No. 09-5801

In The
Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

MICHAEL M. HETHMON*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org

Attorney for the Amicus Curiae
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

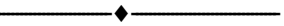
Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Immigration Reform Law Institute (IRLI) is a legal non-profit 501(c)(3) corporation specializing in immigration law. *Amicus Curiae* believe that because Congress has unquestioned plenary authority to prescribe the rules of citizenship, immigration, naturalization and foreign affairs, as laid out by this Court's long established Plenary Doctrine, Petitioners are prevented from seeking relief in this case.

Amicus Curiae has an interest in the Court having a well-informed and accurate understanding of the Plenary Power Doctrine through the Anglo-American legal tradition, the history of the Constitution, and the history of the Fourteenth Amendment.



SUMMARY OF ARGUMENT

The question presented is whether Congress, in its plenary authority to prescribe the rules of citizenship, has the authority to distinguish rules for

[1] Pursuant to this Court's Rule 37.6, *Amicus Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

citizenship at birth according to gender, and whether such a classification by Congress is subject to judicial review. Petitioners argue: "The "plenary power" doctrine, which the Court has applied in the context of the entry of aliens into the United States, does not warrant some lesser standard of scrutiny, because acquisition of citizenship at birth is fundamentally different from the immigration or naturalization of an alien." Pet. Br. 4. Petitioners further assert that "even if the plenary power doctrine applies, the classification does not exempt congressional action in that area from constitutional scrutiny." *Id*.

Despite these claims of the Petitioners and their accompanying *amici*, the Plenary Power Doctrine as it concerns the rules of citizenship is not subject to a different constitutional standard of scrutiny than the other areas touching upon the Plenary Power Doctrine – immigration, naturalization, and foreign affairs. *See* Res. Br. 14-20. Neither the Founding Fathers nor the ratifiers of the Fourteenth Amendment sought to limit congressional plenary power over citizenship, immigration, naturalization, or foreign affairs. Congressional authority in these areas of law was considered as integrally related under every nation's right of self-preservation as understood through the law of nations.

The historical and legal evidence available from the years when the Constitution was framed and the Fourteenth Amendment was ratified affirms that this Court's long standing precedent on the Plenary Power

Doctrine concerning citizenship is correct and what the Constitution commands.

Neither the Fifth Amendment's equal protection guarantee nor the Fourteenth Amendment's Equal Protection Clause was ever intended to have any bearing on the Plenary Power Doctrine. While the Fourteenth Amendment prescribes a constitutional minimum guarantee for citizenship at birth, it is not a broad command. Instead, it is a reaffirmation of the Founding Fathers' understanding of the rules of citizenship. The Fourteenth Amendment guarantees that Congress cannot deny citizenship by birth to persons who are "subject to the jurisdiction thereof" and born in the territorial United States. U.S. CONST. Amend. XIV, § 1; *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).

All legal and historical sources support the view that to be "subject to the jurisdiction thereof" means subject to the "complete jurisdiction" of the sovereign. Through the long-standing doctrine of allegiance and every nation's sovereign right of self-preservation, the ratifiers of the Fourteenth Amendment intended that Congress retain plenary authority to define whether persons are "subject to the jurisdiction thereof" through the doctrine of allegiance, *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (when determining an individual's "ties and allegiances, it is for Congress, not this Court, to make that determination"), and its plenary power over citizenship.

ARGUMENT

I. THE PLENARY POWER DOCTRINE OVER CITIZENSHIP IS WELL-ESTABLISHED BY THE COURT

Since the late nineteenth century, the Supreme Court has repeatedly affirmed that Congress alone has plenary power to prescribe the rules conferring United States citizenship. *Hamilton v. Dillon*, 88 U.S. 73, 92 (1875); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Matthews v. Diaz*, 426 U.S. 67 (1976); *Plyer v. Doe*, 457 U.S. 202, 225 (1982); *INS v. Chadha*, 462 U.S. 919, 940 (1983). The Court has also held that this power is not subject to the limitations set forth in Section 1 of the Fourteenth Amendment, including the Equal Protection Clause. *Wong Kim Ark*, 169 U.S. at 688 (Section 1 "has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution"); *Rogers v. Bellei*, 401 U.S. 815, 830 (1971).

In the last fifteen years, the Court's decisions have not strayed from this precedent. In *INS v. Pangilinan*, 486 U.S. 875, 885 (1998), the Court held, "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship[.]" *See also Miller v. Albright*, 523 U.S. 420, 456 (1998) (Scalia, J., concurring) ("only Congress has the power to set the requirements for the acquisition of citizenship by persons not born within

the territory of the United States, federal courts cannot exercise that power").

Conversely, Petitioners assert that congressional plenary authority over citizenship is distinct from plenary authority over immigration and should be subject to constitutional scrutiny[2] under the Fifth Amendment's equal protection guarantee or the Fourteenth Amendment's Equal Protection Clause. Pet. Br. 7-19, 44-62. Petitioners cite to *Nguyen*, 533 U.S. at 60, in which that Court applied intermediate scrutiny to a gender-based classification for citizenship. However, at no point in *Nguyen* did the Court overturn its previous decisions affirming congressional plenary power to confer the rules of citizenship. Instead, the Court held that it "need not assess . . . our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power" because 8 U.S.C. § 1409(a) would survive the applicable equal protection scrutiny absent the Plenary Power Doctrine. *Nguyen*, 533 U.S. at 72-73.

[2] The Brief for the United States argues for congressional deference and that a "rational basis" standard of review applies. Res. Br. 8, 22, 31. This Court has never applied a level of constitutional scrutiny to the Plenary Power Doctrine concerning citizenship. *Nguyen*, 533 U.S. at 72-73 (affirming the Plenary Power Doctrine concerning citizenship was not overturned).

II. HISTORY AFFIRMS THE COURT'S PLENARY POWER DOCTRINE AS IT CONCERNS CITIZENSHIP

From our Anglo-American legal beginnings, this Court's Plenary Power Doctrine is affirmed through an historical approach. This history affirms that the Court should uphold its longs standing precedent that Congress has plenary power to prescribe the rules conferring United States citizenship. As the historical and legal evidence set forth below demonstrates, the Founding Fathers adopted the Constitution to centralize authority over citizenship, immigration, naturalization, and foreign affairs with the federal government, for these areas of plenary authority were interrelated within the law of nations. *See* Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: A Historical Perspective*, 15 TEX. REV. L. & POL. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618976, at 7-38.

The fact that former 8 U.S.C. § 1401(a)(7) and 8 U.S.C. §§ 1409(a), (c) distinguish citizenship based on gender has no bearing on the constitutionality of these laws, for the Founders meant to confer upon Congress unfettered plenary authority over the rules of citizenship based upon the consent of the Union. *Id*. at 22-30. The power to prescribe the rules of citizenship is a matter of national sovereignty. This power is intertwined with the right of self-preservation, the

doctrine of allegiance, and the law of nations as prescribed by the political branches.[3]

III. THE PLENARY POWER DOCTRINE IS PART OF OUR ANGLO-AMERICAN TRADITION

In accordance with the Founders' understanding of the Constitution, this Court has held that through the text of the Constitution and every nation's right of self-preservation, Congress has plenary power over citizenship, immigration, naturalization, and foreign affairs. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904) (it is an "accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners . . . or to admit them . . . upon such conditions as it may see fit to prescribe"); *Chadha*, 462 U.S. at 940.

Despite this understanding, legal commentators have asserted that the Plenary Power Doctrine is a judicial fiction and subject to the limitations set forth in the Bill of Rights and the Fourteenth Amendment.

---

[3] *Amici Curiae* Professors of History, Political Science, and Law assert that gender based citizenship law are "archaic assumptions" that "run afoul of well-established constitutional principles[.]" Br. Of Amici Curiae Professors of History, Political Science, and Law at 1-2. Whether or not 8 U.S.C. §§ 1401 and 1409 are "archaic" is irrelevant when Congress has legislated in an area of plenary authority.

See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 854-57 (1989). These claims are without legal or historical merit.

An historical approach supports this Court's long-standing precedent, reveals that the Plenary Power Doctrine is deeply-rooted in Anglo-American history, that the Constitution's Framers intended Congress to have unfettered authority in the areas of citizenship, immigration, naturalization, and foreign affairs, and that these areas were all intimately interwoven. In particular, the Framers understood that the Constitution grants Congress exclusive authority to prescribe the rules of citizenship, which are historically and legally based on the long standing doctrine of allegiance.[4]

A. The Anglo Origins of the Plenary Power Doctrine and the Doctrine of Allegiance

The Founders' understanding of the Plenary Power Doctrine, as the Founders understood it, over the rules of citizenship can be traced back to Hugo Grotius (1583-1645) and can be found in England's

[4] The Court has acknowledged the importance of the doctrine of allegiance in multiple cases. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *Wong Kim Ark*, 169 U.S. at 655-67; *Ohio ex rel. Clarke v. Deckebach,* 274 U.S. 392, 396 (1927).

Statutes of the Realm from the inception of the Magna Charta to the early seventeenth century. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 201-2, 819, 857 (Francis W. Kelsey ed., 1925). This plenary authority is interwoven with every nation's right of self-preservation, its power over foreign affairs, and the well-established doctrine of allegiance. *See* Charles, *The Plenary Power Doctrine*, *supra,* at 5-21 (discussing the Anglo and international origins of the Plenary Power Doctrine).

In England, the doctrine of allegiance was essential for defining the rights of an individual, and determining whether such a person was entitled to the status of a subject, alien, or denizen. Allegiance was of such importance to English law that it was even a prerequisite to conduct trade or enter the realm. *See* 32 Hen. 8, c. 16, §§ 1, 3 (1540) (Eng.) ("ev[er]y alien and straungier borne out of the Kinges obe[die]nce . . . [is to be] bounden by and unto the lawes and statut[e]s of this realme").

Nothing in England's historical, legal, or statutory record suggests anything other than that Parliament and the crown possessed unchecked plenary power over citizenship and the entrance of persons born out of the sovereign's allegiance. *See* 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 335-36 (2d ed., 1966). It was well-established that persons born outside the realm were subject to rules of law which differed significantly from the English common law,

including the rights of subjects.[5] Aliens could not immediately claim the rights and liberties of the English subject, because the government had plenary authority to treat them as it pleased. *Id*. at 335.

As early as 1608 the King's Bench addressed the importance of the doctrine of allegiance concerning the rights of individuals born outside the crown's allegiance. *See Calvin's Case*, 7 Coke. 1186 (1608). In *Calvin's Case*, the Court held that although the alien had lived his entire life in England, and had sworn allegiance to the king, if "an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 92 (2d ed., 1966).

The development of the doctrine of allegiance in defining citizenship and the laws concerning immigration, naturalization, and foreign affairs reached its height during the seventeenth century. For instance, in 1641, Sir Francis Bacon stated that the "priviledge of *Naturalization*, followeth *Allegeance*, and that *allegeance* followeth the *Kingdome*." FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT 15 (1641). Citing Sir Thomas Littleton's 1481 treatise *On Tenures*, Bacon

[5] 32 Hen. 8, c. 16, § 1 (1540) (Eng.); 21 Hen. 8, c. 16, § 1 (1529) (Eng.); 4 & 5 P. & M., c. 6, §§ 1, 2 (1557-8) (Eng.); 7 Jac. 1, c. 2 (1609-10) (Eng.).

defined an alien as any person "which is born out the allegeance of our *Lord the King*." *Id*. at 37.

The popular print culture of the seventeenth century also reveals the importance of the doctrine of allegiance, and describes the plenary authority of the political branches over citizenship, immigration, and naturalization as unquestioned. Charles, *The Plenary Power Doctrine*, *supra,* at 11-13. The only matter of legal dispute was the distribution of power between the political branches – i.e., the crown and Parliament. BACON, *supra*, at 15-16; 4 HOLDSWORTH, *supra*, at 335-36. Not one pamphlet or broadside, including those by proponents of naturalizing foreigners, questioned the government's plenary authority to grant citizenship or define the rights afforded aliens. In fact, many political pamphlets posed the argument that foreigners should not be naturalized or permitted to settle due to allegiance conflicts between their nation of origin and that of England. Charles, *The Plenary Power Doctrine*, *supra,* at 11-13.

What these pamphlets reveal is that the plenary power over citizenship, immigration, and naturalization were intimately related and considered to rest with the political branches in England. Such power was based on the international premise that a sovereign government must possess the power of self-preservation, which included the tenets of the doctrine of allegiance. *Id*. Determining the allegiance of foreigners was the entire legal basis by which foreigners were permitted to settle, obtain citizenship, and the rights of subjects. It was a power inherent to

national sovereignty within the political branches of England and could not be questioned.[6]

Even seventeenth century proponents of liberalizing England's immigration and naturalization policies, such as Daniel Defoe, recognized this legal fact. Defoe was for encouraging foreigners to settle, but only those that would "hazard[ ] their lives to save our Liberties" because the "strength of England augmented by such a considerable Accession of zealous Protestants" would "defend our Rights and Liberties as their own[.]" DANIEL DEFOE, SOME SEASONABLE QUERIES, ON THE THIRD HEAD, VIZ. A GENERAL NATURALIZATION 3 (1697). In other words, Defoe supported the settling of only those foreigners that would not pose a danger to the safety of the realm, and knew this determination was a matter left to the political branches because it concerned governmental plenary authority over citizenship, immigration, naturalization, and foreign affairs.

B. Blackstone, Vattel, and Other Eighteenth Century Legal Commentators Support the Court's Plenary Power Doctrine Concerning Citizenship

Eighteenth century legal treatises all attest to the prominence of the Plenary Power Doctrine over

---

[6] PETER AND NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTION, 1776-1814, at 15 (1993).

citizenship, immigration, naturalization, foreign affairs, and they were all interwoven with the doctrine of allegiance.[7] In Matthew Bacon's *A New Abridgement of the Law* it defines an alien as "one born in a strange Country and different Society[.]" 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 76 (6th ed., 1793). Bacon further wrote the "Policy of our Constitution has established several Laws . . . that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy[.]" *Id*.

William Blackstone similarly discussed the importance of the doctrine of allegiance and aliens submitting to a nation's laws as a requirement to obtain entry, citizenship, or the rights of subjects. He wrote that allegiance "both express and implied, is the duty of all the king's subjects" and others residing or travelling within the realm. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (1765). He defined an alien as "one who is born out of the king's dominions, or allegiance[.]" *Id*. at 361. Regarding plenary power over citizenship, immigration, naturalization, and foreign affairs, Blackstone wrote:

> [B]y the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves,

[7] For a summary, *see* 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 395-98 (2d ed., 1966).

> that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient[.]

Id. at 251. Blackstone makes it clear that a foreigner's admission into the community either as a resident or citizen is a privilege, not a right or remedy, and is dependent upon the laws of the respective political branches of government. While Blackstone admits in his commentaries that the English statutes were generous to foreigners entering the realm, entry and settlement were conditioned on "behave[ing] peaceably," a determination that can only be defined by the political branches. *Id*. at 252.

The most influential legal commentator on the law of nations was Emer De Vattel and his impact on England, the American colonies, and the Founding Fathers is undisputed.[8] Vattel viewed the admission

---

[8] *See* BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834); 9 THE PAPERS OF JAMES MADISON 223 (Robert A. Rutland ed., 1975); Andrew Lenner, *Separate Spheres: Republicanism Constitutionalism in the Federalist Era*, 41 AMER. J. LEGAL HISTORY 254, 259 (1997); James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AMER. J. LEGAL HISTORY 208, 219 (1974); Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399, 406, 408, 411 (1997); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 188 (1978); ONUF, FEDERAL UNION, *supra*, at 123-44. For examples of eighteenth century analysis of Vattel, *see generally* ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS (1799); THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN AND SEDITION LAWS (1798);

(Continued on following page)

of aliens as a privilege – not a right or a remedy. 1 EMER DE VATTEL, THE LAW OF NATIONS § 213 (Knud Haakonssen ed., 2008) ("The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country."). In exchange for permission to "settle and stay," aliens were "bound to the society by their residence . . . subject to the laws of the state[.]" *Id*. Such allegiances were required even though a permitted alien did "not participate in all the rights of citizens." *Id*.

According to Vattel, the key to whether a foreigner was granted the privileges and rights of a nation rested upon whether an alien had permission to *settle*. To accomplish this requirement, the alien must adhere to the nation's regulations, *id*. at § 214, and establish "a fixed residence in any place with an intention of always staying there," *id*. at § 218. Indeed, this residence was conditioned by the permission of a nation's government. A "man does not . . . establish his settlement . . . unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration" to the sovereign government. *Id*.

Parliament would include these legal premises concerning allegiance and submission to the laws in its 1793 Alien Bill just as the United States would include them in its first naturalization laws. *See* 33

OBSERVATIONS ON THE ALIEN AND SEDITION LAWS OF THE UNITED STATES (1799).

Geo. 3, c. 4 (1793) (Eng.); 1 U.S. Stat. 103 (1790); 2 U.S. Stat. 153-54 (1802). In 1822, the Committee of the Judiciary reiterated this premise, stating that to "dispense with [the declaration of the intent to *settle*] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission[.]" REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS . . . PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (March 18, 1822).

These commentaries establish that in the eighteenth century, the law of nations stipulated that the rules of citizenship were dependent upon the plenary authority of the political branches. Charles, *The Plenary Power Doctrine*, *supra,* at 5-21. Furthermore, the law of nations, which includes every sovereign nation's right of self-preservation, subjected foreigners to the will of the government and often to additional legal requirements as a condition of settling, the enjoyment of most rights and privileges, and the obtainment of citizenship. *Id*. As Vattel stated, "the public safety, [and] the rights of the nation . . . necessarily require" it. 2 EMER DE VATTEL, THE LAW OF NATIONS § 101 (Knud Haakonssen ed., 2008).

C. The Framers' Understanding of the Rules Concerning Citizenship, the Constitution, and Early Constitutional Commentary Support the Court's Precedent on the Plenary Power Doctrine

The Constitution states that Congress "shall have power to establish a uniform rule of naturalization" – a clause that was accepted without objection because the Articles of Confederation had created a citizenship dilemma. ARTICLES OF CONFEDERATION, Art. IV (1781). The Articles contained no mention of who possessed the authority to naturalize aliens or define the rules of citizenship. Thus, each State could impose national citizenship upon the other States without their consent. As St. George Tucker phrased it in *A View of the Constitution*, "residence for a short time [in one State] conferred all the rights of citizenship" in another. It did not matter that another State passed laws that "legally incapacitated" aliens for "certain rights," for the law of the lenient state was "preposterously rendered paramount" to the State that had adopted firm naturalization protections. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 197 (Clyde N. Wilson fwd., 1999).

These problems were fixed with the adoption of the Constitution, for it expressly granted Congress exclusive authority to prescribe the rules of naturalization and citizenship, which included authority over immigration. While the change came with minor interpretational differences, the Naturalization Clause

was generally interpreted as conferring upon Congress unquestionable authority to regulate the rules of citizenship. Charles, *The Plenary Power Doctrine*, *supra,* at 23-28.

Naturally, this power was intertwined with the doctrine of allegiance as understood from our Anglo origins.[9] In a 1775 tract entitled *America's Appeals to the Impartial World*, Connecticut patriot Moses Mather discussed the three forms of allegiance that existed in the late eighteenth century – "natural, acquired, and local[.]" MOSES MATHER, AMERICA'S APPEAL TO THE IMPARTIAL WORLD 16 (1775). Acquired allegiance occurred upon the naturalization of the individual. *Id*. "[L]ocal temporary allegiance" was what is required by every "alien friend" that "comes into the realm to reside for a time" by adhering to the laws. *Id*. Lastly, "natural allegiance" is that which is acquired by birth, "inheritable to the laws, intitled to the immunities of the government, and the protection of the king[.]" *Id*.

The power to determine these qualifications of allegiance have always rested with the sovereign government. In England, this power rested with the political branches of government. The Founding Fathers borrowed this concept by divesting exclusive plenary power to define the laws of citizenship,

---

[9] *See* 1 BLACKSTONE'S COMMENTARIES § 372 (St. George Tucker ed., 1803).

immigration, and naturalization with Congress. Charles, *The Plenary Power Doctrine*, *supra,* at 5-30.

Early constitutional commentators are in agreement on this fact. St. George Tucker listed congressional power to prescribe the terms of citizenship as being "exclusively granted to the federal government." TUCKER, VIEW OF THE CONSTITUTION, *supra*, at 129, 131. William Rawle addressed how the doctrine of allegiance was the entire basis of obtaining legal citizenship. He asserted that since naturalization is the "mode of acquiring the right" of citizenship and "is the factitious substitution of legal form for actual birth," individuals born outside the United States owe due allegiance to rules. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 98 (1829).

Justice Joseph Story similarly stated that Congress has plenary power to regulate citizenship and naturalization. Story wrote that such power "must be exclusive; for a concurrent power in the States would bring back all the evils and embarrassments which the uniform rule of the Constitution was designed to remedy." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 538 (1833). He went on to write that the use of the language *establish*, which exists in the Naturalization Clause, must be given "the liberal interpretation of the clause." *Id*. at § 554. Story used the Congressional power to *establish* Post-Offices and Post-Roads as an example. Story noted that the power to *establish* these had been interpreted by some as merely a power to define

"where post-offices shall be kept" and "designate or point out, what roads shall be mail-roads, and the right of passage." *Id*. at § 553. However, Story explained that such an interpretation "has never been understood to be limited." *Id*. Instead, *establish* has "constantly had the more expanded sense of the word." *Id*.

In 1873, Thomas M. Cooley elaborated on Story's interpretation. Cooley defined *establish* as "to settle firmly, to confirm, to fix, to form or modify, to found, to build firmly, to erect permanently." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1130 (Thomas M. Cooley ed., 1873). These uses were the types that could be found in "legislative acts, in state papers, and in the Constitution itself." *Id*. Cooley also noted that the Constitution's preamble uses the word *establish* in a general sense by speaking "of one motive being 'to *establish* justice,' and that people do *ordain* and *establish* this Constitution." *Id*. at § 1131. Thus, Cooley believed *establish* meant "to create, and form, and fix in a settled matter." *Id*.

In sum, the power to *establish* was to be understood in the most liberal and general sense. As Cooley stated, "whatever is appropriate to this purpose, is within the power." *Id*. Like Story before him, Cooley saw the Congressional power to "establish a uniform rule of naturalization" as unlimited. Congress had the "power to exhaust[ ] it so far as respects the individual," *id*. at § 1655, and this power extended to rules concerning citizenship and immigration.

D. The History of the Constitution's Ratification Supports the Court's Plenary Power Doctrine Concerning Citizenship

The historical consensus is that the Constitution was adopted, in part, to correct the problems that the Articles of Confederation posed in relation to citizenship, naturalization, foreign policy, and immigration. *See* ONUF, FEDERAL UNION, *supra*, at 113-44; DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 80-86 (1985); Lenner, *Separate Spheres*, *supra*, at 253-56. The Constitution insures that the political branches possess the traditional attributes of national sovereignty as prescribed by the law of nations. In particular, the law of nations was thought to be "an inherent attribute of sovereignty" and "constituted a vital source of federal policy." *Id*. at 256. The law of nations is particularly significant in understanding congressional power to prescribe the rules of citizenship because the Founders were influenced by its tenets in drafting the Constitution. Charles, *The Plenary Power Doctrine*, *supra,* at 23-30.

Indeed, the Founding Fathers were acutely aware of the tenets of international law well before the drafting of the Constitution. For instance, the Founders had to be familiar with the law of nations when they negotiated the 1783 Treaty of Paris, which addressed immigration matters when it distinguished

between the "real British subjects"[10] and American citizens based on the doctrine of allegiance. Kettner, *The Development of American Citizenship*, *supra*, at 241. Moreover, the repeated failures of the Articles of Confederation respecting international relations were well known. Despite international agreements with other nations, countries like England were able to frustrate the United States' diplomatic relations. ONUF, FEDERAL UNION, *supra*, at 94-95. Thus, the disparity between the laws of the States respecting international relations, including the rules of naturalization and citizenship, was an influential factor in dispensing with the Articles of Confederation.

Regarding the rules of naturalization, as early as April 1787, James Madison wrote to George Washington about the importance of the federal government "fixing the terms of and forms of naturalization." Madison felt it was a power that was "absolutely necessary" to be placed with the federal government in order to avert the States from "harass[ing] each other with rival and spiteful measures" and to prevent "the aggressions of interested majorities on the rights of minorities and of individuals." JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 593-94 (Gaillard Hunt, James Scott eds., 1920). The North Carolina Constitutional Convention also supported granting the federal

[10] TREATY OF PARIS, ART. V (1783).

government such plenary power because it was "the means of preserving the peace and tranquility of the Union." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 19-20 (Jonathan Elliot ed., 1836). It was well known by the Founders that the "encroachments of some states on the rights of others, and all of those of the Confederacy, [on the rules of immigration, citizenship, and naturalization] are incontestable proofs" of the weakness of the Articles of Confederation. *Id.*; *see also* TUCKER, A VIEW OF THE CONSTITUTION, *supra*, at 197-98; RAWLE, *supra*, at 85; STORY, COMMENTARIES, *supra*, at § 537.

These issues and discrepancies among the States were elaborated at the 1787 Constitutional Convention. Madison supported including the Naturalization Clause because he viewed it as the power to "fix different periods of residence" to gain citizenship. 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 398 (Jonathan Elliot ed., 1845). Madison's views were not shared by all. Many were concerned with the effect such federal power would have on foreigners who were already residing in the United States. Many aliens had already established residency according to State law under the belief that they would be permitted to remain and be admitted as citizens. Roger Sherman addressed this concern, stating, "The United States have not invited foreigners, nor pledged their faith that they should enjoy equal privileges with native citizens." Conveying the principle that

matters in national concern were about "We the people" and not the respective States, Sherman stated that it was up to Congress to "make any discriminations [it] may judge requisite." *Id*. at 412-13.

Alexander Hamilton's notes at the 1787 Constitutional Convention reveal more of the same. Hamilton viewed congressional power over citizenship and naturalization as necessary to protect American government. He scribbled in his notes on the Convention, "The right of determining the rule of naturalization will then leave a discretion to the [federal] Legislature on this subject which will answer every purpose." 4 THE PAPERS OF ALEXANDER HAMILTON 234 (Harold C. Syrett ed., 1962). Hamilton confirmed such congressional plenary authority at the 1788 New York Convention. In the discussion over the federal government's power to tax, Hamilton argued that the federal government's power to tax should be similar to "that of Naturalization That by Construction would give an Exclusive Right[.]" 5 THE PAPERS OF ALEXANDER HAMILTON 127 (Harold C. Syrett ed., 1962).

E. The Political Discourse Concerning the 1798 Alien Act Supports the Court's Plenary Power Doctrine Concerning Citizenship

Despite its frequent characterization as notorious, the contemporary debates, political discourse,

and print culture respecting the 1798 Alien Act[11] provide great insight into the origins of the Plenary Power Doctrine, and the Early Republic's view of rules of citizenship, the Naturalization Clause, the law of nations, and the right of self-preservation.[12] It is often forgotten that the eighteenth century perception of the law of nations was intimately intertwined with the Constitution. Both Federalists and Republicans supported the adoption of the Constitution as essential to America's progression in the international sphere. Lenner, *Separate Spheres, supra,* at 255-56. Furthermore, the international legal thought of commentators such as Puffendorf, Grotius, Vattel, Blackstone, and others were well known among the Founding generation.

William Rawle, for example, recognized that the "law of nations forms a part of the common law of every civilized country," including the United States. RAWLE, *supra*, at 108. Part of this international common law was recognized as being included in the Naturalization Clause. In fact, the Naturalization Clause was frequently cited to support congressional authority to adopt the 1798 Alien Act,[13] which Congress viewed as consistent with every sovereign

---

[11] 1 U.S. STAT. 577-78 (1798).

[12] *See generally* LANG, *supra*.

[13] 8 ANNALS OF CONGRESS 2020 (1798); EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 24-25; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 441.

government's right of self-preservation. Charles, *The Plenary Power Doctrine*, *supra,* at 31-32.

The sovereign right of self-preservation was conveyed in all the international legal treatises of the eighteenth century, to which the political pamphlets concerning the Alien Act attest. *Id*. at 33-34. For instance, one pamphlet attested to the constitutionality of the Alien Act on the grounds that it "attain[ed] the most important of all political ends, the *preservation of our national existence*[.]" EVANS, *supra*, at 15. Similarly, in the pamphlet entitled *Observations on the Alien and Sedition Laws of the United States*, the anonymous author defended the 1798 Alien Act with the right of self-preservation:

> The sovereign may forbid the entrance of his territory, either in general to every stranger, or, in a particular case, to certain persons, or on account of certain affairs . . . The *public safety* and the *rights of the nation* necessarily suppose this condition, and the stranger tacitly submits to it, as soon as he enters the country, and he cannot presume upon having access upon any other footing.

OBSERVATIONS ON THE ALIEN AND SEDITION LAWS, *supra*, at 10. Similar self-preservation arguments can be found in documents such as *An Address of the Minority of the Virginia Legislature*, which stated, "Government is [an] institute and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to

adopt measures for its security[.]" AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE 6-11 (1799).

The House debates on the 1798 Alien Act reveal more of the same. Harrison Gray Otis argued that the Constitution "might as well have never been made" if the federal government cannot exercise authority which is "necessary to its existence[.]" 8 ANNALS OF CONGRESS 1987 (1798). Meanwhile, William Gordon stated the power of self-preservation was the "very existence of Government" itself. He knew that the "sovereign power of every nation possesses it; it is a power possessed by Government to protect itself[.]" *Id*. at 1984.

Not even the 1798 Alien Act's most ardent opponent, James Madison, argued against the federal government's right of self-preservation or congressional plenary authority over the rules of citizenship. In fact, in 1789, Madison advocated that the law defines the "qualities of a citizen or an alien[.]" 12 THE PAPERS OF JAMES MADISON 179 (Robert A. Rutland ed., 1979).

What is particularly significant about Madison's understanding of naturalization, citizenship, and immigration is that he believed it was constitutional for Congress to prescribe class distinctions. For instance, during the 1794-95 debates over a new naturalization bill, Madison supported a proposal making a "distinction" for "one class of emigrants over another, as to the length of time before they would be admitt[ed] citizens[.]" 15 THE PAPERS OF

JAMES MADISON 432 (Thomas A. Mason ed., 1985). Madison made a similar distinction in 1819. Addressing the fact that some alien classes fostered firmer allegiance ties to the United States than other classes, Madison wrote:

> I have been led to think it worth of consideration whether our law of naturalization might not be so varied as to communicate the rights of Citizens by degrees, and in that way, preclude or abridge the abuses committed by [different classes of aliens.]

8 THE WRITINGS OF JAMES MADISON 425 (Galliard Hunt ed., 1908). While Madison knew that these "restrictions would be felt by meritorious individuals, of whom [he] could name some . . . this always happens in precautionary regulations for the general good." *Id*.

F. The Jurisprudence of John Jay, John Marshall, and Alexander Addison Support the Court's Plenary Power Doctrine

The jurisprudence of former Chief Justices John Jay and John Marshall support the Court's long standing jurisprudence on the Plenary Power Doctrine over citizenship, immigration, naturalization, and foreign affairs. In 1793 Chief Justice John Jay delivered a charge to the grand jury to the circuit court of Richmond, Virginia. Relying on Vattel, that "celebrated writer on the law of nations," Jay proclaimed that the

law of all nations includes plenary authority over aliens or what Vattel referred to as "strangers," stating:

> The respect which every nation owes itself, imposes a duty on its government to cause all its laws to be respected and obeyed; and that not only by proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, than that all strangers *admitted* into a country are, during their residence, subject to the laws of it . . . to maintain order and safety . . . It is a manifest consequence of the liberty and independence of nations, that all of them have a right to be governed as they think proper[.]

THE CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793, pg. 2, cols. 2-3).[14] The jurisprudence of John Marshall similarly supports congressional plenary authority over citizenship, immigration, naturalization, and foreign affairs. In 1807, Marshall wrote that the Necessary and Proper Clause supports the constitutional interpretation that the federal government has "plenary and sovereign authority" over "*specified powers and object*s," and

---

[14] *See also* JOHN JAY, THE CHARGE OF CHIEF JUSTICE JAY TO THE GRAND JURIES ON THE EASTERN CIRCUIT 7 (1790) ("We had become a nation – as such we were responsible to others for the observance of the *laws of nations*; and as our national concerns were to be regulated by *national laws*, national tribunals became necessary for the interpretation and execution of them both.").

acknowledges "explicit sanction to the doctrine of implied powers[.]" 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON, app. at 10 (1807) (emphasis added).

In interpreting the Necessary and Proper Clause in *United States v. Fisher*, 6 U.S. 358, 396 (1805), Marshall held that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." This "choice of means" analysis was later used by Marshall in *McCulloch v. Maryland*, 36 U.S. 316 (1819), and has become embedded in our constitutional jurisprudence. Applying this jurisprudence to congressional plenary authority over the rules of citizenship, Marshall would state that Congress has plenary authority to prescribe the "choice of means" to the rules regarding citizenship.

While Marshall never expressly addressed the constitutional scope of the congressional plenary authority over citizenship, immigration, naturalization, and foreign affairs in his opinions, the historical record shows that he borrowed the "choice of means" analysis from former Pennsylvania Judge Alexander Addison whom Marshall respected and who did address congressional scope in these areas of constitutional law. *See* Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616865, at 2, 7-24.

In 1800 Addison defended the constitutionality of the 1798 Alien Act, writing that Congress has "discretion of the choice of means, necessary or proper, for executing their powers" granted by the Constitution. ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 39 (1800). Addison asserted that the "power over the end implies a power over the means; and a power to make laws, for carrying any power into execution[.]" *Id*.

Addison was the only pre-Marshall commentator to analyze the Necessary and Proper Clause under this "choice of means" paradigm and undoubtedly influenced Marshall. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause*, *supra*, at 2, 7-24. Perhaps the first American commentator to define our Constitution's Plenary Power Doctrine, Addison used his "choice of means" doctrine to argue that federal power over citizenship granted Congress the power to "receive [aliens], and admit them to become citizens; or may reject them, or remove them, before they become citizens." ALEXANDER ADDISON, ON THE ALIEN ACT 11 (1799). Addison argued that the "power over aliens is to be measured, not by internal and municipal law, but by external and national law." ADDISON, ANALYSIS, *supra*, at 21.

Similar to how Madison acknowledged how "meritorious" aliens seeking citizenship could be harmed by distinctive naturalization regulations for the general welfare, Addison emphasized that congressional powers over aliens are not judged with how it "affects . . . the [individual] people of the

United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are" and that have relations with the United States. *Id*. Citing Vattel's *Law of Nations*, Addison knew that "every government must be [the] sole judge of what is necessary to be done, for its own safety or advantage, within its own territory." ADDISON, ON THE ALIEN ACT, *supra*, at 2.

To be precise, Addison interpreted the Constitution as including the law of nations as defined by the political branches of government,[15] and believed that discretion should be given to such definitions in determining whether the laws respecting aliens were permissible. *Id*. at 3; *see also* Ruth Bader Ginsburg, Associate Justice, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Address at International Academy of Comparative Law American University (July 30, 2010), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_07_30_10.html (discussing the Framer's inclusion of the law of nations in the Constitution). Addison elaborated:

---

[15] *Amici Curiae* Equality Now et al. claim that current international norms should determine whether Congress may adopt gender based laws concerning citizenship. *See generally* Br. Of Amici Curiae Equality Now et al. Certainly, the Founders had great respect for the law of nations. However, international norms do not override congressional plenary authority to deviate from such norms.

> Nothing appears in the constitution, that can shew, that the people of the United States meant to deny their own government any right, which, by the law of nations, any other sovereignty enjoys with respect to foreign nations. The limits of power of any government, towards its own subjects, were never meant to be applied as limits of power of that government towards the subjects of other governments. And the question, whether a government conducts itself well toward a subject of another government, is not a question of municipal, but of national law[.]

ADDISON, ANALYSIS, *supra*, at 26.

IV. THE RATIFIERS OF THE FOURTEENTH AMENDMENT DID NOT SEEK TO ALTER CONGRESSIONAL PLENARY POWER OVER CITIZENSHIP OR APPLY THE EQUAL PROTECTION CLAUSE TO THE PLENARY POWER DOCTRINE

The members of the Reconstruction Congress understood the tenets of the Plenary Power Doctrine akin to the Founding generation. The contemporaneous debates and public understanding reveal that the drafters of the 1866 Civil Rights Act and the Fourteenth Amendment never intended to limit congressional plenary authority over the rules of citizenship, naturalization, immigration, or foreign affairs. *See* Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J.

PUB. L. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619372, at 27-32. As early as 1862 representative John Bingham acknowledged congressional plenary authority over citizenship and the constitutional restraints on this power, stating:

> All from other lands, who by the terms of [congressional] laws and a compliance with their provisions become naturalized, are adopted citizens of the United States; all other persons born within the Republic owing allegiance to no other sovereignty, are natural born citizens . . . [There is] no exception to this statement touching natural-born citizens except what is said in the Constitution relating to Indians.

37 CONG. GLOBE 1639 (1862). Bingham's statement is significant because it confirms congressional plenary authority over citizenship and that the doctrine of allegiance, as defined by the federal government, was still controlling. Throughout the 1866 debates over the Civil Rights Act and Fourteenth Amendment, members of Congress spoke frequently of the doctrine of allegiance and congressional plenary authority over citizenship; affirming that neither the Equal Protection Clause nor the Bill of Rights was ever intended to apply as restricting the Plenary Power Doctrine. Charles, *Representation Without Documentation?*, *supra*, at 28.

During the congressional debates on whether to grant citizenship to Freedmen, Senator Peter Van

Winkle stated that Congress has "the right to determine who shall be members of our community[.]" 39 CONG. GLOBE 498 (1866). Representative William Niblack defined congressional authority over the rules of naturalization as the "power to admit "aliens," that is persons born out of the jurisdiction and allegiance of the United States, to citizenship[.]" *Id*. at 3216. Meanwhile, Representative William Lawrence declared that Congress has the right to "declare that classes of people" become citizens as "an exercise of authority which belongs to every sovereign Power[.]" *Id*. at 1832. Lawrence further stated:

> As an alien may be deprived of all rights by law, and even excluded from the country, it is the act of naturalization, the condition of national citizenship, that confers on him the civil rights recognized by the Constitution. It is citizenship, therefore, that gives the title to these rights of all citizens. From the very nature of citizenship, the avowed purpose of the founders of our Government, and the interpretation put upon the Constitution, it must be clear that [the Fourteenth Amendment] creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen[.]

Id. at 1836. During these debates, at no point did a member of Congress state or declare that the 1866 Civil Rights Act or the Fourteenth Amendment altered congressional plenary authority over the rules of citizenship, immigration, naturalization or foreign

affairs. In fact, the debates prove that such plenary authority remained, for Congress saw such power as a "duty to facilitate the belonging of people in [the] community." Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015, 1029 (2008).

Even the first sentence of Section 1 was merely declaratory of the ancient doctrine of allegiance. Charles, *Representation Without Documentation?*, *supra*, at 29-30. Section 1 reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. Amend. XIV, § 1. The debates of this section show that "subject to the jurisdiction thereof" was meant to address the doctrine of allegiance. Charles, *Representation Without Documentation?*, *supra*, at 29-30.

The drafters emphasized that the legal tenets of the doctrine of allegiance was still the key to United States citizenship in the late nineteenth century,[16] for what would become Section 1 originally read: "All persons born in the United States, and not subject to

---

[16] *See generally*, William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Zietlow, *supra*, at 1030 (citizenship "implies a requirement of allegiance in exchange for protection . . . because allegiance is a prerequisite for membership."); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 34-43 (2008) (discussing the allegiance for protection doctrine).

any foreign Power . . . are . . . citizens of the United States." 39 CONG. GLOBE 542 (1866). Senator Justin Morrill stated that this clause confirms the "grand principle both of nature and nations, both of law and politics, that birth gives citizenship of itself." *Id*. at 570. Senator Trumbull agreed and elaborated on the clause in the paradigm of the well-established doctrine of allegiance. Trumbull stated, "My own opinion is that all . . . persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress." *Id*. at 527. He would even later state that this language "make[s] citizens of everybody born in the United States who owe allegiance to the United States." *Id*. at 572; *see also id*. at 1756 ("the prevailing opinion" is that "all native-born persons not subject to a foreign Power are by virtue of their birth citizens of the United States").

Representative Burton Cook stated it "provides that all persons born within the United States, excepting those who do not owe allegiance to the United States Government" are citizens. *Id*. at 1124. Representative Wilson agreed, stating that the language was "merely declaratory of what the law now is." *Id*. at 1115. Discussing the law of nations, Blackstone, and American jurisprudence, Wilson elaborated:

> We must depend on the general law relating to subjects and citizens recognized by all nations for a definition, and that must lead us to the conclusion that every person born in the United States is a natural-born citizen

> . . . except . . . children born on our soil to *temporary sojourners* or representatives of foreign governments[.]

Id. at 1117. The phrase "subject to any foreign Power" was later substituted by Senator Jacob Howard to read "subject to the jurisdiction thereof" in order to remove "all doubt as to what person are or are not citizens of the United States." *Id*. at 2890. Naturally, the substitution sparked debate, including the issue of whether such language would affect congressional power to define who is "subject to the jurisdiction" through the doctrine of allegiance. *Id*. at 2890-97. Senator R. Doolittle made such a query stating that he thought it was "exceedingly unwise" to adopt the "broad language proposed." *Id*. at 2893. However, Senator Trumbull calmed Doolittle and the other members' fears by confirming that the doctrine of allegiance was still applicable in defining United States citizenship. Trumbull stated that "subject to the jurisdiction thereof" meant "Not owing allegiance to anybody else." *Id*. Trumbull elaborated:

> Now, all this amendment provides is, that all persons born in the United States and not subject to some foreign Power . . . shall be considered as citizens of the United States. That would seem to not only be a wise but a necessary provision . . . I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.

Id. What Senator Trumbull and the other members were articulating is that Congress had the power to define which classes are "subject to the authority of the United States" or "subject to the jurisdiction thereof" through the doctrine of allegiance and its plenary authority over citizenship, immigration, naturalization, and foreign affairs.

Amici ACLU asserts that the statutes effecting citizenship at birth should be subjected to a heightened scrutiny. Br. Of Amici Curiae ACLU at 8-18. In making this assertion *Amici* ACLU claim that citizenship by statute is subject to the Equal Protection Clause, that the Plenary Power Doctrine does not touch upon citizenship by birth, and even if the Plenary Power Doctrine did touch upon citizenship by birth that "heightened scrutiny is nonetheless the applicable standard" because citizenship by birth is distinct from the other Plenary Power Doctrine areas of law – immigration, naturalization, and foreign affairs. *Id*. at 9, 11-14. However, *Amici* ACLU fail to provide any empirical evidence to support these claims other than a selective reading of this Court's precedent.

As discussed above, the legal and historical evidence cuts strongly against Petitioners and *Amici* ACLU. Furthermore, this Court held in *Wong Kim Ark* that Senator Trumbull and the Reconstruction Congress did not view Section 1 of the Fourteenth Amendment as impacting congressional plenary power over citizenship, or its intimate relation to immigration, naturalization, and foreign affairs. In

particular the Court held that the change in Fourteenth Amendment text from "subject to any foreign Power" to "subject to the jurisdiction thereof" was "affirmative of existing law[.]" *Wong Kim Ark*, 169 U.S. at 688.

The Fourteenth Amendment's constitutional rule for citizenship at birth is not a broad command, but a reaffirmation of the Founding Fathers' principles. First, the Fourteenth Amendment conditions citizenship to persons that are born in the territorial United States. U.S. CONST. Amend. XIV, § 1. Second, outside of children born of persons who are subject to the "complete jurisdiction" of the United States, the Fourteenth Amendment permits Congress to adopt statutes prescribing who is "subject to the jurisdiction thereof" through the doctrine of allegiance, and congressional plenary power over citizenship, naturalization, immigration, and foreign affairs. Charles, *Representation Without Documentation?*, *supra*, at 29-32; U.S. CONST. Amend. XIV, § 5.

CONCLUSION

Based on the foregoing legal and historical support for the Court's long standing Plenary Power Doctrine concerning citizenship, we ask that the Court uphold the decision of the Ninth Circuit.

Respectfully submitted,

MICHAEL M. HETHMON*
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
Attorney for the Amicus Curiae
**Counsel of Record*