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**HISTORY AS OUR GUIDE?: THE PAST AS AN INVISIBLE SOURCE
OF CONSTITUTIONALITY IN THE LEGISLATIVE DEBATES ON
THE ALIEN ACT IN THE UNITED STATES (1798) AND THE
ÉMIGRÉS PROBLEM IN FRANCE (1791)**

JELTE OLT Hof*

INTRODUCTION

There exists a curious relation between history and constitutions. Constitutions are a written attempt to “solidify” the present, i.e., to capture the prevailing norms and values of one generation and make them binding on future generations. At the same time, a constitution that is stuck in the past will quickly become outdated and redundant. As a result, constitutions constantly seek a balance between continuity and change. This makes it problematic to settle what exactly vague norms, such as the Eighth Amendment’s prohibition of “cruel and unusual punishment,” mean. When applying the original text to new and unanticipated problems, the question of what the constitution exactly says becomes particularly pressing. Those interpreting the constitution, whether they are judges, politicians, or scholars, are always faced with bridging the distance between past and present.¹ Even though most constitutions contain a correction mechanism in the form of amendments, this procedure is typically so cumbersome as to make the outcome uncertain and time-consuming. As a result, advocates of a certain reading of the constitution often try to bolster their argument by invoking the “spirit” of the constitution; the unspoken and invisible principles on which the document is based.²

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1. Rik Peters, *Constitutional Interpretation: A View from a Distance*, 50 HIST. & THEORY (THEME ISSUE) 117, 117 (Dec. 2011).

2. For a discussion of the “spirit” of the United States Constitution, see Robert A. Goldwin & Robert A. Licht, *Preface* to THE SPIRIT OF THE CONSTITUTION: FIVE CONVERSATIONS ix, ix-x (Robert A. Goldwin & Robert A. Licht eds., 1990).

The idea that there is a letter as well as a spirit of the constitution stems from the different functions it performs. Constitutions not only establish a framework of government (the branches) and the relations between them (separation of powers and check and balances). They also provide a *raison d'être*, a reason why the inhabitants of a certain territory should form one political community.³ The Italian political philosopher Dario Castiglione, in this sense, distinguishes between the *instrumental* and *symbolic* function of the constitution.⁴ Whereas the instrumental constitution states the rules of governing for a political community, the symbolic constitution holds that these rules reflect the fundamental principles and values of that particular community.⁵ On the symbolic level, in other words, the constitution is seen as the expression of that political community's identity. This *symbolic* constitution corresponds to the invisible constitution that is the theme of this Symposium. As the American legal scholar Laurence Tribe has pointed out, the invisible constitution plays an important role in establishing the meaning of the visible constitution.⁶ According to Tribe, all extra-textual sources used to determine the meaning of the visible constitution can be considered part of its invisible counterpart.⁷ History, as a source of constitutionality, certainly fits this description.

The reason why history is often cited to settle the meaning of constitutional disputes lies in the belief that the true nature of things can only be known by the study of their past. This relationship between history, identity, and constitutions is highly complex and requires some clarification. According to the German philosopher of history Herman Lübbe, identity should be defined as the answer to the question of who we are.⁸ This answer often takes the form of a story—or history—that explains the narrative dimension of identity, which can be seen as the story people tell about themselves in order to give continuity to their existence as members of a political community.⁹ Countless scholars have stressed the constructivist nature of identity, i.e., that when our

3. Peter A.J. van den Berg in this sense speaks of the “integrative function” of constitutions. See Peter A.J. van den Berg, *The Integrative Function of Constitutions: A Historical Perspective*, in *THE CONSTITUTIONAL INTEGRITY OF THE EUROPEAN UNION* 13–14 (Fabian Amtenbrink & Peter A.J. van den Berg eds., 2010).

4. Dario Castiglione, *The Political Theory of the Constitution*, 44 *POL. STUD.* 417, 421–22 (1996). The latter is sometimes also called the “constitutive” function of constitutions to distinguish it from the instrumental function as laying down the framework for government.

5. *Id.*

6. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 7 (2008).

7. *Id.* at 6.

8. HERMANN LÜBBE, *GESCHICHTSBEGRIFF UND GESCHICHTSINTERESSE: ANALYTIK UND PRAGMATIK DER HISTORIE* 147 (1977).

9. See ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* 45 (2003).

understanding of ourselves changes, so does our identity.¹⁰ The identity of a certain group, in this sense, is never “given,” but can be constituted by means of narrative rhetoric.¹¹ The crucial point here is that all constitutions are an expression of a political community’s identity and that this identity is shaped by stories about the past. The past, then, functions as the first tier in a three-stage argument known as a narrative which connects past to present and future. These narratives form powerful tools to shape the audience’s idea of who they are by defining who they were.

Just how narratives constitute identity can best be illustrated by studying constitutional interpretation in practice. In this Article, a case will be made for the past as an important invisible source of constitutionality by analyzing two eighteenth-century controversies on both sides of the Atlantic: the debate on the Alien Act in the United States Congress in 1798 and the debate on the émigrés problem in the French Legislative Assembly in 1791. A comparison between France and the United States is interesting because the two “sister republics” faced the same challenge by the end of the eighteenth century.¹² Both countries were in the process of creating a new, working constitutional order in the wake of revolutionary upheaval.¹³ The unrest in the countries and unsettled nature of the constitutions forced French and American legislators constantly to adapt past principles to pressing problems.¹⁴ Moreover, the violent fate of the French Revolution, which entered the bloody Reign of Terror after 1792, makes a comparison even more interesting.¹⁵ Besides illustrating how views of the past play a crucial role in constitutional interpretation, the comparison can also shed light on whether different attitudes towards the use of the past in constitutional interpretation can be distinguished, and whether these differences can help explain the radically different fate of the two revolutions.

To answer these questions, this Article studies two constitutional conflicts in the French and American legislatures. The French debate on the émigrés and the American debate on aliens naturally concerned very different issues. The Alien Act, for example, targeted aliens coming to and staying in the United

10. GERARD DELANTY & CHRIS RUMFORD, *RETHINKING EUROPE: SOCIAL THEORY AND THE IMPLICATIONS OF EUROPEANIZATION* 51 (2005); SMITH, *STORIES OF PEOPLEHOOD*, *supra* note 9, at 32.

11. Maurice Charland, *Constitutive Rhetoric: The Case of the People Québécois*, 73 Q.J. SPEECH 133, 133–34 (1987).

12. *See, e.g.*, SUSAN DUNN, *SISTER REVOLUTIONS: FRENCH LIGHTNING, AMERICAN LIGHT*, 1–26 (1999) (describing the “sister revolutions” in the United States and France).

13. HANNAH ARENDT, *ON REVOLUTION* 38–39 (1963). For the familiarity between the French and American revolutionaries, see generally DUNN, *supra* note 12.

14. DUNN, *supra* note 12, at 11.

15. ANNIE JOURDAN, *LA RÉVOLUTION, UNE EXCEPTION FRANÇAISE?* 298–99 (2004).

States,¹⁶ whereas the French were debating émigrés who were seeking to leave or who already resided outside its borders.¹⁷ Yet, on a more abstract level, the two debates share a similarity that make a comparative analysis worthwhile. Both the American immigrants and French émigrés triggered a search for the meaning of conflicting clauses in the constitutions. This way, both debates invited the speakers to turn to the past for guidance and can shed light on the role history played in post-revolutionary constitutional interpretation.

I. THE DEBATE ON THE ALIEN ACT IN THE UNITED STATES CONGRESS IN 1798

In the year 1798, the United States celebrated its twenty-second birthday as an independent federation and entered its second decade under the new Constitution. America's first officer, President George Washington, had steered the country away from potentially explosive conflicts with Europe,¹⁸ as well as through domestic rebellion, and left her at peace with her neighbors, if not herself. As the eighteenth century was drawing to an end, however, so was the relative ease with which the fledgling republic had been governed. Washington's presidency had already seen political infighting,¹⁹ certainly, but as long as the esteemed General remained at the helm, harmony had remained the priority in national politics. In fact, the realization that the country would only "hang together" with him at its head was the only reason for the tired Washington to seek a second term as the country's First Officer.²⁰ By 1796, however, the aged General decided that despite increasing tension among the members of his administration, the time had come for him to retire.²¹

Washington's retirement heralded in a period of fractional politics that had been long in the making. In almost Freudian fashion, no sooner had the father stepped down than his sons started the fight over who should replace him. The two factions in Congress—which started calling themselves Federalists and Republicans²²—had been at each other's throats long before Washington left office,²³ but after 1796 an open conflict between them seemed unavoidable. Right in the middle of this fight were two old friends, Thomas Jefferson and John Adams, who suddenly and unwillingly found themselves leading actors in a political drama. The stern Massachusetts lawyer John Adams considered

16. *See infra* Part I.

17. *See infra* Part II.

18. JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 222 (2004).

19. *Id.* at 215–16.

20. *Id.* at 220.

21. *Id.* at 232.

22. It is important to note that the Federalists and Republicans (or Democratic-Republicans, as they were officially called) did not constitute political parties in the modern sense of the word, but rather state-centered organizations that formed a loose coalition on the national level. *See* STANLEY M. ELKINS & ERIC L. MCKITRICK, THE AGE OF FEDERALISM 515 (1993).

23. *See* ELLIS, *supra* note 18, at 214–17.

himself the heir apparent of the Federalist faction.²⁴ Adams had proven himself a loyal, hard-working Vice President, but after eight years in what he considered “the most insignificant Office that ever the Invention of Man contrived,” he was eager to put his talents to better use in the country’s highest office.²⁵ That the flamboyant Virginian Thomas Jefferson would become his challenger was all but certain. Jefferson had retired from politics when he left as Secretary of State in 1793 and retreated to his rural retreat Monticello, surrounded by his books and his slaves.²⁶ At the same moment Washington decided it was time for retirement, however, Jefferson decided it was time to end his and, encouraged by his Republican friends, decided to make a bid for the presidency.²⁷

As was customary at the time, none of the candidates made any public effort to gain support, instead leaving their campaigns to be run by others.²⁸ The outcome of the election, which put Adams in the White House by a margin of only three votes, only made things worse between the two factions.²⁹ Although Jefferson resigned himself quietly to the Vice Presidency—which was then, as now, often a very quiet job—the same could not be said for his supporters.³⁰ Across the country, the Republicans were forming ever more clubs and organizations where their creed of egalitarianism and limited government was preached.³¹ The press too, with the notorious *Aurora* at its center, started to barrage the new administration,³² which was matched only by the accusations of treason in newspapers in league with the Federalists.³³ Finally, Congress itself increasingly became the site where the rivalling Federalist and Republican members fought out their differences, and this fight was not confined to words alone.³⁴ In the first months of 1798, a shouting match between Republican Representative Matthew Lyon of Vermont and his Federalist colleague Roger Griswold of Connecticut got out of hand.³⁵ During one debate Lyon had covered his opponent with tobacco spit, a month later the

24. SUSAN DUNN, *JEFFERSON’S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* 74, 253–54 (2004).

25. Letter from John Adams to Abigail Adams (Dec. 19, 1793), *available at* www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=L17931219ja.

26. DUNN, *supra* note 24, at 76.

27. *Id.* at 78–79.

28. *Id.* at 81.

29. *Id.* at 85.

30. *Id.* at 86–87.

31. *See* DUNN, *supra* note 24, at 141.

32. *Id.* at 103.

33. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 46 (2004).

34. *See* ROBERT V. REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 62 (2006).

35. *Id.*

two rolled over the House floor in a fist-slinging frenzy, cheered on by their colleagues.³⁶

In this increasingly hostile climate, John Adams eagerly sought for ways to consolidate his victory. It was clear that Adams was more “vulnerable to criticism” than his predecessor, since he lacked both “Washington’s popularity and stature.”³⁷ Conscious of the limited mandate his margin of three electoral votes gave him, Adams set the wheels in motion to guarantee his reelection in the new century. Part of this comprehensive plan to undermine his opponents’ reelection prospects was the Alien and Sedition Acts of 1798.³⁸ Although the Sedition Act is by far the most notorious and has attained the position of *cause célèbre* among the advocates of free speech,³⁹ its smaller brother the Alien Act is by no means less worthy of this indignation.

The Alien and Sedition Acts were a barely disguised attempt of the Adams administration to undermine its opponent’s base of support by throwing up barriers against immigrants.⁴⁰ It was a widely recognized fact that newcomers to the United States, especially the numerous French and Irish immigrants, felt more at home with the egalitarian platform of Jefferson’s Republicans than the well-to-do elitism of Adams’s Federalists.⁴¹ If the partisan nature of both the Alien and Sedition Acts was not clear from whom they targeted, the fact that pieces of the legislation would be in force until March 3, 1801—which “coincidentally” marked the end of Adams’s first term—was a dead giveaway.⁴² Eager though they were to secure their hold on the federal government, the Federalists made sure the Acts could not be turned against them should they lose the Presidency in the next election.⁴³

The Alien Act was composed of three bills aimed at making life worse for aliens in America. The first bill was a supplementary act to the existing naturalization act that required all white aliens in the United States to be registered and extended the residency requirements for citizenship from five to fourteen years.⁴⁴ There was no doubt that the Constitution, in Article I, Section 8, granted Congress the power to “establish a uniform Rule of Naturalization,”⁴⁵ and even the staunchest opponents of the Acts conceded

36. *Id.*

37. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 257 (2009).

38. STONE, *supra* note 33, at 43, 46, 67.

39. *Id.* at 188–91.

40. JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 21 (1956).

41. *Id.* at 23.

42. STONE, *supra* note 33, at 67.

43. *Id.*

44. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802).

45. U.S. CONST. art. I, § 8.

this.⁴⁶ The second bill, the “Alien Enemies Act,” stated that in case war had been declared, all male subjects of the hostile nation could be “apprehended, restrained, secured and removed, as alien enemies” on the President’s order.⁴⁷ Apart from vesting too much power in the hands of the President, this bill too was considered by the opposition to fall within Congress’s constitutional powers.⁴⁸

It was the third bill that comprised the Alien Act that drew considerable fire from the opposition and gave rise to a month-long debate in the Fifth Congress.⁴⁹ This bill, called “An Act concerning Aliens,” gave far-reaching powers to the President to deal with suspicious aliens.⁵⁰ Under this bill, it would become lawful for the President “to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.”⁵¹ In other words, the bill made all aliens residing in the United States subject to deportation, regardless of whether they were subjects of a hostile nation.⁵² Furthermore, under the bill, the burden of proof was shifted to the alien: as soon as the President had “reasonable grounds to suspect,” the alien could be expelled “without wrongdoing, and without trial.”⁵³ In short, the Alien Act declared all aliens outlaws who could be deported from the United States or locked up for three years without warning and without cause.

The Republican opposition in Congress was outraged by the Alien Act and immediately devised a battle plan to kill the bill in the House of Representatives.⁵⁴ Unlike the Senate, where the Federalists held an absolute majority and the debate was not recorded by the press,⁵⁵ the Federalists commanded a majority of only six seats in the House—fifty-six seats against the

46. 8 ANNALS OF CONG. 1571 (1798).

47. Alien Enemies Act of 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24 (2006)).

48. 8 ANNALS OF CONG. 1793–95 (1798). Even Albert Gallatin, one of the leading opponents of the Alien Enemies Act, recognized that the right to arrest alien enemies was “a power possessed by every nation, which it had a right to exercise for its own security.” *Id.*

49. SMITH, *supra* note 40, at 47.

50. Alien Friends Act of 1798, ch. 58, 1 Stat. 570 (expired 1800).

51. *Id.* § 1, at 571.

52. *Id.*; see also 8 ANNALS OF CONG. 1580 (1798) (advocating limitation on President’s power to situations where “war was first declared by this country”).

53. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 255–56 (1997).

54. Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts*, 65 WM. & MARY Q. 565, 566–68, 595 (2008).

55. SMITH, *supra* note 40, at 48.

Republicans' fifty.⁵⁶ If the opposition, in other words, could convince even a handful of Federalists of the undesirability of the Alien Acts, Adams's anti-alien train could still be derailed. One factor that worked in the opposition's favor was the public nature of House debates, which were recorded by reporters and published in major newspapers.⁵⁷ This way, the Republican orators could reach the wider audience of the literate electorate and mobilize them against the bill. Even if the Alien Acts were passed, Republicans could still hope to move the voters to return a strong Republican House in the midterm elections of 1798, which would in turn be able to repeal the Alien Acts.⁵⁸ The Republicans understood that to end the Federalist dream of expelling aliens, a strong display of rhetoric in the House of Representatives was necessary.

The sizeable Republican faction in the House boasted several eloquent speakers that were up to the task. Most outspoken was the Pennsylvania Representative Albert Gallatin.⁵⁹ The Swiss-born Gallatin identified strongly with the European immigrants whose wellbeing the Acts put at risk.⁶⁰ Like them, he had braved the Atlantic in the 1780s in pursuit of a better life.⁶¹ The Acts offended Gallatin personally in a second way, since he had been ousted from the Senate four years earlier by the Federalists on account of supposedly not meeting the required nine years of citizenship.⁶² To many, the Alien Acts looked like a ploy of the Adams administration to prevent newcomers like Gallatin to serve their new country.⁶³ Gallatin found a capable political ally in the eloquent New York lawyer Edward Livingston.⁶⁴ Though he was late to arrive in the debate, Livingston's passionate attack of the Act immediately set him apart from the rest of the faction.⁶⁵

Together, Gallatin and Livingston worked tirelessly to stop the Alien Act. In their speeches on the House floor, the two orators tried to frame the Act as a

56. HENRY ADAMS, *THE LIFE OF ALBERT GALLATIN*, 219–20 (Peter Smith 1943) (1879).

57. SMITH, *supra* note 40, at 333, 420–21.

58. Alan Taylor, *The Alien and Sedition Acts*, in *THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY* 63, 63 (Julian E. Zelizer ed., 2004).

59. *See* ADAMS, *supra* note 56, at 203 (describing one example of Gallatin's outspoken leadership).

60. *See* Taylor, *supra* note 58, at 69 (“The Federalists derided Gallatin, a Swiss immigrant of modest means, for his foreign origins, French accent, and frontier residence.”).

61. RAYMOND WALTERS, JR., *ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT* 10 (1957).

62. JOHN AUSTIN STEVENS, *ALBERT GALLATIN* 63 (1959).

63. NICHOLAS DUNGAN, *GALLATIN: AMERICA'S SWISS FOUNDING FATHER* 63 (2010).

64. *See* Taylor, *supra* note 58, at 69 (“Livingston could rely on wealth, connections, and the social graces garnered by birth into a leading family of landlords, by his education at Princeton, and by his success as a lawyer in New York City.”).

65. *See* 8 ANNALS OF CONG. 2005–15 (1798); Taylor, *supra* note 58, at 69–70.

deliberately vague, unnecessary, and unconstitutional usurpation of power.⁶⁶ With this bill, Gallatin told his colleagues “a new crime [is] instituted, which [is] that of being a suspected person.”⁶⁷ Since the suspects were not officially charged—in itself a clear violation of their habeas corpus rights—it was impossible to determine what they stood accused of, let alone to prove their innocence.⁶⁸ Even more worrisome, Livingston added, was the fact that one could unknowingly act suspiciously since “a careless word, perhaps misrepresented, or never spoken, may be sufficient evidence; a look may destroy, an idle gesture may inspire punishment.”⁶⁹ Under the Alien Act, Livingston insisted, justice would become a mockery, for how could the aliens remove the suspicion, if they were never told whereupon it was founded?⁷⁰ The Federalists, in other words, were asking the House to trust that the President would seize only the culpable aliens—something that Gallatin and Livingston clearly were not prepared to do.

Apart from violating the aliens’ right to a fair trial, the Republicans also insisted that Congress lacked the constitutional power to pass the Alien Act.⁷¹ The Federal Government, Gallatin pointed out, was one of enumerated powers, none of which allowed Congress to give the President the power to deport aliens.⁷² Following the Tenth Amendment, which states that powers not granted rest with the States or the people,⁷³ the competence to remove aliens clearly rested with the states, not the federal government.⁷⁴ By placing this power in the hands of the President, Livingston argued, the Federalists were transforming the federal government into an “engine of oppression” and discarding the idea that the United States was created as a *federal* government.⁷⁵ In short, the Republicans framed the Alien Act as a vague and oppressive measure calculated to vest despotic powers in the hands of the President. As such, Livingston argued, the Act was not only not allowed under the enumerated powers granted by the Constitution, but violated the fundamental principles the Constitution sought to protect.⁷⁶

The defense of the Alien Act was headed by the sizable Federalist delegation from Massachusetts. The main sponsor of the bill, the Boston lawyer Samuel Sewall, could not have chosen a more fitting cause to

66. See 8 ANNALS OF CONG. at 1789–90, 1793, 1955 (1798).

67. *Id.* at 1789.

68. *See id.*

69. *Id.* at 2008.

70. *Id.* at 2011.

71. See 8 ANNALS OF CONG. 1955 (1798).

72. *See id.*

73. U.S. CONST. amend. X.

74. See 8 ANNALS OF CONG. at 1955–56 (1798).

75. *Id.* at 2010.

76. *See id.* at 2010–11.

champion. Sewall's great-grandfather Samuel had been a judge at the Salem witch trials, in which twenty suspected "witches" had been put to death on the basis of questionable testimonies.⁷⁷ Samuel Sr. had later apologized for this blunder,⁷⁸ but his great-grandson showed no sign of leniency against the suspected aliens.⁷⁹ Samuel Jr. answered the criticism that the Republicans leveled against the Alien Act. The Alien Act, he told the House, was not a usurpation of power, but a necessary and constitutional measure to provide for the public safety of the United States.⁸⁰ "In the event of a war with France," he pointed out, "all her citizens here will become alien enemies."⁸¹ In such a scenario, Sewall emphasized, the President should have at his disposal "whatever measures are necessary" to dispose of the threat these aliens posed to the United States.⁸²

Sewall's framing of the Alien Act as a public safety issue provided a sense of urgency and justification and was quickly adopted by other Federalists. Harrison Gray Otis, the unofficial leader of the Massachusetts delegation, added to the sense of urgency by proclaiming that America found itself "in a time of war."⁸³ A Harvard graduate and prominent descendant from an immensely wealthy and influential family, Otis considered the Alien Act the perfect mechanism to protect the United States against the immigrant rabble.⁸⁴ "[T]he times are full of danger," he told the House, "and it would be the height of madness not to take every precaution in our power."⁸⁵ Otis called to mind the fate of Gallatin's native Switzerland, which had succumbed to the French revolutionary army after seditious infiltrates had opened the gates for them.⁸⁶ "[I]n the fate of the European Republics," he argued, "we might read our own, unless all the prudence and energies of our country were summoned to avert it."⁸⁷ It was futile to think, Otis continued, that America was not infiltrated by the enemy.⁸⁸ No further evidence was required, he concluded, than the Republican opposition against the bill, which was proof enough that they too had fallen prey to "the contagion of the French mania."⁸⁹

77. EVE LAPLANTE, SALEM WITCH JUDGE: THE LIFE AND REPENTANCE OF SAMUEL SEWALL 1–2 (2007).

78. *Id.* at 1.

79. *See* 8 ANNALS OF CONG. 1974 (1798).

80. *Id.* at 1959.

81. *Id.* at 1790.

82. *Id.* at 1959.

83. *Id.* at 1791.

84. *See* 8 ANNALS OF CONG. 1989 (1798).

85. *Id.*

86. *See id.* at 1961.

87. *Id.* at 1962.

88. *See id.* at 1961–62.

89. 8 ANNALS OF CONG. 2018 (1798).

For the Federalists, in short, the Alien Act was a matter of public safety. In their view this constituted a higher law than the personal liberty of potentially seditious aliens and the constitutional balance of power. The question was not, as one Federalist speaker put it, of danger arising from the government having too much power, but from its want of power. And the Federalist orators had no doubt that the Constitution provided the necessary power. Both Sewall and Otis pointed out that the power to protect the United States against threats, foreign and domestic, was implied in the preamble,⁹⁰ which stated that the Constitution had been established to “provide for the common defence.”⁹¹ That this power belonged to Congress alone was “extremely clear” according to Otis, since it was also listed in the enumerated powers in Article I.⁹² But even without this explicit reference, many Federalists believed the constitutionality of the Alien Act to be common sense.⁹³ According to Connecticut lawyer Samuel Dana, the one power inherent to every government was “the power of preserving itself,” as without it, the Constitution would carry its own destruction in itself.⁹⁴ It was crystal clear to Dana that this power belonged to the United States alone, since “[w]hat relates to the Union generally, must be done by the Government of the United States.”⁹⁵ Dana’s colleague from South Carolina, Robert Harper, added that “if the safety of the Government of the Union is to depend upon the discordant wills of sixteen States, deplorable and debased indeed would be its situation.”⁹⁶

The debate between the Federalist proponents and Republican opponents of the Alien Act demonstrates how deep the difference of opinion between the two factions really was. Whereas the Federalists considered the deportation of suspect aliens a just and necessary exercise of power, the Republicans regarded it as an unnecessary usurpation. The most heated exchange between the two factions, however, concerned the unconstitutionality of the bill. Gallatin first raised this point by claiming that the bill violated both habeas corpus rights and the Tenth Amendment, which prescribed that the power to deal with aliens rested with the state governments.⁹⁷ The Federalists, however, pointed to the duty to “provide for the common defence,” which they claimed squarely placed the power with the Federal Government.⁹⁸

It is important to point out, at this point, the nature of constitutional debates in the House. In this pre-*Marbury* era, the constitutionality of laws was

90. *Id.* at 1961, 1963.

91. U.S. CONST. pmb1.

92. *See* 8 ANNALS OF CONG. 1959 (1798).

93. *See, e.g., id.* at 1961.

94. *Id.* at 1969–70.

95. *Id.* at 1969.

96. *Id.* at 1990.

97. 8 ANNALS OF CONG. 1974–83 (1798).

98. *Id.* at 1975.

considered to be settled in Congress by means of a simple majority vote.⁹⁹ If a law was passed by Congress, in other words, it was presumed to be in accordance with the Constitution, since the members of Congress supposedly understood the limits to their power well enough not to overstep them.¹⁰⁰ Many representatives were aware, of course, that where these limits to Congressional power lay rested entirely on how strictly one interpreted the Constitution. In the hands of politicians, John Kittera observed that “[t]he Constitution . . . [is] like polemics in the hands of divines: it was made to prove everything or nothing.”¹⁰¹ This did not mean that the delegates believed the constitutional issue was a trivial one. On the contrary, many members of the House assumed there was only one correct interpretation of the Constitution.¹⁰² What it does demonstrate is the rhetorical nature of the debate, since the most persuasive interpretation stood the best chance of winning. The point, then, was to show your side had the only right interpretation of the Constitution, whereas the other’s was plainly false. Otis understood this when he claimed that the Alien Act “followed the Constitution as a lamp to his path,” whereas Gallatin’s portrayal of it made “it a mere *ignis fatuus* [will o’ the wisp], calculated to bewilder and mislead.”¹⁰³

As a result of this emphasis on how the delegates viewed the Constitution, the debate on the Alien Act did not focus simply on one disputed constitutional clause, but turned into a discussion of the “spirit” of the document, i.e., the underlying idea or rationale behind the Constitution. Viewed from this angle, the debate was one between two views on the proper role of government that the Constitution established: that of protecting liberty and that of guaranteeing safety.

The Republicans naturally invoked the former view of the Constitution. Gallatin observed during one of the first days of the debate that the Alien Act violated the “spirit of our Constitution,” which he understood to forbid any exercise of power not explicitly warranted by that document.¹⁰⁴ In his view, the Constitution became a contract, stating which competences belonged to the Union and guaranteeing that all others rested with the States.¹⁰⁵ Gallatin’s view was shared by many in the Republican faction. According to North Carolina

99. *See id.* at 1964.

100. *Id.* (“If a law was passed, it was immediately presumed it was according to the Constitution; as it was supposed Congress understood their power too well to pass a law which the Constitution did not give them authority to pass.”).

101. *Id.* at 2016.

102. Robert Williams, for example, concluded that if the Alien Act were adopted, the following would be true: “[y]our Constitution is only a dead letter; it may be warped any way; it forms no settled principle for your guide.” 8 ANNALS OF CONG. 1995 (1798).

103. *Id.* at 1986.

104. *See id.* at 1794.

105. *Id.* at 1974.

Representative Robert Williams, “Our Constitution would be a very slender security to the people of this country . . . if, on the cry of there being danger here, or seditious persons there, violations were to be made in it, in order to meet the evil.”¹⁰⁶ In fact, he continued, if the Federalists were right in their interpretation of the preamble, the rest of the Constitution became redundant, as “[t]his preamble of the Constitution would swallow up the whole.”¹⁰⁷

The Federalists, on the other hand, relied on the view of the Constitution as a document protecting the country. In framing the Alien Act as a measure of public safety, Sewall already relied on this view. His colleague Otis pointed out that the preamble stated that the Constitution was ordained to provide for the common defense of the Union and thus imposed “the sacred and superior duty of providing for the safety of the country.”¹⁰⁸ “If we find men in this country,” Otis argued, “endeavoring to spread sedition and discord[,] . . . whose hands are reeking with blood, and whose hearts rankle with hatred towards us—have we not the power to shake off these firebrands? Certainly we have.”¹⁰⁹ Would, he asked his colleagues, a Constitution that allowed such atrocities to go on unopposed be “worth a farthing?” According to Otis, “It certainly would not.”¹¹⁰ What the sponsors of the bill wanted, Otis explained, was not to overthrow the Constitution, but to “preserve it against the attempts of insidious and dangerous aliens.”¹¹¹ The Federalists, in short, relied on a view of the Constitution as a shield, or “coat of mail” as one orator put it, to protect the United States against seditious outsiders.¹¹²

To summarize, the debate on the Alien Act turned from a dispute over the necessity and constitutionality of an anti-immigrant measure into a full-blown conflict over the true vision of the Constitution and, with that, the legacy of the Revolution. At this point, references to the past were relied on by both sides to support their claim to possess the only “true” interpretation of the Constitution.

To support their reading of the Constitution, the Republican orators fell back on the principles of 1776. According to Gallatin, the experience under British rule had taught the framers the value of limited government. The Alien Act was a clear sign that the Federalists were acting in violation of this legacy. It was, Gallatin said, “calculated to eradicate from our minds the principles of the Revolution, and to concentrate power in the Executive.”¹¹³ Instead of honoring their identity as the freest nation in the world, the Federalists were

106. *Id.* at 1964.

107. 8 ANNALS OF CONG. 1962 (1798).

108. *Id.* at 1961.

109. *Id.* at 1987.

110. *Id.* at 1960.

111. *Id.* at 1986.

112. 8 ANNALS OF CONG. 2165 (1798).

113. 9 ANNALS OF CONG. 2900 (1799).

assuming the role of oppressors themselves. The Federalists, Gallatin said, “instead of being bound by a Constitution . . . claim the omnipotence of a British Parliament.”¹¹⁴ This way, the idea that the Constitution was a document establishing the limits to the powers of government, was “completely annihilated.”¹¹⁵ By asking the House to pass the Alien Act, in other words, the Federalists were turning Congress itself into a part of their “engine of oppression” and, as Livingston pointed out, “[i]f we exceed our powers, we become tyrants.”¹¹⁶

The reference to the revolutionary past was more than a ploy to cast the Federalists as oppressors; it demonstrated, in the eyes of the Republicans at least, that the Alien Act was *un-American*. Livingston warned the House that the adoption of the Alien Act would herald in despotism.¹¹⁷ According to him, it constituted the “sacrifice of the first-born offspring of freedom . . . by those who gave it birth,” and it would be absurd, he insisted, “to call ourselves ‘*free and enlightened*,’ while we advocate principles that would have disgraced the age of Gothic barbarity.”¹¹⁸ This made the Act, as one Republican member of the House put it, “fitter for the code of Algiers than of America.”¹¹⁹

The above quotes illustrate how the Republicans employed powerful narrative reasoning to move their audience to vote against the measure. By portraying the bill as fit for foreign despots, the Republicans depicted the Alien Act as alien to the United States. America’s true identity, they maintained, was that of a free and enlightened country, born in a struggle against a tyrannical colonial oppressor and built on the principles of liberty and limited government. In this light, the Alien Act became a measure intended to destroy the true spirit of the Constitution, and with it the soul of America. Tellingly, Livingston feared that the adoption of the Alien Act would mean the end to the “sacredness” of the Constitution and that the country, as a result, would be “swallowed up in the gulf of despotism.”¹²⁰ The narrative further cast the Federalists as the successors of the ancient foe that the revolutionary generation had fought so hard to get rid of and turned opposition against the Alien Act into an almost holy goal. Gallatin at one point insisted that resistance to unconstitutional laws was the sacred duty of every American.¹²¹ This reduced the choice for each representative to one for or against America. In order to uphold the true legacy of the Revolution as establishing a free country,

114. *Id.* at 2996.

115. *Id.*

116. 8 ANNALS OF CONGRESS 2010, 2014 (1798).

117. *Id.* at 2014.

118. *Id.* at 2015.

119. *Id.* at 1999.

120. *Id.* at 2014.

121. 8 ANNALS OF CONG. 2111 (1798) (making observation during debate on Sedition Act, but in general terms).

the members of Congress had to vote down the Alien and Sedition Act, as this alone would prevent a Great-Britain-style takeover of American politics.

Two, however, could play at this game, and the Federalists relied on a narrative of their own to support their reading of the Constitution. Their view was, simply stated, that the Framers could never have intended to establish a regime that carried its own destruction within itself. As Harrison Otis pointed out, the main concern of the members of the Philadelphia Convention had been to remedy the paralyzing respect for the sovereignty of the States that had become fatal to the Confederation.¹²² The Constitution they had created sought to prevent this from happening again. As such, Otis refused to consider the debate as a choice between violating the Constitution or protecting the country. “If this was the dilemma into which we are reduced by the Federal compact,” he insisted, “it might as well have never been made, for a Government that is prevented from exercising an authority which may be necessary to its existence, is not better than no Government at all.”¹²³ It would mean, Otis concluded, that “the present Constitution would have no advantage over the old Confederation.”¹²⁴

In this narrative, the Alien Act was far from a violation of the fundamental principles of the Constitution, and became an honest attempt to prevent history from repeating itself. From this angle, it was the Republican faction that squandered the true legacy of the Revolution and tried to destroy America. South Carolina representative Robert Harper proclaimed that he would consider himself “the worst of traitors and assassins to his country” if, by his opposition to the Alien Act, he would “bind us hand and foot, until our enemy comes upon us.”¹²⁵ Far from an un-American measure, in other words, the Alien Act was a patriotic attempt to protect America against its subversive enemies. In the Federalists’ view, the Republicans were the ones out of touch with American identity; they were the true traitors to their country. The true legacy of the Revolution, they said, was that of 1787, and by voting for the Alien and Sedition Act, congressmen were only making operational the promise of providing for the common defense already ordained by the Constitution.¹²⁶

The debate on the Alien Act in the United States House of Representatives clearly demonstrates how the past works as an invisible source of constitutionality. Faced with a controversy in which both sides, Republicans and Federalists, could quote credible clauses of the visible Constitution in support, the representatives instead invoked the “spirit” of the document to

122. *Id.* at 1987.

123. *Id.*

124. *Id.*

125. *Id.* at 1992.

126. 8 ANNALS OF CONG. 1994 (1798).

prove they were right. Unsurprisingly, Federalists and Republicans turned out to have different views of the “true” spirit of the Constitution, and the debate consequently turned to the question of whose view was most convincing. To answer this question, the members of the House reached outside the visible Constitution, and instead relied on narratives to lend credibility to their views. The Republican orators Gallatin and Livingston called to mind the principles of 1776 to portray the Constitution as a sacred contract that the Federalists violated by means of the tyrannical Alien Act. In this view, the true legacy of the Revolution was a jealous vigilance of the limits of government, and the only true American was he who opposed the Alien Act. The Federalist orators Otis and Harper, on the contrary, portrayed their opponents’ position as a return to the redundant and fatal principles of the Confederation. They insisted that the framers in Philadelphia had intended the Constitution to be a shield to protect government, not to shackle it. In this view, the true legacy of the Revolution was order and the only true American was he who stood up to defend his country by granting the President the necessary means to deal with seditious aliens.

What can the debate on the Alien Act tell us about the past as a source of constitutionality? First, it is clear that the past does not function as a guide that was slavishly followed. The speakers’ views of the Constitution and the constitutionality of the Alien Act did not depend on historical inquiry but was guided itself by the position taken prior to the debate. Nevertheless, the past clearly functions as a source for claims about the invisible Constitution to support a certain reading of the visible Constitution. The past, or rather, a certain portrayal of the past, functions as the first, crucial step in the three stage narrative argument that confers a historical identity on the present in order to motivate a certain action in the future.

A further point that must be noted is the interesting fact that in the American debate, both sides rely on the past for their view of the Constitution. History, in other words, is made to serve two masters: it is invoked to establish the constitutionality as well as the unconstitutionality of the Alien Act. The fact that Republicans and Federalists emphasize a different phase of the past—the Revolutions of 1776 and 1787 respectively—is a significant fact, but it should not cloud the fact that the past as such is an undisputed source of constitutional reasoning in the United States. The question then becomes, to what extent is this a unique feature of American constitutional culture? This brings us to the second case study, the debate on the émigrés problem in the French Assembly of 1791.

II. THE ÉMIGRÉS PROBLEM IN THE FRENCH LEGISLATIVE ASSEMBLY IN 1791

If the Federalists in 1798 were troubled by the thought of a revolution *à la française* breaking out in America, in 1791, the French revolutionaries themselves were extremely concerned with the course their revolution was

taking. The year 1791 was a crucial period in the French Revolution. By the summer of 1791 the Revolution was entering the third year of political upheaval, which would test the new regime's ability to restore order to France. The *Assemblée Constituante* (Constituent Assembly), whose declaration as France's national parliament in June of 1789 provided the spark of the Revolution,¹²⁷ had, after more than two years, fulfilled its promise of giving the nation its first written constitution. The Constitution of 1791 transformed the formerly absolute King Louis XVI into the "King of the French," and reduced him to a constitutional monarch who functioned as head of state and leader of the cabinet.¹²⁸ A ratification ceremony in September 1791 completed the metamorphosis when King Louis publicly swore his fidelity to the nation and promised to uphold the new Constitution as the law of the land.¹²⁹

With the adoption of the Constitution, the members of the Constituent Assembly had fulfilled their duty and gave way to their successors, France's very first nationally elected legislative body, the *Assemblée Législative* (Legislative Assembly). As a result of a last-minute decree of the radical deputy Maximilien Robespierre, the members of the Constituent Assembly were barred from reelection, leaving the inexperienced newcomers of the Legislative Assembly to put their Constitution into practice.¹³⁰ Thus, when the 745 members of the Legislative Assembly took their seats in early October, the nation literally had a fresh start. The delegates of the Legislative Assembly that came trickling into Paris by the end of the summer were almost all complete strangers to each other. Large portions of the deputies were obscure, provincial citizens with middle-class backgrounds as doctors, officers, and lawyers. Most of their careers had been in local revolutionary government or as members of the local political clubs and regiments of the National Guard.¹³¹ These were the men (women were still considered unfit to serve in public office) charged with the duty of implementing the Constitution that had been ratified only three weeks earlier. The daunting nature of this task became clear when, only three weeks after they assumed their seats, the delegates found themselves bogged down in a conflict over the émigrés issue.

127. TIMOTHY TACKETT, *BECOMING A REVOLUTIONARY: THE DEPUTIES OF THE FRENCH NATIONAL ASSEMBLY AND THE EMERGENCE OF A REVOLUTIONARY CULTURE (1789-1790)* 146–47 (1996) (describing the buildup to the Constituent Assembly officially declaring itself the National Assembly).

128. *Id.* at 300.

129. *Id.*

130. WILLIAM DOYLE, *THE OXFORD HISTORY OF THE FRENCH REVOLUTION* 150 (2d ed. 2002).

131. For details about the members of the new legislative assembly see Edna H. Lemay, *Les législateurs de la France révolutionnaire (1791-1792)*, *ANNALES HISTORIQUES DE LA REVOLUTION FRANÇAISE* 3, 5, 7–8 (2007).

The émigrés had been a product of the Revolution and part of it from the start. In July 1789, days after the fall of the Bastille, one of the King's brothers, the comte d'Artois, left France, disgusted with what he considered as an insult to the French crown.¹³² By June 1791, the King's other brother and numerous courtiers had joined him in the German border town of Koblenz.¹³³ A small army of dissatisfied nobles and officers were flocking to the royal banner, determined to reestablish the absolute monarchy in their home country.¹³⁴ These émigrés, as the aristocratic emigrants were soon labeled, would cause a parliamentary confrontation between the two factions in the Assembly, the Feuillants and Girondins. Like the debate on the Alien Act in America, the émigrés debate demonstrates the role that the past played in early French constitutional interpretation.

The more conservative right wing of the Assembly was dominated by the Feuillant faction, so called for their membership in the *Club des Feuillants*.¹³⁵ The Feuillants did not form a political party in the modern sense of the word, but rather, a loose collection of like-minded delegates who worked together. Although this faction consisted entirely of new faces, the Feuillants were in fact the successors of the moderate deputies who oversaw the drafting of the Constitution in the Constituent Assembly.¹³⁶ The Feuillant Club was still dominated by this old guard, including one of its founders, the Grenoble lawyer Antoine Barnave. According to Barnave, the first order of business was strengthening the monarchy, which formed the only hope for restoring order to France.¹³⁷ King Louis XVI and his wife Marie-Antoinette formed a beacon of stability behind which all Frenchmen could rally. Barnave's greatest fear was that the inexperienced deputies of the Legislative Assembly would become "*l'instrument de quelque hommes qui . . . préparaient la chute de la Constitution.*"¹³⁸ The best way to avoid this destruction was to ensure that both King and Assembly strictly observed the limits provided by the Constitution. Although Robespierre's decree denied Barnave a seat in the Assembly, he found capable lieutenants among the 170 new delegates that joined his club. Most prominent among them were the eloquent major Mathieu comte de Dumas, and the outspoken colonel François marquis de Jaucourt.

132. DAVID ANDRESS, *THE TERROR: THE MERCILESS WAR FOR FREEDOM IN REVOLUTIONARY FRANCE* 52 (2005).

133. DOYLE, *supra* note 130, at 147.

134. DONALD GREER, *THE INCIDENCE OF THE EMIGRATION DURING THE FRENCH REVOLUTION* 25–27 (1951).

135. *See* DOYLE, *supra* note 130, at 154–58.

136. *Id.* at 154.

137. ANDRESS, *supra* note 133, at 52–58.

138. Antoine Barnave, *Introduction à La Révolution Française*, in 1 *OEUVRES DE BARNAVE* 1, 208 (1843) ("the instrument of several men who . . . are preparing the downfall of the Constitution").

The men Barnave had in mind when warning about the downfall of the Constitution were the members of the Girondin faction who dominated the progressive wing of the Assembly. Like the Feuillants, the Girondins were not a traditional political party, but rather a loose group of like-minded deputies who met in salons to discuss politics and potential strategies to realize their plans.¹³⁹ Unlike the Feuillants, the Girondins did not derive their name from a club—though many were prominent members of the Jacobin Club—but from the department, la Gironde, which many of them represented.¹⁴⁰ The views of these men can be described as liberal, but like true liberals they left each other free to formulate their opinions. While it is difficult to formulate a common platform, the Girondins did share common sources of inspiration that shed light on their convictions. First and foremost, the Girondins were inspired by the American Revolution. Jacques Brissot, their unofficial leader, had traveled through America and returned impressed with the freedom its citizens enjoyed. According to him, the federal state was also the ideal form of government for France.¹⁴¹ Like their American counterparts, the Girondins saw their Revolution as a fight against monarchical tyranny and believed that true freedom was irreconcilable with monarchy. Unlike the Feuillants, the Girondins did not consider the Constitution the termination of the Revolution, but a necessary first step on the road to freedom. “*Une grande révolution s’est opérée en France,*” the philosopher marquis de Condorcet argued, “*elle n’est pas terminée.*”¹⁴² In other words: the monarchy was an obstacle to a truly free republic.

The Girondins had good reasons to mistrust the Court. It was a “public secret” that the royal couple was very unhappy with the constitutional straightjacket that had been imposed on them. This had led them to attempt to flee the country in June 1791. Despite their disguises, the King and Queen were recognized by a postal officer in the border town of Varennes and returned, under guard, to the capitol where they remained prisoners of the

139. See generally M. J. SYDENHAM, *THE GIRONDINS* (1961).

140. Throughout the period of the Legislative Assembly, Girondins and Jacobins can be considered one and the same, but since the name “Jacobins” evokes associations with the later terrorist ideologies that were not necessarily shared by all in the left wing of the Legislative, as well as the fact that some prominent Girondins never set foot inside the Jacobins, I prefer to use the name Girondins to identify the progressive deputies in the early stage of the Legislative Assembly.

141. J.-P. BRISSOT DE WARVILLE, *DE LA FRANCE ET DES ÉTATS-UNIS, OU DE L’IMPORTANCE DE LA RÉVOLUTION DE L’AMÉRIQUE POUR LE BONHEUR DE LA FRANCE; DES RAPPORTS DE CE ROYAUME ET DES ÉTATS-UNIS, DES AVANTAGES RÉCIPROQUES QU’ILS PEUVENT RETIRER DE LEURS LIAISONS DE COMMERCE, ET ENFIN DE LA SITUATION ACTUELLE DES ÉTATS-UNIS* 304–07 (1791).

142. *REIMPRESSION DE L’ANCIEN MONITEUR DEPUIS LA REUNION DES ETATS-GENERAUX JUSQU’AU CONSULAT* 374 (M.A. Ray, 1862) (“A great revolution is occurring in France . . . and is all but finished.”).

National Guard. The flight to Varennes and the public outrage it created threatened to upset the entire Revolution, because it made the limited monarchy envisaged in the Constitution entirely worthless.¹⁴³ To save their lives' work, a coalition of moderates led by Barnave intervened and portrayed the flight as a kidnapping. Despite loud protests from the radical delegates, Barnave persuaded the Constituent Assembly to adopt a proclamation stating that, since the royal family had been abducted against their will, there was no cause to depose them.¹⁴⁴ The decision of the Constituent Assembly to save the monarchy seemed more inspired by a wish to curb a possible counterrevolution than a genuine concern for the King. By July 1791, the delegates of the Constituent Assembly were exhausted after two years of drafting the Constitution.¹⁴⁵ They wanted to save their work from ruin and Barnave played on this feeling by stating that "*il est temps de terminer la Révolution*" and presenting his kidnapping theory as the best possible solution to do so.¹⁴⁶

In saving the monarchy, Barnave did the Revolution little good. The King's flight brought the émigrés issue back to the forefront. At first, the revolutionaries considered the émigrés no problem at all.¹⁴⁷ The departure of counter-revolutionary aristocrats was a relief in the eyes of many.¹⁴⁸ During the summer of 1791, however, increasingly ominous reports arrived in Paris from the borderlands. Reports surfaced that the second cousin of the King, Joseph de Bourbon-Condé, was amassing an army of émigrés at Worms and that both brothers of the King had joined him there.¹⁴⁹ According to the reports, the roads to Germany were filled with aristocrats who were unhappy with the religious and political situation in France and had turned their back on

143. See generally TIMOTHY TACKETT, WHEN THE KING TOOK FLIGHT (2003) (vividly describing the King and Queen's failed flight attempt).

144. *Id.* at 137–42.

145. DOYLE, *supra* note 130, at 149.

146. 28 ARCHIVES PARLEMENTAIRES DE 1787 À 1860: RECUEIL COMPLET DES DÉBATS LÉGISLATIFS & POLITIQUES DES CHAMBRES FRANÇAISES, IMPRIMÉ PAR ORDRE DU SÉNAT ET DE LA CHAMBRE DES DÉPUTÉS, PREMIÈRE SÉRIE (1787 À 1799) 330 (M. J. Madival & M. E. Laurent, 1887) ("It is time to end the Revolution.") [hereinafter 28 ARCHIVES PARLEMENTAIRES].

147. DOYLE, *supra* note 110, at 146.

148. To cite one example of this, the Lyonais lawyer Pierre Lemontey called emigration "*une transpiration naturelle de la terre de la liberté*" ("a natural transpiration of free soil"). 34 ARCHIVES PARLEMENTAIRES DE 1787 À 1860: RECUEIL COMPLET DES DÉBATS LÉGISLATIFS & POLITIQUES DES CHAMBRES FRANÇAISES, IMPRIMÉ PAR ORDRE DU SÉNAT ET DE LA CHAMBRE DES DÉPUTÉS, PREMIÈRE SÉRIE (1787 À 1799) 301 (M. J. Madival & M. E. Laurent, 1890) [hereinafter 34 ARCHIVES PARLEMENTAIRES].

149. Massimo Boffa, *Émigrés*, DICTIONNAIRE CRITIQUE DE LA RÉVOLUTION FRANÇAISE 351 (François Furet & Ozouf, Mona, 1988).

their former home country.¹⁵⁰ The flight of the royal couple to Varennes sparked another exodus of émigrés and caused many noble officers to leave their posts. For many, the defense of the royal house was the only thing still keeping them in France, and now that their commander-in-chief had sought to leave, few officers saw any reason to stay and crossed the Rhine to join the émigrés army.¹⁵¹ No less than 6,000 officers defected by the end of 1791, leaving the French army bereft of nearly sixty percent of its officer corps.¹⁵² The growing fears of an invasion by the émigrés army led to panic in the borderlands, where some cities even took to restoring their ramparts.¹⁵³ All eyes turned towards the Legislative Assembly in Paris to resolve the crisis.

The deputies in the Legislative Assembly found it increasingly hard to ignore the issue. By late October alarming reports and petitions from the borderlands, often presented by local citizens who traveled all the way to the capitol to impress the urgency of the situation on the delegates, made it harder and harder for the delegates to bury their heads into the sand.¹⁵⁴ On October 20, despite heavy resistance from the Feuillant faction, the Girondin leader Brissot succeeded in placing the émigrés problem on the agenda, where it remained until the law concerning émigrés was adopted in early November.¹⁵⁵ At stake in the émigrés debate were three issues. The first was whether the émigrés could be called to a halt or, in other words, whether restricting the freedom of movement could be constitutionally justified. The second issue was whether the émigrés could be punished, and the third issue was *how* they should be punished. The first question is the most important for the purposes of this Article, as it invited a discussion of the visible constitution and forced the delegates to demonstrate why their interpretation was superior.

Determined to restore order to France, the Feuillants considered the émigrés as a nuisance that withheld the Assembly from addressing the real problems the nation faced. Their first line of defense in the debate was to point out that the émigrés problem was no problem at all. Jean Delacroix, a lawyer from Chartres, questioned the necessity of proposals limiting the freedom of movement. The Girondins, Delacroix argued, were motivated by “*craintes chimériques*”; he asked out loud, “[O]ù sont les faits, où est le danger?”¹⁵⁶ In Delacroix’s view, the delegates should be glad to be rid of the fossils from the Ancient Regime and had little to fear from their scheming. There was nothing

150. According to Vidalenc, emigration had become “la mode” by 1790-1791. JEAN VIDALENC, *LES ÉMIGRÉS FRANÇAIS, 1789-1825*, 65 (1963).

151. SAMUEL F. SCOTT, *THE RESPONSE OF THE ROYAL ARMY TO THE FRENCH REVOLUTION: THE ROLE AND DEVELOPMENT OF THE LINE ARMY, 1787-93*, at 106 (1978).

152. GREER, *supra* note 134, at 26.

153. TACKETT, *WHEN THE KING TOOK FLIGHT*, *supra* note 143, at 160.

154. *See, e.g.*, 28 ARCHIVES PARLEMENTAIRES, *supra* note 146, at 236.

155. 34 ARCHIVES PARLEMENTAIRES, *supra* note 148, at 297–98.

156. *Id.* at 238 (“imaginary fears . . . [W]here are the facts, where is the danger?”).

to be afraid of, because the little band of pygmies, as one orator labeled the émigrés, could not challenge a united France inflamed by a passion for liberty.¹⁵⁷

Scholars have more than once pointed out that this estimation was correct. Studies demonstrate that the émigrés at Koblenz formed no threat to the revolutionary army, since they lacked the manpower and discipline to conduct an operation on French soil.¹⁵⁸ When war finally broke out in 1792, the poor performance of the émigrés regiments in the contra-revolutionary army confirmed how little the revolutionary government had to fear from them. In anticipation of this, the Feuillants urged the Assembly that the best way to deal with the émigrés was to ignore them and focus on restoring order in France. In fact, as one deputy for Paris, the lawyer Emmanuel Pastoret, pointed out, prosperity, calm, and order formed the best “laws” against emigration, since they would take away its underlying cause.¹⁵⁹ Once France showed itself an orderly constitutional monarchy, the aversion of the aristocrats would diminish. In this sense, Pastoret concluded, the best protection that the French had against the scheming of the émigrés was “*du bonheur que la Constitution lui assure.*”¹⁶⁰

For many in the Feuillant faction, however, the émigrés question was a pure constitutional issue that should be settled regardless of any potential threat to the nation. The very first speaker in the debate, the Breton judge Joseph Lequinio, insisted that the freedom of movement was guaranteed by the Constitution and that emigration could, as a consequence, not be prohibited. The émigrés, he argued, “*n’ont fait qu’user du droit liberté générale, établi par la nature et consacré dans vos lois constitutionnelles.*”¹⁶¹ In other words, they had “*pas fait un crime, en usant du droit que vous avez le plus solennellement établi et . . . vous ne devez pas les punir.*”¹⁶² As Lequinio told his colleagues, the French people were attached to their Constitution and even more so to the natural rights it guaranteed, and he expected the Assembly to uphold and protect these rights, especially in the face of danger.¹⁶³

For Lequinio, as well as many other Feuillants, the issue was a matter of principle. Since the Constitution explicitly guaranteed as a natural and eternal right to each citizen “*la liberté à tout homme d’aller, de rester, de partir, sans*

157. *Id.* at 318–19. The unidentified speaker is Raymond Gaston.

158. For a good summary of these studies, see Ladan Boroumand, *Emigration and the Rights of Man: French Revolutionary Legislators Equivocate*, 72 J. MODERN HIST. 67, 68 (2000).

159. 34 ARCHIVES PARLEMENTAIRES, *supra* note 148, at 407.

160. *Id.* (“the well-being that the Constitution assures him.”).

161. *Id.* at 299 (“the émigrés have only exercised their right to liberty, established by nature and consecrated in your constitutional laws.”).

162. *Id.* (They had “not committed a crime, by exercising the right that you have most solemnly decreed and . . . you should not punish them”).

163. *Id.* at 299.

pouvoir être arrêté, ni détenu, que selon les formes déterminées par la Constitution” the unconstitutionality of emigration restrictions was a foregone conclusion.¹⁶⁴ According to François Jaucourt, who had served as captain in Condé’s dragoons, a violation of fundamental rights could not be allowed: “[une] projet d’une loi contre l’émigration . . . est contraire au droit naturel, à notre Constitution.”¹⁶⁵

The dead certainty with which the Feuillants presented their case reflected their deep-rooted belief in the truth and inviolability of laws of nature. According to Lequinio, these constituted “*le droit plus solennel*” and formed the backbone of the Constitution. They limited the powers of Government and created a sphere of “non-interference” and personal liberty. Since the Constitution, for the Feuillants, formed the goal as well as the endpoint of the Revolution, it is clear that a violation of a principle of the Constitution could not stand. The Revolution has been completed, Mathieu Dumas stated, and if the Assembly insisted on taking measures against the émigrés, “*c’est dans [la Constitution] qu’il faut chercher des moyens plus qu’il faut des moyens plus certaines et plus féconds d’opérer le bien de la patrie.*”¹⁶⁶ Pierre Baignoux, an administrator from Tours, argued that respect for the Constitution and a prudent and careful enforcement of its principles should prevent the delegates from intervening in the émigrés problem. Certainly, Messieurs, he said, “*avec une constitution comme la nôtre, nous n’avons besoin de règlements proscripteurs pour attacher à leur patrie les citoyens française.*”¹⁶⁷

The position of the Feuillants can be summarized as principled and reluctant. The right wing of the Assembly was unanimously opposed to restricting the freedom of movement, since such a restriction violated a natural right guaranteed in the Constitution. In this light, many of the Feuillant delegates even considered a discussion of emigration restriction unconstitutional in itself. At the same time, many others were more than willing to discuss the merits of a restriction only to point out that the measure was unnecessary since the émigrés hardly formed a threat to the new nation. Whatever the case, the Feuillants were unanimous in their position that everyone had the constitutional right to emigrate, that it did not constitute a crime, and should go unpunished.

164. 1791 CONST., Tit. I (Fr.), as reprinted in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789 36 (Jacques Godechot & Hervé Faupin, 2006) (“the liberty for every man to go, stay, and leave, without being subject to arrest or detention, except according to the forms determined by the Constitution”).

165. 34 ARCHIVES PARLEMENTAIRES, *supra* note 148, at 354 (“[A] legislative proposal against emigration is contrary to natural rights, to our Constitution.”).

166. *Id.* at 321 (“We must look to the Constitution for the most certain and productive means to bring about the wellbeing of the fatherland.”).

167. *Id.* at 304 (“With a Constitution like ours we have no need for prescribed rules to attach the French citizens to their country/fatherland.”).

For the Girondins, on the contrary, the émigrés were a real problem that the Assembly could not ignore. They argued that the country could not stand idly by as a great number of citizens left the country with a view to plot its destruction. Far from exercising their natural rights, the progressive lawyer Jean Crestin argued, the act of emigrating abroad with a view to taking up arms against France was “*le plus dangereux, le plus lâche des abus de la liberté.*”¹⁶⁸ Like the Federalists’ argument that self-preservation was the first duty of every sovereign state, Crestin argued that a nation’s first duty was to protect itself. Certainly, he said, “*il serait bien extraordinaire qu’une nation ne pût pas prendre pour sa sûreté les précautions que les lois de toutes les nations ont prises pour la sûreté des individus.*”¹⁶⁹ In a similar vein, his colleague from Morbihan, Yves Audrein concluded that “*dans les temps extraordinaires, il est nécessaire de prendre des mesures extraordinaires.*”¹⁷⁰

Although the “extraordinary circumstances” played a crucial role in the Girondins’ defense of emigration restriction, there was a deeper constitutional foundation underlying their convictions. All proponents of the restriction on the freedom of movement agreed that the reciprocity of social contract formed the justification for it. Revolutionary citizenship, they maintained, did not simply consist of enjoying certain rights, but of having the duty to defend the community that guaranteed those rights. According to one outspoken deputy from Doubs, Jean Voisnard, each citizen had the obligation not to do what tended to directly diminish the freedom or prosperity of his country. He relied on the first section of the Constitution, which stated the following: “*comme la liberté ne consiste qu’à pouvoir faire tout ce qui ne nuit ni aux droits d’autrui, ni à la sûreté publique, la loi peut établir des peines contre les actes qui, attaquant ou la sûreté publique ou les droits d’autrui, seraient nuisibles à la société.*”¹⁷¹

The Feuillants’ constant hammering on the fundamental right to freedom was, in the eyes of Voisnard, a one-sided approach to the problem: “*ils [les émigrés] ont surtout la liberté de faire leur devoir.*”¹⁷² By conspiring against their motherland, the émigrés forsakened their duties as citizens, committed a

168. *Id.* at 308 (“the most dangerous, the most cowardly abuse of liberty”).

169. *Id.* at 308 (“it will be very extraordinary if a nation cannot take security measures that the laws of all nations have allowed for the safety of the individual”).

170. *Id.* at 237–38 (“extraordinary times call for extraordinary measures”).

171. 1791 CONST. Tit. I (Fr.), as reprinted in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789 36 (Jacques Godechot & Hervé Faupin, 2006) (“since liberty consists of being able to do only whatever is not injurious to the rights of others or to public security, the law may establish penalties for acts which, assailing either public security or the rights of others, might be injurious to society”).

172. 34 ARCHIVES PARLEMENTAIRES, *supra* note 148, at 349 (“the émigrés above all have the liberty to do their duty”).

breach of contract, and were traitors. These “*ennemis de la patrie*,” as the Girondins called them, were guilty of treason—a crime punishable with death.

Overlooking the debate, it is clear that the French delegates, like their American counterparts, were unable to settle their dispute solely by quoting relevant, but mutually exclusive clauses of the Constitution. As in the debate on the Alien Act, the French revolutionaries’ disagreement on the constitutionality of a potential emigration restriction rested on two opposing views of the Constitution of 1791. In the eyes of the Feuillants, the Constitution was the accomplishment of the Revolution, the document that safeguarded the newly found rights of Frenchmen and guaranteed the privileges so long denied by absolutism. For the Girondins, on the other hand, the Constitution formed the starting point of a Revolution still in progress.

This disagreement on the “finality” of the Constitution added an extra dimension to the debate. It is clear the French delegates were not in agreement on whether the Assembly even had the right to interpret the clauses in the Constitution. According to the Feuillants, the Assembly’s task was simply to uphold the rights guaranteed in the Constitution, i.e., to determine whether the émigrés enjoyed a freedom of movement and to then grant it to them. The Girondins, on the other hand, went a step further and claimed that the Legislative Assembly, as sole interpreter of the laws, actually had the duty to interpret what the Constitution said. Since the French Constitution did not explicitly grant the power of review to any of the branches of government, it was primarily left to the Assembly itself to decide whether an emigration restriction conformed to the highest law.¹⁷³ As a result, the debate was about more than the émigrés: it concerned the very self-image of the deputies as passive implementers of timeless principles or the active interpreters of the Constitution, and with that, shapers of their own destiny.

As in the debate on the Alien Act, the past also played a crucial role as a source for constitutionality in the émigrés debate. Like the Jeffersonian Republicans, the Feuillants invoked the past to emphasize that the Constitution had been ordained to limit the powers of government. They viewed the Revolution as a struggle against absolutism that culminated in the Constitution of 1791 and secured for all Frenchmen, even potential émigrés, the natural right to go where they wanted. The liberal major Mathieu Dumas, one of the champions of the Feuillant faction, was the most outspoken advocate of this view. Dumas, a major in the French army who had served under Rochambeau in the American Revolutionary War, believed that the natural rights in the Constitution were the great legacy of the Revolution. According to him, the Constitution could only be destroyed by the faults of those to whom it was entrusted, in other words the Assembly, and only “*si ce n’est par les fausses*

173. GEORGES BURDEAU ET AL., *DROIT CONSTITUTIONNEL* 69, 137 (24th ed. 1995).

mesures auxquelles on nous entrainerait, et par l'oubli des moyens simples et naturels qui sont l'objet véritable de notre mission."¹⁷⁴ Thus, the duty of the Assembly was to live up to this task and to not jeopardize the achievements of the Revolution by raising a despotic government in its place. "*Nous remplirons notre tâche, et nous ne nous laisserons pas plus aveugler par les pièges du faux patriotisme, et que par suite de l'usurpation du pouvoir que nous sommes destinés à contenir.*"¹⁷⁵ The true legacy of the Revolution was a jealous vigilance of the constitutional limits to the government's power, and the only true keeper of this legacy was he who took serious the sacred duty to ensure that despotism never again governed France.

As the speech by Dumas demonstrates, the Feuillant faction in the Assembly used a narrative very similar to the Jeffersonian Republicans and, in the same way, invoked the past as a struggle against tyranny to argue that delegates should be guardians of liberty. The Girondin faction, however, took an entirely different approach to the past. Their view of the Constitution as a "social contract" among the French citizens inspired an entirely different view of the relation between past and present.

This Girondin position was most clearly articulated by their most eloquent speaker, Pierre-Victorien Vergniaud. This brilliant lawyer from Limoges, in the southwest of France, had quickly established himself as the best speaker in the Assembly.¹⁷⁶ According to Vergniaud, "*la liberté absolue n'appartient qu'à l'homme sauvage. [S]a volonté seule et sa conservation sont sa suprême loi.*"¹⁷⁷ In order to demonstrate that this was no longer the case once the polity had constituted itself, Vergniaud relied on a complete rupture between past and present. "*C'est que si l'individu aspire au privilège d'être protégé par la société,*" Vergniaud argued, "*il faut qu'il renonce à cette portion de sa liberté dont l'exercice pourrait devenir funeste à ceux qui le protégeront.*"¹⁷⁸ Thus, before the Constitution, these natural rights that the Feuillants claimed for the émigrés may have applied, but now that the Constitution had been adopted, all rights were political rights and granted by the community, not nature. By

174. 34 ARCHIVES PARLEMENTAIRES, *supra* note 148, at 321 ("by the inappropriate measures of those entrusted and by the neglect of the natural rights that are the real object of our mission").

175. *Id.* at 322. ("We must fulfill our duty, and must not let ourselves be blinded by the snares of false patriotism, and by a usurpation of power that we are destined to bear.")

176. SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 594 (1st ed. 1989); CLAUDE GERNADE BOWERS, PIERRE VERGNIAUD: VOICE OF THE FRENCH REVOLUTION 2-3 (1950).

177. 34 ARCHIVES PARLEMENTAIRES, *supra* note 148, at 399-400 ("... absolute liberty belongs only to the savage man. His will and survival alone are his supreme law.")

178. *Id.* at 400 ("As soon as an individual aspires towards the privilege to be protected by society . . . he has to renounce that part of his liberty of which the exercise can become fatal to those who protect him.")

fleeing the country and arming themselves against it, Vergniaud concluded, the émigrés made the interest of all secondary to their own interest and violated the highest law, namely that the welfare of the people was the aim of society. “*Par sa trahison,*” Vergniaud said, “*il [l’émigré] a rompu le pacte social*” and aimed at nothing short of “*la dissolution du corps social.*”¹⁷⁹ This treason, as Vergniaud called it, actually placed the émigrés outside the social contract. It made them “*ennemis de la constitution,*” and therefore made their crimes punishable with death.

Contrary to his Feuillant opponents, Vergniaud’s reasoning rested not on a reference to the past, but a rupture between past and present. By distinguishing between right in the state of nature and civil society, Vergniaud did away with the constitutional objections of his opponents and established a legal ground on which to charge émigrés with treason and, as a result, execute them. This dissociation, as it is called in rhetorical terms,¹⁸⁰ allowed Vergniaud to escape the tension of having to recognize the émigrés constitutional right to plot against the Constitution by splitting the source of this tension in two. In Vergniaud’s view, there were two sets or rights: 1) natural rights, which man enjoyed solely in the state of nature on account of being born, and 2) social rights, which were enjoyed solely as member of the political community that guaranteed them.¹⁸¹ Only the latter rights were protected by the Constitution, Vergniaud argued, and only if the citizen did not violate the highest constitutional duty to refrain from anything that flew in the face of the wellbeing of the community.¹⁸² On the basis of his dissociation, Vergniaud discarded the Feuillant vision for the Assembly as redundant. The Assembly, in the Feuillant’s view, was simply an administrative organ that had to implement the eternal laws of nature prescribed in the Constitution. Vergniaud cast aside this limited view of the Assembly’s legislative duty as grounded on the false assumption that France was still residing in the state of nature. Instead of passive guardians of natural rights, the delegates were active enforcers of the social contract.

In conclusion, it is clear that the French debate on the émigrés case demonstrates a different attitude towards the past on that side of the Atlantic. Whereas the Feuillants proceeded from a narrative structure of arguments, in which the past played a crucial role, the Girondins made no attempt to justify their position in history, but in fact relied on a complete rupture between past

179. *Id.* at 400, 401 (“By his treason,” Vergniaud said, “he [the émigré] has violated the social contract,” and aims at nothing short of “the dissolution of the social body.”).

180. CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, 2 *LA NOUVELLE RHETORIQUE: TRAITÉ DE L’ARGUMENTATION* 552, 558 (1958).

181. 34 *ARCHIVES PARLEMENTAIRES*, *supra* note 148, at 399.

182. *Id.* at 400.

and present, thereby rendering history irrelevant to their interpretation of the Constitution.

CONCLUSION

In retrospect, there are two important points the case studies demonstrate with regard to the relationship between the past and claims of constitutionality. First, both cases demonstrate that the past forms an important invisible source for establishing the “true” meaning of the French and American Constitutions. In both debates, speakers invoke history to give credibility to their interpretation of the Constitution. It is important to note that the past, in this sense, functions as a means to an end. It is used to confer further persuasive power to an already fixed interpretation of the constitution. This means that references to the past are not made out of a historical curiosity to establish, on the basis of historical records, what the “true” meaning of the Constitution was. On the contrary, just like modern-day Justices of the Supreme Court, the speakers were only interested in the past as a means to build a narrative argumentation to support their reading of the Constitution.

As the debates illustrate, the narratives function as short stories about the origins of American and French government. Yet, however harmless that may sound, scholars have long recognized that narratives are powerful mechanisms to shape and structure the audience’s identity.¹⁸³ Narratives not only tell us that who we are in the present is who we were in the past, but also who we should be in the future. In these narratives, the past functions as a mirror, since it is implied that the identity of the present generation can be found by looking back to history. This link between past, present, and future gives narratives their powerful, suggestive force, and it entices the audience—once it accepts the past—to adhere to the identity created by the speaker and to act accordingly.

As the debate on the Alien Act demonstrates, the use of the past can be highly selective. Republicans and Federalists both emphasize different periods in history to support their reading of the Constitution. For the Republicans, the struggle against British tyranny in 1776 is important because it allows them to paint the Alien Act as a despotic measure. For the Federalists, on the other hand, the constitutional crisis of 1787 is crucial, in order to portray the Alien Act as a measure to maintain order. This selective use of specific pieces of history, however, raises a question with regard to the value of the past in general. After all, if the past can be bent and shaped to support any interpretation of a clause in the Constitution, is history rendered more or less irrelevant for determining the constitutionality of policy measures? The answer to this question, however dissatisfying, must be that as long as the past

183. See Charland *supra* note 9.

functions as an invisible source of constitutionality and shapes political identity, the best remedy against a highly selective view of the history—what legal scholar Jill Lepore calls historical fundamentalism¹⁸⁴—is a thorough understanding of the past itself.

The second point that can be made on the basis of the two case studies is that the past as an invisible source of constitutionality is not a phenomenon unique to either country. As it turns out, history plays a role in constitutional interpretation on both sides of the Atlantic. However, the study of the two debates does show that the past plays a more significant role in the United States. In America, the use of the past to determine what it means to be American is undisputed. Both factions in the debate rely on the past to shape their audience's identity. Only the outcome, and not the use of the past itself, is disputed. Speakers come to different conclusions using the same narrative argumentation. The situation is entirely different across the Atlantic. In the French émigrés debate the use of the past *itself* is highly disputed. Only one faction, the Feuillants, cite history to support their reading of the Constitution, whereas their opponents, the Girondin faction, neglect history all together. In fact, these delegates rely on a complete rupture between past and present to support their reading of the Constitution. Who we are, in this view, is no longer who we were, but simply who we want to be.

This raises the question of how to explain the difference in the weight attributed to the past as an invisible source of constitutionality on both sides of the Atlantic. This Article cannot begin to treat such a question in an exhaustive way. It is certainly clear that American revolutionaries had a very different attitude towards history than their French counterparts. It was, after all, much easier for the Americans to respect and even admire the British Constitution, under which their colonies had thrived, than for the French to anything but loathe the Absolute Monarchy that their Revolution sought to replace. This raises the further question whether we can speak of two distinct “temporal cultures” on either side of the Atlantic. Of course, the two case studies in this Article can only begin to answer such a complex question, but the results certainly invite further inquiry. The prevailing view that rises from the debates studied here is that the past is not something dead and done, but alive and kicking. What the French and American revolutionaries make clear is that the real questions in political debate are *whether* history shall be our guide, and *whose* history that will be.

184. JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 16 (2010).

