The Plenary Power Doctrine After September 11

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INTRODUCTION

Prior to September 11, 2001, it seemed improbable that Congress would again exercise its plenary power over immigration to exclude immigrants based on race, as it did in the nineteenth century Chinese Exclusion Acts. The Exclusion Acts and Supreme Court case law upholding them spawned the plenary power doctrine, a doctrine which, as its name implies, articulates Congress' unfettered power over immigration.[1] As the Supreme Court stated in *Mathews v. Diaz*, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[2]

Earlier, in 2000, Professor Gabriel Chin sounded the death knell of the plenary power doctrine. He argued that it was highly unlikely that Congress would ever again use its plenary power over immigration to exclude noncitizens on express racial grounds; thus, the Supreme Court was unlikely to ever encounter an opportunity to definitively overturn the doctrine.[3] Given the terrorist attacks of September 11, wars in Afghanistan and Iraq, and associated political responses, Chin's assessment appears decidedly optimistic. It is no longer a remote

[1] Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[2] 426 U.S. 67, 79-80 (1976).

[3] Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 285 (2000).

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possibility that Congress would consider discrimination in immigration legislation, discrimination based on race, religion, or other criteria that would be unconstitutional if applied to citizens, but which the plenary power doctrine allows when noncitizens and immigration are at issue.

For example, as a matter of administrative law though not congressional mandate, the United States Department of Justice instituted, in mid-2002, an immigration registration system that required nationals of certain Arab and Muslim countries to be fingerprinted and photographed at the U.S. border prior to entry.[4] When responding to criticism of its proposed registration requirement, the Department of Justice invoked the plenary power doctrine to "strongly disagree that the rule is invidiously discriminatory."[5] Relying on numerous Supreme Court cases, the Department stated bluntly, "The political branches of the government have plenary authority in the immigration area."[6]

Critics of the plenary power doctrine seek to overcome this vulnerability to politics by grounding immigration protections in the Constitution. Legal scholars have long advocated the demise of the plenary power doctrine because it separates immigration law from constitutional norms applicable in other substantive areas.[7] By

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[4] Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003) (requiring registration of certain nationals from Bangladesh, Egypt, Indonesia, Jordan, and Kuwait); Registration of Certain Nonimmigrant Aliens from Designated Countries: Notice, 67 Fed. Reg. 77,642 (Dec. 18, 2002) (requiring registration of certain nationals from Pakistan and Saudi Arabia); Registration of Certain Nonimmigrant Aliens from Designated Countries: Notice, 67 Fed. Reg. 67,766 (Nov. 6, 2002) (requiring registration of certain nationals from Iran, Iraq, Libya, Sudan, and Syria); Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214 and 264).

[5] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,585 (Aug. 12, 2002).

[6] *Id.*

[7] Scholarly criticism of the plenary power doctrine is massive. *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1 (1999); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal*

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providing an immediate context in which to consider the plenary power doctrine, the September 11 attacks and the U.S. response to them highlight two particular gaps in the scholarship that help explain plenary power's persistence in U.S. immigration law.

First, much of the scholarly criticism of the plenary power doctrine rests on the premise that the Constitution applies in the immigration context. What is missing from the criticism, however, is a careful analysis, grounded in the Constitution itself, that explains what specific constitutional rights exist and how they apply to immigration. Given the possibilities and limitations found in the Constitution, as well as the arguments offered by scholars for the demise of plenary power, I posit that what have been termed "constitutional protections" — particularly family unity and racial equality, the rights I examine here — must be characterized as claims based in international human rights and the natural law that informs it, rather than directly in the U.S. Constitution. Moreover, in the current positive law of international human rights, rights of family unity and racial equality in the immigration and citizenship context can be located only vaguely at best.

Second, in the abundant criticism of the plenary power doctrine, scholars have not articulated in detail what U.S. immigration law could and should look like absent the plenary power doctrine, a particularly critical question after September 11. The criticism usually suggests that immigration law be brought into the mainstream of U.S. constitutional law, but leaves the details to be worked out by courts as they review immigration laws and administrative decisions. For that review, many scholars identify what they consider constitutionally *impermissible* criteria for exclusion of noncitizens from the United States. In contrast, few scholars offer guidance as to what would be constitutionally *permissible* criteria for inclusion or exclusion absent the plenary power doctrine. Even those proposed criteria are often subject to the same criticism as current immigration law, that they facilitate discrimination against noncitizens in ways that would be constitutionally impermissible if applied to citizens. Certain criteria for exclusion or inclusion — current nationality, foreign policy, socio-economic factors or class, and family ties — may be constitutionally permissible, but still may not move

Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña , 76 OR. L. REV. 425 (1997); John A. Scanlan, *Alien in the Marketplace of Ideas: The Government, The Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965; Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35 (1996).

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U.S. immigration law significantly away from the discrimination the plenary power doctrine has allowed and the patterns of economic, ethnic, and racial privilege the doctrine has reinforced.

Finally, I argue that despite the discrimination positive law allows between citizens and noncitizens, there are — even after September 11 — few principled justifications for distinguishing between citizens and noncitizens in the immigration context. Further, attempts to ground exclusion of potential immigrants from the United States in constitutionally defensible principles tend to mask the exercise of power and privilege inherent in that exclusion. Grounding exclusion of noncitizens in the plenary power doctrine at least recognizes that exclusion as an exercise of power.

I. THE CONSTITUTION AS A SOURCE OF IMMIGRATION RIGHTS

A. Difficulties

Two strands of scholarship criticize the plenary power doctrine in U.S. immigration law: (1) arguments for "constitutional protections" for noncitizens in the immigration context and (2) arguments relying explicitly on international human rights law and the natural law that informs it. Although ostensibly originating in different legal sources — the positive law of the Constitution and international human rights law, respectively — these arguments are more realistically grounded in the latter. Because the Constitution is the major source of rights language in the United States legal system, the appeal for immigration rights is couched in constitutional terms, but not actually based in the Constitution itself. The major difficulty lies with the Constitution itself, as it says little, if anything, about noncitizens and immigration. It is, thus, problematic to solidly and explicitly ground immigration rights in it, despite scholars' use of the adjective "constitutional" in front of nouns such as "rights" or "protections." Implicit in many of the purportedly constitutional arguments is a post-national or trans-national perspective that international human rights scholars, in contrast, make explicit in their criticism of plenary power. Two substantive rights, family unity and racial equality, illustrate the difficulties of (1) identifying particular rights as constitutionally-grounded and (2) demonstrating their applicability to U.S. immigration law.

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B. Identification of Constitutional Rights

1. Family Unity

As discussed here, family unity means the ability of members of a family to live together in a particular physical location. Identifying a constitutional right to family unity is difficult. In her argument against plenary power and in favor of a right to family unity, Linda Kelly refers to "a constitutionally humane approach" that would assess "the fundamental right of the alien and his or her lawful family" against "the rights of the government."[8] Adding the term "constitutional" to "humane approach" and "fundamental right" does not, however, actually ground the right for which Kelly argues in the Constitution rather than in fundamental rights more broadly understood. Kelly relies on a number of Supreme Court cases in her discussion, but most of the cases she cites refer to broader family privacy issues, rather than rights of family members — citizens or noncitizens — to live together in a place of their choice.[9]

[8] Kelly, *supra* note 7, at 783 (providing most detailed argument for constitutional right to family unity in immigration context). *But see* Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491 (1995); Bill Piatt, *Born as Second Class Citizens in the USA: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).

[9] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 399-400 (1978) (discussing protection of rights of family); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974) (recognizing freedom of choice in marriage and family matters); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (identifying privacy concerns in pregnancy and family life); Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) (allowing parents choice regarding their childrens' education); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (recognizing mother/child bond where children born out-of-wedlock); Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972) (finding equal protection violation where unmarried persons denied access to contraceptives); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (recognizing parents' responsibility for their children); Loving v. Virginia, 388 U.S. 1, 7 (1967) (invalidating Virginia miscegenation law); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (suggesting privacy and family concerns in contraception decisions); May v. Anderson, 345 U.S. 528, 533 (1953) (identifying mother's interest in custody of her children); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting governmental respect for private family realm); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (supporting individual's fundamental interest in procreation); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing parents' interest in education and upbringing of their children); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

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Of all the cases Kelly discusses, *Moore v. City of East Cleveland*[10] is the only case that directly addresses the right of family members to live together.[11] In a plurality opinion, the Supreme Court struck down, on Fourteenth Amendment Due Process grounds, a city zoning ordinance that allowed only a single family to occupy a home.[12] The zoning ordinance provided a very limited definition of what constituted a family, such that a grandmother was convicted of a criminal offense because her son and two of her grandsons who were cousins resided with her.[13] Although *Moore* is a start, a single plurality opinion upholding a family's right to live together in the face of a discriminatory city ordinance weighs little in identifying a solid constitutional right to family unity, particularly when that right must then stand against the onslaught of federal legislation and court cases that have repeatedly undermined family unity in the cross-border, multi-national context.

First, even if one were willing to grant that *Moore* identifies a constitutional right to family unity, it is not clear that families physically separated by citizenship status and international borders would benefit. The *Moore* Court reviewed the city ordinance at issue under a degree of heightened scrutiny, but not the strictest scrutiny possible: "When the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[14] According to the plurality opinion, the government's interests in preventing overcrowding, minimizing traffic, and spreading the public school burden were not sufficient to prevent

[10] 431 U.S. 494 (1977) (plurality opinion). *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1982), offers another argument for family unity as a constitutional right. In *Franz*, the D.C. Circuit cited *Moore* and other cases relating to "freedom of personal choice in matters of family life" to support, as a constitutional matter, "the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship" where a father was separated from his children through the federal government's witness protection plan. *Id.* at 595. The D.C. Circuit did not, however, rule on the merits of the plaintiff father's constitutional claims, but simply reversed the dismissal of his complaint and remanded to the lower court.

[11] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), is not on point because only the right of unrelated persons to live together, not a group claiming to be a family, was at issue. *Belle Terre* speaks only in dicta about family unity or family living arrangements. In *Belle Terre*, the Court upheld a zoning ordinance that limited the types of groups that could live together, but expressly allowed those related by "blood, marriage or adoption" to live together. *Id.* at 9.

[12] *Moore*, 431 U.S. at 495-97.

[13] *Id.*

[14] *Id.* at 494.

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cousins from living together.[15] In dicta, however, the *Moore* Court stated that density regulations limiting the number of people who reside in a house according to minimum floor space could be constitutionally appropriate, even if the individuals were members of the same family.[16]

It is quite conceivable that a federal statute limiting how family unity was accomplished in the immigration realm would survive *Moore*'s heightened scrutiny because of governmental interest in foreign relations, controlling borders, and economics. Such governmental interests may simply trump family unity rights, if the challenged regulation adequately serves those interests. In the domestic context, a family's right to live together in a particular location may be limited due to public health concerns associated with overcrowding.[17] In the international context, a court may similarly hold foreign relations and economic concerns to be constitutionally appropriate means of limiting family unity in the immigration context, even if family unity were acknowledged as a constitutional right.

Second, if the right to live together as a family were recognized as a solid constitutional right, one would expect courts to treat it as such for citizen claimants, or at least hint at its possibility. Quite the opposite is true. The Supreme Court has upheld the exclusion from the United States of a citizen's alien spouse.[18] Virtually all the U.S. circuit courts have denied that any constitutional right of a citizen — from equal protection to the right to reside in the United States to family unity — is violated or even implicated when the citizen's noncitizen family members are excluded from the United States or not allowed to remain here.[19] Moreover, U.S. courts have reviewed citizens' requests that a

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[15] *Id.* at 499-500.

[16] *Id.* at 521 (citing Nolden v. E. Cleveland City Comm'n, 232 N.E.2d 421 (Ohio Ct. App. 1966)) (holding that denial of variance from housing code requirement of minimum habitable floor area in house occupied by family comprised of two adults and seven children was not abuse of discretion); *see also* Kirsch Holding Co. v. Manasquan, 281 A.2d 513, 520 (N.J. 1971) (stating in dicta that appropriate zoning regulation or housing code could include limitation on "the number of occupants [of a dwelling] in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant").

[17] *Moore*, 431 U.S. at 521.

[18] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[19] With respect to the constitutional rights of citizen children, see, for example, *Gallanosa v. United States*, 785 F.2d 116 (4th Cir. 1986), where the court rejected a claim that a citizen child's need for medical care was a substantial constitutional claim sufficient to influence a deportation order against the child's noncitizen parents; *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984), where the court found "no constitutional rights of citizenship implicated" in the deportation of noncitizen parents where the parents could leave their citizen children with relatives in United States; *Acosta v. Gaffney*, 558 F.2d 1153, 1157-58 (3d

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noncitizen relative be allowed to remain in the United States solely in statutory terms requiring a showing of extreme hardship, rather than as a potential constitutional matter.[20] When the Ninth Circuit explicitly

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Cir. 1977), which stated that "the fundamental right of an American citizen to reside wherever he wishes" is merely postponed for a minor child who accompanies her noncitizen parents when they are deported; *Gonzalez-Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir. 1975), which held that deportation orders to noncitizen parents do not violate any constitutional right of citizen children; *Cervantes v. INS*, 510 F.2d 89 (10th Cir. 1975), where the court rejected an argument that the Ninth Amendment prevented the deportation of alien parents of a citizen child; *Enciso-Cardozo v. INS*, 504 F.2d 1252 (2d Cir. 1974), which held there was no denial of due process where a lower court denied a minor citizen child permission to intervene in deportation proceedings against his noncitizen mother where the child claimed a right to be reared in United States; *De Robles v. INS*, 485 F.2d 100 (10th Cir. 1973), which found no Fifth Amendment violation nor deprivation of the citizen children's constitutional right to family unity in the deportation of their noncitizen mother; *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969), which found no deprivation of a citizen child's constitutional right where the noncitizen parents were ordered deported and no denial of equal protection where citizen children over twenty-one could petition for their parents' U.S. citizenship but minor children could not; *Mendez v. Major*, 340 F.2d 128, 131-32 (8th Cir. 1965), *disapproved on other grounds sub nom.* Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), which found no implication of a citizen child's constitutional rights at his parents' deportation because "Congress has the power to determine the conditions under which an alien may enter and remain in United States . . . ."

With respect to the constitutional rights of a citizen spouse, see, for example, *Azizi v. Thornburgh*, 908 F.2d 1130 (2d Cir. 1990), which found no equal protection or due process violation in a statute that required two-year foreign residency for alien spouses who, during deportation proceedings, marry citizens, despite recognition of a constitutional right to marry; *Almario v. INS*, 872 F.2d 147 (6th Cir. 1989); *Anetekhai v. INS*, 876 F.2d 1218 (5th Cir. 1989), which stated that a citizen's assertion of a "fundamental right to marry" did not prevent an alien husband's deportation because the court focused on the rights of the alien spouse, not those of the citizen; *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), which found no deprivation of any constitutional right of a citizen husband where a noncitizen wife was required to return to her native country for two years in accordance with her visa.

Lower courts have cited the Supreme Court in *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957), for the proposition that no constitutional rights of a citizen child are implicated by a noncitizen parent's deportation. However, the Supreme Court did not directly address the citizen-child's constitutional rights in that case, merely finding that the Board of Immigration Appeals ("BIA") had not abused its discretion in denying a suspension of deportation where a citizen-child would suffer economic difficulties because of his parents' deportation. *Id.* at 77. Similarly, in *INS v. Wang*, the Court found no abuse of discretion by the BIA in determining whether two U.S. citizen children would suffer extreme hardship by their parents' deportation to Korea, but did not specifically address the impact of their parents' deportation on the citizen-children's constitutional rights. 450 U.S. 139 (1981).

[20] *See* Motomura, *supra* note 7 (discussing how subconstitutional and statutory norms provide greater protection to noncitizens than does constitutional case law); *see also* Salcido-Salcido v. INS, 138 F.3d 1292, 1293 (9th Cir. 1998) (holding that BIA abused its discretion in denying suspension of deportation when "it failed to consider the hardship to [plaintiff] and her U.S. children if they [were] separated because of [plaintiff's] deportation to Mexico"); Cerillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1986) (requiring INS to evaluate both citizen-children's separation from their parents if left in United States as well as their

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referenced the Supreme Court's decision in *Moore* in a deportation case, it did so to emphasize that "[t]he importance and centrality of the family in American life is firmly established both in our traditions and in our jurisprudence."[21] The Ninth Circuit did not assert the citizen children's constitutional right to family unity. A citizen child's separation from a noncitizen parent who faces deportation may "be a crucial factor in determining extreme hardship"[22] as a statutory matter, but family unity has not been articulated as a constitutional right.

Even hints at a constitutional right to family unity are rare in the case law.[23] Citizens have "an absolute right to remain in the United States,"[24] but not an absolute right to remain in the United States *with their family members*, whether parents, siblings, or spouses. In *Fiallo v. Bell*, the Supreme Court rejected the notion that it should review more strictly an immigration statute that governed the reunification of parents and children in the United States, when the constitutional rights of citizens, rather than noncitizens, were at issue.[25] Current U.S. law does not articulate a positive right to family unity, even if it should.

In making her argument for family unity, Kelly admittedly had a limited purpose: to open a dialogue balancing family unity rights against government interests in the immigration context, not to provide a comprehensive solution to family unity questions.[26] The problem is that, once opened, the dialogue does not go very far as a constitutional matter.

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possible life outside United States when considering whether extreme hardship would exist upon parents' deportation); Annotation, *What Constitutes "Extreme Hardship" or "Exceptional and Extremely Unusual Hardship," Under § 244(a) of Immigration and Nationality Act (8 U.S.C.A. § 1254(a)), Allowing Attorney General to Suspend Deportation of Alien and Allow Admission for Permanent Residence*, 72 A.L.R. FED. 133 §§ 7, 11-12 (1985) (listing cases).

[21] *Cerillo-Perez*, 809 F.2d at 1423. Bill Piatt references a 1986 Eastern District of California case where a judge issued an initial injunction against implementation of a U.S. Department of Housing and Urban Development regulation that prohibited citizens from receiving federally subsidized housing if they lived with ineligible aliens. Piatt, *supra* note 8, at 39-40 (citing Yolano-Donnelly Tenant Ass'n v. Pierce, No. S-86-0846 MLS (E.D. Cal. 1986). When granting the injunction, the judge found persuasive the Fifth Amendment right to cohabitate plaintiffs raised in reliance on *Moore*. *Id.* at 39 n.37.

[22] *Cerillo-Perez*, 809 F.2d at 1425 (referencing Ramos v. INS, 695 F.2d 181 (5th Cir. 1983) and Bastidas v. INS, 609 F.2d 101 (3d Cir. 1979)).

[23] *See, e.g.*, Lee v. INS, 550 F.2d 554 (9th Cir. 1977) (Takasugi, J., dissenting) (arguing for family unity because "American citizen child has an absolute right to remain in this country" which "cannot be exercised meaningfully without allowing his parents to remain here as well"); United States *ex rel.* Huber v. Sibray, 178 F. 150 (C.C.W.D. Pa. 1910) (No. 1), *rev'd on other grounds*, 185 F. 401 (3d Cir. 1911) (observing that citizen-children were entitled to remain in United States and needed their noncitizen mother's care).

[24] *Cerillo-Perez*, 809 F.2d at 1423.

[25] Fiallo v. Bell, 430 U.S. 787, 794 (1977).

[26] Kelly, *supra* note 7, at 782.

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There is no equivalent of *Loving v. Virginia* in the immigration and citizenship context.[27] While a U.S. citizen may marry a noncitizen or may wish to live with other noncitizen family members, no case law supports the citizen's constitutional right to do so in the United States, let alone the similar right of a noncitizen. Citizens certainly have an advantage over others in bringing family members into the United States,[28] but that preference comes about as a matter of statute, not (currently) as a constitutional right to family unity. While family unity — across borders or within them — may be a fundamental right of some type, Kelly's argument only tenuously grounds such a right in the Constitution and Supreme Court jurisprudence.

2. Racial Equality

In contrast to the tenuous grounding of a right to family unity in the Constitution, a constitutional right against racial discrimination is readily identifiable. As Gabriel Chin describes and the case law bears out, *Brown v. Board of Education*[29] created a strong constitutional presumption against racial discrimination in virtually every aspect of U.S. law: "employment, public benefits, voting, jury selection, criminal justice, marriage and the family" — every aspect except immigration.[30] In the domestic context, after the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*,[31] even racial classifications by the federal government meant to assist minorities are constitutionally suspect.[32] In the immigration context, however, Chin points out that at least nine federal circuit courts have suggested that racial classifications are "lawful per se."[33] Like Chin, numerous other scholars have argued as a constitutional matter against racial discrimination in immigration and alienage classifications.[34] The difficulty with respect to racial equality is

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[27] Loving v. Virginia, 388 U.S. 1 (1967) (holding Virginia's miscegenation law unconstitutional). At least one commentator has suggested that *Loving*'s analytic approach to relationships rather than individual rights could be productive in the immigration context. *See* Katharine B. Silbaugh, Miller v. Albright: *Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139, 1150-51 (1999).

[28] 8 U.S.C. § 1153 (2002).

[29] 347 U.S. 483 (1954).

[30] Chin, *supra* note 7, at 34.

[31] 515 U.S. 200 (1995) (requiring strict scrutiny of racial classifications imposed by federal government).

[32] *See also* Romero, *supra* note 7 (arguing for application of *Adarand* in immigration context).

[33] Chin, *supra* note 7, at 4.

[34] Romero, *supra* note 7, at 429; Wu, *supra* note 7, at 35-36.

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not in its initial identification as a constitutional right — the hurdle Kelly faced with respect to family unity — but instead lies in making this readily-identifiable constitutional right applicable to U.S. immigration law. As Chin's research demonstrates, federal courts have declined to do so.

C. *Application of Constitutional Rights to Noncitizens in Immigration Law*

1. Extra-Constitutional Arguments

Scholars take various stances regarding how, absent the plenary power doctrine, particular rights would apply as a constitutional matter to U.S. immigration law and to noncitizens outside U.S. borders. Some scholars simply assume the Constitution applies because it *should* apply and do not make an explicit argument. Others argue that an individual's membership or community ties invoke the Constitution or that mutuality demands constitutional protections. The difficulty with these positions is that they derive from something other than the Constitution. The Constitution itself says little about noncitizens, immigration, or its own applicability in the immigration context. Louis Henkin succinctly stated, "The Constitution is silent concerning its applicability beyond the borders of the United States. Little is said in the Constitution concerning citizens, and nothing about aliens. . . . The Constitution does not say whether it applies to citizens only or to aliens as well."[35] In fact, the only reference the Constitution makes to immigration law itself is Article I, Section 8, Clause 4: "The Congress shall have Power. . . To establish an uniform Rule of Naturalization." Written as the founding document of a nation-state in an age committed to sovereignty, the Constitution is a document focused on government: its structures, limitations, and powers. By its terms, the Constitution focuses inward, not outward, established as it was "for the United States of America."[36]

a. Sovereignty

That criticism of the plenary power doctrine derives largely from extra-constitutional arguments is not surprising, given that justifications for the doctrine are similarly extra-constitutional. Almost from the doctrine's inception, the Supreme Court justified plenary power through

[35] Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 12 (1985).

[36] U.S. CONST. pmbl.

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extra-constitutional theories of sovereignty rather than through specifically enumerated constitutional powers. In *Chae Chan Ping*,[37] the Supreme Court case that originated plenary power over immigration, Justice Field rationalized plenary power as an attribute of sovereignty:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.[38]

Justice Field linked the exercise of that sovereignty to the Constitution, but did so without specific textual support or citation:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.[39]

Likewise, when later extending the plenary power doctrine to the deportation of lawful Chinese residents in *Fong Yue Ting*,[40] the Supreme Court made the same sovereignty argument: "The right of a nation to expel or deport foreigners. . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[41] The Court reinforced its view that "[t]he Constitution of the United States speaks with no uncertain sound upon this subject," but once again failed to provide any textual support for its conclusion.[42]

b. Normative Arguments

When arguing against plenary power, many scholars conflate the argument that the Constitution *should* apply to noncitizens in the immigration context with the argument that the Constitution *does* apply in the immigration context. For example, Michael Scaperlanda argues that:

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[37] 130 U.S. 581, 603-04 (1889).

[38] *Id.*

[39] *Id.* at 609.

[40] Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

[41] *Id.*

[42] *Id.* at 711; *see also* Sarah Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1146-47 (1999).

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> any immigration policy formulated by the political branches of the federal government *should* conform to the substantive and procedural requirements of the Constitution. . . . Congress *ought* to be constitutionally prohibited from discriminating on the basis of race or national origin in its admission policy, as it did in the Chinese Exclusion Act.[43]

Scaperlanda's underlying argument is that changing conceptions of sovereignty in international law provide a new baseline for evaluating the plenary power doctrine.[44] He does not advocate the incorporation of international human rights specifically into the Constitution, but sees the justification for plenary power rooted in traditional notions of absolute sovereignty rather than in the Constitution itself.[45]

Similarly, even with his observations that the Constitution says nothing regarding aliens, Louis Henkin posits that the Constitution applies to noncitizens in the immigration context:

> The people of the United States ordained a compact which established a community of conscience and righteousness. The compact *applies* to everything done by the community and its officials, in the United States and elsewhere, affecting citizens and aliens alike, and concerning immigration no less than other matters. The rights our ancestors recognized as inherent and unalienable knew neither bounds nor state boundaries. Their polity *should* respect these rights with no invidious inequalities, no arbitrary limitations on liberty, and no unnecessary interferences with those who risk all in the pursuit of some happiness.[46]

Stephen Legomsky makes a more detailed normative argument. He uses the term "individual rights" to criticize the plenary power doctrine, resting on the premise that the rights identified in the Constitution apply to all individuals without respect to citizenship status or physical location.[47] In his argument, neither alienage, nor non-residence, nor physical presence outside the United States necessarily bars constitutional protection, nor should it.[48] Legomsky supports his argument with Supreme Court cases that afford at least some constitutional protection — if not the entire panoply of constitutional

[43] Scaperlanda, *supra* note 7, at 1028 (emphasis added).

[44] *Id.*

[45] *Id.*

[46] Henkin, *supra* note 35, at 34.

[47] STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 179-82 (1987).

[48] *Id.* at 321-22.

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rights — to individuals in each category,[49] but Legomsky candidly acknowledges the major weakness. While neither alienage, nor non-residence, nor physical absence from the United States "taken individually precludes constitutional challenge, the combination of all three might be thought to have that effect."[50] In other words, the normative argument falls short. For the vast majority of individuals in the world — those who are not U.S. citizens, not U.S. residents, and not physically present in the United States — Legomsky admits that the Constitution provides no protection.

Similarly, Supreme Court case law does not support the normative argument that the Constitution applies everywhere to everyone.[51] That lack of support comes about, at least in the immigration context, because of a chicken-and-egg problem. The lack of Supreme Court case law supporting universal application of the Constitution is explained by the plenary power doctrine itself.

Gerald Neuman characterizes the approach typified by Scaperlanda, Henkin, and Legomsky as the universalist approach to the Constitution: "Universalist approaches require that constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place."[52] In other words, under the universalist approach, the Constitution becomes a post-nationalist document, transcending the boundaries of the nation-state. Neuman points to a major difficulty with the universalist approach in that "it presupposes an interpretation of the pertinent constitutional restriction; it does not in itself supply one."[53] As a practical matter for those concerned with immigration and citizenship in the United States, the other major difficulty with the universalist approach is its lack of ascendancy in the law,[54] whatever its

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[49] *Id.*

[50] *Id.* at 322. Legomsky distinguishes Supreme Court cases denying constitutional protections to non-resident aliens abroad from the immigration context by noting that they "reflect special considerations" such as unincorporated American territories and enemy aliens in war time. *Id.* at 322 n.284.

[51] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990) (denying Fourth Amendment protections to American authorities' search of Mexican national's property in Mexico); Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950) (denying enemy alien Fifth Amendment protections abroad); United States v. Yunis, 859 F.2d 953, 970 (D.C. Cir. 1988) (Mikva, J., concurring) (noting that "the Supreme Court has never determined whether aliens are entitled to the protections of our Bill of Rights outside the United States").

[52] Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 916 (1991).

[53] *Id.* at 917.

[54] LEGOMSKY, *supra* note 47, at 179-82.

pervasiveness in the academic literature.

c. Membership or Community Ties

The membership or community ties argument for application of the Constitution to the immigration context comes in a variety of forms. The community membership argument posits that constitutional protections increase the more closely an individual identifies with the U.S. community; citizens receive full constitutional protections as the paradigmatic members of the community.[55] As their identification with the community increases and approximates that of the citizen, aliens seeking entry into the United States also receive increasing constitutional protections.[56]

In contrast to the membership argument, Alexander Aleinikoff advocates an approach to procedural protections based on an alien's "community ties": "What we 'owe' persons in terms of process is better understood as a function of what we are taking from them (community ties) than our relationship to them (membership in a national community)."[57] Aleinikoff's approach is eminently practical and fact specific, looking at "the actual relationships the individual has developed with a society: family, friends, a job, association memberships, professional acquaintances, opportunities"[58] rather than the more subjective sense of membership an individual may feel. Under Aleinikoff's community ties argument, an immigrant alien entering the United States for the first time would receive some due process protections because he or she has evidenced a "pre-existing stake" in the United States through family or employment considerations.[59] The community ties argument does not hold that substantive or procedural constitutional rights always apply to every person everywhere. Instead, it grades constitutional protections on the extent of community ties.

As expressed here, Aleinikoff's argument presumes that the stake a would-be immigrant has in the U.S. community depends in part on possession of an immigrant visa. His focus is largely on the procedural

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[55] *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 195 (1983) (arguing in favor of community membership model).

[56] *See id.*; Liliana M. Garces, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1040 (1998).

[57] T. Alexander Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983).

[58] *Id.*

[59] *Id.* at 246-47.

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rights that a would-be immigrant should have once that visa is in hand, not on whether the potential immigrant has a substantive right to a visa in the first place. By making the pre-existing stake dependent on possession of an immigrant visa, Aleinikoff's argument for procedural due process punts the more difficult question of whether someone who wants to emigrate but does not have a visa is entitled to either procedural due process or a substantive right of entry. With respect to undocumented workers, Aleinikoff argues that "it is unlikely that an undocumented alien. . . will be able to establish eligibility to enter the United States no matter how many procedural rights are provided" because "absence of a visa and a valid unexpired passport are grounds of exclusion."[60] But, that is precisely the point: what justifies granting a visa to one individual and denying another? An undocumented immigrant may have exactly the same community ties that a visaed immigrant does — family, employment, participation in religious or professional or community organizations — and intend to make the United States his permanent home. The primary difference between the two is that the latter has official recognition of those ties through a visa while the former does not.

d. Mutuality

Gerald Neuman defines mutuality as the extension of "constitutional rights to aliens abroad. . . in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority."[61] He specifically excludes situations in which the United States acts abroad but claims no authority over foreign nationals.[62] Despite arguments to the contrary, immigration law does not provide a particularly strong case for mutuality.

After positing that family unity is a constitutional right, as discussed above, Linda Kelly argues that the Constitution applies to decisions to admit or exclude noncitizens. In doing so, Kelly relies on Neuman's concept of mutuality. Kelly posits that for "an undocumented alien who wants to be united with his or her lawful family in the United States, it first can be acknowledged that the desire to unite with family brings an individual under U.S. immigration law regarding family unity."[63] How the desire to be reunited with family members in the United States meets

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[60] *Id.*

[61] NEUMAN, *supra* note 7, at 99-100.

[62] *Id.* at 99.

[63] Kelly, *supra* note 7, at 772.

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Neuman's mutuality requirement for constitutional constraints on decision-making is not intuitive. Certainly, for a visa applicant who wishes to reunite with her family in the United States, the United States has set the rules by which that desire can be fulfilled legally. When she applies for a visa, however, the applicant may be said to be "under U.S. immigration law" only in the sense that she must fulfill the requirements of the law to be reunited legally with her family in the United States. U.S. immigration law makes no claims on her obedience, independent of her own desires, and she can choose at any moment not to comply with U.S. law, although then the desired reunification in the United States would not happen legally.

A visa application is different from the strongest case for mutuality, that of extra-territorial application of U.S. criminal law. In the criminal context, the United States acts affirmatively to subject individuals to its laws and to punish them for violating that law. In the immigration context, the United States does not. A visa applicant avails herself of U.S. immigration law, but is not subjected to it. Immigration law presents a weak case for mutuality.

2. Constitutional Texts and Structure

One of the major arguments for bringing immigration law into mainstream constitutional law begins with criticism of sovereignty as the justification for the plenary power doctrine. We should "end appeals to 'ancient principles of the international law of nation-states' in determining the source and scope of the immigration power" because doing so will "help decision makers recognize that the immigration power does not stand above or before the Constitution."[64] When rejecting sovereignty as a justification for plenary power, many scholars identify the Commerce Clause as an explicit constitutional text that empowers the federal government to control immigration into the United States.[65] The argument usually rests on two grounds. First, because the Supreme Court has held the movement of people across state borders to be interstate commerce, the movement of people across international boundaries is commerce among nations.[66] Second,

[64] T. Alexander Aleinikoff, *Rights — Here and There: Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 866 (1989).

[65] LEGOMSKY, *supra* note 47, at 186; Aleinikoff, *supra* note 64, at 866; Chin, *supra* note 7, at 56-57.

[66] LEGOMSKY, *supra* note 47, at 186.

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Supreme Court precedent in the *Head Money Cases*,[67] decided five years before the *Chinese Exclusion Case*, founded regulation of immigration in the Commerce Clause.[68] The assertion, then, is that with immigration law firmly grounded in the Commerce Clause, immigration law would be brought into the mainstream of constitutional law "because there is no question that the commerce authority is limited by the Bill of Rights."[69]

While there may be no question that the Bill of Rights limits Congress' authority under the Domestic Commerce Clause, the answer is far from clear with respect to the Foreign Commerce Clause. *Adarand* explicitly applied the Fifth Amendment to a federal contracting set-aside under the Small Business Act for businesses owned by racially defined "'socially and economically disadvantaged'" individuals, a set-aside presumably taken by Congress under the Domestic Commerce Clause,[70] not the Foreign Commerce Clause.[71] Likewise, there is a long line of Supreme Court cases applying strict scrutiny to differential treatment of aliens and citizens, but the cases involve Fourteenth Amendment challenges to state action, not Fifth Amendment challenges to federal action.[72] In sum, Supreme Court jurisprudence has limited congressional power under the Domestic Commerce Clause, but that case law does not address the scope of the Foreign Commerce Clause.[73]

Even when recognizing the Foreign Commerce Clause as a basis for congressional control over immigration, the Supreme Court has refused to apply the Bill of Rights to a noncitizen's claim to remain in the United

[67] Edye v. Robertson, 112 U.S. 580, 591 (1884).

[68] LEGOMSKY, *supra* note 47, at 186; Chin, *supra* note 7, at 56-57.

[69] Chin, *supra* note 7, at 56-57.

[70] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 204 (1995) (citation omitted).

[71] Without grounding his argument in the Commerce Clause, Victor Romero made a persuasive argument for the benefits of applying *Adarand* in the immigration context. Romero, *supra* note 7, at 429.

[72] Bernal v. Fainter, 467 U.S. 216, 217 (1984) (recognizing equal protection violation where Texas allowed only citizens to be notaries public); Cabell v. Chavez-Salido, 454 U.S. 432, 434 (1982) (upholding California's requirement that peace officers, including deputy probation officers, be citizens); Ambach v. Norwick, 441 U.S. 68, 75 (1979) (finding no denial of equal protection where New York required public school teachers to be citizens); *In re* Griffiths, 413 U.S. 717, 718 (1973) (identifying equal protection violation in Connecticut court rule that admitted only citizens to bar); Sugarman v. Dougall, 413 U.S. 634, 636 (1973) (recognizing equal protection violation in New York's restriction of certain civil service jobs to citizens); Graham v. Richardson, 403 U.S. 365, 372 (1971) (finding violation of Fourteenth Amendment where states conditioned welfare benefits on citizenship and residency status).

[73] Oceanic Steam Navigation v. Stranahan, 214 U.S. 320, 333-34 (1909) (quoting Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904)).

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States.[74] In *Turner v. Williams*, the plaintiff-appellant sought habeas corpus relief from his detention and proposed deportation, challenging on First, Fifth, and Sixth Amendment grounds a federal statute that provided for the exclusion and deportation of noncitizen anarchists.[75] Rejecting Turner's argument, the Court stated that whatever the source of congressional power over immigration — whether sovereignty, international law, or the Foreign Commerce Clause — the exclusion or deportation of an anarchist, as well as his detention to facilitate that deportation, was "not open to constitutional objection."[76] The Court relied explicitly on the *Chinese Exclusion Case* to dispose of the due process and equal protection challenges, but clearly stated that it would have reached the same result under the Foreign Commerce Clause.[77]

The biggest difficulty with using the Foreign Commerce Clause to clean the slate of U.S. immigration law is *Oceanic Steam Navigation Co. v. Stranahan* and cases that rely on it.[78] In *Oceanic Steam*, the Supreme Court relied exclusively on the Foreign Commerce Clause to uphold a federal immigration statute against a due process challenge. The Court rejected the plaintiff's argument that due process concerns prevented an administrative fine against a steamship company for bringing certain aliens to the United States: "In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals."[79] Without mentioning sovereignty, international law, or the *Chinese Exclusion Case*, the Court in *Oceanic Steam* repeatedly noted that Congress has "absolute power" and "plenary power," over the admission of noncitizens to the United States.[80] Moreover, *Oceanic Steam* provided the statement often quoted in subsequent immigration cases that "over no conceivable subject is the

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[74] Turner v. Williams, 194 U.S. 279, 290 (1904).

[75] *Id.* at 289.

[76] *Id.* at 290.

[77] *See also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (relying on *Head Money Cases*, which grounded congressional control of immigration in Foreign Commerce Clause, and *Chinese Exclusion Cases*, which grounded control in sovereignty and international law, to deny writ of habeas corpus to Japanese woman excluded from United States).

[78] 214 U.S. 320 (1909); *see, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). As Justice Frankfurter stated in *Galvan v. Press*, 347 U.S. 522, 530-31 (1954), "[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion." He nonetheless concluded that the slate was not clean and due process did not apply in a deportation case. *Id.*

[79] 214 U.S. at 343.

[80] *Id.* at 342-43.

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legislative power of Congress more complete."[81]

Oceanic Steam used the Foreign Commerce Clause to ground plenary congressional power over immigration in much the same way that the *Chinese Exclusion Case* used sovereignty and international law to justify the same power. Moreover, *Oceanic Steam* and the *Chinese Exclusion Case* are linked in subsequent case law. The Supreme Court cited both in *Kleindienst v. Mandel* when it upheld a federal statute allowing the exclusion of a communist against a First Amendment challenge.[82] The Court also cited both in *Fiallo v. Bell* when it upheld, against a Fifth Amendment challenge, a statute that denied out-of-wedlock children of U.S. resident fathers the immigration preference given to out-of-wedlock children of U.S. resident mothers.[83] The one saving grace of *Oceanic Steam* and its reliance on the Foreign Commerce Clause is that it has not been used to justify racial discrimination in U.S. immigration law, although its broad language suggests that it could have been. Grounding the power to exclude aliens in the Foreign Commerce Clause, rather than in sovereignty, may be a starting point for applying constitutional protections in immigration law. It is not, however, an entirely clean beginning.

II. International Law as a Source of Immigration Rights

While strong statements in favor of family unity and against racial discrimination are prevalent in human rights documents, both international covenants and court interpretation limit their application in the area of immigration and citizenship. The separation of immigration law from other substantive areas of U.S. constitutional law, created by the plenary power doctrine and criticized by scholars, is mirrored in international human rights law. Immigration and citizenship are treated as a sphere separate from other substantive areas to which international human rights norms apply. Moreover, even when recognized in the immigration context, rights of family unity and racial equality are often rights without remedies.

A. Family Unity

International human rights documents recognize an individual's right to family and family life similar to the U.S. Supreme Court's repeated

[81] *Id.* at 339.

[82] 408 U.S. at 765-76.

[83] Fiallo v. Bell, 430 U.S. 787, 791 (1977).

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expression of the importance of family and private decision-making regarding family matters.[84] As a matter of international human rights, however, a fundamental right to family unity hits snags similar to those encountered in Kelly's attempt to ground a right to physical family unity in the Constitution. Whatever importance family takes in international human rights, a right to family unity within the geographical boundaries of a particular nation-state is difficult to identify in current international law. The right remains largely aspirational and non-specific rather than realized for actual families in particular nation-states.

1. International Human Rights Documents

Various international documents attest to family as a fundamental right. Article 16 of the Universal Declaration of Human Rights recognizes a "right to marry and to found a family" and that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[85] Article 23 of the International Covenant on Civil and Political Rights identifies the importance of family with almost exactly the same language.[86] Similarly, the International Covenant on Economic, Social and Cultural Rights urges that "[t]he widest possible protection and assistance should be accorded the family, which is the natural and fundamental group unit of society."[87] Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms allows that "[e]veryone has the right to respect for his private and family life, his home and his correspondence" and

> [t]here shall be no interference by a public authority with the

[84] *See supra* note 9 and accompanying text.

[85] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[86] International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

[87] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); *see also* African [Banju] Charter on Human and Peoples' Rights, *opened for signature* June 27, 1981, art. 18, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (maintaining family as "the natural unit and basis of society" to be protected by state); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 17, 1144 U.N.T.S. 123 (providing that "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation). Article 17 of the American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, 1144 U.N.T.S. 123, is titled Rights of the Family, but deals primarily with the rights of partners at and within marriage rather than as against the state.

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> exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[88]

With specific respect to the parent/child relationship, article 7 of the Convention on the Rights of the Child provides that "as far as possible," a child has the "right to know and be cared for by his or her parents."[89] Such a right is particularly relevant when a parent is expelled from a country where the child is entitled to remain, or when a parent is denied entry to a country where the child is. Nonetheless, the Convention significantly qualifies the child's right. A child's right to be cared for by his or her parents is to be implemented "as far as possible" and in accordance with a party-state's national law.[90] Article 16 also qualifies the child's right to family: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. . . . " In other words, as long as the "interference" is lawful and not arbitrary, the Convention allows it. Party-states have a large margin of appreciation over a child's right to family generally, as well as the more specific right to be cared for by his or her parents.[91] International human rights documents recognize family as an important fundamental right. As the text of the documents makes clear, however, that right is far from absolute.

2. Case Law: Article 8 of the European Convention on Human Rights

When specific individuals claim a right to family unity in the international arena, further difficulties emerge. Of the texts cited above, article 8 of the European Convention on Human Rights is most relevant in understanding how a fundamental right to family unity has actually been implemented in the cross-border context. In contrast to the other texts, article 8 has been litigated a number of times.[92] The European

[88] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222.

[89] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 7(1), Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989).

[90] *Id.* art. 7.

[91] "Margin of appreciation" is the term the European Court of Human Rights uses to indicate a party-state's leeway in interpreting a right set forth in the Convention.

[92] Although the Inter-American Commission on Human Rights and Inter-American Court of Human Rights have considered cases alleging a violation of article 11 of the

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Court of Human Rights has reviewed noncitizens' article 8 claims to family unity or against interference with family life primarily in two situations: (1) where non-citizens seek to enter a specific country to join family members already there and (2) where noncitizens face expulsion from a country where family members reside.

a. Right of Noncitizen to Enter a Country to Join Family Already Present

To date, the European Court of Human Rights has not, on any particular set of facts, found an interference with article 8 where noncitizens sought to join family members already in a country. Citing the state's right to control its own borders, the court has seriously limited any right to family unity involving the entry of non-nationals into a state's territory. Specifically, the court has found that "where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to. . . authorise family reunion in its territory."[93] Two cases, *Abdulaziz v. United Kingdom*,[94] involving spouses, and *Gul v. Switzerland*,[95] involving children, represent the court's reasoning on family unity.[96]

In *Abdulaziz*, three women sought the court's intervention when the United Kingdom refused to permit their non-national husbands to enter or remain in the United Kingdom. Even while recognizing that article 8

American Convention on Human Rights, none of the cases have dealt with a right to family life or family unity. *See, e.g.*, Riebe Star v. Mexico, Case 11.610, Inter-Am. C.H.R., OEA/ser.L/V/II.102, doc. 6 rev. (1999) (finding violation of article 11's provisions regarding honor and dignity in summary deportation of Catholic priest from Mexico without opportunity to collect personal belongings and later efforts to discredit him); Lewis v. Jamaica, Case 11.825, Inter-Am. C.H.R., OEA/ser.L/V/II.102, doc. 6 rev. (1999) (declining to reach merits of claim that death penalty violated right to dignity under article 11); Martín de Mejía v. Peru, Case 10.970, Inter-Am. C.H.R., OEA/ser.L./V/II.91, doc. 7 rev. (1996) (finding violation of Article 11's provision regarding honor and dignity in rape and sexual abuse of plaintiff); Comadres v. El Salvador, Case 10.948, Inter-Am. C.H.R., OEA/ser.L.V/II.91, doc. 7 rev. (1996) (finding violation of article 11's right to be free from arbitrary and abusive interference in pillaging of NGO's office); Garcia v. Peru, Case 11.006, Inter-Am., C.H.R. OEA/ser.L./V.88, doc. 9 rev. 1 (1995) (finding violation of article 11's right to privacy in seizure of family documents).

[93] Ahmut v. Netherlands, App. No. 21702/93, 24 Eur. H.R. Rep. 62, 79 (1997) (Commission report) (finding no violation of article 8 in refusal to admit non-citizen child where father was dual Dutch/Moroccan national who chose to live in Netherlands).

[94] Abdulaziz v. United Kingdom, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471 (1985).

[95] Gul v. Switzerland, App. No. 23218/94, 22 Eur. H.R. Rep. 93 (1996).

[96] *See* Nsona v. Netherlands, App. No. 23366/94, 32 Eur. H.R. Rep. 9 (2001) (finding no violation of article 8 in denial of entry and residence permit to child whose aunt claimed guardianship but lied about her relationship to child).

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may involve "positive obligations inherent in an effective 'respect' for family life,"[97] the court emphasized traditional notions of state sovereignty and the state's margin of appreciation in matters of immigration:

> However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear cut. . . this is an area in which the Contracting Parties enjoy a wide margin of appreciation. . . . [T]he extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.[98]

Most particularly, the court refused to find any obligation on the state's part to respect the women's preferred choice of marital residence:

> The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.[99]

In other words, as in the United States, the women were free to marry whomever they chose, but not to live with their non-national spouses in their preferred location. According to the court, article 8 itself created no right based on family ties for the non-national spouses to enter the United Kingdom. Sovereignty, manifest in the right to control borders, limited family unity.

Similarly, in *Gul v. Switzerland*, the court refused to find a right of entry for the minor son of a father who had been granted residence in Switzerland on humanitarian grounds. The court acknowledged that a bond of family life existed between the father and son, despite the fact that the father had left the son in Turkey more than six years earlier, when the boy was only three months old.[100] The court reiterated the position first articulated in *Abdulaziz*, that article 8 may involve some

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[97] *Abdulaziz*, 7 Eur. H.R. Rep. at 497.

[98] *Id.* (citation omitted).

[99] *Id.* at 497-98 (citations omitted).

[100] *Gul*, 22 Eur. H.R. Rep. at 112-13.

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affirmative obligation on the part of the state, including the obligation to admit the relatives of settled residents.[101] That obligation, however, did not extend to the facts of the case because in light of "well established international law, and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory."[102] Most importantly, in the court's view, the father's own choice to go to Switzerland caused the separation from his son. Switzerland was not responsible for the lack of family unity in the first place and, thus, was not obligated to remedy it.[103]

One could imagine a case where a refugee or asylum-seeker, settled in a particular country, sought to bring family members to join her. In such a situation, the separation might not have been the family's choice, but occasioned by political or other events outside its control. Where family separation was not chosen, the court might recognize an interference with family life under article 8 if a country refused to allow other family members to join an asylee in that country, but it has yet to face such facts. Moreover, the European Court has not recognized the initial right of an asylee or refugee, let alone family members, to enter a particular country.[104] Even granting that family unity is a fundamental right recognized in international human rights law, it is largely aspirational rather than concrete and assertable against a particular nation in the form of a right to enter.

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[101] *Id.*

[102] *Id.* at 114.

[103] *Id.* at 114-15. There is some suggestion in the case that had Mr. Gul been a permanent resident of Switzerland, rather than legally present but without permanent status, the court or Switzerland might have ruled differently. See also the European Commission on Human Rights' decision in *X v. Sweden*, App. No. 9105/80, 4 Eur. H.R. Rep. 408 (1982), which found no right of family members to join their daughter and son in Sweden where the separation came about by the family's choice, as the Commission has "repeatedly held that no right of an alien to enter or to take up residence in a particular country, nor a right not to be expelled from a particular country is as such guaranteed by the Convention."

[104] *See, e.g.,* Ahmed v. Austria, App. No. 25964/94, 24 Eur. H.R. Rep. 278, 290 (1997) (noting that while state may be constrained when deporting someone, neither European Convention nor its Protocols create right of entry or right to political asylum); Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 454-55 (1997) (finding that UK would violate Article 3's prohibition on torture were it to deport individual to India after denying him asylum but acknowledging no right to asylum); Amuur v. France, App. No. 19776/92, 22 Eur. H.R. Rep. 533, 556 (1996) (noting that "Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory" where Somali refugees claimed right of entry).

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b. Right of Noncitizen to Remain in a Country Where Family Members Reside

As with a request to enter, a noncitizen who wishes to remain in a country where family members reside may claim family unity under article 8 of the European Convention. A claim to remain in a country where one is legally present does not, however, raise precisely the same sovereignty concerns as a claim to entry because the nation-state has already acquiesced in some manner to the individual's presence. Nonetheless, even in this context, article 8's right to family is more aspirational than realized. When ruling that a nation would violate article 8's commitment to family unity by deporting a particular individual, the court has not directed the nation at issue to actually refrain from the threatened deportation or to readmit a deported person.[105]

The European Court of Human Rights has found violations of article 8 in ten cases involving a noncitizen's right to remain in a country where other family members reside,[106] although friendly settlements of several

[105] *See* Jakupovic v. Austria, 2003 Eur. Ct. H.R. No. 36757/97, *available at* LEXIS, International Law Library, Human Rights Cases file (asking Austria to rescind applicant's deportation and ten-year residence prohibition but noting that it did not have jurisdiction to require grant of residence permit even where Austria had violated article 8); Yildiz v. Austria, App. No. 37295/97, 36 Eur. H.R. Rep. 553 (2003) (finding violation of article 8 in deportation and five-year residence prohibition but not urging readmission and residence permit); Mehemi v. France, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 741 (2000) (finding judgment of breach of article 8 "just satisfaction" for non-pecuniary damages alleged from noncitizen's expulsion while specifically noting it did not have jurisdiction to require France to readmit him to its territory); Beldjoudi v. France, App. No. A/234-A, 14 Eur. H.R. Rep. 801 (1992) (finding violation of article 8 would occur if Mr. Beldjoudi were deported for repeated criminal conduct but not ordering France to refrain from deporting him); Moustaquim v. Belgium, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 817 (1991) (awarding pecuniary damages for violation of article 8 to where Belgium deported Moroccan national who had lived in Belgium with his family from very young age); Berrehab v. Netherlands, App. No. 10730/84, 11 Eur. H.R. Rep. 322, 332 (1989) (awarding pecuniary damages for violation of article 8, but making no mention of residence permit as remedy).

[106] *Jakupovic*, 2003 Eur. Ct. H.R. No. 36757/97 (holding, by four to three vote, that Austria disproportionately interfered with applicant's article 8 rights where it deported him and banned his residence for ten years where he was minor convicted of numerous burglaries, his mother and siblings lived in Austria, and he was deported to territory involved in significant armed conflict where he had no known relatives); Al-Nashif v. Bulgaria, App. No. 50963/99, 36 Eur. H.R. Rep. 655 (2003) (finding on vote of four votes to three that violation of article 8 occurred when applicant, stateless person accused of being threat to national security, was expelled from Bulgaria without procedural safeguards); *Yildiz*, 36 Eur. H.R. Rep. 32, 563-64 (finding violation of article 8 where deportation of and five-year residence ban imposed on father disrupted family with small child born in Austria despite father's conviction on shoplifting and traffic violations); Boultif v. Switzerland, App. No. 54273/00, 33 Eur. H.R. Rep. 50 (2001) (finding violation of article 8 where Switzerland refused to renew residence permit of noncitizen convicted of crime but

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similar cases have allowed individuals to remain in particular countries.[107] In eight cases, the court found deportation or exclusion not to be a violation of an individual's interest in family life.[108] The cases are extremely fact-specific as the court considers the extent of an individual's family ties with a particular country, whether interference with family life would occur if the individual were deported, and, if so, whether the deportation is proportional and necessary in a democracy.

Given the detailed factual inquiries of each case, a very limited right to remain with family members in a country may be emerging under the European Convention on Human Rights. In his partly concurring, partly dissenting opinion in *Lamguindaz v. United Kingdom*,[109] European

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married to Swiss national); Ciliz v. Netherlands, 2000 Eur. Ct. H.R. 29192/95, *available at* LEXIS, International Law Library, Human Rights Cases file (2000) (finding violation of article 8 where father was denied residence permit); Mehemi v. France, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 753 (1999) (finding violation of article 8 in France's deportation of noncitizen convicted of drug trafficking who had been born and lived his whole life in France where exclusion order separated him from his wife and three minor children of French nationality and his parents and siblings); Nasri v. France, App. No. 19465/92, 21 Eur. H.R. Rep. 458 (1996) (finding France would violate article 8 if it deported deaf-mute individual convicted of rape with no education who had lived virtually all his life in France with his parents and siblings).

[107] *See* Lamguindaz v. United Kingdom, App. No. 16152/90, 17 Eur. H.R. Rep. 213 (1994) (noting friendly settlement of case allowing young man of Moroccan extraction to remain in United Kingdom indefinitely); Djeroud v. France, App. No. 13446/87, 14 Eur. H.R. Rep. 68 (1992) (noting friendly settlement of deportation case that allowed young man who arrived in France from Algeria at six months of age to remain in France despite numerous convictions for theft and driving without license).

[108] *See, e.g.*, Baghli v. France, App. No. 34374/97, 33 Eur. H.R. Rep. 799 (2001) (finding no breach of article 8 where France excluded individual for ten years after he committed criminal acts although his parents and siblings lived in France); Dalia v. France, App. No. 26102/95, 33 Eur. H.R. Rep. 26 (2001) (finding no violation of article 8 where mother of French was permanently excluded from France); C v. Belgium, App. No. 21794/93, 32 Eur. H.R. Rep. 2 (2001) (finding no violation of article 8 when noncitizen father deported after criminal conviction); Bayaidi v. France, App. No. 24404/94, 30 Eur. H.R. Rep. 419 (2000) (finding no breach of article 8 where criminal deported); El Boujaidi v. France, App. No. 25613/94, 30 Eur. H.R. Rep. 223 (2000) (finding no violation of article 8 where noncitizen convicted of drug trafficking was permanently excluded although he had child born in France); Bouchelkia v. France, App. No. 23078/93, 25 Eur. H.R. Rep. 686 (1998) (finding no violation of Article 8 where noncitizen convicted of rape was unmarried at time of deportation order); Boughanemi v. France, App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996) (finding no violation of article 8 where alien who failed to show significant family connections was expelled after committing serious crimes); Cruz Varas v. Sweden, App. No. 15576/89, 14 Eur. H.R. Rep. 1 (1992) (finding no violation of article 8 where noncitizen claimed right to remain in Sweden with noncitizen family members who had also been ordered expelled); *see also* Helene Lambert, *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion*, 11 INT'L J. OF REFUGEE L. 427 (1999).

[109] Lamguindaz v. United Kingdom, App. No. 16152/90, 17 Eur. H.R. Rep. 213, 218 (1994) (Schermers, H.G., partly concurring, partly dissenting).

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Commissioner H.G. Schermers explains how a right to remain could potentially develop after a state admits an individual. In his view, a state takes some responsibility for individuals it lawfully admits and cannot later expel them or their children if they become less desirable or more burdensome:

> I fully agree with the Court that there is well-established international law granting States full control over entry of aliens. I am not so sure, however, whether international law concerning the expulsion of aliens is not changing fundamentally. . . . By admitting aliens to their territory States inevitably accept at least some measure of responsibility. This responsibility weighs even more heavily in the case of children educated in their territory. . . . I doubt whether modern international law permits a State which has educated children of admitted aliens to expel these children when they become a burden. Shifting this burden to the State of origin of the parent is no longer so clearly acceptable under modern international law. It is at least subject to doubt whether a host country has the right to return those immigrants who prove to be unsatisfactory.[110]

Commissioner Schermers notes what he perceives to be a nascent change in international law regarding sovereignty and a noncitizen's right to remain. While supporting this change, his equivocal language — "I am not so sure," "no longer so clearly acceptable," "at least subject to doubt" — emphasizes the tentativeness of the change. For legally admitted individuals, a right to remain in a state may be developing within the European Union, but it remains an emerging right rather than a mature, widely recognized one.

Furthermore, as a right to remain emerges, a concomitant hardening of a state's right to control initial entry into its territory may also occur. Where legal admittance carries with it a more or less permanent commitment allowing individuals and their children to remain in the state's territory, states may refuse initial entry to avoid that responsibility, even where asylees and refugees seek haven.

B. *Racial Equality*

My critique of the scholarship on racial equality rests not on the premise that racial discrimination in immigration law is in any way defensible, but simply that positive international law does not currently

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[110] *Id.* at 218-19.

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prohibit it. Scholars who criticize racial discrimination in U.S. immigration law are significantly in front of where the positive law, domestic or international, actually is. Racial discrimination is more entrenched and the solution further off than the scholarship acknowledges. The difficulty of grounding racial non-discrimination in the positive law of immigration and citizenship at the international level provides additional insight into the continued persistence of plenary power in U.S. immigration law.

As discussed below, various scholars have argued that international law and human rights law provide norms against racial discrimination in U.S. immigration law. Indeed, at least initially, many international conventions or documents seem to do so. Close readings of the international conventions, however, reveal specific limitations in the context of immigration and citizenship.

1. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ("ICEAFRD")[111] is a significant international commitment to eliminate racial discrimination which scholars frequently cite as a basis for eliminating racial discrimination in U.S. immigration law.[112] The ICEAFRD commits signatory states to eliminate "all forms" of racial discrimination, including as article 1 states:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[113]

By its terms, however, the ICEAFRD allows racial discrimination in matters of citizenship and immigration. Specifically, article 1(3) provides that the ICEAFRD does not purport to affect "in any way" legal provisions states may make regarding "nationality, citizenship or naturalization, provided that such provisions do not discriminate against

[111] International Convention on the Elimination of All Forms of Racial Discrimination Dec. 21, 1965, G.A. Res. 2106A(XX), 660 U.N.T.S. 195 (1969) [hereinafter ICEAFRD].

[112] *See, e.g.*, Chin, *supra* note 7, at 60-62. Gabriel Chin terms it "perhaps the broadest expression of the anti-discrimination principle in international law." *Id.* at 60.

[113] Although the ICEAFRD entered into force on January 4, 1969, the United States has not ratified it. 5 I.L.M. 350, 352 (1996).

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any particular nationality."[114] Article 1(2) explains, moreover, that the ICEAFRD is *not* applicable to state discrimination "between citizens and non-citizens."[115] Put bluntly, the most explicit international commitment to eliminate racial discrimination neither creates nor sustains a legal rule against racial discrimination in matters of immigration, citizenship, and naturalization; in fact, it does quite the opposite. Citizenship, naturalization, and immigration issues are specifically and explicitly exempted from the ICEAFRD's norm of racial equality.

The Convention does require state-parties "to prohibit and to eliminate racial discrimination in all its forms and to guarantee. . . [t]he right to nationality."[116] As stated in the Convention, however, the right to nationality implies a collective international effort to avoid statelessness rather than any individual's claim upon a specific country for nationality. Any nationality would appear to suffice, or at least a nationality to which the individual has some connection through either parentage or place of birth.[117]

2. The International Covenant on Civil and Political Rights

Similarly, article 26 of the International Covenant on Civil and Political Rights ("ICCPR") appears to support an international norm against racial discrimination in immigration and citizenship matters, at least if read alone:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[118]

[114] *Id.* art. 1(3).

[115] *Id.* art. 1(2).

[116] ICEAFRD, *supra* note 111, art. 5(d)(iii),

[117] *Jus sanguinis* and *jus solis* are the usual methods by which nations assign citizenship at birth. *Jus solis* citizenship is granted to persons born within the territory of the state. *Jus sanguinis* citizenship is granted to persons based on lineage. The United States relies primarily on *jus solis,* granting citizenship to virtually all children born here, including those of tourists, visiting students, and undocumented persons. U.S. CONST. amend. XIV; 8 U.S.C. § 1401 (2004). With certain limitations, the United States also grants citizenship to the children of citizens born abroad. 8 U.S.C. § 1401.

[118] ICCPR, *supra* note 86, art. 26.

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However, when read in conjunction with other articles of the ICCPR, it is less clear that state signatories commit not to discriminate in matters of citizenship and immigration. Article 2 recognizes that a state signatory commits to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Convention, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[119] For any particular state, the commitment is not to persons everywhere, but only to certain individuals: those within the state's jurisdiction, territorial or otherwise. In other words, with respect to non-discrimination, the ICCPR recognizes and reinforces the traditional categories of state sovereignty and jurisdiction: over specific territory and over specific individuals.

The focus on territorial boundaries and sovereignty continues throughout the ICCPR. Article 12(1) provides that "[e]veryone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence."[120] By implication, those who are in the territory unlawfully do not have the same right of liberty of movement and the same freedom to choose a residence. Articles 12(2) and (4) allow both a right of exit from and entry into a particular country: "Everyone shall be free to leave any country, including his own" and "No one shall be arbitrarily deprived of the right to enter his own country."[121] The phrase "his own country" clearly limits the right of entry described in article 12:[122] only someone who can claim a country as his own has a right to enter it.[123]

By its terms, article 16 suggests a right not limited by territorial boundaries or citizenship status. It is not entirely clear, however, when and how article 16 is meant to apply: "Everyone shall have the right to recognition everywhere as a person before the law." Does recognition as

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[119] *Id.* art. 2.

[120] *Id.* art. 12(1).

[121] *Id.* arts. 12(2), (4).

[122] *See also* ICCPR, *supra* note 86, art. 13:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. *Id.* art. 13.

[123] For a historical discussion of the right to enter one's own country, see JOHN TORPEY, THE INVENTION OF THE PASSPORT (2000).

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a person before the law necessarily mean one is recognized as a citizen? Are the terms "person" and "citizen" synonymous? Article 16 does not appear to mean that, having recognized an individual as "a person before the law," states cannot then distinguish among persons or differentiate based on citizenship status, particularly with respect to ingress into the country.

Furthermore, reading at least two of the other prohibited categories of discrimination in article 26 to apply to citizenship and immigration creates anomalous results. In addition to discrimination based on race, article 26 prohibits discrimination based on "birth" and "other status." At least initially, however, citizenship largely *is* a question of birth. Both *jus sanguinis* and *jus solis* rules explicitly discriminate based on birth. Under *jus sanguinis* rules, if an individual's parent or parents are citizens, the child is a citizen also. Under *jus solis* rules, if an individual is born within certain territorial limitations, the child is a citizen. No one has suggested that the ICCPR's prohibition on discrimination based on birth means that *jus solis* and *jus sanguinis* citizenship rules are now anathema. Similarly, no one has suggested that citizenship is itself an "other status" by which article 26 prohibits state discrimination. The question underlying the ICCPR is (1) whether it guides state action with respect to citizenship and immigration, or (2) whether it applies — primarily or exclusively, as article 2 suggests — with regard to a state's actions in its own territory and with respect to persons subject to its jurisdiction, citizens or not.

3. Other Sources

A close look at the language in the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights demonstrates that whatever international law *should* say about racial equality in immigration and citizenship matters, it does not currently prohibit such discrimination. Similar arguments regarding the lack of an international norm prohibiting racial discrimination in immigration and citizenship matters can be made regarding other international documents. The U.N. Charter "encourag[es] respect for human rights and for fundamental freedoms for all without distinction as to race."[124] The Universal Declaration of Human Rights provides that "all are equal before the law and are entitled without any discrimination to equal protection of the law."[125]

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[124] U.N. CHARTER art. 1, para. 3.

[125] Universal Declaration of Human Rights, *supra* note 85, art. 7; *see also id.* art. 2

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Even the Declaration of Human Rights of Individuals Who Are Not Nationals of the Countries in Which They Live allows states "to establish differences between nationals and aliens" with the caveat that "such laws and regulations shall not be incompatible with the international legal obligations of that state, including those in the field of human rights."[126] The Declaration, however, does not itself say what the "international legal obligations" of the state are with respect to differences between nationals and aliens. None of the international documents specifically articulates a norm against racial discrimination in immigration and citizenship.

III. CRITERIA FOR EXCLUSION OR INCLUSION

While criticizing the plenary power doctrine, many scholars have rightly deplored discriminatory criteria for excluding or including noncitizens. Much more rarely, however, do scholars offer a detailed account of permissible criteria for exclusion or inclusion, even as they specifically deny advocating an open-border policy or suggesting that any and all distinctions between citizens and noncitizens are inappropriate. I suggest that the relative reluctance to identify exclusionary criteria stems at least in part from the inherent difficulty of identifying principled bases for distinguishing between citizens and noncitizens in immigration law.

A. *Arguments Against Open Borders*

Scholars who criticize the plenary power doctrine repeatedly present their position as not implying an open-border policy or unbounded immigration. While arguing that the Constitution provides a social compact recognizing individual rights abroad and with respect to immigration, Louis Henkin states: "*Doubtless, the compact and our society are not necessarily open to all comers at all times*. The people, parties to the compact, may limit the number of new adherents and may exclude those who would endanger security or seriously disrupt order."[127] Henkin provides security and order as justifications for exclusion, but challenges as discriminatory specific past instances of exclusion ostensibly based on these criteria, particularly the differential treatment of Haitians and

(prohibiting discrimination based on race).

[126] Declaration of Human Rights of Individuals Who Are Not Nationals of the Countries in Which They Live, G.A. Res. 144, art. 2, para. 1, 40th Sess., U.N. Doc. A/RES/40/144 (1985).

[127] Henkin, *supra* note 35, at 33 (emphasis added).

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Cubans and the detention of aliens who cannot be deported.[128] Henkin is certainly right to identify these cases as discriminatory. His approach, however, does more to identify impermissible grounds for exclusion than provide permissible grounds that would "limit the number of new adherents" to the social compact of U.S. life.

Michael Scaperlanda argues that constitutional protections should apply evenly to both citizens and aliens, but insists that he does not "advocate a constitutionally-based open-border/open-membership philosophy."[129] Scaperlanda is thus against open borders for the United States. Like Henkin, however, he identifies impermissible instances of exclusion but provides little guidance on permissible exclusion:

> [A]ny immigration policy formulated by the political branches of the federal government should conform to the substantive and procedural requirements of the Constitution. For instance, Congress ought to be constitutionally prohibited from discriminating on the basis of race or national origin in its admission policy, as it did in the Chinese Exclusion Act. Continual and possibly life-long detention of Mariel Cubans, now entering its second decade, should be struck down as violative of constitutional due process safeguards.[130]

Further, Frank Wu deplores an open border policy as naive and utopian because of the severe socioeconomic differences between countries. He specifically identifies race as an unacceptable basis for excluding noncitizens from the United States.[131] Like other scholars, he does not provide criteria by which noncitizens could permissibly be excluded.[132]

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[128] *Id.* at 33-34 (citations omitted).

[129] Scaperlanda, *supra* note 7, at 1028 (emphasis added, citations omitted).

[130] *Id.*

[131] Wu, *supra* note 7, at 39.

[132] *Id.* Wu also believes that visas based on lotteries and investment criteria are problematic:

> A series of political bargains resulted in the programs allowing wealthy investors to buy their citizenship and the lottery that provides players from designated countries with the chance to win their citizenship. In the best light, the former suggests that people may earn citizenship, the latter that they may be rewarded for their luck. Reflecting the worst aspects of American culture, they might send the cynical message that benefits are distributed as much by luck as by work. Together, they are at odds with one another, and not part of a cohesive public policy.

Id. at 42.

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B. *Constitutionally Permissible but Still Problematic Criteria*

Where scholars identify criteria that arguably would pass muster if constitutional protections were applicable to the immigration context, it is not clear how substantially the proposed criteria — current nationality, foreign policy, class and economics, or family ties, for example — would move U.S. immigration law away from its discriminatory past. Each of the proposed criteria significantly intertwines with race or allows the political branches of government leeway that approximates the deference of the plenary power doctrine.

1. Current Nationality

David Martin argues that nationality is an appropriate criteria by which to exclude noncitizens from the United States because it focuses on "current national affiliation and [is] closely related to genuine foreign policy decisions."[133] Gerald Neuman likewise supports current nationality as a constitutionally defensible criteria for distinguishing among aliens:

> Distinctions in federal law among aliens on the basis of their country of current nationality are not constitutionally suspect. Bilateral and multilateral treaties frequently create reciprocal privileges for U.S. citizens and citizens of selected foreign countries, and some federal legislation extends specific favored treatment to particular nationalities. . . . If these distinctions are not defined in terms of race and are not motivated by racial prejudice. . . then they would not elicit heightened scrutiny under ordinary equal protection analysis.[134]

Similarly, using the terms "nationality" and "national origin" interchangeably, U.S. Supreme Court Justice Marshall acknowledged such classifications as possible justifications for discrimination in immigration.[135] Justice Marshall opined in *Jean v. Nelson* that where noncitizens were present in the United States, those from a particular national group could be denied parole while their asylum or refugee claims were processed "if that action would reduce the flow of undocumented aliens while refusing parole to other groups would

[133] David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 363, 364 (2000).

[134] Gerald L. Neuman, *Terrorism, Selective Deportation, and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 340 (2000).

[135] *See* Jean v. Nelson, 472 U.S. 846, 881 (1985) (Marshall, J., dissenting).

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not."[136] Nationality has often been a criterion used to permit certain individuals to enter the United States and to deny entry to others.[137]

The question remains, though, whether current nationality is sufficiently distinct from race or national origin to justify its use to exclude individuals or whether current nationality is, in reality, a proxy — albeit imperfect — for race. The use of current nationality as an exclusionary criterion encounters many of the same problems as the use of race. Moreover, the use of nationality reinforces current patterns of privilege, making it difficult to move U.S. immigration law away from its discriminatory past, even if that law enters the constitutional mainstream.

Martin defends current nationality as a basis for excluding individuals from the United States because it is mutable and linked to foreign policy, in contrast to "national-origin discrimination [which is] based on an immutable characteristic akin to race. . . ."[138] While nationality is technically not immutable like race or gender — categories that our social constructs mark in physical bodies and usually subject to heightened scrutiny in U.S. constitutional law — nationality is nonetheless functionally immutable for the vast majority of the world's population. With neither the financial means nor the family connections to change their status, most people in the world have no alternative to the citizenship with which they were born. In its functional immutability, nationality is more similar to race and gender than it is different from them. Thus, to pass constitutional muster, discrimination based on current nationality merits the same heightened degree of scrutiny race and gender receive in constitutional law.

For example, if, as Martin and Neuman suggest, current nationality is a constitutionally permissible criteria for immigration decisions, the differentiation in U.S. immigration practice that excludes Haitian nationals and includes Cuban nationals would raise no constitutional concerns. The practice is a racially-neutral nationality distinction, even though its impact is specifically racist. The vast majority of Haitian nationals seeking admission to the United States are of African descent, but because proving racial prejudice as a motive is extremely difficult,

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[136] *Id.* at 880.

[137] *Id.* at 862-63 (citing regulations presuming lawful admission for certain national groups, documentary requirements for non-immigrants of particular nationalities, special privileges of communication for certain nationalities with diplomatic officers, and limited inspection required for certain British and Canadian crew).

[138] Martin, *supra* note 133, at 364.

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their exclusion would raise no constitutional questions.[139]

Moreover, the argument assumes that race, national origin, and nationality or citizenship are distinct concepts with well-understood and widely-accepted definitions. These concepts, however, do not stand in isolation of each other. Nor is there broad agreement as to what "race" is or even the extent of its existence outside (powerful) social and legal constructs.[140] Rather, along with gender and class, the boundaries and content of race, national origin, ethnicity, nationality, and citizenship are permeable and overlapping. The International Convention on the Elimination of All Forms of Racial Discrimination recognizes the overlap. Under article 1(3), the Convention does not purport to affect "in any way," legal provisions states may make regarding "nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality,"[141] thus suggesting that discriminating against a particular nationality is similar, if not the same, as discriminating against a particular race.

The further analytic difficulty in arguing that current nationality provides a permissible criteria for excluding certain populations but race does not, is their near congruence in largely homogenous populations, particularly countries that have relied almost exclusively on *jus sanguinis* to determine citizenship: China, Japan, and Germany, for example. Suppose a statute worded similarly to the 1888 Chinese Exclusion Act barred from the United States "any Chinese national," "any Japanese national," "any German national," or "any Irish national." Suppose also that the legislative history was devoid of the express racial animus found in the legislative history of the Chinese Exclusion Act. Rather, the legislative history of the hypothetical act justified the exclusion of Chinese, Japanese, German, and Irish nationals as a foreign policy measure enacted at the request of the respective governments to discourage emigration and conserve human capital at home. Even though expressed in terms of current nationality and justified in terms of foreign policy, the racist implications and undercurrents are hard to avoid, particularly because the specified nationalities are groups against which American society has discriminated on racial or ethnic grounds in

[139] As quoted at *supra* note 35 and accompanying text, Louis Henkin apparently excludes current nationality as a permissible criteria for exclusion. At least, that is an implication of his criticism of the differential treatment of Haitians and Cubans in U.S. immigration law.

[140] *See, e.g.*, NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR (1998); IAN HANEY LÓPEZ, WHITE BY LAW (1996).

[141] ICEAFRD, *supra* note 111, art. 1(3).

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the past. The term "Irish" may now refer to current nationality, but it has also been a racial category.[142] Even in countries where the citizenry is not ethnically or racially homogenous — due to *jus solis*, generous naturalization laws, or colonization — the overlap of race and nationality persists. Excluding "any Mexican national" may exclude a number of whites, but the vast majority of those excluded would be people of color.

Because race and current nationality overlap, allowing current nationality as a permissible means of excluding noncitizens also leads us back perilously close to the birth of plenary power in the Supreme Court case *Chae Chan Ping* and the Chinese Exclusion Acts. Both the legislative history behind the Chinese Exclusion Acts and the Court's decision in *Chae Chan Ping* reveal the underlying justification for the Act as racist; however, the first act in 1882 simply excluded "any Chinese laborer."[143] The term "Chinese" identified nationality as easily as it did race. When the Act was amended in 1884, it again excluded "any Chinese laborer" but expressly stated that its provisions should apply "to all subjects of China and Chinese, whether subjects of China or any other foreign power."[144] The amendment excluded both Chinese nationals and ethnic Chinese of other nationalities, highlighting the permeability of nationality and race. To the extent that nationality and race are distinct, what begins as exclusion based on current nationality may subtly, or not so subtly, morph into exclusion based on race.

More particularly, the administrative regulations the United States implemented in 2002 that required the registration, fingerprinting, and photographing of certain non-immigrants reveal the intersection of race, ethnicity, and nationality.[145] Among others, nationals from Iran, Iraq, Libya, Sudan, and Syria were required to register.[146] Thus, the regulation ostensibly used nationality as the distinguishing criteria.[147] The registration requirement, however, applied not simply to the *actual* nationals or citizens of the designated countries, but to any non-immigrant whom a consular officer or border inspector had "reason to

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[142] IGNATIEV, *supra* note 140.

[143] Act of May 6, 1882, ch. 126, 22 Stat. 58 (amended 1884).

[144] Act of July 5, 1884, ch. 220, § 15, 23 Stat. 115 (amending the Act of May 6, 1882).

[145] *See supra* citations and text accompanying note 4.

[146] Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57,032 (Sept. 6, 2002).

[147] 67 Fed. Reg. 52,584 (Aug. 12, 2002). In responding to criticism of the proposed rule, the government noted that its registration requirements were not new. As early as July 1998, nonimmigrant aliens from Iran, Iraq, Libya, and Sudan were required to register. *Id.* at 52,585 (citing 63 Fed. Reg. 39,109 (July 21, 1998)).

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believe" was a national or citizen of the designated countries.[148] What might give a border inspector "reason to believe" that an individual was an Iranian or Syrian or Libyan national? Being of Iranian, Syrian, or Libyan extraction, or looking like one was, may, in practice, have been enough.

2. Foreign Policy

Foreign policy implemented by the political branches of the government would probably provide a constitutionally permissible means for excluding or including noncitizens in the United States.[149] Foreign policy, however, would not clearly protect against the discrimination that has characterized U.S. immigration law because, as with plenary power in immigration law, U.S. courts routinely leave questions of foreign policy to the political branches.[150] Judicial review of foreign policy decisions are few and far between. Justifying immigration restrictions based on foreign policy grounds does not remove the risk of discrimination — racial or otherwise — but potentially masks it. As Phillip Trimble reminds us, "Foreign policy is not necessarily guided by principle."[151] If the goal is greater constitutional protections in the immigration context, recognizing foreign policy as a permissible criterion for exclusion moves us only marginally closer to judicially enforceable non-discrimination than does the plenary power doctrine.

3. Class and Economics

Economic criteria have also been offered as permissible criteria for choosing among would-be immigrants. The U.S. Supreme Court has

[148] *Id.* at 52,592.

[149] *See, e.g.*, Malek-Marzban v. INS, 653 F.2d 113, 116 (4th Cir. 1981) (upholding time limit on voluntary departures of deportable Iranians); Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (allowing registration requirement for Iranian students). Because immigration restrictions based on foreign policy would likely be expressed in terms of current nationality, the risk of racial discrimination arises. Restrictions on immigration from countries at war with or explicitly hostile to the United States could be justified as self-protective measures. Beyond self-preservation, however, U.S. foreign policy may be more or less principled.

[150] *See, e.g.*, Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (committing questions of foreign affairs to political branches as they are "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry").

[151] Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 709 (1986).

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"often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers.'"[152] The current structure of the visa system, particularly with respect to non-immigrant visas, emphasizes economic or class criteria for admission. The United States does not expressly ask a person's class on visa applications, but eligibility for U.S. visas — whether student, tourist, business, or lottery — focuses in large measure on indicia of upper-class status: financial assets, education, and employment. For example, student visas require a showing of funds sufficient to defray "all living and school expenses during the entire period of anticipated study," or, alternatively, a sponsor willing to cover those costs.[153] H1-B visas are specifically created for high-tech workers with specialized skills.[154] Even the current visa lottery program takes socio-economic background into account; to be eligible for a lottery visa, an applicant must have completed high school or recently worked for two years in an occupation requiring at least two years of training.[155]

If constitutional prohibitions on discrimination applied to the immigration context, it seems likely that such economic or class criteria for exclusion or inclusion would survive. In Supreme Court jurisprudence, wealth or class discrimination alone is not subject to strict or even intermediate scrutiny.[156] Even where race and class intersect, the Supreme Court has not applied strict scrutiny where the equal protection claim was based primarily on class and the asserted right was not deemed fundamental.[157] In *San Antonio School District v. Rodriguez*, the Supreme Court refused to apply strict scrutiny to a claim that a Texas school-financing system violated the Fourteenth Amendment where poor, largely Hispanic school districts received less money than their

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[152] INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183, 194 (1991) (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984)).

[153] U.S. Dep't of State, *Student Visas, available at* http://travel.his.com/visa/temp visitors_types_students2.html (last visited Nov. 3, 2004).

[154] U.S. Dep't of State, *Tips for U.S. Visas: Temporary Workers, available at* http://travel.his.com/visa/tempvisitors_types_temp_overview.html (last visited Nov. 3, 2004).

[155] U.S. Dep't of State, *Instructions for the 2006 Diversity Immigrant Visa Program (DV-2006), available at* http://travel.his.com/visa/immigrants_types_diversity3.html (last visited Nov. 3, 2004).

[156] Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (refusing to apply strict scrutiny to student's equal protection challenge to school bus financing in North Dakota); *see also* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 316 (1991).

[157] *See* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

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wealthier, largely Anglo counterparts.[158] Poverty was not a suspect class; education was not a fundamental right.[159] The Fourteenth Amendment may take account of wealth or class discrimination when fundamental rights associated with the criminal and political process come into play,[160] but Fifth Amendment equal protection analysis is virtually nonexistent. Moreover, even if Fifth Amendment jurisprudence took serious account of wealth or class as a suspect category, the fundamental right requirement necessary to strict scrutiny would be missing; neither U.S. constitutional law nor international law identifies a fundamental right for noncitizens to enter or remain in a nation-state.

Like current nationality, class or economic standing raises significant issues as a defensible criterion for an individual's exclusion from or inclusion in the United States. Class and race intertwine in significant and complex ways. Similarly, class distinctions were key to discrimination under the Chinese Exclusion Acts. The Acts did not exclude all Chinese, but only Chinese "laborers."[161] The Acts allowed "Chinese persons other than laborers" to enter the United States,[162] although proving that an immigrant was something other than a laborer and thus eligible to enter the United States was difficult.[163] Congressional debates surrounding the Chinese Exclusion Acts reveal the complexity of separating the racial and class animus that motivated Chinese exclusion. In those debates, the "worthy representatives" of "honorable labor" — presumably white American workers — were "driven into poverty and exile by an invading race."[164] The immigrants

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[158] *Id.* at 5-6.

[159] *Id.* at 28-29.

[160] Bullock v. Carter, 405 U.S. 134, 149 (1972) (preventing state from totally excluding from ballot candidate who is unable to pay filing fee); Tate v. Short, 401 U.S. 395, 398 (1971) (prohibiting jailing of indigent person for inability to pay criminal fine); Williams v. Illinois, 399 U.S. 235, 243 (1970) (same); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966) (invalidating state elections poll tax); Douglas v. California, 372 U.S. 353, 357 (1963) (holding that equal protection analysis required state to provide counsel for indigent criminal defendant's appeal); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (upholding indigent defendant's right to trial transcript where he could not pay for one); *see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1968) (invalidating state statutes that applied residency requirement on welfare recipients because moving within United States is "a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest is unconstitutional").

[161] Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58.

[162] *Id.* § 6.

[163] *See, e.g.*, Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1 (2000) (discussing difficulty of proving that Chinese immigrant was not laborer).

[164] 13 CONG. REC. 2968 (1882).

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to be excluded were not upper-class Chinese, but "those men. . . . who are mere pauper laborers, who are worse than pauper laborers, who are contract laborers, coolies, a class of men who tend to degrade all labor."[165] As a class, Chinese laborers were equated with slaves,[166] furthering the interconnectedness of race and class in a society not far removed from the Civil War.

Discriminating based on the same factors that identify class may make practical sense for the U.S. economy and even pass constitutional muster. That practical advantage, however, is based on maintaining significant economic privilege for citizens. As with race, exclusion or inclusion of noncitizens based on class reinforces extant patterns of privilege.

4. Family Ties

In addition to its focus on indicators of class, current U.S. immigration law is largely family-based. Citizens and permanent residents may petition for immigrant visas for specified family members. To be eligible, an individual needs to demonstrate the specified family relationship and provide an affidavit of financial support from his sponsoring family member. While family unity may not be a fundamental constitutional right, or even an absolute right recognized in international human rights law, the U.S. system of family-based immigration provides at least some opportunity for families to be together. No equal protection claims have challenged family-based immigration in and of itself, although specific questions regarding preferred family relationships have arisen.[167]

As with other criteria that would pass constitutional muster, the concern with family-based immigration is the degree to which it reinforces current patterns of privilege as it intertwines with race and, to a lesser degree, with class. While she is growing up, a child belongs to her family's class, although her family may be upwardly or downwardly mobile. Likewise, race is generally transmitted through families. A child will most likely claim, or be assigned, the race of one or both her parents. Admission of immigrants to the United States based on family connections reinforces the dominant racial and ethnic make-up of the country. Inter-racial marriages and adoptions exist, but not to the degree that race and ethnicity have become meaningless categories.

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[165] 13 CONG. REC. 2609 (1882).

[166] 13 CONG. REC. 2612 (1882).

[167] Fiallo v. Bell, 430 U.S. 787, 798 (1977) (upholding statutory limitations on permanent resident father's ability to facilitate immigration of his child born out-of-wedlock).

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CONCLUSION

In writing an obituary for the plenary power doctrine, Gabriel Chin offered hope for non-discrimination in immigration law, a hope grounded in political developments rather than in express constitutional protections.[168] Earlier, Hiroshi Motomura argued that plenary power has resulted in a flawed system of subconstitutional protection for noncitizens where statutes and the "phantom constitutional norms" on which legislators base them provide more protection than the Constitution itself.[169] By grounding immigration protections in the Constitution rather than the political process, however, critics of the plenary power doctrine seek to make those protections more absolute and less vulnerable to events like September 11 and the associated political fall out.

Depending, however, on the issue — family unity or racial equality — the ease of identifying a right as constitutional is relative. The more serious problem is the difficulty of grounding even clearly identified rights in the Constitution when immigration is the context. In contrast to the Constitution, international human rights law at first seems to offer a powerful source for fundamental rights to family unity and against racial discrimination. A close analysis, however, shows citizenship and immigration issues to be largely removed from the purview of international human rights law in the same way the plenary power doctrine has removed immigration questions from the mainstream of U.S. constitutional law. Even the most explicit international covenants against racial discrimination exempt distinctions between citizens and noncitizens in the immigration context. Thus, positive law does not fully recognize the rights that critics of the plenary power doctrine advocate.

Even were constitutional protections to limit congressional power in the immigration context, it is not clear that distinctions between noncitizens and citizens regarding entry into the United States would be principled rather than an exercise of power and privilege. Treating racial classifications in immigration law as a suspect classification subject to heightened scrutiny would be an improvement over the plenary power doctrine. Nonetheless, the same groups and individuals would largely be excluded from the United States were current nationality and class deemed constitutionally permissible criteria for exclusion. Moreover, if foreign policy concerns set the criteria for exclusion or inclusion of noncitizens, the availability of judicial review would be minimal, as

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[168] Chin, *supra* note 3, at 285-86.

[169] Motomura, *supra* note 7, at 548-49.

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foreign policy decisions are largely committed to the political branches.

Despite the fact that positive law, as articulated in both international documents and the Constitution, apparently allows discrimination between citizens and noncitizens in the immigration context, I submit that there are in fact few, if any, principled justifications for distinguishing between citizens and noncitizens. Justifications that appear principled in the beginning — current nationality, foreign policy, class and economics, or family ties — are all to some degree based on privilege and power. Accepting that there are few principled justifications for distinguishing between citizens and noncitizens, the plenary power doctrine — grounded as it has been in sovereignty — stands as a fairly transparent approach to immigration law. The plenary power doctrine at least recognizes that the exclusion of noncitizens is an exercise of power, rather than justified by principle, constitutional or otherwise. The plenary power doctrine calls a spade a spade; the United States, and other countries, exclude noncitizens as a matter of power and privilege. Perhaps, despite their limitations, the protections Motomura and Chin identify in statutory law and political developments are as good as it gets, particularly after September 11.

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