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## COMMENT: Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar

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# COMMENT: Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar

## **Keywords**

Marriage law, immigration law

# UNTIL THE PLENARY POWER DO US PART: JUDICIAL SCRUTINY OF THE DEFENSE OF MARRIAGE ACT IN IMMIGRATION AFTER *FLORES-VILLAR*

JESSICA PORTMESS\*

*The Defense of Marriage Act (DOMA) effectively bars a U.S. citizen from sponsoring a foreign national same-sex spouse to immigrate to the United States. The plenary power doctrine—a standard of extraordinary deference to the political branches in immigration—may hinder judicial scrutiny of DOMA in the immigration context. In the past two decades, and most recently in Flores-Villar v. United States, the Supreme Court has failed to establish boundaries of judicial deference in immigration cases; however, dissents throughout the Court’s plenary power case law illuminate possible limitations on the doctrine’s scope.*

*This Comment argues that courts should adopt a limited substantive framework that confines plenary power deference to four substantive areas of immigration law: (1) admission, (2) removal, (3) naturalization, and (4) immigration policy distinctions. When determining whether a case involves one of these four substantive areas, courts should apply Justice O’Connor’s logically prior standard set out in her dissent in Nguyen v. INS. Employing this limited substantive framework and standard, DOMA is likely beyond the scope of plenary power deference. This Comment concludes that DOMA*

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*should thus be subject to traditional standards of constitutional scrutiny even in the immigration context.*

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#### INTRODUCTION

Despite his fifteen-year relationship with a U.S. citizen,<sup>1</sup> Paul Wilson Dorman was facing deportation in early 2011 after the Board of Immigration Appeals (BIA) affirmed the denial of his immigrant visa petition.<sup>2</sup> Mr. Dorman, an Irish national who arrived in the

1. Editorial, *Couple Without a Country*, WASH. POST, Aug. 16, 2011, at A14.

2. See Julia Preston, *Judge Gives Immigrant in Same-Sex Marriage a Reprieve from Deportation*, N.Y. TIMES, May 7, 2011, at A12 (reporting that the BIA denied Mr.

United States in 1996,<sup>3</sup> joined in a civil union with his U.S. citizen, same-sex partner in New Jersey in 2009.<sup>4</sup> Mr. Dorman now seeks to immigrate to the United States based on this relationship<sup>5</sup>—an immigration benefit routinely extended to heterosexual couples.<sup>6</sup> A formidable obstacle currently stands in his way: the Defense of Marriage Act<sup>7</sup> (DOMA) precludes recognition of same-sex unions when interpreting any congressional act or administrative regulation.<sup>8</sup> On April 26, 2011, however, Mr. Dorman’s case showed a glimmer of hope when Attorney General Eric Holder vacated the BIA’s decision ordering Mr. Dorman’s deportation.<sup>9</sup> Attorney General Holder remanded the case for the BIA to determine “whether and how the constitutionality of DOMA [was] presented” in Mr. Dorman’s case, and whether Mr. Dorman’s civil union could provide relief from deportation notwithstanding DOMA’s federal definition of marriage.<sup>10</sup>

Mr. Dorman’s experience is emblematic of the obstacles facing same-sex partners seeking to immigrate to the United States based on relationships with U.S. citizens. With six states and the District of Columbia now issuing marriage licenses to same-sex couples, and five states recognizing same-sex civil unions,<sup>11</sup> DOMA affects an estimated

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Dorman’s petition because his same-sex relationship was not recognized under DOMA).

3. Editorial, *supra* note 1.

4. Preston, *supra* note 2.

5. *Id.*

6. See Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 546 (2010) (explaining that most foreign nationals are permitted to immigrate on the basis of family unity).

7. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

8. See 1 U.S.C. § 7 (2006) (defining “marriage” as “only a legal union between one man and one woman as husband and wife”); see also Suzanne Gamboa, *Holder Intervenes in Gay Man’s Deportation Case*, SEATTLE TIMES (May 5, 2011, 4:31 PM), [http://seattletimes.nwsources.com/html/nationworld/2014974446\\_apusgayimmigrants.html](http://seattletimes.nwsources.com/html/nationworld/2014974446_apusgayimmigrants.html) (stating that the BIA affirmed the deportation order against Paul Wilson Dorman on the basis of DOMA, which prohibited recognition of the civil union with his male partner).

9. See Dorman, 25 I. & N. Dec. 485 (A.G. 2011) (remanding the case to the BIA to decide the merits notwithstanding DOMA’s federal definition of marriage).

10. *Id.*

11. See, e.g., Ill. Religious Freedom Protection and Civil Union Act, 750 ILL. COMP STAT. 75/10 (2012) (defining “civil union” as a “legal relationship between 2 persons” regardless of sex); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (declaring the bar on same-sex marriage unconstitutional under the equal protection clause of the Iowa Constitution); *Defining Marriage: Defense of Marriage Act and Same-Sex Marriage Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated June 2012) (identifying Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and the District of Columbia as states

35,000 U.S. citizens whose foreign national same-sex partners cannot use their relationship to remain in the United States.<sup>12</sup> The executive branch, however, has recently indicated that it will no longer defend DOMA in the courtroom,<sup>13</sup> and binational same-sex couples are seeing similar glimmers of hope in immigration cases across the country.<sup>14</sup>

While Attorney General Holder's decision may signal a step towards recognizing same-sex marriages in the immigration context, the Obama administration has far from abandoned its duty to enforce DOMA.<sup>15</sup> At the same time that Attorney General Holder proclaimed in a February 2011 letter to Congress that the executive branch will no longer defend DOMA in the courts, he confirmed the commitment to enforce DOMA at the administrative agency level,<sup>16</sup> which includes agency adjudication of immigrant visa petitions. Until DOMA is repealed or a challenge to its application in immigration cases succeeds in court, it will continue to effectively bar same-sex partners from immigrating on the basis of relationships with U.S. citizens.<sup>17</sup> With courts uncertain of how Congress's immigration and

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that issue marriage licenses to same-sex couples and Delaware, Hawaii, Illinois, New Jersey, and Rhode Island as states that allow civil unions between same-sex couples).

12. See Titshaw, *supra* note 6, at 540 (stating that this estimate reflects the number of U.S. citizens living in the United States with foreign national same-sex partners).

13. See Letter from Eric H. Holder, Att'y Gen. of the U.S., to John A. Boehner, Speaker, United States House of Representatives (Feb. 23, 2011) [hereinafter Letter from Att'y Gen.], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (concluding that DOMA fails to withstand intermediate scrutiny, the standard the executive branch argues should apply to classifications based on sexual orientation).

14. See Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, (June 30, 2011), <http://www.nytimes.com/2011/06/30/us/30immig.html> (describing the cancellation of the deportation of a foreign national who was denied legal residency as the spouse of a U.S. citizen because of DOMA).

15. See generally Julia Preston, *Justice Dept. to Continue Policy Against Same-Sex Marriage*, N.Y. TIMES, May 9, 2011, at A15 (explaining that according to the Attorney General's spokesperson, Attorney General Holder intervened in the Dorman case to compel the BIA to "decide issues he felt had been overlooked," but the executive will continue to enforce DOMA); Amy Taxin, *Green Cards for Gay Couples?*, HUFFINGTON POST (June 6, 2011, 1:22 AM), [http://www.huffingtonpost.com/2011/06/06/green-cards-for-gay-couples\\_n\\_871818.html](http://www.huffingtonpost.com/2011/06/06/green-cards-for-gay-couples_n_871818.html) (reporting that in the wake of the Attorney General's intervention in the *Dorman* case, Immigration and Customs Enforcement has vowed to enforce DOMA until the law is repealed or struck down by the courts, leaving same-sex couples confused about what to expect in the immigration process). But see Gamboa, *supra* note 8 (reporting that some, like Dorman's attorney, view the Attorney General's intervention as a "far-reaching victory" and evidence of the Obama administration's "commitment to nullify" DOMA).

16. Letter from Att'y Gen., *supra* note 13.

17. See Titshaw, *supra* note 6, at 541 (stating that DOMA has "closed the door to same-sex marriage recognition under the [Immigration and Nationality Act] for now"). The Immigration and Nationality Act is the primary legislation that governs

naturalization authority influences judicial scrutiny of DOMA in immigration cases, these cases are excluded from the dialogue on DOMA's constitutionality.<sup>18</sup>

For over a century, the Supreme Court has understood Congress to have “absolute and unqualified” power in immigration.<sup>19</sup> The Court has historically interpreted this “plenary power” to limit judicial review of immigration statutes and has created diluted standards of constitutional analysis in deference to Congress.<sup>20</sup> In recent decades, the Court has consistently avoided confronting the plenary power doctrine directly.<sup>21</sup> The Court most recently deflected the question of the doctrine's modern boundaries with its decision in *Flores-Villar v. United States*,<sup>22</sup> affirming the U.S. Court of Appeals for the Ninth Circuit's deference to Congress and refusing to clarify the standard of scrutiny that applies in challenges to immigration statutes.<sup>23</sup> Mr. Dorman's case and similar cases challenging DOMA's application in immigration provide the latest opportunity for lower courts to clarify the relationship between judicial scrutiny of DOMA and Congress's plenary power in immigration. Lower courts would benefit from the Supreme Court's guidance in questions as to the scope of the plenary power doctrine—guidance the Court failed to provide in *Flores-*

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U.S. immigration and citizenship. See Immigration and Nationality Act of 1952 (INA) Pub. L. No. 82-414, § 212, 66 Stat. 163, 182–87 (1952) (codified as amended in scattered sections of 8 U.S.C. (2006)).

18. See Titshaw, *supra* note 6, at 544 n.15 (questioning whether DOMA's federal definition of marriage applies to immigration through Congress's plenary power). But see Jordana Lynne Mosten, Note, *Imagining Immigration Without DOMA*, 21 STAN. L. & POL'Y REV. 383, 384 (2010) (assuming that Congress's authority to exclude same-sex spouses “is not open to legal challenge” because Congress can bar same-sex immigration through DOMA due to the plenary power doctrine).

19. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (describing Congress's “absolute and unqualified” power to prohibit the entrance of or to expel foreigners).

20. See, e.g., *Miller v. Albright*, 523 U.S. 420, 455 (1998) (Scalia, J., concurring in the judgment) (defining the plenary power doctrine as the recognition of the political branches' long-established power to expel or exclude aliens free from judicial control); see also *infra* Part I.A.3 (discussing the deferential standards applied in immigration cases that are otherwise foreign to traditional constitutional analysis).

21. See *Nguyen v. INS*, 533 U.S. 53, 71 (2001) (concluding that it was unnecessary to determine whether a lesser degree of scrutiny was warranted by Congress's plenary power because the statute in question satisfied the appropriate level of scrutiny); *Miller*, 523 U.S. at 432 (narrowing the constitutional question before the Court to the extent that the Court did not need to consider the plenary power doctrine's influence on the extent of judicial review).

22. 131 S. Ct. 2312 (2011) (per curiam). The *Flores-Villar* Court affirmed the U.S. Court of Appeals for the Ninth Circuit's decision to dismiss an inquiry of the appropriate level of scrutiny in matters of immigration and citizenship because the statute in question satisfied intermediate scrutiny. *Id.*

23. See *infra* Part I.A.3 (discussing a series of immigration cases where the Supreme Court avoided clarifying the plenary power doctrine's boundaries, including the Court's most recent decision in *Flores-Villar*).

*Villar*<sup>24</sup> or with its denial of certiorari in the similar case of *Johnson v. Whitehead*.<sup>25</sup> This Comment argues that the plenary power doctrine should be limited in scope to questions of admission, removal, naturalization, and immigration policy distinctions and that Congress did not enact DOMA using its plenary power because DOMA does not fit within this limited substantive framework. Thus, plenary power deference cannot shield DOMA from traditional constitutional standards of scrutiny because Congress did not use its immigration power to enact DOMA.

Part I analyzes the plenary power precedent and the evolution of that power throughout the history of the Supreme Court's articulation of the doctrine. This Part also discusses DOMA's application in the immigration context, particularly at the immigrant visa petition stage, and how it serves as a practical bar to the immigration of binational same-sex couples.<sup>26</sup> Part II illuminates the limits of the plenary power doctrine generally and proposes a limited substantive framework that confines the doctrine's scope to questions of admission,<sup>27</sup> removal,<sup>28</sup> naturalization,<sup>29</sup> and immigration policy

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24. *Flores-Villar*, 131 S. Ct. at 2313 (affirming the Ninth Circuit's deferential standard without issuing an opinion).

25. American University, Washington College of Law's UNROW Human Rights Impact Litigation Clinic filed a petition for Writ of Certiorari to the Supreme Court raising an equal protection challenge in a case similar to *Miller, Nguyen, and Flores-Villar*. See Petition for Writ of Certiorari at \*i, *Johnson v. Whitehead*, 647 F.3d 120 (4th Cir. 2011) (No. 11-378). The *Johnson* petition challenged an immigration statute that imposes different requirements on U.S. citizen mothers and fathers for conferring citizenship on illegitimate children. *Id.* at \*3-4. The Court denied the petition. *Johnson v. Whitehead*, 132 S. Ct. 1005 (2012). Although the Supreme Court does not currently have any DOMA challenges on its docket, the prominent immigration legal organization, Immigration Equality, has recently filed suit in federal district court challenging DOMA in the immigration context. See Petition for Writ of Mandamus, *Blesch v. Holder*, No. CV 12-1578 (E.D.N.Y. filed Apr. 2, 2012); see also Julia Preston, *Noncitizens Sue Over U.S. Gay Marriage Ban*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/us/noncitizens-sue-over-us-defense-of-marriage-act.html> (noting the lawsuit brought by Immigration Equality on behalf of five same-sex couples). The suit may eventually give the Supreme Court an opportunity to remedy its failure to confront the plenary power in *Flores-Villar*.

26. "Immigration" is used broadly to encompass all facets of immigration law, including the benefits extended to U.S. citizens and foreign nationals in the immigration context. This Comment argues that a nuanced understanding of immigration law is possible and necessary in order to understand the limits of DOMA's application to same-sex couples involving a foreign national.

27. "Admission" is a term of art in immigration law and is defined as the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(43), 8 U.S.C. § 1101(a)(13)(A) (2006). Prior to the 1996 amendments to the INA, aliens who were considered not to have "entered" the United States were subject to exclusion proceedings while aliens considered to have "entered" were subject to deportation proceedings. See *Landon v. Plasencia*, 459 U.S. 21, 25 (1982) (explaining the differences between deportation and exclusion proceedings). With the 1996 amendments, the "entry" concept was



distinctions. This part also argues that DOMA provides a specific illustration of the plenary power's limits because its influence on certain portions of the immigration process is beyond the doctrine's scope. Part III discusses the limited substantive framework's implications for judicial scrutiny and argues that traditional constitutional standards, like strict or intermediate scrutiny, should apply in challenges to DOMA in immigration.

## I. BACKGROUND

### A. *Defining Congress's Plenary Power in Immigration*

The U.S. Constitution does not explicitly reference Congress's power to legislate generally in immigration.<sup>30</sup> The Constitution's reference to Congress's authority to legislate in immigration is limited to Article I, Section 8, which gives Congress the authority to "establish a uniform Rule of Naturalization."<sup>31</sup> The only remaining reference to Congress's immigration and naturalization authority is the Citizenship Clause of the Fourteenth Amendment, which states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."<sup>32</sup>

Absent explicit authority under the Constitution, Congress's power to legislate in immigration is rooted in more than a century of case law.<sup>33</sup> The Supreme Court has consistently held that the Congress has plenary power to legislate in immigration.<sup>34</sup> Supreme Court

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replaced by "admission" and the grounds of exclusion were replaced by grounds of inadmissibility. *See* INA § 212 (containing the grounds of inadmissibility).

28. *See* INA § 237 (setting forth the grounds of deportability for which an alien can be removed from the United States after being admitted). This Comment uses "removal" and "deportation" interchangeably.

29. *See* *United States v. Wong Kim Ark*, 169 U.S. 649, 686 (1898) (defining naturalization as the "admission of aliens to citizenship by judicial proceedings").

30. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 856 (1987) (noting that the power to regulate immigration is not one of Congress's enumerated powers).

31. U.S. CONST. art. I, § 8, cl. 4.

32. U.S. CONST. amend. XIV, § 1.

33. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (acknowledging that the federal government's "broad, undoubted power" over immigration rests in part on constitutional authority); *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (establishing a standard of judicial deference to Congress's legislation in immigration).

34. While this Comment does not seek to catalog every plenary power decision, many scholars have engaged in extensive analyses of the evolution of the plenary power doctrine throughout history. *See, e.g.,* Henkin, *supra* note 30, at 885–86 (arguing that the doctrine established by a century of plenary power case law has come back to haunt us, and that Congress's plenary power in immigration must be subject to constitutional limitations); Stephen H. Legomsky, *Immigration Law and the*

Justice Frankfurter articulated the weight of the plenary power precedent when he wrote, in *Galvan v. Press*,<sup>35</sup> that “there is not merely ‘a page of history’ . . . but a whole volume.”<sup>36</sup>

1. *The foundation of the plenary power doctrine: Unqualified deference to Congress*

The Supreme Court, in 1889, first articulated what came to be known as the plenary power doctrine in *Chae Chan Ping v. United States*.<sup>37</sup> In *Chae Chan Ping*, the Court upheld an order denying entry to a Chinese foreign national based on a congressional act excluding all Chinese laborers.<sup>38</sup> The Court articulated Congress’s broad authority in immigration and established a standard of extraordinary deference to Congress that would become the hallmark of plenary power case law.<sup>39</sup> The Court justified this deference on the grounds that decisions to exclude foreigners are deeply rooted in the nation’s sovereign powers and directly related to national interests and defense.<sup>40</sup> The Court announced Congress’s broad authority to bar a foreign national’s entry when “the public interest requires such exclusion.”<sup>41</sup> In deferring to Congress, the Court limited judicial review in decisions of exclusion.<sup>42</sup> Thus, the Court in *Chae Chan Ping* gave life to the plenary power doctrine of deference to Congress and limited judicial review in immigration cases.

During the four years following *Chae Chan Ping*, the Supreme Court twice returned to the plenary power doctrine. First, in *Nishimura Ekiu v. United States*,<sup>43</sup> the Supreme Court affirmed Congress’s power, free from judicial scrutiny, to set rules for the admission of foreign

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*Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260–95 (analyzing the various theories and externalities underlying the Supreme Court’s plenary power jurisprudence); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560–75 (1990) (analyzing the distinction between constitutional and subconstitutional norms in immigration law to explain the peculiar development of constitutional analysis in plenary power precedent).

35. 347 U.S. 522 (1954).

36. *Id.* at 530–31.

37. 130 U.S. 581 (1889).

38. *Id.* at 582, 611.

39. See Henkin, *supra* note 30, at 858–59 (explaining that although the Court in *Chae Chan Ping* did not say that the power to regulate immigration was free from constitutional constraints, the Court’s holding and dicta have been interpreted to mean that Congress’s power to regulate immigration is free from such constraints).

40. *Chae Chan Ping*, 130 U.S. at 606–07; see also Legomsky, *supra* note 34, at 274 (explaining that by situating the decision within the concept of “sovereignty,” the Court did not need to justify the plenary power with any constitutionally enumerated authority).

41. *Chae Chan Ping*, 130 U.S. at 606–07.

42. *Id.*

43. 142 U.S. 651 (1892).

nationals.<sup>44</sup> In upholding an immigration inspector's decision to deny admission to a Japanese national, the Court insulated the discretionary decisions of executive officers from judicial review.<sup>45</sup>

Second, the Supreme Court further extended the plenary power doctrine to decisions of expulsion in *Fong Yue Ting v. United States*.<sup>46</sup> In *Nishimura Ekiu* and *Fong Yue Ting*, the Court again justified Congress's plenary power in terms of national sovereignty.<sup>47</sup> The decision in *Fong Yue Ting* marked an important milestone in plenary power jurisprudence, however, as the Court distinguished between the protections that might be afforded to aliens seeking entry to the United States and aliens already within the United States.<sup>48</sup> This distinction caused tension throughout the plenary power case law that followed and led to the Court's recognition, early in the line of plenary power cases, of a procedural due process limitation.<sup>49</sup>

In light of this distinction between the rights of aliens outside the United States and aliens already within the United States, the Court acknowledged in dicta in the 1903 case of *Yamataya v. Fisher*<sup>50</sup> that a foreign national within the United States should be afforded certain procedural due process protections.<sup>51</sup> The Court held, however, that in the case of a foreign national seeking entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."<sup>52</sup> Foreshadowing the ongoing conflict between the plenary power doctrine and traditional constitutional safeguards, the Court concluded that while the plenary power prevented judicial review of substantive due process issues,<sup>53</sup> deportation proceedings may afford foreign nationals who are

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44. *Id.* at 659.

45. *Id.* at 660.

46. 149 U.S. 698, 724 (1893).

47. *Id.* at 711; *Nishimura Ekiu*, 142 U.S. at 659.

48. See *Fong Yue Ting*, 149 U.S. at 724 (stating that foreign nationals, while in the United States, are entitled to the safeguards of the Constitution for their rights of person, property, and civil and criminal liability, but if they remain aliens, they are subject to removal whenever Congress deems their removal "necessary or expedient for the public interest").

49. See *infra* Part I.A.2 (discussing the procedural due process exception to the plenary power doctrine).

50. 189 U.S. 86 (1903).

51. See *id.* at 100 (concluding that immigration legislation does not "necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right").

52. *Id.* at 98.

53. See *id.* at 97–98 (invoking the plenary power precedent to justify limits on the judicial review of procedures Congress establishes for determining whether aliens will be permitted to enter the United States).

present in the United States some procedural due process protections.<sup>54</sup>

The Court thus laid the foundation of the plenary power doctrine with unqualified justifications of state sovereignty, foreign relations, peace, and security.<sup>55</sup> Early plenary power cases reflect “an absolute ‘hands off’ approach by the Court”<sup>56</sup> and have limited the application of traditional constitutional standards in immigration law.<sup>57</sup> By establishing the plenary power doctrine with sweeping statements of sovereignty and generalized references to the field of immigration, the Court erected a formidable obstacle to constitutional challenges involving immigration.

## 2. *The evolution of the plenary power doctrine: “Limited” judicial review*

Throughout most of the twentieth century, courts struggled to address constitutional challenges in immigration cases within the constraints of the firmly entrenched plenary power doctrine.<sup>58</sup> By the next wave of plenary power cases in the 1950s, the nineteenth-century plenary power case law guided the Supreme Court through stare decisis, sometimes seemingly to the Court’s chagrin.<sup>59</sup> By the 1970s, however, the Court began to routinely review certain constitutional challenges in recognition that judicial review, albeit “limited,” was appropriate in immigration cases.<sup>60</sup>

In the 1950 case *United States ex rel. Knauff v. Shaughnessy*,<sup>61</sup> the Supreme Court affirmed the limited judicial review of exclusion

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54. See *id.* at 101 (stating that aliens who are present in the United States and who have become a “part of its population” are entitled to an opportunity to be heard before they are deported).

55. See *Fong Yue Ting v. United States*, 149 U.S. 698, 705–06 (1893) (justifying the “right of a nation to expel or deport foreigners” as inherent to its sovereignty and incidental to Congress’s control of matters of foreign relations, peace, and security).

56. *Fiallo v. Bell*, 430 U.S. 787, 805 (1977) (Marshall, J., dissenting).

57. See Legomsky, *supra* note 34, at 260 (stating that plenary power precedent has established that “immigration is an area in which the normal rules of constitutional law simply do not apply”); Motomura, *supra* note 34, at 613 (arguing that the “most fundamental problem” caused by the plenary power doctrine is that it has “seriously impaired the process of dialogue” on the role of constitutional standards in immigration law).

58. See Legomsky, *supra* note 34, at 289–92 (outlining the effect of changing political forces on the nation and the Court’s attitude toward immigration throughout the twentieth century). Stephen Legomsky was appointed Chief Counsel of United States Citizenship and Immigration Services in 2011.

59. See *Galvan v. Press*, 347 U.S. 522, 530–31 (1954) (lamenting the fact that the “slate is not clean” for the exercise of judicial discretion in challenges to immigration statutes); see also Legomsky, *supra* note 34, at 285 (“The more support the plenary power doctrine accumulated, the more entrenched it became.”).

60. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (considering a First Amendment challenge to Congress’s plenary power in the area of immigration).

61. 338 U.S. 537 (1950).

decisions, upholding the exclusion of the alien wife of a U.S. citizen.<sup>62</sup> The Court reinforced the idea that “[t]he exclusion of aliens is a fundamental act of sovereignty” and extended judicial deference to executive officer determinations enforcing Congress’s rules of admissibility.<sup>63</sup> Justice Frankfurter, in his dissenting opinion, argued that the Court should distinguish between immigration statutes that affect only aliens and statutes that affect the rights of U.S. citizens.<sup>64</sup> Despite this potential distinction, the Court ultimately yielded to Congress’s plenary power in exclusion.<sup>65</sup> Thus, *Knauff* reinforced the Court’s deference to executive branch decisions enforcing the rules Congress established for admissibility.<sup>66</sup>

The Supreme Court further strengthened Congress’s absolute plenary power in questions of admission and exclusion in *Shaughnessy v. United States ex rel Mezei*.<sup>67</sup> The Court—acknowledging the procedural due process exception to the plenary power doctrine—reasoned that while aliens in the United States may be expelled only after proceedings that conform to traditional standards of fairness, “an alien on the threshold of initial entry stands on different footing.”<sup>68</sup> The Court thus concluded that Congress, not the judiciary, has the power to dictate an alien’s right to enter the United States.<sup>69</sup>

In *Harisiades v. Shaughnessy*<sup>70</sup> and *Galvan v. Press*<sup>71</sup>—two 1950s cases involving the removal of alleged members of the Communist Party—the Supreme Court once again acknowledged the procedural due process exception in removal proceedings but ultimately recognized its own limited role in reviewing immigration statutes.<sup>72</sup>

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62. *Id.* at 543.

63. *See id.* at 547 (upholding an executive branch decision to deny an alien’s exclusion without a hearing despite the alien’s marriage to a U.S. citizen).

64. *See id.* at 549–50 (Frankfurter, J., dissenting) (contending that a benefit extended to a U.S. citizen cannot be taken away without a hearing).

65. *Id.* at 543 (majority opinion).

66. *Id.*

67. 345 U.S. 206 (1953).

68. *Id.* at 212.

69. *See id.* at 210 (“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.”). *But see id.* at 217 (Black, J., dissenting) (taking issue with the extent to which the majority deferred to Congress in matters of exclusion and arguing that the alien’s exclusion did not deprive him of constitutional rights despite the practical effect of which being two years of detention on Ellis Island).

70. 342 U.S. 580 (1952).

71. 347 U.S. 522 (1954).

72. *See id.* at 531 (recognizing that executive branch officers must respect procedural due process in the enforcement of immigration policies while acknowledging that the formulation of those policies is trusted exclusively to Congress); *Harisiades*, 342 U.S. at 599 (Douglas, J., dissenting) (arguing that a

In a thorough defense of the justifications for the distinct treatment of aliens in the United States and aliens seeking entry to the United States, the Court in *Harisiades* reasoned that by retaining the immunities of foreign citizenship and thus avoiding the full burdens of allegiance to the United States, aliens had no right to remain in the United States.<sup>73</sup> This time, Justice Frankfurter concurred and summarized the mantra that had become the plenary power doctrine:

The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.<sup>74</sup>

With this deference to Congress's decision to exclude all past and present members of the Communist Party, the Court rejected the claims of the resident alien petitioners that their removal violated due process.<sup>75</sup>

The Court subtly changed its tone when it confronted a similar situation two years later in *Galvan*. There, the Court was reluctant to invoke the plenary power doctrine to affirm the removal of a long-time permanent resident because of a brief prior membership in the Communist Party.<sup>76</sup> Justice Frankfurter, writing for the majority, explained that an alien is a "person" as far as the Due Process Clause is concerned and that the executive branch must respect the procedural safeguards of due process in its enforcement of immigration laws.<sup>77</sup> In addressing the conflict between Congress's plenary power and its constitutional constraints, Justice Frankfurter acknowledged that absent precedent, the Due Process Clause could qualify Congress's discretion in regulating immigration.<sup>78</sup> Unable to conclude that Congress's decision to remove Communist Party members was unconstitutional because of plenary power precedent,

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resident alien has a right to property and liberty and is entitled to due process protections).

73. *Harisiades*, 342 U.S. at 585–86.

74. *Id.* at 596–97 (Frankfurter, J., concurring).

75. *Id.* at 591 (majority opinion).

76. *See Galvan*, 347 U.S. at 523–24, 530, 532 (suggesting that plenary power precedent influences the due process protections that might otherwise be afforded to foreign nationals but ultimately affirming the deportation of a Mexican citizen who had been living in the United States for approximately thirty-six years before an immigration officer ordered him deported).

77. *See id.* at 530 ("Much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . [b]ut the slate is not clean.").

78. *Id.* at 530–31.

Justice Frankfurter noted that Congress's exclusive authority to formulate immigration policy "ha[d] become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."<sup>79</sup>

The plenary power doctrine was without a doubt "firmly imbedded" in the Court's jurisprudence by the 1970s.<sup>80</sup> The Court's characterization of the doctrine, however, as it addressed increasingly complex challenges to immigration statutes, has led to confusion regarding the doctrine's boundaries or, more accurately, the lack of boundaries.<sup>81</sup> Unable to firmly establish the limits of the plenary power doctrine but forced to acknowledge the tension between constitutional protections and the plenary power, the Court established "unusual standards" for constitutional challenges in immigration law.<sup>82</sup>

For instance, the Court's decision to uphold the exclusion of a prominent Marxist scholar, Ernest Mandel, in *Kleindeinst v. Mandel*,<sup>83</sup> rested on Congress's long-established plenary power to exclude and prescribe terms of admission free from judicial intervention.<sup>84</sup> In *Kleindeinst*, the Court addressed a claim that excluding Mandel violated the First Amendment rights of U.S. citizens who would have attended his scholarly presentations.<sup>85</sup> Rather than relying on the traditional constitutional standard that the government can only restrict First Amendment rights if the restriction is necessary to further a compelling government interest,<sup>86</sup> the Court reasoned that the executive branch exercised its power to exclude Mandel based on a "facially legitimate and bona fide" rationale.<sup>87</sup> Thus, because of the plenary power doctrine's influence, "facially legitimate and bona fide" became the Court's standard of scrutiny for constitutional challenges to immigration statutes.<sup>88</sup>

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79. *Id.* at 531.

80. See Legomsky, *supra* note 34, at 291 (stating that beginning in the 1960s, the plenary power doctrine left little room to litigate constitutional challenges to immigration legislation).

81. See *id.* at 306–07 (noting that courts, anxious to establish boundaries to the plenary power doctrine, have devised ways to circumvent plenary power precedent).

82. See *Kleindienst v. Mandel*, 408 U.S. 753, 777 (1972) (Marshall, J., dissenting) (arguing that "merely 'legitimate'" governmental interests are not sufficient to override First Amendment rights).

83. 408 U.S. 753 (1972).

84. *Id.* at 766.

85. *Id.* at 754–60.

86. *Id.* at 777 (Marshall, J., dissenting) (disagreeing with the majority's "unusual standard" (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring))).

87. *Id.* at 770 (majority opinion).

88. See generally Motomura, *supra* note 34 (discussing the increasing application

An important constitutional change took place during this era of the Court's plenary power jurisprudence, which could explain the subtle shift in the Court's analysis from avoidance of constitutional questions to the use of "unusual" constitutional standards in immigration cases.<sup>89</sup> The evolution of the standards of scrutiny applied in equal protection claims, especially the heightened scrutiny applied to classifications based on alienage, was the backdrop for the Court's decisions in the 1970s.<sup>90</sup> Despite these developments, the plenary power doctrine continued to play an influential role. For example, in *Graham v. Richardson*,<sup>91</sup> the Court applied heightened scrutiny to strike down Arizona and Pennsylvania laws prohibiting aliens from receiving welfare benefits.<sup>92</sup> In contrast, the Court in *Mathews v. Diaz*<sup>93</sup> established a different standard for federal law, where plenary-power-style deference was maintained.<sup>94</sup> In distinguishing *Mathews* from *Graham*, the Court reasoned that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions controlling the federal power over immigration and naturalization.<sup>95</sup> The Court held that there was no reason to treat aliens differently from citizens at the state level.<sup>96</sup> At the federal level, however, the Court concluded that the political branches' need to respond flexibly to changing global, political, and economic conditions justifies different treatment.<sup>97</sup>

Since the 1970s, the Court's absolute avoidance of constitutional questions in immigration, as exemplified in *Chae Chan Ping*, has slowly eroded, but the Court has continued to afford broad deference

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of "subconstitutional" and "phantom norms" in immigration cases, which hinder the dialogue about traditional constitutional norms in the immigration context).

89. Compare *Miller v. Albright*, 523 U.S. 420, 428–45 (1998) (plurality opinion) (engaging in equal protection analysis to uphold a statute imposing different requirements based on gender), with *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (concluding that a congressional act aimed at excluding Chinese laborers was constitutional without engaging in equal protection analysis).

90. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (reasoning that classifications based on alienage are subject to "close judicial scrutiny").

91. 403 U.S. 365 (1971).

92. *Id.* at 376. In addition to finding that the laws violated equal protection, the Court also held that the laws encroached on Congress's exclusive power over immigration. *Id.* at 376–78. This case arose from a class action case that argued the restriction violated the Equal Protection Clause and was preempted by the Social Security Act. *Id.* at 368. The Court noted that the power to control immigration is vested solely in the federal government. *Id.* at 379.

93. 426 U.S. 67 (1976).

94. See *id.* at 86–87 (upholding a Medicare eligibility statute requiring permanent residence of at least five years to qualify for Medicare benefits).

95. *Id.*

96. *Id.* at 85.

97. *Id.*



to Congress.<sup>98</sup> For instance, in the seminal plenary power case of *Fiallo v. Bell*,<sup>99</sup> the Court recognized its limited authority to review immigration legislation,<sup>100</sup> which some heralded as the Court's acknowledgment that the plenary power doctrine no longer functioned as a complete barrier to judicial review.<sup>101</sup> In a footnote, the *Fiallo* Court acknowledged a "limited judicial responsibility under the Constitution," even in Congress's legislation of admission and exclusion.<sup>102</sup> Despite these acknowledgements of restricted judicial review, the Court ultimately affirmed the influence of the plenary power doctrine.<sup>103</sup> In sum, despite indications throughout the twentieth century that the Court was willing to entertain constitutional challenges to immigration statutes, it was unable or unwilling to sidestep the enduring plenary power precedent.

### 3. *The modern plenary power doctrine: "Unusual standards" and avoidance*

In recent decades, the Supreme Court has continued to apply diluted constitutional standards to immigration cases even though it has accepted that Congress's plenary power is limited by the Constitution.<sup>104</sup> Rather than abandon the doctrine altogether, the Court has avoided confronting the doctrine's scope when reviewing constitutional challenges.

The Supreme Court creatively avoided the plenary power doctrine in 1998 when it decided *Miller v. Albright*.<sup>105</sup> In *Miller*, the Court addressed a gender-based equal protection challenge to a provision of the Immigration and Nationality Act (INA), which governed the acquisition of citizenship at birth by a child born out of wedlock outside the United States.<sup>106</sup> The provision contained different

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98. See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (noting that there are "important constitutional limitations" on Congress's plenary power); see also *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam) (affirming a Ninth Circuit decision that Congress has "virtually plenary power" in immigration).

99. 430 U.S. 787 (1977).

100. *Id.* at 792 (emphasis added).

101. See Motomura, *supra* note 34, at 608 (arguing that although the Court rejected the constitutional claim in *Fiallo* because of the plenary power doctrine, it left the "door slightly ajar" for judicial review).

102. *Fiallo*, 430 U.S. at 793 n.5.

103. See *infra* Part II.C (discussing the statute at issue in *Fiallo* and the plenary power of Congress in immigration policy decisions).

104. See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (construing an immigration statute to contain an implicit "reasonable time" limitation because allowing indefinite detention would "raise serious constitutional concerns"). See generally Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (arguing that *Zadvydas* helped set the stage for the abandonment of the plenary power doctrine).

105. 523 U.S. 420 (1998).

106. *Id.* at 424 (opinion of Stevens, J.).

requirements for illegitimate children of U.S. citizen mothers and illegitimate children of U.S. citizen fathers.<sup>107</sup> The Court ultimately decided that the petitioner lacked standing, but split on whether the statute violated the Equal Protection Clause under the Fifth Amendment.<sup>108</sup> Justice Stevens, in an opinion in which Chief Justice Rehnquist joined, wrote that “important” government interests supported the difference in statutory requirements and that the provision was “well tailored” to serve those interests.<sup>109</sup> In doing so, Justice Stevens applied a standard less demanding than the traditional constitutional analysis in gender-based classifications, which requires an exceedingly persuasive justification and narrow tailoring to a government objective.<sup>110</sup> In his dissent, Justice Breyer argued that instead of applying the plenary power doctrine to justify less stringent equal protection standards, the Court should distinguish between statutes that implicate the plenary power and those that are merely related to immigration or naturalization.<sup>111</sup> Justice Breyer explained that the case did not involve naturalization but rather a question of the conferral of citizenship at birth.<sup>112</sup> Thus, Justice Breyer maintained that the issue did not justify a deferential standard of review because it was beyond the scope of Congress’s plenary power in naturalization.<sup>113</sup>

Since the turn of the twenty-first century, Supreme Court case law has continued to suggest that the plenary power influences the standard of judicial review rather than justifies avoidance of constitutional questions altogether. In *Nguyen v. INS*,<sup>114</sup> the Court again confronted an equal protection challenge to gender-based

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107. *Id.* at 428.

108. Justice Stevens and Chief Justice Rehnquist concluded that the statute did not violate equal protection, *id.* at 445, while Justices O’Connor and Kennedy concluded that the petitioner lacked standing, *id.* at 451 (O’Connor, J., concurring in the judgment). Justices Scalia and Thomas also joined in the judgment. *Id.* at 452 (Scalia, J., concurring in the judgment). Justices Ginsburg, Souter, and Breyer dissented, arguing that the statute violated equal protection. *Id.* at 460 (Ginsburg, J., dissenting); *id.* at 472 (Breyer, J., dissenting).

109. *See id.* at 424, 438, 440 (opinion of Stevens, J.) (holding that the statute served a “valid” government interest of encouraging the development of a relationship between a citizen parent and child while the child is minor, as well as fostering ties between a foreign-born child and the United States).

110. *See* *United States v. Virginia*, 518 U.S. 515, 534 (1996) (concluding that the Virginia Military Institute’s gender-based admissions policy was unconstitutional for lack of an exceedingly persuasive justification); *see also Miller*, 523 U.S. at 472 (Breyer, J., dissenting) (arguing that the gender-based distinctions at question lacked the “exceedingly persuasive” support that traditional constitutional analysis requires).

111. *Miller*, 523 U.S. at 478–79 (Breyer, J., dissenting).

112. *Id.* at 478.

113. *Id.* at 478–79.

114. 533 U.S. 53 (2001).

classifications in citizenship statutes.<sup>115</sup> In determining that the statutes were consistent with the constitutional guarantees of equal protection, the majority, in a 5–4 decision, held that the statutes were justified by important government objectives and were substantially related to those objectives.<sup>116</sup> Justice Kennedy, writing for the majority, reasoned that there was no need to address the issue of the plenary power’s influence on the standards of constitutional review because the statute satisfied the heightened standard.<sup>117</sup>

In response to Justice Kennedy’s assertion, Justice O’Connor, joined in dissent by Justices Souter, Ginsburg, and Breyer, argued that the majority in *Nguyen* had once again allowed the plenary power to justify a standard of review more lenient than the “exceedingly persuasive” standard required by the Court’s equal protection precedent.<sup>118</sup> Justice O’Connor argued that the majority’s willingness to search for possible rationalizations for the statute’s gender-based classifications and its failure to elaborate on the actual importance of the government interests at stake suggested that the majority was applying rational basis review while calling it heightened scrutiny.<sup>119</sup> Most importantly, while the majority avoided the plenary power question, Justice O’Connor proposed a new understanding of the plenary power’s scope.<sup>120</sup> Justice O’Connor argued that plenary power deference only applies when a person is an alien, not when determining a person’s status for purposes of constitutional protection.<sup>121</sup> She reasoned that determining an individual’s status was a question “logically prior” to admission and thus beyond the plenary power’s scope.<sup>122</sup> Justice O’Connor concluded that because *Nguyen* involved a statute governing the conferral of citizenship at

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115. *Id.* at 57–58.

116. *Id.* at 58–59, 70.

117. *Id.* at 61.

118. *See id.* at 74 (O’Connor, J., dissenting) (arguing that the way in which the majority explained and applied heightened scrutiny was “a stranger to” the Court’s precedent).

119. *See id.* at 78–80 (maintaining that the majority, contrary to the requirements of heightened scrutiny, failed to inquire into the actual purposes of the statute as illustrated by the fact that the Immigration and Nationality Services advanced purposes quite different from those that the majority found). The dissent argued that the majority’s “hypothesized rationale” was insufficient under heightened scrutiny and more akin to the justifications permitted under rational basis review. *Id.* at 75, 84. The dissent ultimately concluded that the statute violated equal protection, most importantly because of the insufficiency of the fit between the statute’s “discriminatory means and the asserted end.” *Id.* at 74, 80.

120. *See id.* at 94, 96 (arguing that that the plaintiffs in *Nguyen* could surmount the hurdle of plenary power deference because their situation was readily distinguishable from *Fiallo*, the pivotal case in plenary power deference).

121. *Id.* at 96.

122. *Id.*

birth, not the admission of aliens, traditional standards of equal protection review should apply.<sup>123</sup>

In 2008, an evenly split Supreme Court affirmed the Ninth Circuit's decision in *United States v. Flores-Villar*<sup>124</sup> to apply a similarly deferential standard to a question of U.S. citizenship.<sup>125</sup> Ruben Flores-Villar, a Mexican national, was arrested for his presence in the United States after deportation.<sup>126</sup> In his defense, Flores-Villar claimed that he was not deportable because he had acquired U.S. citizenship through his father, a naturalized U.S. citizen.<sup>127</sup> His application for a certificate of citizenship had been denied on the grounds that his father, who was sixteen when Flores-Villar was born, had not been present in the United States for five years after his fourteenth birthday,<sup>128</sup> as the statute required.<sup>129</sup> Flores-Villar brought an equal protection claim under the Fifth Amendment's Due Process Clause, challenging the INA's five-year residency requirement for U.S. citizen fathers to confer citizenship on children born out of wedlock—a requirement the statute did not impose on U.S. citizen mothers.<sup>130</sup> The U.S. District Court for the Southern District of California, citing *Nguyen*, acknowledged that it was unclear whether a lesser degree of scrutiny applied to gender-based classifications in the immigration context but concluded that there was a need for special judicial deference.<sup>131</sup> The district court held that Flores-Villar's equal protection claim failed because there appeared to be a "bona fide reason" for applying different physical presence requirements to unwed U.S. citizen mothers and fathers.<sup>132</sup>

On appeal, the Ninth Circuit bolstered the deferential standard applied by the district court, stating that legislative distinctions in immigration do not need to be as "carefully tuned" as the domestic

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123. *Id.* at 97 (citing *Miller v. Albright*, 523 U.S. 420, 480–81 (1998) (Breyer, J., dissenting)).

124. 536 F.3d 990 (9th Cir. 2008), *aff'd per curiam by an equally divided court*, 131 S. Ct. 2312 (2011).

125. *Id.* at 996.

126. *See id.* at 994 (stating that Flores-Villar had been previously convicted of importation of marijuana, two counts of illegal entry into the United States, and had been removed from the United States pursuant to removal orders on numerous occasions).

127. *Id.*

128. *Id.*

129. INA § 18(u)(2), 8 U.S.C. § 1401a(g) (2006).

130. *Id.* at 993.

131. *United States v. Flores-Villar*, 497 F. Supp. 2d 1160, 1164 (S.D. Cal. 2007) (citing *Nguyen v. INS*, 533 U.S. 53, 61 (2001)), *aff'd*, 536 F.3d 990 (9th Cir. 2008), *aff'd per curiam by an equally divided court*, 131 S. Ct. 2312 (2011).

132. *Id.* at 1165.

context requires.<sup>133</sup> The Ninth Circuit dispensed with the need to determine whether a lesser standard of review is required in plenary power cases.<sup>134</sup> The court then concluded that the connection between the statutory requirement and Congress's interests in minimizing the risks of statelessness and assuring a link between an unwed citizen father and a child born out of wedlock was "sufficiently persuasive" to survive constitutional challenge.<sup>135</sup> Thus, in an attempt to apply both intermediate scrutiny and rational basis review, the Ninth Circuit applied a standard less demanding than the traditional constitutional analysis in gender-based claims.<sup>136</sup> While avoiding the question of the plenary power's influence on the level of scrutiny, the Ninth Circuit allowed the plenary power to influence its application of traditional constitutional standards.<sup>137</sup> The Supreme Court affirmed the Ninth Circuit's deferential standard in a 4–4 per curiam decision.<sup>138</sup>

The modern plenary power decisions demonstrate the continuing tension between plenary power precedent and the constitutional safeguards afforded to U.S. citizens and foreign nationals.<sup>139</sup> The Supreme Court failed to clarify the plenary power's scope when it avoided the question of the plenary power's influence in *Miller*, *Nguyen*, and most recently, *Flores-Villar*. While the Court's decision to affirm the Ninth Circuit's holding in *United States v. Flores-Villar* could signify the "steady erosion" of the plenary power doctrine,<sup>140</sup> it is likely that this erosion will leave the courts to grapple with the plenary power doctrine in its modern form<sup>141</sup>—a power that influences the way that constitutional standards are applied to immigration statutes. As the Supreme Court's avoidance of the

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133. *Flores-Villar*, 536 F.3d at 997 (quoting *Fiallo v. Bell*, 430 U.S. 787, 791–93, 799 n.8 (1977)).

134. *Id.* at 996 n.2.

135. *Id.* at 996.

136. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (requiring an exceedingly persuasive justification for gender-based classifications).

137. See *Flores-Villar*, 536 F.3d at 996 (allowing the plenary power to influence the court's determination of whether the statute's means sufficiently fit its objectives).

138. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam).

139. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 806–07 (1977) (Marshall, J., dissenting) (advocating for a distinction between constitutional challenges brought by U.S. citizens and those brought by aliens); *Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting) (arguing that different rights should be afforded to aliens domiciled in the United States and those seeking entry).

140. See Legomsky, *supra* note 34, at 936–37 (predicting that the plenary power doctrine will not be abolished by the Supreme Court cleaning the slate once and for all, but will instead be worn down little by little through court-made exceptions and qualifications).

141. See *id.* at 937 (arguing that courts will likely end up with an "emasculated" version of the plenary power doctrine, or a "PPD-lite").

plenary power doctrine threatens to drive the doctrine's influence underground in judicial review,<sup>142</sup> Justice Breyer's dissent in *Miller* and Justice O'Connor's dissent in *Nguyen* are reminders that distinctions within immigration law are possible and that the plenary power doctrine can be confronted and more clearly defined.

### B. DOMA and Its Application in Immigration

In 1996, Congress passed DOMA in a wave of panic that states would begin to recognize same-sex marriage.<sup>143</sup> DOMA was passed in a climate inimical to gay and lesbian rights, when the Supreme Court's decision in *Bowers v. Hardwick*<sup>144</sup> condoned state laws criminalizing private homosexual conduct.<sup>145</sup> DOMA's supporters argued that it merely reflected a definition of marriage that had been the core of the traditional family for over 5,000 years,<sup>146</sup> a definition that had until then been so obvious that it did not require explanation in the myriad statutes referencing marriage.<sup>147</sup> Despite the arguments of DOMA's opponents that it exceeded Congress's constitutional authority,<sup>148</sup> DOMA followed in the footsteps of policies like "Don't Ask Don't Tell."<sup>149</sup> More recently, as the tide of

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142. See Nina Pillard, Comment, *Plenary Power Underground in Nguyen v. INS: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 836 (2002) (arguing that while the Court may be backing away from the plenary power doctrine, in that it has not chosen to explicitly weaken it in recent case law, it may be submerging the doctrine and creating a host of new problems in constitutional challenges to immigration statutes).

143. See E.J. Graff, *15 Years After DOMA, Hearing Reveals a Nation Transformed*, ATLANTIC (July 20, 2011, 6:06 PM), <http://www.theatlantic.com/politics/archive/2011/07/15-years-after-doma-hearing-reveals-a-nation-transformed/242273/> (attributing the motivation for DOMA to the Supreme Court of Hawaii's decision in *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993), which federal lawmakers feared would "open the door to same-sex marriages in that state"). In *Lewin*, Hawaii's highest court held that the state's statutory ban on same-sex marriages was subject to strict scrutiny and remanded the case to the lower court to determine whether the law met that burden. 852 P.2d at 74.

144. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

145. See *id.* at 196 (concluding that state anti-sodomy laws were constitutional in light of the belief that homosexual sodomy is "immoral and unacceptable"). Today, by contrast, rights activists face a more hospitable political and social climate. See David Schraub, *The Perils and Promise of the Holder Memo*, 2012 CARDOZO L. REV. DE NOVO 187, 187-88 (discussing the successes in the gay marriage context in the past four years, including its legalization in several states and public recognition by the President and Vice President, as well as the executive's newly adopted position that it will no longer defend DOMA).

146. 142 CONG. REC. 22,442 (1996) (statement of Sen. William Philip Gramm).

147. See *id.* at 22,440 (statement of Sen. Donald Nickles) ("[T]hese provisions simply reaffirm what is already known . . .").

148. See, e.g., *id.* at 22,439 (statement of Sen. Edward Kennedy) (arguing that Congress cannot add or subtract from the Full Faith and Credit Clause and thus that DOMA is an unconstitutional exercise of congressional power).

149. See Graff, *supra* note 143 (describing the "moral panic" during the time of

gay and lesbian rights has shifted,<sup>150</sup> DOMA has become the subject of attacks at both judicial and political levels.<sup>151</sup>

Unlike DOMA, the INA's definitions of "spouse" and "marriage" do not address same-sex relationships, despite Congress having redrafted and amended the INA over 100 times in the statute's history.<sup>152</sup> The INA defines spouse only by what it is not—stating that an individual is not a spouse if the parties were not physically present at the marriage ceremony, unless the marriage has been otherwise consummated.<sup>153</sup> In the 1952 iteration, the INA contained a provision aimed at preventing the admission of homosexuals, but Congress has since removed that provision.<sup>154</sup> DOMA, however, establishes a federal definition of marriage:

In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.<sup>155</sup>

DOMA does not reference immigration, nor did Congress expressly contemplate immigration during the Act's passage.<sup>156</sup> While the INA was not amended to reflect DOMA's federal definition, DOMA applies to the immigration context through administrative agency and consular interpretations of "marriage" and "spouse" at the adjudicatory stage of immigration petitions and applications.<sup>157</sup> Thus, DOMA effectively bars a foreign national from

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DOMA's passage, including Congress's passage of the "Don't Ask Don't Tell" policy in 1993, the Hawaii lawsuit, and the passage of several state "Defense of Marriage" laws and constitutional amendments). "Don't Ask Don't Tell"—the United States' official policy on homosexuals in the military from 1994 until 2011—barred openly gay or bisexual individuals from serving in the military. *See generally* 10 U.S.C. § 654 (2006) (repealed 2011).

150. *See supra* note 145 (discussing the shift in the political and social treatment of homosexual rights).

151. *See* Letter from Att'y Gen., *supra* note 13 (announcing the Department of Justice's stance that it will no longer defend DOMA); *Obama Supports Repeal of Gay-Marriage Ban*, THE ATLANTIC (July 19, 2011, 2:40 PM), <http://www.theatlantic.com/politics/archive/2011/07/obama-supports-repeal-of-gay-marriage-ban/242197/> (discussing President Obama's support for the Repeal of Marriage Act introduced in the Senate in July 2011, which would repeal DOMA).

152. INA § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2006); *see also* Titshaw, *supra* note 6, at 559 (suggesting that Congress intended to leave "marriage" undefined in the INA).

153. INA § 101(a)(35).

154. *See infra* Part II.C (detailing the 1952 INA's ban on homosexual admission).

155. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

156. 142 CONG. REC. 22,437-63 (1996).

157. This Comment focuses on DOMA at the adjudicatory stage of immigrant visa

immigrating to the United States on the basis of a same-sex relationship with a U.S. citizen or permanent resident.<sup>158</sup>

Ordinarily, a U.S. citizen or permanent resident can petition to legalize a foreign national spouse using United States Citizenship and Immigration Services (USCIS) Form I-130, Petition for Alien Relative.<sup>159</sup> In the case of a spouse of a U.S. citizen, an I-130 petition establishes the foreign national's immediate relative status for purposes of visa eligibility.<sup>160</sup> These petitions are a necessary step in marriage-based immigrant visa or adjustment of status applications and are adjudicated by USCIS regardless of whether the foreign national will ultimately seek permanent residency through adjustment of status within the United States or by way of an immigrant visa through a consulate abroad.<sup>161</sup> If a USCIS adjudicator finds that the facts stated on the petition are accurate and establish a qualifying relationship between the U.S. citizen and foreign national, the petition is approved.<sup>162</sup> An approved petition, however, does not guarantee the foreign national's admission into the United States; the foreign national must also apply for an immigrant visa abroad or for adjustment of status within the United States after the petition is approved.<sup>163</sup> Even if an immigrant visa petition is approved, a consular official at the port of entry or an immigration officer

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petitions. DOMA, however, influences eligibility for immigration benefits in a variety of circumstances, such as eligibility for certain types of relief from removal that require a showing of hardship to a U.S. citizen's spouse. *See, e.g.*, INA § 240A(b)(1)(D) (allowing discretionary relief from removal where, in addition to other requirements, a foreign national's removal would result in extremely unusual hardship to a U.S. citizen's spouse).

158. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, ch. 21.3(I) Petition for a Spouse [hereinafter ADJUDICATOR'S FIELD MANUAL], *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm> (instructing immigration adjudicators that DOMA's federal definition of marriage controls whether a marriage is valid for purposes of immigration); 9 U.S. DEP'T OF ST., FOREIGN AFFAIRS MANUAL 40.1 n.1 (2011), *available at* <http://www.state.gov/documents/organization/86920.pdf> (instructing consular officers that same-sex marriages cannot be recognized for immigration purposes because DOMA determines that these relationships do not "meet the Federal definition of marriage").

159. 8 C.F.R. § 204.1(a) (1996).

160. *Id.* Congress has established a quota system for immigrant visas depending on the basis or qualifying relationship upon which the visa is issued. INA § 201. Foreign nationals classified as "immediate relatives" are exempt from these quotas and are not required to wait for an available visa. *Id.* § 201(b). Immediate relative status is thus a highly coveted immigrant visa classification. An "immediate relative" is defined as the child, spouse, or parent of a citizen of the United States. *Id.* § 201(b)(2)(A)(i).

161. *See* INA § 204 (detailing "an investigation of the facts in each case").

162. *Id.*

163. *Id.*



adjudicating an application for adjustment of status ultimately makes the decision to admit a foreign national based on a review of the individual foreign national's admissibility.<sup>164</sup>

Immigration officials usually consider three factors when determining whether a marriage is valid for immigration purposes: first, the validity of the marriage where celebrated,<sup>165</sup> second, the evidence of the bona fides of the marital relationship,<sup>166</sup> and third, the existence of a categorical public policy exception regarding who may marry whom.<sup>167</sup> Historically, the rule in both interstate and immigration related marriage recognition has been that a marriage valid in the state or country where it was celebrated is valid everywhere.<sup>168</sup> Conflict of laws principles in marriage recognition, however, allow an exception to this general rule where the marriage violates the "strong public policy" of another state.<sup>169</sup> The BIA and federal courts have sometimes recognized similar public policy exceptions in applying the INA.<sup>170</sup>

Based on DOMA's federal definition of marriage, USCIS advises immigration adjudicators that same-sex marriages are not valid marital relationships for purposes of the I-130 petition.<sup>171</sup> For foreign nationals in same-sex marriages who lack any other basis for immigrating to the United States, DOMA effectively denies their

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164. *Id.*; see also *id.* § 212 (containing the grounds of inadmissibility).

165. See *id.* § 216 (pertaining to the removal of conditions on permanent residence for foreign national spouses).

166. *Id.* § 204; *id.* § 216.

167. See Titshaw, *supra* note 6, at 549–50 (describing the evolution of rules for marriage recognition in immigration, and stating that standards for recognizing the marital relationship are the result of immigration cases "decided in a piecemeal, case-specific manner").

168. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); see also Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L L.J. 105, 105 (2010) ("All states follow the venerable choice of law rule of marriage recognition, which holds that a marriage is considered valid in any jurisdiction if it was valid in the state of celebration, even if it would not be valid in the state where recognition is sought.").

169. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); see *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (establishing that the Full Faith and Credit Clause does not require a state to violate its own legitimate public policy by applying another state's law); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005) (concluding that Florida was not required to apply another state's same-sex marriage law because it conflicted with Florida's public policy of opposing same-sex marriage).

170. See *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982) (finding a public policy exception to the general rule of marriage recognition precluding the immigration of a foreign national in a same-sex marriage long before the passage of DOMA). See generally Titshaw, *supra* note 6, at 579–88 (discussing the federal public policy exceptions historically recognized under the INA).

171. See ADJUDICATOR'S FIELD MANUAL, *supra* note 158, at Ch. 21.3(2)(I) (advising immigration adjudicators that a marriage's validity for immigration purposes is a matter of federal law governed by DOMA).

admission.<sup>172</sup> Given DOMA's uncertain constitutional footing and Attorney General Holder's letter to Congress stating that the executive branch will no longer defend DOMA, courts are employing a variety of ostensibly ameliorative measures to counter DOMA's effects at the adjudicatory stage of immigration benefits.<sup>173</sup> In some cases, courts have put removal proceedings on hold, others have reopened cases *sua sponte* to allow applications for relief where DOMA previously barred same-sex immigration benefits, and still others have closed cases altogether.<sup>174</sup> As uncertainty remains while challenges to DOMA's effect on binational same-sex couples mount, clarifying the plenary power doctrine's influence on standards of judicial scrutiny of DOMA in immigration becomes increasingly important.

## II. CONGRESS'S PLENARY POWER IS LIMITED IN SCOPE AND DOMA'S APPLICATION IN IMMIGRATION IS BEYOND THE POWER'S SCOPE

The Supreme Court's modern approach to the plenary power doctrine, since its decision in *Miller*, demonstrates that a nuanced understanding of Congress's power in immigration and the limits of plenary power deference is possible.<sup>175</sup> The Court's willingness to engage in constitutional analysis, albeit colored by the influence of the plenary power doctrine, is evidence that the plenary power is no longer a barrier against the judicial review of all questions immigration-related.<sup>176</sup> This Comment recommends a substantive framework for understanding the scope of the plenary power that would limit the doctrine to questions of admission, removal, naturalization, and immigration policy distinctions. This limited substantive framework will illuminate the boundaries of the plenary power doctrine in general. This Comment further argues that, given this limited substantive framework, DOMA applies to an area of immigration law beyond the plenary power doctrine's scope. Thus, traditional constitutional standards should apply to DOMA-related

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172. *Id.*; see *supra* notes 1–5 and accompanying text (describing the case of a foreign national who was denied an immigrant visa because DOMA does not recognize his relationship).

173. See Letter from Att'y Gen., *supra* note 13 (articulating the unconstitutionality of DOMA).

174. See Semple, *supra* note 14 (describing a case where an alien's deportation was cancelled after he was denied immigration benefits because of DOMA).

175. See *supra* Part I.A.3 (explaining the modern plenary power case law from *Miller* to *Flores-Villar* as essentially allowing Congress's plenary power to influence the standard of judicial review rather than justifying the avoidance of constitutional questions).

176. See *supra* Part I.A.3 (discussing the diluted constitutional standards applied by the Supreme Court in *Nguyen* and *Flores-Villar*).

challenges in the immigration context.

A. *The Plenary Power Doctrine Should Be Limited to Questions of Admission, Removal, Naturalization, and Immigration Policy Distinctions*

A basic framework for understanding the plenary power's scope is necessary in light of the myriad complexities of immigration law and the difficulty of reconciling these complexities with constitutional requirements. This Comment suggests a limited substantive framework that would confine plenary power deference to four substantive areas of immigration law: admission, removal, naturalization, and practical immigration policy distinctions. The Supreme Court routinely applies plenary power deference in varying degrees to cases involving these four categories, but immigration-related issues that do not fall into one of these categories may be beyond the scope of the plenary power.<sup>177</sup>

The Supreme Court's increasingly refined approach to constitutional questions in each of these four substantive areas is evidence that courts are capable of making the distinctions in immigration law necessary to employ a substantive framework for plenary power analysis. This refined approach is a departure from the tradition, established through twentieth century plenary power case law, which extended great deference to Congress.<sup>178</sup> Thus, rather than approaching immigration as a nebulous concept over which Congress has unqualified power, courts would first inquire into whether the issue fits squarely into one of the substantive categories traditionally afforded some degree of plenary power deference.<sup>179</sup> While the Supreme Court does not currently employ a limited substantive framework in plenary power cases, Justice O'Connor's dissent in *Nguyen* and Justice Breyer's dissent in *Miller* suggest that the Court may entertain such a framework.<sup>180</sup> In light of the increasing number of constitutional challenges to immigration statutes and the DOMA issue in particular, a narrowed and disciplined approach to

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177. See *infra* note 268 and accompanying text (discussing the constitutional standards that apply in immigration cases when the plenary power is not implicated).

178. See Legomsky, *supra* note 34, at 306 ("So great has been the power of the word 'immigration' that its mere mention has been enough to propel the Court into a cataleptic trance.").

179. See *infra* Parts II.A.1–4 (discussing each of the four categories traditionally granted plenary power deference).

180. See *supra* Part I.A.3 (discussing Justice O'Connor's dissent in *Nguyen*, where she attempted to distinguish between citizenship and the questions logically prior to citizenship, and Justice Breyer's dissent in *Miller*, where he attempted to distinguish between naturalization and citizenship at birth); see also *infra* Part II.B.2 (discussing Justice O'Connor's logically prior standard in the context of immigrant visa petitions).

the plenary power is necessary.

### 1. Admission

In cases involving admission, the Supreme Court has routinely deemed Congress's plenary power to be absolute.<sup>181</sup> Since *Chae Chan Ping v. United States*, the Court has afforded extraordinary deference to the rules that Congress establishes for the admission of foreign nationals.<sup>182</sup> The Court laid the foundation for this principle in *Nishimura Ekiu* based on notions of sovereignty and self-preservation.<sup>183</sup>

In the long line of plenary power cases, the Court has never questioned Congress's power to determine rules for admission.<sup>184</sup> Reciting what has become the plenary power mantra in cases of admission, Justice Powell in *Fiallo* acknowledged that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."<sup>185</sup> This reasoning has persisted throughout the doctrine's case law involving questions of admission.<sup>186</sup>

### 2. Removal

In cases involving removal, the Supreme Court now recognizes the

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181. See, e.g., *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting) (recognizing, even in dissent, that Congress has complete legislative power over the admission of aliens); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that recent decisions had not departed from the well-established rule that Congress's power to exclude aliens is a fundamental sovereign attribute); *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (emphasizing that Congress's power to exclude aliens is not "open to controversy").

182. See *Fiallo*, 430 U.S. at 792 (quoting the long line of plenary power cases reinforcing the rule that Congress's power to exclude aliens is inherent to sovereignty); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) ("[R]espondent's right to enter the United States depends on the congressional will . . . ." (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 590-91 (1952))); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (explaining that whatever the rules of deportation may be, there is no question that judicial review is limited in cases of exclusion).

183. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

184. See *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972) (stating that since the Court in *Chae Chan Ping* articulated the principle that the power to exclude is inherent in sovereignty and is to be exercised exclusively by the political branches, the "Court's general reaffirmations of this principle have been legion").

185. *Fiallo*, 430 U.S. at 792 (quoting *Kleindienst*, 408 U.S. at 766; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

186. See *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting) (acknowledging Congress's complete legislative power over the admission of aliens).

constraints of procedural due process on plenary power deference.<sup>187</sup> While the Court in *Harisiades* issued a stern denial of due process claims presented by an alien facing deportation,<sup>188</sup> by the time the Court decided *Galvan*, it readily acknowledged that an alien is a “person” for purposes of the Due Process Clause and that the executive branch must respect procedural due process safeguards when enforcing immigration laws.<sup>189</sup>

By the turn of the twenty-first century, the Court had accepted the procedural due process exception in removal cases. In 2001, the Supreme Court, in *Zadvydas v. Davis*,<sup>190</sup> read an immigration statute “in light of the Constitution’s demands” and concluded that the statute contained an implicit “reasonable time” limitation on post-removal detention.<sup>191</sup> Thus, the Court now recognizes that Congress’s power to determine who will be removed is subject to certain “important constitutional limitations” despite the removal authority being firmly established within Congress’s plenary power.<sup>192</sup>

### 3. Naturalization

Courts have recognized similarly limited constitutional protections in cases involving naturalization.<sup>193</sup> When a case directly implicates Congress’s naturalization authority, the Supreme Court has afforded Congress broad deference.<sup>194</sup> Justice O’Connor’s dissent in *Nguyen* and Justice Breyer’s dissent in *Miller*, however, follow the trend of

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187. See Legomsky, *supra* note 34, at 926, 931–32 (pointing to *Yamataya v. Fisher* as evidence that the Supreme Court has generally guaranteed at least one constitutional right—due process—in immigration cases).

188. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (concluding that an alien’s ability to remain in the United States is a matter of permission and tolerance and that courts have consistently sustained the government’s power to “terminate its hospitality”).

189. See *Galvan v. Press*, 347 U.S. 522, 531 (1954) (recognizing procedural due process safeguards even though the “formulation” of immigration policies is “entrusted exclusively to Congress”).

190. 533 U.S. 678 (2001).

191. *Id.* at 682, 689.

192. Compare *id.* at 695 (stating that Congress’s plenary power to “create immigration law” is “subject to important constitutional limitations”), with *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (holding that the right of a nation to deport foreigners is “absolute and unqualified”).

193. See *Price v. INS*, 941 F.2d 878, 883–84 (9th Cir. 1991) (concluding that once an alien gains admission and establishes ties as a permanent resident, his constitutional status changes but that constitutional protections may be limited), *op. withdrawn, substituted op., on reh’g*, 962 F.2d 836 (9th Cir.1992); see also *Berenyi v. Dist. Dir.*, 385 U.S. 630, 636–37 (1967) (noting the heavy burden on an alien to establish eligibility for citizenship).

194. See *INS v. Pangilinan*, 486 U.S. 875, 883–84 (1988) (limiting federal courts’ authority to confer citizenship to “strict compliance with the terms of an authorizing statute”).

increasingly inventive techniques to limit plenary power deference.<sup>195</sup> Justice O'Connor's dissent in *Nguyen* suggests that while Congress's plenary power over naturalization is absolute, the extension of this power to questions logically prior to naturalization could be subject to traditional judicial inquiry.<sup>196</sup>

The Court's willingness to entertain constitutional challenges to citizenship statutes in *Miller*, *Nguyen*, and *Flores-Villar* is evidence that the plenary power is no longer a barrier to constitutional review of all questions immigration-related.<sup>197</sup> Despite this development in the constitutional analysis of immigration statutes, naturalization remains firmly imbedded in Congress's plenary power.<sup>198</sup>

#### 4. *Immigration policy distinctions*

The fourth category of cases where deference to Congress's plenary power has been nearly absolute consists of challenges to Congress's policy choices distinguishing among aliens for the purposes of federal benefits or immigration preference classifications. Challenges in this category involve Congress's policy decisions to extend benefits to some but not all foreign nationals.<sup>199</sup> The Court in *Mathews* characterized these congressional decisions not as constitutional issues but as policy choices where Congress must draw a line in the allocation of benefits to aliens.<sup>200</sup> The *Mathews* Court thus justified residency requirements for federal benefits, noting that those who fall just to one side of the line will always have cause to

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195. See Legomsky, *supra* note 34, at 936–37 (describing the steadily accumulating case law demonstrating courts' inventive exceptions and qualifications to the plenary power doctrine).

196. See *Nguyen v. INS*, 533 U.S. 53, 96–97 (2001) (O'Connor, J., dissenting) (arguing that plenary power deference only applies when a person is an alien, not when determining the person's status for purposes of constitutional protection); see also *supra* Part I.A.3 (discussing Justice O'Connor's logically prior analysis).

197. Compare *Nguyen*, 533 U.S. at 60 (engaging in equal protection analysis of a citizenship statute), and *Zadvydas*, 533 U.S. at 695 (acknowledging that Congress's plenary power is "subject to important constitutional limitations," particularly that of procedural due process during removal), with *Fong Yue Ting*, 149 U.S. at 711–13 (concluding that Congress's absolute power to exclude and expel aliens precluded judicial review), and *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (showing that the plenary power was an absolute bar to concluding that Congress's legislation in immigration, the Chinese Exclusion Act, was unconstitutional).

198. See, e.g., *Denmore v. Kim*, 538 U.S. 510, 521 (2003) (acknowledging that Congress's broad power over naturalization and immigration allows for rules that would be unacceptable if applied to U.S. citizens).

199. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 799–800 (1977) (holding that Congress's decision not to extend preferential status to the illegitimate children of U.S. citizen fathers was constitutional); *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976) (upholding residency requirements for eligibility for federal Medicare benefits).

200. See *Mathews*, 426 U.S. at 81–83 (upholding a five-year residency requirement to obtain permanent resident status).

complain.<sup>201</sup> In the case of preference category classifications for immigrant visas, the Court has made similar references to Congress's authority to make policy choices distinguishing among eligible aliens.<sup>202</sup> For instance, the *Fiallo* Court looked to legislative history to determine that Congress made an explicit policy choice not to extend preferential status to all aliens, and thus that Congress's decision was insulated from judicial review.<sup>203</sup>

In summary, small variations in the level of judicial review exist even in these four areas of recognized plenary power: admission, removal, naturalization, and immigration policy distinctions. As the Court's precedent demonstrates, Congress's plenary power is at its zenith and may wholly preclude judicial scrutiny in questions of admission. In contrast, the plenary power doctrine permits limited judicial review in cases of removal, naturalization, and policy choices. While these categories are themselves quite broad, employing this limited substantive framework of plenary power case law will allow courts to recognize when immigration-related questions do not fall within the plenary power's scope. This nuanced approach will permit courts to apply non-deferential standards in constitutional challenges to immigration statutes when the issue is beyond the scope of the plenary power doctrine.

*B. DOMA Does Not Apply to Immigrant Visa Petitions Through Congress's Plenary Power Over Admission, Removal, or Naturalization*

A petition for immediate relative classification for a same-sex spouse is not an issue of naturalization or removal.<sup>204</sup> Thus, if plenary power deference were to reach this stage of the immigration process, it would be through Congress's authority over decisions of admission or policy distinctions.<sup>205</sup> This Comment argues that by employing the accepted understanding of the difference between visa petitions and admission, along with Justice O'Connor's nuanced approach to the plenary power's scope in her dissent in *Nguyen*, the visa petition stage of the immigration process is beyond the plenary power's scope. Furthermore, Congress did not intend to make a rule for admission

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201. *Id.* at 83.

202. *See Fiallo*, 430 U.S. at 798 (stating that the issue of which aliens receive preferential status is a policy question entrusted to the political branches).

203. *See id.* at 799 n.9 (noting that the challenged distinction was addressed in a prior bill proposed in Congress); *infra* Part II.C (discussing the policy choice at issue in *Fiallo*).

204. *See supra* notes 28–29 (explaining naturalization and removal).

205. *See supra* note 27 (defining admission); *see also supra* Part II.A.4 (explaining Congress's plenary power in immigration policy).

or a policy choice in immigration when it enacted DOMA. Thus, the plenary power cannot shield DOMA's application in immigration from traditional constitutional review.

1. *Immigrant visa classification versus admission*

In order to establish an immediate relative relationship with a foreign national spouse, a U.S. citizen must file USCIS Form I-130.<sup>206</sup> Once this relationship is established and the I-130 petition is approved, a visa for the foreign national spouse is immediately available pending the approval of an immigrant visa application.<sup>207</sup> The I-130 petition and immigrant visa portions of the process are necessary precursors to the foreign national's admission or adjustment of status,<sup>208</sup> however, determining a foreign national's eligibility for an immigrant visa classification on a form I-130 is distinct from a decision of admission.

The BIA has recognized the distinction between admissibility and adjudication of a visa petition. For example, in a case before the BIA in 1959,<sup>209</sup> a U.S. citizen petitioned for quota-exempt status on behalf of her foreign national spouse.<sup>210</sup> Her spouse, however, had numerous criminal and fraud issues that would have rendered him excludable—or inadmissible, as the modern terminology would describe him.<sup>211</sup> U.S. immigration authorities sought to deny the foreign national's visa petition on the grounds that he would ultimately be found inadmissible, and thus ineligible for a visa.<sup>212</sup> The BIA found that because the visa petition established the requisite immediate relative relationship and U.S. citizenship of the foreign national's spouse, the visa petition should be approved notwithstanding the admissibility issues.<sup>213</sup> The BIA reasoned that the "sole concern for the [visa petition] procedure is eligibility for the status claimed" and that a review of admissibility is left for a consular or immigration service officer at the immigrant visa or adjustment of status stage.<sup>214</sup> Maintaining that this distinction safeguards the foreign national's opportunity for a hearing on his admission in front

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206. 8 C.F.R. § 204.1(a) (1996); *see supra* Part I.B (discussing the general filing and adjudication procedures for the immediate relative classification).

207. *See* INA § 201(b), 8 U.S.C. § 1151(b) (2006) (stating that immediate relatives are quota-exempt).

208. *Id.* § 201(b).

209. O—, 8 I. & N. Dec. 295 (B.I.A. 1959).

210. *Id.* at 295.

211. *Id.* at 296.

212. *Id.*

213. *Id.* at 297.

214. *Id.*



of a consular or immigration service officer, the BIA concluded that approval of a visa petition does not guarantee admission and that the two steps are necessarily distinct.<sup>215</sup>

The INA's statutory scheme governing admissibility reinforces the distinction between admission and eligibility for immediate relative visa classification. Section 212 of the INA contains the grounds of inadmissibility, ranging from public health concerns to terrorist activity.<sup>216</sup> This section states that a foreign national is inadmissible if she does not have a valid and unexpired immigrant visa.<sup>217</sup> Section 212 does *not* state that ineligibility for an immigrant visa renders a foreign national inadmissible.<sup>218</sup> Moreover, the factors and rules for adjudicating an I-130 petition based on a marital relationship with a U.S. citizen are contained in section 204 of the INA, separate and distinct from the section governing inadmissibility.<sup>219</sup> Thus, while section 212 establishes that a valid immigrant visa is necessary for a determination of admissibility, adjudication of an immigrant visa petition is statutorily distinct from admissibility.<sup>220</sup>

To seek admission as an immigrant, a foreign national must establish her eligibility for the given visa classification and obtain the visa.<sup>221</sup> These steps are necessary precursors to admission and are distinct from an immigration officer's decision to admit a particular foreign national.<sup>222</sup>

## 2. *Admission and Justice O'Connor's logically prior standard for the plenary power's scope*

In the absence of Supreme Court guidance on the precise boundaries of the plenary power doctrine, Justice O'Connor's dissent in *Nguyen* provides a useful standard for defining the plenary power's scope. Justice O'Connor's dissent in *Nguyen* suggested that steps logically prior to admission may not be subject to plenary power deference.<sup>223</sup> Justice O'Connor attempted to distinguish between

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215. See *id.* at 297–98 (approving visa petition but warning that the approval did not assure admission to the United States).

216. INA § 212, 8 U.S.C. § 1182 (2006).

217. *Id.* § 212(a)(7)(A)(i)(I).

218. *Id.* § 212.

219. *Id.* § 204.

220. See also U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB No. 1615-0012, PETITION FOR ALIEN RELATIVE (Nov. 23, 2010), available at <http://www.uscis.gov/files/form/i-130.pdf> (containing questions regarding the citizenship of the petitioning spouse and the facts of the qualifying relationship but not questions of admissibility).

221. See INA § 101 (classifying an alien without a valid visa as inadmissible).

222. See *supra* Part I.B (detailing the distinct steps in the process for seeking admission as an immigrant).

223. See *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting) (arguing

naturalization—over which Congress’s plenary power is firmly established—and a determination of whether a foreign national is a U.S. citizen.<sup>224</sup> Her dissent argued that a case must be within the boundaries of the plenary power’s scope in order to receive deference.<sup>225</sup> Employing this reasoning, eligibility for a visa classification can also be characterized as a step logically prior to admission.<sup>226</sup> Just as determining whether an individual is a citizen is a step logically prior to naturalization, determining whether an individual is an immediate relative—a spouse in the case of DOMA—is a step logically prior to admission.<sup>227</sup> As Justice O’Connor concluded in the citizenship question in *Nguyen*,<sup>228</sup> the ordinary standards of constitutional analysis should thus apply to challenges to DOMA’s application in the I-130 visa petition process.

Justice O’Connor is not the first Supreme Court justice to suggest a substantive limitation on plenary power. In his dissent to *Miller*, Justice Breyer stated that conferral of citizenship at birth was distinct from naturalization—an area of the law over which Congress has plenary power.<sup>229</sup> Justice Breyer’s dissent in *Miller* and Justice O’Connor’s dissent in *Nguyen* suggest that arguments attempting to narrow the plenary power doctrine’s scope are reoccurring in the Court’s modern plenary power jurisprudence.<sup>230</sup> With the Court’s avoidance of the plenary power question in *Miller*, *Nguyen*, and *Flores-Villar*, Justice O’Connor advanced one potential understanding of the plenary power’s scope.<sup>231</sup> While the majority has yet to adopt Justice O’Connor’s logically prior standard, the equally divided decision to affirm *Flores-Villar* could be evidence that the Court continues to disagree on the plenary power’s scope in immigration cases, even after Justice O’Connor’s retirement from the Court in 2006.<sup>232</sup> If the

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that a predicate to applying *Fiallo*-style deference is that the individuals involved are in fact aliens).

224. *Id.* at 96.

225. *Id.*

226. See *supra* Part II.B.1 (establishing that a visa petition is a distinct prior step to admission).

227. See *supra* Parts I.B. and II.B.1 (discussing the immediate relative determination in the immigration process and establishing that it is a precursor to admission).

228. *Nguyen*, 533 U.S. at 97 (O’Connor, J., dissenting) (citing *Miller v. Albright*, 523 U.S. 420, 480–81 (1998) (Breyer, J., dissenting)).

229. *Miller*, 523 U.S. at 480–81 (Breyer, J., dissenting).

230. See *supra* note 139 (addressing dissenting opinions that attempted to narrow the scope of the plenary power).

231. *Nguyen*, 533 U.S. at 96–97 (O’Connor, J., dissenting).

232. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam); see *supra* Part I.A.3 (discussing the Ninth Circuit decision affirmed by the Supreme Court in *Flores-Villar*).

Court accepts the distinctions between naturalization and the steps logically prior, or between naturalization and citizenship at birth, it could also recognize the distinction between admission and the logically prior question of immigrant visa classification eligibility.<sup>233</sup>

Distinguishing between admission and the logically prior step of assessing the qualifying relationship for purposes of an immigrant visa petition would require confronting the Supreme Court's decision in *Fiallo*. The Court in *Fiallo* upheld a statute governing eligibility for preferential status for an immigrant visa by citing Congress's plenary power over the admission of foreign nationals.<sup>234</sup> While Congress's plenary power over admission is firmly established,<sup>235</sup> the Court has also long accepted that admission and establishing the necessary qualifying relationship for preferential status are separate and distinct considerations.<sup>236</sup> Moreover, the Court decided *Fiallo* during the era of evolving equal protection standards and prior to the Court's willingness to scrutinize equal protection challenges in immigration.<sup>237</sup> Thus, the Court's conflation of visa petition eligibility and admission in *Fiallo* may be another example of the dangers of the poorly defined plenary power.

While plenary power precedent is formidable, it no longer serves as a barrier to the distinctions in immigration law that may narrow its scope and influence. In the formative years of the Supreme Court's plenary power jurisprudence, the Court interpreted the doctrine to be a strict limitation on judicial review, often foreclosing thoughtful analysis of constitutional questions in cases involving immigration.<sup>238</sup> In *Galvan v. Press*, the Court acknowledged the due process limitations on the plenary power's reach,<sup>239</sup> and later, in *Zadvydas*, the Court explicitly recognized the constitutional limitations of the plenary power doctrine in cases of removal.<sup>240</sup> In the past two

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233. *But see* Legomsky, *supra* note 34, at 298 ("The distinction between distinctions would either swallow the plenary power doctrine entirely or give the courts an unfettered discretion whether to invoke it.").

234. *Fiallo v. Bell*, 430 U.S. 787, 798–99 (1977).

235. *See supra* Part II.A.1 (discussing the broad deference afforded to Congress in the admission of foreign nationals).

236. *See supra* Part II.B.1 (discussing BIA precedent separating the adjudication of immigrant visa petitions and decisions of admissibility as well as the distinct statutory schemes governing the two steps of the immigration process).

237. *See supra* Parts I.A.2–3 (emphasizing the importance of evolving equal protection standards to the subsequent developments in the constitutional analysis of immigration statutes).

238. *See supra* Part I.A.1 (analyzing the Court's avoidance of constitutional questions in early plenary power cases).

239. *See supra* Part I.A.2 (discussing the Court's limited recognition of an alien's procedural due process safeguards).

240. *See Zadvydas v. Davis*, 533 U.S. 678, 682, 695 (2001) (construing an

decades, and with the recent decision to affirm *Flores-Villar*, the Court has grappled with the possibility of distinctions in immigration statutes involving naturalization that may further narrow the plenary power's scope.<sup>241</sup> Thus, the Court could also apply the lessons of the plenary power's constitutional limitations and the distinctions possible within immigration law to cases involving admission.<sup>242</sup>

Given the volume of the plenary power's history, it is unlikely that this evolution marks the death of the plenary power.<sup>243</sup> It does, however, signify that with the increasing knowledge of the complexities of immigration law and the evolution of constitutional standards of review, questions relating to immigration are emerging where the plenary power may no longer be an appropriate justification.<sup>244</sup> A determination of immigrant visa eligibility is a step logically prior to admission and is thus beyond the plenary power's scope.

### C. *DOMA Is Not a Result of Congress's Immigration Policy Goals*

In light of the plenary power precedent, Congress could arguably make a policy choice to explicitly ban the admission of whomever it wants, including homosexuals.<sup>245</sup> Such a ban would, however, be subject to the facially legitimate and bona fide standard of plenary power cases and it is not unlikely that a ban on the admission of homosexuals would fail even this relaxed standard.<sup>246</sup> Although a ban

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immigration statute to comply with constitutional protections); see also T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (arguing that Justice Breyer's use of the phrase "subject to important constitutional limitations" in *Zadvydas* "may represent a radical shift, a turning point for immigration law").

241. See *supra* Part I.A.3 (discussing the disagreement on the Court over whether naturalization could be distinguished from the question of determining whether an alien was a citizen).

242. See Legomsky, *supra* note 34, at 926 (noting that the "precise degree of . . . deference [to Congress] has varied with both the context and the era").

243. See *supra* Part I.A (elaborating on the plenary power's scope and development). But see Spiro, *supra* note 104, at 339 (contending that the Supreme Court's constitutional analysis in *Nguyen* and *Zadvydas* forecasts the demise of the plenary power doctrine).

244. See Motomura, *supra* note 34, at 565 (maintaining that once the immigration inquiry is expanded "to include the more general law of aliens' rights . . . the force of the plenary power doctrine diminishes considerably" and courts often adopt approaches that are in conflict with the plenary power doctrine).

245. See *Boutilier v. INS*, 387 U.S. 118, 120–22 (1967) (affirming the exclusion of a homosexual foreign national because Congress intended the ground of inadmissibility for those "afflicted with psychopathic personality" to exclude homosexuals); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (stating that even if the immigration policy reflects a cruel prejudice or "offend[s] American traditions," it is the prerogative of Congress).

246. See *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (explaining that the

on admission may offend constitutional principles, the Supreme Court has recognized that in its broad power over immigration, “Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>247</sup> In fact, Congress sought to exclude homosexuals with the 1952 INA and bolstered that exclusion when it amended the INA in 1965 to deny admission to those “afflicted with sexual deviation.”<sup>248</sup>

DOMA, however, is readily distinguishable from Congress’s past explicit policy choice to prevent the admission of homosexuals. DOMA was not the product of Congress legislating in immigration, and while it has provided a lens through which executive branch officers interpret the INA, it did not amend the INA itself.<sup>249</sup> Moreover, the 1990 reform of the INA repealed Congress’s explicit ban on homosexual admission,<sup>250</sup> depriving DOMA of any statutory basis for imposing a practical ban on admission.<sup>251</sup>

Unlike most of the statutes confronted by the courts in establishing the plenary power precedent,<sup>252</sup> DOMA was not aimed specifically at immigration and is not an expression of Congress’s policy distinguishing among aliens for the purposes of federal benefits.<sup>253</sup> In *Mathews*, the Supreme Court decided that Congress could constitutionally distinguish among aliens based on years of residency

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departure from *Bowers* was justified by an “emerging awareness” in the latter half of the twentieth century that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); *see also* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (concluding that DOMA’s treatment of same-sex marriage lacks any rational basis because it is not “directed to any identifiable legitimate purpose or discrete objective”), *aff’d sub nom.* Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 9 (1st Cir. 2012).

247. *See Mathews v. Diaz*, 426 U.S. 67, 78–80 (1976) (stating that aliens are not entitled to all the advantages of citizenship and that Congress treating aliens differently from citizens is not necessarily “invidious”).

248. *See* HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 24–25 (2006), *available at* <http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf> (describing Congress’s intention to ban the admission of homosexuals with the 1952 amendments to the INA by excluding “aliens afflicted with psychopathic personality, epilepsy or mental defect”).

249. *See supra* Part I.B (explaining Congress’s aims in passing DOMA).

250. HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, *supra* note 248, at 28.

251. *See* INA §§ 212, 237, 8 U.S.C. §§ 1182, 1227 (2006) (making no reference to homosexuality as a ground for inadmissibility or removability).

252. *See, e.g.,* Nguyen v. INS, 533 U.S. 53, 57–58 (2001) (involving a challenge to a provision in the INA); Fiallo v. Bell, 430 U.S. 787, 789 (1977) (same); Chae Chan Ping v. United States, 130 U.S. 581, 589 (1889) (involving a challenge to Congress’s immigration legislation with the Chinese Exclusion Act).

253. *Cf. Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (emphasizing that the question facing the Court was not one of aliens versus citizens in the eligibility for federal benefits, but rather a question of whether distinctions can be drawn within a class of aliens so that some are eligible for benefits while others are not).

for purposes of eligibility for federal benefits.<sup>254</sup> In the DOMA context, however, the basis for the distinction is the nature of the marital relationship.<sup>255</sup> While Congress may have relatively unfettered power to make policy choices distinguishing among aliens,<sup>256</sup> the difference between a distinction based on years of residency and a distinction based on the nature of a marital relationship—which is likely to invoke the Court’s precedent involving the fundamental right to marry—requires a thoughtful analysis of the constitutional issues at stake.<sup>257</sup>

Unlike DOMA, the statute upheld in *Fiallo* precluded recognition of a particular relationship expressly for the purposes of immigrant visa eligibility.<sup>258</sup> The challenged statute was a provision of the INA barring illegitimate children from qualifying for a non-quota preference category based on a relationship with a U.S. citizen natural father.<sup>259</sup> After analyzing the INA and legislative history of this exclusionary bar, the Court concluded that preferential status should not be extended to illegitimate children and their natural fathers.<sup>260</sup> The Court reasoned that because Congress amended the INA to recognize the relationship between an illegitimate child and a U.S. citizen natural mother for preferential status, but had intentionally refused to extend this status to U.S. citizen natural fathers, Congress’s policy choice was clear.<sup>261</sup> Unlike the challenged statutory provision in *Fiallo*, the legislative history of DOMA does not focus on immigration statutes or DOMA’s effect in immigration.<sup>262</sup> More importantly, the legislative history of DOMA does not indicate that Congress expressly intended to distinguish among the class of

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254. *Id.* at 83.

255. *See supra* Part I.B (explaining DOMA’s effect in immigration).

256. *See Fiallo*, 430 U.S. at 792 (recognizing the “limited scope of judicial inquiry” in Congress’s policy choices involving admission).

257. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (insisting that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” (citation omitted)); *see also* Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Provides a Forum for Attacking DOMA*, 18 *GEO. MASON U. C.R. L.J.* 455, 465 (2008) (arguing that DOMA’s application in immigration infringes on the fundamental right to “make decisions related to marriage”).

258. *Fiallo*, 430 U.S. at 799–800; *see also supra* Part II.C (explaining the Court’s reasoning in *Fiallo*).

259. *Fiallo*, 430 U.S. at 799–800.

260. *Id.* at 797, 799–800.

261. *Id.* at 797.

262. *See supra* Part I.B (discussing DOMA’s passage); *see also* Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.: Immigration Law the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 *GEO. IMMIGR. L.J.* 407, 446–52, 466–67 (2011) (discussing DOMA’s limited legislative history and indicating that Congress was aware of DOMA’s immigration consequences even though immigration was not a focus during DOMA’s passage).

foreign nationals by extending the immediate relative classification to heterosexual couples but not same-sex couples.<sup>263</sup> Moreover, DOMA did not necessitate a change in the INA because “child” and “parent” are explicitly defined in the INA<sup>264</sup> but “marriage” is not.<sup>265</sup> Thus, DOMA cannot be defended as Congress’s policy choice in immigration.

Accordingly, Congress’s plenary power in immigration policy decisions cannot insulate DOMA from traditional constitutional review. The Supreme Court has recognized Congress’s power to make policy choices in immigration as inherent to its plenary power in immigration. DOMA, however, was neither a result of Congress’s policy making in immigration nor an explicit practical decision to extend a benefit to some classes of foreign nationals but not others.

### III. CONSTITUTIONAL CHALLENGES TO DOMA’S APPLICATION IN IMMIGRATION SHOULD BE SUBJECT TO TRADITIONAL CONSTITUTIONAL STANDARDS OF REVIEW BECAUSE CONGRESS DID NOT ENACT DOMA USING ITS PLENARY POWER

Even though DOMA influences the immigration process, Congress did not enact DOMA using its immigration authority. Thus, judicial review of DOMA’s effect in immigration should not be limited to the deferential constitutional standards applied in plenary power cases.<sup>266</sup> If the plenary power doctrine is narrowed such that DOMA’s application in immigration falls outside the plenary power’s scope, the level of scrutiny that would apply to a constitutional challenge to DOMA in the immigration context, like the fate of DOMA itself, is not entirely clear.<sup>267</sup>

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263. See *supra* Part I.B (discussing DOMA’s legislative history).

264. INA § 101(b)(1), 8 U.S.C. § 1101 (2006).

265. See *supra* Part I.B (discussing how marriage is defined in immigration law).

266. Although Congress arguably did not enact DOMA using its immigration and naturalization authority, DOMA may apply to the immigration context as a public policy exception to marriage recognition. See *supra* Part I.B (discussing public policy exceptions in marriage recognition). The reconciliation of general rules of marriage recognition and federal public policy exceptions exemplifies the tension between the federal and state powers to define marriage under the Constitution’s Full Faith and Credit Clause—a conflict at the heart of the DOMA debate. This conflict is beyond the scope of this Comment; it is sufficient to differentiate between Congress’s plenary power to legislate in immigration and its authority to assert a public policy exception to marriage recognition. Unlike the plenary power doctrine, a public policy exception does not prohibit or influence judicial review. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (concluding that a state public policy exception foreclosing recognition of interracial marriages violated the Fourteenth Amendment). See generally Titshaw, *supra* note 6, at 579–93 (discussing federal public policy exceptions to marriage recognition).

267. See Mark Strasser, *What if DOMA were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT’L L.J. 249, 249 (2010)

When legislation involves foreign nationals, but was not enacted under Congress's immigration or naturalization authority, the Supreme Court has recognized that traditional equal protection standards apply.<sup>268</sup> Moreover, the INA, which contains a number of restrictions and limitations on judicial review of immigration decisions,<sup>269</sup> does not prohibit a constitutional challenge to DOMA in the immigration context. The INA explicitly states that none of its provisions "shall be construed to preclude review of constitutional claims."<sup>270</sup> Since Congress did not enact DOMA using its immigration or naturalization power, a constitutional challenge to DOMA's discrimination based on sexual orientation in the immigration context should be scrutinized like any other alleged equal protection violation.

Although DOMA can be distinguished from immigration law's apparent exceptionalism in constitutional analysis, the scrutiny applied to classifications based on sexual orientation in the traditional equal protection framework is unsettled.<sup>271</sup> In his February 23, 2011 letter to Congress, Attorney General Holder stated that President Obama has determined that DOMA's federal definition of marriage, as applied to same-sex couples legally married under state law, violates the Equal Protection Clause of the Fifth Amendment.<sup>272</sup> In reaching this determination, the President

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(arguing that it is unclear whether a "state would have the power to refuse to recognize a [same-sex] marriage valid . . . in another state" in the absence of DOMA); Titshaw, *supra* note 6, at 537 (doubting that a repeal of DOMA would "result in a clear, uniform rule recognizing all same-sex marriages" in immigration because of the INA's lack of clarity).

268. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 374 (1886) (stating that the provisions of the Equal Protection Clause are "universal in their application" and concluding that a city ordinance, which discriminated against a class of immigrants, was unconstitutional); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (stating that an alien is a "person" for the purposes of constitutional protections, whatever his status under the immigration laws). But see *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982) (concluding that the INA's denial of visa preference to same-sex spouses was constitutional in light of the INA's then explicit bar on homosexual admission).

269. See INA § 242 (outlining the myriad limits on judicial review of immigration decisions under the INA).

270. *Id.* § 242(a)(2)(D); cf. *id.* § 202(a)(1)(A) (containing a clause prohibiting discrimination based on "race, sex, nationality, place of birth, or place of residence" but not sexual orientation in the issuance of immigrant visas).

271. See, e.g., *Cook v. Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008) (concluding that homosexuals are not a suspect class and that classifications based on sexual orientation do not warrant heightened scrutiny); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006) (same); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997) (same). But see *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (holding that DOMA fails rational basis review and violates equal protection), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012).

272. Letter from Att'y Gen., *supra* note 13.



concluded that classifications based on sexual orientation should be subject to a heightened standard of scrutiny and that DOMA would fail to meet this standard.<sup>273</sup> Attorney General Holder thus announced to Congress that the executive branch would not defend DOMA in federal court cases challenging its constitutionality.<sup>274</sup> This announcement, while arguably a victory for DOMA's opponents, does not affect the adjudication of binational same-sex couples' petitions for immigration benefits because the Attorney General also stated that the executive branch would continue to enforce DOMA outside of the courtroom.<sup>275</sup>

Additionally, the Supreme Court has not ruled that classifications based on sexual orientation warrant heightened scrutiny. The Supreme Court in *Romer v. Evans*<sup>276</sup> applied rational basis review to invalidate a state statute that encouraged discrimination based on sexual orientation,<sup>277</sup> and the Court has since avoided the question of whether claims of discrimination based on sexual orientation warrant heightened scrutiny.<sup>278</sup> Many federal circuit courts of appeals have also declined to extend heightened scrutiny to classifications based on sexual orientation.<sup>279</sup> Moreover, some scholars argue that DOMA's interference with the marital decisions of U.S. citizens infringes on a fundamental right and thus is subject to strict scrutiny.<sup>280</sup> The Supreme Court, however, has been reluctant to frame immigration questions in terms of the rights of affected U.S. citizens.<sup>281</sup>

In addition to equal protection concerns, opponents have criticized Congress for exceeding its power in domestic relations by

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273. *Id.*

274. *Id.*

275. *Id.*

276. 517 U.S. 620 (1996).

277. *Id.* at 635.

278. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (focusing on the right to privacy and due process instead of the issue of what level of scrutiny applies to classifications based on sexual orientation).

279. See *supra* note 271 (illustrating in several cases that homosexuals are not a suspect class and warrant only rational basis review).

280. See Pinix, *supra* note 257, at 458 (arguing that DOMA infringes on the fundamental rights of U.S. citizens and that equal protection "trumps" the plenary power doctrine); Cori K. Garland, Note, *Say "I Do": The Judicial Duty to Heighten Scrutiny of Immigration Policies Affecting Same Sex Binational Couples*, 84 IND. L.J. 689, 711 (2009) (advocating for heightened scrutiny and less deference to Congress's plenary power because DOMA affects the fundamental rights of U.S. citizens).

281. See *Fiallo v. Bell*, 430 U.S. 787, 799 (1977) (concluding that immigration policy decisions are entrusted exclusively to the political branches, regardless of the effects of these decisions on the rights of U.S. citizens); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (refusing to frame the question as whether a benefit extended to a U.S. citizen can be revoked without a hearing and instead focusing on whether an alien has a right to admission).

enacting DOMA.<sup>282</sup> At a July 2011 hearing before the Senate Judiciary Committee on the impact of DOMA, Senator Dianne Feinstein, an ardent opponent of DOMA, argued that the Act is the single exception to a traditional legal scheme that has left marriage, divorce, adoption, and inheritance rights to the states.<sup>283</sup> In a variety of contexts, the Supreme Court has recognized the general rule that domestic relations are the prerogative of state and not federal law.<sup>284</sup> Thus, whether the federal government can define the spousal relationship is at the heart of the DOMA debate.<sup>285</sup> To allow Congress to do so in immigration simply because of the field's legal exceptionalism would ignore the fact that this debate is unsettled.

Much remains undecided in both the specific constitutional scrutiny of DOMA and the general role of constitutional review in immigration law. After the Attorney General's February 2011 letter, binational same-sex couples in immigration proceedings may find their cases closed or placed on hold,<sup>286</sup> while same-sex couples petitioning for immigration benefits will likely be denied altogether.<sup>287</sup> This confusion leaves foreign nationals, like Paul Wilson Dorman, in a legal limbo. As this situation develops, abandoning the plenary power justification for DOMA should at least allow courts to apply traditional constitutional standards of review—whatever those standards may ultimately be—rather than the deferential or diluted standards employed in modern plenary power

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282. See *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing on S. 589 Before the S. Comm. on the Judiciary*, 112th Cong. 3–4 (2011) [hereinafter *Respect for Marriage Act Hearing*] (statement of Sen. Dianne Feinstein) (noting her disagreement with the policy); see also *Massachusetts v. U.S. Dept. of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) (deciding that DOMA raises federalism concerns by regulating an area customarily left to states' discretion).

283. See *Respect for Marriage Act Hearing*, *supra* note 282, at 3 (statement of Sen. Dianne Feinstein) (insisting that the determination of marriage rights remain the "preserve of State law").

284. See *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (recognizing that state domestic relation orders regarding community property interests of separated or divorced spouses and their children are matters for state law and are not preempted by federal statutes); see also *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (recognizing, in the context of parental rights, that the area of domestic relations "has been left to the States from time immemorial, and not without good reason").

285. Cf. Pinix, *supra* note 257, at 464 (asserting that the Court has frequently struck down regulations that restrict marriage because the Constitution protects marriage decisions).

286. See *supra* note 14 and accompanying text (discussing immigration courts' hesitation to strictly enforce DOMA despite immigration courts and the BIA being bureaus or agencies for the purposes of DOMA's federal definition).

287. See ADJUDICATOR'S FIELD MANUAL, *supra* note 158 (advising adjudicators to deny the visa petitions of same-sex partners).

cases.<sup>288</sup>

#### CONCLUSION

Immigration cases since the 1970s indicate that the plenary power is no longer an unqualified barrier to judicial review. Rather than acting as a bulwark against judicial review, the plenary power doctrine should be interpreted narrowly and its limited application recognized in light of the myriad complexities in immigration law. A limited substantive framework for the plenary power's scope is possible, and plenary power case law suggests that not all political branch decisions involving immigration can be insulated from traditional standards of judicial review. The Supreme Court should recognize the limits of the plenary power rather than avoid the doctrine the next time it grants certiorari to a case in the unsettled line of *Miller*, *Nguyen*, and *Flores-Villar* challenges. If the Court adopts a nuanced plenary power framework, DOMA's application in immigration may fall outside the scope of that power.

With the Supreme Court's failure to confront the plenary power doctrine in *Flores-Villar*, constitutional jurisprudence in immigration remains a field mired with complexities and exceptions. Until the Supreme Court confronts DOMA's constitutionality or Congress repeals the Act, the fate of binational same-sex couples like Paul Wilson Dorman and his spouse remains undecided. By freeing DOMA's application in immigration from the plenary power justification, the conversation on DOMA's constitutionality can include its immigration consequences.

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288. See *supra* Part I.A.3 (discussing the constitutional standards applied in modern plenary power case law).