

‘Establishing a constitutional “right of asylum” in early nineteenth-century Britain’

(Short title: ‘Right of asylum’)

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Abstract:

For over half a century before the First World War, the idea that the British constitution contained a 'right of asylum' for foreign nationals was commonplace, profoundly impacting Britain's treatment of political and religious exiles, its relations with foreign states, and the drafting of its major laws on extradition and immigration. Although historians have acknowledged this idea's later importance, there has been little enquiry into its origins. This article locates the emergence of the notion of a constitutional 'right of asylum' in a series of political clashes in the decade after the Napoleonic Wars. In opposing the Alien Act, a piece of wartime legislation that was extended after Waterloo and which gave government ministers the summary power to detain and deport aliens, Whigs and radicals accused the Tory government of breaching Britain's constitution. They saw the act as part of a conspiracy to suppress constitutionalist movements across Europe and argued that it placed arbitrary power in the hands of an already overmighty executive. More importantly, any legislation that specifically targeted foreigners violated aliens' rights as enumerated in great constitutional documents like Magna Carta and the Habeas Corpus Act. By the 1820s, these arguments had cohered into the conviction that foreign nationals could claim asylum in Britain as a matter of right. This idea, and the subsidiary claims from which it arose, remained influential during the following decades and formed the basis of what came to be nearly universally recognised the 'right of asylum' into the twentieth century.

Keywords:

Right of asylum; Alien Act; constitutionalism; Holy Alliance; Magna Carta; habeas corpus.

Introduction

In 1906, the legal scholars N. W. Sibley and Alfred Elias published *The Aliens Act and the Right of Asylum*, an analysis of the 1905 Aliens Act and its place in international law and British constitutional history. Though they deemed its provisions limiting the entrance of impoverished and other ‘undesirable immigrants’ the ‘severest’ in living memory, its ‘most significant feature’ was a clause guaranteeing free entrance to refugees fleeing persecution ‘on religious or political grounds’. This was ‘the most comprehensive declaration of the Right of Asylum’ in ‘the history of this country’, affirming what since ‘the commencement of the nineteenth century’ had been clear: ‘that the Right of Asylum is writ in characters of fire on the tablets of our Constitution’.¹

However ringing Sibley’s and Elias’s declaration, the claim that the British constitution offered all foreigners a ‘right of asylum’ had been common for half a century. It was akin to, and intertwined with, other classic constitutional liberties like free speech, a free press, and habeas corpus. Although different commentators offered widely varying interpretations of this right, by the middle of the nineteenth century few denied its existence.² Its assumed existence appeared both in scholarly works like Thomas Erskine May’s influential *Constitutional History of England*, which claimed it as an ‘inviolable’ right offered to all since at least the sixteenth century, and in the world practical politics.³ As several historians have noticed, concerns to safeguard it decisively shaped legislation like the 1870 Extradition Act, which forbade the extradition of widely defined ‘political offenders’,

¹ N. W. Sibley and Alfred Elias, *The Aliens Act and the Right of Asylum* (London: William Clowes and Son, 1906), 125 and 130. The act, 5 Edw. 7 c. 13, appears in full on 83-91.

² Thomas C. Jones, ‘Définir l’asile politique en Grande-Bretagne (1815-1870)’, *Hommes et migrations : Revue française de référence sur les dynamiques migratoires* 1321 (2018), 12-21.

³ Thomas Erskine May, *The Constitutional History of England*, vol. 2 (London: Longman, Green, Longman, Roberts, & Green, 1863), 283.

and ensured cross-party support for the refugee clause in the 1905 Aliens Act celebrated by Sibley and Elias.⁴

Yet the origins of the idea of a constitutional ‘right of asylum’ remain relatively unexplored. This is, as Caroline Shaw has noted, likely due to the influence of Bernard Porter’s 1979 landmark work *The Refugee Question in mid-Victorian Politics*. In his exploration of the politics of the ‘refugee question’, Porter discussed Britain’s ‘principle’ and ‘doctrine’ of asylum, viewing the era’s open approach as a corollary of the wider Victorian liberal values of tolerance and the economic self-confidence that stemmed from the ‘mid-Victorian boom’.⁵ Though he occasionally noted language couching asylum as a right, he did not pay it particular attention. Shaw has recently sought to revise what she calls this thesis of ‘accidental refuge’.⁶ Though her 2015 book *Britannia’s Embrace* recognised the salience of the ‘right of asylum’ only in the final third of the nineteenth century,⁷ she more recently argued that the idea of a ‘right to refuge’ emerged in 1855, after the expulsion of several dozen foreign refugees from the island of Jersey. These exiles, republican in their politics and having recently lewdly criticised Queen Victoria for her alliance with Napoleon III, were unsympathetic to many Britons and so pro-refugee activists could not secure support for them

⁴ Nicholas Adams, ‘British Extradition Policy and the Problem of the Political Offender (1842-1914)’ (PhD diss., University of Hull, 1989); Constance Bantman, *The French Anarchists in London, 1880-1914: Exile and Transnationalism in the First Globalisation* (Liverpool: Liverpool University Press, 2013), 131-56; Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Alien Act and the Evolution of Refugee Law’, *Law and History Review* 32, no. 2 (2014), 309-50; Bernard Gainer, *The Alien Invasion: The Origins of the Aliens Act of 1905* (London: Heinemann Educational, 1972); John A. Garrard, *The English and Immigration, 1880-1910* (London: Oxford University Press, 1971); David Glover, *Literature, Immigration, and Diaspora in Fin-de-Siècle England: A Cultural History of the 1905 Aliens Act* (Cambridge: Cambridge University Press, 2012); David Feldman ‘The Importance of Being English: Jewish Immigration and the Decay of Liberal England’, in David Feldman and Gareth Stedman Jones, eds., *Metropolis – London: Histories and Representations since 1800* (London: Routledge, 1989) 56-84; Caroline Shaw, *Britannia’s Embrace: Modern Humanitarianism and the Imperial Origins of Refugee Relief* (Oxford: Oxford University Press, 2015), ch. 6.

⁵ Bernard Porter, *The Refugee Question in mid-Victorian Politics* (Cambridge: Cambridge University Press, 1979), 1-11, 219-22. See also Bernard Porter, ‘The Asylum of Nations: Britain and the Refugees of 1848’, in Sabine Freitag, ed., *Exiles from European Revolutions: Refugees in mid-Victorian England* (New York: Berghahn Books, 2003), 43-56.

⁶ Caroline Shaw, ‘Success in a Failed Campaign: The French Refugees of Jersey and the Making of an Abstract “Right to Refuge”’, *Journal of British Studies* 57 (2018), 495.

⁷ Shaw, *Britannia’s Embrace*, 148-75, 191-7.

on purely humanitarian grounds. They instead ‘turned to rhetorical abstractions’, creating, Shaw argues, a ‘language of universal responsibility and “right”’ through Biblical references, declarations of moral duty, and appeals to British history and liberty.⁸

Shaw is correct to seek a deeper explanation for Victorian support for open asylum than Porter ultimately provided, but the Jersey expulsions were not the origins of ‘an abstract right to refuge’. Rather, they represented one of several inflection points in the 1850s when arguments about the ‘right of asylum’ became significantly more prevalent. Debates about the nature of asylum had gained particular salience after the collapse of the revolutions of 1848 and the arrival of thousands of revolutionary refugees in Britain had prompted alarmed complaints from Europe’s reactionary governments.⁹ In the face of pressure from foreign despots to extradite or censor these exiles, asylum was often defended as a matter of right. *The Times* in 1850, boasting that Britain was the ‘asylum of nations’, declared that ‘exclusion or other ill-treatment of political refugees’ would be ‘unfaithful to our Constitution’.¹⁰ The *Daily News* was sceptical of a proposed extradition treaty with France, warning that it might compromise ‘the character of England as the inviolable asylum of political exiles’.¹¹ In early 1852, as the number of refugees arriving peaked, the Whig foreign secretary Earl Granville reminded his ambassadors that all foreign nationals had the right to enter and reside in Britain and that the country’s institutions guaranteed ‘a secure asylum to political refugees of all parties’.¹² With the arrival of a new Conservative government that year, the Peelite-turned-Liberal Richard Monckton Milnes enquired about the ‘protection afforded to refugees’, emphasizing that the ‘right of asylum’ stretched back centuries and was ‘an indefeasible right

⁸ Shaw, ‘Success in a Failed Campaign’, 497 and passim.

⁹ Porter, *Refugee Question*, ch. 3; Many such complaints are in the National Archives (TNA), London, Home Office Papers (HO), 45/3263, 45/3264, 45/4013.

¹⁰ *The Times*, September 19, 1850, 4.

¹¹ *Daily News*, May 29, 1852, 5.

¹² Earl Granville to Her Majesty’s Representatives at Vienna, St. Petersburg, Paris, and Frankfort, January 13, 1852, in House of Commons, ‘Correspondence Respecting the Foreign Refugees in London, *Sessional Papers*, 1852, vol. 54, 24-6.

which the Legislature could not touch'. The home secretary Robert Walpole answered by insisting that the government would maintain 'the right of asylum to foreign refugees', and the prime minister Earl Derby, had already affirmed that as long as they obeyed British law, 'exiles and fugitives ... have always a right to claim ... the frank hospitality of England'.¹³ The Jersey expulsions saw these arguments more widely repeated, as did the international fallout from the attempted assassinations of Napoleon III by Paoli Tibaldi in 1857 and Felice Orsini in 1858, both of which were allegedly assisted by exiles in London.¹⁴ Yet if the political and diplomatic conditions of the 1850s brought the idea of a 'right of asylum' to the fore, its origins lay several decades in the past.

The Alien Act,¹⁵ Postwar Politics, and Nineteenth-Century Constitutionalism

The notion that aliens had a constitutional right to asylum took recognisable form in the decade after Waterloo, during debates over the regular renewal of a modified version of the Alien Act of 1793. This legislation, originally passed as Britain was on the cusp of war with revolutionary France, was designed to guard against potential *agents provocateurs* infiltrating the thousands of anti-revolutionary *émigrés* then pouring into Britain.¹⁶ It required incoming foreign nationals to register with customs officers, securing certificate to proceed inland from their ports of arrival. Those not resident before 1792 were forbidden firearms without a special license and could reside only where the authorities deemed compatible with 'public

¹³ Richard Monckton Milnes and Robert Walpole, *The Parliamentary Debates from the Year 1803 to the Present Time*, third series, vol. 120, April 1, 1852, 483-6, 504; Earl Derby, *Parliamentary Debates*, third series, vol. 119, February 27, 1852, 896. For a position echoing Derby's, see, 'The Right of Asylum to Political Refugees', *Dublin Evening Packet and Correspondent*, March 26, 1853, 2.

¹⁴ See below.

¹⁵ In this article, following contemporary parlance, 'Alien Act' will refer to the legislation in operation in 1793-1826, and 'Aliens Act' to the 1905 legislation.

¹⁶ Lord Grenville, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 30, December 21, 1792, 158. On these exiles, see Kirsty Carpenter, *Refugees of the French Revolution: Émigrés in London, 1789-1802* (Basingstoke: Palgrave, 1999); Margery Weiner, *The French Exiles, 1789-1815* (London: John Murray, 1960).

security'. They were monitored by a new Alien Office and could be imprisoned without bail, summarily deported, and, if they returned to the country without permission, executed.¹⁷ The act was renewed several times in the early years of the war and modified in 1798 to embrace all adult aliens regardless of their length of residence.¹⁸ Though its provisions were relaxed during the Peace of Amiens, when bail was allowed in some circumstances, they were tightened again when hostilities resumed in 1803.¹⁹ The 1803 iteration of the act also explicitly confirmed its status as a war measure, being made permanent until the signing of a 'Definitive Peace Treaty'. Though that peace came with Napoleon's first abdication in 1814, Lord Liverpool's Tory government brought in a pared down version of the legislation, removing restrictions on aliens' entrance, residency, and ownership of firearms, but retaining the government's power to summarily detain and deport foreign nationals. Aliens could appeal against their arrests and expulsions to the privy council, but there was no legislative or judicial oversight of the executive's management of the act.²⁰ Full wartime restrictions returned during Napoleon's Hundred Days in 1815, but were removed again in 1816, when the Alien Act was time-limited in to two years, necessitating renewals in 1818, 1820, 1822, and 1824 before it finally lapsed in 1826.²¹

These renewals took place in a fraught political atmosphere. The war's end left Britain with high public debt, slackening demand, and a labour glut partly caused by military demobilisation. Poor economic conditions, exacerbated by bad harvests in 1816, and revived political radicalism saw a renewal of public agitation which was met by government force, most notoriously in the Peterloo Massacre at Manchester in 1819, the increased censorship and repression of the 'Six Acts' of the same year, and the discovery and execution of the

¹⁷ 33 Geo. III c. 4; Elizabeth Sparrow, 'The Alien Office, 1792-1806', *The Historical Journal* 33, no. 2 (1990), 361-84.

¹⁸ 38 Geo. III c. 50.

¹⁹ 41 Geo. III c. 92; 42 Geo. III c. 155.

²⁰ 54 Geo. III c. 155.

²¹ 55 Geo. III c. 54; 56 Geo. III, c. 86; 58 Geo. III c. 96; 1 Geo. IV c. 105; 3 Geo. IV c. 97; 5 Geo. IV c. 37.

leading members of the Cato Street Conspiracy, which had planned to assassinate the cabinet. This made the question of whether and how quickly to unwind the extraordinary powers assumed by the state during the war hotly contested. The government, often represented in parliament by Liverpool and by his foreign and home secretaries, Lord Castlereagh and Lord Sidmouth, later respectively replaced by George Canning and Robert Peel, cited this domestic turbulence and continued instability in Europe to justify the maintenance of the Alien Act. They were challenged in parliament by leading Whigs like Lord Holland, Henry Brougham, John Russell, the lawyer James Mackintosh, and the future chief justice Thomas Denman, and by more radical figures like John Cam Hobhouse, the lawyer and descendant of Huguenot refugees Samuel Romilly, and Robert Wilson, a veteran who had commanded Portuguese refugee soldiers during the Peninsular and later helped the condemned Bonapartist general Antoine de Lavalette escape from France. These critical MPs were joined by sections of the press, a small but growing number of popular petitioners, and writers connected with the cosmopolitan and internationalist social set of Whigs at Holland House and the radical circle around Jeremy Bentham.

The debates over the Alien Act, like so many others in the early nineteenth century, were couched in the ‘idiom’ of constitutionalism. As several historians have shown, the long history of the constitutions of the United Kingdom and its predecessor states provided a shared set of legal, cultural, and historical reference points that members of all political traditions could cite to demonstrate their own causes’ legitimacy. Moreover, the rigidity of *Ancien Régime* Europe and the chaos of the French Revolution seemed to vindicate the British constitution’s adaptive durability and further incentivized ‘constitutionalist’ discourse in the postwar years. Tories therefore emphasised their roles as defenders of a monarchy equipped with broad prerogative powers that ensured legitimate government and protected public order. By contrast the Whigs sought to ‘restore’ the constitutional settlement of 1688

by paring back executive power and re-emphasising parliament's role as repository of the nation's will and guardian of the people's rights. This overlapped with radical constitutionalism which, though more sympathetic to democratic governance and liable to condemn the 'Norman Yoke' which had suppressed Anglo-Saxon proto-democracy, was similarly focused on parliament and keen to circumscribe an overly powerful executive.²²

Attacks on the Alien Act therefore questioned its constitutionality. Many assumed that it had been maintained to help despotic European powers, particularly the 'Holy Alliance' of Austria, Prussia, and Russia, hunt down dissidents, especially after the failed liberal revolutions in southern Europe in 1820-3 sent a wave of constitutionalist exiles to Britain. The act therefore seemed to range Britain on the side of anti-constitutionalist repression, betraying its own principles and raising questions about ministers' commitment to constitutionalist governance at home. This latter fear seemed confirmed by the summary powers of detention and deportation granted by the act to ministers, unchecked by parliamentary or judicial oversight. This both increased executive power at a time when it should instead be diluted, and represented a circumvention of trial by jury for the individuals detained and expelled. Though those individuals were foreign nationals, the state's cavalier attitude to due process for aliens inevitably threatened Britons' own liberties. Moreover, it was argued that key pillars of the constitution, particularly Magna Carta, the statutes protecting habeas corpus in England and Scotland, and several key eighteenth-century

²² On the constitutional idiom, see James Vernon, *Politics and the People: A Study in English Political Culture, c. 1815-1867* (Cambridge: Cambridge University Press, 1993), ch. 8; James Vernon, ed., *Re-Reading the Constitution: New Narratives in the Political History of England's Long Nineteenth Century* (Cambridge: Cambridge University Press, 1996). For summaries of its uses across the political spectrum, see Mark Goldie, 'Retrospect: The Ancient Constitution and the Languages of Political Thought', *The Historical Journal* 62, no. 1 (2019), 3-34 and Angus Hawkins, *Victorian Political Culture: Habits of Hearts and Mind* (Oxford: Oxford University Press, 2015), 29-64, 131-53. For Whig constitutionalism see Peter Mandler, *Aristocratic Government in the Age of Reform: Whigs and Liberals, 1830-1852* (Oxford: Clarendon Press, 1990) and Jonathan Parry, *The Rise and Fall of Liberal Government in Victorian Britain*, (New Haven and London: Yale University Press, 1993), 73-8. For radicalism, see John Belchem, 'Republicanism, Popular Constitutionalism and the Radical Platform in Early Nineteenth-Century England', *Social History* 6 (1981), 1-32 and James Epstein, *Radical Expression: Political Language, Ritual, and Symbol in England, 1790-1850* (Oxford: Oxford University Press 1994), ch. 1.

judicial decisions over the status of slaves in Britain all provided aliens with nearly the same protections as those enjoyed by native subjects. These arguments were repeated and fleshed out during the biennial renewals of the Alien Act, and by the 1820s they had cohered into a conviction that aliens could claim asylum as a right. The specific arguments underpinning that right were then repeated over the next several decades, forming the basis for the idea of a ‘right of asylum’ that re-emerged so decisively in the 1850s.

Understanding the emergence and nature of the idea of a ‘right of asylum’ in this way provides several useful insights. It adds a new layer to our understanding of the politics of constitutionalism, revealing an outward-looking and cosmopolitan dimension to what is often understood as an insular and exceptionalist tendency in British public life. There can be few other constitutional rights, after all, that exclusively apply to non-citizens. It also locates a crucial paradigm-shift in Britain’s treatment of refugees, moving from what Susanne Lachenicht has identified as an ethic of ‘utility’, by which seventeenth- and eighteenth-century exiles were admitted, refused entry, or deflected to the colonies according to the immediate political or economic needs of the day, to the nineteenth-century maintenance of open asylum as a matter of principle.²³ Without that shift, it is much more difficult to explain how Britain became a society that expelled no foreign nationals for explicitly political reasons between 1823 and 1914 and that, in the meantime, hosted tens of thousands of refugees, including figures as diverse as Klemens von Metternich, Giuseppe Mazzini, Louise Michel, and Karl Marx. The significance of that history of refugees during Britain’s long nineteenth century is currently being explored by a wide range of historians, and

²³ Susanne Lachenicht, ‘Langages d’asile, langages de tolérance?’, paper given at the *De l’asile de liberté au droit d’asile* conference at the Università C’Foscari, Venice, 30 March 2019.

understanding the nature and depth of their support amongst the British public can only further elucidate that fascinating subject matter.²⁴

War, Peace, and the International Struggle for Constitutionalism

In the broadest sense, the Alien Act was anti-constitutional in its effect on British foreign policy, linking the country with Europe's absolutist regimes and threatening to damage the continental constitutionalist movements which reached their postwar apogees in the failed revolutions of the 1820s. The government's own justifications for the legislation's continued renewal verified these fears, allowing the opposition to tap into widespread popular sympathy for the revolutionary refugees. It seemed that the Alien Act placed Britain firmly on the wrong side of an international struggle for constitutionalism, raising fears about the fate of constitutional liberty at home.

Though the Alien Act was widely understood as a war measure, Castlereagh justified its continuation in 1814 by noting that it was naïve to assume that 'perfect security' had returned to Europe or that 'all measure of precaution' should be cast aside.²⁵ Such caution seemed vindicated by Napoleon's brief return to power in 1815, and for the rest of the decade, the primary targets of the Alien Act were the Bonapartists expelled from France at

²⁴ Since the beginning of this century, major English-language works of relevance include: Bantman, *French Anarchists*; Constance Bantman and Ana Cláudia Suriani da Silva, eds., *The Foreign Political Press in Nineteenth-Century London: Politics from a Distance* (London: Bloomsbury Academic, 2018); Matthew Ian Brand, 'Right-Wing Refugees and British Politics, 1830-1871' (PhD diss., University of East Anglia, 2016); Maurizio Isabella, *Risorgimento in Exile: Italian Émigrés and the Liberal International in the post-Napoleonic Era* (Oxford: Oxford University Press, 2009); Laura C. Forster, "'Scraped from Paris and Crossed the Narrow Sea": The Paris Commune in the British Political Imagination, 1871-1914' (PhD diss., King's College London, 2018); Freitag, ed., *Exiles from European Revolutions*; Nicole Freitag Gilbertson, 'Redrawing the Boundaries of Citizenship: The Spanish Exile and the Development of a Gendered National Identity in Britain, 1823-1834' (PhD diss., University of California, Irvine, 2007); Debra Kelly and Martyn Cornick, eds., *A History of the French in London: Liberty, Equality, Opportunity* (London: Institute of Historical Research, 2013); Thomas C. Jones, 'French Republican Exiles in Britain, 1848-1870' (PhD diss., University of Cambridge, 2010); Christine Lattek, *Revolutionary Refugees: German Socialism in Britain, 1840-1860* (London: Routledge, 2006); Pietro di Paolo, *The Knights Errant of Anarchy: London and the Italian Anarchist Diaspora (1880-1917)* (Liverpool: Liverpool University Press, 2013); Shaw, *Britannia's Embrace*; Marcella Pellegrino Sutcliffe, *Victorian Radicals and Italian Democrats* (Royal Historical Society, 2014).

²⁵ Lord Castlereagh, *Parliamentary Debates*, vol. 28, July 14, 1814, 715.

the second restoration.²⁶ Nevertheless, opposition figures objected to the act's extension in a time of 'profound peace', with France definitively defeated, and argued that, as the years passed, its *raison d'être* became 'successively more doubtful'.²⁷ Figures like Mackintosh and Romilly suggested that the act was actually the result of a secret agreement between Britain and the monarchies of Europe to collectively quell dissent, a suspicion strengthened by the legislation's introduction into parliament by the foreign, rather than home, secretary.²⁸ Even without such an explicit agreement, it was inconceivable that 'diplomatic agents have never spoken upon the subject' and its presence on the statute book would encourage foreign states to demand the extradition of their dissidents since the mechanism to expel them existed.²⁹ This led Holland in 1818 to unsuccessfully request the publication of diplomatic correspondence 'on the subject of Aliens and Passports' to clarify 'the extent of the Alien act', and to widespread accusations of international 'connivance', particularly with the highly unpopular Holy Alliance of Austria, Prussia, and Russia.³⁰

Such fears seemed vindicated after the outbreak of liberal, nationalist, and constitutionalist revolutions in Spain, Italy, Portugal, and Greece in 1820-1. Sidmouth in 1820 claimed that these disturbances made the case for the Alien Act 'much stronger' and as late as 1824 Liverpool cited the government's duty to 'guard against the danger arising' from

²⁶ J. R. Dinwiddy, *Radicalism and Reform in Britain, 1780-1850* (London: Hambledon Press, 1992), 165-6. For these exiled Bonapartists, including some expelled from Britain, see the Archives Nationales (AN), Paris, Police Générale, F/7/6778-83.

²⁷ *Parliamentary Debates*, vol. 34, May 10, 1816, 434; 'Political Disquisition. Considerations on the Alien Bill', *National Register*, June 2, 1816, 5; An Alien, pseudo., *On the Alien Bill* (London: J. and H. J. Hunt, 1824), 30.

²⁸ Mackintosh, *Parliamentary Debates*, vol. 34, May 10, 1816, 474; Samuel Romilly, *Memoirs of the Life of Sir Samuel Romilly, Written by Himself; With a Selection from his Correspondence*, vol. 2 (London: John Murray, 1840), 415.

²⁹ An Alien, *On the Alien Bill*, 18n. William Empson, anon., 'The Alien Law of England', *Edinburgh Review* 42 (1825), 168-9.

³⁰ Lord Holland, *Parliamentary Debates*, vol. 38, May 14, 1818, 652; Lord Normanby, *Parliamentary Debates*, second series, April 23, 1824, vol. 11, 361; 'Renewal of the Alien Bill', *Bell's Weekly Messenger*, March 29, 1824, 2. For wider fears of government coordination with the Holy Alliance, see John Clarke, *British Diplomacy and Foreign Policy, 1782-1865: The National Interest* (London: Unwin Hyman, 1989), 148-9.

revolutionary opinion as a reason to renew the act.³¹ With the collapse of the revolutions in Italy in 1821 and Spain in 1823, due to Austrian and French interventions, respectively, thousands of exiles fled to Britain. Though far from approving of the Austrian and French interventions, the government feared that the exiles might turn Britain into a ‘general receptacle for the discontented’ and a centre for ‘conspiracies and cabals’.³² With Napoleon’s death in 1821, these refugees became the Alien Act’s most likely targets and the Alien Office monitored the activities of figures like the Italian general Guglielmo Pepe, lest they attempt to launch an attack on the continent or to inflame radical domestic opinion.³³

But the popularity of the liberal and constitutionalist exiles from Spain and Italy placed the government in an awkward position. The absolutist regimes that they had challenged were widely disliked in Britain, their short-lived constitutionalist regimes resembled Britain’s own, and many of the Spanish had fought alongside the British during the Peninsular War. The Spanish general Francisco Espoz y Mina was therefore greeted by 8,000 cheering Britons at Plymouth and widely feted as he travelled to London.³⁴ As Shaw has noted, the exiles’ images as heroic freedom fighters and tales of their daring escapes helped them to secure moral and financial support from the public.³⁵ This popularity, especially for the Spanish veterans, crossed party lines. Liverpool himself welcomed Mina, promising that the general could ‘rely on the protection of the Laws of that Country which he has chosen for his Asylum’, and a state pension was organized, largely by the Duke of

³¹ Lord Sidmouth, *Parliamentary Debates*, second series, vol. 2, July 18, 1820, 530; Lord Liverpool, *Parliamentary Debates*, second series, vol. 11, May 11, 1824, 630.

³² Liverpool, *Parliamentary Debates*, second series, vol. 7, July 29, 1822, 1852; Robert Peel, *Parliamentary Debates*, second series, vol. 7, June 5, 1822, 807.

³³ Alien Office reports on Pepe and British figures like Robert Wilson in January-June 1822, TNA, HO 1/5. Pepe later claimed that British disinterest disabused him of hopes of fomenting revolution from London. Guglielmo Pepe, *Memoirs of General P  p  . Comprising the Principal Military and Political Events of Modern Italy. Written by Himself*, vol. 3 (London: Richard Bentley, 1846), 231.

³⁴ Gilbertson, ‘Redrawing the Boundaries’, 42-4.

³⁵ Shaw, *Britannia’s Embrace*, 76-7.

Wellington, for several hundred refugee veterans of the war.³⁶ But the Tories did not soften the Alien Act for the exiles. Motions to exempt them from its provisions were rejected and Liverpool stated that though he ‘should not wish to send a refugee Spaniard to Spain’ the ‘power of sending aliens away must be kept without limits’.³⁷

This contradiction, and the close relationships that exiles like Giovanni Arrivabene, Felipe Bauzá, Joseph Blanco White, Ugo Foscolo, Antonio Panizzi, Giuseppe Pecchio, and Santorre Santarosa established with Whig and radical circles, fuelled further attacks on the Alien Act.³⁸ Not only were these exiles, as Denman put it, ‘glorious martyrs in the cause of universal liberty’, they had been directly inspired by Britain’s example.³⁹ Holland, at whose home so many refugees were frequent visitors, personally vouched that that their politics were inspired by ‘speeches made in the good old times of the English House of Commons’ and the lawyer William Empson called them ‘heirs of Sydney and Locke’.⁴⁰ The contrast with the more reactionary exiles of the 1790s, the protection of whose asylum had been specifically referenced in the preamble of the 1798 Alien Act, was striking. The Benthamite and Huguenot descendant Edward Blaquiére could not conceive how Britain had harboured those earlier ‘supporters and satellites of superstition and tyranny’ but now hesitated to aid ‘the real and natural friends of England’.⁴¹ Indeed, to target these exiles betrayed ignorance

³⁶ Summary of Liverpool to Mina, n.d. (1823), HO 1/5; Gilbertson, ch. 2.

³⁷ Liverpool, *Parliamentary Debates*, second series, vol. 11, May 14, 1824, 750.

³⁸ For these connections, see Carlo Maria Franzero, *A Life In Exile: Ugo Foscolo in London, 1816-1827* (London: W. H. Allen, 1977); Isabella, *Risorgimento in Exile*, 111-13; Martin Murphy, *Blanco White: Self-Banished Spaniard* (New Haven and London: Yale University Press, 1989); Leslie Mitchell, *Holland House* (London: Duckworth, 1980); Harry W. Rudman, *Italian Nationalism and English Letters: Figures of the Risorgimento and Victorian Men of Letters* (New York: Columbia University Press, 1940); Daniel Muñoz Sempere, ‘Cultural Identity and Political Dissidence: The Periodicals of the Spanish Liberal Exile in London (1810-1841)’, in Bantman and da Silva, eds., *Foreign Political Press*, 33-50; Margaret C. W. Wicks, *The Italian Exiles in London, 1816-1848* (Manchester: Manchester University Press, 1937).

³⁹ Denman, *Parliamentary Debates*, second series, vol. 7, June 5, 1822 820.

⁴⁰ Holland, *Parliamentary Debates*, second series, vol. 10, March 23, 1824; Empson, ‘Alien Law of England’, 172.

⁴¹ Blanquiére’s introduction to Giuseppe Pecchio, *Journal of Military and Political Events in Spain during the Last Twelve Months* (London: G. and W. B. Witteraker, 1824), x.

of Britain's own constitutional history, which Mackintosh argued owed its existence and 'successive improvements' to 'open resistance' against tyranny.⁴²

Britain was therefore denying the rest of Europe the means by which it had achieved its own liberty. For Hobhouse, the Alien Act shamefully 'bound Great Britain in common cause with the tyrannic sovereigns of Europe against their oppressed people'.⁴³ *The Times* in 1822 called it an 'informal atonement' to Europe's reactionaries for not officially joining the Holy Alliance, and an 1824 petition from the Lord Mayor, Aldermen, and Commons of the City of London said that it 'countenanced the charge, that the government of this country was a party in the general conspiracy of the continental despots against freedom'.⁴⁴ So long as it remained in place, the act forced Britain 'to choose between those abhor the British Constitution, and tell us so, and those whose admiration of it constitutes their only crime'.⁴⁵ The government's seeming preference for the former raised grave doubts about its commitment to constitutionalism at home.

The Alien Act and Executive Power

Aside from its baleful consequences for British foreign policy, critics argued that the Alien Act represented a threat to Britain's constitutional order at home. This was true generally, since it was an extraordinary war measure now carried into peace, and of the nature of its specific provisions. Its lack of legislative or judicial oversight, and the government's claim that these were unnecessary since the crown had a prerogative power to expel aliens anyway, represented a major increase in executive power, upsetting the constitutional equilibrium between Britain's branches of government. Such arbitrary power was likely to be abused, as

⁴² James Mackintosh, *Parliamentary Debates*, second series, vol. 7, June 14, 1822, 1103-4.

⁴³ John Cam Hobhouse, *Parliamentary Debates*, second series, vol. 10, 23 March 1824, 1345.

⁴⁴ Leader, *The Times*, June 17, 1822, 5; Petition presented to the Lords by Holland, *Parliamentary Debates*, second series, vol. 11, May 11, 1824, 628.

⁴⁵ Empson, 'Alien Law of England', 170.

several examples seemed to show, which in turn raised the spectre of a direct threat to Briton's own liberties. The specific anti-alien measures retained by the government therefore all fell foul of Britain's traditional constitutional order.

On its initial introduction in December 1792, the Alien Act's provisions were attacked as draconian by the Whig faction led by Charles James Fox.⁴⁶ Yet it passed easily with the onset of war and became an accepted element of the wartime state, being renewed without objection during the conflict and left untouched when Fox's Whigs briefly came to power in the coalition government of 1806-7.⁴⁷ Yet precisely because it was an emergency measure, the act's continuation was constitutionally inappropriate. As Empson put it, the law was 'no standing part of the British constitution' but instead 'one of the monster births of the French Revolution'.⁴⁸ Petitioners from the City of Westminster claimed that it was 'contrary to the principles of the constitution' to maintain the act during a 'time of peace' and several commentators argued that scrapping it would return Britain to its 'ancient' constitutional practice. This alone was reason to resist its being 'passed as a matter of course'.⁴⁹

It was not only the Alien Act's origins as an emergency measure, but the nature of its particular provisions, that called its constitutionality into question. Ministers' abilities to detain and deport foreign nationals concentrated significant power in executive hands. But after a quarter-century of increased and often repressive executive power to fight the war and quell domestic disturbances, the issue was now not whether the government had too little power, but 'whether it should be lessened'.⁵⁰ Both Whigs and radicals were eager to buttress

⁴⁶ *Parliamentary History*, vol. 30, 156-70 and 174-238. One of Fox's speeches was later published as *The Speech of the Right Hon. Charles James Fox, in the House of Commons, Jan. 4, 1793. On the Alien Bill* (London: James Ridgway, 1794).

⁴⁷ Dinwiddy, *Radicalism and Reform*, ch. 8.

⁴⁸ 'Empson, 'Alien Law of England', 100.

⁴⁹ Petition presented to the Commons by Henry Grey Bennet, *Parliamentary Debates*, second series, vol. 1, June 8, 1820, 999; 'Alien Bill', *Bell's Weekly Messenger*, May 31, 1818, 170; *A Few Thoughts on the Probable Renewal of the Alien Bill. By a Member of Parliament* (London: J. Hatchard and Son, 1822), 20.

⁵⁰ *Ibid.*, 19.

parliament's role vis-à-vis the executive, emphasising that the power conveyed in the Alien Act was more appropriately wielded jointly by the 'King, Lords, and Commons' since the crown-in-parliament was the country's 'supreme authority'.⁵¹ John Newport therefore moved in 1815 that the act's 'extraordinary measures' should be 'exercised under the immediate view and control of Parliament' and the next year Romilly asked the government to reveal to parliament details about the aliens that had been expelled, with requests aired in the press.⁵²

The government brushed aside these efforts and claimed to need no legislative approval for its actions at all. According to Castlereagh, the crown already 'possessed the right of sending aliens out of the realm' as a prerogative power, and its seeking 'the countenance of the legislature' via the Alien Act was a mere nicety.⁵³ John Singleton Copley, the solicitor-general and future Lord Lyndhurst, pointed to the emerging but still largely theoretical field of international law, including the writings of the early modern legal theorists Samuel Pufendorf and Emmerich de Vattel, to show that in every state 'a right of sending foreigners out of the country resided in the sovereign power'. That in Britain this meant the monarch was proven peacetime expulsions by Elizabeth and William I.⁵⁴ Peel later added to these precedents similar instances in the reigns of Henry IV, Elizabeth, and James I, and Canning thought it 'monstrous' to deny that expulsion powers existed 'somewhere in the constitution'.⁵⁵

This was vigorously denied by the opposition. Appeals to the 'law of nations' were irrelevant because, while its theorists granted each state discretion in its treatment of resident

⁵¹ Mackintosh, *Parliamentary Debates*, vol. 34, May 10, 1816, 471; Empson, 'Alien Law of England', 109.

⁵² John Newport, *Parliamentary Debates*, vol. 30, March 22, 1815, 322-3; Romilly, *Parliamentary Debates*, vol. 34, May 1, 1816, 167-8; Romilly, *Memoirs*, 416; 'Alien Bill', *Bell's Weekly Messenger*, May 31, 1818, 2..

⁵³ Castlereagh, *Parliamentary Debates*, vol. 33, April 25, 1816, 1229-30.

⁵⁴ John Singleton Copley, *Parliamentary Debates*, second series, vol. 1, June 1, 1820, 788-9. For nineteenth-century conceptions of the 'law of nations' see Casper Sylvest, 'The Foundations of Victorian International Law', in Duncan Bell, ed., *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2007), 47-66.

⁵⁵ Peel, *Parliamentary Debates*, second series, vol. 10, March 23, 1824, 1335-8; George Canning, *Parliamentary Debates*, second series, vol. 10, March 23, 1824, 1381.

aliens, they did not prescribe any particular course for all states to follow. Therefore an ‘absolute monarchy probably will take one course, an aristocracy another’, since the existence and nature of any relevant prerogative powers ‘can be looked for no where but at home’.⁵⁶ With more national chauvinism, Mackintosh claimed that Pufendorf, a ‘German jurist’ who lived ‘under a despotic government’, could not be ‘an authority as to the prerogative of the Crown of England’ and Brougham argued that one ‘might as well have quoted the Koran, the Talmud, or the Levitical law’ as cite a foreign theorist on ‘the British constitution of which he knew nothing’.⁵⁷ Meanwhile the examples of English monarchs expelling aliens all hailed from ‘barbarous’ periods in English history that ‘ought to be avoided rather than imitated’.⁵⁸ Only with the 1688 settlement, that Whig touchstone, had the constitution become ‘regular and consistent’ and the ‘arbitrary acts’ of Henry IV, Elizabeth, and James I could not ‘prove the spirit of the English Constitution’.⁵⁹ Since 1688, ‘when constitutional precedents begin’ not ‘a single scrap of paper’ had been cited to prove a crown prerogative of expulsion.⁶⁰ Indeed, in 1792 the government’s own attorney general had denied the existence of such a prerogative, which was why the Alien Act had been introduced in the first place, a fact pointed out repeatedly in the postwar period.⁶¹

The power granted to ministers by the Alien Act also represented a major circumvention of due process. Ministers did not have to reveal any reason for an alien’s detention or deportation and aliens could not bring legal counsel to challenge them. Several MPs argued that this made the right to appeal to the privy council effectively meaningless.⁶²

⁵⁶ Empson, ‘Alien Law of England’, 105.

⁵⁷ Mackintosh, *Parliamentary Debates*, second series, vol. 1, June 1, 1820, 792; Henry Brougham, *Parliamentary Debates*, vol. 34, May 10, 1816, 435-6.

⁵⁸ James Scarlett, *Parliamentary Debates*, second series, vol. 7, June 5, 1822, 818.

⁵⁹ *On the Alien Bill*, 12n.

⁶⁰ Empson, ‘Alien Law of England’, 155.

⁶¹ Mackintosh, *Parliamentary Debates*, second series, vol. 10, March 23, 1824, 1361; Empson, ‘Alien Law of England’, 129n.

⁶² Brougham, Romilly, and Mackintosh, *Parliamentary Debates*, vol. 34, May 11, 1816, 438-9, 449, 478.

The act therefore created an ‘absolute minister’ with power held ‘in terrorem’ over the roughly 25,000 foreign nationals living in Britain.⁶³ That such a power ‘*must* be abused’ was quickly demonstrated.⁶⁴ The threat of being falsely denounced as Jacobins left aliens vulnerable to threats and blackmail, and both Holland and *The Times* claimed was happening to foreigners arriving to testify in the 1820 trial of Queen Caroline.⁶⁵ Scope for more straightforward abuse was allegedly demonstrated in the case of Gaspard Gourgaud. Gourgaud, Napoleon’s former-aide-de camp who spent several years in St Helena with emperor before coming to England in May 1818, was quickly deported after he came under the Alien Office’s suspicions and annoyed the government by publishing an account of the Waterloo campaign that attributed British victory to luck and criticized Napoleon’s imprisonment in the South Atlantic as a dishonourable betrayal since he had abdicated and requested asylum aboard a British ship.⁶⁶ Gourgaud then petitioned parliament from abroad, claiming he had been bludgeoned by Alien Office agents, denied access to the privy council, and had his papers seized and held even after his deportation.⁶⁷ The Alien Office denied these allegations but the case conformed with critics’ expectations that cruelty ‘was naturally to be expected from such a law’.⁶⁸ That potential for abuse led Holland others in 1818 and 1822 to protest in the Lords’ Journal that the Alien Act was ‘unconstitutional’.⁶⁹

The mere existence of such absolute power, even if targeted at aliens, was a threat to British liberty. Gourgaud’s case suggested that ‘no man, however innocent, can be secure,

⁶³ Hobhouse, *Parliamentary Debates*, second series, vol. 10, March 23, 1824, 1344; Robert Wilson, *Parliamentary Debates*, second series, vol. 7, June 5, 1822, 818.

⁶⁴ Empson, ‘Alien Law of England’, p. 168.

⁶⁵ Holland, *Parliamentary Debates*, second series, vol. 2, July 18, 1820, 534-5. ‘Letter of M. Mariettie to His Son’, *The Times*, September 7, 1820, 3; ‘Correspondence Relative to Mr. Marietti’, *The Times*, October 4, 1820, 3.

⁶⁶ Alien Office reports on Gourgaud, TNA, HO 1/5; Gaspard Gourgaud, *The Campaign of MDCCCXV; Or, a Narrative of the Military Operations which Took Place in France and Belgium during the Hundred Days* (London: John Ridgway, 1818).

⁶⁷ AN, Fonds Gourgaud, 314AP/6.

⁶⁸ Christopher Hely-Hutchinson, *Parliamentary Debates*, vol. 39, April 2, 1819, 1377.

⁶⁹ Protests against the Alien Bill, *Parliamentary Debates*, vol. 38, June 2, 1818, 1116-7 and second series, vol. 7, July 20, 1822, 1857-8.

and none but the slaves and sycophants of power will long remain unmolested'.⁷⁰ This was because 'the liberties of England are interwoven with each other' and 'to pluck one thread away, is to destroy the strength and beauty of the entire texture'.⁷¹ Given that the 1793 Alien Act had soon been followed by the 1794 suspension of habeas corpus, and that Liverpool's government had similarly suspended habeas corpus across the United Kingdom in 1817 and again in Ireland in 1822 and repeatedly resorted to force and censorship, these did not seem like idle fears. The Alien Act was part of a 'fatal system' that favoured authoritarian expedients over 'the principles of our free constitution. – Hence our gagging bills – hence our standing armies – hence the avowed infringement on the ancient institutions of this once-happy country. – This Alien bill bears the same impression'.⁷² In this context, Russell concluded that the act was 'calculated to corrupt and destroy the free institutions of our free constitution'.⁷³

The British Constitution and the Rights of Aliens

Even if the arbitrary power inherent in the Alien Act did not eventually destroy Britain's free institutions, it was already trampling on the key constitutional principle of equality before the law. The detention and expulsion provisions in the act denied aliens the classic liberties of habeas corpus and trial by jury. But opponents of the Alien Act argued that these rights, and all others, barring a few essential and historically-sanctified exceptions like the right to vote and to own real property, were guaranteed equally to aliens by the British constitution.

Evidence of this could be found in Magna Carta, the writings of great English jurists, and habeas corpus statutes and judicial decisions interpreting them in both England and Scotland.

⁷⁰ 'Glynn', 'General Gourgaud's Arrest', *Morning Chronicle*, November 19, 1818, 2.

⁷¹ *On the Alien Bill*, 30-1.

⁷² Hobhouse, *Parliamentary Debates*, second series, vol. 2, July 12, 1820, 415-16.

⁷³ John Russell, *Parliamentary Debates*, second series, vol. 10, March 23, 1824, 1371.

This web of protections amounted to something akin to subjecthood for the duration of a foreigners' residence, and a long chain of historical precedents showed that asylum was universally afforded to all aliens. Asylum could therefore be claimed as a matter of right and phrases similar to 'right of asylum' had come into use by the 1820s.

By the nineteenth century, the near-mythical importance of Magna Carta as the first great charter guaranteeing English liberties and recovering the ancient rights of the Anglo-Saxons ensured its centrality in constitutionalist political battles.⁷⁴ This was true of those surrounding the Alien Act, which focused on the statement in the charter's 41st clause that 'All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs', unless England was at war with their countries of origin.⁷⁵ On its face, this permission for 'merchants' to enter England was not a right of free ingress for all foreigners, a point made by Peel and other Tory MPs like Charles Wetherell.⁷⁶ Yet the government's critics argued that such a strict definition of 'merchants' was outdated. Merchants had been explicitly mentioned because they were among the few thirteenth-century international travellers. Modern understandings of the clause should therefore embrace all migrants.⁷⁷ Moreover, the 'reason for the provision' was encouraging 'communication between the different people of the globe' for their mutual commercial and intellectual enrichment, meaning that to remain relevant it should be understood expansively.⁷⁸ And subsequent iterations of the charter, notably one from Edward III's reign, had used more inclusive language, protecting 'all merchants, denizens, and forreins'. In part

⁷⁴ Miles Taylor, 'Magna Carta in the Nineteenth Century', in Nicholas Vincent, ed., *Magna Carta: The Foundations of Freedom, 1215-2015* (London: Third Millennium, 2015), 136-53.

⁷⁵ Translation by the National Archives: <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/>

⁷⁶ Robert Peel and Charles Wetherell, *Parliamentary Debates*, new series, vol. 7, June 5 and July 19, 1822, 808 and 1718.

⁷⁷ Mackintosh, *Parliamentary Debates*, new series, vol. 7, June 5, 1822, 815.

⁷⁸ *On the Alien Bill*, 22.

based on this influential sixteenth- and seventeenth-century jurists Edward Coke and Matthew Hale had subsequently interpreted the clause to include all foreign nationals.⁷⁹ Without specific legislation stating otherwise, free entry was the natural state.⁸⁰ The Alien Act therefore ‘directly violated’ one of the ‘maxims of Magna Charta, that all foreigners should have free ingress and egress’.⁸¹ For Denman, it neatly reversed that maxim since ‘The old law protected the foreign merchant according to the old and rightful customs of England ... The new law proscribed the foreign merchant, and refused him an asylum upon the shores of England.’⁸²

Meanwhile, habeas corpus, referred to in Magna Carta, observed as a writ for several centuries, and written into English law in 1679 and Scottish in 1701, also applied equally to foreigners. England’s Habeas Corpus Act referred to ‘persons’ rather than natives and aliens, as did Scotland’s act against ‘wrongous imprisonment’.⁸³ Moreover, several judicial decisions had explicitly ruled that habeas corpus applied to foreign nationals, most significantly in *Somerset v. Stewart* in England in 1772 and *Knight v. Weddeburn* in Scotland in 1778. Both cases involved enslaved Africans who had escaped after being brought to Britain from the colonial empire. When recaptured and threatened with removal out of the country, both men successfully challenged their owners in court with support of prominent abolitionists. The cases found that slavery had no explicit basis in English or Scottish law and, with habeas corpus forbidding arbitrary detention, neither Somerset nor Knight could be forcibly transported out of the country and back into slavery.⁸⁴ These decisions were widely understood to have effectively ended slavery in Britain and opponents of the Alien Act

⁷⁹ Empson, ‘Alien Law of England’, 124-6.

⁸⁰ *On the Alien Bill*, passim; ‘Alien Bill’, *Bell’s Weekly Messenger*, May 31, 1818, 2.

⁸¹ ‘Renewal of the Alien Bill’, *Bell’s Weekly Messenger*, March 29, 1824, 2.

⁸² Denman, *Parliamentary Debates*, new series, vol. 7, June 5, 1822, 820.

⁸³ Romilly, *Memoirs*, 429-30.

⁸⁴ On the impact of these and other cases on slavery’s status in eighteenth-century Britain, see Simon P. Newman, ‘Freedom-Seeking Slaves in England and Scotland, 1700-1780’, *The English Historical Review* 134, no. 570 (2019), 1136-68.

argued that both showed the applicability of habeas corpus to all aliens.⁸⁵ The Alien Act, mockingly labelled a ‘Foreigners’ Habeas Corpus Suspension Act’, therefore struck at the now-cherished principle that an ‘African slave is no longer a slave when he touches the shores of Great Britain’.⁸⁶ In an era of revived anti-slavery agitation, British pressure on the states of Europe, the Americas, and Africa to end the international slave trade which Britain had foreswore in 1807, and the permanent stationing of the Royal Navy’s West Africa Squadron to suppress the trade from 1819, one of the most charged claims possible against the Alien Act was that ‘the soil of England, instead of the glorious privilege of enfranchising the slave, would henceforward have the wretched power to enslave the free’.⁸⁷

This all amounted to a powerful web of constitutional protections for resident aliens. Taken together, they amounted to effective subjecthood and invalidated any legislation like the Alien Act which discriminated against foreigners per se. This was shown forcefully in an 1824 pamphlet by an anonymous refugee who cited Magna Carta, its subsequent interpretations, and the eighteenth-century jurist William Blackstone’s characterisation of the ‘English nation’ consisting of native subjects, denizens, and aliens ‘mutually united and strictly bound together’.⁸⁸ The inevitable conclusion was ‘*That foreigners residing in England constitute an integral part of the English people; that they are subject to the same obligations and charges, and owe the same fidelity and allegiance; and that, by a parity of reasoning, they ought to enjoy the same liberties and franchises, and all the same rights as*

⁸⁵ Empson, ‘Alien Law of England’, 142; Romilly, *Parliamentary Debates*, vol. 38, May 5, 1818, 529.

⁸⁶ *Bury and Norwich Post*, March 31, 1824, 2; ‘Alien Bill’, *Bell’s Weekly Messenger*, May 31, 1818, 2.

⁸⁷ Mackintosh, *Parliamentary Debates*, vol. 34, May 10, 1816, 479. For the anti-slavery movement at this time, see Seymour Drescher, ‘Whose Abolition? Popular Pressure and the Ending of the British Slave Trade’, *Past and Present* 143 (1994), 136-66; Richard Huzzey, ‘The Politics of Slave-Trade Suppression’, in Robert Burroughs and Richard Huzzey, eds., *The Suppression of the Atlantic Slave Trade: British Policies, Practices and Representations of Naval Coercion* (Manchester: Manchester University Press, 2015), 17-52; Paul Michael Kielstra, *The Politics of Slave Trade Suppression in Britain and France, 1814-1848* (Basingstoke: Macmillan, 2000).

⁸⁸ William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), ch. 10; *On the Alien Bill*, 24.

natural-born subjects or denizens, with the sole exception of such as are denied them by established laws or by invariable custom. The Somerset case proved that all who arrived on British soil ‘become free; because that ground instantly transforms them into British subjects.’ Thus there could be no law ‘treating foreigners differently from natives’ or one which dealt with them ‘more *summarily*’.⁸⁹ More simply, Mackintosh proclaimed ‘Alien friends were temporarily subjects of the king; they owed temporary allegiance and were entitled to temporary protection’.⁹⁰

Finally, the constitutional rights of aliens, and particularly of refugees, were proven and safeguarded by historical precedent, the enumeration of which was a key element of nineteenth-century constitutional analysis, given Britain’s relatively uncodified constitution.⁹¹ The long history of political and religious refugees finding asylum in Britain was therefore repeatedly delineated to ‘show that it was our ancient policy to welcome and foster foreign fugitives, to endow them with the privileges of freemen of the realm – not to cast them as slaves on the pleasure of the Crown’.⁹² The Dutch and French Protestants of the sixteenth to eighteenth centuries were particularly fondly remembered for bringing ‘their industry and skill, which they poured into our lap’.⁹³ And the Huguenots’ military service during the wars against Louis XIV showed that ‘If we have been to them a city of refuge, they have been to us a strong tower of defence.’⁹⁴ Closing off Britain to new refugees risked barring similarly beneficial arrivals in the future. Moreover, asylum had been offered universally, even to those that would not normally support Britain’s religious and constitutional order. This had been most recently demonstrated with the welcoming of the émigrés in the 1790s but it was

⁸⁹ ‘*On the Alien Bill*, 26-8. For the relevant part of Blackstone, see William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), ch. 10; *On the Alien Bill*, 24.

⁹⁰ Mackintosh, *Parliamentary Debates*, second series, vol. 1, June 1, 1820, 794-5.

⁹¹ Hawkins, *Victorian Political Culture*, 57.

⁹² Mackintosh, *Parliamentary Debates*, vol. 34, May 10, 1816, 473.

⁹³ Brougham, *Parliamentary Debates*, vol. 34, May 10, 1816, 437.

⁹⁴ *On the Probable Renewal of the Alien Bill*, 15.

also clear from examples such as the Jesuits expelled from Portugal in 1759 of whom ‘no notice was taken’ and no Alien Act instigated.⁹⁵ This record was powerful proof that ‘England was the land of protection’ to ‘the distressed and the persecuted of all the world’.⁹⁶

As the biennial debates on the Alien Act repeatedly brought these arguments to the fore, it became more common to speak of asylum as a simple matter of right. As early as 1815, Mackintosh, protesting against the extradition of several Spanish dissidents from Gibraltar to Cadiz, urged that states should return to the pre-revolutionary practice of minimal border control, which would restore the ‘inviolable right of political asylum’ across Europe.⁹⁷ By the mid-1820s, the notion that Britain’s key charters, statutes, judicial rulings, and long historical practice all guaranteed foreigners the right to free ingress, residence, and equality before the law cohered into one of a constitutionally protected right to asylum, and variants of the latterly popular phrase ‘right of asylum’ began to appear. In the 1824 Alien Act debates Denman argued that all incoming exiles ‘were entitled to claim’ England’s ‘ancient hospitality’, Christopher Hely-Hutchinson urged Britain to offer those fleeing the Holy Alliance ‘the rights of hospitality’, and Joseph Hume maintained that all law-abiding ‘strangers had a right to remain in this country’.⁹⁸ The following year in the *Edinburgh Review* Empson opened a lengthy article on ‘alien law’ by claiming the question was essentially ‘of the right and privilege of an alien friend to admission and residence in England’. He closed his argument with an injunction to provide aliens with ‘a compassionate welcome, and a free, undegraded, unconditional asylum’.⁹⁹ A series of debates that had initially focused on enumerating the particular ills of the Alien Act ended with a conception of a constitutionally protected right to asylum taking clear form.

⁹⁵ *Ibid*, 13.

⁹⁶ Lord Stanley, *Parliamentary Debates*, second series, vol. 7, June 5, 1822, 823.

⁹⁷ *Parliamentary Debates*, vol. 29, March 1, 1815, 1137-8.

⁹⁸ Denman, *Parliamentary Debates*, second series, vol. 11, April 12, 1824, 371; Hutchinson and Joseph Hume, *Parliamentary Debates*, second series, vo. 10, March 23, 1824, 1373 and 1378.

⁹⁹ Empson, ‘Alien Law of England’, 99 and 173.

Towards the ‘Right of Asylum’

The Alien Act lapsed in 1826, not because it was overturned by the opposition, which lost yet another general election that year, but because of the rising tide of liberal Toryism.¹⁰⁰ In the mid-1820s the Liverpool government was revitalized by the rise of men like Peel and Canning, an increased ethic of professionalism and emphasis on efficiency, and a willingness to accommodate perceived shifts in public opinion by repealing earlier repressive legislation.¹⁰¹ This occurred with the Alien Act as the amount of negative press coverage and hostile petitioning increased and Canning’s foreign policy was already orienting Britain away from the powers of the Holy Alliance.¹⁰² The act had already been amended in 1824 to exempt aliens resident for more than seven years and that year Peel was eager to emphasise how infrequently the legislation had actually been used.¹⁰³ As he announced the Alien Act’s lapsing in 1826, Peel claimed that ‘no one could be more willing to part’ with the ‘burthen’ of its expulsion powers than he. Though warning exiles against hatching ‘cabals or conspiracies’, he directly addressed familiar objections to the act by noting the one expulsion he had ordered as home secretary was ‘not at all’ for political reasons and that aliens and ‘natural-born subjects’ were now equally secure from deportation.¹⁰⁴ The opposition duly celebrated the end ‘of a system so abhorrent to the principles of the British constitution’ and the country’s restored status as ‘the protectress of the oppressed, and the great patroness of public liberty all over the world’.¹⁰⁵

¹⁰⁰ Dinwiddy, *Radicalism and Reform*, 168.

¹⁰¹ Boyd Hilton, *A Mad, Bad, and Dangerous People?: England, 1783-1846* (Oxford: Oxford University Press, 2006), 286-308, 314-28; Parry, *Rise and Fall*, 34-45.

¹⁰² Negative articles in *The Times* began in the 1820s and proliferated in 1824. Petitions to the House of Commons arrived from Westminster in 1820, Leicester and Ipswich in 1822, and Derby and the mayors and aldermen of Nottingham and London in 1824. *Journals of the House of Commons*, vol. 75, 290, vol. 77, 385 and 423, and vol. 79, 230, 247, and 253.

¹⁰³ 5 Geo. IV c. 37; Peel, *Parliamentary Debates*, second series, vol. 10, March 23, 1824, 1332-43.

¹⁰⁴ Peel, *Parliamentary Debates*, second series, vol. 15, April 20, 1826, 498-500.

¹⁰⁵ Hobhouse, *Parliamentary Debates*, second series, vol. 15, April 20, 1826, 501.

Whig and radical arguments against the Alien Act had therefore mattered and they would be repeated over subsequent decades. Their relevance was aided by the continued expansion and popularity of the refugee population, notably by Portuguese liberals fleeing Dom Miguel's coup in 1828 and by the Polish exiles arriving in the aftermath of the failed rising against Russian rule in 1834. The latter group was popular enough to secure a pension from the Whig government despite having rendered no direct service to Britain.¹⁰⁶ Moreover, the arrival in the 1830s of both absolutist monarchists like the Spanish Carlists and early socialist figures like France's Étienne Cabet, and after 1848 of overthrown monarchs and failed revolutionaries alike, further vindicated the claim that British asylum was afforded universally, adding the 'exiled Absolutist' and the 'Republican' to a rich history stretching back to the Protestant 'French, Flemings and Germans'.¹⁰⁷ Campaigners continued to make comparisons between freedom Britain granted to political exiles and fugitive slaves, before and after Europe's revolutions of 1848 and America's Fugitive Slave Act of 1850 caused an increase in the arrival of both.¹⁰⁸ And arguments about violations of exiles' rights directly threatening the freedom of Britons were revived dramatically in 1844 when the government

¹⁰⁶ On the Portuguese, see José Baptista de Sousa, *Holland House and Portugal: English Whiggery and the Constitutional Cause in Iberia* (London: Anthem Press, 2018), 84-101. Expressions of popular support for them appear in the Plymouth and West Devon Record Office, 1/646/2/14-16. On support for the Poles see Shaw, *Britannia's Embrace*, 58-9; For their pensions, see House of Commons, 'A Return of all Persons receiving Pensions or any Assistance from the Grant voted by Parliament for the Relief of *Polish* Refugees; specifying the Name and the Amount paid in each Year to each Individual, from the Year 1837, inclusive, to the present Time', *Sessional Papers*, 1842, vol. 26, 643-56 and TNA, Treasury Papers 50/81-97 and Paymaster General Papers 53/2-8.

¹⁰⁷ Leader, *The Times*, February 28, 1853, 4. On these diverse groups, see Fabrice Bensimon, 'The IWMA and its Precursors in London', in Fabrice Bensimon, Quentin Deluermoz, and Jeanne Moisand, eds., *"Arise Ye Wretched of the Earth": The First International in a Global Perspective* (Leiden: Brill, 2018), 21-38; Brand, 'Right-Wing Refugees'; Philip Mansel, 'Courts in Exile: Bourbons, Bonapartes and Orléans in London, from George III to Edward VII', in Kelly and Cornick, eds., *History of the French in London*, 99-127; Tom Stammers, 'From the Tuileries to Twickenham: The Orléans Exile and Anglo-French Liberalism, 1848-1880', *English Historical Review* 138, no. 564 (2018), 1120-54.

¹⁰⁸ Shaw, *Britannia's Embrace*, chs. 2-3.

opened Mazzini's letters at Austria's request, causing a public backlash and parliamentary inquiry.¹⁰⁹

The arguments of the 1810s and 1820s having thus remained relevant were directly cited and repeated at the introduction of a new Alien Act in 1848. Introduced by the Whig government of John Russell, himself a prominent opponent of the acts of 1814-26, this measure was explicitly aimed at potential revolutionary spies, and the home secretary George Grey insisted that it contained 'nothing at variance' with Britain's role as 'the protectress of constitutional liberty'.¹¹⁰ Though it lapsed in 1850 without having been used,¹¹¹ it triggered protests from those who voted against it, like the radicals Richard Cobden and John Bright, and others who supported it with reservations, like Derby. These objections directly drew on the debates of 1814-26. The new Lord Holland, for example, read out the words of his father's official protests of 1818 and 1822 and William Molesworth listed the MPs, many still in parliament, who had spoken against the Alien Act in the decade after Waterloo.¹¹² Like its predecessors, the 1848 legislation made the British the 'enemies of rising constitutional Governments, and the friends of despotisms everywhere deservedly crumbling into oblivion'.¹¹³ It gave the executive 'arbitrary' power that should not be 'possessed by any class of men whatever'.¹¹⁴ It effectively 'repealed the great charter of England as relates to the free ingress and free residence of foreign merchants' and was a direct threat to trial by jury for foreigners and Britons alike.¹¹⁵ This violated the principle forbidding 'any difference of legislation for foreigners', scuppering the 'protection' due to aliens for their 'temporary

¹⁰⁹ Porter, *Refugee Question*, 54; F. B. Smith 'British Post Office Espionage, 1844', *Historical Studies* 14, no. 54 (1970), 189-203.

¹¹⁰ George Grey, *Parliamentary Debates*, third series, vol. 98, May 1, 1848, 560. This volume contains all parliamentary debates on the 1848 Aliens Act, including the passages cited below.

¹¹¹ House of Commons, 'Return showing the Number of Aliens who may have been directed, under the Provisions of the Act 11 & 12 Vict. c. 20, to depart the Realm', *Sessional Papers*, 1850, vol. 33, 227.

¹¹² Holland, April 17, 1848, 397; William Molesworth, May 1, 1848, 564-70.

¹¹³ W. J. Fox, May 1, 1848, 577.

¹¹⁴ Molesworth and Dudley Stuart, May 1, 1848, 562 and 570.

¹¹⁵ Stuart quoting Hobhouse and Hume, May 1, 1848, 571.

allegiance to the laws'.¹¹⁶ Most obviously, the act was an 'interference with the principle of the British constitution' to give the 'utmost freedom' to 'refugees from other countries'.¹¹⁷

This direct recitation of the arguments of the 1810s and 1820s was the immediate background to the political battles over the refugees of the 1850s. It was this intellectual tradition from which Monckton Milnes drew in 1852 when he called asylum an 'indefeasible right', echoing a conclusion reached by Denman, Empson, Hume, and Mackintosh thirty years previously. This formulation was then repeated after the 1855 Jersey expulsions, and in the Tibaldi and Orsini affairs of 1857 and 1858, when French demands for the extradition of exiles in London were treated as assaults upon asylum rights,¹¹⁸ and the British government's proposal to increase the penalty of conspiracy to murder from a misdemeanour to a felony was labelled a new Alien Act.¹¹⁹ This effectively cemented the place of the 'right of asylum' in British political discourse, allowing for its scholarly and legal codification and the near-universal acceptance of its existence for the rest of the century. The intellectual pedigree of that right was fully encapsulated in a leading article in a provincial newspaper in 1855:

Among the many distinguished characteristics of our country may be reckoned the sacred rights of asylum which we guarantee to the political refugees of all lands. This has been the proud boast of Englishmen for many generations. We say with pride that the poor exile, whether he comes as a dethroned king, or a broken-hearted republican, he finds under the aegis of British law, that right to live denied him in his own land. We say with pride that when the slave touches our shores, that moment his shackles fall off, and he feels disenthralled and free by virtue of the irresistible genius of universal emancipation. We say with pride that England is the home of the exile – the land of the political outcast. These rights of asylum are sanctified by law and

¹¹⁶ David Urquhart, May 1, 1848, 579; Thomas Milner Gibson May 11, 1848, 857.

¹¹⁷ Stanley, April 13, 1848, 274.

¹¹⁸ 'Plot against the Right of Asylum', *Dublin Evening Packet and Correspondent*, August 18, 1857, 2; 'Conspiracy against the Right of Political Asylum in Britain', *Londonderry Standard*, July 30, 1857, 2. One London-based column citing this threat was reproduced on August 15, 1857 in provincial papers as various as the *Isle of Wight Mercury*, the *Bicester Advertiser*, the *Walsall Free Press and General Advertiser*, the *Brighton Gazette*, the *Bury Free Press*, the *East Kent Gazette*, the *Beverley Guardian*, and the *Cheptsow Weekly Advertiser*. Thomas Milner Gibson, *Parliamentary Debates*, third series, vol. 148, February 19, 1858, 1752. Police reports casting doubts on the exiles' involvement in the Tibaldi Affair are in TNA, Foreign Office Papers (FO) 519/176. By contrast, for British assistance attempting to link the exiles to the Orsini affair, see FO 519/187.

¹¹⁹ John Roebuck, *Parliamentary Debates*, third series, vol. 148, February 5, 1858, 765; 'The New Alien, or French Colonels' Bill', *Reynolds's Newspaper*, February 21, 1858, 1; George Jacob Holyoake, *Sixty Years of An Agitator's Life*, vol. 2 (London: T. Fisher Unwin, 1892) vol. 2, ch. 66.

interwoven in the texture of our constitution. We have hitherto regarded them as precious heirlooms, purchased by the best blood of worthies, and by the struggles of centuries. One would have thought that they were as much a portion of the constitution as Magna Charter or Habeas Corpus, and that a minister would as soon annihilate trial by jury, as he would treat with contempt those sacred rights.¹²⁰

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¹²⁰ 'The Rights of the Exile in Danger', *Cheshire Observer and General Advertiser*, November 10, 1855, 7.

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