to their respective numbers of men, women, and children."¹²⁷ However, as the Constitution currently stood, without this Amendment, the "recently slaveholding States" could "exclude from the ballot the whole of their black population" while including the "whole of that population in the basis of their representation."¹²⁸

125. *Id.* at 102.

126. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

127. *Id.*

128. *Id.*

Section 2 fixed this disparity. It ensured that numbers remained the basis of representation as it always had. Howard illuminated on this point several times, explaining that apportionment could not be determined according to property,¹²⁹ education, or upon the numbers of voters.¹³⁰ It was essential that apportionment be based on total numbers because it “is the safest and most secure principle upon which the Government can rest. Numbers not voters; numbers not property; this is the theory of the Constitution.”¹³¹

Naturally, not everyone in the Senate agreed with the Joint Committee’s apportionment provision. Senator Thomas Hendricks did not see why the Freedmen should be counted as whole persons. He offered an amendment that would count the “whole numbers of persons in each State,” but exclude Indians and “two fifths of such persons as have been discharged from involuntary servitude.”¹³² Meanwhile, Senator James R. Doolittle proposed that apportionment be based on “male electors over twenty-one years.”¹³³ He elaborated:

[T]he voting population of the country should be represented; that a voter in Wisconsin should have precisely the same voice in the House of Representatives as a voter in Massachusetts or a voter in Kentucky or a voter in South Carolina; that if twenty thousand voters in Wisconsin are permitted to speak one voice or cast one vote in the House of Representatives, twenty thousand voters in South Carolina should not be permitted to cast any more than one voice or vote. I believe that a constitutional amendment based upon this principle, the principle of the representation of voters, is more likely to be acceptable to the States than the proposition which is reported by the committee and pending before the Senate.¹³⁴

Senator Doolittle supported his argument with tables and statistics

129. One could argue that the Three-Fifths Compromise partially based apportionment on property, but the Thirteenth Amendment overturned this provision. *Id.*

130. *Id.* at 2767 (“Nor did the committee adopt the principle of making the ratio of representation depend[ant] upon the number of voters, for it so happens that there is an unequal distribution of voters in the several States . . .”).

131. *Id.* Howard also stated that “numbers shall be the basis of representation in Congress, the only true, practical and safe republican principle.” *Id.* Additionally, Howard stated:

the true representation of the [people is] whole population. It is not property, it is not education, for great abuses would arise from the adoption of the one or the other of these two tests. Experience has shown that great numbers and numbers only is the only and true safe basis; while nothing is clearer than that property qualification and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided.

Id.

132. *Id.* at 2940.

133. *Id.* at 2942.

134. *Id.*

showing the impact of apportioning according to either “male electors” or “the voters as returned by the census.”¹³⁵ Senator Williams expressed concern that Doolittle’s plan would cause New York to lose apportionment. Similar to what New York Representative Roscoe Conkling had stated months earlier, Williams knew that currently apportionment was “based upon population” including the “four hundred thousand foreigners not naturalized;” thus, he queried whether or not New York would lose the “three Representatives in the House” gained from the apportionment of foreigners under Doolittle’s plan.¹³⁶

Doolittle did not address Williams’ concerns. Instead, he reiterated his belief that the “principle that voters should have an equal voice in the choice of Representatives in the House . . . is a principle upon which we can stand and contend.”¹³⁷ However, before Doolittle’s amendment was put to a vote, Senator George F. Edmunds interjected that whether apportionment should be according to population or voters “is a question which enters into the profoundest philosophy of government.”¹³⁸ If Edmunds had to choose, though, he would not “discard the original principle that all society in some form is to be represented in a republican Government.”¹³⁹ To him, apportionment by population was an “impregnable” principle.¹⁴⁰

In the end, the Doolittle Amendment did not pass—“yeas 7, nays 31.”¹⁴¹ It seems that the overwhelming Senate majority felt that Doolittle’s proposal disenfranchised the community. Senator Luke Poland commented on this point, stating, “All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government.”¹⁴² Simply put, Poland believed to base representation solely on voters was philosophically and politically flawed. He observed that “we all know that many females are far better qualified to vote intelligently and wisely than many men who are allowed to vote; and the same is true of many males under twenty-one, and of foreigners who have not resided here for a period of five years.”¹⁴³

Within moments of his amendment being denied, Senator Doolittle

135. *Id.* at 2943–44.

136. *Id.* at 2944.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 2986.

142. *Id.* at 2962.

143. *Id.*

proposed a nearly identical amendment that apportioned according to the number of “male citizens of the United States over twenty-one years of age qualified by the law of such State” to vote.¹⁴⁴ Senator William Sherman supported the amendment, stating that “the true basis of representation . . . is the number of male citizens who under the laws of the States are allowed to vote.”¹⁴⁵ Sherman also stated that it was a proposition that “puts a citizen in one State on a footing of precise equality with a citizen in every other State.”¹⁴⁶ Sherman did not see why a state that has “a preponderance of women,” “a very large element of unnaturalized foreigners,” or “a large mass of [the] negro population” should have more political power than other states.¹⁴⁷ He believed the true proposition was to base apportionment on male citizen voters so that “[n]o State and no community would have the right to complain” and “every citizen would stand equal before the law, with precisely the same political power.”¹⁴⁸

Senator James Wilson chimed in, declaring that he would not support any amendment that would “strike from the basis of representation two million one hundred thousand unnaturalized foreigners . . . for whom [Iowa is] now entitled to seventeen Representatives.”¹⁴⁹ Sherman countered by asking, “But ought [foreigners] . . . be counted until we intrust [sic] them with political power?”¹⁵⁰ He hoped that foreigners would not be included in apportionment until they are fit to vote. In the end, Senators Doolittle and Sherman’s hopes were dashed, for the amendment was handily defeated—“yeas 7, nays 31.”¹⁵¹

With the failure of the Doolittle Amendment to restrict apportionment to male citizen voters, the Senate turned its attention to Section 2 as the Joint Committee presented it.¹⁵² Senator Johnson

144. *Id.* at 2986.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 2986–87.

150. *Id.* at 2987.

151. *Id.* at 2991.

152. It read:

Representatives s[h]all be apportioned among the several States [which may be included within this Union] according to the respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

defended Section 2 by assuring his fellow Senators that population is the “true basis” of apportionment.¹⁵³ However, Johnson could not see the logic in excluding Freedmen from a respective state’s apportionment should they be denied the right to vote. “[A]liens . . . women, black and white, . . . minors, those under twenty-one years of age, white and black . . . [and] those who have participated ‘in rebellion or other crimes’” are excluded from the right to vote, yet, they are included in the apportionment stated Johnson.¹⁵⁴ A point he would reiterate multiple times.¹⁵⁵

Johnson could not see how Congress could “deny [Freedmen] the right to be represented . . . simply because they are not permitted to exercise the right of voting.”¹⁵⁶ This constitutional punishment, which was intended to affect the States, inadvertently placed the black population on less of a constitutional footing than aliens, rebels, minors, females, and “those who may have committed crimes of the most heinous character.”¹⁵⁷

Senator Henry Henderson justified this disparity with prejudiced logic. He distinguished “women and aliens” from the freed slaves by stating the former “are regarded as persons and not dumb brutes; they enjoy the right to acquire property, to enter the courts for its protection, . . . they are a part of the people.” He further differentiated aliens from the freed slaves, stating, “[t]he road to the ballot is open to the foreigner; it is not permanently barred” as it was to the Freedmen.¹⁵⁸

Given the era of American history, assuredly Henderson was not alone in his sentiments, but this should not disparage the underlying purpose of the Fourteenth Amendment, which was to ensure equal protection to the recently freed slaves. Its entire purpose was to condition the admission of the Southern states into to the Union. In terms of Section 2, the Fourteenth Amendment served to encourage the States to allow Freedmen to participate in the political process with white men by conditioning apportionment on equal civil and political rights.

Id.

153. *Id.* at 3027.

154. *Id.*

155. *Id.* at 3027–28.

156. *Id.* at 3029.

157. *Id.*

158. *Id.* at 3035.

IV. THE CONSTITUTIONALITY OF EXCLUDING UNLAWFULLY
PRESENT ALIENS FROM THE APPORTIONMENT

As shown above, the history of the Apportionment and Fourteenth Amendments affirms that the phrase “whole numbers of persons” was intended to include all persons—citizens and non-citizens alike. However, this history also demonstrates that the drafters envisioned different protections for citizens and non-citizens.¹⁵⁹ A speech by John Bingham illustrates this point perfectly, in which he stated that the Constitution guarantees “political rights to the citizens of the United States” and “natural rights to all persons, whether citizens or strangers.”¹⁶⁰ Eventually, this distinction would be placed within the text of the Fourteenth Amendment itself. While Section 1 ensures that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” it differentiates aliens from citizens in the Privileges or Immunities Clause.¹⁶¹

Another significant fact is that at the time of the Fourteenth Amendment, it was generally assumed that foreigners had either settled in accordance with local laws or were applying for citizenship. Regarding this latter assumption, it should be noted all that was required to obtain citizenship was that foreigners announce their presence, give an oath of allegiance, and reside in the United States for five years.¹⁶² The rules of naturalization were lenient on settlement for many reasons, political and economic, but the debates reveal that the drafters assumed that emigrating foreigners intended to settle and apply for citizenship in adherence with the rules of naturalization.¹⁶³ Such lenient rules, however, should not distract from the fact that the drafters of the Fourteenth Amendment were familiar with the law of nations concerning settlement and allegiance to laws.¹⁶⁴

159. AKHIL REED AMAR, *BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 172–74, 182 (1999).

160. CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859).

161. U.S. CONST. amend. XIV, § 1.

162. 2 Stat. 153 (1802).

163. Senator Johnson justified separating foreigners from those Southerners that participated in the Civil War because “a foreigner reside[s] peaceably among us with the intention of becoming a citizen.” CONG. GLOBE, 39th Cong., 1st Sess. 2400 (1866).

164. Outside of the classic works of Grotius, Vattel, Hale, Blackstone, and others, numerous international law treatises discussed the importance of allegiance, settlement, and the rights of a nation. See HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE* 99–101, 111–12, 122, 177–81, 230, 237–42 (1836) (numerous later editions were published); DANIEL GARDNER, *A TREATISE ON INTERNATIONAL LAW, AND A SHORT EXPLANATION OF THE JURISDICTION AND DUTY OF THE GOVERNMENT OF THE REPUBLIC OF THE UNITED STATES* 98, 110, 150, 157, 180, 255 (1844) (numerous later editions were published); 1 RICHARD WILDMAN, *INSTITUTES OF INTERNATIONAL LAW: INTERNATIONAL*

In fact, members of both the House and Senate defended their respective positions regarding the inclusion of “unnaturalized foreigners” in apportionment on the belief that the “unnaturalized foreigner” would acquire political privileges in five years, including the right to vote. In other words, much of the debate centered on the belief that “unnaturalized foreigners” had submitted themselves to the laws and taken steps to obtain citizenship. For instance, when Representative Roscoe Conkling stood up and defended the constitutionality of aliens in the apportionment, he did so because their “political disability . . . was certain to be temporary.”¹⁶⁵ It did not matter that the “unnaturalized foreigner” did not have “full political rights” because this disability would be fixed upon their naturalization.¹⁶⁶ Meanwhile, Senator Henderson defended inclusion of aliens in the apportionment because “[t]he road to the ballot is open to the foreigner; it is not permanently barred.”¹⁶⁷ Senator Sherman even defended the proposition of voter-based apportionment because the “unnaturalized foreign population” are on “a short period of probation—five years; and in most of the states the great body of them are promptly admitted to citizenship.”¹⁶⁸

Thus, the philosophy behind including (or, in some cases, excluding) settled foreigners in the apportionment base was that they were viewed as members of the United States, the respective states, and their local communities. The *Macon Daily Telegraph* made this philosophical observation when it argued that “Reason, justice, [and] philosophy” support aliens should be included in congressional apportionment because they “come under the jurisdiction of government.”¹⁶⁹ “[A]ll the governed” are subject to the jurisdiction because they are “controlled by the laws and pay their money for the support of government.”¹⁷⁰ Senator Poland made a similar observation for including foreigners in the apportionment base, stating, “All the people, or all the members of a State or community, are equally entitled to protection [because] they are all subject to its laws [and] they must all share in its burdens, and they are all interested in its legislation and government.”¹⁷¹ Emphasis should be placed on the important legal principle alluded to in these statements—individuals

RIGHTS IN TIME OF PEACE 6, 40–45, 82, 133 (1849) (numerous later editions were published and also cited by the Supreme Court in the 1873 *Carlisle v. United States* opinion).

165. CONG. GLOBE, 39th Cong., 1st Sess. 356 (1866).

166. *Id.*

167. *Id.* at 2987.

168. *Id.* at 3035.

169. MACON DAILY TELEGRAPH (Macon, GA), February 9, 1866, at 2, col. 1.

170. *Id.*

171. CONG. GLOBE, 39th Cong. 1st Sess., 2962 (1866).

are included in the apportionment because they are fully “subject to its laws,” “share in its burdens,” and are “controlled by the laws.”

A. The Doctrine of Allegiance and Congressional Apportionment

The doctrine of allegiance—or plenary power over immigration—was not created at the time of Reconstruction.¹⁷² It existed long before the adoption of the Constitution and was well understood by the Reconstruction Congress.¹⁷³ Foreigners during Reconstruction generally qualified under the doctrine of allegiance because they were adhering to the rules of naturalization. However, today, a large portion of foreigners do not subject themselves fully to laws by entering or remaining in the United States as unlawfully present aliens. It is arguably outside the bounds of constitutional logic for a class of foreigners to be entitled to the full protection of the Constitution, especially the political privilege of apportionment, if they do not subject themselves fully to the laws. As “[t]he right to vote is one of the badges of citizenship,”¹⁷⁴ one may equally argue that the right to be apportioned is a badge of law abiding residence.

A common argument levied against such reasoning is that unlawfully present aliens share in the burdens of the community, sometimes contribute taxes, and therefore should be counted for apportionment purposes. However, when aliens only partially submit to the laws of their host nation they violate the first rule of the law of nations concerning emigration—the doctrine of allegiance and submission to the government. These rules were well understood during the Founding and in the late nineteenth century. If we use these basic legal principles in contemporary legal philosophy, we can conclude that they are constitutional principles by which Congress may exclude unlawfully present aliens from apportionment. As of today, the federal immigration laws expressly require all aliens who remain “in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.”¹⁷⁵ Any alien that fails to register is not only subject to deportation, but may also be fined up to \$1000, be imprisoned for six

172. The doctrine can be traced back to sixteenth century England. *See* Charles, *supra* note 33.

173. *See generally* Charles, *supra* note 33; Green, *supra* note 36, at 34–43; Mayton, *supra* note 36; William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1256–57 (2010); Zietlow, *supra* note 36, at 1030; Wood, *supra* note 21, at 506–10.

174. *Barnett v. City of Chi.*, 141 F.3d 699, 704 (7th Cir. 1998).

175. 8 U.S.C. § 1302(a) (2006).

months, or both.¹⁷⁶

Therefore, there is a strong constitutional argument that failure to apply for such registration and to announce one's presence is a violation of the doctrine of allegiance and a sufficient ground for Congress to exclude such violators from the apportionment base. Judge Timothy Farrar would have thought so. Based upon his commentary in the Manual, he knew the phrase "whole number of persons in each State" did not have to "mean everybody on the soil at the particular time."¹⁷⁷ Congress could condition apportionment of aliens on the legal doctrine of allegiance, requiring that they be "legally admitted, or otherwise constituted as such."¹⁷⁸ "Legally admitted" did not "mean everybody, without regard to anything but their humanity and personality," but "persons" that "bear some relation to the State in which they are enumerated."¹⁷⁹

Recently, the Congressional Research Services (CRS) has asserted otherwise. Without adequately examining the issue, CRS asserts that the history of the Fourteenth Amendment proves that all aliens, unlawful and lawful, have a political right to be counted for apportionment purposes.¹⁸⁰ Although CRS provides no historical evidence, support for their argument could principally rest in Senator Johnson's opposition to granting the States the option of whether to include Freedmen in the apportionment, for it "den[ied foreigners] the right to be represented."¹⁸¹ Johnson stated:

Minors, women, black or white, with or without a property qualification, all within the limits of a State, have a right to have themselves considered in ascertaining who is to represent that State, numerically, because in proportion to the number of representatives do you increase the security of all the citizens who may be within the limits of a State.¹⁸²

There is no denying that Senator Johnson and the Reconstruction Congress viewed lawful aliens as having a political right to be counted for apportionment purposes. However, it would be misleading to

176. *Id.* § 1306(a).

177. FARRAR, *supra* note 1, § 450 at 403.

178. *Id.* § 205 at 214.

179. *Id.* § 240 at 237.

180. *See generally* MARGARET MIKYUNG LEE & ERIKA K. LUNDER, CONG. RESEARCH SERV., R41048, THE CONSTITUTIONALITY OF EXCLUDING ALIENS FROM THE CENSUS FOR APPORTIONMENT AND REDISTRICTING PURPOSES (2010) *available at* http://assets.opencrs.com/rpts/R41048_20100120.pdf.

181. CONG. GLOBE, 39th Cong., 1st Sess. 3029 (1866).

182. *Id.* at 767.

assume the same political right extends to aliens that Congress categorizes as unlawful through its plenary authority over immigration, citizenship, naturalization, and foreign affairs.¹⁸³ Just as the Constitution gives lawfully present aliens the political right to be apportioned for representation in Congress, the Constitution also grants Congress great latitude in excluding unlawfully present aliens.¹⁸⁴ Historical and legal support for this exclusion is derived from the history of the Constitution's Naturalization Clause and the long established doctrine of allegiance, which will be discussed further.

For instance, let us take into account Senator Johnson's comments. He conveys the importance of the doctrine of allegiance in construing the Fourteenth Amendment, stating, "when a person is an alien enemy, either by being the subject of a foreign jurisdiction or by virtue of his own treason, he remains an alien enemy to this Government until Congress relieves him from that disability."¹⁸⁵ This disability includes the "forfeit[ing] all the [political] rights that he ever enjoyed under the Constitution," including "the right to be represented in Congress . . . the right to hold office . . . [and] every right except such as he may exercise under the law of nations" or the Constitution of the United States.¹⁸⁶ Generally, an "alien enemy" is a citizen of a country that is in a state of conflict with the land in which he or she is located. However, Johnson undoubtedly includes aliens that are "the subject of a foreign jurisdiction" as well.¹⁸⁷ A definition that is reminiscent of Sir Francis Bacon's *Three Speeches*, wherein he declared that even an alien friend "may be . . . an enemy," thus "the Law allotteth" only a "benefit" that is "transitory."¹⁸⁸

While one may argue that Johnson's legal analysis was unsupported in the late nineteenth century, a brief examination of some of the prominent legal treatises of the era verifies Johnson's interpretation as the correct one, and confirms that the doctrine of allegiance was alive and well at the time of the ratification of the

183. For case law supporting the Plenary Power Doctrine, see *Demore v. Kim*, 538 U.S. 510, 521–22 (2003); *Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *INS v. Chadha*, 462 U.S. 919, 940 (1983); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Tiaco v. Forbes*, 228 U.S. 549, 556–67 (1913); *Hamilton v. Dillin*, 88 U.S. 73, 92 (1874).

184. See *Charles*, *supra* note 33, at 22–39.

185. CONG. GLOBE, 39th Cong., 1st Sess. 2400 (1866).

186. *Id.*

187. *Id.*

188. FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT 11 (1641).

Fourteenth Amendment.¹⁸⁹ For instance, in Alexander Porter Morse's work, *A Treatise on Citizenship*, the doctrine of allegiance was addressed in detail from the time of Aristotle to the late nineteenth century.¹⁹⁰ Morse identified this ancient doctrine as being "in substantial accord with the legislation and practice of . . . the United States."¹⁹¹ In fact, Morse confirms that "*temporary* allegiance (which describes the obedience due by an alien to the laws of the jurisdiction in which he happens to be commorant) [was] everywhere recognized" at this time.¹⁹²

What is of particular interest in Morse's work is that he unknowingly addresses the contemporary legal dilemma of unlawfully present aliens that the United States faces. Morse wrote:

Certain persons may . . . be under the jurisdiction of two different states, or even a great number of states. In case of conflict, the preference will be given to the state in which the individual or family in question have their [legal] domicile; their rights in the states where they do not reside will be considered as suspended. If the oath of allegiance is the first tie which binds the citizen to the state, it is evident that the individual cannot appeal . . . simultaneously to two sovereignties, to two distinct nationalities.¹⁹³

Morse's analysis is applicable today because unlawfully present aliens, although physically present, do not lawfully reside or have a legal domicile within the United States. They are essentially under the territorial jurisdiction of the United States while still fully subject to the foreign jurisdiction they originated from, which they have yet to formally denounce by submitting to registration in the United States.

Perhaps the most comprehensive analysis of the importance of

189. See, e.g., JOEL TIFFANY, A TREATISE OF GOVERNMENT, AND CONSTITUTIONAL LAW: BEING AN INQUIRY INTO THE SOURCE AND LIMITATION OF GOVERNMENTAL AUTHORITY, ACCORDING TO THE AMERICAN THEORY 211-14 (1867) (discussing the doctrine of allegiance in defining citizenship). See also *supra* note 164.

190. See generally ALEXANDER PORTER MORSE, A TREATISE ON CITIZENSHIP, BY BIRTH AND BY NATURALIZATION, WITH REFERENCE TO THE LAW OF NATIONS, ROMAN CIVIL LAW, LAW OF THE UNITED STATES OF AMERICA, AND THE LAW OF FRANCE (1881). A few articles have examined Morse's treatise in light of understanding citizenship and allegiance. See Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L. J. 519 (2001); Sarah Helene Duggin & Mary Beth Collins, *'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53 (2005).

191. MORSE, *supra* note 190, § 128 at 159.

192. *Id.* § 129 at 159.

193. *Id.* § 129 at 160 (internal quotation marks omitted) (quoting JOHANN KASPAR BLUNTSCHLI, INTERNATIONAL LAW CODIFIED, § 394).

allegiance in the constraints of the Fourteenth Amendment stems from Henry Brannon's *A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment*.¹⁹⁴ Discussing Section 1's definition of birthright citizenship, Brannon writes:

[M]ere birth within American territory does not always make the child an American citizen. He must be born within allegiance to the United States, within its "jurisdiction." Such is the case with children of aliens born here while their parents are traveling or only temporarily resident Such children are born within our territory, and within our territorial jurisdiction, but not within the pale of allegiance to us, as when born they are not subject to our laws.¹⁹⁵

Thus, from a late nineteenth century legal perspective, it is unlikely that Senator Johnson misspoke or confused two legal principles into one. In fact, the debates on the birthright citizenship clause¹⁹⁶ give further weight to the interpretation to which Johnson sought to give credence—that the doctrine of allegiance is intimately intertwined with the Plenary Power Doctrine, and grants Congress large powers in defining who is a resident for apportionment purposes.

B. The Fourteenth Amendment Debates, the Plenary Power Doctrine, and the Doctrine of Allegiance

For nearly a century, legal commentators have been asserting that the Plenary Power Doctrine is a judicial fiction that is subject to the limitations set forth in the Bill of Rights and the Fourteenth Amendment.¹⁹⁷ These claims are without legal or historical merit.¹⁹⁸

194. HENRY BRANNON, *A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* (1901).

195. *Id.* at 25.

196. See generally, Kelly Gindele, *The Birthright of Citizenship as to Children Born of Illegal Immigrants in the United States: What Did the Drafters of the Fourteenth Amendment Intend?*, 34 N. KY. L. REV. 367 (2007).

197. See Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51(1999); Alexander Aleinikoff, *Federal Regulations of Aliens and the Constitution*, 83 AM. J. INT'L. L. 862 (1989); Steven J. Burr, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889 (1985); Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights - The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 COLUM. HUM. RTS. L. REV. 521 (2000); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997); Philip Monrad, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989); David Moyce, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF.

No empirical evidence exists that the Founding Fathers intended to limit congressional authority over naturalization, citizenship, immigration, or foreign affairs to the individual freedoms in the Bill of Rights, especially the political rights of citizens. Congressional plenary power in these areas was intimately intertwined with the doctrine of allegiance and every nation's right of self-preservation.¹⁹⁹

The same holds true regarding the history of the Reconstruction Congress, for the debates show that the drafters of the 1866 Civil Rights Act and the Fourteenth Amendment were well aware of congressional plenary authority over naturalization, immigration, and the law of nations. As early as 1862, representative John Bingham acknowledged congressional plenary authority over citizenship and the constitutional restraints on this power, stating:

All from other lands, who, by the terms of [congressional] laws and a [sic] compliance with their provisions become naturalized, are adopted citizens of the United States; all other persons born within the Republic, of parents owing allegiance to no other sovereignty, are natural-born citizens. [There is] no exception to this statement touching natural-born citizens except what is said in the Constitution in relation to Indians.²⁰⁰

Bingham's statement is significant in many respects, but for the purposes of this article it confirms that the doctrine of allegiance, as prescribed by the political branches, was still prominent and applicable. Throughout the 1866 debates over the Civil Rights Act and Fourteenth Amendment, members of Congress spoke frequently of the doctrine of allegiance in relation to congressional power over aliens—both in terms of settlement and citizenship.

For instance, during the debates on whether to grant citizenship to Freedmen, both those who were for and those who were against the proposition attested to congressional plenary authority over aliens and asserted arguments incorporating the tenets of the doctrine of allegiance. Senator Peter Van Winkle stated that members of the community have “the right to determine who shall be members of our

L. REV. 1747, 1773–76 (1986); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 787–91 (1971); Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982); W. Aaron Vandiver, Comment, *Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusion*, 55 EMORY L.J. 751 (2006).

198. Charles, *supra* note 33, at 4–38.

199. *Id.* at 23.

200. CONG. GLOBE, 37th Cong. 1st Sess., 1639 (1862).

community.”²⁰¹ Senator Lyman Trumbull similarly declared that the Constitution “vests in Congress the sole power of naturalization.”²⁰² Representative William Niblack²⁰³ defined congressional authority over naturalization as only the “power to admit ‘aliens,’ that is, persons born out of the jurisdiction and allegiance of the United States, to citizenship.”²⁰⁴ Meanwhile, Representative William Lawrence declared that Congress has the right to “declare that classes of people” become citizens as “an exercise of authority which belongs to every sovereign Power,” and is granted to Congress through the Naturalization Clause.²⁰⁵ Lawrence’s understanding of congressional authority over aliens is of particular interest because he confirms that the Fourteenth Amendment did not change the constitutional status quo:

As an alien may be deprived of all rights by law, and even excluded from the country, it is the act of naturalization, the condition of national citizenship, that confers on him the civil rights recognized by the Constitution. It is citizenship, therefore, that gives the title to these rights to all citizens. From the very nature of citizenship, the avowed purpose of the founders of our Government, and the interpretation put upon the Constitution, it must be clear that [the Fourteenth Amendment] creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen²⁰⁶

During these debates, at no point did a member of Congress declare that the 1866 Civil Rights Act or the Fourteenth Amendment altered congressional plenary authority over citizenship, naturalization, immigration, or foreign affairs. In fact, the debates prove that such plenary authority remained, for Congress saw such power as a “duty to facilitate the belonging of people in [the] community.”²⁰⁷

Even the first sentence of Section 1 was merely declaratory of the ancient doctrine of allegiance.²⁰⁸ Section 1 reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”²⁰⁹ As discussed below, the debates on this section show that

201. CONG. GLOBE, 39th Cong. 1st Sess., 498 (1866).

202. *Id.* at 1756.

203. Niblack went into great detail about the constitutional powers granted to define the rules of citizenship, including citing Vattel and Kent’s Commentaries. *See id.* at 3211–17.

204. *Id.* at 3216.

205. *Id.* at 1832.

206. *Id.* at 1836.

207. Zietlow, *supra* note 36, at 1029.

208. Smith, *supra* note 36, at 1127–28.

209. U.S. CONST. amend. XIV § 1.

“subject to the jurisdiction thereof” was meant to address the long-standing doctrine of allegiance.

The doctrine of allegiance was the key to United States citizenship in the late nineteenth century,²¹⁰ for what would become Section 1 originally read: “All persons born in the United States, and not subject to any foreign Power . . . are . . . citizens of the United States.”²¹¹ Senator Justin Morrill stated that this clause confirms the “grand principle both of nature and nations, both of law and politics, that birth gives citizenship of itself.”²¹² Senator Trumbull agreed and elaborated on the clause in the paradigm of the doctrine of allegiance. Trumbull stated, “My own opinion is that all . . . persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress.”²¹³ He would even later state that this language “make[s] citizens of everybody born in the United States who owe allegiance to the United States.”²¹⁴

Representative Burton Cook understood Section 1 to “provide[] that all persons born within the United States, excepting those who do not owe allegiance to the United States Government” are citizens.²¹⁵ Representative Wilson agreed, stating that the language was “merely declaratory of what the law now is.”²¹⁶ Discussing the law of nations, Blackstone, and American jurisprudence, Wilson elaborated, stating:

We must depend on the general law relating to subjects and citizens recognized by all nations for a definition, and that must lead us to the conclusion that every person born in the United States is a natural-born citizen . . . except . . . children born on our soil to temporary sojourners or representatives of foreign [g]overnments²¹⁷

The phrase “not subject to any foreign Power” was later substituted by Senator Jacob Howard with “subject to the jurisdiction thereof” in order to remove “all doubt as to what persons are or are

210. See Green, *supra* note 36, at 34–43 (discussing the allegiance for protection doctrine); Zietlow, *supra* note 36, at 1030 (citizenship “implies a requirement of allegiance in exchange for protection . . . because allegiance is a prerequisite for membership”). See *generally*, Mayton, *supra* note 36.

211. CONG. GLOBE, 39th Cong., 1st Sess. 542 (1866).

212. *Id.* at 570.

213. *Id.* at 527.

214. *Id.* at 572. See also *id.* at 1756 (Trumbull stated, “the prevailing opinion” is that “all native-born persons not subject to a foreign Power are by virtue of their birth citizens of the United States”).

215. *Id.* at 1124.

216. *Id.* at 1115.

217. *Id.* at 1117.

not citizens of the United States.”²¹⁸ Naturally, the substitution sparked debate, including the issue of whether such language would make citizens of persons born from sojourners, Indians, and Gypsies.²¹⁹ Senator R. Doolittle made this query, stating that he thought it was “exceedingly unwise” to adopt the “broad language proposed.”²²⁰ However, Senator Trumbull assuaged the fears of Doolittle and the other members’ by confirming that the doctrine of allegiance was still applicable in defining United States citizenship. Trumbull stated that “subject to the jurisdiction thereof” meant “[n]ot owing allegiance to anybody else.”²²¹ Senator Johnson elaborated:

Now, all this amendment provides is, that all persons born in the United States and not subject to some foreign Power . . . shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision . . . I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.²²²

Just as the Supreme Court would later confirm in *United States v. Wong Kim Ark*,²²³ Trumbull and the Reconstruction Congress did not view the change in language, from “subject to any foreign Power” to “subject to the jurisdiction thereof,” as altering the definition of Section 1 or congressional plenary power over naturalization, immigration, or foreign affairs.²²⁴ Citizenship was still determined by two constitutional rules.²²⁵ First, the Constitution granted citizenship

218. *Id.* at 2890.

219. *Id.* at 2890–97.

220. *Id.* at 2893.

221. *Id.*

222. *Id.* See also BRANNON, *supra* note 194, at 25 (“[M]ere birth within American territory does not always make the child an American citizen. He must be born with allegiance to the United States, within its ‘jurisdiction.’ Such is the case with children of aliens born here while their parents are traveling or only temporarily resident . . . Such children are born within . . . our territorial jurisdiction, but not within the pale of allegiance to us, as when born they are not subject to our laws.”).

223. *U.S. v. Wong Kim Ark*, 169 U.S. 649, 688 (1898) (“This sentence . . . is . . . affirmative of existing law . . . in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated.”).

224. *Id.* at 675–76.

225. See *Elk v. Wilkins*, 112 U.S. 94, 101–02 (1884). Charles Sumner viewed “subject to the jurisdiction” as empowering Congress “to enforce this definition of Citizenship and this guaranty, by ‘appropriate legislation.’” 14 CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 379, 385 (1883). The popular print culture reveals a similar interpretation. For instance, one journal wrote, “If all who are born in this country are by this fact made subject to the jurisdiction of the United States, then there would be no use in naming this item as a condition

to individuals that were born in the territorial United States “of parents”²²⁶ that had allegiance to the United States.²²⁷ Second, and more importantly, all other obtainments of citizenship required allegiance to government, which would-be citizens pledged by fully subjecting themselves to the laws in compliance with congressional plenary authority.²²⁸ In other words, “subject to the jurisdiction thereof” did not mean “territorial jurisdiction,” but “national jurisdiction,” defined by submission to the laws of the land. An 1884 law review article by George D. Collins addressed this point:

The phrase in the above section “subject to the jurisdiction thereof” does not mean territorial jurisdiction, as has been held in some cases, but means national jurisdiction; that is the jurisdiction which a nation possesses over those who are its citizens or subjects as such. The phrase as used in the constitution was intended to have a negative operation; that this is true, and that territorial jurisdiction was not meant, is evident from . . . section 1, of what is known as the “Civil Rights Bill,” and which was enacted by the same Congress which framed and proposed the Fourteenth Amendment to the Constitution; that section is as follows: “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared citizens of the United States.”²²⁹

of citizenship.” *The Constitution and the Indians*, 25 THE INDEPENDENT 964 (July 31, 1873). In 1877, Samuel Spears wrote, “The phrase ‘subject to the jurisdiction thereof’ is a phrase of limitation, intended to exclude certain persons from the classes specified.” Samuel Spear, 15 ALB. L.J. 484 (1877). Another 1877 editorial read: “This doctrine was not created by this Amendment, since it had existed in the Constitution from the very commencement of the Government and had been expounded and applied by the courts in enforcing individual rights.” *American Citizenship*, 29 THE INDEPENDENT 16 (Aug. 23, 1877).

226. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). See also Samuel T. Spear, *Indians Not Taxed*, 32 THE INDEPENDENT 6 (Apr. 29, 1880) (Samuel Spear quoting James Kent, writing an individual “may be born within the territory, but not within the ligeance [of the government]”).

227. *Elk*, 112 U.S. at 102; see also Wood, *supra* note 21, at 506–10 (discussing the importance of the doctrine of allegiance in determining birth right citizenship).

228. For instance, being born outside of the United States does not automatically grant citizenship absent a law by Congress. See BRANNON, *supra* note 194, at 26 (“Suppose an American citizen, native or naturalized . . . domiciled abroad, [has] children born abroad. Are such children American citizens? They are not, because [they were] born abroad and not subject to our jurisdiction. They come under the common law doctrine that all persons . . . born within the territory of a nation are its citizens, by which rule a child born of alien parents domiciled permanently in the United States is a citizen thereof.”).

229. George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 837 (1884). For other late nineteenth century support for this view, see G.M. Lambertson, *Indian Citizenship*, 20 AM. L. REV. 183, 185 (1866) (“[B]orn in the United States’ means born, not alone on the soil of the United States, but within its allegiance To be a citizen of the United States is a political privilege, which no one not born in it can assume, without its consent in some form.”); D.H. Pingrey, *Citizenship and Rights Thereunder*, 24 THE CENT. L.J. 540 (1887) (“subject to the jurisdiction thereof . . . [means] persons born within the allegiance and jurisdiction of the United States are citizens

It is a hard sell to assert that aliens who fail to comply with the federal immigration laws fully submit themselves to the law. According to the tenets of the doctrine of allegiance, this failure to submit is a legal condition by which Congress could effectively exclude unlawfully present aliens from apportionment.²³⁰ To elaborate, an alien's failure to submit to the laws and declare his or her intent to lawfully settle makes that individual still a subject of the foreign jurisdiction from which he or she came, not the United States. To come to any other interpretation conflicts with the well-established plenary authority of the United States government to exclude and expel aliens—a power that is inherent with every sovereign nation through the right of self-preservation.

It should be emphasized that the right to be represented is a political right, not a natural or civil right. The distinction is significant because it was understood by the Founding Fathers that international law grants nations the sovereign authority to restrict or exclude aliens from political rights, including rights such as voting and bearing arms.²³¹ There is no disputing that the Founding Fathers and the framers of the Fourteenth Amendment intended to grant lawful aliens the political right of apportionment. This is why the census has traditionally included foreigners, residing with the intent to become citizens, in the apportionment base. All other alien classifications, however, could be denied this political right should Congress enact legislation to that effect.

V. ONE STEP BACK, TWO STEPS FORWARD—THE FRAMERS AND THE CONSTITUTIONAL SIGNIFICANCE OF ALLEGIANCE AFFIRMED

As the history above shows, the decision to include or exclude unlawfully present aliens from the apportionment base is a political issue that is at the discretion of Congress. The constitutional support for such exclusion is based on the doctrine of allegiance as it was understood by the drafters of the Fourteenth Amendment.²³²

without reference to the political allegiance of their fathers.”); Irving Berdine Richman, *Citizenship of the United States*, 5 POL. SCI. Q. 104, 114 (Mar. 1890) (stating that “subject to the jurisdiction thereof” means “subject to the complete jurisdiction” and that “citizenship of the United States, as now authoritatively defined, was not created by the Fourteenth Amendment to the Constitution, but has always existed since the adoption of the Constitution itself.”).

230. Adam C. Abrahms, *Closing the Immigration Loophole: The 14th Amendment's Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 480 (1998).

231. Charles, *The Plenary Power Doctrine*, *supra* note 33, at 26, 28 (addressing the right to vote and the obtaining of rights by degrees); *see also* 1 U.S. Stat 271 (1792) (restricting the political right to keep and bear arms in the national militia to citizens).

232. *See supra* Part IV.

Opponents of this argument assert that “persons” should be construed broadly²³³ and that the Founding Fathers could not have foreseen the illegal immigration problem today.²³⁴ Therefore, opponents believe that we should interpret the Fourteenth Amendment’s Apportionment Clause to protect everyone, lawful or not.

What this argument fails to address, however, is that the Framers intended for the doctrine of allegiance to be imbedded within the Constitution itself.²³⁵ Furthermore, the historical fact that the Constitution was adopted to fix the disparities of states prescribing different rules of citizenship²³⁶ supports the conclusion that Congress has the authority to exclude unlawfully present aliens as a means to maintain the integrity of the Union. While there is nothing in the history of the Census Clause itself that would compel Congress to exclude unlawfully present aliens from the apportionment base, the doctrine of allegiance as understood by the Founding Fathers and the history of the Naturalization Clause supports correcting the problems that the apportionment of unlawfully present aliens presents.

Concerning the Naturalization Clause, it is often forgotten that the disparity between the states regarding the rules of naturalization, and the lenient granting of rights and privileges to aliens, was an attributing factor in dispensing with the Articles of Confederation. As early as April 1787, James Madison had written to George Washington about the importance of “fixing the terms . . . and forms of naturalization.”²³⁷ It was a power that had to be placed in the hands of the federal government in order to avert the States from “harass[ing] each other with rival and spiteful measures” and to prevent “the aggressions of interested majorities on the rights of minorities and of individuals.”²³⁸

The North Carolina Constitutional Convention supported granting

233. LEE & LUNDER, *supra* note 180, at 4.

234. Judith Lichtenberg, *Within the Pale: Aliens, Illegal Aliens, and Equal Protection*, 44 U. PITT. L. REV. 351, 375 (1983); Mary Romero, “Go After the Women”: *Mothers Against Illegal Aliens’ Campaign Against Mexican Immigrant Women and Their Children*, 83 IND. L.J. 1355, 1379 (2008); Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 709 (1995).

235. The Supreme Court has recognized the doctrine of allegiance in multiple cases. For examples, see *United States v. Wong Kim Ark*, 169 U.S. 649, 655–67 (1898); *Oh. ex rel. Clarke v. Deckebach*, 274 U.S. 392, 396 (1927); *Toyota v. United States*, 268 U.S. 402, 412 (1925).

236. Charles, *supra* note 33.

237. JAMES MADISON, *To George Washington, in THE WRITINGS OF JAMES MADISON: 1783-1787*, 346 (Gaillard Hunt ed., N.Y.) (1901).

238. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES* 593–94 (Gaillard Hunt & James Scott eds., 1920). For a summarized history on this topic see KETTNER *supra* note 27, at 221–22.

the federal government such plenary power as “the means of preserving the peace and tranquility of the Union.”²³⁹ The Convention elaborated, stating that the “encroachments of some states on the rights of others, and of all on those of the Confederacy, are incontestable proofs of the weakness” of the Articles of Confederation.²⁴⁰ The need for federal plenary authority on naturalization, immigration, and its impact on the States was further discussed at the 1787 Constitutional Convention. For instance, Madison viewed the Naturalization Clause as not only the power to “fix different periods of residence,” but to also prescribe the “conditions of enjoying different privileges of citizenship.”²⁴¹ Madison believed any other interpretation of the Naturalization Clause would prove dangerous and impede congressional authority to “confer the full rank of citizens on meritorious strangers.”²⁴²

Naturally, the doctrine of allegiance was intertwined with the first rules of naturalization and immigration. For instance, during the debate of the 1790 Naturalization Act, Mr. Hartley hoped “some security for [aliens’] fidelity and allegiance” would be required besides a “bare oath.”²⁴³ Another instance occurred in the debate over the Alien and Sedition Acts when James Madison defended its constitutionality. Madison knew that some were bold enough to declare the Constitution’s “rights and privileges . . . cannot be at all claimed by” aliens.²⁴⁴ He disagreed. Madison responded by stating aliens “are entitled” to the “protection and advantage” of the laws and Constitution.²⁴⁵ These protections, however, came under a condition—

239. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 19 (Jonathan Elliot ed., 1836).

240. *Id.* at 20. St. George Tucker phrased the problem as being “residence for a short time [in one state] conferred all the rights of citizenship” in another. ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 190, 197 (Clyde N. Wilson fwd., 1999). It did not matter that another State passed laws that “legally incapacitated” aliens of “certain rights.” *Id.* For the law of the lenient state was “preposterously rendered paramount” to the state that had adopted naturalization protections. *Id.* The second dilemma was that the police power of the respective states was undermined. *Id.* The Articles granted the rights of citizenship to citizens of any state. *Id.* The “laws of several states” that had been adopted to create “descriptions of aliens” that had “rendered themselves obnoxious,” and the descriptions of “other persons whose conduct had rendered them liable to the highest penalties of the law” were “inconsistent, not only with the rights of citizenship, but with the privileges of residence.” *Id.* at 197–98. For similar commentary by the other early constitutional commentators see WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 85 (2d ed., 1829); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 537 (1833).

241. 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 398 (Jonathan Elliot ed., 1845).

242. *Id.*

243. 1 ANNALS OF CONG. 1109 (1790).

244. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 239, at 556.

245. *Id.*

this being that aliens owe *temporary obedience* to the United States and its laws.²⁴⁶

One may ask, why is this history of the Naturalization Clause important to the apportionment issue? The answer is simple. The action of some local governments encouraging the settlement of unlawfully present aliens through sanctuary policies ultimately increases their respective State's representative base. Just as the Founding Fathers experienced problems with the varying rules of naturalization affecting the granting of the rights of citizenship without the consent of the Confederation, a similar dilemma presents itself when states allow and encourage unlawful aliens to settle within their respective borders. Without the consent of the Union, some localities and municipalities are openly permitting and encouraging unlawful aliens to settle,²⁴⁷ thus granting them the conditional political privilege of being apportioned and represented; all the while increasing their respective State's apportionment base.

Few will disagree with the proposition that apportionment and representation for unlawfully present aliens is a political privilege, and not a right as it is for lawful aliens. The constitutional question is whether Congress has the inherent authority to strip unlawfully present aliens of this privilege through the doctrine of allegiance. As addressed above, the intent of the Framers in adopting the Constitution and the Naturalization Clause undoubtedly supports this authority. However, to fully understand the legal concept of allegiance, it is important to appreciate the Framers' understanding of it.

A. *One Step Back—The Founding Fathers and the Doctrine of Allegiance*

The differentiation between the political rights of citizens and those allotted to aliens existed well prior to the adoption of the Constitution. In many ways, the Founders were influenced by English statutes and precedent.²⁴⁸ However, given the colonists' grievances in obtaining equal rights and citizenship for those individuals born in England, the American model differed in some respects. In rendering these differences, many of the Founders relied on the influential writing of Emer De Vattel.²⁴⁹

246. *Id.*

247. See Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 479-80 (2008).

248. Charles, *The Plenary Power Doctrine*, *supra* note 33, at 21.

249. See 1 VATTEL, *THE LAW OF NATIONS* (1787). Vattel's works were not translated into English until 1787, but Benjamin Franklin's correspondence reveals that Vattel's treatise was

Vattel's influence on the Founders in framing the Constitution is immeasurable.²⁵⁰ His influence would have included the Founders' understanding of the rules of naturalization (such as who may obtain a country's rights, privileges, and immunities), the laws of war, foreign affairs, and immigration. Regarding immigration and entry, Vattel viewed the admission of aliens as a privilege—not a right.²⁵¹ In exchange for permission to “settle and stay,” aliens were “bound to the society by their residence,” “subject to the laws of the state” and “obliged to defend it, because it grants them protection.” Such allegiances were required even though aliens did “not participate in all the rights of citizens,” for the law of nations prescribed that unnaturalized foreigners were “citizens of an inferior order,” and “united to the society without participating in all its advantages.”²⁵²

Naturally, such privileges and rights, whether political or civil, depended upon whether an alien had *settled*. To accomplish the legal requirement of settlement, Vattel writes that aliens must first establish “a fixed residence in any place, with an intention of always staying there.”²⁵³ On its face this may seem like a broad allowance. However, Vattel qualifies settlement by stating that a “man does not . . . establish his settlement . . . unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration.”²⁵⁴

To be precise, eighteenth century precedent required aliens to

prevalent among the Founders. In a letter to Charles Duman, Franklin wrote:

I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly that copy which I kept (after depositing one in our own public library here, and sending the other to the college of Massachusetts Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author.

1 BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834).

250. Andrew C. Lenner, *Separate Spheres: Republicanism Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 254, 259 (1997); James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 219 (1974); Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399, 406, 408, 411 (1997); JAMES H. KETTNER, *supra* note 27, 181, 188; PETER AND NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTION, 1776-1814*, at 123-44 (1993). For examples of eighteenth century analysis of these works by the Founding generation see generally TUCKER, *supra* note 240; THOMAS EVANS, *AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN & SEDITION LAWS (1798)*; *OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES (1799)*.

251. 1 VATTEL *supra* note 249, § 213 (“The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country.”).

252. *Id.*

253. *Id.* § 218.

254. *Id.*

announce their intent to settle. This legal premise has survived throughout the world today, and is the entire basis of immigration law as we know it. Most importantly, “announcing” one’s self to the government is a legal premise that the Founders included in their first laws regarding naturalization.²⁵⁵ The Committee of the Judiciary in 1822 repeated this rule of law, stating “[t]o dispense with [the declaration of the intent to *settle*] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission” into the United States.²⁵⁶

Other eighteenth century commentators confirm the requirement of allegiance to the laws and government as a prerequisite for aliens to obtain certain privileges and rights. For instance, Joseph Yates, a former Judge of the King’s Bench, transcribed the doctrine of allegiance in his personal volume of *Hale’s Pleas of the Crown*.²⁵⁷ Yates defined two types of allegiance—natural and local. Natural allegiance was “that which is due from every man who is *born* a Member of a society.”²⁵⁸ Such allegiance was “perpetual & Indefeasible and therefore the Allegiance arising from it is equally perpetual & unalienable.”²⁵⁹ Meanwhile, local allegiance was the obedience that was due from aliens, foreigners, and sojourners while present within the jurisdiction of the host nation. Yates described local allegiance as follows:

Local Allegiance is that which is due from a Foreigner during his Residence here; and is founded in the Protection he enjoys for his own person his Family & Effects during the Time of that Residence.²⁶⁰

Yates was not the only prominent eighteenth century English judge to observe the importance of allegiance and the “Law of Nations” in

255. 1 Stat. 103–04 (1790); 2 Stat. 153–54 (1802).

256. REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS TO THE RIGHTS OF CITIZENSHIP WHO RESIDED WITHIN THE UNITED STATES ONE YEAR PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (Mar. 1818, 1822).

257. Former Judge of the King’s Bench, Joseph Yates (1722-1770) kept a personal edition of Matthew Hale’s *Pleas of the Crown*. It was rebound with blank leaves of paper placed in between sections so that Judge Yates could scribble his own notes concerning the famous treatise. See 1 JOSEPH YATES, MATTHEW HALE’S PLEAS OF THE CROWN (6th ed., 1759) (available at Georgetown Law Center Special Collections). In 1873, the Supreme Court relied on Hale’s *Pleas of the Crown* in confirming the doctrine of allegiance in relation to defining residence. *Carlisle v. United States*, 83 U.S. 147, 155 (1872).

258. 1 YATES *supra* note 257, at 1.

259. *Id.*

260. *Id.*

the granting of rights and privileges to aliens.²⁶¹ William Blackstone defined aliens as persons that are “born out of the king’s dominions, or allegiance.”²⁶² Blackstone was well attuned to the fact that the “law of nations” gave every nation the power “to take such measures about the admission of strangers, as they think convenient.”²⁶³ This power included conditioning rights and privileges on an alien’s allegiance to the law or what Blackstone described as “behav[ing] peaceably.”²⁶⁴

The fact that the “law of nations” was of such importance to Yates and Blackstone gives further credence to the importance of Vattel and the law of nations as was understood by the Founding Fathers. In fact, the first Chief Justice of the Supreme Court, John Jay, referenced Vattel in a 1793 charge to the grand jury delivered in Richmond, Virginia. Jay described Vattel as a “celebrated writer on the law of nations”²⁶⁵ when he delivered the following:

The respect which every nation owes to itself, imposes a duty on its government to cause all its laws to be respected and obeyed; and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, that that all strangers admitted into a country are, during their residence, subject to the laws of it; and if they violate the laws, they are to be punished according to the laws . . . to maintain order and safety.²⁶⁶

Perhaps what makes Jay’s charge of such importance was his emphasis on the law of nations. It consists of “those laws by which nations are bound to regulate their conduct towards one another” and “those duties, as well as rights, which spring in relation from nation to nation.”²⁶⁷ These laws undoubtedly included every nation’s right over aliens. According to Vattel, aliens that did not comport to the laws of settlement were vagrants. They are individuals that “have no settlement,” for to “settle . . . in a nation, is to become a member of it, at least as a perpetual inhabitant, if not with all the privileges of a

261. *Id.* at 3.

262. 1 WILLIAM BLACKSTONE, COMMENTARIES *366361(Oxford, Clarendon 1765) . See also 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 76 (6th ed., 1793) (“An Alien is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance.”).

263. 1 BLACKSTONE, *supra* note 262, at 251.

264. *Id.* at 252.

265. THE CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793, at 2, col. 2.

266. *Id.* at col. 3.

267. *Id.* at col. 1.

citizen.”²⁶⁸ Thus, what the Founders would have understood from Vattel is that the law of nations required aliens to settle in order to obtain the “privileges of a citizen.” That is what Vattel described as the “tacit condition, that [they] be subject to the laws.”²⁶⁹

This includes naturalization and immigration laws “which have no relation to the title of citizen, or of the subject of the state.” The legal and philosophical justification for this “tacit condition” imposed on aliens wishing to enjoy a nation’s rights and privileges was every nation’s right of self-preservation.²⁷⁰ Vattel elaborated on this point, writing:

The public safety, the rights of the nation . . . necessarily require this condition; and the foreigner tacitly submits to it, as soon as he enters the country, as he cannot presume that he has access upon any other footing. The sovereignty is the right to command in the whole country; and the laws are not simply confined to regulating the conduct of its citizens towards each other, but also determine what is to be observed by all orders of people throughout the whole extent of the state.²⁷¹

In sum, Vattel’s *Law of Nations* is considerable because it proves that the legal basis of granting privileges and rights to aliens rests on the doctrine of allegiance or what Vattel describes as the “tacit condition” that they submit themselves to the laws.²⁷² Furthermore, it gives us insight as to how the Founding Fathers would handle our current dilemma of apportioning unlawful immigrants. Few will dispute that the Founders intended to incorporate the Anglo origins of the Plenary Power Doctrine.²⁷³ Naturally, part of this Plenary Power Doctrine is the power to define the rules regarding allegiance and its relation to settlement for apportionment purposes.

However, as has been shown, there is another historical and constitutional justification for excluding unlawfully present aliens from the apportionment base—the intent of the Framers in adopting the Naturalization Clause.²⁷⁴ The inherent purpose of the Naturalization

268. 1 VATTEL, *supra* note 249, § 219.

269. 2 VATTEL, *supra* note 249, § 101.

270. Charles, *The Plenary Power Doctrine*, *supra* note 33, at 6, 34–35.

271. 2 VATTEL, *supra* note 249, § 101.

272. *Id.*

273. 1 BLACKSTONE, *supra* note 262, at 362; 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 395–98 (2d. ed., 1966).

274. See STORY, *supra* note 240, § 1099. Congressional power over naturalization “must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments, which the uniform rule of the constitution was designed to remedy.” *Id.* Any doubts about concurrent power are removed because legislation by Congress on this matter is not

Clause was to protect the political rights and privileges of the United States citizen. Thus, it was not only drafted to establish “uniform rules” on the obtaining of citizenship, but to protect the highly coveted rights, privileges, and immunities of the United States. Certainly, one of these coveted rights is the political right of apportionment and representation.

B. Two Steps Forward—The Fourteenth Amendment, Apportionment, Aliens, and the Doctrine of Allegiance

The Fourteenth Amendment protects citizens and aliens alike, affording both the political right of apportionment.²⁷⁵ For instance, all persons are protected from being deprived of “life, liberty, or property, without due process of law”²⁷⁶ and from being denied the “equal protection of the laws.”²⁷⁷ The Fourteenth Amendment’s drafters never disputed that basic protections of “life, liberty, or property, without due process of law” extend to all individuals. They are basic rights that Blackstone²⁷⁸ and Vattel²⁷⁹ recognized as applying to all foreigners entering a nation. Absent these natural and basic rights, all other rights, especially the political privilege of apportionment, stem from the doctrine of allegiance. However, in order to exclude unlawfully present aliens from apportionment it would take legislation from Congress, for the courts have repeatedly held that this is a political question.²⁸⁰

As addressed above, the doctrine of allegiance, the Framers’ understanding of this doctrine in the constraints of the Fourteenth Amendment, and the history of the Naturalization Clause all support the constitutionality of legislation such as the Vitter Amendment. Apportionment is a political privilege, and there is no disputing that Congress has the plenary authority to enact legislation that distinguishes the political privileges of aliens, especially those that do not fully submit themselves to the laws. A brief examination of the late nineteenth century treatises regarding citizenship and immigration confirms this.

only “supreme law” by the language of the Constitution, but the courts also “firmly established [the power] to be exclusive.” *Id.* § 1103. In other words, “[i]f each state had power to prescribe a distinct rule, there could be no uniform rule.” *Id.* § 1104.

275. U.S. CONST. amend. XIV, § 2.

276. *Id.* § 1. These are basic rights that Blackstone described as being extended to all persons—citizens and aliens alike. See 1 BLACKSTONE, *supra* note 262, at 125.

277. U.S. CONST. amend. XIV, § 1.

278. 1 BLACKSTONE, *supra* note 262, at 125, 360.

279. 2 VATTEL, THE LAW OF NATIONS, *supra* note 249, §§ 103, 108, 109.

280. See *supra* Part III (beginning of).

Returning to *A Treatise on Citizenship*, Alexander Porter Morse writes that “certain natural rights [are] reserved to each individual in the very compact itself by which civil society is formed.”²⁸¹ “It is a doctrine of international law,” wrote Morse, “that each state warrants . . . full and complete protection to the life, liberty, and property of all the individuals within her jurisdiction.”²⁸² Morse was sure to distinguish these natural and civil rights from political rights, stating that it is within the power of the nation to be the “sole judge, regulator, and disposer” of all “other rights.”²⁸³ Furthermore even when “rights and immunities [are] created by, or dependent upon, the Constitution of the United States,” Morse writes, Congress may vary such rights “to meet the necessities of a particular right.”²⁸⁴

The Fourteenth Amendment did nothing to change this legal understanding.²⁸⁵ Members of the Reconstruction Congress repetitively affirmed this to be true.²⁸⁶ As Morse points out, the only effect the Fourteenth Amendment had on the rights, privileges, and immunities given to aliens was that it confirmed the status quo.²⁸⁷ It reinforced that states could not infringe on the basic civil rights of “life, liberty, or property, without due process of law,”²⁸⁸ the same rights that all individuals were already entitled to receive according to international precedent.²⁸⁹

All other rights, privileges, and immunities in excess of the basic civil rights of “life, liberty, and property” still required allegiance to the laws. It is a requirement that aliens do not adhere to when they enter the United States unlawfully and is the legal premise that permits Congress to exclude unlawful aliens from the apportionment base. For instance, in Alexander Cockburn’s 1869 work entitled *Nationality*, he reasons “an alien is entitled to the protection of the country in which

281. MORSE, *supra* note 190, § 18.

282. *Id.* § 4; *see also id.* § 41.

283. *Id.* § 18.

284. *Id.* § 145.

285. The adoption of the Fourteenth Amendment did not bestow any new rights, privileges, or immunities upon the citizens of the United States or change how Congress may regulate immigration. *See supra* Part IV.B; BRANNON, *supra* note 194, at 15, 19, 47 (“The amendment . . . adds nothing to the catalogue of privileges, immunities, rights of life, liberty or property, or of equality before the law. It does not specify or define any of them. It only defends those rights existing under the law of the land, federal or state, and in being at its adoption, or born of the law afterwards.”). For Supreme Court decisions, see *In re Kemmler*, 136 U.S. 436, 448 (1890); *Hurtado v. California*, 83 U.S. 147, 537 (1872).

286. *See supra* Part IV.B.

287. MORSE, *supra* note 190, § 145.

288. U.S. CONST. amend. XIV, § 1.

289. MORSE, *supra* note 190, § 17 (“One of the accepted canons of modern private international law is that the law of the nation to which an individual belongs decides if he is native or alien . . . whether or not he enjoys civil rights [established] in the state.”).

he may be; and in return for this protection owes obedience to the law, and *temporary allegiance* to the Sovereign or State.”²⁹⁰ Alexander Porter Morse confirms this interpretation, stating, “protection and allegiance are correlative terms” that “involve reciprocity.”²⁹¹ It is the “obedience due by an alien to the laws of the jurisdiction in which he happens to be commorant.”²⁹² In other words, as a condition for aliens to possess political rights, privileges, and immunities, they can be required to give *temporary allegiance*.

What is temporary allegiance and why is it significant for apportionment legislation that may exclude unlawfully present aliens? Temporary allegiance is the adherence to the laws of a nation, including those “which do not relate specifically to [the nation’s] own citizens.”²⁹³ This is of considerable importance because any future apportionment legislation concerning aliens can be conditioned on allegiance to the immigration and naturalization laws. Naturally, lawfully present aliens would comply with the doctrine of allegiance because they announce to the government their intent to settle at a port of entry, thereby adhering to the legal doctrine of temporary obedience. Meanwhile, unlawfully present aliens would not qualify, for their failure to submit themselves to the government and declare their intent to settle would violate the doctrine of temporary allegiance, so that they are not “entitled to a correspondent protection.”²⁹⁴

To be clear, unlawfully present aliens would automatically fail the requirement of temporary obedience and allegiance because they enter the United States in violation of the immigration laws. As Madison argued, aliens that reside in violation of the law cannot be entitled to the “protection and advantage” of the laws—federal or state.²⁹⁵ This would include most Article 4 Section 2 privileges and immunities, because an alien must first give its allegiance to the national government before being able to lawfully obtain the privileges of a state. It may be argued, since the Constitution does not expressly state aliens owe allegiance, that it is not a condition upon which Congress may deny unlawful aliens the political privilege of apportionment. In the words of William Rawle, the Constitution, however, does not give

290. ALEX COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS 139 (1869) (emphasis added).

291. MORSE, *supra* note 190, § 74.

292. *Id.* § 128.

293. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 75 (O.W. Holmes ed., 12th ed. 1873).

294. *Id.* at 557.

295. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 239, at 556.

a “definition of the nature and rights of citizens,” yet the “descriptive term” used is a “plain indication that its meaning is understood by all, and this indeed is the general character of the whole instrument.”²⁹⁶

Furthermore, the state constitutions in force circa 1868 support the requirement of *bona-fide* lawful residence or the attainment of citizenship to obtain certain rights and privileges. This is illustrated in state constitutional analogues concerning the obtainment of real property. For instance, many state constitutions such as Arkansas’s prescribed, “Foreigners who are, or may become, *bona fide* residents of this State, shall be secured the same rights in respect to the acquisition, possession, enjoyment and descent of property as are secured to native-born citizens.”²⁹⁷ Mississippi’s 1868 constitution granted a similar guarantee using the term “alien friends,” requiring that “No distinction shall ever be made by law between citizens and alien friends in reference to the possession, enjoyment, or descent of property.”²⁹⁸ Meanwhile, state constitutions such as Indiana’s only enshrined the right of citizens to obtain state “privileges or immunities.”²⁹⁹ No mention was made of “people,” “inhabitants,” “foreigners,” or “aliens.”

In sum, the historical and legal evidence clearly supports the conclusion that the doctrine of allegiance was alive and well at the ratification of the Fourteenth Amendment. Aliens entering the United States³⁰⁰ and residing in any state of the Union must first pledge due allegiance to the former in order to enjoy the legal protections of

296. RAWLE, *supra* note 240, at 85.

297. ARK. CONST. of 1868 art. I, § 20. Similar provisions were present in other State constitutions. See CAL. CONST. of 1849 art. I, § 17; FLA. CONST. of 1868 art. I, § 17; IOWA CONST. of 1857 art. I, § 22; MICH. CONST. of 1850 art. XVIII, § 13; NEV. CONST. of 1864 art. I, § 16.

298. MISS. CONST. of 1868 art. I, § 22.

299. IND. CONST. of 1851 art. I, § 23. A similar provision was included in other State constitutions. See IOWA CONST. of 1857 art. I, § 6; OR. CONST. of 1857 art. I, § 21.

300. For the requirement of allegiance to obtain protection of the laws of the United States, which would include the states, see *De Lima v. Bidwell*, 182 U.S. 1, 80 (1901) (“The inhabitants of [occupied] territory would . . . owe[] temporary allegiance to the United States such as aliens within its jurisdiction now owe it.”); *United States v. Wong Kim Ark*, 169 U.S. 649, 657 (1898) (quoting A.V. DICEY, *THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* 173–77, 741 (1896)) (“[A]n alien who, because he is within the British dominions, owes ‘temporary’ allegiance to the Crown.”); *Carlisle v. United States*, 83 U.S. 147, 154–55 (1873) (“The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen . . . [Secretary of State] Mr. Webster . . . said: ‘Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.’”).

either.³⁰¹ The doctrine of allegiance has deep roots in English history³⁰² and is, in fact, the entire basis of obtaining legal citizenship.³⁰³ Blackstone even referenced the doctrine, writing, “[It is] due from an alien, or stranger born, for so long time as he continues within the king’s dominion and protection.”³⁰⁴ Other support for the doctrine of allegiance can be found in the political writings of William Cobbett—a famed English political commentator. While residing in America as an alien in 1817, Cobbett remarked of the *allegiance* due from himself. “I owe a *temporary allegiance* to [the United States], and am bound to obey its excellent laws and Government,” wrote Cobbett. “All this I owe in return for the protection I receive.” Cobbett would go on to write that he owed a “great gratitude to [the] sensible and brave people [of the United States] and to their wise, gentle, and just Government . . . I owe to them my freedom at this moment.”³⁰⁵ In 1829, Maryland professor David Hoffman also recognized the temporary allegiance doctrine, stating aliens may be subject to lawsuits because “they are temporarily in the country, in which . . . they owe a temporary allegiance, and are bound to submit to its laws.”³⁰⁶

Finally, in his 1829 *Treatise of Universal Jurisprudence*, John Penford Thomas writes that the rights of aliens exist “whilst they obey the laws.”³⁰⁷ Aliens are bound to temporary allegiance—“the condition of sufferance on which alone [an alien] can be allowed to remain.”³⁰⁸ It is an allegiance that requires a country’s “express recognition; in return for which [an alien] pledges his allegiance.”³⁰⁹ However, even absent this allegiance, “aliens are generally liable, during their stay . . . to the operation of the laws.” Like James Madison before him,³¹⁰ Thomas knew these legal principles were “sometimes of unequal

301. RAWLE, *supra* note 240, at 89, 98; 1 BLACKSTONE, *supra* note 262, at 371. For early state laws—preceding the Constitution—requiring allegiance by aliens, see KETTNER, *supra* note 27, at 214, 221.

302. This English history was understood in the popular print culture of the Reconstruction. See *Aliens*, THE ALBION 484 (Oct. 12, 1867).

303. See 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES § 372 (1803) (“Thus allegiance . . . both express and implied, is the duty of all the king’s subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king’s ligeance”).

304. 1 BLACKSTONE, *supra* note 262, at 358.

305. 5 WILLIAM COBBETT, SELECTIONS FROM COBBETT’S POLITICAL WORKS 207 (John M. Cobbett & James P. Cobbett eds., 1835) (emphasis added).

306. 1 DAVID HOFFMAN, LEGAL OUTLINES 217 (1829) (emphasis added).

307. JOHN PENFORD THOMAS, TREATISE OF UNIVERSAL JURISPRUDENCE 338 (1829).

308. *Id.* at 143.

309. *Id.*

310. Charles, *The Plenary Power Doctrine*, *supra* note 33, at 27–28.

operation; but the inconvenience must exist.” “There is no injustice in this rule,” wrote Thomas, because “its infraction is much more likely to cause evils than its observance.”³¹¹

VI. CONCLUSION

While it is not permissible to challenge in litigation the apportionment of unlawfully present aliens for congressional representation, this does not mean that Congress cannot pass legislation doing so. Such legal challenges are doomed to fail not only because it is nearly impossible to obtain standing, but also because the history of the Apportionment Clause does not compel the Census Bureau to distinguish between aliens and citizens. The drafters of the Fourteenth Amendment lumped together men, women, minors, and aliens in their understanding of “whole people.” However, at the same time, the history of the Fourteenth Amendment does not prevent Congress from excluding unlawful aliens from the apportionment base, for its drafters understood that such political privileges were subject to allegiance and subjecting one’s self fully to the laws. Therefore, through congressional plenary authority over naturalization, immigration, and foreign affairs, the doctrine of allegiance affords Congress a constitutional vehicle to pass legislation that excludes unlawful aliens. Naturally, Congress will not pass such legislation on its own. It will require state legislation, such as Arizona SB 1070 or ordinances excluding aliens from local apportionment bases, to bring the issue to the forefront.

311. THOMAS, *supra* note 307, at 340.