Integration Policy as an Instrument of Self-Preservation of Power: Historical Inquiry

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Abstrakt:

This essay unpacks the political aim of integration policies. In particular, it examines the notion of self-interest of the ruling in assuring cohesion of values, opinions and culture among the ruled via state immigration control and assimilation programmes. In legal doctrines under the Law of Nations and state practices in the US and UK in the 18th and 19th centuries, the ruling classes pursued their interest in preserving power through integration policies, when they perceived migrants as an ideological or political threat. Although the interests of the ruling and the ruled in the 'self-preservation of the state' or 'social and value cohesion' (as these objectives were sometimes framed) intersect, the essay demonstrates occasions when lawmakers and lawyers explicitly pursued their interest in preserving power. A new methodological lens is proposed to explain the overly broad and vaguely formulated objectives in today's integration policies by demonstrating the historical existence of the legislative rationale of power preservation and positioning it into the framework of social theories of power and conflict.

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Prohlašuji, že jsem esej na téma: 'Integration Policy as an Instrument of Self-Preservation of Power: Historical Inquiry' zpracovala sama a uvedla jsem všechny použité prameny. Dávám souhlas s prvním zveřejněním své eseje vyhlašovateli soutěže nebo spolupracujícími institucemi v papírové či elektronické podobě.

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Nicole Štýbnarová

'[The] object of a proper immigration law ought to be to secure by a careful and not merely perfunctory educational test some intelligent capacity to appreciate American institutions and act sanely as American citizens […]'

Theodore Roosevelt, 1901[1]

Introduction

Migration laws in the traditional immigration states of the EU as well as on the EU level are designed to pursue the aim of integration of immigrants. Some states, such as the UK or France have been addressing the matter of integration of foreigners since the 1980s, for other EU states, including the Czech Republic, this became an agenda of migration law-making more recently[2]. Supranational organizations in Europe, such as the EU or the Council of Europe became gradually involved in regulating national policies of integration via law-making or soft law[3] to the point where it is now argued that the EU legislation has been a key driver in instituting the so-called pre-departure integration conditions in national migration laws[4]. Integration was formulated as an aim justifying stricter migration laws on the EU as well as national levels[5].

On the theoretical level, the objectives and benefits of integration policies present a contentious topic; often these are understood as related to preserving a political, social and economic whole in the host society[6]. Frequently, legislations aimed at enhancing integration are underscored with economic rationale, such as facilitation of the entry of migrants to the labour market and assuring their commitment to working necessary for the functioning of the re-distributive welfare system[7].

[1] Congressional Record – Senate, 1901, 84

[2] Clíodhna Murphy, *Immigration, Integration and the Law: The Intersection of Domestic, EU and International Legal Regimes* (1st edition, Routledge 2013) 14. For account of laws governing integration of foreigners in the Czech Republic see e.g. Pavel Pořízek, „Lesk a bída" integrace cizinců pohledem vládních koncepcí integrace cizinců (s využitím kazuistik z praxe veřejného ochránce práv)' (2018) 64 Acta Universitatis Carolinae Iuridica 49.

[3] EU Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Immigration, Integration and Employment' COM(2003) 336 final, Annex 1; Council of Europe Ministers of Foreign Affairs, 'White Paper on Intercultural Dialogue: "Living Together As Equals in Dignity"' (2008); EU Council JHA, 'Justice and Home Affairs Council Conclusions, Common Basic Principles on Immigrant Integration' (2004) Council Document 14615/04.

[4] Saskia Bonjour, 'The Transfer of Pre-Departure Integration Requirements for Family Migrants Among Member States of the European Union' [2014] Comparative Migration Studies 204–205; Kees Groenendijk, 'Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?' (2011) 13 European Journal of Migration and Law.

[5] Integration was stated as a justification for stricter migration rules e.g. in: EU Council, Council Directive concerning the status of third-country nationals who are long-term residents [2003/109/EC of 25 November 2003]; EU Council, Council Directive on the right to family reunification [2003/86/EC of 22 September 2003].

[6] Adrian Favell, 'To Belong or Not to Belong: The Postnational Question' in Andrew Geddes and Adrian Favell (eds), *The Politics of Belonging: Migrants and Minorities in Contemporary Europe* (Ashgate Pub Ltd 1999) 214; Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (2nd edn, Palgrave Macmillan UK 2001) 3.

[7] Murphy (n 2) 12; D Miller, 'Multiculturalism and the Welfare State: Theoretical Reflections' in K Banting and W Kymlicka, *Multiculturalism and the Welfare State* (Oxford University Press 2006) 323–330.

Other times, the objectives of integration measures are formulated more vaguely, such as facilitation of participation in democratic processes or enhancing commitment to shared goals[8]. Under-determinacy and a lack of causal relationship between the legislative objectives and the impact of the adopted measures have been common points of critique for scholars looking at integration-driven developments in migration laws[9].

According to US president Roosevelt, cited above, migration laws ought to select foreigners who will appreciate American institutions and act sanely as American citizens. His statement gives a hint at a political dimension of integration-based selection of migrants and shows the president's desire for politically obedient migrants with certain political or public behaviour labelled as 'sane'. To contribute to the de-coding of the objectives of integration policies, this essay enquires into the possible diffusion of aims to integrate immigrants and ensure their political obedience.

The lens for the inquiry is the notion of self-interest of the ruling representatives in maintaining political, value and social cohesion to perpetuate their power position. It offers an overview of historical legislative and theoretical formulations of the objectives of immigration control related to social, value and religious cohesion or, what we today call, integration, with a special focus on the self-interest of those benefiting from the current power distribution in the society. Historical theories of Law of Nations' scholars and law-making in the nineteenth century in the UK and the US, reviewed in this essay, show that that besides other benefits – national security, economy and welfare – both theorists and governments articulated self-interest in perpetuating their own position of power as a benefit of selecting immigrants based on moral, religious, cultural or political conviction.

Theoretical Framework

The essay cannot aspire to present a full account with all complexities of the historical making of the notion of integration of foreigners in law and legal doctrine. Rather, doctrines and legislative activities are selected in which the ruling class – even explicitly – demonstrates intent to perpetuate its power through designing and reification of integration policies. The term integration policy stands for many forms of bureaucratic efforts towards migrants. This essay uses the term as standing for one-sided processes of pre-residence migrant selection[10] as well as post-residence assimilation programs affecting residence rights[11] rather than two-sided processes contributing to mutual tolerance

[8] Murphy (n 2) 33; David Schiefer and Jolanda van der Noll, 'The Essentials of Social Cohesion: A Literature Review' (2017) 132 Social Indicators Research 579, 579.

[9] Favell (n 6) 3; Karen N Breidahl, Nils Holtug and Kristian Kongshøj, 'Do Shared Values Promote Social Cohesion? If so, Which? Evidence from Denmark' (2018) 10 European Political Science Review 97, 98; Nils Holtug, 'Immigration and the Politics of Social Cohesion' (2010) 10 Ethnicities 436.

[10] Miller (n 7) 323–338; K Banting and W Kymlicka, 'Introduction' in K Banting and W Kymlicka, *Multiculturalism and the welfare state* (Oxford University Press 2006) 3; Bonjour (n 4) 204–205; Groenendijk (n 4); Murphy (n 2) 26.

[11] Murphy (n 2) 15–26.

or facilitation of migrant's entering to the host society. The term 'the ruling' is used interchangeably with 'the ruling class'[12] or the 'dominant class'[13] as in social conflict and power theories[14]. The term does not stand only for the bureaucratic bodies constitutionally mandated to govern the state, rather it encompasses those in powerful positions sustained by the hierarchy of social values and the value status quo[15].

The first section presents approaches of some of the most commonly cited Law of Nations scholars in works dealing with the history of migration law[16] to what we would today call integration policy. It reveals that these scholars of the Law of Nations distinguished between general social benefits of integration (dominantly understood as migrant selection), and sectoral benefits of sustaining power of the sovereign. The second section then focuses on the self-interest of the ruling class as articulated in integration-driven changes to migration law in the UK and the US through 18th and 19th centuries. It shows that other than national economy and security (considered to be general interests, although this characterization can too be problematized) the legislators selected migrants worrying that they could form an unpredictable, thus challenging, political capital.

The last part discusses the self-interest of the ruling class in preserving its power position as demonstrated in its pursuit of integration within the theoretical framework of conflict and power theories. From the perspective of political history, self-preservation has been continuously one of the prime duties and interests of the ruling class[17]. Its immanent interest in preserving dominant relations suggests that the ruling class is more likely to direct its efforts towards social and value conservation rather than change[18]. The interest in preservation of dominant relations may thus be immanent to integration policies. In such cases, the meaning of certain actions (actions oriented to foreigners' integration) is mobilized at service of dominant group to establish and sustain structural social relations from which some individuals benefit more than others and which some groups have an

[12] John Rex, *Key Problems of Sociological Theory* (Routledge 1998) 90; Steven Lukes, *Power: A Radical View* (2nd edition, Red Globe Press 2004) 5.
[13] Gerhard Lenski, *Power and Privilege: A Theory of Social Stratification* (University of North Carolina Press 1966) 41.
[14] Generally about conflict and power theories: Hans Joas and Wolfgang Knöbl, *Social Theory: Twenty Introductory Lectures* (Cambridge University Press 2009) 174. In this essay, I shall mainly refer to John Rex, Gerhard Lenski and Steven Lukes.
[15] ibid 187.
[16] Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27 European Journal of International Law 901; Gideon Baker, 'Right of Entry or Right of Refusal? Hospitality in the Law of Nature and Nations' (2011) 37 Review of International Studies 1423; James AR Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 The American Journal of International Law 804.
[17] Quentin Skinner, *A Genealogy of the Modern State: British Academy Lecture* (British Academy 2009) 327–328.
[18] John B Thompson, *Ideology and Modern Culture* (Stanford University Press 1990) 40; Rex (n 12) 91.

interest in preserving[19]. Values and institutions that are protected through these efforts, serve the purposes of the ruling group but are claimed to be serving the social system as a whole[20]. This framing – separating the interests of the dominant and the dominated classes – guides the analysis of the historical data. Explicit historical language evidences the sectoral- or self-interest of the politically dominant class in selecting immigrants based on their potential for integration.

The first contribution of the essay is to present this aspect of the objectives of historical migration control and assimilation policies. The second contribution is methodological. It provides a lens for analysing and criticising the current integration policies. This lens might further the current critical accounts of integration policies applied in traditional Western immigration states. The data-analysis shows that historical lawyers and governments regarded differences in migrants' morals, values and religion as a political threat potentially weakening their powerful positions. Simultaneously, the immigration policy-based measures against this 'threat' did not distinguish between direct, violent threat and an opinion challenge. The over-broad reach of integration-aimed legal measures is problematized accordingly in current contexts due to a lack of definition in the aims of integration policies and of empirical data supporting these policies[21]. The problem of over-broad integration measures was suggested to stem from neo-colonial epistemology[22]. Additionally, multi-layered socio-economic interests of governments arguably dilute the focus of integration policies[23]. Religious or cultural aspects of integration are often over-emphasized in current national integration policies[24] and contribute to negative social phenomena of elite-reproduction and othering[25].

In US migration and citizenship legal history, the ideological exclusion of migrants for their 'dangerous' beliefs as potentially detrimental to the political setting was thus far developed in relation

[19] Thompson (n 18) 72–73.
[20] Rex (n 12) 89; Lenski (n 13) 41.
[21] Karen N. Breidahl, Nils Holtug and Kristian Kongshøj, 'Do shared values promote social cohesion? If so, which? Evidence from Denmark', European Political Science Review (2018/ 10:1), pp. 98; Nils Holtug, 'Immigration and the politics of social cohesion', Ethnicities (2010/10(4)), pp. 436
[22] Willem Schinkel, 'Against 'immigrant integration': for an end to neo-colonial knowledge production', Comparative Migration Studies (2018/6:31)
[23] Bonjour, supra note, pp. 209; Kofman, E., Saharso, S., Vacchelli, E., Gendered Perspectives on Integration Discourses and Measures (2013) International Migration, pp. 86; Kraler. A, Kofman, E., Family migration in Europe: policies vs. reality, IMISCOE Policy Brief No. 16 (2009), pp. 4 (accessed in August: http://research.icmpd.org/fileadmin/Research-Website/Project_material/NODE/IMISCOE_PB_Familymigration_in_EU.pdf)
[24] Pascale Fournier and Gökçe Yurdakul, 'Unveiling Distribution: Muslim Women with Headscarves in France and Germany' in Michal Bodemann and Gökçe Yurdakul (eds), *Migration, Citizenship and Ethnos* (Palgrave, 2006), pp. 167-180; Murphy, supra note, pp. 45
[25] Adrian Favell, 'To belong or not to belong: the postnational question' in Andrew Geddes and Adrian Favell (eds), The politics of Belonging: Migrants and Minorities in Contemporary Europe (Ashgate, 1999), p. 214; Joseph Weiler, 'Thou shall not oppress a stranger: On the Judicial Protection of the Human Rights of Non-EC nationals' 3 European Journal of International Law (1992, 65), pp. 67

to anarchists or communists[26] and terrorists more recently[27]. The present essay expands the conceptualization of ideological exclusion of aliens beyond these, most outstanding, cases of confluence between maintaining cohesive society and exclusion of political opposition in the US migration law history. By showing further examples of this confluence in the historical migration legal theory and practice, it suggests that the political interest in excluding challenges to the ordering of power in society, driven by different values, morals and beliefs, may be inherent to the objectives of integration policies. It does not question that economic, security or social interests instigate lawmakers to delineate the socio-demographic design of immigration. The suggestion is that it might not always be in the interest of governing representatives to distinguish between nationalist, culturally supremacist and ideologically exclusionary interests not making any actual benefit to the host society and vital interests for maintenance of the prosperity and functioning of the host society. While the previous research on current integration policies in the EU showed that governments can base integration policies on biased regulatory knowledge, the author challenges the conceptualization of the extensive and sometimes mis-targeted regulatory activity as mistake, a lack of knowledge or a consequence of a prejudice and suggests that governments might have self-interest in broader targeting and regulatory arbitrariness in limiting religious, value- and opinion-plurality fueled by immigration.

Rudiments of Integration of Foreigners in the Scholarship of the Law of Nations

Control over admission of foreigners, although today understood as a matter of domestic jurisdiction[28] was historically theorized and applied under the doctrine of the Law of Nations[29]. Historians of migration law demonstrated that under the Law of Nations before the 19th century, migration law doctrine adhered to the notion of *ius communicationis*[30] as 'the right to natural partnership and communication' which included also free movement of persons as a basic axiom of international law[31]. This section does not offer a full account of the doctrinal development of migration control under the Law of Nations[32]. The focus here is demonstrating the attention paid to diversity and

[26] Mitchell C Tilner, 'Ideological Exclusion of Aliens: The Evolution of a Policy' (1987) 2 Georgetown Immigration Law Journal 1; Gerald L Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton University Press 1996) 149–151.

[27] Kevin R Johnson, 'The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens' (1996) 28 St. Mary's Law Journal 833.

[28] Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 52; Gerassimos Fourlanos, *Sovereignty and the Ingress of Aliens: With Special Focus on Family Unity and Refugee Law* (Almqvist & Wiksell International 1986) 55; Richard Plender, *International Migration Law.* (Sijthoff 1972) 51.

[29] Chetail (n 16); Nafziger (n 16).

[30] Chetail (n 16); Nafziger (n 16).

[31] Chetail (n 16) 2; Francisco De Vitoria and Anthony Pagden, *Vitoria: Political Writings* (Cambridge University Press 1991) 250–278.

[32] Complex accounts can be found e.g. in Plender (n 28); Chetail (n 28).

integration of foreigners. The early scholarship adhered to the notion of free communication and trade and the later scholars attached more weight to state sovereignty and the rights and interests of the sovereign. With the changing dynamics, the apprehensiveness over integration grew.

Some of the most cited Law of Nations' scholars commenting on migration control, Vitoria or Grotius[33], claimed in their writings that the principle of free communication and trade came first and only in exceptional, substantialized cases, could states refuse the entry of foreigners[34]. Those special reasons were for example that the foreigners were criminals or in other way could be harmful to the host society, disrespect laws and cause sedition[35]. Harmfulness was understood as an immediate, physical harm[36]. The postulate of '*ius communicationis*', albeit apparently liberal, must be understood in the political context of the scholarship which was motivated to justify and naturalize political expansion and domination through colonialization[37]. The two legal thinkers, although often treated as representatives of the historical doctrine, were not uncontested by their peers. Other contemporary lawyers understood the dynamics between sovereign's right to exclusion and freedom of trade and communication differently[38].

In the following scholarship, it was still commonly assumed that international exchange is paramount and should not be arbitrarily restricted, however, the qualification of just restriction was conceived more broadly, arguing for a wider discretion of the sovereign. This is also where the theoretical objective of migration control expanded from the exclusion of immediately threatening violent anarchists and rebels, directly opposing the government, to the broader goal of a maintenance of cohesive society. For various reasons, the concept of sovereignty came to dominate international communication in the later Law of Nations scholarship of Samuel Pufendorf, Christian Wolff and Emmer de Vattel[39]. The doctrine pursued by the last lawyer was directly, although selectively, quoted

[33] On the influence of Vitoria's notion of ius communicationis on Grotius' scholarship see e.g. Peter Borschberg, 'Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)' (2005) 29 Itinerario 31, 18–19.
[34] Vitoria and Pagden (n 31) 278; Feenstra, *Hugo Grotius Mare Liberum 1609-2009* (Bilingual edition, Martinus Nijhoff 2009) 26.
[35] Vitoria and Pagden (n 31) 278; Hugo Grotius, *The Rights Of War And Peace: Three Volume Set* (Richard Tuck ed, New Edition, Liberty Fund Inc 2005) 440.
[36] Grotius (n 35) 441.
[37] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 Social & Legal Studies 321; Borschberg (n 33).
[38] For example, the Portugese Deraphin de Freitas claimed that Natural Law entitles sovereign to exclude any foreigner from travelling and trading in his country; Feenstra (n 34) XXIV. The Spaniard Domingo de Soto also had a more minimal understanding of the 'ius communicationis'; Borschberg (n 33) 19.
[39] The geopolitical and philosophical influences driving this change are discussed in Chetail (n 28) 26–38.

in 19th century case-law of the US Supreme Court to support argumentation with state sovereignty in restricting immigration to the US despite obligations under bilateral treaties[40].

These lawyers, when writing about migration control, preferred, through the notion of national self-interest[41], the idea that the discretion of the sovereign is paramount in the admission of foreigners; it is informed by the needs of the state and the benefit of the immigrants. The German lawyers, Pufendorf and Wolff, similarly aimed to assist European rulers to bring about the security and welfare of their regimes[42] and they both were well-networked figures in the highest political classes and princely courts[43]. Similarly, the Swiss Vattel, considered last in this section, was a diplomat and later political advisor[44]. These influential lawyers thus either directly partook on the political projects of the ruling class or were invested in the class' interests.

Samuel Pufendorf argued that the decision on admission of foreigners should primarily draw from consideration of the advantages rising from the admission and as such, one of the conditions of admission was that incomers could be 'conveniently placed and disposed, to rend them incapable of giving any jealousy to the government'[45]. In centralizing the notion of self-interest of the sovereign, a mere capability of foreigners to bring jealousy to the government was seen as a reason for exclusion, which in comparison with the previous scholarship is a broader understanding suggesting that the sovereign affords preventive thinking and a plan for convenient placement of these strangers. This thesis is akin to Pufendorf's belief that one of the tasks of the sovereign is to procure internal tranquillity of the state[46]. The proposal that conveniently placed migrants can be prevented from giving a jealousy to the government shall be seen as one of the early traits of the idea that proper work with foreigners can make them obedient and cooperative with the needs of the host state (and the ruler), which is one of the essences of what we today call integration policy.

Similar understanding that the sovereign is best placed to assess advantages of migration to the society occurred in the scholarship of Christian Wolff. Among the reasons justifying restriction of access of foreigners he mentioned:

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[40] Nafziger (n 16) 811.
[41] Chetail (n 16) 911; Chetail (n 28) 28.
[42] Martti Koskenniemi, 'Transformations of Natural Law: Germany 1648–1815' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 67.
[43] Heikki Eerikki Haara, 'Pufendorf, Samuel' in D Jalobeanu and CT Wolfe (eds), *Encyclopedia of Early Modern Philosophy and the Sciences* (Springer 2019).
[44] Koen Stapelbroek, 'Universal Society, Commerce and the Rights of Neutral Trade: Martin Hübner, Emer de Vattel and Ferdinando Galiani' [2006] Helsinki Collegium for Advanced Studies Working Paper 73.
[45] S von Pufendorf, *The Law of Nature and Nations or a General System of the Most Important Principles of Morality, Jurisprudence and Politics, Book VIII* (5th edn, 1749) ch XI, p. 873, para ii; Chetail (n 16) 911–912.
[46] Skinner (n 17) 351.

'Here properly belongs the fact that the number of subjects is greater than can be provided for adequately from the things which are demanded for the needs, comforts, and pleasure of life, both as regards the people in general and also as regards the class of people who follow the same pursuit of life. Here also belongs the reason that there is fear lest the morals of the subjects may be corrupted, or lest prejudice may be aroused against religion, or even lest criminals be admitted, because of whom injury threatens the state, and other things which are detrimental to public welfare."[47]

Wolf thus also understood that different morals or religion can cause social prejudice, which could potentially be detrimental to public welfare. Additionally, his elaboration suggests that when 'the state' is threatened it is detrimental to public welfare. It is unclear whether 'the state' is understood as the sovereign, or the ruling class/apparatus, or the functioning structure of the society as a whole.

Conversely, a later scholar, Emer de Vattel proclaimed that sole difference in religion was not considered a sound reason for exclusion[48]. Vattel's theory of double law (internal and external) meant that sovereigns are bound in their decisions by their consciousness, i.e. they must have particular and important reasons to exclude foreigners[49]. These reasons were not a mere inconvenience stemming from the admission[50] but inconvenience for the state and its society. Vattel believed that every nation has a right to judge what its conscience requires of it[51]. The state's right for self-preservation was for Vattel the paramount and indefeasible right[52] and the state had a right to restrict immigration if it threatened the nation or the state with destruction[53]. Vattel was arguably influenced by a mercantilist ideology which would later translate into utilitarianism[54].

It can be argued that with the rise of value-subjectivism and later utilitarism, the reasons for exclusion in the doctrine were elaborated in a broader less-determined language pointing to the discretion of the sovereign linked generally to preserving or enriching the state. Migration control

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[47] Christian Wolff, *Jus gentium methodo scientifica pertractatum / by Christian Wolff.*, vol 2 (Joseph H Drake tr, Clarendon 1934) ch I, 81.
[48] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Béla Kapossy and Richard Whatmore eds, Liberty Fund 2008) Book II, ch. X, page 154, para 135.
[49] ibid Book II, ch. X, page 328, para 135. cited in Chetail (n 16) 918.
[50] Chetail (n 16) 919.
[51] Korowicz, supra note, pp. 37
[52] Peter Pavel Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (Springer 1960) 197.
[53] Nafziger (n 16) 812.
[54] Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (Christopher Sutcliffe tr, Cambridge University Press 2012) 68.

was by Vattel characterized as an instrument of so-called self-preservation of the state, which construct was used in the subsequent case-law to Chinese exclusion acts in the USA and proved influential in the doctrine in the long run[55]. As shown through this section for some authors this meant prevention of criminality, resource exploitation and conflict stimulation, while the later scholars tilted towards expanding discretion, including more explicitly a preservation of the governing power structures.

Exclusion based on the preservation of the state and its welfare expanded through the Law of Nations scholarship. In the early scholarship, the reasons to exclude people were based on a criminal behaviour where the link of the material threat to the host society was rather clear. While insufficiency of resources was not an explicit concern leading to exclusion of foreigners for Grotius, it became so under the doctrine of migration control of Pufendorf and Wolff. Both criminal behaviour and insufficiency of resources as potential harms to the host society occurring through thoughtless admission of masses of criminals and paupers had already a twofold implication – firstly, the host society would have less welfare; and secondly, the sovereign would have less support or deference. Both Pufendorf and Wolff also claimed that the difference in moral and cultural background of immigrants can lead to the undesirable conditions of social prejudice or jealousy and sedition against the sovereign authority. This overview of developments in reasoning evidences the emerging belief in the migration law doctrine that cohesion in society and limiting the plurality of opinions or morals are linked to the effectivity of the sovereign's control over their subjects and the subjects' obedience to the political power.

Exclusion and Integration based on Different Beliefs in State Practice in the 18th and 19th centuries

The notion that foreigners of diverse religious and political background can become a source of sedition was reflected in the state practice of migration control accordingly through the late 18th and 19th centuries. This is evidenced below by introducing selected occasions of British and mostly American law-making when governments resorted excluding foreigners due to their political persuasion, which was seen threatening the legitimacy of the dominant relations. In the later part, this section focuses predominantly on migration law-making in the US because due to the extreme exposure of the US to diverse flows of immigrants in the era, the development of US migration legal

[55] Nafziger (n 16) 817.

doctrine was paradigm changing and influential in the long term also in other Western immigration states[56].

One of the first ever alien bills passed in the English Parliament, the Alien Bill of 1792, was enacted as a result of arriving French refugees fleeing from the French Revolution. This was accompanied by rising Francophobia and a fear that revolutionary emissaries had infiltrated the refugee groups[57]. The contemporary Francophobia is evident from the records of parliamentary deliberations, where several members speak of the French as murderers and atheists. The members of the parliament considered French immigrants as a threat to the life of the royal family and themselves[58] and claimed that the Frenchmen come to Britain to 'cause confusion'. This was supported through claims that the French despised with Christendom and planned to overturn the British constitution. Other MPs spoke of the necessity not to confuse refugees with emissaries and noted the quite negligible number of French people actually residing in England at that point[59]. The bill was eventually adopted to temporarily restrict immigration[60] and the alleged political persuasion of French migrants was presented as a justification of the stricter selection of migrants:

> *'If […] great number of foreigners were cast upon this country, without means of subsistence, purposes of commerce, or possibility of discrimination one should consider even that as affording a sufficient object of jealousy and attention; but when it appeared they came from a country whose principles were inimical to the peace and order of every other government; and although many might have fled for refuge from the sword of prosecution, yet if there was a reason to suspect that among these has mingled emissaries seeking for prey, a due regard to our own interest and the security of our country, enforced the necessity of peculiar vigilance'*[61].

The extract demonstrates the twofold objective of the restrictive approach to the French immigrants: the self-interest of the governing structure in maintaining its power position and the broader interest in the security of their country. The parliamentary records show that the lawmakers associated the difference in religion and political persuasion of migrants with the threat to good order, but also a threat to the royal family and the English nobility, i.e. a threat to the existing distribution of power.

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[56] Fourlanos (n 28) 55; Chetail (n 16) 902.
[57] Plender (n 28) 43.
[58] John Adolphus, *The History Of England, From The Accession To The Decease Of King George The Third* (John Lee 1845) Vol. V, Ch. 78, 268.
[59] ibid.
[60] Plender (n 28) 44.
[61] Adolphus (n 58) Vol. V, Ch. 78, 273.

In the end of 18th century, the fears that French refugees had a political agenda led to the enactment of a similar legislations in the USA. As in England, French refugees were subject to political calculations. According to some accounts, the so-called Alien and Sedition Acts, were adopted because the leading Federalist party was aware of the support their Republican opponents had from migrant groups and did not want them to become more powerful in the House of Representatives[62]. There were four Alien and Sedition Acts: Naturalization Act, elevating the minimum length of residence in America for naturalization, Alien Enemy Act, allowing the government to, at any time arrest and deport citizens of an enemy nation in the event of war, Alien Friends Act, allowing the president to deport any non-citizen suspected of plotting against the government, and Sedition Act, directly targeted at those who spoke against Federalist-dominated government. Short after the enactment of the Sedition Act, cases were brought before the US Supreme Court to assess its compliance with the First Constitutional Amendment[63]. The Alien and Sedition Acts were repealed in 1802.

The 19th century American legislative responses to immigration are then particularly interesting because the USA were extremely exposed to immigration in that period which led to elevated concern of lawyers[64] and legislators over the integration of foreigners also with regard to their political convictions[65]. The justifications for immigration law-making provide evidence that differences in culture and values between immigrants and the host society were seen as potentially detrimental to the government. As the USA was a self-governing republic rather than a community under the dominium of a sovereign, the expansions of the class of eligible electorate through the 19th century fuelled the vision of migrants as a potential electorate and reflected in the expanding requirements for their integration[66].

The theme of cultural and religious cohesion emerged in the legislative deliberations on migration to the US as early as the mid-19th century in regard to Catholic immigrants on the East coast. Later it was joined by the discontent of the West-coast Americans with the Chinese immigrants, where religious differences infused with racism and prominent economic interests. Although these aspects were important and even key[67], this essay directs its attention to the aspect of 'political

[62] EP Hutchinson, *Legislative History of American Immigration Policy, 1798-1965* (1981st edn, University of Pennsylvania Press Anniversary Collection 1981) 12.
[63] Alan J Faber, 'Reflections on the Sedition Act of 1798' (1976) 62 American Bar Association Journal 325.
[64] Chetail (n 28) 50.
[65] Tilner (n 26) 6–7.
[66] This idea of governance in relation to inclusion/exclusion of foreigners is described in e.g. Neuman (n 26) 63–71.
[67] Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act* (University of North Carolina Press 1998); Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era, 1882-1943* (First Paperback Edition, University of North Carolina Press 2003); Kitty Calavita, 'The Paradoxes of Race, Class, Identity, and "Passing":

competence' of migrants and how it was articulated in respect to the Chinese and later Eastern and Southern European immigrants. As will be demonstrated, the Congressmen worried about the political preferences of the migrants and their ability to navigate the republican, democratic value system, i.e. the system and hierarchy of values that kept the Congressmen in power. This worry went hand in hand with the extension of the franchise to more citizens and thus, with reconsidering the availability of citizenship to immigrants and introducing integration checks for both immigration and citizenship applications.

The detrimental character of Chinese culture was alleged on both legislative and judicial levels. The presented causes of cultural clash included for example the Chinese language, religion, treatment of women and insistence on conservative religious culture instead of orientation on reform[68]. Congressional debates heard arguments that the Chinese practised prostitution, gambling and used opium which was allegedly against the American morality[69]. In addition, some senators were concerned about a possible overpowering of Christianity in the US but also about the Chinese working efficiency in conjunction with their high numbers, which was seen as a risk to national self-preservation: '[w]e know the efficiency of this race, and we know that if it was to come in its deluge or successive, numberless waves from an empire that numbers one fourth of the population of globe it might well give us cause for alarm […] I want no Mongolian Government'[70]. These opinions were upheld through judicial decisions arguing that the perceived loyalty to Chinese culture and customs disallows the Chinese to become 'Americas' own people'. Assimilation, at which they allegedly failed, became gradually stressed as the ultimate condition of their incoming. In a habeas corpus writ decision, the Circuit Court of California ruled: 'It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people'[71]. On another occasion, the US Supreme Court ruled: 'they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living'[72].

Enforcing the Chinese Exclusion Acts, 1882-1910' (2000) 25 Law & Social Inquiry 1; Kerry Abrams, 'Polygamy, Prostitution, and the Federalization of Immigration Law' (2005) 105 Columbia Law Review 641; Ming M Zhu, 'The Page Act of 1875: In the Name of Morality' [2010] SSRN.

[68] For example of contemporary argumentation see e.g. Samuel R Brown, 'Chinese Culture: Or Remarks on the Causes of the Peculiarities of the Chinese' (1851) 2 Journal of the American Oriental Society 206.

[69] Cong. Globe 1872 1872 1739–1741.

[70] Cong. Globe 1869 287. (remarks of Senator Garrett Davis) in Zhu (n 67) 9.

[71] *Re Ah Fong* [1874] Circuit Court, D California Case No. 102 8.

[72] *CHAE CHAN PING v UNITED STATES* [1889] Supreme Court 130 U.S. 581.

While all these differences fertilized a perception of 'cultural inferiority' and racist discourse, the key perspective for this essay is the legislators' focus on the political participation of the Chinese. The fears about political empowerment of the Chinese immigrants culminated during the process of adopting the Naturalization Act in 1870 extending naturalization rights to 'aliens of African nativity and to persons of African descent' while denying naturalization to other non-white races. During the Congressional debates, it was asserted that unlike the immigrants of European descent, the Chinese were unfit to participate in the political power of the USA. Reasons given for this were that they did not understand the Christian oath incorporated in the body politic[73] and their 'lack of education and intelligence'[74]. Difference in morals in relation to the political participation was also stressed: 'Considering the tremendous power of the ballot, which you propose to give into the hands of these people, considering that morality, virtue and religion are essential to the preservation of our institutions, considering the perils that surround us from other sources – can Congress at this time afford to do this thing?'[75].

This demonstrates that in the eyes of the legislators, plurality of opinion and values not only made it impossible for the two cultures to coexist peacefully in the USA (and hence their stress on assimilation) but also this pluralism was unwanted by the politicians because it could challenge the premises on which they maintained their power. The legislators perceived the Chinese immigrants as a threat not only because they lived separately and practiced their own customs, but also because, as the US Supreme Court argued, they were uninterested in assimilating into American culture and unimpressed by the American institutions[76]. Chinese kept their traditions and 'superstitious bonds' to their country[77] and therefore the major of San Francisco advocated that their 'mental organization did not allow them the capacity to appreciate the blessings of liberty'[78]. The perceived reluctance to assimilation was understood as an attack and a threat to the political organization, as it was equated with incapacity to understand and appreciate liberty, republicanism and democracy in the US definition of these terms.

[73] Cong. Globe 1870 5155.
[74] ibid 5157.
[75] ibid.
[76] *Chew Heong v US* [1884] Supreme Court 112 US 536 567.
[77] Charles J McClain, 'The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of Baldwin v. Franks' (1985) 3 Law and History Review 349, 532; Pyau Ling, 'Causes of Chinese Emigration' (1912) 39 The ANNALS of the American Academy of Political and Social Science 74, 74.
[78] James D Phelan, 'Why the Chinese Should Be Excluded' (1901) 173 The North American Review 663, 672.

The Congressional debates, the adopted legislation (Naturalization Act of 1870) and the long-followed continuous judicial stand on this[79] show that the lawmakers and judges blamed the Chinese for not being interested in becoming citizens but at the same time, it was not desirable for them to become citizens. This stand prevailed in spite of the occasional contemporary voices advocating that keeping the Chinese as second-class residents is at the cause of their provincialization and separation rather than the other way around[80].

While the concerns over the Chinese unfitness for political participation were underscored by open and widespread racism, the fears of political power of foreigners re-surfaced in relation to Eastern Europeans arriving to the USA in the late 19th and early 20th centuries. Unlike the first generation of Europeans immigrants, who mostly came from Western and Northern Europe, the newcomers from Eastern and Southern Europe were not so welcome. The Congress appointed an Immigration Commission to investigate and report on the causes and impact of immigration, including form Eastern Europe in 1907. The Dillingham Commission Reports found that the new European immigrants were mostly unskilled industrial workers (as opposed to the German and Scandinavian farmers) and tended to live in isolated communities in the cities. The barrier to assimilation was, according to the Immigration Commission, caused by their lesser intelligence, higher illiteracy and different expectations from migration – where the old immigrants moved to 'settle and build a nation', the new ones came for profits and expected to move back to their home countries later[81].

The Commission noted that previous legal conditions for immigration on the physical and mental quality of migrants ensured that majority of new migrants were strong and healthy. This would not prevent other problems, since these migrants would not assimilate and the wealth they produced would end up in their country of origin. Assimilation prospects together with economic concerns of the host country were thus greatly emphasized in the Recommendations of the Immigration Commission for future migration laws. Some of the concrete measures proposed to reach these ends included redistribution of migrants through the country, encouragement of permanent residence and investment into local property, excluding the illiterate and limiting the unskilled, enacting quotas for annual influx by race[82]. The report whereby suggested that migrants could be sifted upon their

[79] About fifty years later, the judicial stand remained the same, see e.g. *Takao Ozawa v US* [1922] Supreme Court 260 U.S. 178.
[80] Phelan (n 78) 672.
[81] Immigration Commission (1907-1910), 'Abstracts of Reports of the Immigration Commission: With Conclusions and Recommendations, and Views of the Minority' (GPO 1911) Vol. 1, 14.
[82] ibid Vol. 1, pp. 46–48.

admission by their personal qualities and habits to select those with the highest assimilation prospect and those who would make the best citizens[83].

While the instruments of assimilation aimed largely at enhancing cultural cohesion and economic production, these alleged vices of the new immigrants also translated to the concerns about their competence to participate in the political power of the country. The political fear of immigrants being 'politically incompetent' and easily manipulated by political campaigns was one of the reasons for introducing the literacy tests and institutionalizing requirements for assimilating[84]. The ruling representatives were aware that a lack of shared values, whether articulated as literacy or understanding of republican principles, might lead to decreasing political support. The approach with the Eastern Europeans, unlike with the Chinese, was to instigate them to assimilation and aspiration to become citizens. Organizations were supported by the Congress, such as the German-American Alliance (focusing on immigrants from Austro-Hungarian Empire) with the mandate to help the residing migrants with English language and with 'identifying with American institutions'[85]. Accordingly, it was acknowledged in the Congress that these organizations were essentially political. Arguably, under the aim to enhance cultural and value cohesion, the system had an effect of political moulding as well.

The political concern that immigrants are easily manipulated, and thus an unpredictable part of the electorate effectuated in the adopted immigration restrictions and assimilation measures[86]. The common understanding of Chinese, Slavic and some other classes of European immigrants was that as they were not used to liberty and did not know how to use it responsibly [87]. Some Congressmen believed that foreign powers were interested in 'bringing aliens in improper manner and make them naturalized so that they finally could make an assault upon the ballot'[88].

Immigrant integration was central to the Dillingham Immigration Commission's proposal to design immigration laws that would reveal people's assimilation potential, e.g. by testing their literacy. At the same time, the US lawmakers were more explicit in their concern about the capability of migrants to participate in the political body 'responsibly' and as desired by the current ruling class. Migrants who mingled with the host society or spoke the language escaped the suspicion. Those who

[83] Katherine Benton-Cohen, *Inventing the Immigration Problem: The Dillingham Commission and Its Legacy* (Illustrated edition, Harvard University Press 2018) 235.
[84] Roger Daniels, *Coming to America: A History of Immigration and Ethnicity in American Life* (2nd edition, Harper Perennial 2002) 45.
[85] Cong. Record (House) 1906 65.
[86] James Bryce Bryce, *The American Commonwealth.* (Macmillan 1920) Vol. 1, 218, Vol. 2, p 131.
[87] Roy Lawrence Garis, *Immigration Restriction: A Study of the Opposition to and Regulation of Immigration Into the United States* (Macmillan 1927) 10.
[88] Cong. Record (House) (n 85) 462.

did not, remained seen with suspicion and fertilized the efforts to urge assimilation. These efforts were apparently burdened with the same challenge faced in today's integration policies – what is the core of responsible use of one's freedom and what is the penumbra defined by political preferences?

Like today, the politicians were not able or interested in distinguishing finely between these interests and decided to conceive the requirements rather broadly. In regard to Chinese or Eastern European immigrants, differences of culture and political participation were combined without distinguishing which of these differences can threaten the whole society and which only challenged the ruling representatives. Anarchists associated with the Eastern Europe were excluded from US immigration in a similar way. Tilner describes that Congressmen were unable to distinguish anarchists, socialists, nihilists and communists and thus did not attempt to strike a line between legitimate opinion about social change and what was seen as a direct threat to the government[89]. As a result, the bill excluding alien anarchists[90] targeted both those who advocated for overthrowing governments by force or violence and those who believed in such thing or were in any way associated with groups of this belief. This applied to both entry, possibility of deportation and denial of naturalization and these broad formulations opened for guilt-by-association principle of exclusion and for investigation of consciousness and devotion to what was defined, by the government, as democratic principles and tested by the immigration officers[91].

In the Turner decision regarding an exclusion of an anarchist who claimed he is merely an anarchist by philosophy, the US Supreme Court ruled: 'If […] the anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that Congress was of the opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population […]'[92]. In this case, the Court confirmed the view that even people innocent of evil intent should be excluded because it is better for the 'general welfare' to conceive the exclusion of anti-governmental opinions broadly.

Discussion

At the outset, this essay showed that scholars see current immigration laws as over-broad in aim and supported by unclear justifications. Scholarship focused on integration showed that current rules,

[89] Tilner, supra note, pp. 21
[90] Act of March 3, 1903, ch. 1012 32 Stat. 1213
[91] Tilner, supra note, pp. 31-32
[92] Turner v. Williams, 194 U.S. 279, US Supreme Court, 1904

officially driven by the aim to enhance integration, produce arbitrary outcomes that are far from the law's proclaimed intention. Are governments, with all their expertise, resources and vast apparatus, not able to elaborate more precise and well-targeted legislation? Or is it possible that they do not have an interest in doing so?

The presented overview of historical theoretical and legislative takes on integration of foreigners focused on the aspect of social and value homogeneity as a preferred condition by those dominating according to the current social and value hierarchy. It showed that in the early doctrine of migration law, under the Law of Nations between 16th and 18th centuries, foreigners of different values and morals were seen as a threat both to the society and the sovereign, which justified restrictive legal measures. Through various moments of migration law-making in the USA and the UK, this essay aimed to make apparent that lawmakers feared the changing of political landscape and the potentially ensuing challenges to the governing structures. The presented moments of law-making restricting migration due to, among others, political preferences of migrants included reactions to immigration flows of French after the French revolution or to immigration of anarchists in early 20th century. In cases of immigration restrictions targeted at Chinese and Eastern European immigrants, value, cultural and religious differences of migrant groups were conflated in the legislative justifications with the political incompetence of these migrants threatening the default hierarchy of political power.

At these occasions, the considerations over the general wellbeing of the society have been diffused with the sectoral concerns of the lawmakers, or generally those in power positions, to preserve the ideological direction of politics and hence, their dominant position. On the example of the US law-making, the essay demonstrated continuous production of laws unable to discriminate between the actual threat to the society and the grey zone around it representing different values and political opinions or even criticism to the institutions, which are not necessarily harmful to the society but nevertheless could disbalance social preferences and drive a change in governance and politics. Because the lawmakers had no interest in it, they did not strive to make this distinction in migration laws because their interests in maintaining their dominant position could be effectively served if both these elements were excluded.

This perspective adds to the critical scholarship on the unclarity of the objectives of integration policies and their over-broad selective impact presented in the introduction. The self-interest of the ruling class in perpetuation of their power position can be a factor in under-defining integration policies. The prime duty of each sovereign to preserve the state and maintain their own standing as ruler has been proposed in the literature on the history of political and legal theory since

the Renaissance[93]. In modern sociology, power and conflict theorists draw from the same idea. Integration policies aim at maintaining homogenous population which is easier to govern and is likely to remain in preservation rather than strive for a change, which is a condition preferred by those in power[94]. Insistence on the established social order and respect for legitimacy of the position of the ruling class are in the interest of those in position of authority and accordingly those in position of authority are acting in order to prevent the encroachment of the ruling class values[95].

Such take on the interests and actions of lawmakers in pursuing integration policies and excluding migrants based on their integration potential, emphasizes the agency of the actors and suggests an existence of a bias in their law-making actions[96]. Lenski proposes that one of the basic objectives of the coordinated efforts of the society is the maintenance of political status quo, including minimization of the rate of the internal political change[97]. These coordinated efforts of the society essentially pursue the goals of the ruling class, often present its interests as converging with the interests of the society[98]. As such, the ruled masses not necessarily live in an illusion, but policies are presented in such way that consent is ascertained to it[99], hence the confluence of general wellbeing of the society and sectoral interests in perpetuation of power in the reviewed scholarly and legislative rationale. Law, including migration law and rules of integration, and political ideologies justifying the status quo, are instruments of such coordinated efforts of social control.

Self-interest of the ruling class in high level of homogeny in the ruled society and minimization of external drivers of change is an under-studied notion in critical scholarship on current integration policies in Europe. This essay does not claim, based on the examples of evident consideration of self-interest in perpetuation of power in the historical legal scholarship and practice, that current lawmakers maintain or adhere to the self-interest accordingly. This essay mainly aimed at elaboration of the notion of self-interest from the perspective of theories of power and conflict and with evidence of this bias through numerous moments of historical migration law-making. The existence of this bias in current policies of integration, implemented in migration law or through programmes of assimilation, is open to further examination.

[93] Skinner (n 17) 327–328.
[94] Rex (n 12) 91.
[95] ibid.
[96] Joas and Knöbl (n 14) 288.
[97] Lenski (n 13) 41.
[98] ibid.
[99] Lukes (n 12) 8.

Conclusions

Critical scholarship has highlighted both the under-determination and over-broadness in aim of legal provisions limiting immigration based on integration potential. This essay centralized the notion of self-interest of the ruling class as one of the possible explanations of the pertaining under-determinacy of integration policies leading to the broad exclusion of migrants from entry, entitlements and rights. It expanded previous scholarship on so-called 'ideological exclusion' which thus far focused on US legislation excluding from migration anarchists, communists and most recently terrorists. This scholarship problematized exclusion of migrants for what they think and showed how the perceived ideological danger drives lawmakers to fortify exclusionary and assimilatory measures. By introducing further historical examples of legal scholarship and practice, from US history of migration law-making and beyond, this essay suggested that self-interest in perpetuation of the political status quo might not be an anomaly surfacing only in the context of most-heated geopolitical tensions. Furthermore, by positioning the notion of self-interest in pursuing policies of exclusion and assimilation into the framework of critical theories of power and conflict, the essay aimed to 'naturalize' the existence of such interest and suggested that the political self-interest may be immanent to integration-oriented legal measures. The notion of self-interest of the ruling class in maintaining social cohesion in the form of homogeny in values, religion and culture through integration policies might expand current critical perspectives on the scholarship of migration and integration policies today.

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