

DERIVATIVE CITIZENSHIP: ITS HISTORY, CONSTITUTIONAL FOUNDATION, AND CONSTITUTIONAL LIMITATIONS

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INTRODUCTION

Consider the case of two American soldiers, one male and one female, stationed outside of the United States and its territories.¹ Imagine both form relationships with local aliens, both produce illegitimate children, and both return to the United States with those children. These soldiers appear to have engaged in identical behavior, yet Congress nevertheless treats them differently on the basis of their gender. The female soldier's child becomes a United States citizen immediately through federal derivative citizenship laws.² The male soldier's child, however, does not become a citizen until the father satisfies several additional and burdensome requirements before the child reaches eighteen years of age.³ If the male soldier fails to meet these requirements within eighteen years, his child will become ineligible for United States citizenship and will lose all of its included privileges and protections.

How can such a law affecting derivative citizenship exist in an era when the Supreme Court applies heightened scrutiny to stat-

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1. This scenario is adapted from the facts in *Miller v. Albright*, 523 U.S. 420 (1998) and *Nguyen v. INS*, 533 U.S. 53 (2001). See also David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 315 (2005) (describing a number of hypothetical situations highlighting anomalies in citizenship law).

2. See 8 U.S.C. § 1401(g) (2000). The mother must also have been a resident of the United States or its territories for no less than five years prior to the birth of the child. See *id.*

3. See *id.* § 1409(a). The father must establish a blood relationship with the child, establish that he was a United States citizen at the time of the child's birth, agree to provide financial support, and acknowledge paternity. The child may also be legitimated under local law, or a court may declare paternity. The father must also satisfy the § 1401 residency requirement.

utes that create classifications based on gender?⁴ The answer is that the Supreme Court declines to review immigration and naturalization laws with the same level of scrutiny it applies in other contexts.⁵ This weak form of review stems from the plenary power doctrine and dates back to the earliest federal immigration cases.⁶ It is a doctrine “under which the Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints.”⁷ Thus, the plenary power doctrine may uphold immigration statutes creating distinctions based on gender, race, and nationality that would not withstand scrutiny in any other area of the law.⁸ This is true, as seen above, even when those immigration statutes touch on a subject as fundamental as citizenship.

This Note seeks to examine derivative citizenship—the type of citizenship granted to foreign-born children of United States citizens—by exploring its application, constitutional origins, and relationship to the plenary power doctrine. Citizenship is of fundamental importance because it entitles an individual “to the full protection of the United States, to the absolute right to enter its

4. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (“To summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’ The burden of justification is demanding and it rests entirely on the State. The State must show ‘at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”) (citations omitted).

5. *Miller*, 523 U.S. at 434 n.11 (“Deference to the political branches dictates ‘a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.’”). The Court in *Miller* did believe, however, that 8 U.S.C. § 1409 would satisfy heightened scrutiny if it applied. *Id.* The Court in *Nguyen* reached the same conclusion and did not reach the question of whether a lower standard of review applied. *Nguyen*, 533 U.S. at 61 (“[W]e conclude § 1409 satisfies [the standard for evaluating gender-based classifications]. Given that determination, we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’ immigration and naturalization power.”).

6. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

7. *Id.*

8. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

borders, and to full participation in the political process.”⁹ These same benefits and responsibilities attach to derivative citizenship.¹⁰

Congress first offered derivative citizenship in 1790, and today more than three-and-a-half million Americans are derivative citizens.¹¹ Curiously, however, the source of Congress’s authority to grant such citizenship is unclear because no constitutional clause specifically enumerates this power. There are two possible indirect sources: Congress’s authority to “establish an uniform Rule of Naturalization,”¹² and Congress’s implied power to manage foreign affairs. Independent of Congress, the Citizenship Clause of the Fourteenth Amendment¹³ may also provide a basis for derivative citizenship.

Assuming Congress does have the authority to grant derivative citizenship, the corollary question is whether the Constitution restricts this authority. The plenary power doctrine, as noted, traditionally limits judicial review on immigration matters such as derivative citizenship.¹⁴ This doctrine, applicable only to immigration and naturalization matters, is inappropriate today, given modern developments in constitutional law. Derivative citizenship, like many areas of immigration law, involves core rights and privileges guaranteed by the Constitution that should not be subject to the unchecked will of Congress. The constitutional norms that apply in all other contexts should apply with the same force to immigration laws such as the derivative citizenship statute.

Recent cases suggest that the Supreme Court is prepared to reevaluate its traditional stance towards Congress on immigration laws. The decisions in *Miller v. Albright*¹⁵ and *Nguyen v. INS*,¹⁶ both of which involved challenges to modern derivative citizenship laws, engaged in substantive review of those laws. The *Zadvydas v. Davis*¹⁷

9. *Nguyen*, 533 U.S. at 67.

10. See 8 U.S.C. § 1401. The method by which recently-naturalized parents automatically pass citizenship to their minor children could also reasonably be described as “derivative citizenship” since the children take no formal step to acquire it. See *id.* § 1431. This Note will not consider or discuss this form of derivative citizenship.

11. UNITED STATES CENSUS BUREAU, PROFILE OF SELECTED DEMOGRAPHIC AND SOCIAL CHARACTERISTICS FOR THE NATIVE POPULATION: 2000, Table FBP-1 (2000) available at <http://www.census.gov/population/cen2000/stp-159/native.pdf>.

12. U.S. CONST., art. I, § 8, cl. 4.

13. U.S. CONST., amend. XIV, § 1.

14. See, e.g., Legomsky, *supra* note 6, at 255–56.

15. 523 U.S. 420 (1998).

16. 533 U.S. 53 (2001).

17. 533 U.S. 678 (2001).

decision, in which a resident alien challenged his indefinite detention, suggested that other segments of immigration law might also be subject to more substantive review.¹⁸ The Supreme Court should continue to apply more searching review to immigration statutes, like derivative citizenship, rather than allowing an antiquated doctrine to distort modern constitutional law.

Part I of this Note will explore the history and value of derivative citizenship in the United States, including how its requirements evolved from the initial, simple 1790 statute to the present-day statute with its conditions and provisos. Many of the early conditions, such as the residency requirement, remain part of the statute today, and it is informative to examine why Congress initially adopted these often constitutionally suspect conditions.

Part II of this Note will then examine and evaluate the constitutional foundation of Congress's ability to grant derivative citizenship. The inquiry will focus on the Naturalization Clause and the implied foreign affairs power, but will also address whether the Citizenship Clause of the Fourteenth Amendment provides an independent basis for derivative citizenship. Ultimately, the foreign affairs power emerges as the most likely source of Congress's constitutional authority to create derivative citizenship. The foreign affairs power is extremely broad, and there is a clear connection between foreign affairs and granting citizenship to the foreign-born children of citizens.

Part III of this Note will argue that courts should adopt serious review of Congress's power to grant derivative citizenship. Courts should be able to scrutinize expressions of that power just as they do for any other congressional power. There is no compelling reason why legislation involving citizenship, with its important corresponding rights and privileges, should receive anything less than full constitutional review. The Supreme Court should continue to apply the substantive review it used in *Miller* and *Nguyen* to ensure that Congress does not pass abusive or unconstitutional laws in immigration areas including derivative citizenship.

18. *But see* *Demore v. Kim*, 538 U.S. 510 (2003) (holding that mandatory detention of an alien during deportation process did not violate the Due Process Clause of the Fifth Amendment).

I. HISTORY OF DERIVATIVE CITIZENSHIP AND THE DEVELOPMENT OF THE MODERN STATUTE

A. *Historical Overview of Derivative Citizenship*

Derivative citizenship, for the purposes of this Note, refers solely to the method by which United States citizen-parents pass their citizenship to their foreign-born children. In general, citizenship is governed by one of two traditional principles: *jus sanguinis* or *jus soli*.¹⁹ *Jus sanguinis*—the “right of blood”—is the principle behind derivative citizenship; it passes parental citizenship automatically to children. *Jus sanguinis* assumes that children inherit their parents’ loyalties, regardless of where they are born. As an illustration, consider Romania and Qatar, both of which follow the practice of *jus sanguinis* citizenship.²⁰ If a child is born to two Romanian citizens in Qatar, that child becomes a Romanian citizen. The child will not become a citizen of Qatar.

Jus soli—the “right of birthplace”—represents a different approach to citizenship. Under *jus soli*, any child born within the borders of a state becomes a citizen of that state. The citizenship of the parents is irrelevant. *Jus soli* assumes that people born within a state owe their allegiance to that state, regardless of national heritage.²¹ As an illustration, consider Uruguay and Venezuela, both of which adhere to the *jus soli* principle.²² A child born to Uruguayan citizens in Uruguay becomes an Uruguayan citizen. The same child born to Uruguayan citizens in Venezuela, however, becomes a Venezuelan citizen (and *not* an Uruguayan citizen).

These principles do not always complement each other. If a child is born in a strict *jus sanguinis* state like Romania to parents who originate from a strict *jus soli* state like Venezuela, that child

19. See, e.g., Isaacson, *supra* note 1, at 316–17.

20. U.S. OFFICE OF PERS. MGMT. INVESTIGATIONS SERV., CITIZENSHIP LAWS OF THE WORLD 162–63 (2001), available at <http://www.opm.gov/extra/investigate/IS-01.pdf> [hereinafter OPM CITIZENSHIP LAW REPORT].

21. The *jus soli* conception traditionally allows an exception for the children of diplomats living overseas and conducting official business outside the geographic bounds of the state. It also traditionally provides an exception excluding the children of foreign diplomats conducting business within the geographic bounds of the state from *jus soli* citizenship.

22. Uruguay allows an exception for children who are born abroad to an Uruguayan citizen and who are registered in the Civic Register for Vital Records. OPM CITIZENSHIP LAW REPORT, *supra* note 20, at 210. Venezuela allows an exception for a child born abroad to a Venezuelan citizen, so long as the child’s parents establish residence in Venezuela before the child turns eighteen, or the child declares an intention to accept Venezuelan citizenship before age twenty-five. *Id.* at 213.

will lack citizenship in either state. Romania will not grant the child citizenship because his parents are not Romanian; Venezuela will not grant him citizenship because he was not born in Venezuela. Contrast that with the situation of a child born in Venezuela to Romanian parents. This child will receive citizenship from *both* states. Venezuela will grant him citizenship because he was born on its soil; Romania will grant him citizenship because his parents are Romanian. Thus, the conflicting principles can result in either dual citizenship or no citizenship at all.

The United States inherited the *jus soli* tradition from Great Britain and ultimately codified it in the Citizenship Clause of the Fourteenth Amendment to the Constitution. The Clause provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."²³ The *jus soli* aspect of the clause has two requirements: first, that the child is born in the United States; and second, that it is "subject to the jurisdiction thereof." This qualifier is generally interpreted as excluding American Indians born under tribal jurisdiction and the children of diplomats born in the United States.²⁴ Otherwise, it applies to all children regardless of their parents' citizenship or immigration status.²⁵ This clause is thus the most common basis of American citizenship.

International law does not recognize either *jus sanguinis* or *jus soli* as the standard basis for citizenship, although many authors have argued in favor of either principle. M. D. Vattel, an eighteenth-century international law scholar whose work greatly influenced the Framers of the Constitution,²⁶ argued that *jus sanguinis* was the international standard.²⁷ He wrote:

23. U.S. CONST. amend. XIV, § 1.

24. See, e.g., Christopher Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 63–64 (1997). But see Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519 (2001) (arguing that the generally accepted interpretation of the Citizenship Clause was not inevitable to contemporary commentators).

25. See *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898). But see generally PETER H. SCHUCK & ROGER M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (arguing that the children of illegal aliens are not covered by the "citizenship clause" because the United States did not consent to their presence within its borders).

26. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* 9 (1996).

27. M. D. VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 161 (1820).

By the law of nature alone, children follow the condition of their fathers, and enter into all their rights: the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him; I say of itself, for civil law, or politics, may order otherwise, from particular views.²⁸

Even Vattel, however, conceded the value of the *jus soli* principle. He continued:

But I suppose that the father has not entirely quitted his country in order to settle elsewhere. If he has fixed his abode in a foreign country, he is become the member of another society, at least as a perpetual inhabitant, and his children are so too.²⁹

The children born into that other society become members of it, just as their father became a member by relocating to it. These passages demonstrate the ambivalence that makes it difficult to determine a controlling international standard.³⁰ Clearly, both principles have merit.

The British common law, on the other hand, was quite clear about which principle applied to its citizenship. Blackstone wrote that the common law awarded British citizenship to all children born within Britain and its territories, and that any child born elsewhere—save for one born to British diplomats or the King—was an alien.³¹ Blackstone also noted that *jus soli* was not the sole source of British citizenship. Parliament granted *jus sanguinis* citizenship by statute.³² The United States inherited this tradition at its independence and similarly uses both principles. The vast majority of nations are not so generous, however, and offer citizenship solely through the *jus sanguinis* principle.³³

28. *Id.* (citations omitted).

29. *Id.*

30. The Supreme Court also addressed the question of an international citizenship standard in *Wong Kim Ark*. The Court held that it was unable to determine decisively that *jus sanguinis* was the international standard, either in 1789 or in 1898, the year the Court decided the case. *Wong Kim Ark*, 169 U.S. at 667.

31. WILLIAM BLACKSTONE, 1 COMMENTARIES *373.

32. *Id.*

33. As of 2001, approximately forty-seven of the 190 countries covered by the OPM CITIZENSHIP LAW REPORT offered *jus soli* citizenship, either alone or in concert with *jus sanguinis* citizenship like the United States. These countries were generally located in and around North and South America, along with India and a few countries in Africa. Comparatively, approximately 128 nations offered *jus sanguinis* citizenship exclusively, with the vast majority located in Europe, Africa, and Asia. See OPM CITIZENSHIP LAW REPORT, *supra* note 20.

B. *The Value of Derivative Citizenship*

Let us consider for a moment why the United States, or any other nation, would want to grant *jus sanguinis* derivative citizenship in addition to *jus soli* citizenship. Derivative citizenship is valuable to two parties: the state (which provides the citizenship) and parents and their children (who benefit from that citizenship). While most scholars focus on the division of rights between citizens and non-citizens, some do discuss the inherent value of citizenship. The value stems from both practical and normative considerations that make it worthwhile for states to offer derivative citizenship, and for parents and children to seek it.³⁴

States receive several practical benefits.³⁵ States that grant derivative citizenship benefit by allowing their citizens to take advantage of living and working overseas without fear that their children will become stateless.³⁶ States may benefit directly, as when an overseas citizen works for the state, or indirectly, as when an overseas citizen achieves professional success or prestige.³⁷ If states did not offer derivative citizenship, citizens would have less incentive to live and work overseas, which would cost states the fruit of their success.

34. See, e.g., PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS* 176–206 (1998); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990); Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 285, 299 (1994); Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504 (1986) (discussing the intersection between community and citizenship); Note, *The Functionality of Citizenship*, 110 HARV. L. REV. 1814 (1997). The *Harvard Law Review* Note divides citizenship into “functional” and “non-functional” components. Schuck divides it into “normative” and “positive” components. This Note will instead use “practical” and “normative” to draw a similar distinction between the legal-relationship and national-community components of citizenship.

35. Derivative citizenship may also create additional costs for states that grant it, and for the native-born citizens of those states. In discussing areas of society in which citizenship is relevant, Stephen Legomsky listed the following: “[F]ederal and state government employment, private employment, eligibility for specific professions, protection of labor laws and nondiscrimination laws, public benefit programs, public education, land ownership, jury service, access to courts, eligibility to military service, conscription and tax liability.” See Legomsky, *supra* note 34, at 290. Increasing the number of people eligible for these benefits and protections may also increase the cost of providing them. Governments pay out more in social security benefits, while native-born citizens must pay more taxes and compete with derivative citizens for jobs and resources. This Note will not consider such costs in detail.

36. See *id.* at 299 (“[N]ationality status is important and statelessness spells vulnerability.”).

37. See *infra* p. 476 for a discussion of tax receipts from American citizens living abroad.

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States receive another practical benefit from granting citizenship to the foreign-born children of citizens: those children may grow up and contribute to the states of which they are citizens.

States also receive several normative benefits by granting derivative citizenship. One author has suggested that citizen-parents are more likely to support state institutions when they believe their children will benefit from them.³⁸ Guaranteeing that children will enjoy the full rights and privileges of citizenship will certainly help convince parents that their children will benefit from state institutions. Others have suggested that citizenship is the bond that holds the national community together.³⁹ It provides a shorthand method for distinguishing “us” from “them.” A third benefit is that citizenship promotes assimilation into the national community because naturalization laws typically require applicants to be familiar with the state language, culture, and history.⁴⁰ Finally, derivative citizenship increases the number of people who are loyal to the state, and who therefore have a stake in the state’s welfare.⁴¹ The fact that these derivative citizens are located throughout the world binds them to state culture and interests on a global level. States thus receive considerable value from derivative citizenship.

Parents and children, as noted, similarly receive both practical and normative benefits from derivative citizenship.⁴² One practical benefit is that common citizenship makes it easier for families to travel.⁴³ Families are able to navigate the given advantages and disadvantages of the same set of passports. Another benefit is that the children acquire all the rights and privileges of citizens despite their physical distance from the state, including the right to return to the parents’ state of origin and the right to participate in the

38. Eisgruber, *supra* note 24, at 83.

39. See Legomsky, *supra* note 34, at 292–93; Schauer, *supra* note 34, at 1504–06; Peter Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 14–15 (1989). But see Aleinikoff, *supra* note 34, at 30 (“It is just wishful thinking to suggest that most Americans feel the kinds of obligations to other Americans that we usually associate with ‘community.’”).

40. See Aleinikoff, *supra* note 34, at 28–29; Legomsky, *supra* note 34, at 294–95; Schuck, *supra* note 39, at 13–14 (discussing the “dangers” of a “devalued citizenship”).

41. See Legomsky, *supra* note 34, at 291, 295; Schuck, *supra* note 39, at 14.

42. Derivative citizenship places costs on individuals, just as it does on states. These costs may include compulsory military service and being subject to jurisdiction in one’s home state for crimes committed abroad. See Legomsky, *supra* note 34, at 298. This Note will not address such costs in detail.

43. *Id.* Legomsky argues that international considerations such as these provide the strongest argument for granting citizenship. It is the only way to navigate a world system based on nation-states.

political process.⁴⁴ Children may seek reentry and engage in political participation for a number of cultural, educational, or employment-related reasons, and these rights have undeniable value to them. Citizenship also creates a definite source of protection overseas.⁴⁵ This is especially important when a child is born in a strict *jus sanguinis* state; absent derivative citizenship, that child would be stateless and unable to seek refuge or aid from any embassy.

The primary normative benefit derivative citizenship provides to parents and children is a common background of culture and history.⁴⁶ Citizenship is the public embodiment of the bond between the individual and the state.⁴⁷ That bond is important in any context,⁴⁸ but it is particularly valuable to citizens living abroad. Parents share this bond with their children, regardless of how those children adapt to another culture. Children inherit an identity separate from that of their adopted homeland,⁴⁹ which is especially significant if their new place of residence views them with suspicion or contempt. Taken together, derivative citizenship has significant practical and normative value to states, parents, and children.

Some concrete examples will help crystallize the value and importance of derivative citizenship. Imagine that Congress stopped extending derivative citizenship to the foreign-born children of American citizens. This would deeply affect the state, parents, and their children. The United States, for example, would likely alienate a significant segment of its tax base. According to the Internal Revenue Service 2005 Data Book, the IRS received more than eleven billion dollars from overseas American individuals and corporations during the 2005 fiscal year.⁵⁰ If a significant percentage of American citizens decided to forego overseas employment because their children would not receive derivative citizenship, the federal government would lose a considerable amount of revenue

44. *See id.* at 287.

45. *See id.* at 298.

46. *See id.* at 291. *But see* Schuck, *supra* note 39, at 13–14 (arguing that American citizenship has been “devalued” as non-citizens have gained additional rights and political participation).

47. *See* Legomsky, *supra* note 34, at 291.

48. *See* Aleinikoff, *supra* note 34, at 28.

49. *See* Isaacson, *supra* note 1, at 330 (stating that a purpose of requiring a parent-child relationship is to give the child a connection to the United States).

50. INTERNAL REVENUE SERV., 2005 DATA BOOK 10 (2006), *available at* <http://www.irs.gov/pub/irs-soi/05databk.pdf>.

and perhaps even encounter difficulty in staffing its foreign offices and operations.⁵¹

Parents and children would also be gravely affected. Consider the following situation: two American citizens working in Venezuela have a child who does not automatically become an American citizen because of Congress's revocation of the derivative citizenship statute. The parents continue to work in Venezuela until the child is eighteen and then move the family back to the United States. Upon the family's reaching American territory, the United States Congress declares war on Venezuela. The child, a *jus soli* Venezuelan citizen⁵² but not an American citizen (in the absence of the derivative citizenship statute), could be subject to detention and deportation due to his status as an "alien enemy."⁵³ His potential deportation will also have a significant impact on his citizen-parents: they will be forced to either leave the United States to remain with their child or fragment their family to remain in the United States. These are the types of hardships that the state and citizens would face in the absence of a derivative citizenship statute, and they emphasize precisely why the United States has always provided such a privilege.

C. *The Development of American Derivative Citizenship*

The United States inherited its derivative citizenship tradition from Britain, but the source of Congress's ability to grant it is uncertain. The Constitution famously provides a list of enumerated powers, and the direct authority to grant derivative citizenship is not among them.⁵⁴ It is possible that this power is so closely tied to sovereignty that it was unnecessary to include it in the Constitution.⁵⁵ Indeed, consider the drastic consequences if Congress

51. This assumes, of course, that those who forego foreign employment opportunities could not find employment of greater or equal compensation domestically.

52. OPM CITIZENSHIP LAW REPORT, *supra* note 20, at 213.

53. 50 U.S.C. § 21 (2000) ("Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.").

54. Several possible indirect sources of this power will be explored in Section III, *infra*.

55. *Cf.* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("The power to acquire territory by discovery and occupation, the power to expel

could not grant derivative citizenship: either that power would fall to the individual states, or it would not exist at all. If it fell to the states chaos would ensue, as some individuals would be citizens of an individual state but not of the United States as a whole. This view may have been plausible in 1789, but it is unthinkable and unworkable today. If the power failed to exist at all, the United States, parents, and children would be robbed of the benefits discussed in the previous section.

Determining the source of this power is important because it helps frame the argument against limited review of derivative citizenship statutes. The argument is stronger if Congress's authority derives from the Naturalization Clause because nothing in the Constitution indicates that Clause should be treated any differently from other Article I clauses.⁵⁶ This argument is unavailable, however, if Congress's authority is based on implied foreign affairs powers that do not appear specifically in the Constitution.⁵⁷ Courts have also been more willing to enforce limitations on some of Congress's powers than on others, depending on the source of the power.⁵⁸

It is worth noting that Congress itself has never seemed troubled by its potential lack of authority. It is useful to chart the development of derivative citizenship statutes, since it helps to explain the requirements of the modern provision and illustrates the types of problematic constitutional distinctions that have long been part of the derivative citizenship laws. The First Congress passed the original derivative citizenship statute in 1790.⁵⁹ The statute provided, in pertinent part:

undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality.") (internal citations omitted).

56. *See infra* pp. 484–88.

57. *See generally* *Curtiss-Wright*, 299 U.S. 304 (holding that the federal government has inherent powers that do not appear in the text of the Constitution when dealing with external affairs).

58. *See, e.g.*, Judith Schenck Koffler, 58 N.Y.U. L. REV. 22, 26, 37–40, 77 (1983) (noting that the Supreme Court has adopted different interpretations of "uniformity" in the bankruptcy, naturalization, and taxation clauses of the Constitution); Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1775 (2006) (noting that while the Rehnquist Court curtailed Congress's Commerce Clause and Fourteenth Amendment enforcement powers, it did not curtail Congress's Thirteenth Amendment enforcement powers).

59. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104.

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And the children of Citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: *Provided also*, that no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed.⁶⁰

That statute granted derivative citizenship only if its conditions precedent were met at birth. Congress sought to encourage immigration without swamping the fledgling nation and its delicate republican institutions.⁶¹ The same considerations likely tempered its first derivative citizenship statute. Conditions precedent are still a major part of the modern derivative citizenship statute.⁶² The 1790 statute also created the first distinction between citizen-fathers and citizen-mothers. Although the first clause uses the gender-neutral “Citizens,” the residency requirement limited the ability of citizen-mothers to pass citizenship to their foreign-born children.⁶³ The modern statute allows either parent to pass citizenship, but still draws constitutionally suspect distinctions between citizen-fathers and citizen-mothers, as described in the Introduction to this Note.⁶⁴

Congress amended the statute in 1795 to prohibit anyone legally convicted of having joined the army of Great Britain in the Revolutionary War from receiving citizenship.⁶⁵ Congress passed what proved to be a more substantial amendment in 1802, when it reworked the statute to read: “And the children of persons who now are, or have been citizens of the United States, shall though born

60. *Id.*

61. See FRANK GEORGE FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* 38 (1969).

62. See 8 U.S.C. § 1401(g) (2000).

63. The foreign-born child of a citizen-father and alien-mother would definitely receive derivative citizenship, but the foreign-born child of a citizen-mother and an alien-father would receive derivative citizenship only if the alien-father had been a resident of the United States.

64. Compare 8 U.S.C. § 1401(c) (“[A] person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person.”), with 8 U.S.C. § 1409 (requiring that citizen-fathers with foreign-born children born out of wedlock meet stricter requirements than citizen-mothers). See *supra* pp. 467–68 for the Introduction example.

65. Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415.

out of the limits and jurisdiction of the United States, be considered as citizens of the United States”⁶⁶

Horace Binney, a nineteenth-century immigration attorney, argued that the revised language stripped many citizens of the ability to pass citizenship to their foreign-born children.⁶⁷ Binney focused on the phrase “now are, or have been,” interpreting it to mean that only those who were citizens in 1802 could pass citizenship to their children.⁶⁸ The statute made no provision for any parent who became a citizen *after* 1802.⁶⁹ It seems doubtful that Congress intended this change, especially given that the Democratic majority sought to broaden immigration laws following the party’s victory over the Federalists in the 1800 election and the reduced threat of war with Europe.⁷⁰ Indeed, several authors have questioned Binney’s interpretation.⁷¹ The Supreme Court, nevertheless, cited Binney favorably in the late-nineteenth-century case *United States v. Wong Kim Ark* as expressing the proper interpretation of the 1802 statute.⁷²

Congress amended the statute again in 1855 to unambiguously provide derivative citizenship.⁷³ The same statute also limited its provisions to children “whose fathers were or shall be at the time of their birth citizens of the United States.”⁷⁴ Citizen-mothers were therefore expressly precluded from passing citizenship to their foreign-born children. The reason for this change is not entirely clear from the contemporary record. If the fight to repeal the provision in the 1930s is any indication, however, the debate revolved around the argument that allowing citizen-mothers to pass their citizenship on to their children born overseas would exacerbate the perceived problem of dual citizenship because the children would simultaneously receive the citizenship of their foreign-born fathers.⁷⁵ The

66. Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155.

67. Horace Binney, *The Alienigenae of the United States*, 2 AM. L. REG. 193, 193 (1854).

68. *Id.* at 205–08.

69. *Id.*

70. See FRANKLIN, *supra* note 61, at 106.

71. E.g., 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 93.01[3] (rev. ed. 2007); Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 12 (1968).

72. 169 U.S. 649, 673 (1897).

73. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

74. *Id.*

75. 78 CONG. REC. 7331 (1934). See also CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN 208–09 (1998). Citizen-fathers did not face the same concern because even as late as 1930 only seven states allowed women to pass on citizenship to their children. Thus, in most states, children born to American ex-

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State Department feared that dual citizenship undermined the integrity of United States citizenship and created jurisdictional problems with other countries.⁷⁶ Thus, only citizen-fathers could pass American citizenship to their foreign-born children.

The statute remained unaltered until 1907, when Congress amended it to require that children with derivative citizenship register with the American consulate by age eighteen in order to retain the protection of the United States. These individuals would have to declare their intent to both retain their citizenship and to reside within the United States.⁷⁷ President Theodore Roosevelt spurred the effort to reevaluate immigration law in this period, asking Congress to encourage only immigrants who would make good citizens and to discourage all others, such as anarchists.⁷⁸ Roosevelt was also concerned about the violent reaction to the flow of Japanese labor into California.⁷⁹ This amendment introduced conditions subsequent to derivative citizenship, a feature that remains in the modern statute.⁸⁰

Congress tightened derivative citizenship laws in the 1930s and 1940s in response to concerns about the number of children born overseas who were citizens of the United States but lacked any real connection to the country.⁸¹ Thus, the 1934 amendment introduced a five-year residency requirement for the foreign-born children of one citizen and one alien.⁸² Children had to spend those five years in the United States before their eighteenth birthday and take a loyalty oath within six months of reaching twenty-one.⁸³ The same amendment also restored women's ability to pass citizenship to their children.⁸⁴ In 1940, Congress added a ten-year parental

patriate fathers would become solely American citizens and would not simultaneously adopt the citizenship of their mothers. *Id.* at 208–09 n.32.

76. BREDBENNER, *supra* note 75, at 208–09.

77. Act of Mar. 2, 1907, Pub. L. No. 59–103, § 6, 34 Stat. 1228, 1229. Although nothing in the statute expressly stripped the derivative citizenship of those who failed to meet its requirements, this consequence was implicit in the language.

78. E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 127 (1981). Roosevelt himself was no doubt at least partially motivated by the circumstances of his ascension to the Presidency: his predecessor's assassin was the anarchist son of immigrants and there was a great deal of anti-anarchist popular sentiment. See EDMUND MORRIS, THEODORE REX 8 (2001).

79. MORRIS, *supra* note 78, at 482–84.

80. See 8 U.S.C. § 1409(a) (2000).

81. S. Rep. No. 2150, at 4 (1940).

82. Act of May 24, 1934, Pub. L. No. 73–250, § 1993, 48 Stat. 797, 797.

83. *Id.*

84. *Id.* This provision was motivated by a desire to fully equalize the nationality status of women after the Nineteenth Amendment and the Cable Act in 1922.

residency requirement for the foreign-born children of one citizen and one alien.⁸⁵ Notably, Congress did not create any parallel residency requirements for the foreign-born children of two citizens in either of these statutes. The additional conditions placed on the children of one citizen and one alien endure in the modern statute, along with the many other historical conditions precedent and subsequent discussed in this section.

D. The Modern Statute

Congress passed the Immigration and Naturalization Act (INA) in 1952.⁸⁶ This statute, supplemented by its later amendments, includes many of the aforementioned limitations on and distinctions from derivative citizenship. The statute grants derivative citizenship to three basic groups: the foreign-born children of two citizens, the foreign-born children of a citizen and a national,⁸⁷ and the foreign-born children of one citizen and one alien. The least restrictive requirements fall on the foreign-born children of two citizens: one of their parents must have been a United States resident prior to the birth of the child,⁸⁸ and no length of parental residency is specified. The next-lightest requirements fall on the children of one citizen and one non-citizen national: the citizen-parent must have resided in the United States or its territories for at least one year.⁸⁹ These requirements will rarely prevent a child from receiving derivative citizenship.

The heaviest requirements fall on the foreign-born children of one citizen and one alien.⁹⁰ The citizen-parent must have resided in the United States for at least five years, at least two of them after the age of fourteen.⁹¹ The statute imposes no separate residency requirement for the child, unlike previous derivative citizenship statutes. Several additional requirements apply if the child is born out of wedlock to a citizen-father, but not if he is born out of wed-

78 CONG. REC. 7331 (1934). Many women's rights groups lobbied Congress for years to restore their ability to pass citizenship to their children. BREDBRENNER, *supra* note 75, at 241, 243.

85. Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1139.

86. See 8 U.S.C. § 1401 (2000).

87. The INA defines a "national of the United States" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101(a)(22).

88. See *id.* § 1401(c).

89. See *id.* § 1401(d).

90. The INA defines an "alien" as "any person not a citizen or national of the United States." *Id.* § 1101(a)(3).

91. See *id.* § 1401(g).

lock to a citizen-mother. The statute sets out four conditions: a blood relationship must be established between the father and the child by clear and convincing evidence; the father must be a United States national; the father (unless deceased) must agree in writing to provide financial support for the child until the age of eighteen; and, while the child is under eighteen, the child must be legitimated under the law of the child's residence or domicile, the father must acknowledge paternity of the child in writing under oath, or the paternity of the child must be established by the adjudication of a competent court.⁹² The child will not receive derivative citizenship unless all of the above conditions are met.

These conditions create a number of constitutional problems. First, they draw constitutionally suspect distinctions between aliens and citizens and between citizen-fathers and citizen-mothers. Second, they threaten to revoke citizenship. These distinctions survive under the plenary power doctrine and leave an opening for Congress to provide additional distinctions in the future.⁹³ Yet in order to determine what, if any, constitutional limitations apply to derivative citizenship statutes, it is useful to investigate the constitutional origin of that authority. The particular constitutional origin shapes the argument of how robustly the Supreme Court should review derivative citizenship statutes.⁹⁴

II. CONSTITUTIONAL SOURCES OF AUTHORITY FOR DERIVATIVE CITIZENSHIP

The Constitution, as stated earlier, does not directly grant Congress the authority to provide derivative citizenship to the foreign-born children of American citizens. There are, however, two potential indirect sources: the Naturalization Clause in Article I, and the "Implied Foreign Affairs Powers" recognized by the Supreme Court. Independently of Congress, the Citizenship Clause of the Fourteenth Amendment might also provide a basis for derivative

92. *Id.* § 1409.

93. At the time of this writing, the 110th Congress is considering a bill that seeks to amend the derivative citizenship statute. The Save America Comprehensive Immigration Act of 2007 would soften the requirements of 8 U.S.C. § 1409 and remove the eighteen-year time limit. H.R. 750, 110th Cong. § 301(a)(3) (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h750ih.txt.pdf. While this bill does not create any additional suspect classifications, the option remains open to Congress under the plenary power doctrine.

94. The Supreme Court examined this question in both *Miller* and *Nguyen*. In neither case did the majority arrive at a definite set of conclusions.

citizenship. This section will examine and evaluate the arguments for and against each of these candidates for the source of derivative citizenship authority.

A. *The Naturalization Clause*

One potential constitutional foundation for Congress's authority to grant derivative citizenship is the Naturalization Clause, which empowers Congress to "establish an uniform Rule for Naturalization."⁹⁵ This construction requires that derivative citizenship be considered a form of naturalization. The Naturalization Clause theory ultimately fails precisely because it is difficult to classify derivative citizenship, generally an automatic birthright and not an elective administrative procedure, as a form of naturalization.⁹⁶ Importantly, this implies that derivative citizenship statutes should not receive the same level of deference typically accorded to naturalization statutes.

The Supreme Court endorsed this reading of the Naturalization Clause in *United States v. Wong Kim Ark*, in which it determined the citizenship status of a man of Chinese descent born in the United States to Chinese immigrants.⁹⁷ The government argued that the Fourteenth Amendment did not provide citizenship when a child's parents were ineligible for naturalization.⁹⁸ The Court held that the plain language of the Fourteenth Amendment included Wong Kim Ark within its grant of citizenship.⁹⁹ The Court went on to write:

But [the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.¹⁰⁰

The Fourteenth Amendment thus embraced anyone born within the boundaries of the United States, but not anyone eligible for

95. U.S. CONST., art. I, § 8, cl. 4.

96. *Rogers v. Bellei*, 401 U.S. 815, 827–31 (1971).

97. 169 U.S. 649, 701–02 (1898).

98. Chinese nationals were ineligible for naturalization from 1870 until the passage of the Magnuson Act in 1943. See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 415 (2005).

99. 169 U.S. at 702 (“[C]itizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.”).

100. *Id.* at 688.

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derivative citizenship. Citizenship in the latter case was strictly statutory and subject to congressional design, not granted directly by constitutional mandate. Although this statement was dictum, the Supreme Court clearly believed that Congress's authority to grant derivative citizenship resided in the Naturalization Clause.

The *Wong Kim Ark* interpretation received recent support in the concurring opinion by Justice Scalia in *Miller v. Albright*.¹⁰¹ The case addressed the constitutionality of the additional 8 U.S.C. § 1409 requirements relating to children born out of wedlock to citizen-fathers.¹⁰² Specifically, the petitioners claimed that these requirements violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰³ The Court's plurality opinion held that the statute would satisfy even heightened scrutiny.¹⁰⁴ Justice Scalia, joined by Justice Thomas, concurred on the premise that the Supreme Court could not grant relief—namely, award United States citizenship—and thus did not have jurisdiction over the case.¹⁰⁵ He argued that only Congress could award citizenship to those not included in the Fourteenth Amendment.¹⁰⁶ In reaching this conclusion, Justice Scalia described Congress's derivative citizenship power as among its Naturalization Clause powers.¹⁰⁷ He cited no authority to support this assertion and failed to explain how derivative citizenship operated as a form of "naturalization." Nevertheless, at least two members of the modern Court continue to support the premise that Congress derives its authority from the Naturalization Clause.

The original derivative citizenship statute also provides support for this argument. The original Congress passed the act in 1790 under the heading: "An Act to establish an uniform Rule of Naturalization."¹⁰⁸ This heading strongly suggests Congress believed derivative citizenship was a form of naturalization.¹⁰⁹ It is true that

101. 523 U.S. 420, 453 (1998) (Scalia, J., concurring) (stating that petitioners' case must be dismissed because the only sources of citizenship are birth and naturalization, and naturalization is under the authority of Congress, not the Court).

102. See 8 U.S.C. § 1409(a) (2000).

103. 523 U.S. at 426.

104. *Id.* at 435 n.11 ("Even if, as petitioner and her *amici* argue, the heightened scrutiny that normally governs gender discrimination claims applied in this context, we are persuaded that the requirement imposed by § 1409(a)(4) on children of unmarried male, but not female, citizens is substantially related to important governmental objectives.") (citations omitted).

105. *Id.* at 452–53 (Scalia, J., concurring).

106. *Id.* (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702–03 (1898)).

107. *Id.* at 453 ("Here it is the 'authority of Congress' that is appealed to—its power under Art. I, § 8, cl. 4, to 'establish an uniform Rule of Naturalization.'").

108. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103.

109. See *Rogers v. Bellei*, 401 U.S. 815, 840 (1971) (Black, J., dissenting).

the titles of acts do not typically carry great persuasive power,¹¹⁰ but it is reasonable to assume that if this original Congress—the one closest to the ratification of the Constitution—understood the Naturalization Clause to include the authority to grant derivative citizenship, then the Framers understood it the same way. Indeed, twenty of the seventy-nine members of the original Congress had been delegates to the Constitutional Convention.¹¹¹ According to this line of analysis, derivative citizenship is a form of naturalization and covered by the clause.

Yet this interpretation seems to stretch the general understanding of the term “naturalization.” Naturalization typically involves an alien who elects to become a citizen after moving to a new state. Derivative citizenship, in contrast, is generally granted automatically at birth. There is a stark difference between choosing and inheriting citizenship. Congress itself seems to recognize this difference in the Immigration and Naturalization Act. The definition section provides: “The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever.”¹¹² Thus, Congress has indicated in at least one context that naturalization does not include granting citizenship at birth, the most common method of conferring derivative citizenship. This suggests that derivative citizenship does not fall within the Naturalization Clause.

Justice Breyer addressed this same argument in his *Miller* dissent. He first noted that Congress created the aforementioned distinction in the INA’s definition section, and later concluded: “In sum, the statutes that automatically transfer American citizenship from parent to child ‘at birth’ differ significantly from those that confer citizenship on those who originally owed loyalty to a different nation.”¹¹³

Derivative citizenship was distinct from naturalized citizenship; it was an original citizenship rather than an adopted one. This distinction had important consequences for Justice Breyer because it

110. See *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (“The title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] sheds light on some ambiguous word or phrase.”) (quoting *Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947)).

111. Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 894 n.75 (1988).

112. 8 U.S.C. § 1101(a)(23) (2000).

113. *Miller v. Albright*, 523 U.S. 420, 481 (1998) (Breyer, J., dissenting).

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opened derivative citizenship laws to full constitutional scrutiny.¹¹⁴ Naturalization laws received deference, and if derivative citizenship did not fit into that category then it had to be reviewed with the same scrutiny as any other law. This would place much stronger limitations on Congress's ability to legislate derivative citizenship.

Justice O'Connor also drew on this distinction while dissenting in *Nguyen v. INS*,¹¹⁵ a case that involved essentially the same legal questions as *Miller*. Responding to the argument that the Supreme Court was unable to grant citizenship even if the plaintiff succeeded on the merits, Justice O'Connor noted that the relevant statute applied only to citizens who were "naturalized."¹¹⁶ Since the INA defined "naturalization" as the transmission of citizenship *after* birth, and derivative citizenship transmitted citizenship *at* birth, derivative citizenship was not a form of naturalization and the Supreme Court could fashion a remedy.¹¹⁷ The conversation between Justices Breyer and Scalia in *Miller*, and the later contribution by Justice O'Connor, illustrates the awkwardness of the relationship between derivative citizenship and the Naturalization Clause.

Further evidence that derivative citizenship does not, at the very least, fit neatly into the Naturalization Clause comes from the Presidential Qualification Clause of the Constitution. That clause provides:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been Fourteen Years a Resident within the United States.¹¹⁸

114. *Id.* ("To fail to recognize [that statutes that transfer citizenship 'at birth' differ significantly from those that grant citizenship to those who originally owed loyalty to another nation], and consequently to apply an unusually lenient constitutional standard of review here, could deprive the children of millions of Americans . . . of the most basic kind of constitutional protection. Thus, generally prevailing, not specially lenient, standards of review must apply.") (citations omitted). Justice Breyer did not suggest an alternative source for Congress's ability to create derivative citizenship laws, but contended that the Supreme Court had never held that statutes granting citizenship "at birth" had been subject to a more lenient standard of review. *Id.*

115. 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting).

116. *Id.* at 95.

117. *Id.* ("Section 1421(d) governs only naturalization, which the statute defines as 'the conferring of nationality of a state upon a person after birth,' whereas §§ 1401(g) and 1409 deal with the transmission of citizenship at birth.") (citations omitted).

118. U.S. CONST., art. II, § 1, cl. 5.

This clause makes clear that uncontroversially “naturalized” citizens—those who elect to become American citizens but who have no previous connection to the United States—are ineligible for the Presidency, as they are neither “natural born” nor a citizen at the time of the adoption of the Constitution. The clause is more ambiguous about derivative citizens, even if they are covered by the Naturalization Clause, because their eligibility hinges on the definition of “natural born.”¹¹⁹ Derivative citizens should be considered “natural born” because their citizenship passes to them at birth, just as it does to nearly everyone born in the United States.¹²⁰ This seems especially true given that the Revolution-era British term “natural born subject,” the likely source of the constitutional phrase, included both those born in Britain and those born overseas to British parents.¹²¹ Further, as a practical matter, courts would likely follow this interpretation rather than void the candidacy of a derivative citizen selected as a party candidate by popular vote.¹²² Thus, the evidence strongly suggests that derivative citizens are “natural born” citizens under the Presidential Qualifications Clause, marking another distinction between derivative citizenship and traditional naturalized citizenship. Derivative citizenship simply does not fit comfortably within the Naturalization Clause.

B. *The Implied Foreign Affairs Power*

Another constitutional source that may provide Congress with the authority to grant birthright citizenship is the foreign affairs power. The Constitution grants Congress several specific foreign affairs powers (such as the power to declare war and regulate foreign commerce), and others may be implied from Congress’s sover-

119. See Sarah Helene Duggin & Mary Beth Collins, *Natural Born in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualification Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 89–108 (2005); Gordon, *supra* note 71, at 2.

120. See Gordon, *supra* note 71, at 3. Gordon notes, however, that the clause could also be read to apply solely to the non-natural born who were citizens at the time the Constitution was adopted. He also notes this would be a very narrow reading. *Id.*

121. See Duggin & Collins, *supra* note 119, at 74 (quoting Gordon, *supra* note 71, at 7–8). Duggin and Collins note, however, that a brief submitted to Congress for its inquiry into the 1968 presidential candidacy of George Romney, born to American parents in Mexico, determined that “natural born subjects” included only those born in Britain. Those born outside Britain to British citizens gained their citizenship by statute. *Id.* at 7.

122. See Duggin & Collins, *supra* note 119, at 124–25; Gordon, *supra* note 71, at 22.

eign responsibilities.¹²³ James Madison, in fact, contended that Congress had plenary power over foreign affairs except where the Constitution granted authority to the President.¹²⁴ While constitutional practice has not borne out Madison's claim and the Executive has assumed an increasingly large role in handling foreign affairs,¹²⁵ Congress has determined the scope and requirements of derivative citizenship since the earliest days of the Republic. This construction of Congress's authority requires that derivative citizenship qualify as an expression of the foreign affairs power. It is a fair construction, given the connection between derivative citizenship and foreign relations, and the foreign affairs power is thus the most likely source of Congress's power to grant derivative citizenship.

The Supreme Court's most detailed discussion of the foreign affairs powers appears in *United States v. Curtiss-Wright Export Corp.*¹²⁶ The Court contended that the Constitution limits Congress to its enumerated powers only in the context of internal affairs.¹²⁷ External affairs are not so limited because the individual states never possessed foreign affairs powers; these had passed directly from Great Britain to the collective states after independence.¹²⁸ Congress thus inherited several non-enumerated foreign-affairs powers from Great Britain exclusive of the Constitution.¹²⁹

Invocation of Congress's inherent foreign affairs authority is a long-standing feature of immigration law.¹³⁰ This is probably because the language of the Naturalization Clause is narrow, which makes it a poor source for the type of broad authority Congress requires to address the full spectrum of immigration issues.¹³¹ Ger-

123. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 76–80 (2d ed. 1996).

124. *Id.* at 77–78.

125. *Id.* at 79–80.

126. 299 U.S. 304 (1936).

127. *Id.* at 315–16 (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”).

128. *Id.* at 316 (“[T]he powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”).

129. *Id.* at 317. The Court noted, as examples, that Congress would have had the ability to declare war and ratify treaties even if these powers were not enumerated in the Constitution. *Id.* at 318.

130. See *infra* pp. 490–91 for discussion of nineteenth-century decisions in the *Chinese Exclusion Cases* and *Fong Yue Ting*.

131. See section A of this Part, *supra*, for discussion of the Naturalization Clause.

ald Neuman has written that this very robust conception of Congress's role in immigration law did not appear until after the Civil War, largely because of its potential effect on slave states.¹³² Slave states were concerned that federal control of the borders would compel them to admit free blacks, whom they feared would foster slave rebellions; hence, the states fought hard against any such legislation.¹³³ The end of the Civil War extinguished this concern, and Congress began to respond to perceived problems of unfit immigrants and unfair immigrant labor practices at the national level.¹³⁴ These and other policies were also driven by increased support for American expansionism and corresponding views of racial superiority.¹³⁵ The Supreme Court generally endorsed these broad expressions of congressional power, and two primary post-Civil War "inherent powers" decisions serve as the foundation for this line of extra-constitutional authority.¹³⁶

The first is the *Chinese Exclusion Cases*,¹³⁷ in which Chinese migrants challenged a statute that denied their reentry into the United States in direct contravention of an existing treaty between the United States and China. The Court held that treaties were equivalent to statutes, and that the most recent governmental expression controlled the dispute.¹³⁸ It then held that Congress had authority to pass the statute, writing: "The United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."¹³⁹ Building on this extraordinary grant of authority, the Supreme Court also contended that nearly all other considerations yielded to preserving national independence, security against for-

132. Gerald Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1866 (1993).

133. *Id.* at 1867–68.

134. 1 GORDON ET AL., *supra* note 71, § 2.02[3].

135. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 261–62 (2002).

136. *Id.* at 263.

137. 130 U.S. 581 (1889).

138. *Id.* at 600.

139. *Id.* at 604.

eign aggression, or encroachment.¹⁴⁰ The implied power of exclusion was thus considerable.

The Supreme Court built on this reasoning in *Fong Yue Ting v. United States*,¹⁴¹ which addressed alien deportation proceedings. Congress had passed a statute requiring all Chinese residents to obtain residency certificates proving they had arrived legally in the United States before passage of the then-recent Chinese Exclusion Act.¹⁴² Those who did not obtain the residency certificate would be subject to deportation.¹⁴³ The Court quoted the sweeping language of inherent sovereignty extensively in reaching the conclusion that:

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.¹⁴⁴

Over several angry dissents, the Supreme Court again described Congress's foreign affairs power over immigration in broad terms and set the tone for the long line of cases that followed.¹⁴⁵ Most noteworthy among the dissents was that of Justice Field, who wrote the majority opinion in the *Chinese Exclusion Cases*.¹⁴⁶ Field drew a distinction between excluding aliens at the border and deporting them following entry into the United States.¹⁴⁷ He argued that properly admitted aliens deserved protection under the Constitution,¹⁴⁸ and that it was dangerous to allow Congress to indiscriminately deport friendly aliens in peacetime because the practice could lead to even more despotic powers in the future.¹⁴⁹ Never-

140. *Id.* at 606 ("To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.").

141. 149 U.S. 698 (1892).

142. *Id.* at 726–28.

143. *Id.* at 728–29.

144. *Id.* at 707.

145. Important subsequent cases include *Mathews v. Diaz*, 426 U.S. 67 (1976), and *Fiallo v. Bell*, 430 U.S. 787 (1977).

146. *Fong Yue Ting*, 149 U.S. at 744 (Field, J., dissenting).

147. *Id.* at 746.

148. *Id.* at 749.

149. *Id.* at 760–61 ("I cannot but regard the decision as a blow against constitutional liberty, when it declares that Congress has the right to disregard the guaranties of the Constitution intended for the protection of all men, domiciled in this country with the consent of the government, in their rights of person and property.").

theless, Justice Field's warnings failed to persuade a majority of the Court, and the broad grant of power to Congress stood.

Given the Supreme Court's broad interpretation of Congress's foreign affairs power—particularly in the realm of immigration affairs—a reasonable argument might posit that the foreign affairs power provides Congress the authority to grant derivative citizenship.¹⁵⁰ Congress has the ability to determine who may enter the United States.¹⁵¹ It follows that Congress must also be able to determine the status of individuals prior to entry. Congress may admit people as citizens, alien residents, or visitors, and may set the proper criteria for distinguishing among these categories.¹⁵² Granting automatic citizenship to foreign-born children of citizens who meet the specified criteria is entirely consistent with this power.¹⁵³ The fact that the Constitution does not grant Congress express authority is immaterial because this is an “external” affair and, under *Curtiss-Wright*, Congress is not limited to its enumerated powers when dealing with external affairs.¹⁵⁴ Thus, derivative citizenship falls within Congress's implied foreign affairs power.

Yet this argument has its weaknesses. Derivative citizenship may also be characterized as an “internal” affair. Citizenship itself is more fundamental than merely determining the status of those who enter the United States; it determines membership among the sovereign people and who may participate in governing the United States.¹⁵⁵ Derivative citizenship is thus an “internal” affair and, according to *Curtiss-Wright*, Congress is limited to its enumerated powers. If no enumerated power grants Congress the authority to issue derivative citizenship, then Congress simply cannot provide it. This argument illustrates how even Congress's expansive foreign affairs power is an imperfect source of authority for derivative citizenship. Nevertheless, its expansive nature makes it a better source than the Naturalization Clause. It is an imperfect fit, but it is the best of the available options.

150. See *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898) (“Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.”).

151. See *Chinese Exclusion Cases*, 130 U.S. 581, 604 (1889) (“If [Congress] could not exclude aliens it would be to that extent subject to the control of another power.”).

152. See *Wong Kim Ark*, 169 U.S. at 668.

153. *Id.*

154. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936).

155. See Legomsky, *supra* note 34, at 287.

C. The Fourteenth Amendment Citizenship Clause

A final potential constitutional foundation for derivative citizenship is the Citizenship Clause of the Fourteenth Amendment. That Clause provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹⁵⁶ This clause does not specifically grant Congress the authority to create derivative citizenship, but Congress can still influence the application of the clause through its ability to create naturalization laws. A generous reading of this Clause allows derivative citizenship to fall within its scope. This reading requires two key assumptions: first, that derivative citizenship is a form of naturalization¹⁵⁷ and second, that foreign-born children are naturalized “in” the United States. The Supreme Court, however, interpreted the Citizenship Clause narrowly in *Rogers v. Bellei* and rejected the argument that derivative citizenship fell within its meaning.¹⁵⁸ If derivative citizenship had fallen within the Citizenship Clause, it would have become a direct constitutional right and Congress would be much more restricted in its regulatory ability.

Justice Black, in his *Bellei* dissent, argued forcefully that the Citizenship Clause included derivative citizenship.¹⁵⁹ The *Bellei* case involved a foreign-born man with a citizen-parent and an alien-parent.¹⁶⁰ *Bellei* had failed to meet a statutory residency requirement and had forfeited his United States citizenship as a result.¹⁶¹ If he could demonstrate that the Fourteenth Amendment contained derivative citizenship, he would automatically become an American citizen, and his failure to meet the residency requirement would be immaterial. Justice Black first argued that derivative citizenship was a form of naturalization—in order to satisfy the first prong of the Citizenship Clause—and made familiar citations to both *Wong Kim Ark* and the initial 1790 derivative citizenship statute.¹⁶² He then

156. U. S. CONST., amend. XIV, § 1.

157. See section A of this Part, *supra*, for arguments in support of and against recognizing derivative citizenship as a form of naturalization.

158. 401 U.S. 815, 827–32 (1971).

159. *Id.* at 836 (Black, J., dissenting).

160. *Id.* at 817 (majority opinion).

161. Under the derivative citizenship statute in effect in 1971, the foreign-born child of a United States citizen and an alien received United States citizenship at birth, but had to reside in the United States for at least five years prior to reaching eighteen in order to maintain it.

162. 401 U.S. at 840–41 (Black, J., dissenting). Since *Bellei* was not “born” in the United States, he would have to show that he was “naturalized” in the United States to qualify for citizenship under the Fourteenth Amendment. *Id.*

argued for a broad interpretation of the word “in” within the Citizenship Clause:

[O]ne can become a citizen of this country by being born *within* it or by being naturalized *into* it. This interpretation is supported by the legislative history of that Citizenship Clause. That clause was added in the Senate rather late in the debates on the Fourteenth Amendment and as originally introduced its reference was to all those “born in the United States or *naturalized by the laws thereof*.” The final version of the Citizenship Clause was undoubtedly intended to have this same scope.¹⁶³

Thus, in Black’s view, the foreign-born children of American citizens were “naturalized into” the United States and qualified for citizenship under the Fourteenth Amendment.

Justice Black dissented alone, however, and the majority took an equally plausible (and more literal) approach to the Citizenship Clause. The Court held that:

[Bellei] was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence-citizen.¹⁶⁴

The Court’s opinion thus focused on Bellei’s location outside the United States and avoided the question of whether derivative citizenship was a form of naturalization. The Fourteenth Amendment cannot serve as the source of derivative citizenship under this interpretation.

If the Citizenship Clause were in fact the source of derivative citizenship, it would have significant consequences for Congress’s powers in that area. This is because derivative citizenship would be an expressly constitutional right and not a statutory right as it would be under either the Naturalization Clause or the foreign affairs power. An individual’s constitutional citizenship, according to the Supreme Court in *Afroyim v. Rusk*, cannot be rescinded by an act of Congress against the citizen’s will.¹⁶⁵ *Afroyim* involved a statute that revoked citizenship if an individual voted in a foreign election.¹⁶⁶ The Court struck down the statute, holding that the Fourteenth Amendment prevented Congress from involuntarily removing citi-

163. *Id.* at 843 (citations omitted).

164. *Id.* at 827 (majority opinion).

165. 387 U.S. 253 (1967).

166. *Id.* at 254.

zenship once it had been granted.¹⁶⁷ Thus, if the Fourteenth Amendment included derivative citizenship, Congress could not impose conditions subsequent that would revoke such citizenship. Congress could still place conditions precedent on derivative citizenship as part of the process of naturalization. This makes the Citizenship Clause unique; neither the Naturalization Clause nor the implied foreign affairs powers would necessarily require a prohibition on conditions subsequent. Nevertheless, the *Bellei* decision clearly precludes identifying the Fourteenth Amendment as the source of Congress's ability to grant derivative citizenship. The foreign affairs power remains the strongest foundation for congressional power to grant derivative citizenship.

III. CONSTITUTIONAL LIMITATIONS ON CONGRESSIONAL POWER OVER DERIVATIVE CITIZENSHIP

Assuming that Congress does have the power to pass derivative citizenship laws, the corollary question is whether the Constitution limits that power. Traditionally, the Supreme Court has engaged in minimal, if any, review of immigration laws as a result of its plenary power doctrine. Subsection A will define this doctrine and explore the arguments in favor of its continued application. Subsection B will discuss four recent Supreme Court cases that suggest the Court may be prepared to reevaluate the plenary power doctrine. Finally, Subsection C will argue that the Supreme Court should abandon the plenary power doctrine by refuting its alleged justifications. Applying the standard level of review to derivative citizenship and other areas of immigration law would prevent Congress from denying important rights and privileges, such as derivative citizenship, on the basis of unconstitutional laws. The plenary power doctrine is a fossil of the nineteenth century and should be abandoned to bring immigration law into the modern constitutional fold.

A. *Traditional Review of Immigration Laws*

The Supreme Court typically declines to seriously review immigration matters—including derivative citizenship—because of the

167. *Id.* at 268 (“We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race.”).

plenary power doctrine.¹⁶⁸ The doctrine's chief premise is that Congress has more complete control over immigration law than over any other subject.¹⁶⁹ It is a "doctrine, under which the Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints."¹⁷⁰ The Supreme Court denied any ability to review such legislation in the earliest years of the plenary power doctrine but has since applied a weak form of review.¹⁷¹ This limited review typically allows the Court to uphold nearly all federal immigration legislation. Why is such extraordinary deference appropriate?

Cornelia Pillard and Alexander Aleinikoff have provided an excellent study of the rationale behind the plenary power doctrine.¹⁷² They suggest two possible reasons for the Supreme Court's deferential attitude toward Congress on immigration matters. First, the Constitution provides different "substantive norms" when dealing with questions of naturalization and foreign affairs.¹⁷³ Essentially, this means that the usual constitutional rules do not apply to immigration law, and laws that would be unconstitutional in other contexts will be upheld if passed in the immigration context.¹⁷⁴ Second, the Supreme Court engages in deference for institutional reasons.¹⁷⁵ Pillard and Aleinikoff break these institutional justifications into two subcategories: judicial deference is either mandated by the Constitution, or it is simply wise for the Supreme Court to invoke judicial restraint. Each of these major rationales for the plenary power doctrine will be discussed in turn.

The practice of applying different "substantive norms" dates to two nineteenth-century, decisions discussed earlier in this Note:

168. See, e.g., NEUMAN, *supra* note 26, at 118–38; Legomsky, *supra* note 6 at 255; Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

169. Legomsky, *supra* note 6, at 255.

170. *Id.*

171. *Id.* at 257 nn.9 & 12 (comparing *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893), with *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

172. Cornelia Pillard & Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (1998).

173. *Id.* at 34.

174. Compare *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down state laws that deny welfare benefits to aliens who do not meet certain criteria on the grounds they violate the Equal Protection Clause of the Fourteenth Amendment), with *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding federal law that denies welfare benefits to aliens who do not meet certain criteria).

175. See *Mathews*, 426 U.S. at 81–82.

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Chinese Exclusion Cases and *Fong Yue Ting v. United States*.¹⁷⁶ Both cases, as noted, rely heavily on the philosophy of inherent sovereignty regarding foreign affairs. The strongest statement that this sovereignty leads to different constitutional norms appears in the *Chinese Exclusion Cases*, in which the Court wrote: “[Sovereign powers] cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.”¹⁷⁷ Similar language appears even in relatively recent Supreme Court cases.¹⁷⁸ Perhaps the most famous expression appears in *Mathews v. Diaz*, a case in which an alien challenged his exclusion from the Federal Medicare program.¹⁷⁹ A unanimous Court held: “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹⁸⁰ Thus, the Constitution arguably provides different “substantive norms” for questions involving immigration and the rights of aliens.

Pillard and Aleinikoff also recognize that there are institutional reasons for adhering to the plenary power doctrine.¹⁸¹ Although they do not explore these reasons, Martin Redish has provided careful analysis in the context of the political question doctrine.¹⁸² His analysis is relevant, as several authors have identified the plenary power doctrine as a variant of the political question doctrine.¹⁸³ Redish delves into the academic debate and identifies one constitutionally mandated reason and four institutionally mandated reasons for declining serious review of the political branches.¹⁸⁴ Courts are mandated by the Constitution to decline review when power is specifically committed to one or both remaining branches.¹⁸⁵ For example, day-to-day conduct of foreign affairs

176. See *supra* pp. 490–91.

177. *Chinese Exclusion Cases*, 130 U.S. 581, 609 (1889).

178. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 787 (1977); *Mathews*, 426 U.S. at 78–79.

179. 426 U.S. at 79–80.

180. *Id.*

181. Pillard & Aleinikoff, *supra* note 172, at 34.

182. Martin Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031 (1985).

183. See, e.g., Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 350 (2002) (citing THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 54–55 (1992)).

184. Redish, *supra* note 182, at 1039–40, 1043–44.

185. *Id.* at 1039 (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976)).

is generally regarded as the sole power of the executive.¹⁸⁶ The role of the courts in such cases is to determine *whether* a political branch has the power to act, not *how* it should act.¹⁸⁷ Courts must decline further review once they determine that a political branch has the power to act.

Courts should decline review for institutional reasons under four circumstances. First, they should decline review when they are unable to develop general principles and rules of construction to resolve a dispute.¹⁸⁸ If courts cannot fashion a framework for resolution, then they should avoid the issue entirely. Second, courts should decline review because of their lack of capacity to revisit political-branch decisions.¹⁸⁹ The courts do not have the same level of information or expertise as the political branches and may embarrass themselves by trying to correct them. Third, courts should decline review because they must exercise restraint given their undemocratic nature.¹⁹⁰ Federal judges are not elected, and they should respect the people's representatives in the political branches.¹⁹¹ Finally, courts should show restraint so that the political branches will adhere to their rulings.¹⁹² The courts lose prestige when their rulings are dismissed, and it is best they select their battles wisely. These justifications capture the basic institutional reasons supporting the plenary power doctrine.

There is also a strong stare decisis argument in favor of maintaining the plenary power doctrine. Justice Powell described the argument in favor of stare decisis as having three prongs: it made a judge's work easier to avoid revising an issue; it enhanced stability in the law and allowed various actors to shape their behavior accordingly; and it fostered public legitimacy when the courts gave

186. Redish, *supra* note 182, at 1039–40. Note that Redish uses the phrase “day-to-day conduct” of foreign affairs, and does not mention overall policy formation.

187. *Id.* at 1039.

188. *Id.* at 1046.

189. *Id.* at 1050–51.

190. *Id.* at 1045.

191. *See, e.g.,* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 474 (1982) (“[Repeated] and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.” (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974)) (Powell, J., concurring)).

192. Redish, *supra* note 182, at 1053.

weight to their own previous rulings.¹⁹³ These factors carry significant weight when applied to the plenary power doctrine. Plenary power is not some recent judicial construct, but a doctrine that has endured with support for more than a century, dating back to the *Chinese Exclusion Cases*. Even fairly recent cases like *Fiallo v. Bell* apply the same basic principles set out in those early decisions. Courts must continue to apply the plenary power doctrine to enhance their standing and maintain stability in the law.

For some or all of these reasons—different substantive constitutional norms, institutional deference, and stare decisis—the plenary power doctrine is appropriate and the Supreme Court should continue to decline review on immigration matters like derivative citizenship.

B. Is the Supreme Court Moving Away from Plenary Power?

Despite the arguments in favor of the plenary power doctrine, the Supreme Court has given some indication that it is willing to reconsider its approach to immigration laws like derivative citizenship. This subsection will address four recent Supreme Court cases: *Miller v. Albright*,¹⁹⁴ *Nguyen v. INS*,¹⁹⁵ *Zadvydas v. Davis*,¹⁹⁶ and *Demore v. Kim*.¹⁹⁷ *Miller* and *Nguyen* both involved direct challenges to the derivative citizenship statute, and although both decisions upheld the statute, the Court engaged in substantive review. The Court in *Zadvydas*, which involved the indefinite detention of an alien, also engaged in substantive review and signaled that the plenary power doctrine may collapse in other areas of immigration law. In *Demore*, however, which was decided after September 11, 2001, the Court returned to limited review of immigration laws. The future of the plenary power doctrine is thus uncertain.

Miller v. Albright, discussed *supra*, is a case in which a Filipino woman challenged the derivative citizenship provisions relating to the foreign-born illegitimate children of citizen-fathers.¹⁹⁸ The case is notable because, for the first time, a majority of the Justices seemed willing to apply heightened scrutiny to a congressional im-

193. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, available at http://www.supremecourthistory.org/04_library/subs_volumes/04_c09_g.html.

194. 523 U.S. 420 (1998).

195. 533 U.S. 53 (2001).

196. 533 U.S. 678 (2001).

197. 538 U.S. 510 (2003).

198. See *supra* pp. 485–87.

migration statute.¹⁹⁹ Only Justices Scalia and Thomas sought to uphold traditional deference.²⁰⁰ The Supreme Court could have struck down the plenary power doctrine in *Miller* had the issue of standing not splintered the Justices.²⁰¹ Many scholars argued that the Supreme Court would apply heightened scrutiny the next time it had the opportunity to do so.²⁰²

The Supreme Court decided *Nguyen v. INS* three years later.²⁰³ *Nguyen* involved the same provision as *Miller* but was not crippled by the issue of standing. Nguyen, born in Vietnam but reared in the United States since childhood, was subject to deportation because his father had not complied with the derivative citizenship requirements that applied to the illegitimate children of citizen-fathers and alien-mothers.²⁰⁴ These same requirements did not apply to citizen-mothers and alien-fathers, and Nguyen argued they were an unconstitutional violation of equal protection.²⁰⁵ The Supreme Court, however, refused to strike down the law or expressly hold that heightened scrutiny applied.²⁰⁶ Rather, the majority held that the statute satisfied heightened scrutiny even if it did apply.²⁰⁷ Justice O'Connor, in a scathing dissent, argued that heightened scrutiny should apply, and that this statute could not satisfy that standard so long as sex-neutral alternatives existed.²⁰⁸ Thus, although the Supreme Court did not formally abandon the plenary power doctrine, neither did it formally endorse it.

Another case, decided the same year as *Nguyen*, suggested that the Supreme Court was prepared to reevaluate the plenary power doctrine elsewhere in immigration law. *Zadvydas v. Davis*²⁰⁹ in-

199. Pillard & Aleinikoff, *supra* note 172, at 18.

200. *Miller v. Albright*, 523 U.S. 420, 452–53 (1998) (Scalia, J., concurring).

201. Miller's father was not a party in the lawsuit. Justice Breyer, in his dissent, noted that although he disagreed with Justice O'Connor's conclusion that Miller could not assert her father's equal protection rights, he agreed with Justice O'Connor's belief that the statute would not survive heightened scrutiny: "a view shared by at least five members of this Court." *Id.* at 475–76 (Breyer, J., dissenting).

202. See, e.g., *id.* at 476; *The Supreme Court 1997 Term*, 112 HARV. L. REV. 202, 212 (1998).

203. 533 U.S. 53 (2001).

204. *Id.* at 56–57.

205. *Id.* at 58.

206. *Id.* at 61.

207. *Id.*

208. *Id.* at 74, 82 (O'Connor, J., dissenting). Justice O'Connor did not squarely address the plenary power doctrine in her dissent, instead framing the case solely in terms of an unconstitutional sex-based distinction.

209. 533 U.S. 678 (2001).

volved an alien held indefinitely as immigration authorities sought to remove him from the United States. The Court, reading the relevant statute to avoid constitutional concerns, concluded that it limited post-removal detention to a period “reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.”²¹⁰ Several scholars read the case—which touched upon a central area of immigration law—as making another dent in the plenary power armor.²¹¹ These same scholars, though, expressed concern that the reaction to the September 11 terrorist attacks would dampen the impact of *Zadvydas* and allow the plenary power doctrine to survive.²¹²

These concerns came to pass in *Demore v. Kim*, in which an alien challenged his mandatory detention prior to removal from the United States.²¹³ The alien argued that the lack of any individualized finding that he was a flight risk or posed a threat to the community violated his due process rights.²¹⁴ The Supreme Court held that Congress could require the brief detention of aliens subject to removal proceedings.²¹⁵ The Court distinguished *Zadvydas* as involving an alien who could not be removed from the United States and who was therefore subject to indefinite detention.²¹⁶ Kim was actually in the process of being deported, and therefore the Constitution permitted his detention.²¹⁷ Given the conflicting priorities of *Zadvydas* and *Kim*, it remains to be seen whether these recent decisions signal a new path for immigration law or merely a brief detour.

C. *Rebutting Substantive Norms and Institutional Deference*

The Supreme Court should continue down the path of *Miller*, *Nguyen*, and *Zadvydas* because there are strong arguments against applying the plenary power doctrine to derivative citizenship statutes and to many other areas of immigration law. This is true re-

210. *Id.* at 689.

211. See, e.g., Spiro, *supra* note 183. But see Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 365–67 (2002) (arguing that the decision continued to draw a line between those who entered the United States and those who hadn’t, did not guarantee future judicial review, and was unlikely to maintain its impact in light of the September 11, 2001, attacks).

212. See Aleinikoff, *supra* note 211; Spiro, *supra* note 183, at 357–58.

213. 538 U.S. 510 (2003).

214. *Id.* at 514.

215. *Id.* at 513.

216. *Id.* at 527.

217. *Id.* at 527–28.

ardless of whether the plenary power doctrine originates in differing “substantive norms,” institutional deference, stare decisis, or some combination of the three. This subsection will argue against each aforementioned plenary power justification in turn and demonstrate that many areas of immigration law should receive full constitutional review. This review will ensure that Congress cannot pass abusive statutes and will protect important individual rights.

There are several reasons the Constitution does not apply different “substantive norms” to aliens and immigration law. The first is that such a distinction would violate the fundamental principles of the Constitution.²¹⁸ Aliens would have to meet all of the typical burdens and obligations of society but would receive few guarantees from the federal government in return. This is especially true when one considers that individual rights play a much larger role, and receive much more protection, today than they did in the nineteenth century.²¹⁹ Therefore, it is inappropriate for the Supreme Court to invoke the plenary power doctrine at the expense of individual rights. Aliens should receive the same constitutional rights and protections as other individuals.

The second reason is that the more recent Supreme Court decisions may be read as refusing to apply stricter review for reasons of institutional deference rather than as the result of different “substantive norms.” Pillard and Aleinikoff argue that language in these cases strongly suggests that there is only one set of “substantive norms” in the Constitution.²²⁰ Aliens are entitled to the same constitutional protections as citizens, but the Supreme Court elects not to enforce them. The authors argue that the reach of the oft-cited *Mathews* quotation is overstated.²²¹ The sentence following the quotation indicates that the Court is referring to Congress’s power to exclude and deport aliens, not to its power to draw distinctions based on alienage.²²² Pillard and Aleinikoff also refer to the following lengthy passage in *Mathews*:

218. See NEUMAN, *supra* note 26, at 124; Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 773–74 (1971); Note, *Constitutional Limitations on the Power of Congress to Confer Citizenship by Naturalization*, 50 IOWA L. REV. 1093, 1113 (1965).

219. See NEUMAN, *supra* note 26, at 120–21; Joy Pepi Wiesenfeld, *The Conditional Nature of Derivative Citizenship*, 8 U.C. DAVIS L. REV. 345, 370 (1975).

220. Pillard & Aleinikoff, *supra* note 172, at 37.

221. *Id.* at 36.

222. *Id.*

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign power, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization.²²³

Although “political” appears throughout this passage, echoing nineteenth-century cases, the language here also reflects a call for judicial restraint more than an assertion of different substantive norms in cases relating to immigration and foreign affairs.²²⁴ Thus, the Constitution provides the full complement of rights for aliens.

These alien rights do not vanish simply because the Supreme Court fails to enforce them; instead, they exist as underenforced legal norms.²²⁵ When these rights remain underenforced because the Supreme Court declines to enforce them, the responsibility shifts to the political branches. The political branches, however, typically confuse institutional deference for differing “substantive norms” and fail to apply the more robust constitutional protections.²²⁶ Thus, not only does the Constitution apply the same “substantive norms” to aliens and immigration law as it does in every other context, but arguably courts should also take a larger role in enforcing those norms.

There are several reasons why institutional deference similarly provides insufficient justification for the plenary power doctrine. Even if the Constitution does vest broad power over immigration matters in Congress and fail to specify how that power should be exercised, that does not mean *all* applications of that power are

223. *Id.* at 37 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)).

224. *Id.*

225. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Legal Norms*, 91 HARV. L. REV. 1212 (1978).

226. *Id.* at 1221, 1264.

immune from judicial scrutiny.²²⁷ The individual rights guaranteed by the amendments to the Constitution must play a role in how that power is applied, especially given the expansion of those rights since the mid-twentieth century.²²⁸ The power may be vested in Congress, but it still must be exercised in a manner consistent with the entire Constitution.

The Supreme Court recognized this assertion in *Baker v. Carr*,²²⁹ a case that primarily involved electoral redistricting but also addressed the general political question doctrine:

[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its managements by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.²³⁰

This analysis also applies to the plenary power doctrine as a variant of the political question doctrine. There may be cases where declining review is appropriate because broader constitutional rights are not implicated, but those cases will be few and far between. *Baker* provided factors to employ in identifying cases where declining review is appropriate.²³¹ These factors encompass many of the concerns identified by Martin Redish as justifications for institutional deference in the political question doctrine (e.g., “a lack of judicially discoverable and manageable standards”).²³² Ultimately,

227. Redish, *supra* note 182, at 1040–41. Redish notes that constitutional provisions should not be read to exclude judicial review simply because political branches are mentioned while courts are not. After all, no provision of the Constitution specifically mentions judicial review. *Id.* See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (arguing that courts may adjudicate any issue not assigned to another branch by the Constitution).

228. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 55 (1998) (arguing that the plenary power doctrine should be reevaluated in light of cases like *Brown v. Bd. of Education of Topeka*, 347 U.S. 483 (1954), and especially *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

229. 369 U.S. 186 (1962).

230. *Id.* at 211–12.

231. *Id.* at 217.

232. Legomsky identified three of these *Baker* factors as specifically applicable to the plenary power doctrine: a textually demonstrable commitment to a coordinate branch, a lack of judicially discoverable and manageable standards, and a unique need to speak with one voice. Legomsky, *supra* note 6, at 265. Since the

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these factors fail to support the plenary power doctrine, either in the context of derivative citizenship or in many other areas of immigration law. Each factor will be discussed in turn.

First, there are definite, judicially-manageable standards for courts to apply, particularly when considering derivative citizenship statutes. Challenges to derivative citizenship statutes have typically involved Equal Protection Clause challenges to constitutionally suspect classifications.²³³ The constitutional standards in such cases are the same as those applying to any other equal protection challenge: strict scrutiny to derivative citizenship statutes drawing distinctions based on race, heightened scrutiny to those based on gender, and rational-basis review to those based on any other distinction.²³⁴ These standards are readily identifiable, well developed, and provide no barrier to reviewing questions involving either derivative citizenship or many other immigration issues.

Second, the perception that courts suffer from a lack of capacity is more illusory than real. If there is an information gap between the courts and Congress, the gap could be rectified by requiring the executive branch to provide courts with the the same information that led Congress to make a particular decision or draw a particular conclusion.²³⁵ Surely there will be contexts in which courts will have less expertise than their political branch counterparts and should therefore be mindful of their limitations, but this does not mean courts must perform either cursory review or no review at all.²³⁶ The fear that court action will embarrass the nation and the judiciary is similarly absurd. Redish points out that the United States endures when the Senate rejects a treaty, and it will endure if the Supreme Court strikes down statutes relating to immigration.²³⁷ Lack of capacity is therefore a poor justification for the plenary power doctrine.

broader Redish factors essentially encompass the Legomsky factors, and take several more into consideration, this Note will focus on the Redish factors.

233. See *supra* pp. 485–87 (discussion of *Miller* and *Nguyen*).

234. See Redish, *supra* note 182, at 1046–47. Redish also cites due process and First Amendment jurisprudence as examples of where the courts have been able to create standards, even if not perfect ones, to adjudicate related cases. See generally Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

235. See Redish, *supra* note 182, at 1050–51.

236. *Id.* See also Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567–73 (1966) (arguing that lack of information is often a weak justification for the political question doctrine, but has relevance where courts simply cannot get the relevant information).

237. Redish, *supra* note 182, at 1052.

Third, the idea that courts should decline review because they are undemocratic institutions is inconsistent with the accepted principle of judicial review.²³⁸ It is true that courts are undemocratic—judges are appointed for life and have the power to overturn laws and regulations supported by popular majorities—but they are *always* undemocratic. If judges should not engage in judicial review in the plenary power context, then why should they be allowed to engage in judicial review of the Commerce Clause or in any other context? Once one accepts judicial review in principle, it is difficult to argue that it should not apply to every case.²³⁹ The undemocratic nature of courts is an especially poor justification for the plenary power doctrine.

The idea that courts should decline review because they do not want their decisions to be ignored by the political branches is misguided. Congress would rarely risk the public backlash that would come with ignoring a Supreme Court directive.²⁴⁰ President Nixon, for example, would have found it all but impossible to refuse to provide Congress with his Oval Office tapes.²⁴¹ Redish even argues that courts gain from challenging the political branches.²⁴² Courts, and especially the Supreme Court, are viewed as the final arbiters of the Constitution, and public support will frequently be on their side if they choose to challenge Congress or the executive.²⁴³ Thus, the institutional reasons for granting deference to Congress provide little support for the plenary power doctrine.

Finally, the stare decisis argument is also without merit. The Supreme Court explored the reach of stare decisis in *Planned*

238. *Id.* at 1045–46.

239. Some scholars have argued on behalf of interpretivism, the idea that judges should enforce only those norms that are clearly within, or are clearly implied from, the written text of the Constitution. This philosophy should not preclude courts from reviewing derivative citizenship statutes because, as discussed, the challenges will most likely be based on known and accepted equal protection challenges. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

240. Redish, *supra* note 182, at 1053; see also Sharpf, *supra* note 236, at 549–51. But see Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924).

241. See *United States v. Nixon*, 418 U.S. 683 (1974).

242. Redish, *supra* note 182, at 1054.

243. The Supreme Court enjoys enduring widespread public support even in this era of political polarization. The Gallup News Service reported in September 2006 that 60% of those asked approved of the way the Supreme Court handled its job while 32% disapproved. Jeffrey M. Jones, *Supreme Court Approval Rating Best in Four Years*, GALLUP NEWS SERV., Sept. 29, 2006, available at <http://www.galluppoll.com/content/?ci=24802&pg=1>.

Parenthood of Southeastern Pennsylvania v. Casey.²⁴⁴ The Court analyzed the reversals of the *Lochner* and *Plessy* lines of cases, and then declined to overturn *Roe v. Wade* because no analogous change in its “factual underpinnings” or “understanding” had occurred.²⁴⁵ Both the factual underpinnings and understanding of the plenary power line of cases, however, have changed dramatically over the past century. The factual underpinnings have changed because the *Chinese Exclusion Cases* were decided in a world where international relations were fragile and interstate war posed a serious threat.²⁴⁶ Given the tenuous peace between states, there was a far greater likelihood that a poorly-timed or poorly-reasoned decision could lead to war than there is today. The stakes were much higher, and it was far more appropriate for judges to avoid certain decisions.²⁴⁷

Similarly, the understanding of the *Chinese Exclusion Cases* has changed in light of the expansion of individual rights since the mid-twentieth century. Gabriel Chin has argued that *Bolling v. Sharpe*,²⁴⁸ the school desegregation case that recognized the Equal Protection Clause aspect of the Fifth Amendment, demands a reevaluation of the plenary power doctrine.²⁴⁹ The Equal Protection Clause applies to *all* exercises of federal power, including the immigration power. This argument rings true: it is unthinkable that the modern Supreme Court would uphold race-based immigration laws, as the nineteenth-century Court did in the *Chinese Exclusion Cases*. There has been a fundamental change in the relationship between the Equal Protection Clause and the rest of the Constitution.²⁵⁰

244. 505 U.S. 833 (1990).

245. *Id.* at 864.

246. See Spiro, *supra* note 183, at 340–41; see also Aleinikoff, *supra* note 34, at 11–12.

247. It is possible, of course, that history will reverse course and return us to a tense state of world affairs. *Casey* does not indicate how the Supreme Court would handle such a return to the original “factual underpinnings” of a previously reversed case. Presumably the Court could apply *Casey* analysis again to determine whether the factual underpinnings had changed to such an extent that it merited a return to the plenary power doctrine.

248. 347 U.S. 497, 498–99 (1954). While the Court held literally that, “discrimination may be so unjustifiable as to be violative of due process,” and noted that the Court “do[es] not imply that the two are always interchangeable phrases,” the Court usually applies regular equal protection analysis to relevant challenges to the Fifth Amendment. See generally *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 213–18 (1995) (charting the application of equal protection analysis to the Fifth Amendment).

249. Chin, *supra* note 228, at 55–56.

250. The *Chinese Exclusion Cases* were decided in an era when the Equal Protection Clause was not part of the Fifth Amendment, and therefore did not limit Congress in any way. Now that the Equal Protection Clause is understood as part

Thus, each argument in support of maintaining the plenary power doctrine—different substantive constitutional norms, institutional deference, and stare decisis—fails to survive closer inspection. Derivative citizenship, and in fact many immigration laws, deserve full constitutional review. The Supreme Court should abandon the plenary power doctrine and enforce the usual constitutional limitations on derivative citizenship and other immigration law statutes.

CONCLUSION

The United States has a long history of granting derivative citizenship, although the constitutional source of Congress's authority to grant such citizenship is unclear. The two leading candidates—the Naturalization Clause and the implied foreign affairs power—are each flawed. The argument that the Naturalization Clause includes foreign-born children who become citizens at birth requires an unreasonably broad interpretation of the term "naturalization." The implied foreign affairs power emerges as a better option but also requires a generous interpretation to include derivative citizenship. The Citizenship Clause provides another independent source for derivative citizenship, but the Supreme Court decision in *Bellei* specifically excludes derivative citizenship from the Citizenship Clause. Thus, the implied foreign affairs power is the most likely source for derivative citizenship.

Assuming that Congress does have the power to grant derivative citizenship, the corollary question is whether the Constitution provides any limitations on that power. Courts have traditionally invoked the plenary power doctrine to decline serious review of immigration laws, although this failure to review is inappropriate in the modern constitutional era. The doctrine may be justified on three different grounds: different constitutional substantive norms, institutional deference, and stare decisis. These justifications have kept the plenary power doctrine in place for more than a century.

Despite this long pedigree, the Supreme Court has signaled it may be willing to reevaluate the plenary power doctrine. In *Nguyen*, the Court applied intermediate review to a sex-based distinction in the derivative citizenship laws, although it found that the law satisfied that level of review. *Zadvydas* saw the Court disallow the indefi-

of the Fifth Amendment, Congress is indeed subject to its limitations. Since the Supreme Court reviews distinctions based on race—such as the wholesale exclusion of Chinese immigrants—with strict scrutiny, it is extremely unlikely that an identical law passed today would be held constitutional.

nite detention of an alien eligible for removal from the United States. The Supreme Court backtracked in *Kim* by allowing mandatory detention of aliens eligible for removal from the United States, but it is still possible that the Supreme Court could abandon the plenary power doctrine and fully enforce individual rights in derivative citizenship and broader immigration laws.

The Supreme Court should abandon the plenary power doctrine because each of its justifications ultimately fails. Recent Supreme Court cases like *Mathews* indicate that the Supreme Court is not applying different substantive norms, but engaging in institutional deference in immigration law cases. Institutional deference, in turn, typically involves concerns that are either exaggerated or can be remedied. *Stare decisis*, finally, provides no justification for the plenary power doctrine because there have been dramatic changes in both the factual underpinnings and the understanding of its line of cases. The plenary power doctrine is a relic from an earlier constitutional age. It is time for the Supreme Court to lay it to rest and ensure that Congress cannot prevent the full expression of individual rights in the context of immigration laws such as derivative citizenship.

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