CAN COURTS CONFER CITIZENSHIP? PLENARY POWER AND EQUAL PROTECTION

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In this Note, Derek Ludwin applies principles of equity to the jurisprudence of nationalization law. In a recent case, Miller v. Albright, *the Supreme Court failed to provide a remedy for the victim of an unconstitutional naturalization statute that favors foreign-born illegitimate children of citizen mothers over those born to citizen fathers. Ludwin highlights the Court's unnecessary impotence due to its strict adherence to the plenary power doctrine and unquestioning deference to Congress. He traces the history of the application of the plenary power doctrine in naturalization law, noting that the Court has never overturned a naturalization statute on equal protection grounds. Ludwin finds, however, that* Miller, *in which a majority of the justices deemed a naturalization statute to be unconstitutional, marks an important jurisprudential shift toward applying the plenary power doctrine in conjunction with other interests, such as equal protection. Ludwin further argues that the* Miller *Court's unwillingness to address the tension between plenary power and equal protection has left the lower courts without guidance in this area and that without an effective remedy—the power to grant citizenship directly—the Court's finding of unconstitutionality is too weak to afford any real protection. The answer, he states, lies in principles of modern equity. Ludwin concludes that direct conferral of citizenship is in accordance with the Court's generous post-*Brown *exercise of equity power in equal protection cases.*

Equity Does Not Suffer a Wrong to be Without a Remedy[1]

INTRODUCTION

Lorelyn Miller—the illegitimate daughter of an American serviceman serving a tour of duty in the Philippines and a Filipina national[2]—filed for citizenship under the Immigration and Nationality Act (INA).[3] Miller was the acknowledged and undisputed daughter

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1 G.W. Keeton, An Introduction to Equity 111 (2d ed. 1948).

2 For one commentator's comparison of Lorelyn Miller and Madam Butterfly, see Jeffrey Rosen, America in Thick and Thin: Exclusion, Discrimination, and the Making of Americans, New Republic, Jan. 5 & 12, 1998, at 29, 29.

3 Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (1994).

of an American citizen, but although the United States grants citizenship at birth to children "born out of wedlock" in a foreign country to an American citizen parent,[4] her application was denied.[5]

The reaction to Miller's plight, and to the laws that prevented her successful citizenship application, was strong: One editorial simply exhorted, "Let her in!"[6] It seemed patently unfair that had Lorelyn Miller's mother, rather than her father, been the citizen parent, she would have met the citizenship requirements. Under the relevant statute, 8 U.S.C. § 1409(a), a foreign-born, illegitimate child[7] of a United States citizen father and an alien mother must meet certain requirements to perfect her citizenship rights, including the requirement that she be legitimated prior to her eighteenth birthday;[8] § 1409(c), which governs citizenship of illegitimate children of citizen mothers, requires no such legitimation.[9] In other words, the INA distinguishes between illegitimate children of citizen fathers and those of citizen mothers, and places greater requirements on the children of citizen fathers.[10] Claiming that this distinction violates the equal pro-

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4 See generally 8 U.S.C. §§ 1401-1409 (1994 & Supp. II 1996) (describing categories of aliens eligible to be "nationals and citizens of the United States at birth").

5 See Miller v. Albright, 118 S. Ct. 1428, 1433 (1998).

6 James Kilpatrick, Editorial, Court Hears Case of Filipino Born, San Antonio Express-News, Jan. 1, 1998, at 25A, available in 1998 WL 5071966. Media reaction to the Supreme Court's final decision was equally negative. See, e.g., Editorial, Judicial Goulash, Miami Herald, May 3, 1998, at 2L (calling on Congress to change § 1409).

7 The issue of illegitimacy in general, as well as discrimination between legitimate and illegitimate children, is beyond the scope of this Note. For the development of Supreme Court precedent in this area, see generally Johan Meeusen, Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Developments in Europe and the United States, 43 Am. J. Comp. L. 119 (1995); Susan E. Satava, Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute, 25 Cap. U. L. Rev. 933 (1996).

8 8 U.S.C. § 1409(a) (1994) includes four provisions uniquely applicable to citizen fathers: (1) a blood relationship between child and father must be "established by clear and convincing evidence"; (2) the father must have been a United States national at the time of the child's birth; (3) the father (if living) must agree in writing to provide financial support for the child until age 18; and (4) while the child "is under the age of 18 years—(A) the person is legitimated under the law of the person's residence or domicile, (B) the father acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court." According to the State Department and the Immigration and Naturalization Service (INS), Miller was not legitimated within the time period specified in § 1409(a)(4). See *Miller*, 118 S. Ct. at 1433.

9 Section 1409(c) provides as follows:

> [A] person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

10 Justice Stevens, defending the distinction in *Miller v. Albright*, argued that the biological differences between single men and single women (i.e., that the birth mother

tection component of the Due Process Clause of the Fifth Amendment,[11] Miller filed suit.[12]

In *Miller v. Albright*,[13] a splintered Supreme Court denied Miller's claim.[14] While five of the justices would have invalidated the statute, only three thought Miller had standing to bring a challenge; as a result, the statute survived, and the Court did not have to consider what remedy Miller could obtain.[15] Thus, the standing issue prevented the Court from squarely reaching a vital question: Could the Court confer citizenship as a remedy to applicants denied naturalization under unconstitutional provisions of the INA?

"surely" would know of the child's existence) justify the differing rules. See *Miller*, 118 S. Ct. at 1440-42. Justice Ginsburg countered that Congress historically has ignored the mother-child bond in refusing to allow citizen mothers to transmit citizenship to their foreign-born children without those children meeting additional requirements unless the father was also a U.S. citizen. Further, she argued that, in any case, the law was based on stereotyped assumptions about male and female roles in childrearing. See id. at 1454 (Ginsburg, J., dissenting).

11 See Miller v. Christopher, 870 F. Supp. 1 (D.D.C. 1994), rev'd and remanded, 96 F.3d 1467 (D.C. Cir. 1996), aff'd on other grounds sub nom. Miller v. Albright, 118 S. Ct. 1428 (1998); see also U.S. Const. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."). Miller's claim of an equal protection violation was made under the Fifth Amendment through reverse incorporation. See Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that Equal Protection Clause applies to federal government via Fifth Amendment, and writing: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."); cf. Lawrence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 240 (1988) (arguing that Ninth Amendment validates claims of constitutional right not explicitly manifest in liberty-bearing provisions of Constitution but enjoying same status as those explicit in text). This Note will use Fifth Amendment due process and equal protection interchangeably.

12 Miller sought a declaratory judgment that she "was a U.S. citizen by birth." See Brief for Petitioner, Miller v. Albright, 118 S. Ct. 1428 (1998) (No. 96-1060), available in 1997 WL 325338, at *7.

13 118 S. Ct. 1428.

14 See *Miller*, 118 S. Ct. at 1429 (announcing judgment of Court denying petitioner's claim).

15 See discussion infra Part II. The *Miller* decision already has attracted academic attention. See, e.g., Collin O'Connor Udell, Miller v. Albright: Plenary Power, Equal Protection, and the Rights of an Alien Love Child, 12 Geo. Immigr. L.J. 621 (1998) (examining case history of *Miller* and concluding that *Miller* opinion demonstrates continued erosion of plenary power doctrine and portends increasingly gender-neutral jurisprudence); Debra L. Satinoff, Comment, Sex-Based Discrimination in U.S. Immigration Law: The High Court's Lost Opportunity to Bridge the Gap Between What We Say and What We Do, 47 Am. U. L. Rev. 1353 (1998) (analyzing gender-based immigration laws and arguing that 8 U.S.C. § 1409 violates equal protection); The Supreme Court, 1997 Term—Leading Cases, 112 Harv. L. Rev. 122, 203 (1998) (describing *Miller* case).

A long and powerful tradition holds that the Court has no power to confer citizenship as a remedy.[16] In several instances, the Supreme Court has determined that Congress has plenary power—in other words complete control—over immigration and naturalization, which precludes the Court from interfering in this area.[17] Thus, the plenary power doctrine seems to prevent the Court from asserting a power to confer citizenship directly,[18] and may even prevent it from severing constitutionally offensive clauses and allowing the naturalization of affected aliens through the normal process.[19]

Because the five justices who agreed with Lorelyn Miller's petition did not claim to overturn the plenary power doctrine, their ability to grant her citizenship would need to stem from a separate doctrinal root, albeit one powerful enough to unseat the plenary power doctrine. The principles of modern equity, which mandate appropriate remedies in equal protection cases, provide the Court with the power to confer citizenship.[20] Given the wide scope of equitable remedies offered in desegregation and similar equal protection areas, the Court's continued refusal to extend these equitable principles to naturalization is constitutionally unsupportable.[21]

This Note applies the principles of equity to the naturalization field, arguing that the Court does have power to confer citizenship in appropriate cases. Part I.A considers Congress's traditional authority to regulate naturalization, Part I.B discusses the plenary power doctrine, and Part I.C looks at the application of the plenary power doctrine in more modern cases, including *Miller* and subsequent cases. Part I concludes that *Miller* marks a jurisprudential shift from plenary power doctrine supremacy to a regime in which the plenary power doctrine is considered in conjunction with other central doctrines, including equal protection. Using this shift as a starting point, Part II considers the question of the Court's power to confer citizenship. Part

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16 Justice Scalia has been one of the most prominent voices in support of this view. See *Miller*, 118 S. Ct. at 1446 (Scalia, J., concurring in judgment); see also discussion infra note 109 and accompanying text.

17 See infra Part I.

18 The Court would effect direct conferral by declaring a petitioner to be a citizen or enjoining the Federal government to approve a naturalization application. Indirect conferral would occur if the Court expanded the scope of a naturalization or citizenship statute by striking down specific portions of the statute as unconstitutional. See infra Part II.B.

19 In *Miller*, five justices disagreed with this strong view on nonconferral, arguing that it was inapposite as the Court, in providing declaratory relief, would merely be confirming Miller's extant citizenship. See infra Part I.C.2. Justice Stevens did not reach the remedy question: "Because we conclude that there is no constitutional violation to remedy, we express no opinion on this question." *Miller*, 118 S. Ct. at 1442 n.26.

20 See infra Part II.B.

21 See infra Part II.

II.A discusses indirect conferral and concludes it is an unsatisfactory remedy in *Miller*-type cases. Part II.B explores the expansive reach of modern equity, and argues that this remedial power provides the judiciary with the authority necessary to confer citizenship directly in equal protection cases. The Note considers the tension between the plenary power and equity doctrines, and suggests an interpretive stance supporting the use of equity in the citizenship realm.

I
THE TRADITIONAL VIEW OF NATURALIZATION

A. *History of Congressional Power Under the Naturalization Clause*

The Framers included naturalization in Congress's enumerated powers, giving Congress the authority "[t]o establish an uniform Rule of Naturalization."[22] This grant of power was a reaction to the fact that the British Crown had "obstruct[ed] the Laws for Naturalization"[23] and that the states had attempted to set their own citizenship requirements.[24]

In the early history of the United States, naturalized citizenship was available only to "free white persons" who satisfied basic residency and good moral character requirements.[25] Over the years, the residency and character requirements changed very little, but more groups of residents were included in the process; in 1870, for instance, naturalization rights were extended to "aliens of African nativity and to persons of African descent."[26] For some groups, inclusion occurred much later: Chinese aliens, for example, were statutorily prohibited from naturalizing until 1943.[27]

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[22] U.S. Const. art. I, § 8, cl. 4. For a thorough examination of naturalization's early history in this country, see generally James H. Kettner, The Development of American Citizenship, 1608-1870 (1978).

[23] The Declaration of Independence para. 9 (U.S. 1776).

[24] See Michael T. Hertz, Limits to the Naturalization Power, 64 Geo. L.J. 1007, 1009 (1976) (describing contemporaneous criticism of states' naturalization power).

[25] See United States v. Wong Kim Ark, 169 U.S. 649, 671 (1898) (tracing early history of naturalization laws).

[26] Act of July 14, 1870, ch. 254, 16 Stat. 254, 256 (1871). In her *Miller* dissent, Justice Ginsburg traces the development of certain naturalization statutes and reveals how, until recently, these citizenship statutes also heavily favored men in terms of retention of citizenship and transmission of citizenship to children. See Miller v. Albright, 118 S. Ct. 1428, 1450 (1998) (Ginsburg, J., dissenting) ("During most of our Nation's past, laws on the transmission of citizenship from parent to child discriminated adversely against citizen mothers, not against citizen fathers.").

[27] See Act of May 6, 1882, ch. 126, 22 Stat. 58, 61 (1883) (codifying existing practice in Chinese Exclusion Acts that "no State court or court of the United States shall admit Chinese to citizenship"). The Chinese Exclusion Acts were repealed by the Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

Passage of the INA eliminated much of the scope for overt discrimination in the naturalization laws, as section 311 of the Act provided that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[28] For most applicants, current requirements for naturalization are limited to five years of residency;[29] a minimum understanding of the English language, American history, and the basics of American government;[30] and a finding of "good moral character."[31] The vast majority of naturalization applications are filed by permanent residents under these provisions,[32] but a few select groups, including children born outside the United States to one or two citizen parents, are subject to different citizenship requirements under the INA.[33]

The mechanics of the naturalization process also underwent a historical development. For a little more than a century, Congress enacted only "general controlling principles" of naturalization, which led to grievous abuses of the system.[34] As a result, Congress in 1906 passed legislation setting out in detail the procedures for naturalization.[35] At the same time, Congress also reaffirmed its sole authority under Article I, Section 8, of the Constitution to confer citizenship on aliens or to delegate that authority as it saw fit. Language from the 1906 Act[36] provided the basis for section 310(d) of the 1952 Act, which reads as follows: "A person may only be naturalized as a citi-

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28 Immigration and Nationality Act (INA) § 311, 8 U.S.C. § 1422 (1994). 8 U.S.C. § 1409 (1994), the statutory provision at issue in *Miller*, avoids the strictures of Section 311 because it is based not on the gender of the petitioner, but on the gender of the petitioner's citizen parent.

29 See 8 U.S.C. § 1427(a) (1994).

30 See id. § 1423. Among other exceptions, the English language requirement does not apply to applicants over the age of 50 who have resided in the United States for twenty years and those over the age of 55 who have resided in the United States for 15 years. See id.

31 See id. § 1427(a)(3). The INA also prohibits members of certain groups from naturalizing, including, among others, those who advocate "opposition to all organized government," see id. § 1424(a)(1), and members of the Communist Party or "other" totalitarian parties, see id. § 1424(a)(2)-(3).

32 In fiscal year 1996, the INS reported 1,044,689 naturalizations, over 96% of which were processed under these general provisions. See U.S. Dep't of Justice, 1996 Statistical Yearbook of the Immigration and Naturalization Service 136 (1997).

33 See, e.g., 8 U.S.C. § 1409 (1994) (children born out of wedlock); id. § 1401(c) (persons born outside of United States to two citizen parents); cf. id. § 1439 (naturalization through service in United States armed forces).

34 See, e.g., United States v. Ginsberg, 243 U.S. 472, 475 (1917) (upholding cancellation of citizenship certificate issued in spite of applicant's failure to meet all statutory criteria). *Ginsberg* is discussed infra note 42 and accompanying text.

35 Act of June 29, 1906, ch. 3592, 34 Stat. 596.

36 See id.; cf. H.R. Rep. No. 59-1789, at 1-2 (1906).

zen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."[37]

In so stating, Congress explicitly asserted plenary power over the naturalization process.[38]

B. *The Rise of the Plenary Power Doctrine*

The Court traditionally has accepted the notion that Congress's power over naturalization is plenary—complete in every respect and not subject to review.[39] The plenary power doctrine was first announced in the immigration context in the *Chinese Exclusion Case*,[40] and was applied to naturalization soon thereafter in *United States v. Ginsberg*.[41] The *Ginsberg* decision, handed down shortly after enactment of the first comprehensive naturalization procedures, reviewed the case of Solomon Ginsberg, upon whom a district judge had conferred citizenship notwithstanding Mr. Ginsberg's noncompliance with the naturalization requirements.[42] The Court held that "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes . . . ; their duty is rigidly to enforce the legislative will . . . ."[43]

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37 INA § 310(d), 8 U.S.C. § 1421(d) (1994). The INA also provides that "[t]he sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General." Id. § 310(a) (codified at 8 U.S.C. § 1421(a) (1994)). In INS v. Pangilinan, 486 U.S. 875 (1988), discussed infra note 67 and accompanying text, Justice Scalia argued that this specific grant of authority precluded assertions of other authority by the courts. See *Pangilinan*, 486 U.S. at 884.

38 It is interesting to note that prior to 1990, responsibility to effect naturalizations in accordance with § 310(d) rested in the courts. See Immigration Act of 1990 § 401(a), Pub. L. No. 101-649, 104 Stat. 4978, 5038 (codified as amended at 8 U.S.C. § 1421(a) (1994)) (moving naturalization authority from courts to Attorney General). The courts retain authority to administer citizenship oaths only. See 8 U.S.C. § 1421(b) (1994).

39 The judiciary's extreme deference to Congress on matters of immigration is also well established. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 756, 769-70 (1972) (rejecting challenge to Attorney General's discretionary denial of visa to alien "revolutionary Marxist" because "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established"); Galvan v. Press, 347 U.S. 522, 531 (1954) (holding that Congress's exclusive authority over alien admissions policies "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

40 130 U.S. 581 (1889) (upholding exclusion of Chinese laborer who carried certificate entitling him to reentry into United States).

41 243 U.S. 472 (1917).

42 Mr. Ginsberg had not met the statutory residency requirements. See id. at 473.

43 Id. at 474. The Court premised its deference on its conception of naturalization as "a matter . . . vital to the public welfare," and therefore falling within the scope of Congress's national sovereignty and security authority. See id.

This view of the Court's limited role in immigration and naturalization has been reaffirmed frequently after *Ginsberg*,[44] notably in *Mathews v. Diaz*.[45] In *Mathews*, alien petitioners were denied benefits under the Medicare Part B program for failure to meet a five-year residency requirement and a requirement that an alien be admitted for permanent residence.[46] Noting Congress's "broad power over naturalization and immigration," the Court upheld the requirements,[47] and held further that although all persons, "aliens and citizens alike," are protected by the Due Process Clause, a "host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other."[48] The *Mathews* Court justified its deference for the same reasons that preclude judicial review of political questions: a belief that the Constitution had placed power squarely in a different branch of government and that the Court lacked judicially manageable standards for reviewing actions under this power.[49]

Despite the *Mathews* Court's emphasis on the political question rationale for plenary power, this aspect of the doctrine has been greatly overshadowed by the Court's reliance on ideas of sovereignty to support its deference on matters of immigration and naturalization.[50] Justice Field, in the *Chinese Exclusion Case*, proclaimed that

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[44] For examples of the Court's deference, see Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *Kleindienst*, 408 U.S. at 769-70 ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established."); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

[45] 426 U.S. 67 (1976).

[46] *Mathews*, 426 U.S. at 69-70.

[47] Id. at 79-80.

[48] Id. at 78.

[49] Id. at 81-84. Political questions are those cases or controversies that lack judicially cognizable standards for their resolution, and thus should be avoided by the courts. See Baker v. Carr, 369 U.S. 186, 208-37 (1962) (describing political questions and discussing their justiciability); see also Laurence H. Tribe, American Constitutional Law § 3-13, at 96 (2d ed. 1988) (discussing political questions). Political questions include issues of warmaking, foreign affairs, or a restructuring of the operations of a coordinate branch of government. See id. Professor Sager argues that in some cases the Court underenforces constitutional norms by declining to strike down official actions that violate the Constitution out of deference to the other branches of government or due to concerns about its own competence to decide the case; in these cases, however, the other branches are still bound to act under the constraints of the Constitution. See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1220-21 (1978).

[50] Several other theories have been offered in support of plenary power: that an alien is merely a guest with privileges, not a member of the community with rights; that aliens

"[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated."[51] Another commentator has noted that at various points in time, the Court has used the Naturalization, Commerce, and Migration and Importation Clauses, the War Power, and the implied powers to conduct foreign policy as justifications for the federal government's immigration power.[52] However, at the heart of each justification rests the idea that sovereignty—expressed as national security or international relations requirements—mandates that the executive and legislative branches exercise exclusive control over borders and aliens.[53]

Notwithstanding these myriad justifications, the plenary power doctrine's continued vitality rests significantly on the fact that it is so firmly embedded in Supreme Court precedent that stare decisis plays a major role in keeping it alive.[54] While critiques of the doctrine abound,[55] its power over immigration and naturaliza-

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lack allegiance to the United States and thus deserve fewer rights; and that aliens would be unfairly advantaged vis-à-vis U.S. citizens if they were granted both the constitutional rights of citizens and the international law protections afforded aliens. See Stephen H. Legomsky, Ten More Years of Plenary Power: Immigration, Congress, and the Courts, 22 Hastings Const. L.Q. 925, 927-28 (1995) (collecting theories and citing references).

Another rationale behind limiting rights of aliens is that "[b]y withholding [their] allegiance" aliens leave open a foreign call on their loyalties. See Harisiades v. Shaughnessy, 342 U.S. 580, 585-86 (1952) (upholding, against due process challenge, deportation of aliens who joined Communist Party). This argument holds little application to aliens seeking to swear allegiance to the United States.

[51] 130 U.S. 581, 606 (1889); see also T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int'l L. 862, 863 (1989) (arguing that plenary power doctrine is rooted more in realities of sovereign relations than constitutional text).

[52] See Ira J. Kurzban, Kurzban's Immigration Law Sourcebook 12-13 (5th ed. 1995).

[53] See Sarah H. Cleveland, The Plenary Power Background of *Curtiss-Wright*, 70 U. Colo. L. Rev. 1127, 1148-49 (1999) (arguing that concept of "powers inherent in sovereignty" became basis for federal power to exclude or deport aliens).

[54] See Galvan v. Press, 347 U.S. 522, 531 (1954) (noting that plenary power doctrine was too firmly ingrained to be overruled).

[55] The plenary power doctrine has been under fire for decades in academic circles, but, to paraphrase Mark Twain, rumors of its demise have been greatly exaggerated. For critiques of the doctrine, see generally Linda S. Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. Rev. 1047 (1994) (considering extent to which state's power to regulate admission of aliens includes power over aliens already resident in state and examining consequences of plenary power doctrine); Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1 (1998) (arguing that plenary power is at odds with values of contemporary society and has been undermined); Louis Henkin, The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and its Progeny, 100 Harv. L. Rev. 853 (1987) (arguing that plenary power doctrine should be abandoned); Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255 (1985) (calling on Supreme Court to hold Congress to same standards on immigration

tion[56]—even in recent years—has not diminished. As a result, one theory suggests that the plenary power doctrine will not soon be eliminated, but that the Court could, in various ways, limit its force through the adoption and strengthening of other doctrines.[57] After considering more recent applications of the plenary power doctrine, this Note will take up this theory by considering whether the Court could use equity in equal protection contexts to cabin the reach of plenary power in the citizenship arena.[58]

C. *Modern Applications of the Plenary Power Doctrine*

1. *Recent Plenary Power Cases*

The federal judiciary has adhered to the plenary power doctrine in the face of what seem to modern eyes to be blatantly discriminatory statutes.[59] Even preceding the 1906 statute,[60] for instance, a federal court affirmed—without comment—that a native of China could not be admitted to citizenship under the naturalization laws.[61] In fact, the

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matters as attach to other constitutional concerns); Michael Scaperlanda, Partial Membership: Aliens and the Constitutional Community, 81 Iowa L. Rev. 707 (1996) (arguing that Court should rest its federal alienage jurisprudence on community formation, not unlimited inherent federal power).

[56] Some commentators have focused their critiques specifically on the plenary power doctrine as applied to naturalization. See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 31-42, 52-61 (1983) (insisting on availability of naturalization to alien residents who are actually admitted in order to prevent their exploitation); Note, Constitutional Limitations on the Power of Congress to Confer Citizenship by Naturalization, 50 Iowa L. Rev. 1093, 1093 & n.4 (1965) (asserting that First and Fifth Amendments and prohibition on bills of attainder constrain Congress's Naturalization power); Stanley N. Ingber, Note, Constitutional Limitations on the Naturalization Power, 80 Yale L.J. 769, 796-98 (1971) (arguing that naturalization statutes should be subject to normal standards of constitutional review and that fundamental interest strand of equal protection doctrine demands strict scrutiny of naturalization criteria).

[57] See Legomsky, supra note 50, at 934-37 (arguing that while Supreme Court will not abolish plenary power doctrine outright, it will help chisel away at doctrine's more unsightly aspects).

[58] This Note does not take up the general principle of plenary power, and considers only the limited world of naturalization cases that include an equal protection component, arguing that even if the plenary power doctrine generally is applicable, it should not apply to this subset of cases.

[59] It is worth noting that Justice Field, a prime author of the plenary power doctrine now so firmly embedded in U.S. constitutional theory, urged Congress to combat the "'oriental gangrene'" while campaigning for president, and attacked the Chinese while calling for further restrictions on their entry in other judicial writings. See Cleveland, supra note 53, at 1145-46 (describing Justice Field's views on Chinese immigration and discussing his judicial opinions).

[60] See supra note 35.

[61] See In re Gee Hop, 71 F. 274 (N.D. Cal. 1895). In United States v. Wong Kim Ark, 169 U.S. 649 (1898), the Court, while declaring that the principles of birthright citizenship acted to make the Chinese petitioner a citizen of the United States, let stand the naturalization laws preventing native Chinese from attaining citizenship. See id. at 701-04.

Court has never struck down a naturalization statute on equal protection grounds.[62]

In *Fiallo v. Bell*,[63] an immigration case, the Court upheld provisions of the INA granting special immigration preferences (a statutory waiver of many of the normal INA requirements) to illegitimate children of citizen mothers, but not children of citizen fathers.[64] Justice Powell, writing for the majority, noted petitioners' arguments that the rights of citizen fathers were impinged upon, but concluded that the decision nonetheless remained solely "'the responsibility of the Congress and wholly outside the power of this Court to control.'"[65] Justice Marshall, writing in dissent, called the majority's limited review an "abdication" and noted that the legislation discriminated among citizens on the basis of gender, a "traditionally disfavored classification[ ]."[66]

A decade after *Fiallo*, the Supreme Court reaffirmed Congress's plenary power over immigration and naturalization. In *INS v. Pangilinan*,[67] the Supreme Court rejected a Fifth Amendment challenge to a naturalization statute. The case involved sixteen Filipino nationals who served in World War II with the Armed Forces and thus were eligible for naturalization upon application, by December 31, 1946, to an INS representative in Manila.[68] This representative, however, was absent for nine months during the application period, and

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62 Recently, a panel of the Ninth Circuit struck down § 1409(a)(3)-(4), the statute at issue in *Miller*. See United States v. Ahumada-Aguilar, No. 96-30065, 1999 U.S. App. Lexis 20964, at *2 (9th Cir. Sept. 2, 1999); see also infra notes 85-91 and accompanying text (discussing *Ahumada-Aguilar* case). But see United States v. Viramontes-Alvarado, 149 F.3d 912, 916 n.2 (9th Cir.) (considering statute's unconstitutionality in light of *Miller* and concluding that "this argument has been rejected by the Supreme Court in Miller v. Albright"), cert. denied, 119 S. Ct. 434 (1998). Earlier this decade, the Ninth Circuit also struck down a pre-1934 provision that granted citizenship to foreign-born children of citizen fathers but not children of citizen mothers. See Wauchope v. United States Dep't of State, 985 F.2d 1407, 1418 (9th Cir. 1993). While the *Wauchope* decision considered many of the same issues as *Miller* and reached conclusions in line with this Note's thesis, the decision was ignored by all of the justices in the *Miller* Court, even though Miller cited *Wauchope* extensively in her brief. See Brief for Petitioner, Miller v. Albright, 118 S. Ct. 1428 (1998) (No. 96-1060), available in 1997 WL 325338, at *9. Consequently, this Note does not consider the *Wauchope* decision specifically. For a comparison of the *Miller* and *Wauchope* decisions, see Satinoff, supra note 15, at 1382-83.

63 430 U.S. 787 (1977).

64 See id. at 792-99. For a discussion of the *Miller* Court's treatment of *Fiallo* see infra notes 79-84 and accompanying text.

65 430 U.S. at 799 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

66 Id. at 805, 809 (Marshall, J., dissenting). Heightened scrutiny for gender-based statutes is discussed infra note 74.

67 486 U.S. 875 (1988).

68 See id. at 880.

petitioners argued that this absence violated their rights under the equal protection component of the Fifth Amendment's Due Process Clause.[69] The Ninth Circuit agreed with petitioners and conferred citizenship on them as an equitable remedy.[70]

The Supreme Court reversed in an opinion authored by Justice Scalia, holding that the Court had no power to effect a remedy—conferral of citizenship—under the plenary power doctrine.[71] In spite of this categorical denial that the Court could ever hold for naturalization-seeking plaintiffs, Justice Scalia's opinion reached the merits of the equal protection challenge. The Court ruled that because the Filipino veterans had in fact received greater opportunity to petition INS representatives than many other alien servicemen, and because the legislation reflected more an "especial esteem" for the Filipino veterans than a racial animus, no violation existed.[72]

Pangilinan is as close as the Supreme Court came, prior to *Miller v. Albright*, to accepting that a naturalization statute could implicate equal protection concerns.[73] However, *Pangilinan* also represents the strongest precedent against judicial conferral of citizenship for any such violations. This tension provided the context in which the *Miller* case was decided.

2. Miller v. Albright *and Beyond*

The *Miller* opinions reflect the *Pangilinan* tension. Five justices—a "solid majority" of the Court—adhered to the "vital understanding" that the Constitution consistently rejects "official actions that classify unnecessarily and overbroadly by gender,"[74] two other

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[69] See id. at 885; see also discussion supra note 11 (examining reverse incorporation).

[70] See id. at 875.

[71] See id. at 885 ("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 in violation of [congressional] limitations.").

[72] See id. at 886.

[73] The contrast between Justice Scalia's opinions in *Pangilinan* and *Miller* is notable. As discussed, in *Pangilinan* Justice Scalia, after announcing that the requested remedy was not available, did not then end his opinion, as he did later in *Miller*. Rather, he ruled on the merits of the equal protection claim. Compare Miller v. Albright, 118 S. Ct. 1428, 1446 (1998) (Scalia, J., concurring in judgment), with *Pangilinan*, 486 U.S. at 885-86. Perhaps the difference was that in *Miller*, Justice Scalia may have realized that a real equal protection violation was at issue, and felt compelled to defend the doctrine more vehemently. In any event, this discrepancy between *Miller* and *Pangilinan* at the very least suggests an unstable doctrine.

[74] *Miller*, 118 S. Ct. at 1450 (Ginsburg, J., dissenting). Even though the particular statutory provision at hand, § 1409, actually seems to favor women, Justice Ginsburg argued that it "treats mothers one way, fathers another, shaping government policy to fit and reinforce the stereotype or historic pattern" of mothers caring for their out of wedlock children and fathers avoiding this responsibility. See id. at 1449-50 (Ginsburg, J., dissenting).

justices maintained that the plenary power doctrine precluded such a determination,[75] while the final two did not find that the statute discriminated.[76] Despite the fact that a majority of the Court agreed that the statute violated equal protection, it was upheld because two of the five justices who agreed that an equal protection violation existed also held that Lorelyn Miller lacked standing to challenge the statute.[77] While a majority of the Court supported the equal protection determination, no majority of the Court came out in favor of overturning the plenary power doctrine.[78]

Thus, the *Miller* Court did not explicitly overrule *Fiallo*,[79] and that precedent hinders challenges to discriminatory INA provi-

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Justice Ginsberg's opinion noted numerous gender discrimination cases, including United States v. Virginia, 518 U.S. 515, 534 (1996) (finding that state military male-only admissions policy violated Equal Protection Clause), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (finding that state offended equal protection principles by operating female-only nursing school, even though it also offered coeducational facility), for the proposition that traditional stereotypes based on gender were inherently suspect. See *Miller*, 118 S. Ct. at 1454. *United States v. Virginia* reaffirmed the proposition that gender-based statutes would be reviewed under "skeptical scrutiny," requiring the challenged provision to demonstrate an "exceedingly persuasive justification" in order to withstand scrutiny. See *Virginia*, 518 U.S. at 531.

75 See *Miller*, 118 S. Ct. at 1446-55 (Scalia, J., concurring).

76 See id. at 1440-42 (Stevens, J.).

77 See *Miller*, 118 S. Ct. at 1442-46 (O'Connor, J., concurring).

78 The decision of a majority of the *Miller* justices to deny Miller standing seems a barrier to the Court ever finding an equal protection violation in any case where children's ability to naturalize is premised impermissibly on a trait of their parents. See *Miller*, 118 S. Ct. at 1444-45 (O'Connor, J., concurring) (holding that Miller's circumstances did not trigger rare exceptions to standing barrier). In United States v. Ahumada-Aguilar, No. 96-30065, 1999 U.S. App. Lexis 20964 (9th Cir. Sept. 2, 1999), however, the Ninth Circuit held that an illegitimate child of a deceased citizen father did have standing to assert an equal protection claim under Justice O'Connor's *Miller* standard. See id. at *15. But two other courts considering challenges to citizenship statutes based on the gender of the citizen parent since the *Miller* decision each cited Justice O'Connor's *Miller* concurrence for the proposition that the plaintiffs lacked standing. See Terrell v. INS, 157 F.3d 806, 809 (10th Cir. 1998) (following Justice O'Connor's view of plaintiff's standing in challenge to § 1409); Breyer v. Meissner, 23 F. Supp. 2d 521, 530 (E.D. Pa. 1998) (applying Justice O'Connor's holding to analysis of another naturalization statute based on distinctions between citizen fathers and citizen mothers). For a description of the standing issue in *Miller*, see Udell, supra note 15, at 639-43.

79 The Court did not, therefore, follow the course suggested by Judge Wald, concurring in the court of appeals decision in *Miller*, who simply asserted that *Fiallo* should be overturned:

> I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women .... *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court.

Miller v. Christopher, 96 F.3d 1467, 1477 (Wald, J., concurring), aff'd on other grounds sub nom. Miller v. Albright, 118 S. Ct. 1428 (1998).

sions,[80] as *Fiallo* stands for the proposition that gender discrimination in immigration matters does not mandate heightened scrutiny.[81] In *Miller*, Justice Stevens relied on the distinction between Miller's claim that she was a citizen and the *Fiallo* petitioners' application for "special status" to support Miller's right to have her case heard on the merits.[82] Justice Breyer argued that as § 1409 confers citizenship at birth, it avoids the need for the transfer of loyalties involved in a naturalization, and Miller's situation was thereby distinct from the *Fiallo* facts.[83] But there is no justification for carving a narrow exception to *Fiallo* for applications not involving a "special status" or "transfer of loyalties" because applicants in other categories may exhibit much stronger ties to the United States in many cases than putative citizens at birth.[84]

By failing to distinguish *Fiallo* while simultaneously agreeing that § 1409 unconstitutionally discriminates against foreign-born, illegitimate children of citizen fathers, the five *Miller* justices created a convergence of two seemingly irreconcilable doctrines—plenary power and equal protection—leaving little guidance for lower courts seeking to rule on these issues.

The Ninth Circuit's recent ruling in *United States v. Ahumada-Aguilar*[85] reveals the limitations of *Miller*'s inherent tensions. A majority of the Ninth Circuit panel found that the claimant, whom the government was attempting to deport,[86] had standing to assert that he was the illegitimate child of a citizen father, and would be a citizen under § 1409 absent its unconstitutional provisions.[87] The panel held that § 1409(a)(3) and (a)(4) violated equal protection "because a majority of the U.S. Supreme Court has effectively so declared."[88] In

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[80] The Ninth Circuit, considering and rejecting a similar challenge to § 1409 in light of the *Miller* decision, explicitly followed *Fiallo* in support of its conclusion. See United States v. Viramontes-Alvarado, 149 F.3d 912, 916 (1998) (holding that *Fiallo* analysis "applies equally to the case at hand").

[81] See discussion supra notes 63-66 and accompanying text.

[82] See *Miller*, 118 S. Ct. at 1436.

[83] See id. at 1458 (Breyer, J., dissenting).

[84] See The Supreme Court, 1997 Term—Leading Cases, supra note 15, at 203-04 (arguing that the *Miller* justices' attempt to distinguish *Fiallo* is unpersuasive and that "narrow exception for statutes that confer citizenship at birth is untenable").

[85] No. 96-30065, 1999 U.S. App. Lexis 20964 (9th Cir. Sept. 2, 1999).

[86] Ahumada-Aguilar had been convicted of illegally returning to the United States after deportation as a convicted felon under 8 U.S.C. § 1326(a), (b)(1) (1994 & Supp. III 1997). See id. at *6.

[87] See id. at *2; see also supra note 78 (noting that Ahumada-Aguilar met standing requirements as his father was deceased).

[88] See *Ahumada-Aguilar*, 1999 U.S. App. Lexis 20964, at *2. Although the panel found that § 1409(a) violated the equal protection rights of Ahumada-Aguilar's father, it held that Ahumada-Aguilar was entitled to citizenship as a remedy. See id.

reaching its decision, the panel concluded that heightened scrutiny was appropriate.[89]

The *Ahumada-Aguilar* dissent, however, read *Miller* to mandate exactly the opposite conclusion—that six justices had answered no to the certified question of whether § 1409 was violative of equal protection.[90] Moreover, neither the majority nor the dissent considered explicitly the plenary power concerns, nor did the majority consider the conferral concerns raised by the successful constitutional challenge.[91] Finally, the court did not explain why a finding of unconstitutionality justified conferral of citizenship. In other words, the *Miller* opinion could be—and was—used by each side of the *Ahumada-Aguilar* panel to support precisely opposite results. Thus, without a clearer pronouncement from the Court and a stronger doctrinal underpinning to support it, the equal protection decision reached by the five members of the *Miller* Court will not carry sufficient weight to affect naturalization jurisprudence.

The remainder of this Note attempts to provide the needed justification for the "effective" *Miller* majority, *Ahumada-Aguilar*, and future similar decisions. It will examine first the importance of bringing equal protection into the naturalization realm, and thus provide support for judicial action in this area, and then will consider the means by which courts could provide effective relief when naturalization applicants are unconstitutionally stymied by discriminatory laws.

II
EQUAL PROTECTION IN THE NATURALIZATION FIELD

A. *The Necessity for Equal Protection in the Naturalization Field*

Unlike other limitations on the constitutional rights of aliens—for example, limitations on their First Amendment rights—an equal protection violation within the naturalization statute itself stands in the way of certain aliens ever achieving citizenship,[92] and thus the assur-

[89] See id. at *13. The court did not address any of the plenary power concerns, asserting only that "a majority of the Court would have found § 1409(a)(4) unconstitutional by applying heightened scrutiny." Id. at *16.

[90] See id. at *21-*22 (Kleinfeld, J., dissenting).

[91] See infra notes 107-08 and accompanying text (discussing conferral).

[92] The vital legal consequences of citizenship include the right to vote; protection from exclusion, deportation, and myriad other immigration laws; eligibility for Federal programs, including welfare, see infra note 96, and for certain positions in the government barred to aliens, see, e.g., Ambach v. Norwick, 441 U.S. 68 (1979) (public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (state troopers); and the ability to sponsor family members for entry in the United States, not to mention the importance of citizenship as a means to foster community in the United States.

ance of complete constitutional protections.[93] There are many areas of the law that recognize distinctions between citizens and aliens;[94] successfully naturalizing or attaining citizenship through other INA provisions is thus of real import. As one commentator has noted, "alienage legitimately matters not merely at the border but for the allocation of rights and benefits in the interior as well."[95] Congress has made this point explicit in its recent enactment of laws tying statutory welfare eligibility to citizenship.[96] For applicants in need of public assistance, delays in naturalization could have severe repercussions.[97]

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[93] Certainly, there are major concerns about the Court's deference in many aspects of alienage jurisprudence. In a recent immigration case, the Court held that the Executive Branch, acting under authority delegated by Congress, could deport aliens for any or no reason, even if such deportations were targeted at aliens based on their membership in a particular political group. See Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 945, 947 (1999). This Note focuses on naturalization statutes, and does not explore the question of aliens' constitutional rights, as the remedy for violations of such rights would not be conferral of citizenship, but some other means to eliminate discrepancies between the rights of citizens and aliens.

[94] The Court in Mathews v. Diaz, 426 U.S. 67 (1976), set out the distinctions in full:

> The Constitution protects the privileges and immunities only of citizens, and the right to vote only of citizens. It requires that Representatives have been citizens for seven years, and Senators citizens for nine, and that the President be a "natural born Citizen."
>
> A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon Government employment of aliens, upon private employment of aliens, and upon investments and businesses of aliens; statutes excluding aliens from benefits available to citizens, and from protections extended to citizens; and statutes imposing added burdens upon aliens.

Id. at 78 n.12 (1976) (citations omitted).

[95] Linda S. Bosniak, supra note 55, at 1086. But see Alexander M. Bickel, The Morality of Consent 33 (1975) (arguing that citizenship now "plays only the most minimal role in the American constitutional scheme").

[96] See 1996 Welfare Reform Act, Pub. L. No. 104-193, 110 Stat. 2105 (1997) (codified as amended at 8 U.S.C. §§ 1612-1613 (Supp. III 1997)). Specifically, title IV, sections 402 and 403 of the Act substantially limited welfare benefits even for those immigrants classified as "qualified" (those lawfully admitted permanent residents, refugees, and aliens granted asylum). See id. §§ 402-403, 110 Stat. at 2262-67. Despite these limitations, some proponents of the legislation argued that the Act provided incentives for aliens to naturalize. Even assuming these assertions were correct, such arguments fail to consider the possibility that some applicants may encounter insurmountable barriers to attaining citizenship, or experience a debilitating delay, as a result of unconstitutional provisions.

[97] Those concerned that such conferral of citizenship could circumvent the stricter controls placed on criminal aliens, see, e.g., Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-79 (1996) (codified in scattered sections of 8 U.S.C.) (outlining expanded definition of criminal acts rendering aliens subject to deportation and streamlined procedures for such deportation), should note that applicants would

The *Miller* case provides an example of a potential equal protection violation within the naturalization statute, but is merely one of many such potential violations. *Miller*'s import stems in part from the fact that if Congress can enact laws affecting aliens' ability to naturalize based on the gender of a citizen parent—in spite of the INA prohibition on discrimination based on race, sex, or marital status—then Congress conceivably could pass similar bills based on the race of the citizen parent (making it harder, say, for the child of a black father to naturalize), or perhaps the marital status of the parent.[98] Such laws, while clearly discriminatory, would slip through the cracks of the INA prohibition against discrimination.[99]

In this sense, the 1952 prohibition on discrimination, by eliminating the worst discrimination, reduced the need for the Court to intervene and to develop a constitutional jurisprudence in this area.[100] At the same time that the Court announced a far stronger conception of equal protection in desegregation and other contexts,[101] continued application of the plenary power doctrine and Congress's elimination of the most egregious areas of discrimination in naturalization forestalled judicial action in this field.[102] And while cases like *Miller* sug-

still need to meet the general criteria of citizenship, including good moral character. See discussion supra note 31.

98 Presumably, such statutes would still need to meet a rational basis test.

99 See supra note 28 and accompanying text (discussing INA prohibition on discrimination). Most courts obviously would look skeptically at any explanations presented for such distinctions, but the fact remains that under current Supreme Court precedent, aliens' protection from discrimination rests solely on statutory grounds.

100 Under traditional cannons of interpretation, a court will avoid finding a constitutional question if the case may be disposed of by other means, especially an interpretation of a statute that avoids a constitutional infringement. See Gomez v. United States, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

101 See infra Part II.C.1.

102 Another factor that perhaps has hindered a reevaluation of the Supreme Court's remedial role in naturalization is that Congress retains power to enact private naturalization bills for applicants unable to meet the requirements of the INA, essentially performing the court's role of providing appropriate equitable relief. See United States v. Realty Co., 163 U.S. 427, 440 (1896) (offering equitable rationale for Congress's power to enact private bills); Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1686 (1966) (asserting that Congress, in enacting private laws, "resembles an ancient court of equity"). On private bills generally, see Bernadette Maguire, Immigration: Public Legislation and Private Bills (1997).

Although these bills indubitably are constitutional, see Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 239 n.9 (1995), there are several subconstitutional objections to them. For one, they lack generality, a hallmark of legislation and of the principle that such legislation should apply equally to all citizens, including the legislators. See Private Bills in Congress, supra, at 1686 (arguing that such lack of generality could produce equal protection violation); cf. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of soci-

gest that members of the Court are willing to find that naturalization provisions could violate equal protection, such findings are irrelevant if the Court is unwilling to sanction an appropriate remedy.

In order for the Court to provide a remedy in naturalization-based equal protection cases, it would need to find a jurisprudential foundation to counter the plenary power doctrine and sanction such a remedy. For citizenship applicants stymied by unconstitutional naturalization provisions, meaningful relief ultimately must come in the form of a grant of citizenship, so the doctrinal foundation would need to support judicial conferral of citizenship. This Note considers two possible doctrinal solutions: indirect or direct conferral of citizenship—the former a byproduct of the Court's striking down an unconstitutional statute and the latter stemming directly from the Court's equitable powers. In the end, only equity can provide a strong enough foundation to support judicial conferral.

B. Indirect Conferral of Citizenship

If the Court finds that a statute violates the Equal Protection Clause, it may strike down the statute or sever the offending clauses;[103] this ensures that everyone is judged under a constitutional law.[104] Indirect conferral of citizenship could mean nothing more than striking down offending clauses of naturalization statutes and allowing petitioners who meet the remaining, valid requirements to naturalize through those channels.

At first glance, this means of conferral seems unexceptionable, as courts regularly sever offending clauses from federal acts.[105] In many

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ety; the application of those rules to individuals in society would seem to be the duty of other departments."). Such bills are also at odds with the Constitution's stricture that Congress shall promulgate a *uniform* rule of naturalization. See Michael T. Hertz, Limits to the Naturalization Power, 64 Geo. L.J. 1007, 1009-15, 1025 (1976). These concerns, coupled with the peculiar notion that Congress has asserted for itself a *judicial* role in the traditional naturalization process, reveal another anomaly that sits at the heart of the traditional view of naturalization, and suggest a serious potential separation of powers concern in the traditional naturalization power.

[103] See Heckler v. Mathews, 465 U.S. 728, 738-39 (1984) (stating that Court, when faced with invalid legislation, may either declare statute null or extend statute's coverage, and noting that courts "frequently entertain[ ] attacks on discriminatory statutes or practices," even when government could deprive successful plaintiff of relief by withdrawing statute's benefits universally).

[104] See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 238 (1994) ("[B]ecause no one may be judged by an unconstitutional rule of law, a statute that has unconstitutional applications cannot be constitutionally applied to anyone . . . unless the court can sever the unconstitutional applications of the statute from the constitutionally permitted ones.").

[105] See, e.g., Reno v. ACLU, 521 U.S. 844, 882-83 (1997) (severing unconstitutional portion of Communications Decency Act and leaving intact remainder of statute).

cases, these courts use the statute's own severability clause as a guide. Such clauses include instructions on severing, providing, for example, that if any portion of the Act is struck down, the rest of the statute shall remain in effect. Given that the INA includes such a clause, and thus contemplates severance, effecting such severance cannot inherently be seen as judicial overreach.[106]

From one perspective, merely severing the unconstitutional provisions of the statute would not implicate the conferral issue: "[O]nce the two unconstitutional clauses are excised from the statute, that statute [would] operate[ ] automatically to confer citizenship . . . 'at birth.'"[107] On the other hand, severance could be seen as effecting a conferral of citizenship, albeit indirect, contrary to *Pangilinan*'s strictures; the practical import of such severance would be the indirect conferral of citizenship to those included in the statute by virtue of the severance. The Ninth Circuit panel in *Ahumada-Aguilar* followed this path in declaring petitioner a citizen: "The evidence in the record sufficiently demonstrates that Ahumada-Aguilar is the child of a U.S. citizen father, satisfying the requirements of § 1409(a)(1) and (a)(2)."[108]

But indirect conferral is still conferral; an argument, then, must be provided to justify such conferral in the face of the plenary power doctrine. Indirect conferral through severance provides no such doctrinal underpinning sufficient from a jurisprudential perspective to counter the plenary power doctrine.[109] Without such doctrinal sup-

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106 The INA severability clause reads as follows: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." Act of June 27, 1952, ch. 477, § 406, 66 Stat. 163, 281. The *Ahumada-Aguilar* court did not reference this clause. See United States v. Ahumada-Aguilar, No. 96-30065, 1999 U.S. App. Lexis 20964, at *2 (9th Cir. Sept. 2, 1999).

107 Miller v. Albright, 118 S. Ct. 1428, 1457 (1998) (Breyer, J., dissenting). It appears that the Ninth Circuit in *Ahumada-Aguilar* followed Justice Breyer's instructions to the letter. See 1999 U.S. App. Lexis 20964, at *18. Justice Stevens distinguished the severance issue entirely in *Miller*, reasoning that a judgment in Miller's favor would "confirm her preexisting citizenship rather than grant her rights that she does not now possess." *Miller*, 118 S. Ct. at 1436. In other words, Justice Stevens drew a line between conferral of citizenship and merely the removal of unconstitutional barriers to citizenship. But Justice Stevens did not reach Justice Scalia's assertion that the Court had no power to grant the relief requested: "Because we conclude that there is no constitutional violation to remedy, we express no opinion on [Justice Scalia's argument]." Id. at 1442 n.26.

108 *Ahumada-Aguilar*, 1999 U.S. App. Lexis 20964, at *18.

109 See *Miller*, 118 S. Ct. at 1448 (Scalia, J., concurring) ("It is in my view incompatible with the plenary power of Congress over those fields or judges to speculate as to what Congress would have enacted if it had not enacted what it did . . . ."). Justice Scalia also cites *Pangilinan* to make this point even more explicitly:

> Even if we were to agree that the difference in treatment between illegitimate children of citizen-fathers and citizen-mothers is unconstitutional, we could

port, indirect conferral could not meet the obstacles imposed by plenary power.

Indirect conferral also suffers from more pragmatic limitations, which are strikingly revealed in the statute at issue in *Miller*. Unlike a statute that simply applies an unconstitutional condition to one class, the INA places conditions on both citizen fathers and mothers.[110] Because citizen mothers have some, albeit minimal, responsibilities listed at § 1409(c),[111] striking the provisions regarding citizen fathers merely would produce a law that favored fathers.[112] Thus, according to Justice Scalia, a court

> would have to disregard [restrictions both on mothers and on fathers], either leaving no restrictions whatever upon citizenship of illegitimate children or (what I think the more proper course) denying naturalization of illegitimate children entirely .... In sum, this is not a case in which we have the power to remedy the alleged equal protection violation by either expanding or limiting the benefits conferred so as to deny or grant them equally to all.[113]

The *Ahumada-Aguilar* panel did not discuss Justice Scalia's concerns when it provided indirect conferral, nor did it explain how the severed statute was now meant to operate.

In other areas, Supreme Court precedent provides support for the notion of remedying equal protection violations through severance, and the Court historically has severed clauses in such a way as to expand the covered class in equal protection cases where federal benefits were at stake.[114] But according to one academic commentator,

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> not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship. "Once it has been determined that a person does not qualify for citizenship, ... the district court has no discretion to ignore the defect and grant citizenship."

Id. at 1454-55 (Scalia, J., concurring) (quoting INS v. Pangilinan, 486 U.S. 875, 884 (1988)).

110 The number of classes upon which statutes place conditions may affect the ease with which provisions of the statutes may be severed. For instance, two cases cited infra note 114, *Westcott* and *Frontiero*, dealt with easily severed unconstitutional statutory provisions, and in *Miller*, Justice Scalia offered Craig v. Boren, 429 U.S. 190 (1976), as an example of the easy severance category. *Craig v. Boren*, however, presented two classes of alcohol drinkers, each restricted from drinking until reaching a different age. See id. at 191-92. Given that striking down either age requirement in *Craig* would not result in equal treatment for both classes, the statute in this case seems more an example of a difficult-to-sever statute. See *Miller*, 118 S. Ct. at 1448-49 (Scalia, J., concurring).

111 See supra note 9.

112 See *Miller*, 118 S. Ct. at 1449 (Scalia, J., concurring).

113 Id.

114 See Dorf, supra note 104, at 252 n.61 (citing, inter alia, Califano v. Westcott, 443 U.S. 76, 89-91 (1979) (gender discrimination in welfare benefits) and Frontiero v. Richardson, 411 U.S. 677, 691 & n.25 (1973) (plurality opinion) (dependency allowance for husbands of armed forces members)).

the "complexity inherent in deciding how to sever" equal protection cases and statutes like § 1409 likely is behind a general trend on the part of the Court not to sever clauses to expand coverage in equal protection cases, but instead to strike down the statutes in their entirety.[115] Striking down the entire INA is an unacceptable option. Literally millions of permanent residents await naturalization, and eliminating the only avenue to citizenship would wreak havoc with the administration of the naturalization system[116]—a factor the Court has credited in similar cases.[117]

Thus, indirect conferral suffers from both doctrinal and practical flaws, and is an insufficient remedy for equal protections violations in naturalization statutes. To challenge the plenary power doctrine and effect conferrals of citizenship, the Court must rely on a counterweight, a foundation that can equal plenary power in force and import. Equity, which provides the basis for direct conferral, is such a foundation.[118] The final portion of this Note considers the potential role of equity in effecting direct conferral of citizenship.

C. Direct Conferral of Citizenship

1. Development of Equity

The antecedent roots of equity extend back to Aristotle, who wrote that "equity is justice that goes beyond the written law."[119] In England, courts of equity, operated by chancellors under the aegis of

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115 Dorf, supra note 104, at 251-53.

116 In addition to the administrability effects of striking down the naturalization laws, aliens needing welfare benefits could be hurt by the resulting delays in the naturalization process because of the provisions of the 1996 Welfare Reform Act tying some welfare benefits to citizenship. See 8 U.S.C. §§ 1611-1612 (Supp. III 1997). But see Hiroshi Motomura, Federalism, International Human Rights, and Immigration Exceptionalism, 70 U. Colo. L. Rev. 1361, 1380 nn.65-66 (1999) (describing subsequent laws limiting reach of 1996 Welfare Reform Act's immigrant provisions and pending legislation that would restore even more immigrant welfare benefits).

117 The Court has found occasion to consider such issues of administrability and fairness in dealing with unconstitutional statutes. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982) (invalidating portions of Bankruptcy Act of 1978 but staying judgment to afford Congress opportunity to reconstitute bankruptcy statute without impairing administration of bankruptcy proceedings).

118 Moving from indirect to direct conferral as a remedy does not absolve the Court from its mandate to strike down an unconstitutional statute or sever its offending provisions. And as direct conferral is a means to avoid intractable severability issues, this mandate seems to present a serious obstacle to this form of relief. The solution is that the Court, in conferring citizenship directly, really is just creatively severing the offending clauses for a particular petitioner or class of petitioners. While such action still begets charges of judicial legislation, it is much more palatable given its limited scope of application.

119 Aristotle, Art of Rhetoric ¶ 1374a (J.H. Freese trans., 1926). For a detailed description of the ancient roots of equity, see Gary L. McDowell, Equity and the Constitution 15-

the sovereign, provided nonmonetary remedies and relief from the sometimes harsh rigor of the law courts.[120] Petitioners went to equity courts when the law could not supply an adequate remedy, and chancellors, following their conscience, provided appropriate relief.[121]

The Framers of the Constitution assumed the presence of equity in American jurisprudence but placed the equitable and legal powers in the judiciary: "The judicial Power shall extend to all Cases, in Law and *Equity*, arising under this Constitution . . . ."[122] The Supreme Court was given authority under the Judiciary Act of 1789 to promulgate rules of equity, which it did in accordance with the British model.[123] The rules were updated twenty and seventy years after their enactment,[124] and in 1938, with the passage of the Federal Rules of Civil Procedure, the distinctions between law and equity were abolished in favor of the unified "civil action."[125]

In spite of the merger of equity and law, the principles underlying equity were not abolished in the twentieth century. In fact, modern equity is far more robust and wide-reaching than its British and American ancestors.[126] In recent decades, equity has been "stretched" to offer relief to whole social classes, and the Supreme Court has "fused"

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24 (1982). On equity generally, see Aaron Kirschenbaum, Equity in Jewish Law (1991) (surveying equity in legal history and Jewish law).

120 The development of the English equity courts is well documented. See, e.g., J. H. Baker, An Introduction to English Legal History 112-33 (1990).

121 The centrality of the chancellor's conscience, as well as the tools at his disposal for the resolution of cases, is discussed in Peter Charles Hoffer, The Law's Conscience: Equitable Constitutionalism in America 12-15 (1990). But the notion that equity historically was based solely on a chancellor's conscience is inaccurate. Equity too was bound by principles and doctrines; in fact, by the nineteenth century, equity in England had "hardened into law" and had "almost lost the ability to discover new doctrines." See Baker, supra note 120, at 127-28.

122 U.S. Const. art. III, § 2, cl. 1 (emphasis added). In a recent opinion, Justice Scalia carefully traced the development of American equity from its British roots. See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 1968 (1999).

123 In 1822, the Supreme Court promulgated thirty-three Equity Rules, see 20 U.S. (7 Wheat.) v-xiii (1822), and replaced them with ninety-two Rules in 1842, see 42 U.S. (1 How.) xli-lxx (1842).

124 For discussion of these equity rules, see generally Wallace R. Lane, Twenty Years Under the Federal Equity Rules, 46 Harv. L. Rev. 638 (1933) (examining Federal Equity Rules twenty years after promulgation); Robert H. Talley, The New and the Old Federal Equity Rules Compared, 18 Va. L. Reg. 663 (1913) (discussing equity rules promulgated by Supreme Court in 1912).

125 See Fed. R. Civ. P. 1 (discussing unified rules governing "all suits of a civil nature whether cognizable as cases at law or in equity"). Most states followed the example of the federal system, but Delaware's prominent Court of Chancery is a notable exception. For a detailed description of the role of equity in Delaware jurisprudence, see generally William T. Allen, Speculations on the Bicentennial: What Is Distinct About Our Court of Chancery, in Court of Chancery of the State of Delaware 1792-1992, at 13, 16 (1992).

126 See Baker, supra note 120, at 128, 132 (noting that equity is more flexible than law and that abolition of historical distinctions between law and equity in England "gave new

the idea of equity with the right to equal protection under the law,[127] leading to what one commentator describes as the "triumph" of equity in American jurisprudence.[128] The culmination of this development is marked by the desegregation cases.

. Lost in the furor over desegregation sparked by the *Brown v. Board of Education*[129] decision is the fact that this case and its progeny represent the most prominent examples of modern equitable remedy actions by federal courts.[130] In fact, one of the "most important but least discussed" aspects of the school desegregation cases is that they posit a new understanding of equitable relief.[131] *Swann v. Charlotte-Mecklenburg Board of Education*,[132] for example, presents a stark delineation of the federal judiciary's remedial power: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[133]

The desegregation Courts did not see equitable power as unique to their cases. In fact, the opinions placed the power to desegregate squarely in the context of other remedial situations: "As with any equity case, the nature of the [constitutional] violation determines the scope of the remedy."[134] Moreover, Justice Ginsburg just last term

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emphasis" to view of equity as "an approach to justice which gave more weight than did the law to particular circumstances and hard cases").

127 See McDowell, supra note 119, at 4. McDowell argues that this right is newly discovered and "sociological" in nature. See id. (arguing against expansion of equity to equal protection arena).

128 See Douglas Laycock, The Triumph of Equity, 56 Law & Contemp. Probs. 53, 53 (1993) ("The war between law and equity is over. Equity won."). But see Thomas D. Rowe, Jr., No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law, 56 Law & Contemp. Probs. 105, 105-06 (1993) ("An outpost that has so far less than fully fallen to the triumph of equity is modern U.S. federal public law . . . .").

129 347 U.S. 483 (1954) (*Brown I*) (invalidating Jim Crow segregation of public schools). An earlier example of the Court's remedial power can be found in *Sweatt v. Painter*, 339 U.S. 629, 635 (1950), in which the Court ordered the all-white University of Texas Law School to admit black students.

130 See Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (*Brown II*) (ordering remedy for constitutional violations found in *Brown I* and noting that "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs").

131 McDowell, supra note 119, at 97. McDowell argues that the *Brown II* Court "fashioned a new understanding" of the Court's equitable remedial powers, replacing individual litigants with aggrieved social classes and decreeing remedies based on deprivation of rights. See id. at 8; cf. Laycock, supra note 128, at 54 (arguing that traditional requirements for equitable relief, particularly irreparable harm, are no longer enforced and that equitable remedies are now considered ordinary in American courts).

132 402 U.S. 1 (1971) (affirming district court's orders, in face of extreme recalcitrance to desegregation, to redraw school district lines and to bus students).

133 Id. at 15.

134 Id. at 16, cited with approval in Missouri v. Jenkins, 515 U.S. 70, 88 (1995).

reiterated her understanding of the equitable foundation of *Brown v. Board of Education* and its application to nondesegregation cases.[135]

The Court explored and affirmed this equitable power in *Missouri v. Jenkins*.[136] In *Jenkins*, the judiciary encroached into a traditional legislative prerogative: taxation. Faced with a segregated school district in Kansas City desperately in need of huge capital improvements, the district court ordered an increase in property taxes sufficient to enable the school district to pay its share of the costs, in spite of the fact that such an increase directly contravened state law.[137] The court of appeals upheld the judgment, but modified its future application by ordering the school district to raise its revenue and enjoining enforcement of those state laws that would prevent such increased tariffs.[138]

The Supreme Court, in a five-four decision written by Justice White, upheld the district court's prerogative to order an increase in revenue, although it held that the district court could do so only through the indirect method imposed prospectively by the court of appeals.[139] The *Jenkins* Court pointed to a "long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations."[140] The Court sanctioned an indirect means of circumventing the state law limiting school dis-

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135 See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 1977 n.4 (1999) (Ginsburg, J., dissenting) ("In a series of cases implementing the desegregation mandate of *Brown v. Board of Education* . . . we recognized the need for district courts to draw on their equitable jurisdiction . . . .").

136 495 U.S. 33 (1990). The Court's later decision in this case, see 515 U.S. 70, in which it overturned the district court's ordered remedy as being outside the bounds of its equitable power, rested not on new limitations on that power but on a reaffirmation of the limitation of desegregative power to intradistrict remedies for intradistrict violations. See id. at 88. But see Carter M. Stewart & S. Felicita Torres, Recent Developments, 31 Harv. C.R.-C.L. L. Rev. 241 (1996) (arguing that, from practical standpoint, *Jenkins* decision "drastically limited the power of district courts").

137 See *Jenkins*, 495 U.S. at 41 ("Finding itself with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD [Kansas City, Missouri, School District] to raise its share of the cost of the plan . . . the court ordered the KCMSD property tax levy raised . . . ." (citations omitted)).

138 See id. at 42-43. In other words, the court of appeals merely transformed the judgment into an indirect, rather than blatant, judicial taxation.

139 See id. at 57 ("It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation.").

140 Id. at 55 (citing cases).

trict taxation powers[141] that accomplished exactly the same result as would have a direct taxation by the judiciary itself.[142]

The development of modern equity has not been limited to desegregation cases. In *Wyatt v. Stickney*,[143] for instance, the late Judge Frank Johnson of the Middle District of Alabama placed the entire Alabama state mental health program under federal receivership to procure improvements in the living standards of its patients.[144] Judge Johnson, discussing *Wyatt* in a later article, noted that "[a]fter deciding that under the facts of a case the Constitution mandates that the litigants are entitled to relief, a judge cannot discharge his oath of office without seeing to it that relief is provided."[145]

Cases like *Jenkins* and *Wyatt* send a strong message about modern equitable power: not only is it far-reaching, but it has particular application to equal protection cases.[146] This is normatively consistent with Chief Justice Warren's implied understanding of equity as an approach to law, including constitutional law, "based on doing justice for

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141 The remedial power displayed in *Jenkins* has application in the federal context. In Bolling v. Sharpe, 347 U.S. 497 (1954), for example, the Court ordered school desegregation in Washington, D.C., asserting its power over Congress, the relevant legislature in this case. See id. at 500. Unlike *Jenkins*, however, the *Bolling* Court needed to impose no special taxes to effect its order; Congress had power to raise its own revenues. In *Jenkins*, on the other hand, any authority to tax had to come from the federal judiciary as the school district, far from having authority to raise taxes on its own, was in fact precluded by state law from raising such taxes. *Bolling* thus provides no evidence that the Court's power would be limited more in the federal context. It is impossible to imagine a situation, however, in which the Court *would* compel Congress to tax; it can always order remedies knowing that Congress has the resources to implement them.

142 Justice Kennedy, concurring in the judgment, concluded that "[t]he very cases cited by the majority show that a federal court has no . . . authority [to levy a higher tax]." *Jenkins*, 495 U.S. at 75. From Justice Kennedy's perspective, "[i]ll-considered entry into the volatile field of taxation is a step that may place at risk the legitimacy that justifies judicial independence." Id. Even in opposition to this expansion, Justice Kennedy acknowledged the independence and latitude of the judiciary.

143 325 F. Supp. 781, 785-86 (M.D. Ala. 1971).

144 See id. at 785-86.

145 Frank M. Johnson, Jr., The Role of the Federal Courts in Institutional Litigation, 32 Ala. L. Rev. 271, 273-74 (1981).

146 Although Justice Scalia, in *Grupo Mexicano*, found that equity did not extend to a newly created right of a court to freeze the assets of an alleged debtor in a preliminary injunction, he admitted that equity is flexible. See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 1969 (1999). Moreover, Justice Scalia's argument in *Grupo Mexicano*, that Congress is in a much better position to fashion a remedy for creditors, certainly is not applicable to the situation where Congress is perpetrating the wrongs in need of remedy. See id. at 1969-70. Finally, Justice Scalia argues that the asset freeze is outside the "broad boundaries of traditional equitable relief." Id. at 1969. Considering that *Brown*-style equitable remedies for discriminatory governmental behavior have been in place for decades, it is possible to argue (though Justice Scalia undoubtedly would disagree) that conferral of citizenship could rest comfortably within such broad boundaries.

all concerned."[147] Although Justice Thomas has made his opposition to this expansive modern equity well known, his vigorous attack on the doctrine is itself a comment on its vitality: "[T]he federal judiciary has for the last half-century been exercising 'equitable' powers . . . entirely out of line with its constitutional mandate."[148]

In spite of Justice Thomas's protests, the modern view of equity is merely an extension of the older version of equity as a "moral force"; the Court in *Brown* and its progeny followed this view of equity in fashioning their relief.[149] Under this concept of modern equity as a tool to ensure equal protection, it is difficult to justify a doctrine that holds naturalization statutes that discriminate on the basis of gender (or race, for that matter) as somehow exempt from this judicial power.[150]

2. *Equity Applied to the Naturalization Field*

The *Pangilinan* Court outlined the most extensive argument against equitable relief in naturalization cases. Reading the Court's earlier decision in *INS v. Hibi*[151] to hold that "normal estoppel rules applicable to private litigants did not apply" to the INS because equity could not override the "public policy established by Congress,"[152] the *Pangilinan* Court thus held that such limits on estoppel "surely appl[y] as well to the invocation of equitable remedies."[153] Drawing from other older cases, the Court noted that courts of equity can "'no more disregard statutory and constitutional requirements than can courts of

147 Hoffer, supra note 121, at 7 (describing view of Chief Justice Warren's *Brown* decisions). But see John Choon Yoo, Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts, 84 Cal. L. Rev. 1121 (1996) (arguing against expansive judicial equitable power).

148 Lewis v. Casey, 518 U.S. 343, 365 (1996) (Thomas, J., concurring). In Missouri v. Jenkins, 515 U.S. 70 (1995), Justice Thomas, concurring, provided his own reading of the history of equity to argue that the "extravagant uses of judicial power" inherent in equity "are at odds with the history and tradition of the equity power and the Framers' design." Id. at 126; see also id. at 126-33 (outlining Thomas's view of history of equity).

149 See Hoffer, supra note 121, at 20-21, 198.

150 Thomas Rowe refers to those who refuse "to provide full relief for violations of federal rights" as bringing to mind the description of an ideologue as "one who cares little for the harm done in the name of one's theory." See Rowe, supra note 128, at 120.

151 414 U.S. 5 (1973) (reversing Ninth Circuit decision preventing invocation of cutoff date in 1940 Nationality Act), cited in INS v. Pangilinan, 486 U.S. 875, 883 (1988).

152 *Pangilinan*, 486 U.S. at 882-83 (citing *Hibi*, 414 U.S. at 8 (describing that Attorney General, in enforcing INA, merely enforces congressional public policy established with regard to conferral of naturalization benefits)).

153 Id. at 883.

law,'"[154] and cannot, after determining that there is a right but no remedy known to law, "'create a remedy in violation of the law.'"[155]

The *Pangilinan* Court concluded that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers."[156] Following the *Pangilinan* line of reasoning in *Miller*, Justice Scalia suggested that only Congress could set citizenship requirements and that "federal courts cannot exercise that power under the guise of their remedial authority."[157] Lorelyn Miller's fate thus would be in the hands of Congress: "If there is no congressional enactment granting petitioner citizenship, she remains an alien."[158]

Many of the *Pangilinan* Court's plenary power arguments apply as well to taxation, which also is seen as an area under Congress's plenary authority; in fact, the Court has called taxation "the exercise of the most plenary of sovereign powers."[159] And the Court has displayed the same deference toward taxation as it has done in citizenship matters: "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."[160]

From this perspective, the Court should be as reluctant to interfere in taxation matters as it is in citizenship matters. Yet, as *Jenkins* reveals, at times the Court has been willing to intrude into legislative authority in order to effect an equitable remedy.[161] Nothing about citizenship suggests that it should be treated more deferentially than

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154 Id. (quoting Hedges v. Dixon County, 150 U.S. 182, 192 (1893)).

155 Id. (quoting Rees v. Watertown, 86 U.S. (19 Wall.) 107, 122 (1874)).

156 Id. at 883-84. Mandamus is codified at 28 U.S.C. § 1361 (1994); injunction is codified at 28 U.S.C. § 1651 (1994).

157 Miller v. Albright, 118 S. Ct. 1428, 1447 (1998) (Scalia, J., concurring). As one commentator has noted, Justice Scalia generally seeks to limit the Court's equitable powers. See Rowe, supra note 128, at 118 ("[I]t is little if any exaggeration to say that [Justice Scalia] strives to minimize the scope for judicial discretion.").

158 *Miller*, 118 S. Ct. at 1446 (Scalia, J., concurring) (arguing that authority of Congress is appealed to in citizenship cases, specifically its power under Art. I, § 8, cl. 4, to establish uniform rule of naturalization).

Justice Scalia might point out that Congress could itself provide an equitable remedy for Miller by enacting a private bill for her relief. See discussion supra note 102. Such a possibility is so remote, however, as not to affect this discussion.

159 Lawrence v. State Tax Comm'n, 286 U.S. 276, 279 (1932); see also Hylton v. United States, 3 U.S. (3 Dall.) 171, 176 (1799) (construing tax power as "vest[ing] in Congress plenary authority in all cases of taxation").

160 Merriwether v. Garrett, 102 U.S. 472, 501 (1880); see also The Federalist No. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961) (arguing that "the legislative department alone has access to the pockets of the people").

161 See supra Part II.C.1; see also Christopher W. Nelson, Comment, *Missouri v. Jenkins*: Judicial Taxation and the Funding of School Desegregation, 26 New Eng. L. Rev. 529, 541-42 (1991) (arguing that Third Circuit, in Evans v. Buchanan, 582 F.2d 750 (3d Cir.

taxation. In fact, several important distinctions between taxation power and naturalization power make conferral less of an intrusion into legislative prerogatives than *Jenkins*-style involvement in taxation.

The major rationale behind the Court's deference in this arena stems from its view that "the power to tax involves the power to destroy";[162] consequently, the Court believes that taxation should be left to the politically accountable legislature and that taxation by the life-tenured federal judiciary would implicate federalism concerns.[163]

Judicial taxation also raises majoritarianism concerns: "[T]he judiciary is not subject to the political accountability that is commonly held to justify the legislature's ability to levy taxes."[164] Thus, as another commentator notes, "[b]ecause the federal judiciary is not designed to represent the interests of all concerned constituents adequately in taxation decisions, a federal judicial tax amounts to nothing less than taxation without representation."[165] Essentially, judicial taxation implicates the idea that only those politically accountable to the people may tax the people.

Citizenship does not implicate those same concerns. Although one could argue that only those accountable to the people should be allowed to choose the people's new co-citizens, the potential harm of judges conferring citizenship on a select group of applicants (those whose Fifth Amendment rights have been violated and who meet all of the other criteria for naturalization) seems far more attenuated.[166]

Moreover, the effect of a judicially imposed tax could be far more reaching than the ordering court envisioned. Suppose the economy changed and revenues decreased; would the court forever be enmeshed in policing the imposed tax? Citizenship does not implicate such concerns either; the Court could limit or expand the reach of its decision as necessary to preserve Congress's fundamental prerogative to set naturalization policy, and the Court could not ignore any valid

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1978), upheld judicially established taxation notwithstanding legislature's acknowledged plenary authority).

162 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

163 See Douglas J. Brocker, Taxation Without Representation: The Judicial Usurpation of the Power to Tax in *Missouri v. Jenkins*, 69 N.C. L. Rev. 741 (1991) (discussing rationale behind plenary nature of tax power).

164 G.R. Wolohojian, Note, Judicial Taxation in Desegregation Cases, 89 Colum. L. Rev. 332, 342 (1989).

165 Brocker, supra note 163, at 761 (footnotes omitted). Brocker suggests that judicial taxation implicates the unfairness of British rule that prompted the American Revolution to demonstrate his strong aversion to such judicial action. See id. at 747.

166 Moreover, from an administrability perspective, the pool of citizenship applicants is much more manageable than the taxpayer pool.

remaining naturalization provisions in effecting judicial conferral of citizenship.

Most fundamentally, citizens who are displeased with federal taxation policy can, and do, vote the responsible legislators out of office.[167] Aliens have no such power.[168] Thus, for the same reasons that courts have extended Fifth Amendment protection to aliens[169] and have allowed equitable estoppel against the INS for abusing settled expectations about the naturalization process,[170] they should extend that protection to the most important right an alien can attain.[171]

The Court saw good reason to override its deference on taxation matters when desegregation was at stake: Legislatures were intransigent in maintaining unequal funding levels for black students and equal protection was at stake.[172] In the naturalization context, Congress has maintained statutes that discriminate on the basis of gender; once again, equal protection is at stake. Consequently, the Court should see excellent reasons to use the same equitable power it used to enforce the Constitution in the desegregation arena to confer citi-

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167 Consider, for instance, President George Bush's famously broken "read my lips, no new taxes" promise during the 1988 presidential campaign, widely held to be an important factor in his 1992 loss to President Bill Clinton. See E.J. Dionne, Jr., After 12 Years of Conservatism, a New Era Emerges, Wash. Post, Nov. 4, 1992, at A21.

168 The Supreme Court's protection of aliens stems at least in part from their lack of political representation. See Gerald M. Rosberg, The Protection of Aliens from Discriminatory Treatment by the Federal Government, 1977 Sup. Ct. Rev. 275, 309 ("Given the exclusion of aliens from the political process, it is . . . reasonable for the Court to demand a special showing from the state if it is to classify on the basis of alienage.").

169 See Landon v. Plasencia, 459 U.S. 21, 32 (1982) (holding that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence," he or she gains increased constitutional status and protection); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (internal citations omitted) (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950)); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931); Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

170 See, e.g., Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976) (using equitable estoppel to preclude deportation of alien who violated immigration statutes upon misrepresentation by INS officials); Eskite v. District Dir., INS, 901 F. Supp. 530, 538 (E.D.N.Y. 1995) (holding that due process violation provides evidence of "affirmative misconduct" required for equitable estoppel).

171 The question of citizenship as a right certainly is controversial, but the Ninth Circuit's decision in United States v. Ahumada-Aguilar, No. 96-30065, 1999 U.S. App. Lexis 20964 (9th Cir. Sept. 2, 1999), assumed such a right in granting the remedy that it did. See id. at *2. Similarly, those members of the *Miller* Court willing to grant the relief Miller sought also seemed inclined to recognize a right of sorts in order to justify such a remedy. See supra notes 74-78 and accompanying text (discussing *Miller* decision).

172 See Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984) (finding that Kansas City, Missouri, School District operated segregated system and ordering desegregation).

zenship to remedy equal protection violations in the citizenship context.

Chief Justice Warren asserted that citizenship is "the right to have rights."[173] Whether technically accurate or merely rhetorical, his assertion suggests that discriminatory denial of citizenship represents the ultimate equal protection violation, for denial of citizenship both impinges on an applicant directly and implicates a host of other rights.[174] From this perspective, the integrity of the proposition that all persons who encounter the law should be regarded equally depends on the idea that the provision of this most central right is not made in a discriminatory fashion.[175] Even Justice Scalia admits of the possibility of the "rare case in which the alleged basis of discrimination is so outrageous" that the strictures of the plenary power doctrine "could be overcome."[176] With fundamental rights and notions of equal protection at stake, blatant discrimination in citizenship—the gender distinctions that Lorelyn Miller faced under § 1409, for example—surely qualifies under the "rare case" mantra and deserves the equitable relief that such a mantra could provide.

CONCLUSION

Without the remedial power that stems from modern equity, courts are less able to fulfill their duty to ensure fidelity to constitutional norms. Under traditional application of plenary power, the only protection citizenship applicants have against discriminatory treatment at the hands of government is Congress's prohibition of such behavior.[177] As *Miller* reveals, that prohibition is less than adequate in practice,[178] and the prohibition itself is merely statutory. Such limited protection is antithetical to the Court's role in protecting constitutional rights, as the development of modern equity in other equal protection contexts makes abundantly clear.

Justice Scalia concluded his concurrence in *Miller* with a reiteration of the essence of the plenary power doctrine taken from *Fiallo*—"[w]e are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived

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173 Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

174 See discussion supra notes 92-97 and accompanying text (discussing implications of alienage on rights).

175 In other words, society itself might suffer a harm from allowing its most central right to be laden with discriminatory underpinnings.

176 Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 947 (1999).

177 See supra note 28 and accompanying text (discussing INA § 311 prohibition on discrimination on basis of race, gender, or marital status).

178 See supra note 28 (discussing inapplicability of INA § 311 in *Miller* because Lorelyn Miller's own gender not relevant).

national interests"[179]—and added the admonition that "[f]ederal judges may not decide what those national interests are, and what requirements for citizenship best serve them."[180] While the role of the judiciary is not—and should not be—to lead a legislative policy forum, the Constitution itself presents a set of overriding national interests, one of which is an interest in equal protection for all persons subject to its jurisdiction. *Miller v. Albright* marks a shift away from the plenary power doctrine and toward a theory of naturalization more compatible with equal protection principles. Under this new theory—and buttressed by modern equity—a court, such as the panel in *Ahumada-Aguilar*, confronted with a discriminatory naturalization statute would have a doctrinal base from which to take whatever steps are needed to provide relief, even if this relief includes the conferral of citizenship.

[179] Fiallo v. Bell, 430 U.S. 787, 795 n.6, cited in Miller v. Albright, 118 S. Ct. 1428, 1449 (1998) (Scalia, J., concurring in judgment).

[180] *Miller*, 118 S. Ct. at 1449 (Scalia, J., concurring in judgment).