Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen

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Does citizenship as we know it still exist in the post-September 11 world? Do the exigencies of war require an inquiry into who among the citizenry is legitimately a citizen? Two cases in which the government detained U.S. citizens as enemy combatants resolve these questions in conflicting ways. Hamdi v. Rumsfeld[1] *and Rumsfeld v. Padilla*[2] *each raised constitutional challenges to the military detention of a U.S. citizen accused of taking action against the U.S. government in a time of war.*[3] *In Hamdi, the Supreme Court fractured around the question whether citizenship matters when measuring the constitutional protections of an individual detained as an enemy combatant. In Padilla, the majority shelved the relevance of citizenship and disposed of the case on procedural grounds, while citizenship was central to the dissent's protest that the Court should reach the substantive questions in the case.*

This Article exposes the radical redefining of citizenship augured in the recent case law addressing citizens suspected of disloyalty. Cases in which the military detained U.S. citizens on the suspicion that they are "enemy combatants" have blurred the distinctions between citizens and non-citizens. Rules that grew out of jurisprudence about non-citizens have crept into decisions in which the government has questioned the legitimacy and loyalty of citizens. The

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[1] Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

[2] Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

[3] *Id.* at 2715; *Hamdi*, 124 S. Ct. at 2635.

appearance of these rules and their implications for citizenship have gone virtually unnoticed by both advocates and critics of the enemy combatant cases. Yet the presence of these rules accompanies the courts' sub rosa evaluation of whether the citizen is legitimately a member of the citizenry. Together, they create a hybrid category of citizenship —what I call "pseudo-citizenship" —to which constitutional protections against federal power apply with diminished force.

This approach reframes the current heated debate about these cases. That debate has polarized as a conflict between the power of the federal government in wartime and the scope of constitutional protections for citizens.[4] *Recast as a debate about the very substance of citizenship, radically different issues arise. These cases reconstruct the constitutional framework to include a new category of citizenship that draws from extra-constitutional norms governing non-citizens. They suggest a jurisprudence of pseudo-citizenship in a world in which traditional notions of war and conflict no longer seem to apply.*

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[4] *See, e.g.*, David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 INT'L J. LEGAL INFO. 290, 291 (2003); George C. Harris, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 CORNELL INT'L L.J. 135, 147-49 (2003); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 1-2, 9, 15-20 (2004); William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L.J. 927, 932 (1997); Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371 (2003).

INTRODUCTION

On May 8, 2002, upon landing at Chicago's O'Hare International Airport, José Padilla was arrested in connection with a grand jury investigation into the September 11 attacks.[5] Padilla is a U.S. citizen, born in Brooklyn, New York.[6] He grew up in Brooklyn and Chicago and moved to Florida as a young adult.[7] Family friends and others remember him as a handsome, quiet boy who played basketball in the street and was close to his mother.[8] As a teen, and later an adult, he apparently joined a gang[9] and acquired a criminal record that included a juvenile conviction for murder and, later, a weapons charge.[10] He converted from Roman Catholicism to Islam at some point along the way.[11] According to the Department of Defense, in 1998, Padilla moved

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[5] *Padilla*, 124 S. Ct. at 2715.

[6] *Id.*; Lucio Guerrero et al., *A Couple of Years Back, I Knew He Entered a Cult*, CHI. SUN-TIMES, June 11, 2002, at 6.

[7] James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1; Cam Simpson, *FBI Hunts Padilla 'Partner'; Worldwide Alert Issued for Saudi*, CHI. TRIB., Mar. 21, 2003, at C1.

[8] Guerrero et al., *supra* note 6; Richard A. Serrano, *U.S. Breaks Old Legal Ground; Precedents of WWII Are Cited in Jailing of Alleged 'Dirtybomber' Since May Without Charges*, L.A. TIMES, Nov. 25, 2002, at 1.

[9] Manuel Roig-Franzia & Amy Goldstein, *A Bomb Suspect's Search for Identity; In Padilla's Metamorphosis Into Al Muhajir, Fla. Provided a Turning Point*, WASH. POST, June 15, 2002, at A1.

[10] Padilla v. Rumsfeld, 352 F.3d 695, 700 (2003).

[11] Jonathan Weisman, et al., *American Terror Suspect Is Not Unique*, USA TODAY, June 11, 2002, at A3; Risen & Shenon, *supra* note 7.

to Egypt,[12] changed his name to Abdullah al Muhajir,[13] and traveled to countries in the Middle East and Southwest Asia in 1999 and 2000.[14] He allegedly met with senior Al Qaeda officials and discussed plans to detonate a radioactive bomb in the United States.[15]

Just after his arrest in Chicago, Padilla was held as a civilian material witness[16] in the Metropolitan Correctional Center in New York.[17] In June 2002, when Padilla's counsel moved to vacate the material witness warrant, President Bush declared that Padilla was an "enemy combatant" and ordered the Secretary of Defense to take him into custody.[18] The Department of Defense transferred him to a naval brig in South Carolina and has detained him there ever since, incommunicado and, until recently,[19] without access to counsel.[20]

In the fall of 2001, the Northern Alliance[21] captured Yaser Esam Hamdi in Afghanistan. They then turned him over to the U.S. military along with other prisoners.[22] When the U.S. military discovered that Hamdi was a U.S. citizen, they transferred him from a detention camp in Guantanamo Bay, Cuba, to the Norfolk Naval Station Brig in Virginia.[23]

Unlike Padilla, Hamdi did not grow up in the United States. He was born in Baton Rouge, Louisiana, but his family moved to Saudi Arabia when he was a young child.[24] In contrast to the searching media inquiry

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[12] *Padilla*, 352 F.3d at 700.

[13] Padilla v. Bush, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002) (citing declaration of Michael H. Mobbs, special advisor to Under Secretary of Defense for Policy (hereinafter Mobbs Declaration)). Mobbs claimed to have no direct knowledge of Padilla's actions or of the interrogations that produced the information in the declaration. *Padilla*, 352 F.3d at 700.

[14] *Padilla*, 352 F.3d at 700-01 (citing Mobbs Declaration).

[15] *Id.* at 701; *see also* Risen & Shenon, *supra* note 7.

[16] The government may detain as a material witness an individual who has unique information about a crime and when necessary to ensure the person's appearance and testimony at relevant court proceedings. 18 U.S.C. § 3144 (2000); *see* Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 485 (2002).

[17] Rumsfeld v. Padilla, 124 S. Ct. 2711, 2730 (2004).

[18] *Id.*

[19] Neil A. Lewis, *Supreme Court Will Hear 3rd Detainee Case*, N.Y. TIMES, February 21, 2004, at A9 (reporting that government officials had granted Padilla and Hamdi access to counsel while maintaining that they were under no legal obligation to do so).

[20] *Padilla*, 124 S. Ct. at 2716.

[21] The Northern Alliance is a coalition of military groups opposed to the Taliban. Michael R. Gordon & Eric Schmitt, *A Nation Challenged: The Strategy; U.S. Seeks Afghan Coalition Against Taliban*, N.Y. TIMES, Sept. 24, 2001, at A1.

[22] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635-36 (2004).

[23] *Id.* at 2636.

[24] *Id.* at 2535.

into Padilla's U.S. childhood,[25] neither the media nor the courts have shed much light on Hamdi's background. According to the petition his father filed on his behalf, Hamdi resided in Afghanistan when Northern Alliance forces detained him.[26] The Department of Defense alleges that he served with the Taliban and was captured with an assault rifle.[27] Like Padilla, President Bush has labeled Hamdi an "enemy combatant."[28] And, like Padilla, the Department of Defense has detained Hamdi in a military brig incommunicado and, until recently, without access to legal counsel.[29] The United States has brought no charges against either detainee.[30]

On January 8, 2003, the Fourth Circuit upheld the military's detention of Hamdi,[31] ruling that the Fifth and Fourteenth Amendments do not require the government to provide him with a criminal trial.[32] Portraying Hamdi as a foreigner who "may not have renounced his American citizenship,"[33] the opinion described his U.S. citizenship as accidentally obtained and characterized his connection with the U.S. community as minimal at best.[34] Consistent with that portrayal, the opinion relied upon rules that govern the scope of constitutional protections for non-citizens.[35] It applied the plenary power doctrine, which calls for extraordinary judicial deference to the executive and legislative branches and diminished constitutional protections when those branches act within the spheres of immigration, national security, or foreign policy.[36] The plenary power doctrine was created in part to

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[25] *See, e.g., supra* notes 10-13, 15.

[26] *Hamdi*, 124 S. Ct. at 2635.

[27] *Id.* at 2637.

[28] *Id.*

[29] *Id.* at 2636, 2652.

[30] *Id.* at 2636; Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715-16 (2004).

[31] *Hamdi* generated three panel opinions in the Fourth Circuit, the last two of which are relevant to this article. *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).

[32] *Hamdi*, 316 F.3d at 470-71.

[33] *Id.*

[34] *Id.* at 460 (stating "Hamdi apparently was born in Louisiana but left for Saudi Arabia when he was a small child").

[35] *Id.* at 474 (citing, *e.g.*, INS v. St. Cyr, 533 U.S. 289 (2001)); *see infra* notes 247-56 and accompanying text.

[36] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (articulating elements of plenary power doctrine). *Curtiss-Wright* excluded citizens from the scope of its holding: "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."). *Id.*; *see also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1015-26 (2002)

govern individuals deemed outside the social contract embodied in the Constitution, such as non-citizens.[37] This was the first time that a court had applied the plenary power doctrine to a U.S. citizen in the United States alleged to be an unlawful combatant.

The Second Circuit took the opposite course in *Padilla*. On December 18, 2003, the Second Circuit ruled that, because Padilla was an "American citizen" seized on "American soil," the military could not constitutionally detain him and he was entitled to the constitutional protections of a criminal trial.[38] It declined to apply standards developed to govern non-citizens detained indefinitely, instead emphasizing Padilla's citizenship and the constitutional protections limiting the President's power to detain citizens.[39] It rejected the application of the plenary power doctrine to Padilla, holding that the President had overstepped his powers in indefinitely detaining this citizen.[40]

Little distinguishes these two detainees. Both are citizens. Both have been classified as enemy combatants. Both are detained in military custody in the United States. Yet the two cases reach opposite conclusions that seem inconsistent with the magnitude of the threat these citizens allegedly posed. Assuming the government's allegations about Hamdi and Padilla are true, the harm to the United States that Padilla would cause by detonating a radioactive bomb in the United States is probably greater than the harm that Hamdi allegedly caused fighting the Northern Alliance in Afghanistan. Arguably, the executive branch should have greater latitude to protect the country against disloyal citizens when the threat is within our borders. The characterization of Hamdi as effectively a foreigner and Padilla as the archetypal U.S. citizen suggests a more compelling explanation for the different outcomes in these two opinions.

[hereinafter *In Aid of Removal*] (describing Supreme Court's deference to plenary power of federal government when "substantive criteria" is created to govern admission and expulsion of aliens, and noting that plenary power is limited only by due process considerations).

[37] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 5 (2002); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 429-30 (2002) [hereinafter *Asserting Plenary Power*].

[38] Padilla v. Rumsfeld, 352 F.3d 695, 699 (2003).

[39] *Id.* at 711-24; *see also id.* at 733 (Wesley, J., dissenting) (citing as precedent for legality of Padilla's detention *Zadvydas v. Davis*, 533 U.S. 678 (2001) (establishing standards for detention of non-citizens)).

[40] *Padilla*, 352 F.3d at 711-24.

Although the opinions seek to distinguish one another based on whether the seizure took place outside the United States and in a zone of combat,[41] both citizens have been detained within the United States and within reach of a functioning civil court. One might attribute these disparate outcomes entirely to a liberty-oriented Second Circuit versus a security-minded Fourth Circuit. But there is a curious significance to the reliance in *Hamdi*, and not *Padilla*, on rules traditionally applied to non-citizens and to *Hamdi*'s use of the plenary power doctrine.

The Supreme Court failed to resolve the puzzle posed by these two cases. It disposed of *Padilla* on procedural grounds without reaching the merits of Padilla's habeas claims. In *Hamdi*, four opinions without a clear majority splintered around the significance of citizenship to the constitutional reach of federal power over detained individuals. A plurality determined that any individual, whether citizen or alien, who the government detains as an enemy combatant is entitled to a "meaningful opportunity" to challenge that designation.[42] That opportunity, however, may be satisfied by a military trial and by a process that grants significant presumptions and procedural advantages to the government.[43]

Like the Fourth Circuit, the plurality collapsed the categories of citizen and alien, and drew from authority governing aliens.[44] In effect, it permitted the legislative and executive branches to exert plenary power over the detained citizen. As a result, *Hamdi* solidified the creation of a new category of pseudo-citizens with lesser constitutional protection against government action. In dissent, Scalia and Stevens chastised the plurality for failing to distinguish between citizens and aliens.[45] They argued that citizenship invokes the constitutional protections of a criminal trial and the jurisdiction of a federal court.[46]

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[41] *Id.* at 711; *Hamdi*, 316 F.3d at 465.

[42] *Hamdi*, 124 S. Ct. at 2635.

[43] *Id.* at 2642-43.

[44] *Id.* at 2640 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

[45] *Id.* at 2663 ("Justice O'Connor, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. *Id.* at 2640. That is probably an accurate description of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.").

[46] *Id.* at 2660 ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.")

Scholarship concerning the enemy combatant cases has generally overlooked the appearance of the plenary power doctrine and, associated with it, the reliance on rules governing non-citizens to measure the scope of constitutional protections for citizens. Many observers have commented on the differences in the treatment of citizens and non-citizens alleged to be belligerents. However, little attention has been paid to whether these cases maintain a firm line between citizenship and alienage.[47]

In this Article, I propose that the unlawful combatant cases have erased the divide between citizens and non-citizens and created a hybrid category of citizenship. I seek to explain why rules that govern the scope of federal power over non-citizens, such as the plenary power doctrine, have begun to appear in decisions about federal power over citizens. I suggest that determinations about the legitimacy of the individual petitioner's citizenship underlie the courts' decisions throughout the unlawful combatant cases. The emergence of the plenary power doctrine in these cases reflects the application of a *sub rosa* membership test for true citizenship that evaluates whether a citizen is entitled to the full benefits of individual constitutional rights.[48] This membership test measures the strength of the individual's connection to the United States. It also evaluates the community with which the court associates the individual and the legitimacy of that community's claim to constitutional protection.

I conclude that whether a citizen suspected of being an "enemy combatant" is truly a member of the national community predetermines the ultimate decision about whether the citizen is entitled to the constitutional protections of a criminal trial rather than a military forum. Those viewed as having insufficient ties to the United States community become, in effect, pseudo-citizens who receive a lower level of constitutional protection than full citizens. Pseudo-citizens are subject to the plenary power doctrine, which invites the application of law

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[47] Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1296 (2002) (arguing protecting rights of non-citizens requires linking them with rights of citizens); Hiroshi Motomura, *Immigration and We The People After September 11*, 66 ALB. L. REV. 413, 422 (2003) ("What is really troubling about the government's response to September 11 has not been that the government is treating citizens and non-citizens differently. Rather, it is that current policies treat many citizens as if they were non-citizens — at least if we look beyond a narrow, legalistic definition of what it means to be a U.S. citizen.").

[48] *See* Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 456-88 (2000) [hereinafter *Citizenship*] (describing four discourses in case law regarding citizenship: formal legal status, rights, political activity, and identity).

governing non-citizens. This focus on the quality or nature of the individual's citizenship is consistent with the use of the plenary power doctrine, which grew out of contexts in which citizenship was either suspect or absent.

Part I of this Article describes the development of the pseudo-citizen classification in the Supreme Court case law, beginning with *Ex parte Milligan*[49] in 1866 and leading up to the current enemy combatant cases. Part II argues that this membership test plays out in opposite ways in *Hamdi* and *Padilla*. It explores the application of the plenary power doctrine in *Hamdi* to citizens accused of being enemy combatants,[50] and the tension in *Padilla* concerning the doctrine.[51] Part III addresses the implications of a membership test that creates a new category of citizenship. It confronts the larger effects of the malleability of citizenship categories on both citizens and non-citizens. I observe that a hierarchy of citizenship, in which some citizens receive greater constitutional protections than others, upsets common understandings about equal treatment of all citizens. A membership test for citizenship is likely to disproportionately impact those citizens who are perceived as being on the margins of citizenship. It also unmoors expectations about the stability and permanency of citizenship by allowing the government, rather than the citizen, to control citizenship status. Finally, I conclude that the enemy combatant cases instruct us to be cautious when fashioning rules for non-citizens because of their potential application to citizens.

I. CITIZENSHIP, MEMBERSHIP, AND THE RISE OF THE PLENARY POWER DOCTRINE

In the decades between the Supreme Court's *Ex parte Milligan* and *Ex parte Quirin* decisions, the Court laid the groundwork for a membership test to determine whether a citizen accused of aiding the enemy was subject to a military trial rather than the constitutional protection of a criminal trial. This test identifies whether the citizen is a member of the social contract underlying the Constitution and therefore entitled to its protection. Social contract principles focus on "the consent of a particular population to be governed"[52] and seek to identify who is

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[49] 71 U.S. (4 Wall.) 2 (1866).

[50] *Hamdi*, 124 S. Ct. at 2648-51; *Hamdi*, 316 F.3d at 474; *Hamdi*, 296 F.3d at 281.

[51] Padilla v. Rumsfeld, 352 F.3d 695, 713-14 (2003).

[52] Cleveland, *supra* note 37, at 20.

entitled by that consent to the protections of the Constitution.[53]

Who is entitled to constitutional guarantees is not obvious from the text of the Constitution.[54] Although the Constitution begins with the phrase "We the People," it does not define who those "People" are.[55] Few provisions of the Constitution specify that they apply exclusively to citizens.[56] Most provisions, particularly the Bill of Rights, either address "the people" or "persons"[57] or couch their application in more general terms.[58] The acquisition of citizenship appears once in the body of the Constitution, empowering Congress to enact "an uniform Rule of Naturalization."[59]

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[53] Scholars of immigration jurisprudence have explored the tension between social contract/membership theory and a more inclusive view of constitutional protection based on personhood. They seek to explain the tension in the Supreme Court's alienage jurisprudence between extreme deference to the political branches of government under the plenary power doctrine and heightened suspicion of invidious governmental action. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 523 (2001) (explaining that membership theory in alienage scholarship is "tension between 'plenary power' principles and the imperative of national borders on the one hand, and equality principles at stake in government regulation of all persons within its borders on the other"); *see also* Cleveland, *supra* note 37, at 19-25 (providing comprehensive history of membership theory, its connection to social contract theory, and flexibility and indeterminacy of theories); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 712 (1996).

[54] Cleveland, *supra* note 37, at 20-25 (describing various approaches in nineteenth century to this question); *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 5 (1996); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 36-37 (1998).

[55] NEUMAN, *supra* note 54, at 3-4; *see* Cleveland, *supra* note 37, at 17-20.

[56] U.S. CONST. art. IV, § 2, cl. 1 (granting privileges and immunities to "Citizens of each State"); *id.* art. I, § 3, cl. 3 (requiring citizenship to hold office of senator); *id.* art. I, § 2, cl. 2 (requiring citizenship to become member of Congress); *id.* art. II, § 1, cl. 4 (limiting office of presidency to natural born citizens); *see also* Cleveland, *supra* note 37, at 18. The Fourteenth Amendment, which provides for birthright citizenship, did not exist when the Supreme Court decided *Milligan*. *See* U.S. CONST. amend. XIV, § 1.

[57] U.S. CONST. amend. I (protecting "the right of the people peaceably to assemble"); *id.* amend. II (protecting "the right of the people to keep and bear arms"); *id.* amend. IV ("the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); *id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall any person . . . be twice put in jeopardy . . . nor be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. IX (retaining for "the people" rights other than those enumerated); *id.* amend. X (reserving to states and "the people" those powers not delegated to United States).

[58] *E.g.*, *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."); *id.* amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").

[59] *Id.* art. I, § 8, cl. 4. Arguably, Article II also addresses the acquisition of citizenship. *See id.* art. II, § 1, cl. 4 (limiting presidency to birthright citizens). *See also* Saito, *Asserting Plenary Power*, *supra* note 37, at 436.

Social contract theory has attempted to identify who "the People" are.[60] The social contract approach begins with the premise that "members of the citizenry have agreed to be governed in a particular manner."[61] *McCulloch v. Maryland* took this approach in its description of the constitutional bargain struck between the people and their government. It asserted that "[t]he government proceeds directly from the people" and that "[i]ts powers are granted by them, and are to be exercised directly on them, and for their benefit."[62] From that contractual premise, "[o]nly members and beneficiaries of the social contract are able to make claims against the government."[63] Conversely, "the government may act outside of the contract's constraints against" non-members.[64] In the enemy combatant cases, this approach underlies the emergence of a test to determine whether the accused citizen is a member of the social contract and therefore entitled to constitutional benefits.

A. Ex Parte Milligan: *The U.S. Citizen Insider*

Ex parte Milligan's[65] use of social contract theory laid the groundwork for the evolution of a category of pseudo-citizens without full membership in the citizenry. In *Milligan*, the Court granted the habeas petition of a citizen of Indiana who the military had detained and tried during the Civil War.[66] Lamdin P. Milligan was born in Ohio.[67] He lived in Indiana for twenty years before the officer commanding the military district of Indiana arrested him at his home.[68] Military authorities raided

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[60] Cleveland, *supra* note 37, at 20-21.

[61] *Id.* at 20; Alexander M. Bickel, *Citizen or Person? What is not Granted Cannot Be Taken Away, in* THE MORALITY OF CONSENT 34 (1975); NEUMAN, *supra* note 54, at 5 (noting that Constitution's Preamble "arguably speaks the language of social contract").

[62] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

[63] Cleveland, *supra* note 37, at 20; *see also* MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 82-95 (1992) (describing citizen as member of political community entitled to certain benefits from state who must fulfill "common expectations" pertaining to that membership); T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1490 (1986) (describing citizenship as "membership in a state generated by mutual consent of a person and the state"); J.M. Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263, 271-72 (2003) (describing citizenship theories based on consent).

[64] Cleveland, *supra* note 37, at 20; *see also* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT, ILLEGAL ALIENS IN THE AMERICAN POLITY 37 (1985).

[65] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

[66] *Id.* at 121-22.

[67] Rehnquist, *supra* note 4, at 932. According to Chief Justice Rehnquist, Milligan was a lawyer who had become active in Democratic politics. *Id.*

[68] *Id.*

the offices of Milligan's associate and confiscated "guns, ammunition, and incriminating documents."[69]

A military commission tried Milligan and several others on charges of conspiring against the U.S. government, affording aid and comfort to the rebels, inciting insurrection, disloyal practices, and committing violations of the laws of war.[70] The government alleged that in 1863 and 1864, Milligan aided a secret society known as the Order of American Knights or the Sons of Liberty in an attempt to overthrow the U.S. government. The government also asserted that Milligan communicated with the enemy, and conspired to seize munitions stored in arsenals, liberate prisoners of war, and resist the draft.[71] The military commission found him guilty and sentenced him to be hanged. The President approved the War Department's order for his execution.[72]

A few months later, Milligan sought a writ of habeas corpus in civil court.[73] The United States Circuit Court for Indiana empanelled a grand jury pursuant to a federal statute that made habeas corpus available to citizens of states "in which the administration of the laws in the Federal tribunals was unimpaired" once a grand jury had convened and adjourned without indictment or presentment.[74] The grand jury considered Milligan's case and then dispersed, having found no violation of U.S. laws.[75] Milligan's habeas corpus petition thus confronted the Supreme Court with irreconcilable outcomes from the civil and military courts.[76]

The Supreme Court decided, as a threshold matter, that it had jurisdiction to determine whether a military commission rather than a criminal court was the proper tribunal for Milligan.[77] The Supreme Court then held that a military commission had no jurisdiction to try a citizen who was not a member of a military force and who resided in a state loyal to the Constitution when the civil courts, created by Congress

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[69] *Id.*

[70] *Milligan*, 71 U.S at 6, 122. Several others active in the Democratic Party were also arrested and charged, including Harrison H. Dodd, a leader of the Order of American Knights, Horace Heffren, a Democrat in the Indiana legislature, and William Bowles, in his eighties, who was a slave owner and sympathized with the South. Rehnquist, *supra* note 4, at 932. Dodd escaped to Canada before his military trial could conclude. *Id.* at 933.

[71] *Milligan*, 71 U.S. at 6-7.

[72] *Id.* at 107-08.

[73] *Id.*

[74] *Id.* at 108, 116.

[75] *Id.* at 107-08.

[76] *Id.*

[77] *Id.* at 118.

and empowered to hear criminal cases, were open and functioning.[78] The Court rejected the government's argument that the Bill of Rights did not apply during wartime.[79] It held that the military trial violated the Sixth Amendment's requirement of a trial before an impartial jury and the Fifth Amendment's guarantee that a grand jury indictment precede all prosecutions of citizen civilians.[80]

From one perspective, controversy about citizenship and membership in the national community seem to be absent in *Milligan*. After the Civil War, the dominant vision of federal power was of a federal government limited by the enumerated powers in the Constitution.[81] *Milligan*'s holding relied upon two precepts of the enumerated powers doctrine: that the national government's power stems solely from the enumerated powers of the Constitution and that the powers granted to the people in the Constitution limit that federal power.[82] First, *Milligan* confined the source of the government's authority to the text of the Constitution.[83] It rejected arguments that law external to the Constitution, such as an "unwritten criminal code" or the "laws and usages of war," could trump constitutional provisions.[84] Second, the constitutional powers of the states and the people prohibited the federal government from suspending civil rights and subjecting citizens to military command.[85] The founders had "secured in a written constitution every right which the people had wrested from power during a contest of ages" and neither the President, nor Congress, nor the judiciary could unsettle those rights.[86]

However, *Milligan* reveals a deep conflict about "the People" who wield the constitutional power that constrains the government. While *Milligan* seems to extend constitutional protections to "all classes of men,

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[78] *Id.* at 121.

[79] Rehnquist, *supra* note 4, at 934.

[80] *Milligan*, 71 U.S. at 118-30.

[81] *See id.* at 119; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (declaring "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."); Cleveland, *supra* note 37, at 3 (describing earmarks of enumerated powers doctrine).

[82] U.S. CONST. amend. X.; *Milligan*, 71 U.S. at 119; *McCulloch*, 17 U.S. at 405.

[83] *Milligan*, 71 U.S. at 121-22. The military commission could not be "justif[ied] on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws . . . ." *Id.* at 121. Nor could Congress grant such power to a military commission. *Id.*

[84] *Id.* at 121.

[85] *Id.* at 124.

[86] *Id.* at 119, 125.

at all times, and under all circumstances,"[87] a closer reading of the opinion suggests that membership in the constitutional community is rooted in citizenship status. Throughout the opinion, the Supreme Court invokes citizenship as a central source of constitutional rights and characterizes it as a status imbued with constitutional guarantees against government action.[88]

Milligan's citizenship is the first piece of information that the Court imparts, emphasizing that "Milligan is a citizen of the United States" and "has lived for twenty years in Indiana."[89] The opinion frames the "controlling question" of the case in terms of citizenship. Inquiring whether the military had jurisdiction to try and sentence Milligan, the opinion begins its response by observing that "Milligan, not a resident of one of the rebellious states, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home" arrested by the military, imprisoned, convicted, and sentenced to be hanged.[90]

Citizenship defines the rights at play in this case for the Court, invoking the constitutional protections of a criminal trial. In discussing the suspension of the writ of habeas corpus, the Court noted that the writ had "never before been withheld from the citizen."[91] The Court stated that "it is the birthright of every American citizen when charged with a crime, to be tried and punished according to law."[92] That "birthright" entitles the American citizen to the protections of the Fourth, Fifth, and Sixth Amendments.[93] Other than those serving in the military, "citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury."[94] Military trials of civilian citizens were impermissible because "a trial by an established

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[87] *Id.* at 120. The Court emphasized that the principles of the Constitution do not yield even in "troublous times. . . when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper. . . ." This proclamation of the breadth of the Constitution's protections and the universal population to which they extend flows from a vision of the Constitution as the central source of law for all people, not just citizens. *Id.*

[88] *E.g.*, *id.* at 115 ("[t]he privilege of this great writ had never before been withheld from the citizen"); *id.* at 119 ("it is the birthright of every American citizen when charged with a crime, to be tried and punished according to law"); *id.* at 121 ("the 'laws and usages of war' . . . can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed"); *see also id.* at 121-23, 125-26.

[89] *Id.* at 107.

[90] *Id.* at 118.

[91] *Id.* at 115.

[92] *Id.* at 119.

[93] *Id.*

[94] *Id.* at 123.

court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong."[95]

In this way, *Milligan* identifies "the People" whose powers limit the government's actions. Citizens — at least those who reside in loyal states — belong to the class of "people" who may invoke Constitutional protections.[96] The Court positions Milligan the Citizen as an insider, a member of the constitutional community deserving of constitutional protections, despite allegations and evidence that he aided the enemy.

This emphasis on citizenship is not merely rhetorical. The Court's focus on the significance of citizenship to constitutional protections appears to motivate the result in this case. Certain facts — that Milligan is a citizen, has been a longstanding resident of Indiana, and has never lived in the rebellious states — surface again and again in the opinion.[97] This refrain emphasizes Milligan's identity with the community of citizens of Indiana and the United States.[98] It assumes a significance in the opinion that transcends mere rhetorical support for the Court's holding. His citizenship is defined less by the one-dimensional nature of his formal citizenship status than by the depth and quality of his connection to the United States.[99] Milligan's citizenship, the length of his residence in Indiana, and his connection to that state form a sort of

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[95] *Id.* at 126.

[96] *See* Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575, 1592 (2002) (positing citizenship as form of inclusion, in which citizens "imagine fellow members who are to be included in a network of kinship or membership").

[97] *Milligan*, 71 U.S. at 107 ("The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States"); *id.* at 108 ("Milligan insists that said military commission had no jurisdiction to try him . . . because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government"); *id.* at 118 ("Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States"); *id.* at 131 ("It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion.").

[98] *See* Volpp, *supra* note 96, at 1593 (focusing on role of ideology in "either including one as a citizen or excluding one from membership").

[99] *See* Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 207-08 (2000) (comparing "legal" dimension of citizenship, which "emphasizes the positive law that creates the distinctive status of citizen," with "psychological" dimension which measures an individual's identification with a particular state, and with the "sociological dimension" of citizenship which "looks to how individual citizens are integrated into civil society").

"minimum contacts" test[100] that measures the strength of the connection between the citizen and the citizenry.

Yet, applying a social contract approach could lead to a conclusion opposite from the one reached by the Court. Milligan arguably breached the social contract through his alleged conduct.[101] In the midst of a war over the very survival of the social contract, why not permit a military commission to decide whether Milligan remained a party to that contract?

The answer may lie in *Milligan*'s dual vision of the parties to the social contract between the government and its people that underlies the Constitution. The parties to that contract are, on one level, individual citizens. On a second level, the people of the state or the nation as a whole compose a distinct party to that contract. Under *Milligan*, entitlement to constitutional protection depended on the citizen's association with a community considered a party to the social contract and the potential for harm to that community's stake in the social contract. *Milligan* examined the effect of military jurisdiction on both the individual and collective parties to the social contract. In addition to addressing whether the Constitution endowed Milligan with enforceable rights as an individual member of the social contract, the opinion also focused on the people of Indiana and the United States.

This second view of membership hearkens back to the social contract principles that appeared in *McCulloch v. Maryland*.[102] *McCulloch* described the bargain as struck primarily between the people of the states and the national government, and secondarily requiring the "assent of the states" themselves.[103] This agreement was entered into by delegates "chosen in each state by the people" of that state.[104] In this view, the people of the states as a whole compose the membership of the community that entered into the social contract.

This collective bargain theory manifests itself in two ways in *Milligan*. First, the opinion characterized the government's use of a military commission, instead of a criminal court, as flouting the instruction of the people's national representatives. Congress had created a statutory

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[100] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing "minimum contacts" test for personal jurisdiction).

[101] Milligan was charged with insurrection, conspiring against the government, communicating with and aiding the enemy, and conspiring to seize weapons and liberate prisoners of war. *Milligan*, 71 U.S. at 6-7, 122.

[102] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[103] *Id.* at 403.

[104] *Id.*

process to determine the loyalty of citizens like Milligan who had been detained by the military.[105] It "declared penalties against the offences charged, provided for their punishment, and directed [the Circuit Court of Indiana] to hear and determine them."[106] In effect, the legislature defined a protected category of citizen-members entitled to judicial process. The military trial evaded these instructions.

Second, the opinion turned to the people of Indiana. The loyalty of the state of Indiana and its people marked them as members of the constitutional community and affirmed their accord with the constitutional contract. The proceeding in the Indiana Circuit Court "was held in a state, eminently distinguished for its patriotism, by judges commissioned during the Rebellion."[107] Its people, "upright, intelligent, and selected by a marshal appointed by the President," composed the jury that participated in providing Milligan the constitutional right to trial by jury.[108] The community of citizens of Indiana who composed the grand jury found no criminal violation,[109] indicating that they, as a jury of Milligan's peers, had seen no reason to exclude him from their group. Thus, the use of the military commission upstaged and demeaned the authority provided to the states and the people under the Constitution. It violated the bargain embodied in the Constitution between "the people" of the state of Indiana and the government they and others had created.

This second level of the social contract — the interest of the people of Indiana — appears to determine the outcome for Milligan. The connection between Milligan's citizenship and the community of citizens of Indiana underlies the Court's decision that the Fifth and Sixth Amendments applied to Milligan. The Court rejected the application of the "laws and usages of war" to citizens "in states which have upheld the authority of the government."[110] Milligan's connection to Indiana permits that state's loyalty to act as a proxy for Milligan's, thereby nullifying his alleged disloyalty. As a citizen of a loyal state, regardless of his own beliefs or actions, the benefits of membership apply to guarantee him a criminal trial. By affirmatively considering the loyalty of the state of Indiana and the value of the participation of its people in the criminal process, the Court elevated to constitutional magnitude the

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[105] *Milligan*, 71 U.S. at 115-16, 122.

[106] *Id.* at 122.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 107-08, 122.

[110] *Id.* at 121.

harm that trial by military commission might do to this second level of the social contract.

On the strength of this social contract analysis, the government's accusations of treason and insurrection did not cause the Court to exclude Milligan as an outsider. He is never characterized as a member of the enemy forces. The anti-governmental actions of which he is accused scarcely make an appearance in the opinion, and then as an appendage to the central holdings.[111] Even when the Court suggests that those who conspire against the government in wartime are "dangerous enemies,"[112] their alleged actions are "crimes" and the "enemies" are subject to criminal law, not a military trial.[113]

Milligan is usually interpreted as a case about the scope of constitutional protections for citizens during wartime.[114] Its holding could have been limited to the unique context of the Civil War, and the emphasis on citizenship explained by the need to promote unity among a divided people just after the war ended. Yet, the case takes up more interpretive space than that. It employs the enumerated powers doctrine to constrain the federal government and constitutionally empower Milligan and the citizens of Indiana. It enlivens notions of social contract and membership to centralize citizenship within the constitutional inquiry. It also defines the guideposts for identifying those citizens that belong within the membership: indicia of association with a state or community considered a party to the social contract and the potential for harm to that community's stake in the social contract. These guideposts re-emerged after the Civil War in cases addressing citizens and foreign

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[111] *Id.* at 107, 122 (referring to accusations merely as "certain charges and specifications"). Even then, the accusations are almost an afterthought, an opportunity for the Court to condemn the alleged conduct without attaching to it any significance that would impact the outcome of the case. The Court stated: "[A]lthough Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment." *Id.* at 130.

[112] *Id.* at 130 ("Open resistance to the measures deemed necessary to subdue a great rebellion . . . becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States.") (emphasis in original).

[113] *Id.* ("[T]hose concerned in [such conspiracies] are dangerous enemies to their country, and should receive the heaviest penalties of law, as an example to deter others from similar criminal conduct.").

[114] *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946) (citing *Milligan* as case about power of military to arrest and detain civilians); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 130, 137 (1998) (contextualizing *Milligan* within Civil War and focusing on question of constitutional rights during wartime).

wars.

B. Plenary Power and the Pseudo-Citizen

Nearly a century passed between *Milligan* and *Quirin*, the next time the Court addressed the extent of federal power over citizens accused as enemy combatants. During that time, the plenary power doctrine emerged through case law that excluded particular groups — primarily Native Americans and Asian immigrants — from membership in the constitutional community.[115] The result was an expansion of federal power over those groups and a lessening of constitutional protection for individual members of those groups. The Court's use of membership theory in formulating the plenary power doctrine led to the construction of a pseudo-citizenship class subject to greater federal power and fewer constitutional protections.[116] Citizenship, or the lack of it, was a central concern in the Court's move towards expansive federal power and away from a national government limited by the constitutional division of power between the federal government, the states, and the people.

1. *Curtiss-Wright* and the Plenary Power Doctrine

The plenary power doctrine emerged in its modern form in the Supreme Court's 1936 decision in *Curtiss-Wright*,[117] over 60 years after *Milligan*. The case arose from allegations that the Curtiss-Wright Export Corporation sold arms to Bolivia in violation of a presidential proclamation prohibiting such sales.[118] The Supreme Court upheld the proclamation against the challenge that it was an invalid delegation of legislative power to the executive branch.[119]

Curtiss-Wright articulated three characteristics of the plenary power doctrine:[120] reliance on a source of federal power that originated outside

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[115] *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 11-36 (2002) [hereinafter SEMBLANCES]; REHNQUIST, *supra* note 114, at 25-158; Saito, *Asserting Plenary Power*, *supra* note 37, at 434-43. These scholars have also explored a third context: the territories. *See* Cleveland, *supra* note 37, at 163-250; Saito, *Asserting Plenary Power*, *supra* note 37, at 443-47, 455-58. I do not focus on the territories in this Article.

[116] Criticism of the plenary power doctrine has been legion. *See, e.g.*, Wishnie, *supra* note 53, at 503 & n.51 ("The plenary power doctrine has suffered withering criticism as a shameful and racist relic.").

[117] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318-22 (1936).

[118] *Id.* at 311. The proclamation was made pursuant to a joint resolution of Congress. *Id.*

[119] *Id.* at 333.

[120] *Id.* at 318-22; *see* Cleveland, *supra* note 37, at 5 (delineating three characteristics).

of the text of the Constitution,[121] the absence of substantive constitutional limits on federal power,[122] and judicial deference to executive or legislative decisions that extend from that power.[123] It also took two steps that would later influence the treatment of U.S. citizens detained as enemy combatants.

First, *Curtiss-Wright* took a great step away from *Milligan*'s reliance on the enumerated powers of the Constitution as the source of federal power and a constraint upon that power. Instead, it confined the enumerated powers doctrine to "internal affairs,"[124] excluding it from contexts that involved sovereignty or nationality.[125] Second, *Curtiss-Wright* carefully divorced its holding from U.S. citizens. It declared that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens.*"[126] Thus, citizens appeared to remain firmly within constitutional boundaries and outside of the reach of the plenary power doctrine.

Although *Curtiss-Wright* is acclaimed as the first full articulation of the plenary power doctrine, its beginnings have been traced to the nineteenth century, shortly after the decision in *Milligan*.[127] Despite *Curtiss-Wright*'s exempting citizens from its holding, the history of the doctrine reveals that citizens who were perceived as less than full members of the citizenry could, in fact, be subject to the plenary power doctrine. It is this history that opened the way to the doctrine's

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[121] *Curtiss-Wright*, 299 U.S. at 318-19 (declaring that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution" and, consistent with international law, President was "sole organ of the nation in its external relations"). Federal authority over foreign affairs was inherent in the United States' status as an independent sovereign. *Id.*

[122] *Id.* (rejecting claims of constitutional restraint on federal power in acquisition of territory, expulsion of aliens, and making of international agreements, and declaring that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory").

[123] *Id.* at 322 (cautioning that Court "should not be in haste" to craft judicial rules about federal power in foreign relations and warning courts to "hesitate long before limiting or embarrassing" the "sovereignty" and "powers of nationality" of federal government) (quoting Mackenzie v. Hare, 239 U.S. 299, 311 (1915)).

[124] *Id.* at 315-16 (rejecting "broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution").

[125] *See id.* at 322. The federal powers to "acquire territory by discovery and occupation," to "expel undesirable aliens" and to make "such international agreements as do not constitute treaties in the constitutional sense" were "inherently inseparable from the conception of nationality" despite not being "expressly affirmed by the Constitution." *Id.* at 318.

[126] *Id.* (emphasis added).

[127] *See* ALEINIKOFF, *supra* note 115, at 11-36; Cleveland, *supra* note 37, at 25-158; Saito, *Asserting Plenary Power*, *supra* note 37, at 434-43.

application in the current enemy combatant cases.

2. The Early Development of the Plenary Power Doctrine: Non-Citizens

The roots of the plenary power doctrine emerged through judicial decisions about non-citizens that reflected an expanded legislative and executive branch power over groups considered outside of the social contract. In the early 1800s, prior to *Milligan*, both Native Americans and Chinese immigrants were considered citizens of foreign states, and Congress barred them from naturalizing as U.S. citizens.[128] The Supreme Court used the enumerated powers doctrine to limit the federal government's power over Native Americans to the constitutional provisions that expressly addressed them.[129]

Beginning two decades after *Milligan*, the Court reversed its reliance on the enumerated powers doctrine and invoked membership principles to justify expanding federal power over both Native Americans and immigrants. In separate decisions, the Court described both communities as aberrant states, existing within but apart from the nation. In *United States v. Kagama*, the Court held that Congress had authority to legislate a criminal code specifically for Native Americans.[130] The Court based its decision in part on a view of Native Americans that excluded them as a community from equal membership in the polity. As dependents of the federal government, the tribes were fully within the "exclusive sovereignty" of the government: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."[131] Later, the Court would describe the Native Americans as "wards of the nation," "in a state of

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[128] *See* Naturalization Act of January 29, 1795, ch. 20, 1 Stat. 414 *and* Immigration and Naturalization (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101 – 1537 (2000)); Chinese Exclusion Act, ch. 126, 22 Stat. 28 (1882), *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600 (1943); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 19-20 (1831) (holding that Court had no jurisdiction over Native American tribes as "foreign states" under Article III); *see also* Saito, *Asserting Plenary Power*, *supra* note 37, at 436 (describing legislative and judicial racial restrictions on citizenship prior to Fourteenth Amendment).

[129] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832) (holding that War, Treaty and Indian Commerce clauses of Constitution governed relationship between Native Americans and national government). *Worcester* also rejected the argument that international law provided a source of authority in lieu of the Constitution. *Id.* at 543-46.

[130] 118 U.S. 375, 380 (1886).

[131] *Id.* at 384.

pupilage," and as such subject to federal plenary authority.[132]

This child-like relationship with the federal government left no room for conceiving of the tribes as equal parties to the constitutional contract. Greater federal power over these groups followed naturally from their status as wards and pupils in need of protection and tutelage. They were incapable of equal membership with those "among whom they dwel[t]." Greater federal power and the lack of equal membership went hand-in-hand with lesser constitutional protections for the tribes.[133]

Three years after *Kagama*, in *Chae Chan Ping v. United States*,[134] the Court held that Congress had sovereign power to exclude Chinese resident aliens from reentry into the country, despite a treaty with China that guaranteed their reentry.[135] Like *Kagama*, *Chae Chan Ping* relied heavily on membership and social contract theory to deny constitutional protections to Chinese residents.[136] The Court described the Chinese as a race inherently separate from the members of the national community, "a Chinese settlement within the state, without any interest in our country or its institutions."[137] Instead, "they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate

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[132] Stephens v. Cherokee Nation, 174 U.S. 445, 484 (1899).

[133] Plenary power drawn from sovereignty undergirded federal authority to lease tribal lands without tribal consent, determine the citizenship of tribes, abolish tribal laws and courts, legislate the division of tribal lands, and subject the tribes to the jurisdiction of the United States. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294, 307-08 (1902); *Stephens*, 174 U.S. at 486-92 (rejecting Fifth Amendment takings challenge). This power brooked no interference from judicial consideration of individual constitutional rights: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (rejecting Fifth Amendment due process and takings claims).

[134] Chae Chan Ping v. United States, 130 U.S. 581 (1889); *see also* Frank H. Wu, *The Limits of Borders: A Moderate Proposal For Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 43-44 (1996) (describing background of Chinese Exclusion Act).

[135] *Chae Chan Ping*, 130 U.S. at 589. The Court rejected the plaintiff's claim that the Constitution did not empower Congress to expel permanent residents and that the due process clause protected them from arbitrary expulsion. *Id.* at 589-90, 609; Cleveland, *supra* note 37, at 124-26 & n.874 (citing Briefs for Appellant by Attorneys Houndly and Carter at 30, 62, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (No. 1446)). Instead, it turned to sources of sovereign power outside any specific constitutional provision, locating adequate federal authority in international principles governing national territory, and sovereign concerns for self-preservation and security. *Chae Chan Ping*, 130 U.S. at 603-04, 606; *see also* Saito, *Asserting Plenary Power*, *supra* note 37, at 435. The decision did not address Chae Chan Ping's constitutional due process arguments. *See* Cleveland, *supra* note 37, at 131; Saito, *Asserting Plenary Power*, *supra* note 37, at 435.

[136] Cleveland, *supra* note 37, at 72, 129-31.

[137] *Chae Chan Ping*, 130 U.S. at 595-96.

with our people, or to make any change in their habits or modes of living."[138]

This refusal to assimilate constituted a breach of the social contract. Because the Chinese "retained the habits and customs of their own country,"[139] they set themselves apart from "our people," the primary parties to the social contract. As a result, Chinese immigrants had no claim to the constitutional protections that were the benefit of the constitutional bargain.[140]

Significant to the later enemy combatant cases, the Court relied on analogies to war and invasion to intensify the necessity for federal control over Chinese immigrants.[141] Justice Stone declared it the "highest duty of every nation" to secure its people against "foreign aggression and encroachment," defining that encroachment as "vast hordes of [a foreign nation's] people crowding in upon us."[142] If Congress considered

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[138] *Id.* at 595.

[139] *Id.*

[140] *See* Cleveland, *supra* note 37, at 125 (noting that Court rejected plaintiff's constitutional due process claim without explicitly addressing it, and similarly rejecting membership-based argument that resident aliens were "persons [to whom] all the protection afforded by the Constitution to 'persons' not citizens, can apply") (citing Briefs for Appellant by Attorneys Houndly and Carter at 30, 34, 62, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (No. 1446)). Later decisions relied on membership/social contract theory to expand the notion that powers inherent in sovereignty rather than constitutional grants of authority were the source of federal control over Native Americans and immigrants. Upholding immigration statutes excluding individuals deemed likely to become a public charge, the Court declared that under international law, "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation," to exclude foreigners. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); *see also id.* at 660 (rejecting arguments that constitutional due process protected all "persons" within U.S. jurisdiction, reasoning that decisions of President and Congress constituted sufficient due process of law for entering aliens without claim to membership). The following year, the Court declared that the "right to exclude or to expel all aliens," including permanent residents, was "an inherent and inalienable right of every sovereign and independent nation." Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893). This expansion of inherent federal power over immigrants was concentrated in decisions about immigrants who sought to enter or remain in national territory. *E.g.*, *Chae Chan Ping*, 130 U.S. 581 (granting expansive federal power over alien seeking reentry); *Ekiu*, 142 U.S. at 659 (limiting due process protections for entering aliens). Inherent federal power encountered greater judicial resistance when applied to aliens within the United States who were not seeking entry or fighting deportation. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (striking down San Francisco ordinance that discriminated on basis of alienage as violation of Equal Protection clause).

[141] *See* Wu, *supra* note 134, at 43-44 (noting that opinion connected Chinese immigration to hypothetical war with China, and opining that "[i]t is doubtful that Justice Field distinguished much between a literal war — military invasion by Chinese soldiers — and a metaphorical war — racial invasion by Chinese immigrants.").

[142] *Chae Chan Ping*, 130 U.S. at 606.

"the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects." For Justice Stone, the invasion of "vast hordes" of Chinese immigrants was equivalent, or nearly so, to an actual war with China.[143] As such, Congress was empowered to repel the immigrants who made up the invading force from China.[144]

The Court's decisions in the Native American and Chinese Exclusion cases hearken back to the second level of the social contract from *Milligan*, which considered whether the community to which the individual belonged was part of the "People" of the constitutional bargain. Whether the tribes or the Chinese community are themselves parties to the social contract predetermines the question whether the individual plaintiff has a legitimate constitutional claim. The aberrational communities that appear in these cases contrast markedly with *Milligan*'s staunchly loyal and civic-minded state of Indiana. Unworthy of the constitutional contract to which the citizenry of Indiana was a party in *Milligan*, the Native American tribes and Chinese communities were incapable of employing that contract to imbue their Native American and immigrant members with constitutional protections.

3. The Acquisition of Citizenship and the Plenary Power Doctrine

The beginning of the twentieth century brought two major expansions in U.S. citizenship: the passage of the Fourteenth Amendment granting citizenship to those born in the United States[145] and Congress' naturalization of the Native American tribes.[146] The question arose whether this expansion of citizenship should constrain the government's plenary power over the Native Americans and native-born children of Chinese residents. While at first the Court appeared to forbid the

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[143] *Id.* (declaring that "[t]he existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.")

[144] *Id.*

[145] U.S. CONST. amend. XIV.

[146] Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 183 (current version at 25 U.S.C. § 349 (1994)); *see also* Indian General Allotment (Dawes) Act of 1887 § 6, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1994) (§§ 331-333 repealed 2000).

application of plenary power to citizens, its ultimate recognition of federal plenary power over Native Americans resulted in the creation of the pseudo-citizen category.

In *United States v. Wong Kim Ark*, the Court held that the Fourteenth Amendment's grant of birthright citizenship included the U.S.-born offspring of Chinese immigrants.[147] The specter that birthright citizenship would confer full constitutional rights on this aberrant group and that the government would lose its plenary power to exclude them engendered stormy debate among the justices.[148] In a strident dissent, Chief Justice Fuller and Justice Harlan argued that Congress had the power to bar "all persons of a particular race, or their children," from citizenship.[149]

Nevertheless, the majority held that the plenary power of the government to expel Chinese aliens from the country did not trump the Fourteenth Amendment's grant of citizenship to all those born within the territorial jurisdiction of the United States.[150] The Court reached this conclusion through a focus on membership, reasoning that both citizens born in the United States and aliens residing there were entitled to federal protection and owed allegiance to the United States.[151] Consistent with the second level of social contract analysis, the opinion defined both Chinese resident aliens and their native-born children as part of the United States as a nation. It invoked mutual obligations of allegiance to

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[147] United States v. Wong Kim Ark, 169 U.S. 649, 684 (1898).

[148] *Id.* at 705-06, 726 (Fuller, C.J., dissenting) (emphasizing that majority's ruling would exempt native-born children from plenary power that permitted government to deport their parents).

[149] *Id.* at 732 (Fuller, C.J., dissenting).

[150] *Id.* at 699-701. It rejected the contention that legislation and a treaty with China prohibiting the naturalization of Chinese aliens overrode the constitutional provision of birthright citizenship. *Id.* at 701-04; *see also* Cleveland, *supra* note 37, at 155 (characterizing decision as rejecting notion that Congress had "legislated to make the Chinese a politically subordinated racial caste — an 'internal colony' — within the United States") (citing RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 99 (rev. ed. 1998)).

[151] *Wong Kim Ark*, 169 U.S. at 693 ("Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet . . . 'strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject'"); *id.* at 663 ("[E]very man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born.").

the United States and entitlement to its protection.[152] Then, as in *Milligan,* the opinion undertook an analysis of Wong Kim Ark's connection with the United States, including him as a member of the citizenry because of his birthplace, the length and consistency of his residence in the country, and because "neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom."[153]

This unity between citizenship and immunity from federal plenary power disintegrated when Native American tribes obtained U.S. citizenship.[154] In a series of decisions, the Court held that continuing federal plenary power over Native Americans was consistent with the tribes' acquisition of citizenship.[155] In *Cherokee Nation v. Hitchcock,* despite legislation granting citizenship to the Cherokee tribe, the Court relied on plenary power to deny the Cherokees' Fifth Amendment due process and takings claims.[156] The Court held that, although Congress had invested the tribes with citizenship, it retained plenary control over the administration of tribal property.[157] The takings question, therefore, was "not one for the courts."[158]

Here too, the second level of the social contract influenced the Court's decision about whether the Native American citizen could invoke

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[152] *Id.*

[153] *Id.* at 652-53 (stating "Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom"); *see also id.* at 704-05 (analyzing same factors).

[154] Congress increasingly imposed citizenship on the tribes as part of an effort to assimilate them. Cleveland, *supra* note 37, at 74 & n.516 (describing progression of statutes and treaties that had effect of dismantling sovereignty of tribes and bestowing citizenship on individual Native Americans). Native Americans did not obtain citizenship with the passage of the Fourteenth Amendment. Elk v. Wilkins, 112 U.S. 94, 109 (1884).

[155] United States v. Nice, 241 U.S. 591, 598 (1916) (stating that "[c]itizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."); United States v. Sandoval, 231 U.S. 28, 48 (1913) (asserting that "citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians"); United States v. Celestine, 215 U.S. 278, 290-91 (1909) (declaring that Congress did not intend, "by the mere grant of citizenship, to renounce entirely its jurisdiction over the individual members of this dependent race").

[156] Cherokee Nation v. Hitchcock, 187 U.S. 294, 307 (1902).

[157] *Id.* at 307-08 (reasoning that because congressional power was "political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine").

[158] *Id.*

constitutional rights. Unlike the people of the loyal states in *Milligan*, the tribes were "a state, or separate community,"[159] apart from the national community and incapable of imbuing their members with the benefits of the social contract. The inability of the tribes as a community to enter into this second level of the social contract stemmed from their race. Conferring citizenship did not change the race of the Native Americans, who remained dependent on the federal government[160] and were not entitled to the "privileges and immunities" associated with U.S. citizenship.[161] Despite the tribes' claim to citizenship, they were "nevertheless Indians in race, customs, and domestic government," and like other Native American communities, required "special consideration and protection"[162] by the United States "as a superior and civilized nation."[163]

In contrast to the state of Indiana acting as a proxy for Milligan in the social contract, the tribes' exclusion from the social contract acted as a proxy for the exclusion of individual Native American citizens. In *United States v. Sandoval*,[164] the Court held that the citizenship of tribal members was not "an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Native Americans as a dependent people."[165] Although a few individual Native Americans may have shown themselves ready for citizenship,[166] the "degraded," "simple, uninformed, and inferior" nature of the tribe as a whole justified Congressional plenary power.[167]

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[159] Stephens v. Cherokee Nation, 174 U.S. 445, 484 (1899).

[160] *Celestine*, 215 U.S. at 290-91.

[161] *Id*; *see also* United States v. Sandoval, 231 U.S 28, 48 (1913).

[162] *Sandoval*, 231 U.S. at 39.

[163] *Id.* at 46; *see also* Cleveland, *supra* note 37, at 76.

[164] 231 U.S. 28 (1913).

[165] *Id.* at 48.

[166] *Id.* at 41 (quoting report of federal superintendent in Albuquerque: "While a few of these Pueblo Indians are ready for citizenship . . . a large per cent of them are unable, and not yet enough advanced along the lines of civilization, to take upon themselves the burden of citizenship.").

[167] *Id.* at 39, 45; *see also id.* at 46 (stating "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." (quoting Tiger v. Western Invest. Co., 221 U.S. 286, 315 (1911)).

4. Plenary Power and the Pseudo-Citizen

The result of the immigrant and Native American tribe exclusions was the creation of a type of citizenship distinct from that described in *Milligan*. The citizen in *Milligan* possessed the constitutional clout to limit the federal government to its enumerated powers. In contrast, in the Native American and immigrant exclusion cases, lack of citizenship expanded the scope of federal plenary power and limited constitutional protections. Once Native Americans were formally granted citizenship, that status provided no greater footing for constitutional rights. These cases suggest that for communities excluded from membership, citizenship was not sufficient to stave off application of the plenary power doctrine.

It is tempting to discard these cases as bygone relics of race-based thinking, or pigeonhole them as relevant only to the specialized areas of immigration and Native American jurisprudence. These cases, however, reflect a thoroughly modern conflict between two theories of citizenship. The first, privileging "formal or nominal membership in an organized political community,"[168] is exemplified by the Fourteenth Amendment's grant of birthright citizenship to native-born Chinese or the statutory citizenship of the Native Americans. The second defines citizenship as identity or solidarity with a nation and its members.[169] Formal citizenship status highlights equality among citizens and distinctions between citizens and non-citizens.[170] Solidarity with a nation implies patriotism, evoking loyalty to country and compatriots.[171]

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[168] Bosniak, *Citizenship*, *supra* note 48, at 456; *see also* Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 522 (2000); Spectar, *supra* note 63, at 271-72 (applying citizenship theory to political and legal context of capture and trial of John Walker Lindh).

[169] Bosniak, *Citizenship*, *supra* note 48, at 480. It evokes "the quality of belonging — the felt aspects of community membership." *Id.* (citing DEREK HEATER, CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION (1990)); *see also* WILLIAM E. CONNOLLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX 198 (1991).

[170] *See* Scaperlanda, *supra* note 53, at 718. One either has equal status as a citizen among other citizens, or lesser status as an alien. "When citizenship is understood as formal legal membership in the polity, aliens remain outsiders to citizenship: they reside in the host country only at the country's discretion; there are often restrictions imposed on their travel; they are denied the right to participate politically at the national level; and they are often precluded from naturalizing." Bosniak, *Citizenship*, *supra* note 48, at 461-62.

[171] Bosniak, *Citizenship*, *supra* note 48, at 480. Patriotism "takes as given that members of the nation experience themselves as part of a collective whole, part of a shared national culture or project." *Id.* at 481. This approach to citizenship has attracted critique as myopically focused on the nation-state as the location of citizenship, when individuals often experience stronger feelings of identity and solidarity with social or cultural groups or with transnational and transborder groups other than members of the same nation, or

Under these two models of citizenship, *Milligan* can be seen as a case in which both formal citizenship status (of Milligan) and identity and solidarity (of the state of Indiana) led to full citizenship for Milligan. The Native American cases, in contrast, are the result of a divergence between the formal legal citizenship status of the individual Native American and the tribes' lack of identity and solidarity with the nation and its members. As a result, Milligan's full citizenship entitled him to constitutional rights against excessive federal power, while Native Americans became pseudo-citizens, entitled to a lesser set of rights and subject to greater plenary power.[172]

The Court's decisions about immigrants and Native Americans laid the groundwork for the full articulation of the plenary power doctrine in *Curtiss-Wright*, as Sarah Cleveland has described.[173] *Curtiss-Wright* explicitly relied on the immigrant exclusion cases to bolster inherent federal power.[174] While *Curtiss-Wright* suggested that U.S. citizenship was a dividing line between the use of the plenary power doctrine and the full application of the Constitution,[175] this suggestion was short-lived. By 1942, *Ex parte Quirin*[176] employed aspects of the plenary power doctrine during the Second World War to sanction the military trial of a captured soldier who claimed U.S. citizenship.

C. Ex Parte Quirin: *Dismantling the Citizen/Alien Divide*

Ex parte Quirin appears to radically depart from *Milligan* in subjecting a U.S. citizen accused of colluding with the enemy to a military tribunal

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with a more global community. *See id.* at 480-85 (arguing that "at least some politically and socially-based non-state communities — including some that have taken form across national boundaries — can serve as sites of citizenship identity and solidarity"); *id.* at 480 n. 136 (citing ERNEST GELLNER, NATIONS AND NATIONALISM (1983)).

[172] *Id.* at 463-64 (describing enjoyment of rights as "the defining feature of societal membership").

[173] Cleveland, *supra* note 37, at 273-77 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 317, 318-19, 322 (1936)). Cleveland notes: "The decisions in the Indian, alien, and territory cases do much to explain, though not to justify, the inherent powers analysis of *Curtiss-Wright*." *Id.* at 273 (proposing that cases engendered turn toward extra-constitutional sources of inherent federal power, absence of limitations on that power from individual constitutional protections, and extreme judicial deference that later appeared in *Curtiss-Wright* as three hallmarks of plenary power doctrine).

[174] *Curtiss-Wright*, 299 U.S. at 318 (citing Jones v. United States, 137 U.S. 202, 212 (1890); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893)).

[175] *Curtiss-Wright*, 299 U.S. at 318 (stating that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens").

[176] *Ex parte* Quirin, 317 U.S. 1 (1942).

rather than the criminal process.[177] Scholars have labeled *Quirin* an unprecedented expansion of federal power in its deference to the executive's military trial of a U.S. citizen when the civilian courts were open and available.[178] Yet, *Quirin* follows the lead of *Milligan* and the early plenary power cases in focusing on the indicia of full citizenship and the quality of the community with which the Court associates the citizen seeking habeas corpus. *Quirin* and the more recent enemy combatant cases reveal an emphatic distancing of the petitioners from the community of U.S. citizens, and a relocation of the accused citizens to the realm of foreigners.

1. The Citizen Outsider

As in *Milligan*, the issue in *Quirin* was whether the Fifth and Sixth Amendments required a criminal jury trial rather than a military trial.[179] In *Quirin*, the Court denied writs of habeas corpus to eight soldiers of the German army.[180] The soldiers had been delivered by submarine to beaches on Long Island and in Florida with instructions to destroy war industries and facilities in the United States.[181] They were arrested in Chicago and New York City and tried before a military tribunal.[182] The eight challenged the jurisdiction of the military tribunals to try them when civil courts were open and functioning.[183] One soldier, Herbert Haupt, claimed to be a naturalized citizen and asserted that, consistent with *Milligan*, the Fifth and Sixth Amendments precluded a military trial.[184]

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[177] *Quirin*, 317 U.S. at 40-45.

[178] *See* A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 361-63 (2003); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 270 (2002); Katyal & Tribe, *supra* note 47, at 1296 (2002).

[179] *Quirin*, 317 U.S. at 40-45.

[180] *Id.* at 48.

[181] *Id.* at 21. Upon landing in the United States, they removed their uniforms and buried them. *Id.* It is likely that they landed in uniform in order to ensure that, if captured, they would be classified as lawful combatants under international conventions. *See id.* at 31 (defining unlawful combatant as one "who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property"); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 335 (2002).

[182] *Quirin*, 317 U.S. at 21.

[183] *Id.* at 18-19, 24.

[184] *Id.* at 20, 24. Although *Quirin* addresses only Haupt's claim of citizenship, in fact there was another naturalized citizen among the eight whose citizenship the Court never mentions. *See* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 735 n.531 (2002)

In response to the soldiers' petition, the Court convened a special term to hear arguments in the case.[185] In July 1942, the Court issued a brief per curiam ruling holding that use of a military commission to try the petitioners was lawful.[186] The ruling opened the way for the government to execute six of the petitioners.[187] The Court then issued a full opinion in October.[188]

Justice Stone's opinion declined to inquire into Haupt's claim to citizenship,[189] reasoning that there was no distinction between alien and citizen belligerents. Since the federal government exercised discretion over both, the Court upheld the use of the military commission to try Haupt and the other soldiers.[190]

In contrast to the elevation of citizenship status in *Milligan*, *Quirin* completely discarded the role of citizenship in the inquiry about the constitutional rights of alleged enemy combatants. By aggregating citizens and non-citizens within the single category of enemy belligerents, *Quirin* allowed norms created for non-citizens and pseudo-citizens to apply to U.S. citizens.

The opinion's first move, categorizing Haupt with the alien German soldiers, effectively excludes him from membership in the U.S. citizenry and from the benefits of the constitutional contract. Its introduction of Haupt aligns him with the non-citizen petitioners so strongly that he is indistinguishable from them: "All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between

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(citing Robert E. Cushman, *Ex Parte Quirin et al. — The Nazi Saboteur Case*, 28 CORNELL L.Q. 54, 54 (1942)). Ernest Peter Burger immigrated to the United States in 1927 and naturalized in 1933. He later returned to Germany, where he joined the Nazi Storm Troopers. *See* Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 471 n. 287 (2002) (citing David J. Danelski, *The Saboteurs' Case*, J. SUP. CT. HIST. SOC'Y 61, 62-63 (1996)).

185 REHNQUIST, *supra* note 114, at 137.

186 *Quirin*, 317 U.S. at 1.

187 REHNQUIST, *supra* note 114, at 137.

188 *Id.*

189 *Quirin*, 317 U.S. at 37-38.

190 *Id.* at 44. *Quirin* has been criticized as lacking in precedent, hastily decided, and politically and circumstantially motivated. *E.g.*, Belknap, *supra* note 184, at 471-77 (describing unusual pressure Court was under to render opinion quickly and reach particular result); Bryant & Tobias, *supra* note 178, at 330-31 (noting that "Chief Justice Stone, who penned the opinion, characterized the attempt to justify the result as a 'mortification of the flesh,'" and critiquing the opinion as politically motivated); *see also* Katyal & Tribe, *supra* note 47, at 1291 (suggesting that "Quirin plainly fits the criteria typically offered for judicial confinement or reconsideration" because it was "rendered under extreme time pressure, with respect to which there are virtually no reliance interests at stake, and where the statute itself has constitutional dimensions suggesting that its construction should be guided by relevant developments in constitutional law").

1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war."[191] Like *Milligan* and the plenary power cases, the Court's description of Haupt burrows beneath the surface of formal citizenship status. Haupt's U.S. citizenship is submerged within his identification with the seven German citizens.

The Court in *Quirin* distinguishes Haupt from the archetypal member of the citizenry in a way that contrasts sharply with *Milligan*'s refrain about the petitioner's long-term association with the state of Indiana. *Quirin* highlights the involuntary and inadvertent nature of Haupt's acquisition of citizenship: "Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship."[192] Haupt thus arrived in the United States when he was too young to make weighty decisions about nationality. His claimed naturalization was second-hand, trickling down through his parents. The Court portrays Haupt as, at most, an accidental citizen — one whose citizenship, if it existed at all, was acquired through no fault of his own, and, for unexplained reasons, was never lost.

At this point, the Court reached a crossroads. It could have confronted or remanded the question of whether Haupt was a citizen by deciding whether, as the government contended, Haupt had "renounced or abandoned his United States citizenship" and "elected to maintain German allegiance and citizenship."[193] If the Court had found that Haupt was not a citizen, it might have avoided altogether considering the role of citizenship in determining an accused citizen's constitutional rights. By the time the Court drafted its opinion, however, it no longer had the luxury of considering that question. The government had

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[191] *Quirin*, 317 U.S. at 20.

[192] *Id.*

[193] *Id.* The government's position was based on legislation that permitted the involuntary denationalization of a naturalized citizen who returned to his home country or of any citizen who served in the armed forces of a foreign state. *See* Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1137, 1169 (providing for loss of citizenship because of service in armed forces of foreign state, serving as government employee of foreign state, or voting in foreign elections, among other bases); Nationality Act of Mar. 2, 1907, ch. 2534, § 2, 34 Stat. 1228 (establishing presumption that naturalized citizen who returned to live in country of origin would forfeit U.S. citizenship); *see also* Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 505 & n. 128-29 (1999). Subsequently, the Supreme Court held that expatriation was unconstitutional without the consent of the citizen. Vance v. Terrazas, 444 U.S. 252, 261 (1980) (holding expatriation permissible only where citizen intended to denaturalize); Afroyim v. Rusk, 387 U.S. 253, 256 (1967) (declaring unconstitutional expatriation for voting in foreign election).

executed Haupt on August 8, 1942.[194]

Instead, in a brief paragraph, the Court discarded the relevance of Haupt's citizenship to whether he could be tried by a military commission rather than within the constitutional constraints of a criminal trial.[195] It reasoned that U.S. citizenship does not relieve citizens "who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts" from the consequences of a violation of the law of war.[196] It distinguished Milligan from Haupt on that basis because, unlike Haupt, "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war. . . ."[197]

This passage can be read as merely distinguishing Haupt from Milligan by labeling Haupt an enemy belligerent and Milligan as a non-belligerent.[198] But the distinction does not hold up under scrutiny. Although the Court asserted that the difference between Haupt and Milligan lay in Haupt's association with the armed forces of the enemy,[199] the offenses alleged in both cases are difficult to distinguish. Milligan and his secret society, like the saboteurs in *Quirin*, were accused of aiding the enemy, inciting insurrection, disrupting the war effort, and conspiring to send arms and currency to the enemy.[200] While Milligan was not accused of wearing the uniform of the enemy army, the charges against him were, in essence, the same as those in *Quirin* — that he "associated" with the enemy and was "bent on hostile acts."[201]

Quirin is consistent with *Milligan* and the immigrant and Native American cases in that it applied a kind of "minimum contacts" test,[202] analyzing certain factors that signal connection with the United States, including the citizen's place of birth, length of residence in the United

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[194] EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA 284-87 (1961). Six of the eight men were executed. *Id.* The sentences for two of the soldiers, who had cooperated in the capture and prosecution of the others, were commuted to long-term imprisonment. *Id.*

[195] *Quirin*, 317 U.S. at 37-38; *see also* Katyal & Tribe, *supra* note 47, at 1296 (noting "the very precedent [President Bush] seeks to revitalize, *Quirin*, explicitly permits military tribunals to be used against American citizens who are 'unlawful belligerents' within our own borders").

[196] *Quirin*, 317 U.S. at 37-38 (citing Gates v. Goodloe, 101 U.S. 612, 615, 617-18 (1879)).

[197] *Id.* at 45.

[198] *Id.*

[199] *Id.*

[200] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 6, 122 (1866).

[201] *Id.*

[202] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

States, and residence (or lack thereof) in enemy territory. *Quirin* contrasted Haupt's accidental acquisition of citizenship with Milligan's archetypal citizenship status. It echoed *Milligan*'s recurring emphasis on the indicia of full citizenship, describing Milligan as "a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion."[203] Unlike *Milligan*, *Quirin* focused on Haupt's lack of connection to the United States and his alignment with a belligerent foreign nation to conclude that no constitutional protections applied. Justice Stone's analysis of the quality of Haupt's citizenship excluded him from the national membership in a manner reminiscent of the resident aliens in the immigrant exclusion cases and the pseudo-citizens of the Native American cases.

Quirin also evaluated the second level of the social contract, in which the state or national community holds a constitutional interest in the rights asserted by an accused citizen. Similar to *Milligan*'s focus on the loyalty of the state of Indiana and its near-silence about the acts Milligan was accused of, *Quirin* highlighted Haupt's association with a community: the citizenry of Germany and the members of its army. Using this lens, the Court's characterization of Haupt as indistinguishable from the other Germans allowed the group of German soldiers and the nation of Germany to act as a proxy for his membership. Germany acted as a proxy for Haupt in the same way that the citizens of Indiana acted as a proxy for Milligan, and the tribes acted as a proxy for individual Native Americans. Haupt's association with the members of the enemy nation excluded him from the benefits of the social contract.

Aligning Haupt so completely with the rest of the German soldiers foreclosed any judicial consideration of the interest of another potential party to the social contract: the citizenry of the United States. The opinion does not confront the possibility that the military trial of Haupt deprived the people of the United States of a constitutionally significant interest in participating in the process of determining Haupt's guilt.

2. The Alien Citizen

Quirin's second step toward discarding the relevance of citizenship to the constitutional inquiry was to erase the distinction between citizen and non-citizen enemy belligerents. The Court drew a parallel between aliens and "citizen enemies." It reasoned that since the Fifth and Sixth Amendments permitted military trial of "offenders [who] are aliens not

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[203] *Quirin*, 317 U.S. at 45.

members of our Armed Forces, it is plain that [the Amendments] present no greater obstacle to the trial in like manner of citizen enemies. . . ."[204]

The Court contrasted this undifferentiated enemy belligerent category with members of the loyal community. It asserted that the drafters of the Constitution would not have excepted "members of our own armed forces charged with infractions of the Articles of War" from the guarantee of trial by jury while extending it to "alien or citizen offenders against the law of war."[205] These "members of our own armed forces" are parties to the social contract and embody archetypal members of the national community.[206] It would be inconsistent to deny constitutional protections to these full members while granting them to aliens and pseudo-citizens outside of the constitutional contract.

The Court's description of Haupt's citizenship as an inadvertent naturalization and the consequent devolution in his status to that of an alien without constitutional protections is reminiscent of the way that membership principles limited the constitutional rights of immigrants and Native Americans under the plenary power doctrine. Just as the Court drew on principles from the immigrant exclusion cases to expand plenary authority over Native Americans,[207] *Quirin* drew on a parallel to aliens to minimize the role of citizenship in determining whether constitutional protections applied to Haupt. Similarly, the conclusion that Native Americans, though nominally citizens, were incapable of membership in the national community mirrors *Quirin*'s portrayal of Haupt's accidental citizenship and his resulting exclusion from full citizenship. In both contexts, the Court concluded that citizenship alone did not bestow constitutional protection against the sovereign power of the government.

3. Membership and Plenary Power

The Court's third move in *Quirin* was to introduce central elements of the plenary power doctrine. *Quirin* embodies a struggle between the

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[204] *Id.* at 44.

[205] *Id.*

[206] The armed forces also constitute a category that does not distinguish on the basis of citizenship status. They are composed of both citizens and non-citizens, as the Court points out in its reference to "aliens not members of our Armed Forces." *Id.* In this light, the Court appears to act as an equalizing force, erasing distinctions based on citizenship so that citizen and alien alike, loyal member and disloyal belligerent alike, receive equal protection under the Constitution when accused of the same offenses.

[207] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (relying on United States v. Chae Chan Ping, 130 U.S. 581 (1889) to hold that Congress could abrogate treaties with Indians in same way it could abrogate treaties with foreign nations).

enumerated powers doctrine, which held sway in *Milligan*, and the plenary power doctrine, as developed in the Native American and immigration cases. The opinion does not rely expressly on the plenary power doctrine, and, in fact, Justice Stone asserts in his opinion that the enumerated powers doctrine governs his analysis.[208] Yet all three hallmarks of the plenary power doctrine ground the decision: reliance on inherent federal power derived from sources of law originating outside of the Constitution; diminished constitutional limitations on federal government power; and judicial deference to the executive and legislative branches.[209]

The opinion mainly relies upon the first hallmark of the plenary power doctrine: sources of law, particularly international law and pre-constitutional norms,[210] considered outside of the enumerated powers of the government in *Milligan*'s time. The Court elevated international law to primary status over constitutional or domestic law as precedent to determine Haupt's rights.[211] The Court held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."[212] The use of international law at this juncture is significant because, in line with the plenary power doctrine, it originates outside of the constitutional framework and, therefore, apart from the social contract.[213]

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[208] *Quirin*, 317 U.S. at 25 (stating "Congress and the President, like the courts, possess no power not derived from the Constitution"). Justice Stone also framed the relevant issue in terms of constitutional limits on federal power: "We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged." *Id.* at 29.

[209] See discussion of the elements of the plenary power doctrine, *supra* text accompanying notes 120-23. *See also* Cleveland, *supra* note 37, at 5 (describing characteristics of plenary power doctrine).

[210] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 317-18 (1936); *see* Cleveland, *supra* note 37, at 5.

[211] *Quirin*, 317 U.S. at 38.

[212] *Id.* at 37-38.

[213] *Id.* at 29. The Court concluded that the "laws and usages of war" were within the constitutional boundaries of the congressional power: "By the Articles of War, and especially Article 15, Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, *within constitutional limitations*, the jurisdiction of military commissions." *Id.* at 28 (emphasis added). This is exactly the argument that *Milligan* rejected as outside of the enumerated powers of the Constitution. *Milligan* held that neither

Quirin turned also to conventions of war formulated for non-citizens prior to the Constitution.[214] The Court first determined that enemy belligerents fell neither within the guarantees of the Fifth and Sixth Amendments nor within the stated exception for members of the armed forces.[215] It then looked outside the text of the Constitution and outside the realm of citizenship to pre-constitutional rules of war that permitted the military trial of "alien spies" without a jury.[216] Based on those rules, *Quirin* broadly exempted from the Fifth Amendment the military trial, without a jury, of enemies for offenses against the law of war.[217]

The second hallmark of the plenary power doctrine, diminished individual constitutional rights,[218] appears in the Court's conclusion that the Fifth and Sixth Amendments did not apply. The third hallmark, judicial deference to inherent federal power, is less clear.[219] Although the

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the "laws or usages of war" nor the laws of nations empowered the legislature or the executive to use a military commission to try a citizen who was not a member of the armed forces. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121-22 (1866) (declaring that laws and usages of war could "never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed . . . Congress could grant no such power").

[214] *Quirin*, 317 U.S. at 33, 41-44.

[215] *Id.* at 40-43.

[216] *Id.* In construing the Fifth and Sixth Amendments, the Court relied on a statute passed contemporaneously with the Amendments that had permitted the military trial of alien spies "according to the law and usage of nations." *Id.* at 41 (citing § 2 of the Act of Congress of Apr. 10, 1806, 2 Stat. 371). It was later amended to include citizen spies. 34 U.S.C. § 1200; *see Quirin*, 317 U.S. at 42 n.14 (noting that "in 1862 Congress amended the spy statute to include 'all persons' instead of only aliens"). *Quirin* relied on this later inclusion of citizens as support for erasing the citizen/alien distinction, stating, "[u]nder the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war." *Quirin*, 317 U.S. at 44.

[217] *Id.* at 41-44. The opinion asserts that its conclusion was consistent with "a contemporary construction of both Article III, § 2, and the Amendments." *Id.* at 41. This construction of the Fifth and Sixth Amendments was contested in the parties' briefs in *Milligan* and rejected as outside the enumerated powers of the Constitution. *Milligan*, 71 U.S. at 121-33; *see id.* at 30 (On Side of Petitioner) ("These acts do not confer upon military commissions jurisdiction over any persons other than those in the military service and spies."); *id.* at 99-100 (Reply of the United States) (describing use of military commissions to try and execute spies and traitors during Revolutionary War). Without expressly addressing the government's analogy to spies and traitors, *Milligan* concluded that there were no implicit exceptions to the right to trial by jury. That right "is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service." *Id.* at 123.

[218] *See* Cleveland, *supra* note 37, at 5.

[219] *Cf.* Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 379 (2002) (asserting that Court in *Quirin* exercised "federal judicial authority and resolved challenges to the constitutionality of presidential orders on the merits"). Bryant and Tobias' analysis is partly in tension with my reading of the case. It is true that the

Court initially claimed broad jurisdiction to review executive branch actions affecting individual constitutional safeguards,[220] it retreated from this role when it addressed the scope of the executive's power. In an echo of *Curtiss-Wright's* warning that the courts should "hesitate long before limiting or embarrassing the executive when wielding the 'powers of nationality' or relations with other countries,"[221] the Court yielded to the discretion of the executive. It declared that the courts should not interfere with a military detention and trial "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" without a "clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."[222] This "clear conviction" allowed for a greater level of judicial review than the abject deference ultimately mandated by the plenary power doctrine.[223] Still, it was a far remove from the pro-active judicial inquiry that *Milligan* employed under the enumerated powers doctrine.[224]

II. THE RECENT ENEMY COMBATANT CASES

Hamdi and *Padilla* squarely addressed for the first time whether principles governing non-citizens could govern the constitutional rights of U.S. citizens. *Hamdi* and *Padilla* presented a question unexplored by *Milligan* or *Quirin*: the constitutional legitimacy of indefinite military detention in the United States, without trial, of a U.S. citizen alleged to be an enemy combatant.[225] The two cases diverged over whether the

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Court agreed to accept jurisdiction; however, its explicit deference to executive power raised the bar for the application of individual constitutional rights in a way that is characteristic of judicial deference under the plenary power doctrine.

[220] *Quirin*, 317 U.S. at 19. In setting the stage for the Court's inquiry, Justice Stone spoke "of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." *Id.* Neither the President's attempt to limit judicial review nor the petitioners' status as "enemy aliens" could "foreclose consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.* at 25.

[221] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 322 (1936).

[222] *Quirin*, 317 U.S. at 25.

[223] Wishnie, *supra* note 53, at 503 & n.49 (noting that in cases establishing doctrine, "the Supreme Court declared that Congress and the Executive Branch possessed a 'plenary immigration power,' and that exercises of this power largely were immune from judicial oversight") (citing Fong Yue Ting v. United States, 149 U.S. 698, 724, 730 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889)).

[224] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 115, 122 (1866).

[225] *Milligan* and *Quirin* both addressed claims that a criminal rather than a military trial

plenary power doctrine applies to U.S. citizens detained in the United States who are suspected enemy combatants. In *Hamdi*, the Fourth Circuit relied on the plenary power doctrine to uphold indefinite detention, deferring to the President's declaration that Hamdi was an enemy combatant.[226] In *Padilla*, the Second Circuit held that Padilla's detention was unconstitutional.[227] It rejected the government's argument that under the plenary power doctrine, the President's declaration that Padilla was an enemy combatant justified the detention and mandated judicial deference to executive power.[228]

The Supreme Court gave no explicit guidance in either opinion about whether the plenary power doctrine applied to U.S. citizens. It remanded in both cases: to dismiss Padilla's petition without prejudice to refiling in the proper jurisdiction,[229] and to provide Hamdi a chance to contest the enemy combatant designation.[230] Although the plurality in *Hamdi* declined to explicitly address the plenary power of the executive branch, it fashioned for the legislative and executive branches a form of plenary power over citizens that strikingly resembles that applied to aliens.

A. Hamdi v. Rumsfeld

Because the circuit court decisions reveal a vigorous dialogue about the application of the plenary power doctrine to citizens, it is worth examining them in some detail. The Fourth Circuit generated three

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was the proper forum for addressing the government's suspicions. *Id.* at 118; *Quirin*, 317 U.S. at 40-45.

[226] Hamdi v. Rumsfeld, 316 F.3d 450, 474 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004) (holding that "a factual inquiry into the circumstances of Hamdi's capture would be inappropriate" and rejecting "any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant"). Hamdi allegedly fought on the side of the Taliban during the United States' military action in Afghanistan. *Id.* at 461. Hamdi was "captured or transferred into the custody of the United States" in Afghanistan in the fall of 2001 and transported from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba in Jan. 2002. *Id.* at 460. When the authorities there learned of his citizenship, he was transferred to the Norfolk Naval Station Brig in Virginia. *Id.*

[227] Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003). Padilla is suspected of conspiring with Al Qaeda to build a radiological bomb and set it off in the United States. *Id.* at 701. In May 2002, Padilla was arrested in Chicago on a material witness warrant related to a grand jury investigation into Al Qaeda's role in the attacks on September 11th. *Id.* at 699, 700. The following month, President Bush ordered the Secretary of Defense to take custody of Padilla. *Id.* at 700.

[228] *Id.* at 698.

[229] Rumsfeld v. Padilla, 124 S. Ct. 2711, 2727 (2004).

[230] Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

panel opinions in *Hamdi v. Rumsfeld*. The first (*Hamdi I*)[231] held that Hamdi's father had standing to bring a habeas petition on his son's behalf.[232] *Hamdi II*[233] reversed the district court's order granting unmonitored access to counsel.[234] *Hamdi III*[235] held that Hamdi's detention was constitutional.[236] In *Hamdi II* and *III*, the Fourth Circuit applied the plenary power doctrine, for the first time, to a U.S. citizen detained as an enemy belligerent.[237]

1. The Membership Test and the Pseudo-Citizen

The Fourth Circuit applied a membership test that initially included but ultimately excluded Hamdi from the social contract and its constitutional benefits. *Hamdi III*'s first holding, that the court had jurisdiction to review Hamdi's habeas petition,[238] gathered him into the fold of American citizenship and invoked principles of equality among citizens from constitutional doctrine.[239] It stated that "Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity."[240] It declared that the Bill of Rights "applies to American citizens regardless of race, color, or creed. . . ,"[241] concluding that "[t]he detention of United States citizens must be subject to judicial review."[242]

Consistent with *Milligan*, at this juncture U.S. citizenship appears to have an elevating effect on the scope of constitutional protections. The existence of American citizenship invokes the power of the Bill of Rights: "Drawing on the Bill of Rights' historic guarantees, the judiciary plays its

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[231] Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).

[232] *Id.* at 600 n.1.

[233] Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).

[234] *Id.* at 279.

[235] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

[236] *Id.* at 470-71.

[237] *Hamdi*, 316 F.3d at 465; *Hamdi*, 296 F.3d at 281.

[238] *Hamdi*, 316 F.3d at 465.

[239] Scholars have at times defined citizenship as the rights required to attain "full and equal membership." Charles L. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 9 (1970) (defining citizenship as "the right to be treated fairly when one is the object of action by that government of which one is also a part"); *see also* KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 1-61, 173-242 (1989) (describing "equal citizenship" as core principle of constitutional thought); *Bosniak, Citizenship, supra* note 48, at 450 (citing JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1 (1991)).

[240] *Hamdi*, 316 F.3d at 465.

[241] *Id.*

[242] *Id.* at 464 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120 (1866)).

distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government."[243] The Bill of Rights becomes a "lens through which we recognize ourselves" as the nation becomes more diverse — a way of identifying the citizen despite the increased diversity of "race, color, or creed."[244] Perhaps by calling on equal citizenship principles the court sought to forestall doubts that Hamdi's race, color, or religion might have motivated his exclusion from the circle of citizenship.

At odds with this declaration of equal citizenship is the opinion's later application of the membership test which parallels the analysis in *Quirin*. Upon reaching the merits, the Fourth Circuit's portrayal of Hamdi abruptly transformed him from a citizen-insider to a pseudo-citizen with illusory citizenship. The opinion is littered with question marks about Hamdi's status. Though Hamdi's citizenship status is undisputed, the court began its analysis by stating that "Hamdi is *apparently* an American citizen,"[245] suggesting a need to look below the surface for a more accurate impression. In its description of Hamdi's background, the opinion more directly questioned Hamdi's claim to citizenship:

> Hamdi apparently was born in Louisiana but left for Saudi Arabia when he was a small child. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship.[246]

This characterization of Hamdi's history divorces him from anything but a tenuous connection with the United States. The statement that Hamdi "may not have renounced his American citizenship"[247] likely refers, as in *Quirin*, to whether Hamdi had given up his U.S. citizenship status.[248] It suggests that Hamdi's failure to cast off his citizenship was merely an oversight on his part. It also implies that the accidental retention of his citizenship, like a clerical error, might be easily remedied.

The court's description distinguishes Hamdi from the archetypal citizen described in *Milligan*. Milligan's twenty years living in the loyal state of Indiana, his continued presence in a state not hostile to the

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[243] *Hamdi*, 316 F.3d at 465.

[244] *Id.*

[245] *Id.* at 462 (emphasis added).

[246] *Id.* at 460.

[247] *Id.* This statement appears in all of the Fourth Circuit's opinions in *Hamdi*. *See* Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002); Hamdi v. Rumsfeld, 294 F.3d 598, 601 (4th Cir. 2002).

[248] *See* Afroyim v. Rusk, 387 U.S. 253 (1967).

government, and his presence amidst the upstanding citizenry of Indiana contrast sharply with Hamdi's fleeting presence in Louisiana, his residence in a country invaded by the United States, and the accident of birth that resulted in his citizenship. This biographical sketch of Hamdi suggests a much greater resemblance to Haupt as the citizen saboteur in *Quirin* than to Milligan as a member of the Indiana community.

The opinion's portrayal of Hamdi as having a tenuous claim to citizenship is consistent with its holding that Hamdi's detention is constitutional because he was captured in an active war zone in a foreign country.[249] The opinion's recurring emphasis on Hamdi's presence on foreign ground overrides his presence in the United States, instead drawing connections between Hamdi's citizenship and that foreign territory. Whenever Hamdi's citizenship status appears in the opinion, so too does foreign geography.[250] From the initial framing of the issue, the opinion repeatedly locates Hamdi outside the United States. Hamdi is "not 'any American citizen alleged to be an enemy combatant' by the government; he is an American citizen captured and detained by American allied forces in a foreign theater of war."[251] The court defines "the specific context" of the decision with reference to Hamdi's foreign location: "that of the undisputed detention of a citizen during a combat

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[249] *Hamdi*, 316 F.3d at 459 (holding that because "it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict," his detention was constitutional regardless of his current presence within United States).

[250] *Id.* ("Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship"; "Hamdi is a citizen of the United States who was residing in Afghanistan"; "Although acknowledging that Hamdi was seized in Afghanistan . . . the petition alleges that 'as an American citizen, . . . Hamdi enjoys the full protections of the Constitution'"); *id.* at 462 ("Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan."); *id.* at 465 ("the undisputed detention of a citizen during a combat operation undertaken in a foreign country"),; *id.* at 471 ("Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus" followed closely by: "Hamdi's petition alleges that he was a resident of and seized in Afghanistan"); *id.* at 473 (addressing "whether, because he is an American citizen currently detained on American soil by the military, Hamdi can be heard . . . to rebut the . . . 'enemy combatant' designation. We hold that no evidentiary hearing . . . is necessary . . . because . . . Hamdi was captured in a zone of active combat operations in a foreign country"); *id.* at 475 ("One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant"); *id.* at 476 ("despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts. . . . Where . . . a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an zone of active combat operations abroad"); *id.* at 476 ("Hamdi is not 'any American citizen alleged to be an enemy combatant' by the government; he is an American citizen captured and detained by American allied forces in a foreign theater of war.").

[251] *Id.* at 476.

operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."[252] The recurring references in *Hamdi III* to Hamdi's presence in foreign territory[253] connect him to that territory despite his citizenship and his presence in the United States.

These connections and characterizations are more than just rhetorical devices used to bolster the court's holding. The characterization of Hamdi as having no true link to the United States and the questioning of his status as a citizen suggest that despite Hamdi's citizenship, he is essentially an alien. This depiction of Hamdi opens the way for the application of norms traditionally applied to non-citizens, including the plenary power doctrine.

2. Plenary Power and Non-Citizen Norms

Hamdi represents the first time that a court has explicitly applied the plenary power doctrine to U.S. citizens detained in the United States under the suspicion that they are unlawful enemy combatants. Citing *Curtiss-Wright*, the Fourth Circuit declared in *Hamdi II* that "the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."[254] It also declared that the President has "delicate, plenary and exclusive power. . . as the sole organ of the federal government in the field of international relations."[255] The court extended that plenary power to "military designations of individuals as enemy combatants in times of active hostilities, as well as

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[252] *Id.* at 465.

[253] *Id.* at 459 ("Hamdi was captured in a zone of active combat in a foreign theater of conflict"); *id.* at 460 ("Although initially detained in Afghanistan"; "Hamdi is a citizen of the United States who was residing in Afghanistan when he was seized"; "Hamdi was seized in Afghanistan"); *id.* at 461 ("if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan"; "Mobbs . . . confirms that Hamdi was seized in Afghanistan"; "it is undisputed that Hamdi was captured in Afghanistan"); *id.* at 470 (referring to "a detainee's [Hamdi's] activities in Afghanistan"); *id.* at 471 ("Hamdi's petition alleges that he was a resident of and seized in Afghanistan"); *id.* at 473 ("it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country"); *id.* at 475 ("One who takes up arms against the United States in a foreign theater of war"; "we reject Hamdi's argument that even if his initial detention in Afghanistan was lawful, his continuing detention on American soil is not"); *id.* at 476 ("he is an American citizen captured and detained by American allied forces in a foreign theater of war").

[254] Hamdi v. Rumsfeld, 296 F.3d 278, 281 (4th Cir. 2002) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936)).

[255] *Hamdi*, 296 F.3d at 281 (citing *Curtiss-Wright*, 299 U.S. at 320).

to their detention after capture on the field of battle."[256] It concluded that Hamdi is not entitled to "the safeguards that all Americans have come to expect in criminal prosecutions."[257] This open reliance on the plenary power doctrine is a significant step from *Quirin*'s nominal adherence to the enumerated power doctrine and its submerged use of the plenary power doctrine.

As in *Quirin*, the exclusion of the citizen from the social contract and the subsequent use of the plenary power doctrine make way for precedent governing non-citizens that results in diminished constitutional rights.[258] The Fourth Circuit's rejection of the legitimacy of Hamdi's citizenship reveals itself in its reliance on these non-citizen cases. As a prelude to the denial of habeas, *Hamdi III* drew an analogy to the executive's power "to deport or detain alien enemies during the duration of hostilities. . . ."[259] Accompanied by a reference to *Ludecke v. Watkins*, which addressed the internment and deportation during World War II of enemy aliens deemed dangerous by the Attorney General,[260] it places Hamdi squarely on the non-citizen side of the citizenship line. Similarly, the court cited *In re Yamashita*,[261] which denied the habeas petition of a non-citizen, as a source for the term "enemy combatant."[262] Finally, it considered and rejected as insufficiently deferential the legal standard governing the permissible length of detention of criminal aliens in the United States.[263] Like *Quirin*, *Hamdi* placed citizens and aliens on

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[256] *Id.* The opinion sought to locate that plenary power in the enumerated powers of the Constitution: "Indeed, Articles I and II prominently assign to Congress and the President the shared responsibility for military affairs. *See* U.S. CONST. art. I, § 8, art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi*, 296 F.3d at 281.

[257] *Hamdi*, 316 F.3d at 465.

[258] *Id.* at 463 & n.3 (citing Ludecke v. Watkins, 335 U.S. 160 (1948); *In re* Yamashita, 327 U.S. 1 (1946)); *id.* at 466 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950)); *id.* at 468 (citing Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978)); *id.* at 469 (citing *Eisentrager*, 339 U.S. at 789 n.14); *id.* at 473 (citing *Eisentrager*, 339 U.S. at 793); *id.* at 474 (citing INS v. St. Cyr, 533 U.S. 289 (2001); *Eisentrager*, 339 U.S. at 779; Fernandez v. Phillips, 268 U.S. 311 (1925)); *id.* at 476 (citing *Ludecke*, 335 U.S. at 169).

[259] *Hamdi*, 296 F.3d at 463.

[260] *Id.* at 463 & n.3 (citing *Ludecke*, 335 U.S. at 173).

[261] *Id.* (citing *Yamashita*, 327 U.S. at 7).

[262] *Yamashita*, 327 U.S. at 26 (denying habeas petition of Japanese general and holding that Executive had authority to use military commission after hostilities had ended and before peace had been declared).

[263] *Hamdi*, 316 F.3d at 473 (holding that "a factual inquiry into the circumstances of Hamdi's capture would be inappropriate" and rejecting "any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant"); *see id.* at 474 (citing *St. Cyr*, 533 U.S. at 306). The Fourth Circuit rejected Hamdi's contention based on

the same level and created a category of pseudo-citizens to whom standards governing non-citizens apply.

B. Padilla v. Rumsfeld

In *Padilla*, the Second Circuit held that military detention of an American citizen seized on American soil, outside a zone of combat, was unconstitutional without explicit Congressional approval.[264] The majority opinion departed from *Hamdi*'s analysis in three ways. First, it did not evaluate the petitioner's association with a foreign community to distinguish citizens entitled to constitutional protections from pseudo-citizens who are not. Second, it rejected the application of the plenary power doctrine to a citizen in Padilla's circumstances.[265] Third, principles and precedent governing non-citizens do not drive the majority opinion.

1. *Padilla* and the Prototypical Citizen

In contrast to *Hamdi*, the Second Circuit's characterization of Padilla emphatically affirmed his citizenship. Padilla's first appearance in the opinion emphasizes his nationality and his presence in the United States: "On May 8, 2002, Jose Padilla, an American citizen, flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport."[266] The repetitive invocation of the term "American," the evidence of his citizenship in his passport, and the ease with which he entered the United States highlight the strength of Padilla's connection with the U.S. citizenry. The link between Padilla's citizenship and the United States is most clear in the opinion's

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St. Cyr that at least "some evidence" must support a determination that a citizen was an enemy combatant, instead deferring to allegations in the executive branch's declaration without providing Hamdi an opportunity to rebut them. *Id.* By applying a lower standard of evidence to Hamdi than that required to detain immigrants without a trial, the opinion erected a hierarchy of membership in which citizens accused as enemy combatants inhabit the bottom rung. *See St. Cyr*, 533 U.S. at 306. At the top are U.S. citizens holding full membership in the citizenry who are entitled to the "reasonable doubt" evidentiary standard of a criminal trial. Below them are criminal aliens awaiting deportation who are entitled to review of whether there is "some evidence" to support the detention. *Id.* at 306. At the bottom are U.S. citizens alleged to be enemy combatants, entitled to no review at all.

[264] Padilla v. Rumsfeld, 352 F.3d 695, 699, 711-12 (2d Cir. 2003). The district court had held that the detention was constitutional once the federal government produced "some evidence" that Padilla was an unlawful enemy combatant. Padilla v. Rumsfeld, 233 F. Supp. 2d 564, 570 (S.D.N.Y 2002) (applying "some evidence" standard drawn from cases establishing constitutional rights of detained aliens).

[265] *Padilla*, 352 F.3d at 711-18.

[266] *Id.* at 699.

characterization of Padilla as the archetypal "American citizen" on "American soil."[267] The majority repeatedly draws connections between Padilla, his citizenship, and his physical presence in the United States, which contrast with the Fourth Circuit's identification of Hamdi with foreign territory.[268]

Absent from *Padilla* is the kind of analysis of Padilla's connection to the United States or to an aberrant or enemy group that appeared in *Hamdi*, *Quirin*, and the immigrant and Native American plenary power cases. Based on Padilla's formal citizenship status alone, the majority includes him as a member of the citizenry "entitled to the constitutional protections extended to other citizens."[269] It rejects the government's attempt to apply the membership test in *Quirin*, stating that it is "not persuaded" by the government's assertion of "factual parallels between the *Quirin* saboteurs and Padilla."[270]

The majority's depiction of Padilla as the prototypical citizen stands in stark contrast to the dissent's exclusion of him from the citizenry. Judge Wesley's "U.S. citizens" require executive protection from "acts of belligerency on U.S. soil that would cause [them] harm"[271] rather than constitutional protection against executive power. Under this view, Padilla is not a member of the citizenry; rather, he *is* the impending harm. He is "a terrorist citizen dangerously close to a violent or

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[267] *Id.* at 698.

[268] *Id.* ("Jose Padilla, an American citizen held by military authorities as an enemy combatant"; "an American citizen seized on American soil"); *id.* at 699 ("American citizens on American soil"); *id.* at 702 ("Does the President have the authority to designate as an enemy combatant an American citizen captured within the United States . . .?); *id.* at 711 ("our review is limited to the case of an American citizen arrested in the United States"); *id.* at 712 ("we find that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat"; "the Joint Resolution does not authorize the President to detain American citizens seized on American soil"); *id.* at 713 ("whether the Constitution gives the President the power to detain an American citizen seized in this country"); *id.* at 721 ("the President, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the United States, away from a zone of combat"); *id.* at 721 n.29 (holding that the President's Commander-in-Chief powers are not plenary "in the context of a domestic seizure of an American citizen"); *id.* at 722 ("the authority to use military force" does not include "the authority to detain American citizens seized on American soil"); *id.* at 723 ("The plain language of the Joint Resolution contains nothing authorizing the detention of American citizens captured on United States soil"); *id.* at 724 ("the President's inherent constitutional powers do not extend to the detention . . . of an American citizen seized within the country away from a zone of combat").

[269] *Id.* at 724.

[270] *Id.* at 716 n.26.

[271] *Id.* at 727 (Wesley, J., dissenting).

destructive act on U.S. soil,"[272] a "U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil,"[273] and, in an evocative transformation from person to object, "a loaded weapon of al Qaeda."[274]

The majority opinion in *Padilla* applies the second level of the social contract in much the same way that *Milligan* did. As in *Milligan*, the collective constitutional interests of national and state communities play a part in the decision.[275] The opinion's reasoning that the Constitution requires explicit congressional action for Padilla's military detention parallels *Milligan*'s concern that a military trial would bypass the collective voice of the nation: Congress had "declared penalties against the offences charged, provided for their punishment, and directed [the civil courts] to hear and determine them."[276]

Moreover, as in *Milligan*, the executive's imposition of military control in *Padilla* usurped a civilian grand jury's constitutional role. The court describes Padilla's arrest "in connection with a grand jury investigation of the terrorist attacks of September 11" and describes the executive's interruption of those proceedings.[277] Reminiscent of *Milligan*'s reluctance to undercut the competence of the Indiana grand jury, the Second Circuit twice invokes the grand jury as a constitutional route for proceedings regarding Padilla.[278]

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[272] *Id.* at 728.

[273] *Id.* at 732.

[274] *Id.* at 730. Judge Wesley would have affirmed the district court's opinion. *Id.* at 726. As in *Quirin*, *Hamdi*, and the nineteenth century plenary power cases, the district court applied the plenary power doctrine after a fact-based test for membership in the citizenry. Padilla v. Bush, 233 F. Supp. 2d 564, 571-74 (S.D.N.Y 2002). Judge Mukasey depicted Padilla as sharply breaking with the law-abiding citizens of the United States and turning instead to a foreign and hostile community. *Id.* Padilla rejected the laws of his birthplace by committing murder as a teenager, changed his name to one distinctly Middle Eastern, changed his residence to Egypt, and traveled to Saudi Arabia and Afghanistan where he allegedly met with Al Qaeda. *Id.* at 572. This description of Padilla is sandwiched between a description of the September 11 attacks, the government's allegations that Padilla associated with Al Qaeda, and a description of the 1998 Al Qaeda bombings of United States embassies. *Id.* at 570-75.

[275] Padilla v. Rumsfeld, 352 F.3d 695, 699 (2nd Cir. 2003).

[276] *Id.*; *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866). *Padilla* steers clear of holding that congressional authorization would render the detention constitutional: "Nor do we express any opinion as to the hypothetical situation of a congressionally authorized detention of an American citizen." *Padilla*, 352 F.3d at 699.

[277] *Padilla*, 352 F.3d at 699.

[278] *Id.* (ordering Padilla's release from military custody and suggesting that Padilla could be "transferred to the appropriate civilian authorities who can bring criminal charges against him. If appropriate, he can also be held as a material witness in connection with grand jury proceedings."); *id.* at 710 (stating "he arrived in New York as a material witness

2. Plenary Power and Non-Citizen Norms

Having constructed an image of Padilla as a member of the American citizenry in the United States, the majority rejects the government's claim that detaining Padilla is within the President's plenary power.[279] It confines the plenary power doctrine to cases involving "external affairs" and characterizes this case as one involving "internal affairs" over which the President cannot exercise unilateral power.[280]

Unlike the Fourth Circuit's analogies to alien enemies and its consideration of standards governing the detention of criminal aliens,[281] *Padilla* does not rely upon principles governing non-citizens. It declines to apply *Zadvydas v. Davis*,[282] which required only "some evidence" to justify indefinite detention of deportable aliens, in favor of the constitutionally-bounded criminal process.[283]

Hamdi and *Padilla* present different factual contexts, involving different conduct, different geographical boundaries, and different allegations of involvement with forces opposing the United States. The paramount significance of membership principles, however, is common to both. The Second Circuit's inclusion of Padilla within the realm of the citizenry, and the Fourth Circuit's exclusion of Hamdi from that realm, indicate the powerful role that social contract and membership principles play in defining constitutional rights. *Hamdi*'s application of the *Quirin* test for citizenship, and *Padilla*'s eschewal of that test, lead to completely different outcomes.

The disparity between the circuits in *Hamdi* and *Padilla* raised provocative questions for Supreme Court review. These questions included whether formal citizenship status was unconditional or subject to scrutiny for connection to the social contract, whether the rights of citizens and aliens were equivalent when detained as enemy combatants, and whether the plenary power doctrine applied to U.S. citizens within the United States. In ways both direct and roundabout, the Supreme Court addressed each of these questions.

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in a grand jury investigation related to the September 11 attacks and departed an enemy combatant").

[279] *Id.* at 713-14 (noting government's claim that President had "inherent executive authority" to detain Padilla) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936)).

[280] *Id.* at 713 & n.29.

[281] Hamdi v. Rumsfeld, 316 F.3d 450, 463-76 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004); *see supra* notes 254-63 and accompanying text.

[282] Zadvydas v. Davis, 533 U.S. 678, 691-97 (2001).

[283] *Padilla*, 352 F.3d at 733 (Wesley, J., dissenting).

C. *Fractured Supreme Court*

The significance of citizenship is central to the debate among the multiple opinions in *Hamdi* and *Padilla.* The Court's opinions in both cases implicate the distinctions between citizens and aliens. In *Padilla,* although the Court dismisses the habeas claims on grounds of venue,[284] the role of citizenship is the bone of contention between the majority and the dissent.[285] In *Hamdi,* the plurality opinion relies on the membership test from *Milligan* and *Quirin* to conclude that Hamdi is entitled to no greater protections than aliens, over a strong dissent from Justice Scalia decrying the loss of constitutional distinctions between citizens and aliens.[286] Together, the cases affirm the creation of a pseudo-citizen category that is at least as close to alienage as it is to the core of U.S. citizenship.

1. *Padilla v. Rumsfeld*

The Supreme Court did not reach the issue of whether Padilla's detention was constitutional. Instead, it resolved the case on procedural grounds, holding that the Southern District of New York did not have jurisdiction over his habeas petition.[287] The four dissenting justices would have held that jurisdiction was proper because the case raised "special circumstances."[288] Those special circumstances were the "unique and unprecedented threat" that Padilla's detention posed to "the freedom of every American citizen."[289]

Consistent with membership theory, the majority and dissenting opinions reveal very different conclusions about the importance of Padilla's status as a U.S. citizen. For the majority, Padilla is merely another detainee indistinguishable from any other petition-filing prisoner. For the dissent, Padilla is the archetypal U.S. citizen, representative of "every American citizen."[290] Even when characterized as a "subversive citizen,"[291] Padilla retains his citizenship and therefore his protection against prolonged, incommunicado detention. The dissent's inclusion of Padilla in the membership of the U.S. citizenry is

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[284] Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715, 2727 (2004).

[285] *Id.* at 2733.

[286] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640-42 (2004).

[287] *Padilla,* 124 S. Ct. at 2715, 2727.

[288] *Id.* at 2730, 2731 (Stevens, J., dissenting).

[289] *Id.* at 2733.

[290] *Id.*

[291] *Id.* at 2735.

reflected in its social contract analysis. According to the dissent, the case implicates the bargain struck between "the people" and their "rulers." The benefit of that bargain is "the constraints imposed on the Executive by the rule of law."[292] Here, Padilla represents the people, and the benefits of the people's contract with their rulers belong to him as well.

2. *Hamdi v. Rumsfeld*

The question whether the citizen is entitled to greater constitutional protections than the alien fractured the Court in *Hamdi*. The plurality disavowed any constitutional distinction between citizens and aliens detained as enemy combatants.[293] Relying on *Quirin* when merging the categories of citizen and alien, the plurality declared that an "individual" may be detained in the United States after a "meaningful opportunity" to contest the basis for an enemy combatant designation.[294] Concurring and dissenting, Justices Souter and Ginsburg disagreed with the plurality's conclusion that Congress had authorized the Executive to detain citizens.[295] In dissent, Justices Scalia and Stevens would have held that the "citizens' constitutional right to personal liberty" prohibited the establishment of a "different, special procedure for imprisonment of a citizen" accused of aiding the enemy.[296] Placing Hamdi's citizenship status front and center, they would have required the government to prosecute him for treason or another crime.[297] Only Justice Thomas would have affirmed the Fourth Circuit and deferred to the executive's determination that Hamdi was an enemy combatant, regardless of his citizenship.[298]

a. Membership and Citizenship

The Justices' characterizations of Hamdi's membership in the U.S. community play a large part in the disparate results in *Hamdi*. On the surface, the plurality affirms the importance of Hamdi's citizenship to its conclusion. It highlights the tension between the government's autonomy and "the process that a citizen contends he is due before he is

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[292] *Id.*

[293] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640-41 (2004) (plurality opinion).

[294] *Id.* at 2647-50.

[295] *Id.* at 2653, 2660 (Souter, J., concurring and dissenting).

[296] *Id.* at 2663 (Scalia, J., dissenting).

[297] *Id.* at 2660.

[298] *Id.* at 2678-80, 2685 (Thomas, J., dissenting).

deprived of a constitutional right."[299] It affirms "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law."[300]

Yet the plurality employs membership theory to categorize Hamdi as an outsider to the social contract. It invokes the membership test in *Milligan* to determine the proper level of constitutional protection for Hamdi. In distinguishing *Milligan*, O'Connor attributes its holding that the military had no jurisdiction to "the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there."[301] In her view, Milligan's residency in Indiana, more than his citizenship, determined the scope of his constitutional protections.[302] The contrast between Milligan's domestic residence and connection to a local community and Hamdi's lack of U.S. residence and his capture abroad justify the constitutional distinctions between the two.

Similarly, the few facts that Justice O'Connor includes about Hamdi's background sketch his life as a trajectory away from the United States, starting with his birth in Louisiana, his childhood move to Saudi Arabia, and ending with his residence in Afghanistan.[303] These background facts seem out of place. Because the opinion deliberately limits its focus to the "duration of the particular conflict"[304] and the site of a foreign battlefield, Hamdi's childhood relocations would be irrelevant in the absence of a membership test.

Consistent with the characterization of Hamdi as an outsider, the plurality opinion merges the categories of citizens and non-citizens. As in *Quirin*, it defines a category of "enemy combatants" that does not distinguish between citizens and aliens, stating that "a citizen, no less than an alien, can be part of or supporting [hostile forces]."[305] Relying on *Quirin*, the plurality asserts that citizenship is irrelevant to whether an enemy combatant can be detained.[306] In describing those subject to military detention, the opinion focuses not on citizenship, but on the broader category of "individuals," encompassing both citizens and non-citizens.[307]

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[299] *Id.* at 2646.

[300] *Id.*

[301] *Id.* at 2642.

[302] *Id.* (suggesting that under the circumstances, the military could have detained Milligan for the duration of the conflict "whether or not he was a citizen").

[303] *Id.* at 2636.

[304] *Id.* at 2640.

[305] *Id.* at 2640-41.

[306] *Id.* at 2640-41.

[307] *Id.* at 2640.

On its face, the plurality seems to uphold constitutional protections for citizens detained as enemy combatants by declaring that Hamdi is entitled to contest his designation as an enemy combatant. At the end of the day, however, the plurality employs membership theory to exclude Hamdi from full citizenship, denying him the protections of the Bill of Rights that full citizens enjoy. Implicit in the language that the plurality uses to describe Hamdi and in the legal rules and authorities it relies on is an understanding that these citizens' rights are no greater than those of aliens. The result is a lesser level of constitutional protection for citizens detained as enemy combatants compared with the protections of a criminal trial.

Citizenship drives a wedge between the plurality and the dissent. The dissent takes the plurality to task for erasing the distinction between citizens and non-citizens. In his opinion, Scalia emphatically includes Hamdi as a member of the U.S. citizenry and a beneficiary of the social contract. He begins by placing Hamdi's citizenship front and center, calling him a "presumed American citizen" and framing his case as one that "brings into conflict the competing demands of national security and our citizens' constitutional rights to personal liberty."[308] There is no mention of Hamdi's extraterritorial residence or his connection with other countries. After that first introduction, Hamdi as an individual seems almost to drop out of the opinion, becoming an abstract representation of the archetypal citizen. The opinion is replete with references to "citizens," while scarcely mentioning Hamdi himself.[309]

This is the first opinion in all of the enemy combatant cases to confront the diminishing of citizens' rights as a result of categorizing them with aliens. Having included Hamdi as a member of the citizenry, Scalia chastises the plurality for its failure to distinguish between citizens and aliens.[310] His historical analysis concludes that citizens have greater constitutional protections against federal power than aliens. He argues that the Founders understood that citizens must be charged criminally in an Article III court, and that only aliens could be tried before a military tribunal.[311] In his analysis of pre-Constitutional law on treason[312] and his historical overview of criminal trials in federal court of citizens accused of levying war against their country, Scalia implicitly connects Hamdi to the community of U.S. citizens. He categorizes Hamdi as equivalent to

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[308] *Hamdi*, 124 S. Ct. at 2660 (Scalia, J., dissenting).

[309] *Id.* at 2660-62, 2664, 2666-69.

[310] *Id.* at 2663.

[311] *Id.* at 2663-64.

[312] *Id.* at 2663.

Milligan and to the U.S. citizens who were tried criminally for aiding the Nazi saboteurs in *Ex parte Quirin*.

In contrast, for Justice Thomas, Hamdi represents not citizens but the class of enemy combatants and dangerous detainees. Thomas focuses on Hamdi's capture by the Northern Alliance and his status as a declared enemy combatant.[313] Where Hamdi's name appears, it is usually paired with the phrase "enemy combatant."[314] The opinion also connects Hamdi to national security and foreign affairs, and is silent about his citizenship and his presence in the United States.

Like the plurality, Thomas merges the categories of citizen and alien in measuring the government's power to detain suspected enemy combatants. Unlike the plurality, he offers a justification for employing authority involving aliens to establish standards for citizens. He notes that *United States v. Salerno* relied on precedent governing the detention of enemy aliens to determine whether the Due Process Clause permitted pretrial detention in the criminal context.[315] Thus, Justice Thomas explicitly acknowledges the use of precedent expanding the power of the federal government over aliens to limit the rights of U.S. citizens.

The result of this myriad of opinions is that the Court affirms the creation of a pseudo-citizen category. Aggregating the four votes from the plurality with Justice Thomas' lone voice, the Court has sketched the boundaries of a class of citizens whose constitutional rights are subject to a balancing test in which the government is presumed to prevail.

b. Plenary Power and the Pseudo-Citizen

Perhaps the most significant aspect of *Hamdi* is its embrace, *sotto voce,* of the plenary power doctrine. The plurality sidesteps the question whether the executive branch alone has plenary power to detain a citizen by holding that Congress authorized the President to detain citizens who are enemy combatants.[316] Yet the tracings of the plenary power doctrine suggest themselves throughout the opinion.

The three hallmarks of the plenary power doctrine — reliance on inherent federal power derived from sources of law originating outside of the Constitution, diminished constitutional limitations on federal government power, and judicial deference to the executive and

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[313] *Id.* at 2674, 2678 n.5 (Thomas, J., dissenting).

[314] *Id.* at 2674, 2678, 2680, 2683, 2685.

[315] *Id.* at 2681 (citing Ludecke v. Watkins, 335 U.S. 160 (1948)); U.S. v. Salerno, 481 U.S. 739 (1987).

[316] *Hamdi*, 124 S. Ct. at 2639-40 (plurality opinion).

legislative branches — each play a part in the opinion. First, in interpreting whether Congress authorized the President to detain U.S. citizens, the plurality relied on "universal agreement and practice," international definitions of the "incidents of war," and the Geneva and Hague Conventions rather than specific powers enumerated in the Constitution.[317] Second, the plurality opinion diminished individual constitutional limitations on federal power by creating a balancing test in which the constitutional right to liberty may bow to the federal government's interest in security.[318]

Finally, the third hallmark of the plenary power doctrine is revealed in the limits the plurality places on the role of the judiciary. Although Justice O'Connor proclaims a vibrant role for the judiciary "in the realm of detentions,"[319] her opinion requires substantial judicial deference to the government. In proceedings challenging the enemy combatant designation, courts must exercise a presumption in favor of the government's evidence that the citizen-detainee is an enemy combatant.[320] By allowing the government to rely on hearsay evidence in those proceedings, the plurality transfers to the government the judicial function of testing the value of the evidence.[321] These procedural standards require the courts, in effect, to defer to the government's enemy combatant designation unless the citizen-petitioner is able to overcome the presumption against him.

Tellingly, Justice O'Connor cites to *INS v. St. Cyr*,[322] a case involving the scope of judicial review over the habeas petitions of aliens, when describing the scope of judicial review over the Executive's discretion to detain citizens.[323] The plurality would remove the question altogether from the federal courts by permitting a military tribunal, rather than a federal court, to resolve whether the citizen is an enemy combatant.[324] This presumably limits judicial review of the tribunal's decision to whether the military court met the plurality's procedural standards. Thus, although the plurality does not follow the Fourth Circuit in calling

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[317] *Id.* at 2640-41 (citing various international sources, including Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002), decision of Nuremberg Military Tribunal, and passages from *Quirin* that themselves rely on authorities outside of enumerated powers in Constitution).

[318] *Id.* at 2648-50.

[319] *Id.* at 2650-51.

[320] *Id.* at 2649.

[321] *Id.*

[322] INS v. St. Cyr, 533 U.S. 289 (2001).

[323] *Hamdi*, 124 S. Ct. at 2650.

[324] *Id.* at 2651.

on *Curtiss-Wright* and the plenary power doctrine, the effect of its opinion is nearly the same.

The result is a reduced level of constitutional protection for citizens detained as enemy combatants. Having determined that Congress had properly authorized the Executive to detain American citizens who were enemy combatants, the plurality establishes a reduced level of procedural protection for the pseudo-citizen. In contrast to the presumption of innocence and the procedural protections of a criminal trial, the citizen-detainee's right to liberty may be balanced against the government's interest in preventing those who fought on the side of the enemy from returning to battle. It is reduced to a right to "notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."[325] That "fair opportunity" strays far from the thicker presumptions and procedures provided to those accused of a crime.

Consistent with his inclusion of Hamdi as a member of the citizenry, Justice Scalia completely rejects the application of the plenary power doctrine to U.S. citizens. It is the hallmarks of the plenary power doctrine in the plurality opinion that are the focus of the dissent's disagreement. First, Scalia takes issue with the plurality's reliance on extra-Constitutional sources of law. The plurality's embrace of international law to justify the captivity of American citizens is unacceptable because it is inconsistent with "the restrictions that the Constitution places on the American government's treatment of its own citizens."[326] In his mind, the plurality went astray when it relied on the laws and usages of war to justify Hamdi's detention, because the Constitution limits the powers of the Executive in using its military power to threaten "the blessings of liberty."[327]

Second, Scalia would augment, rather than diminish, the protections that the Constitution provides to the citizen, arguing that the treason clause is a guarantee to the citizen of a criminal trial and the Suspension Clause protects citizens from trial outside of a criminal court.[328] Finally, he takes issue with the plurality's procedural framework as overly deferential to the executive, calling it a "judicial remediation of executive default" rather than a "determin[ation] of the legality of executive detention."[329] Thus, it is the elements of the plenary power doctrine in

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[325] *Id.* at 2648.

[326] *Id.* at 2671 n.5 (Scalia, J., dissenting).

[327] *Id.* at 2668.

[328] *Id.* at 2663-64, 2671.

[329] *Id.* at 2672.

the plurality opinion that raise the hackles of the dissent.

Scalia's dissent would abolish the pseudo-citizen category and draw a clean line between the rights of aliens and citizens. He interprets the Constitution to require a criminal trial in a federal court for citizens, and to permit a military tribunal for aliens.[330] He rejects the plurality's reliance on case law concerning non-citizens because "citizens and non-citizens, even if equally dangerous, are not similarly situated."[331] While international law may be sufficient for aliens, only the Constitution governs the relationship between the citizen and the government.[332] Scalia envisions a clear hierarchy based on citizenship in which formal citizenship status guarantees a quantifiable level of constitutional protection, and alienage allows for significantly greater room for federal power and reliance on sources of authority outside of the Constitution.

Only Thomas would explicitly invite application of the plenary power doctrine to citizens accused of aiding the enemy. His dissent asserts that the federal government has war powers that are unrestrained by either the Constitution or the judiciary, arguing that "no constitutional shackles can wisely be imposed" on the power to protect the country.[333] According to Thomas, the judiciary lacks the expertise and capacity to interfere with the detention. He relies on *Curtiss-Wright* for the proposition that the President has independent authority under the Constitution to make determinations concerning war and foreign affairs, and must be free to make those decisions without interference from the judiciary.[334] He would limit the role of the judiciary to deciding whether the President has the authority to declare Hamdi an enemy combatant, and would prohibit judges from reviewing that declaration.[335] And, consistent with the application of the plenary power doctrine, Thomas' opinion relies upon authorities and principles governing aliens, not citizens.[336]

Just before this article went to print, the government announced that it had reached an agreement with Hamdi to release him from detention.[337] In exchange for his freedom, Hamdi agreed among other things to

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[330] *Id.* at 2663-64.

[331] *Id.* at 2671 n.5.

[332] *Id.*

[333] *Id.* at 2675 (Thomas, J., dissenting).

[334] *Id.* at 2676 (Thomas, J., dissenting).

[335] *Id.* at 2678 (Thomas, J., dissenting).

[336] *Id.* at 2679, 2681 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950); Ludecke v. Watkins, 335 U.S. 160 (1948); *In re* Yamashita, 327 U.S. 1, 12 (1946)) (Thomas, J., dissenting).

[337] Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sept. 23, 2004, at A1.

renounce his U.S. citizenship.[338] This loss of citizenship status supports the intuition that membership theory excludes Hamdi from the core of U.S. citizenry. In some ways, it merely formalizes the courts' characterization of Hamdi as an outsider. It also highlights the fragility of citizenship in a nation where citizenship is often considered the most robust of membership classifications.

III. CONCLUSION: THE IMPLICATIONS OF PSEUDO-CITIZENSHIP AND THE APPLICATION OF LAW GOVERNING NON-CITIZENS

The debate surrounding the enemy combatant cases tends to polarize around the proper balance that decisionmakers should strike between national security and individual liberty. Many courts and scholars have argued that the executive and legislative branches need flexibility to act quickly to curtail a threat to the nation when an individual is suspected of having acted against the interests of the nation.[339] Others have argued that the criminal process is sufficient to protect us against the actions of citizens who are unlawful combatants.[340] This debate is dangerously anemic without an assessment of the consequences to citizens and citizenship of a membership test that creates different levels of constitutional protection. There are dangers to isolating a class of citizens whose claim to full citizenship is perceived as questionable. Significant implications arise for all citizens, as well as non-citizens,

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[338] *Id.*

[339] *See, e.g.*, Cole, *supra* note 4; Harris, *supra* note 4; Issacharoff & Pildes, *supra* note 4; Rehnquist, *supra* note 4; Tobias, *supra* note 4; *see also* Hamdi v. Rumsfeld, 296 F.3d 278, 281 (4th Cir. 2002); Padilla v. Bush, 233 F. Supp. 2d 564, 587-96 (S.D.N.Y. 2002); *Ex parte* Quirin, 317 U.S. 1, 25, 37-38 (1942); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936).

[340] *E.g.*, Michael Greenberger, *Is Criminal Justice a Casualty of the Bush Administration's "War on Terror"?*, 31 HUM. RTS. 19, 21 (2004); *see* Issacharoff & Pildes, *supra* note 4, at 31 (detailing argument that no person is subject to detention without criminal trial). If criminal conviction is a marker of success, then providing the constitutional protections of a criminal trial to John Walker Lindh and Timothy McVeigh supports this view. *See* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998); United States v. Lindh, 227 F. Supp. 2d 565, 565, 567 (E.D. Va. 2002). Lindh was sentenced to twenty years imprisonment because, like Hamdi, he allegedly fought for the Taliban against forces allied with the United States. *Lindh*, 227 F. Supp. 2d at 565; *see also* United States v. Lindh, 212 F. Supp. 2d 541, 548-52, 564-68 (E.D. Va. 2002) (denying Lindh's motions to dismiss on several constitutional grounds, including challenges under Fifth, Sixth, and Fourteenth Amendments). Nor did the criminal process fail in the case of Timothy McVeigh's bombing of an Oklahoma City federal building. *McVeigh*, 153 F.3d at 1176. Perhaps of greater concern would have been a decision to classify the initial suspects as pseudo-citizens and subject them to a military tribunal: Arab-Americans who were initially detained after the Oklahoma City bombing. *See* Kevin R. Johnson, *The Case Against Race Profiling In Immigration Enforcement*, 78 WASH. U. L.Q. 675, 727 (2000).

when rules traditionally applied to aliens apply to citizens.

The first question is whether courts should use membership theory as a measure of the constitutional protections due to citizens. The critical question, then, is whether the use of a membership test does more good than harm. Assuming that such a test is desirable, the criteria should test for the attributes that we seek in citizens of the United States, and should succeed in protecting the citizenry from citizens who mean to do the country harm. It should also avoid over-inclusiveness, casting suspicion on legitimate citizens for illegitimate reasons. Courts seem to use the membership test to protect the members of the social contract from fellow citizens who align themselves with an enemy. The test, at bottom, seems intended to act as a screening device to weed out those who are formally citizens but who are more likely than the majority to act in a way that is disloyal to the nation. It is, at its core, a loyalty test.[341]

A loyalty test of this sort is unlikely to adequately protect the nation against disloyal individuals with formal citizenship status.[342] Even assuming that the membership test and the pseudo-citizen category provide some measure of protection to the nation, both citizens and non-citizens stand to experience a negative impact from these cases.

The enemy combatant cases upset three common understandings about U.S. citizenship: (1) that citizenship imbues the citizen with constitutional rights and privileges that are greater than those granted to non-citizens,[343] (2) that those rights and privileges apply to all citizens

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[341] Seen this way, the enemy combatant cases represent a struggle for dominance between two different dimensions of citizenship: citizenship conceived of as formal legal status versus citizenship as identity or solidarity with a nation state. Bosniak, *Citizenship*, *supra* note 48, at 455; *see also* Rubenstein & Adler, *supra* note 168, at 522; Spectar, *supra* note 63, at 271-72 (describing citizenship theories). If the formal legal status of the citizen is viewed as more important than identity or solidarity in the enemy combatant cases, then constitutional benefits will follow as soon as the individual establishes citizenship. Bosniak, *Citizenship*, *supra* note 48, at 463-64; *see also* Black, *supra* note 239 at 8-10 (1970) (articulating three critical aspects of rights-based citizenship: "First, citizenship is the right to be heard and counted on public affairs, the right to vote on equal terms, to speak, and to hold office when legitimately chosen. . . . Secondly, citizenship means the right to be treated fairly when one is the object of action by that government of which one is also a part. . . . Thirdly, citizenship is the broad right to lead a private life.") If, on the other hand, identity and solidarity with the nation-state is paramount, the cases suggest that the citizen's loyalty must be tested before the citizen is entitled to the benefits of societal membership: constitutional rights.

[342] *See generally* Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race after September 11*, 52 DEPAUL L. REV. 871 (2003).

[343] *See* Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (stating that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens").

equally,[344] and (3) that citizenship, once acquired by birth or naturalization, is a virtually permanent and stable status.[345]

A category of pseudo-citizens for whom constitutional protections are equal to or lesser than those of non-citizens challenges each of those understandings. Applying to citizens legal principles that were originally created to govern non-citizens challenges the first understanding that citizens have greater constitutional rights than non-citizens. Establishing a hierarchy in which full citizens are entitled to greater constitutional protections than pseudo-citizens challenges the second understanding that constitutional benefits apply equally to all citizens. Redefining citizenship to create a hybrid citizen/non-citizen category unsettles citizens' expectations of the permanency and stability of their citizenship status.

The framework of the membership test seems to ameliorate these concerns in part. Most citizens have sufficient ties to the national community so that they would escape the pseudo-citizen category. However, the use of membership criteria in the unlawful combatant cases is not explicit, and its contours are vaguely defined. Courts may apply the membership test one way or another to support the result they find attractive. Citizens may become less certain about the level of power that the federal government has, which may create uncertainty about who they can associate with and what they can say or do.

Nevertheless, the majority of citizens will not be directly affected by the malleability of citizenship categories. Of greatest concern are citizens on the margins of membership, those likely to be perceived as less than full citizens. For them, the use of the plenary power doctrine in the current enemy combatant cases raises troubling questions. The membership test and the categorizations that spring from it have their roots in the origins of the plenary power doctrine. There is a danger that the doctrine's historical use to exclude Chinese immigrants and Native Americans may find echoes in decisions concerning certain groups, like Arabs and Muslims, who are currently perceived with suspicion.[346]

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[344] *See* Black, *supra* note 239 at 33-66; KARST, *supra* note 239, at 173-242; Bosniak, *Citizenship*, *supra* note 48, at 450.

[345] *See* Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967); Aleinikoff, *supra* note 63, at 1471.

[346] Volpp, *supra* note 96, at 1592-99 (describing creation of Arab Muslim terrorist citizen as group separate from American public). These concerns gain clarity in light of the Japanese internment cases, decided contemporaneously with *Quirin*. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. LAW 295, 337 (2003); Liam Braber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L.

Exacerbating this danger is that the pseudo-citizen category upsets established norms about the permanency of citizenship. Outside of the enemy combatant context, it is the citizen, and not the government, who has control over her citizenship status. The pseudo-citizen category and the membership test undermine the principle that a citizen cannot lose her citizenship status unintentionally. In *Afroyim v. Rusk*, the Supreme Court placed the burden on the government to prove that the citizen intended to renounce her citizenship.[347] *Afroyim* requires the government, in effect, to explicitly alter the individual's formal citizenship status before it may treat the citizen as a non-citizen. Classifying the citizens in *Quirin* and *Hamdi* as pseudo-citizens allowed the government to apply rules governing non-citizens without bearing

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REV. 451 (2002); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 22-31 (2002); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as 'Terrorists,'* 8 ASIAN L.J. 1, 8-9 (2001); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1190-91 (1985) (book review). The internment cases upheld military orders imposing curfews, displacement, and confinement in internment camps on all persons of Japanese ancestry, including U.S. citizens. Korematsu v. United States, 323 U.S. 214, 223 (1944) (upholding orders to report to "assembly centers"); Yasui v. United States, 320 U.S. 115, 116-17 (1943) (upholding curfews); Hirabayashi v. United States, 320 U.S. 81, 102 (1943) (upholding curfews). *Korematsu* employed a membership test based on Korematsu's association with a group — those of Japanese ancestry — who were excluded from membership in the social contract. It stated, "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members" of the Japanese American population "whose number and strength could not be precisely and quickly ascertained." *Korematsu*, 323 U.S. at 218. In effect, the Court substituted the presumptive disloyalty of Japanese-Americans as a group for Korematsu's status as an individual citizen. *Korematsu* did not apply the plenary power doctrine. *See id.* at 216 (applying "rigid scrutiny" to racial classification). But some scholars and judges, including Chief Justice Rehnquist, have suggested that similar military action could warrant judicial deference to the executive and legislative branches. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 171 (2001) ("powerful norms of legal justice, such as the nondiscrimination principle, can bend to practical exigencies, [including] winning a war"); RICHARD A. POSNER, THE TRUTH ABOUT OUR LIBERTIES, RESPONSIVE COMMUNITY: RIGHTS AND RESPONSIBILITIES 4, 6 (2002); REHNQUIST, *supra* note 185, at 222-24; Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 (1962); *see also* Joo, *supra*, at 24-25 (critiquing viewpoints of these authors). The plenary power doctrine stands ready for such an application.

[347] Afroyim v. Rusk, 387 U.S. 253, 257-68 (1967). Cases in which the government has attempted to revoke an individual's citizenship have raised this same tension between formal citizenship status and citizenship as identity or solidarity. *See* Aleinikoff, *supra* note 63, at 1473-75. These cases involved conduct by citizens that similarly reflected disloyalty to the United States. *See* Vance v. Terrazas, 444 U.S. 252 (1980) (swearing allegiance to another government); *Afroyim*, 387 U.S. at 257-68 (voting in a foreign election); United States *ex rel.* Marks v. Esperdy, 315 F.2d 673, 676 (2d Cir. 1963) (serving in the armed forces of Cuba after the Castro revolution), *aff'd sub nom.* Marks v. Esperdy, 377 U.S. 214 (1964).

its burden of altering the individual's formal citizenship status. When the Fourth Circuit accepted without rebuttal the President's designation of Hamdi as an enemy combatant and applied the plenary power doctrine,[348] it presumed, counter to *Afroyim*, that Hamdi intended to renounce his citizenship and any identification or solidarity with the nation.[349] The deal that the government struck with *Hamdi* in which he would renounce his U.S. citizenship formalizes the courts' designation of him as a non-citizen, but it undermines *Afroyim*'s goal of ensuring that the citizen affirmatively intend to lose his or her citizenship.

The impact on non-citizens is more attenuated but no less significant. The application to citizens of rules governing non-citizens reaffirms the lower level of constitutional protections accorded to non-citizens as well as their exclusion from the social contract.[350] The greatest concern that these cases raise is that the rules being applied to citizens were originally crafted for non-citizens, without the foresight that they might later cross the citizenship divide. David Cole has observed that immigration law acts as a testing ground for rules that would be unacceptable to the citizenry at the time.[351] In times of national stress, those rules come to be applied to citizens as well.[352]

Thus, the enemy combatant cases suggest that we need to be cautious about the rules we craft for non-citizens. Relying too heavily on a formal distinction between citizens and non-citizens will fail to anticipate the effect on citizens of rules now being crafted for non-citizens.[353] If courts break down the division between citizen and non-citizen in ways that

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[348] Hamdi v. Rumsfeld, 316 F.3d 450, 466 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

[349] It is telling that the only time in the current unlawful combatant cases that a court has faced the issue of denaturalization is in the confined constitutional context of a criminal trial. In *Lindh*, the district court acknowledged, and directed to Congress, arguments that loss of citizenship might be an appropriate criminal punishment for Lindh's conduct. United States v. Lindh, 227 F. Supp. 2d 565, 573 (E.D. Va. 2002).

[350] Critics have questioned the legitimacy of a distinction between constitutional protections for citizens and non-citizens, and some have argued instead in favor of according constitutional rights on the basis of personhood. *See, e.g.*, Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002-2003); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185 (1998).

[351] Cole, *supra* note 350, at 957.

[352] *Id.* at 959.

[353] Motomura, *supra* note 47 ("What is really troubling about the government's response to September 11 has not been that the government is treating citizens and non-citizens differently. Rather, it is that current policies treat many citizens as if they were non-citizens — at least if we look beyond a narrow, legalistic definition of what it means to be a U.S. citizen.").

lessen constitutional protections for both, then we all must be concerned about the rules that apply to enemy combatants, whether citizen or alien.

Finally, the appearance of the plenary power doctrine in the enemy combatant cases has consequences for scholarship addressing both these cases and a range of related constitutional issues. Scholarship examining the enemy combatant cases has tended to focus separately on the role of the judiciary, the scope of constitutional rights, and the reach of executive and legislative power. These separate areas of inquiry make up the elements of the plenary power doctrine. The danger is that a piecemeal approach to the scope of federal power, the role of the judiciary, and the impact on constitutional protections risks missing the larger picture — that the plenary power doctrine has been re-assembled within the realm of citizenship.

The appearance of the plenary power doctrine in the enemy combatant cases parallels in the citizenship realm the evolution of the doctrine in the realm of non-citizens. The Native American and immigration cases provide a primer for examining the consequences of importing the plenary power doctrine into areas governing citizenship. Like the incremental increase of plenary power in the immigration and Native American cases, the plenary power doctrine has taken root and expanded its hold in each of the enemy combatant opinions. To avoid an unexamined expansion of the doctrine, it is imperative to examine its roots in the non-citizenship realm in order to understand its impact on our conceptions of citizenship.