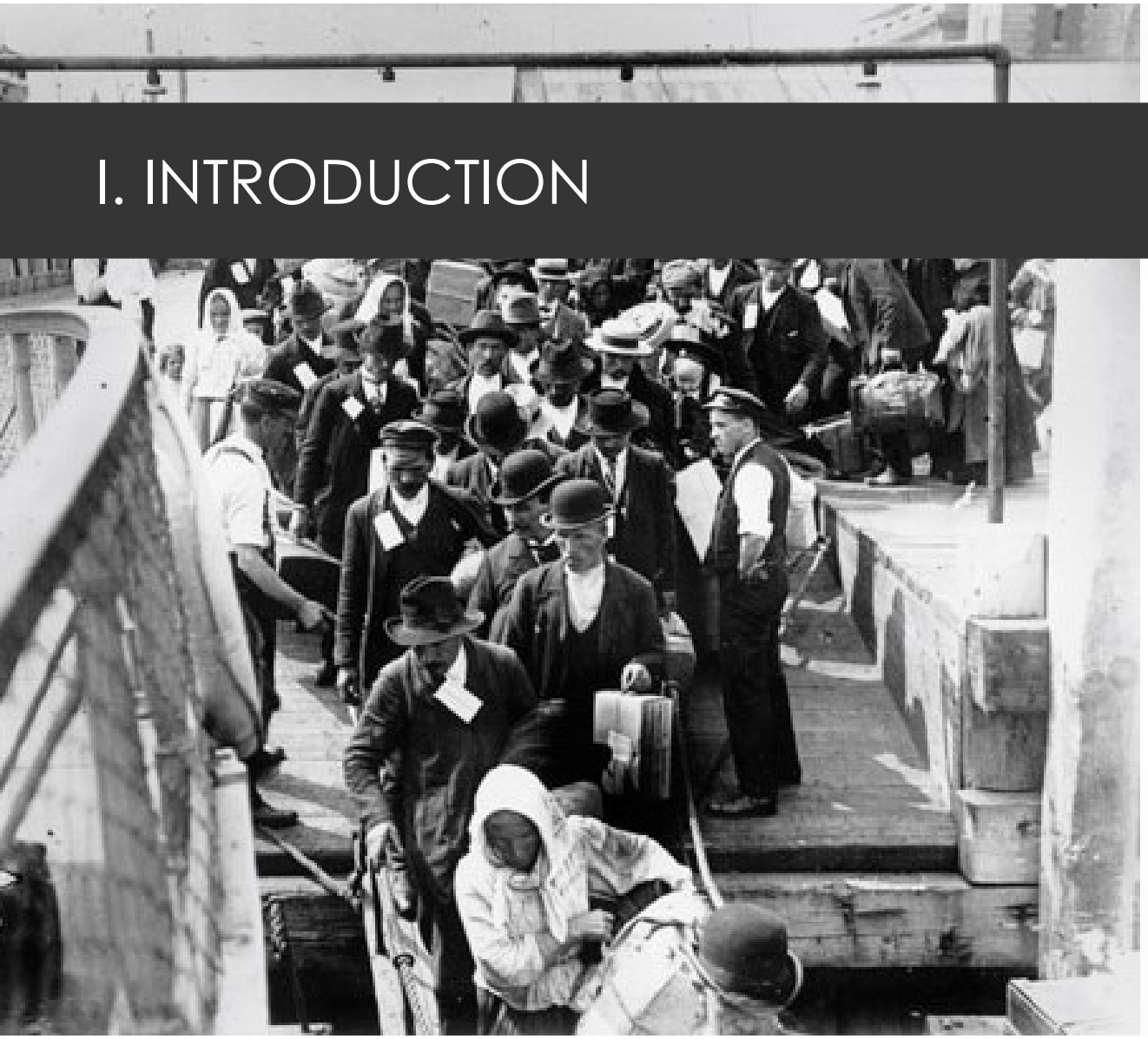
Deconstructing the Myth of the Plenary Power Doctrine:

Employing a New Originalism Approach to Understand the Federal Government's Constitutional Immigration Powers

I. INTRODUCTION



- Defining the myth
- Defining the Plenary Power Doctrine
- Identifying a New Originalism Approach

Identifying the Myth: The Illegitimacy of the Plenary Power Doctrine in Immigration

- Since the end of the 19th Century, the legal field of Immigration – among other legal fields– has been governed by the Plenary Power Doctrine.
- Despite the reaffirmance of this doctrine in modern immigration cases of the U.S. Supreme Court, a vast majority of Immigration Law scholars have questioned the constitutional and theoretical legitimacy of the plenary power doctrine for almost 40 years.

Defining the Plenary Power Doctrine in Immigration Law

- Two Central Tenets:
  1. The Federal Government has *implied* constitutional powers to regulate, not only the naturalization of foreigners, but all aspects related to the migration of noncitizens, including their exclusion, detention and removal from the United States.
  2. The Federal Judiciary will give deference to the federal political branches' actions within the sphere of Immigration.

A New Theoretical Approach to Challenge the Myth

- This presentation –and its accompanying article – argues that under a *New Originalism* optic, immigration scholars can:
  - Find a new approach that recognizes the legitimacy of the two tenets of the plenary power doctrine;
  - And identify the social, political, democratic, legislative and judicial forces required to abandon such doctrine, if desired.

II. The Racist Origin of the Plenary Power Doctrine in Immigration:

The Chinese Exclusion Laws and Cases

Bancroft Library

No. 65622

ORIGINAL.
Harry G Weldon

UNITED STATES OF AMERICA.

Certificate of Residence.

Issued to Chinese LABORER, under the Provisions of the Act of May 5, 1892.

This is to Certify That Hang Jung, a Chinese LABORER, now residing at SAN FRANCISCO, CALIFORNIA has made application No. 10522 to me for a Certificate of Residence, under the provisions of the Act of Congress approved May 5, 1892, and I certify that it appears from the affidavits of witnesses submitted with said application that said Hang Jung was within the limits of the United States at the time of the passage of said Act, and was then residing at SAN FRANCISCO, CALIFORNIA and that he was at that time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese LABORER viz.:

NAME: Hang Jung AGE: 39 Years
LOCAL RESIDENCE: 1708 Sacramento St 2nd fl SAN FRANCISCO, CALIFORNIA
OCCUPATION: Shoemaker HEIGHT: 5 ft 3 in COLOR OF EYES: Brown
COMPLEXION: Dark PHYSICAL MARKS OR PECULIARITIES FOR IDENTIFICATION: Scar left temple near eye, Mole same place, Several small scars on right temple.

Hang Jung

And as a further means of identification, I have affixed hereto a photographic likeness of said Hang Jung

GIVEN UNDER MY HAND AND SEAL THIS Twenty seventh day of March, 1894, at San Francisco.

State of CALIFORNIA

SEAL

M Hellman
Collector of Internal Revenue,
FIRST District of CALIFORNIA
Thos P Cusick Deputy

2—1498

Brief Historical Background

- The migration of Chinese noncitizens to the United States in the middle of the 19th Century augmented drastically due to the need of workers for the construction of the Transcontinental Railroad and the West Coast Gold Rush.
- After the construction of the transcontinental railroad ended, Chinese noncitizens had already enjoyed numerous years to settle in the United States and nativist bigotry began to see the Chinese community as an alleged threat to the United States' labor market, cultural identity and security.
- Chinese noncitizens who once served well to construct the resources required for America's industrialization, now were unfoundedly labeled as criminals, prostitutes, noncitizens unwilling to assimilate and job-takers.

The Chinese Exclusion Acts

- In 1875, 1882, 1884, 1888 and 1892, Congress gave in to the racist and bigoted claims of nativist groups and approved the Chinese Exclusion Acts.
- These laws restricted and prohibited the immigration of Chinese laborers who had not entered and settled in the United States before November 17, 1880.

The Chinese Exclusion Cases

A. Chae Chan Ping v. U.S.:

- Chae Chan Ping claimed that he could lawfully re-enter the United States according to the Chinese Exclusion Act of 1882, which allowed for the re-entry of a Chinese noncitizen who held a certificate establishing his residence in the United States before November 17, 1880.
- The Federal Government, on the other hand, argued that Chan was subject to exclusion from the United States in light of the 1888 Scott Act of Congress, which established that Chinese entry into the United States was prohibited, notwithstanding the fact that a returning Chinese laborer had a certificate showing that he had settled in California before the Chinese Exclusion Act and its November 17, 1880 cut-off date.
- The U.S. Supreme Court held that:
  1. Congress had constitutional authority to issue the 1888 Scott Act, despite the Burlingame Treaty with China;
  2. This implied constitutional power was found in the sovereignty, independence and foreign affair interests of the federal government, which rested on an amalgamation of express federal powers
     - The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship.
  3. The federal judiciary owed deference to the political branches in immigration actions, and it should only intervene to establish the validity of a challenged federal immigration law, interpret its meaning and apply it to the controversy before it.

The Chinese Exclusion Cases

B. *Fong Yue Ting v. U.S.:*

- The U.S. Supreme Court expanded its recognition of Congress' constitutional power to regulate immigration, by legitimizing an 1892 federal law that authorized the deportation of any Chinese noncitizen unlawfully present in the United States, who did not possess a certificate of residence issued by the Collector of the Internal Revenue Service ("IRS"), that could only be acquired if a foreigner secured the testimony of a white male witness who could vouch for the noncitizen's residence in the United States before May 5, 1892.
- The Court reaffirms the two prongs of the Plenary Power Doctrine:
  1. Congress' implied constitutional power to issue laws that affect foreign relations and the Nation's sovereignty and independence; and,
  2. The federal judiciary's deference to such laws, provided that: the *end* of the challenged immigration legislation was:
     a. Legitimate,
     b. Within the scope of the constitution,
     c. Executed through appropriate means which are plainly adapted to the legislation's ends, and
     d. Are not prohibited, but consistent with the letter and spirit of the constitution.

The Chinese Exclusion Cases

C. *Wong Wing v. U.S.*

- Analyzing if an1892 amendment to the Chinese Exclusion Act, which provided for up to one (1) year of imprisonment with hard labor, and the subsequent deportation, of an unlawfully present Chinese noncitizen violated the Constitution's requirement of the imposition of punishment only after a judicial trial, the U.S Supreme Court held that:

  1. Detention while the government or a judge determines summarily if a noncitizen is subject to deportation or exclusion, did not constitute punishment or imprisonment that constitutionally required a trial by jury;
  2. As stated in *Fong Yue Ting*, deportation is a civil procedure and not a criminal procedure;
  3. If Congress desired to impose imprisonment and punishment of hard labor before the noncitizen was deported, then the noncitizen had to be provided a judicial trial to establish his or her guilt

How Do We Address the Fact that the Plenary Power Doctrine is Still "Good Law" under a Constitutional Democracy Subject to the Rule of Law?

- ***Trump v. Hawaii***, 138 S.Ct. 2392 (2018) (Chief J. Roberts) (expressly citing *Kleindienst v. Mandel*, 408 U.S. 753, 765-766 (1972) (Reaffirming the Chinese Exclusion Cases as established legal doctrine).
- ***Jennings v. Rodríguez***, 138 S.Ct. 830, 866 (2018) (J. Breyer, dissenting) (citing *Wong Wing v. United States*, 163 U.S. 228 (1896), which validates the plenary power doctrine, with some level of approval in relation to the limits on the federal government's power to detain noncitizens) and *Kleindienst v. Mandel*, 408 U.S. 753, 765-766 (1972).

II. A Survey of Four Decades of Scholarly Rejection of the Plenary Power Doctrine in Immigration

2010 protest in San Diego against Arizona immigration law *(Bob Davis)*

Five Schools of Thought:
Four Decades of Scholarly Protests Against the Plenary Power Doctrine

1. A Liberal Theory Approach
2. An International Law Approach
3. Rights-Based Anti-Exceptionalism
4. Separation of Powers Exceptionalism
5. Federalism Exceptionalism

A Liberal Theory Approach

- **Signature Scholar**:
  - Prof. Peter H. Schuck.
- **Main Argument Against Plenary Power Doctrine**:
  - *Lockean* principles of *Universal Human Rights* and *Consent-Based Immigration* should govern Immigration Law instead of the Plenary Power Doctrine or *Communitarian Values*.
- **Main Critique**:
  - Classical Liberalism, although fundamental to our Nation's founding notion of Naturalization and Immigration, was applied in the first 100 years of U.S. Immigration Law to exclude foreigners with non-protestant religious views or who were seen as unable to assimilate and only defended the *Universal Human Rights* of White Men.

An International Law Approach

- **Signature Scholars**:
  - Professors Louis Henkin, Michael Scaperlanda, Peter J. Spiro, Natsu Taylor Sinto.
- **Main Argument Against Plenary Power Doctrine**:
  - After the advent of International Human Rights, International Treaties and International Organizations and Tribunals in the aftermath of WWII, the plenary power doctrine is not justified because the concept of Absolute Sovereignty has been abandoned; International Human Rights Inform our Constitution and Federal Courts should review Federal Congressional or Executive Branches in light of International Human Rights Treaties and Conventions and Customary International Law.
- **Main Critique**:
  1. The United States is signatory to few international human right treaties or covenants;
  2. When the United States has signed many international covenants, it has done so with explicit reservations;
  3. Immigration Law, despite being an area of American Law subject to international considerations, has been historically insular in its nature, with few international treaties —such as the Convention Against Torture or the Protocol Relating to the Status of Refugees— having significant or palpable influence in the federal immigrational legal system;
  4. The United States has not implicitly adopted International Covenants and Treaties through Customary International Law;
  5. There is still some basis of sovereignty and foreign relations that justifies some aspects of the plenary power doctrine;
  6. Foreign International Relations is a perpetually moving arena (e.g. Populist Movements);
  7. A recent international effort to provide uniform rights to immigrants —the United Nations' General Compact for Migration— has been expressly rejected by countries with great influx of migrants such as the United States and Australia.
  8. Immigration rights are rarely supported by effective enforcement remedies at the international stage, making them aspirational statements more that practical legal remedies;
  9. Domestic protections for noncitizens through the federal Bill of Rights, the various State Bill of Rights, and other political and rights-based legislations, provides a more practical and traditionally palatable solution to the Nation's human rights crisis in the immigration context, than the adoption of international treaties and covenants in our domestic constitutional order

Exceptionalism Theories

A. Anti-Exceptionalism in Protection of Immigrant Rights:

1. **Professors**:
   - Stephen H. Legomsky, T. Alexander Aleinikoff, Hiroshi Motomura, Michael Kagan, Maureen Callahan VanderMay, Gabriel J. Chin, Shalini Bhargava Ray, and Kevin R. Johnson.
2. **Main Argument**:
   - Scholars have attempted to reconcile the exceptionalism or isolation of Immigration Law from the individual rights revolution and the substantive due process of law and equal protection of law jurisprudence that evolved in other areas of American Law after the Chinese Exclusion Cases were adopted. These scholars argue for the end of Immigration Law exceptionalism in the area of individual rights in light of the limits that the Bill of Rights imposes on other areas of American law under suspect-based judicial review and modern constitutional notions of individual rights.
3. **Main Critique:** Uniformity in Foreign Relations, especially in Asylum and Refugee cases; Democratic Legitimacy.

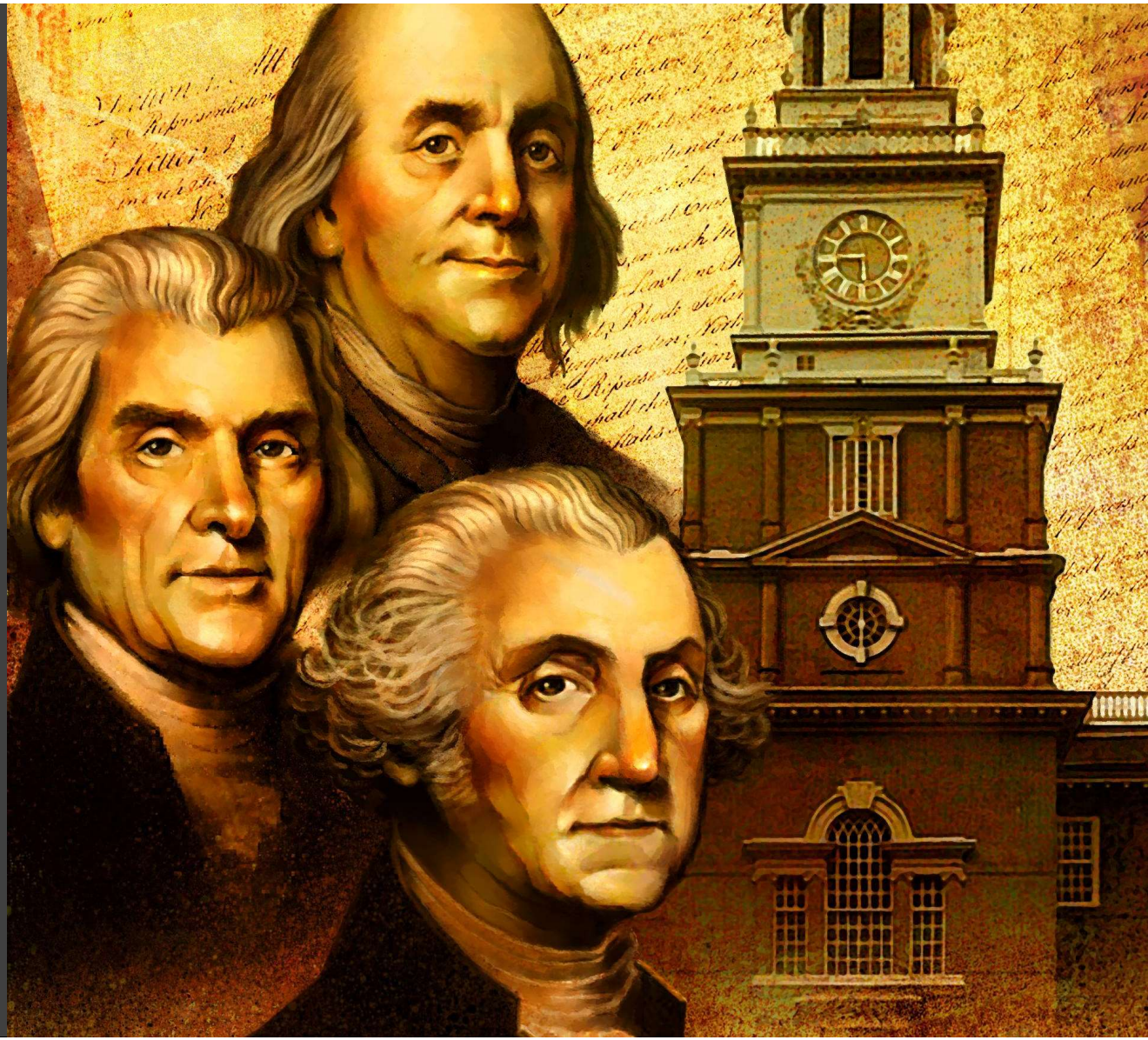
B. Exceptionalism in Separation of Powers Doctrine:

1. **Professors**:
   - Adam Cox, Cristina Rodriguez and Hiroshi Motomura.
2. **Main Argument:**
   - Many scholars argued in favor of Executive exceptionalism and Presidential Action light of Congress failure to pass a sound immigration reform in decades. These scholars mostly argued this approach under the Obama Presidency.
3. **Main Critique**: The Obama v. The Trump Presidential Era Case.

C. Exceptionalism in Federalism Doctrines:

1. **Professors**:
   - David Martin, Cristina Rodriguez, Clare Huntington, Adam Cox, Eric Posner.
2. **Main Arguments**:
   a. The Constitutional Structure and a Structural Approach a la Charles Black, legitimizes the Plenary Power Doctrine (David Martin);
   b. There should be a federal preemption of state immigration laws v. states should have freedom to legislate in the field of Immigration.
3. **Main Critique**:
   1. Expertise of state governments in enforcing or controlling legislation; lack of one-uniform voice in foreign affairs; potential for 50 different patterns of immigration discrimination in the States; The Obama v. Trump Case.

III. New Originalism



The Origin of New Originalism

- New Originalism arose in the 1980s as a response and critique to the classic constitutional theory of originalism that was being strongly posited by the Justices William Rehnquist and Anthony Scalia and Judge Robert Bork.
- It attempts to address two problems of classical originalism:
  - The Dead Hand Problem
  - The Democratic Illegitimacy Problem
- Main Scholars:
  - Randy Barnett
  - Lawrence Solum
  - Keith Wittington
  - Jack Balkin

Its Basic Principles

1. **Original Meaning v. Original Intent:**
   - A concern with the communicative content of the constitutional text, as fixed at the time of its framing or ratification by the semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers and citizens.
   - No longer do originalists claim to be seeking the subjective intentions of the framers, but instead are occupied with understanding the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment, as discovered by references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text.
2. **Constitutional Construction:**
   - When the plain text of the Constitution and its original understanding does not offer a response to a contemporary problem, future generations will employ constitutional construction to fill in the moral and social gaps and ambiguities of the constitutional text.
   - Constitutional Construction is the process by which doctrines and laws are created to concretize principles and decide cases, and build institutions to make the constitutional system work in practice.
3. **Who Constructs?**:
   1. Citizenry through social and political movements;
   2. The political branches by acting in response to the citizenry; and,
   3. The judicial branch by ratifying the adopted legislation.

New Originalism and its Shortcomings

- The difficulty of finding an "objective understanding";
- The expertise required in historical research;
- The space for violations of democratic and rule of law principles through the invidious use of constitutional construction.

IV. New Originalism and the Plenary Power Doctrine

Original Public Meaning

Constitutional Construction

The Original Framework

- **Colonial Era**:
  - The 13 Colonies adopted particular immigration laws that discriminated and affected who could enter the British Colonies (e.g. Section 89 of the Massachusetts Body of Liberties of 1641 and the "Common Belief in Christianity" Criterions).
  - Nevertheless, the British Crown determined who became a "Subject of the Kingdom"
    - The Plantation Act-The British Naturalization Act of 1740 (Required 7 years of residency, a Loyalty Oath and to be a Protestant).
- **Revolutionary Era**:
  - Through the Declaration of Independence and the Declaration and Resolves of the First Continental Congress in 1776 and 1774, respectively:
    - the colonies express their opposition to the limitation of migration to the 13 colonies and the limitation of their rights as English Citizens.
  - Letters from the Founding Fathers, Treatises on the Law of Nation
    - E.g.: Benjmin Frnklin's Nativist text "I am Partial to the Complexion of my Country" in 1755;
    - Vattel's 1758 Book on The Law of Nations;
    - John Lock's writings on Consent-Based Citizenship.
- **Articles of Confederation**:
  - Excluding Paupers, Fugitives and Vagabonds from State Citizenship.
- **Constitutional Text**:
  - Preamble of the Constitution and Sovereignty Principles;
  - Enumerated Power to Legislate Naturalization Laws;
  - Constitutional Convention Debate of August 9, 1787, as to residency requirements and exclusion of certain individual from qualifying for citizenship and holding government office.
  - Federalist No. 2 , John Jay, "A People Descended From the Same Ancestors", National Unity Defined as Ethnic Similarity.
- **The First Years of the Republic**:
  - The Alien and Sedition Acts
  - The numerous laws of residency and naturalization, as early as 1789.

Seven Eras of Constitutional Construction

1. The Antebellum Period (1800-1865)
2. The Civil War, the End of Slavery and the Beginning of the 20th Century
3. World War II and the 1952 Immigration and Nationality Act
4. From 1952 to September 11, 2001
5. A Post 9/11 Immigration Regime
6. The Obama Presidency
7. The Trump Presidency

Conclusion

- The Plenary Power Doctrine does not have to be perpetual.