NOTE

Nguyen v. INS: No, Your Honor, Men Are Not From Mars

*Melanie L. Shender**

TABLE OF CONTENTS

* Senior Articles Editor, U.C. Davis Law Review, Volume 36. J.D. Candidate, U.C. Davis School of Law, May 2003; B.A., Westmont College, Dec. 1996. The author would like to thank her family and friends for all of their love and support. Many thanks to Rob Flemer, David Kelly, Elyse Park and the members of the U.C. Davis Law Review for their edits and suggestions.

INTRODUCTION

Jim is an American corporate employee based in Moscow, dating a Russian woman, Katya. Across the globe, Mary is an American executive working in Buenos Aires. She is also dating a local citizen, Juan. Each woman discovers she is pregnant, and each couple decides that the child should remain with the American when he or she returns to the States. In a few years' time, Mary and Jim move back to the United States, bringing their children with them.

However, the children, both born on foreign soil to a citizen and a non-citizen, are not on equal footing with the Immigration and Naturalization Service (INS).[1] Mary's daughter is now a citizen.[2] Jim's son is not.[3]

Jim does not know that to establish his son's citizenship he must comply with an obscure section of the Immigration and Naturalization Code, 8 U.S.C. § 1409.[4] The section requires fathers, but not mothers, to complete a number of steps to convey citizenship to their progeny.[5] Jim

---

[1] *See* 8 U.S.C. § 1409 (2002); *see also* Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 570 (2000) (discussing disparate treatment of fathers under immigration law) [hereinafter Kelly, *Republican Mothers*]; Debra L. Satinoff, Comment, *Sex-Based Discrimination in U.S. Immigration Law: The High Court's Lost Opportunity to Bridge the Gap Between What We Say and What We Do*, 47 AM. U. L. REV. 1353, 1356 (1998) (noting that section 1409 makes it more difficult for children born out-of-wedlock to American men than for those born to American women to gain citizenship).

[2] 8 U.S.C. § 1409(c).

[3] 8 U.S.C. § 1409(a).

[4] *Id.*

[5] The relevant statute provides:

> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 [8 USCS § 1401(c)-(e), (g)], and of paragraph (2) of section 308 [8 USCS § 1408(2)], shall apply as of the date of birth to a person born out of wedlock if —
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years —
>
> > (A) the person is legitimated under the law of the person's residence or domicile,

will only discover his mistake after his son pleads no contest to a criminal charge, and the INS appears at his house, prepared to deport his son because of that offense.[6]

The United States Supreme Court confronted this issue in *Nguyen v. INS*.[7] Joseph Boulais, an American in Vietnam working for a corporation, fathered Tuan Anh Nguyen with a Vietnamese woman.[8] Although Boulais raised Nguyen in the United States from the age of six, he did not legitimate him.[9] After Nguyen committed a felony, the INS sought to deport him based on 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii), which allows the INS to deport aliens convicted of certain crimes.[10] Because Nguyen's father had not legitimated him prior to his eighteenth birthday as required by 8 U.S.C. § 1409, Nguyen did not have citizenship.[11] When all appeals failed, Nguyen and his father petitioned the Supreme Court, which granted certiorari.[12] The Court held that section 1409 withstands heightened scrutiny and is consistent with the Equal Protection Clause of the Fourteenth Amendment.[13]

> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a). The House Committee on the Judiciary is currently considering an amendment to the statute which would remove the discriminatory language. *See infra* notes 241-43 and accompanying text.

[6] *See* 8 U.S.C. § 1227(a)(2) (authorizing deportation for specified criminal offenses including crimes of moral turpitude, firearm offenses, drug addiction and domestic violence).

[7] 533 U.S. 53 (2001).

[8] *Id.* at 57.

[9] *Id.* To legitimate his child, the father must petition a court for a declaration that the child qualifies for the same rights as a child born in wedlock. *See, e.g., Parnham v. Hughes*, 441 U.S. 347, 349 n.2 (1979) (quoting state statute setting forth process of legitimation).

[10] *Nguyen*, 533 U.S. at 57. Section 1227(a)(2)(A)(ii) and (iii) provides:

> (ii) Multiple criminal convictions. Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined [therefore] and regardless of whether the convictions were in a single trial, is deportable.
> (iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. §§ 1227(a)(2)(A)(ii) - (iii).

[11] *Nguyen*, 533 U.S. at 57. The word legitimate is defined as "[b]orn of legally married parents." BLACK'S LAW DICTIONARY 912 (7th ed. 1999). Legitimation is the process of "declaring a person legitimate." *Id.*

[12] *Nguyen*, 533 U.S. at 58.

[13] *Id.* at 58-59. *See infra* text accompanying notes 61-75 for a discussion of heightened

Contrary to the Court's holding, 8 U.S.C. § 1409(a) cannot withstand the heightened scrutiny required for sex-based classifications.[14] Indeed, section 1409(a) violates the Equal Protection Clause by discriminating against fathers, as well as their illegitimate children.[15] Unfortunately, the Supreme Court frequently fails to properly apply heightened scrutiny to rules that facially involve the biological differences between the genders.[16]

Part I of this Note presents the history behind 8 U.S.C. § 1409. Part II details the facts, procedure, and rationale of *Nguyen v. INS*. Part III analyzes the holding of the case, and makes three arguments. First, the Supreme Court erred in its application of the test for heightened scrutiny. Second, the Court mistakenly ignored Nguyen's argument that section 1409(a) discriminates against illegitimate children.[17] Finally, the Supreme Court once again mistakenly relied upon biology to justify sex discrimination.

I. LEGAL BACKGROUND

This section presents the historical development of section 1409(a). First, it briefly summarizes theories of citizenship. It then discusses

---

scrutiny.

[14] *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (describing heightened scrutiny required for sex-based classifications); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (stating party defending sex-based classification must show "exceedingly persuasive justification"); *see also* United States v. Ahumada-Aguilar, 189 F.3d 1121, 1122 (9th Cir. 1999) (holding section 1409 violates equal protection), *rev'd* 533 U.S. 913 (2001). Even if heightened scrutiny does not apply, in 1976 the Court determined mid-tier scrutiny applies to all sex-based classifications challenged under the Fourteenth or Fifth Amendments. Satinoff, *supra* note 1, at 1360. This level of scrutiny requires the presumption that gender-based classifications are invalid. *Id.*

[15] *See* Kelly, *Republican Mothers*, *supra* note 1, at 574 (noting immigration law consistently relies upon stereotype of nurturing mothers and insignificant or absent fathers).

[16] *See, e.g.*, Michael M. v. Super. Ct., 450 U.S. 464 (1981) (holding that because legislature designed statutory rape law to prevent teenage pregnancy, defining act as taking place on female did not violate equal protection); Geduldig v. Aiello, 417 U.S. 484 (1974) (allowing state's disability insurance to exclude disabilities resulting from pregnancy because exclusion only affected pregnant women).

[17] *See, e.g.*, Pickett v. Brown, 462 U.S. 1 (1983) (holding two year statute of limitation on paternity and support actions involving illegitimate children denies them equal protection of law); Trimble v. Gordon, 430 U.S. 762 (1977) (holding unconstitutional law preventing illegitimate children from inheriting intestate only from their mothers when legitimate children could inherit intestate from both their mothers and fathers); Gomez v. Perez, 409 U.S. 535 (1973) (invalidating law denying right of paternal support to illegitimate children while granting that right to legitimate children); Levy v. Louisiana, 391 U.S. 68 (1968) (rejecting law preventing illegitimate children from recovery in wrongful death actions).

legislative action regarding citizenship, subsequent litigation, and the legislative response. Finally, it describes the standard of review to be applied to sex-based statutes.

A. The History of 8 U.S.C. § 1409(a)

1. Citizenship in the United States

Although each country is free to develop its own citizenship laws, there are three primary methods of gaining citizenship.[18] The first method is that of *jus solis* - meaning citizenship depends upon the soil on which the child is born.[19] Under this doctrine, the physical location of birth determines citizenship.[20] The second method is that of *jus sanguinis*, or citizenship by blood.[21] In other words, citizenship is transmitted from parent to child.[22] The United States Constitution does not prescribe *jus*

---

[18] FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 3 (photo. reprint 1980) (1904); *see also* Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93, 95 n.1 (2000) (explaining rules to determine citizenship); Captain David S. Gordon, USA, *Section V Civil Rights: Dual Nationality and the United States Citizen*, 102 MIL. L. REV. 181, 181 (1983) (discussing three methods of citizenship); Paula Guitierrez, *Mexico's Dual Nationality Amendments: They Do Not Undermine U.S. Citizens' Allegiance and Loyalty or U.S. Political Sovereignty*, 19 LOY. L.A. INT'L & COMP. L. REV. 999, 1000 (1997) (describing methods of citizenship); Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. 181, 181-82 (2000) (discussing difference between *jus sanguinis* and *jus solis*) [hereinafter Kelly, *Alienation of Fathers*]; Katharine B. Silbaugh, Miller v. Albright: *Problems of Constitutionalization in Family Law*, 79 B.U.L. REV. 1139, 1142-43 (1999) (describing two forms of citizenship).

[19] VAN DYNE, *supra* note 18, at 3. *See generally* Augustine-Adams, *supra* note 18, at 95 n.1 (describing grant of *jus solis* citizenship); Kelly, *Alienation of Fathers*, *supra* note 18, at 181 (noting child born on United States soil gains citizenship regardless of parents' status); Silbaugh, *supra* note 18, at 1142 (stating *jus solis* citizenship results from location of birth).

[20] *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); *see also* Miller v. Albright, 523 U.S. 420, 423-24 (1998) (commenting that citizenship by birth is guaranteed by Constitution). *See generally* Augustine-Adams, *supra* note 18, at 95 n.1 (noting United States relies primarily on *jus solis*, granting citizenship to any child born within country including those of tourists, students and illegal aliens); Kelly, *Alienation of Fathers*, *supra* note 18, at 181 (observing that child born on United States soil is constitutionally recognized citizen); Silbaugh, *supra* note 18, at 1142-43 (commenting that *jus solis* is common law form of citizenship).

[21] VAN DYNE, *supra* note 18, at 3. *See generally* Augustine-Adams, *supra* note 18, at 95 n.1 (noting that within certain limitations, United States grants citizenship to children of American citizens born abroad); Silbaugh, *supra* note 18, at 1143 (describing *jus sanguinis* from Roman and civil law tradition, which considers persons to be citizens of parents' nations regardless of place of birth).

[22] *See generally* Kelly, *Alienation of Fathers*, *supra* note 18, at 182 (discussing conferring citizenship by blood); Silbaugh, *supra* note 18, at 1143 (observing *jus sanguinis* citizenship is

sanguinis citizenship, and thus, Congress has control over whether children born abroad become citizens.[23] Finally, there is naturalization, by which a person takes a new nationality after birth.[24]

Jus solis citizenship, as the common law and constitutionally-based method of citizenship, is the least controversial method of the three.[25] Because it is a simple matter — a child gains the citizenship of the country in which he is born — there is little room for debate.[26] However, *jus sanguinis*, as the statutory form of citizenship, has often been a point of much contention, discussed in numerous cases, usually resulting in deference to Congress.[27] As the following cases demonstrate, scholars and jurists continue to debate these issues of citizenship.

---

created by statute).

[23] See Miller v. Albright, 523 U.S. 420, 478-79 (1998) (Breyer, J., dissenting).

[24] Gutierrez, *supra* note 18, at 1000 n.9.

[25] *See generally* Kelly, *Alienation of Fathers*, *supra* note 18, at 181 (discussing established doctrine of *jus solis* citizenship); Silbaugh, *supra* note 18, at 1142 (describing constitutional grant of citizenship to those born in United States).

[26] Kelly, *Alienation of Fathers*, *supra* note 18, at 181.

[27] *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (commenting on Congress' plenary powers in immigration matters); Rogers v. Bellei, 401 U.S. 815 (1971) (upholding provision imposing post-age-fourteen and pre-age-twenty-eight residential requirement to persons bestowed citizenship by birth abroad to one alien and one citizen parent); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (noting courts historically recognized political, rather than judicial, control over immigration matters). Plenary power is power which is broadly construed; here, it comes from the simple statement in the Constitution that Congress has power over naturalization. U.S. CONST. art. I, § 8, cl. 1, 4.

The derivation of congressional power over immigration matters is unclear. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 10 (3d ed. 2002). One possible source is the Commerce Clause found in Article I of the Constitution. *Id.* The relevant clause reads that Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. Under this view, immigration implicates commerce with foreign nations. LEGOMSKY, *supra*, at 10.

At least one scholar suggests that the concept that the power to control immigration is essential to the nature of a sovereign state. Gabriel Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 58 (1998). This power derives from international law, rather than the Constitution. *Id.* The Supreme Court itself notes the derivation, stating that the power to expel aliens derives not from the Constitution, but from "the law of nations." United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 318 (1936). Regardless of its origins, throughout the United States' history, the courts have consistently upheld this ideal, granting great deference to Congress in immigration matters. Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616 (2000).

2. *Fiallo v. Bell* and the Legislative Response

In 1977, the Supreme Court decided *Fiallo v. Bell*.[28] The plaintiffs were three sets of unwed fathers and their children, seeking special immigration preference based upon their familial relationships.[29] Special immigration status allowed entry without regard to labor certification requirements or numerical quotas.[30] In each case, the government informed the applicant that failure to legitimate made preference unavailable.[31] In response to the rulings, the applicants filed suit in federal court, challenging the constitutionality of sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952.[32] This statute provided special preference immigration status to aliens who qualified as the children or parents of United States citizens.[33] The statutory definition of "child" excluded illegitimate children who sought preference by virtue of a relationship with the natural father.[34] The plaintiffs challenged the constitutionality of the statute, raising a number of arguments.[35]

First, the plaintiffs contended that the statute infringed upon their right to privacy.[36] Second, the plaintiffs argued that the statute violated their Fourteenth Amendment equal protection rights, applicable to the federal government as part of Fifth Amendment due process.[37] It did so by discriminating on the basis of the illegitimacy of the child and the marital status and gender of the parent.[38] Third, the plaintiffs argued that the statute denied them their Fifth Amendment right to due process of law by assuming an absence of a relationship between fathers and their un-legitimated children.[39] Finally, the plaintiffs argued the statute

---

[28] 430 U.S. 787 (1977).

[29] *Id.* at 790.

[30] *Id.* at 789.

[31] *Id.* at 790.

[32] *Id.* at 791.

[33] *Id.* at 788.

[34] *Id.* at 789.

[35] *Id.* at 791.

[36] *Id.*

[37] *Id.*; *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 601 n.1 (14th ed. 2001).

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

[39] *Id.* The term "due process" means that the "conduct of legal proceedings" will be in accordance with "established rules and principles for the protection and enforcement of private rights." BLACK'S LAW DICTIONARY 516 (7th ed. 1999). In plain English, this means that a person's rights may not be infringed upon without proper legal proceedings. James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 101-102 (1996). Because the statute at issue in *Fiallo* assumed a lack of personal

violated the Ninth Amendment by infringing upon the natural rights of fathers and children to have a relationship.[40]

A three-judge district court convened to consider the Constitutional issues.[41] Two of the judges observed that Congress has broad powers in immigration and naturalization issues, and dismissed the case.[42] The United States Supreme Court granted certiorari, and affirmed the lower court.[43] The Court recognized that the statute appeared to discriminate against illegitimate children, but held that Congress had ultimate authority over immigration matters.[44]

Three years later, Congress responded to *Fiallo* by enacting a new statutory regime.[45] Explicitly rejecting *Fiallo*, Congress stated that it considered the current law to be both unfair and unwise as a matter of policy.[46] Thus, it adopted 8 U.S.C. § 1409.[47]

B. Section 1409(a) and the Court's Analysis

Section 1409 of the Immigration and Nationality Act deliberately changed the conveyance of citizenship to illegitimate children.[48] Nevertheless, it retained the same type of sex-based classification that made its predecessor unfair.[49] Thus, it was only a matter of time before new plaintiffs filed suit, claiming a violation of their constitutional rights.[50]

1. Conveying Citizenship to Children Born Out-of-Wedlock

Section 1409 sets forth the standards and procedure by which a child born out of wedlock on foreign soil to a citizen and a non-citizen may

---

relationship between fathers and their children, the plaintiffs believed it violated this principle. *Fiallo*, 430 U.S. at 791.

[40] *Fiallo*, 430 U.S. at 791.

[41] *Id.*

[42] *Id.* at 791-92

[43] *Id.* at 799-800.

[44] *Id.* at 799.

[45] REPORT OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ON H.R. 7273, H.R. REP. NO. 96-1301, at 24 (1980) [hereinafter REPORT], reprinted in 9 IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 1977-1986 (James Francis Bailey, III, ed., 1987); *see* Kelly, *Republican Mothers*, *supra* note 1, at 574 (recognizing pressure on Congress to amend immigration provisions challenged in *Fiallo v. Bell*).

[46] REPORT, *supra* note 45, at 24.

[47] *Id.*; 8 U.S.C. § 1409 (2001).

[48] REPORT, *supra* note 45, at 24.

[49] Nguyen v. INS, 533 U.S. 53, 60 (2001).

[50] Miller v. Albright, 523 U.S. 420 (1998).

obtain citizenship.[51] If the mother of the child is a citizen who has previously lived in the United States for at least one continuous year, the child is automatically a citizen.[52] However, if the father of the child is a citizen, the child only gains citizenship if his father meets certain other requirements.[53]

As enacted in 1980, the statute requires fathers to take several steps to pass citizenship to their progeny.[54] First, the father must establish a blood relationship between himself and the child with clear and convincing evidence.[55] Second, the father must have been a United States citizen at the time of the child's birth.[56] Finally, the father must demonstrate that at least one of the following occurred before the child turned eighteen: the father legitimated the child under the law of the child's residence or domicile, the father acknowledged paternity of the child in writing under oath, or that a court, through adjudication, established the paternity of the child.[57]

In 1986, Congress amended the statute to add an additional requirement.[58] Now, the father must also agree in writing to provide financial support for his child until the child reaches eighteen years of age.[59] Children born prior to 1986 may elect to apply either the amended version or the pre-1986 version of the statute.[60]

2. Heightened Scrutiny for Sex-Based Classifications

On its face, section 1409 contains different criteria for men and women.[61] The statute is therefore a sex-based classification.[62] Sex-based classifications are potentially unconstitutional because they create different standards that benefit or burden one sex.[63] Examples of such

---

[51] 8 U.S.C. § 1409.

[52] § 1409(c).

[53] § 1409(a).

[54] *Id.*; Nguyen, 533 U.S. at 59-60; Miller, 523 U.S. at 431.

[55] § 1409(a)(1).

[56] § 1409(a)(2).

[57] § 1409(a)(4)(A-C).

[58] § 1409(a)(3).

[59] *Id.*

[60] Nguyen v. INS, 533 U.S. 53, 60 (2001).

[61] 8 U.S.C. § 1409.

[62] *Nguyen*, 533 U.S. at 60.

[63] The Fourteenth Amendment provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." U.S. CONST. AMEND XIV, § 2; *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985) (discussing issues surrounding sex-based classifications).

classifications include excluding one sex from enrolling in an educational institution, or using peremptory challenges in jury selection to exclude one gender.[64]

Generally, sex-based classifications are subject to a higher level of scrutiny than ordinary laws, which typically receive more deferential review.[65] When a challenged policy relies on sex, the court must examine it under the Equal Protection Clause of the Fourteenth Amendment.[66] Equal protection requires that similarly situated people be treated alike.[67] The party defending a sex-based classification must show an "exceedingly persuasive justification" for the classification.[68] Furthermore, the party must establish that it serves key government policies.[69] Finally, the classification must be substantially related to the furtherance of those policies.[70] When the preceding factors are not demonstrated, the court should strike the statute down.[71]

Many impermissible sex-based classifications reflect overbroad generalizations or "imperfect proxies."[72] Courts usually find these sex-based classifications unconstitutional.[73] Presumably, a law reflecting a "perfect proxy," or a generalization true of all or none of one sex, could be constitutional.[74] However, even sex-based classifications based on

---

[64] *See* United States v. Virginia, 518 U.S. 515 (1996) (invalidating policy excluding women from state educational institution); J.E.B. v. Alabama, 511 U.S. 127 (1994) (invalidating jury selection process allowing peremptory strikes based on gender); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (invalidating state-supported school's policy excluding males from enrolling); *see also* Parnham v. Hughes, 441 U.S. 347 (1979) (upholding statute allowing mother, but not father, of illegitimate child to sue for wrongful death).

[65] *See Virginia*, 518 U.S. at 531 (commenting that burden of proof on parties seeking to defend sex-based government action requires "exceedingly persuasive justification"); *J.E.B.*, 511 U.S. at 135 (noting that Court consistently applies heightened scrutiny to sex-based classifications). *But see* United States v. Ahumada-Aguilar, 189 F.3d 1121, 1125 (9th Cir. 1999) (deciding that when reviewing immigration statutes, *Fiallo* decision provides appropriate standard of rational basis review), *rev'd* 121 S. Ct. 2518 (2001).

[66] *See Hogan*, 458 U.S. at 723.

[67] *Cleburne Living Ctr.*, 473 U.S. at 439.

[68] *See Virginia*, 518 U.S. at 531; *Hogan*, 458 U.S. at 724.

[69] *Hogan*, 458 U.S. at 724.

[70] *Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724).

[71] *See id.* at 539 (finding no persuasive evidence that male-only admissions policy furthered state policy); *Hogan*, 458 U.S. at 730 (holding female-only admissions policy invalid because State did not make showing sex-based classification was substantially and directly related to state policy).

[72] Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000).

[73] *Id.*

[74] *Id.*

statistics reflecting overwhelmingly accurate generalizations may not survive heightened scrutiny.[75]

3. *Miller v. Albright*

The United States Supreme Court substantively applied heightened scrutiny to section 1409 in *Miller v. Albright*.[76] Miller, born out of wedlock in the Philippines to an American man and a Filipino woman, grew up in the Philippines.[77] At age twenty-one, Miller requested United States citizenship.[78] The State Department denied her application.[79] Miller's father then obtained a decree of paternity, and Miller reapplied.[80] The State Department again denied her application.[81]

The Department ruled that because her father did not legitimate her prior to her eighteenth birthday, she had not complied with section 1409(a).[82] Miller and her father then filed a complaint against the Secretary of State.[83] The defense filed a motion to dismiss, and in response, the district court dismissed Mr. Miller as a party, removing the case to the District Court for the District of Columbia.[84] After losing her case in both the district court and the court of appeals, Miller appealed to the Supreme Court, which granted certiorari.[85]

The Court affirmed the court of appeals' judgment in a splintered opinion.[86] Writing for a plurality, Justice Stevens found the facts of the case only implicated one issue: whether section 1409(a)(4) violated equal protection.[87] With this limitation, the Court only examined the provision

---

[75] *Id.* at 1450.

[76] *See* Miller v. Albright, 523 U.S. 420, 433-45 (1998) (analyzing section 1409 and concluding important governmental interests support it).

[77] *Id.* at 425.

[78] *Id.* at 426.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 426-27.

[85] *Id.* at 427-28.

[86] *Id.* at 445. Justice Stevens and Chief Justice Rehnquist determined the statute did not violate the Fifth Amendment. *Id.* at 424. Justices O'Connor and Kennedy believed that Miller did not have standing to raise a sex discrimination claim because the statute distinguished the sex of the parent, not the child. *Id.* at 445-46. Justices Scalia and Thomas agreed with the outcome of the case, but expressed the view that the Court had no power over citizenship matters. *Id.* at 453.

[87] *Id.* at 432.

that fathers must obtain proof of paternity while the child is a minor.[88]

The Court determined the statute furthered several important governmental objectives.[89] First, the statute ensured trustworthy evidence of a biological relationship between the child and the parent.[90] Second, the statute encouraged the child to develop a relationship with the parent, and in turn, with the United States.[91] The *Miller* plurality determined the means employed substantially furthered those ends.[92]

The Court stated that DNA testing was more burdensome and expensive than court-obtained legitimation.[93] Thus, Congress could rationally conclude it preferable to require a formal legal act, combined with clear and convincing evidence, to prove paternity.[94] Further, requiring legitimation would mean that the father knew of the biological link, thus ensuring an opportunity for a relationship to develop.[95] The opinion only briefly referred to the heightened scrutiny normally applied to sex-based classifications.[96] The majority's analysis, however, reveals that it tested the statute on those grounds.[97] Unfortunately, due to the splintered opinion, the Court did not resolve the issue of the constitutionality of the statute's distinction between fathers and mothers.[98]

II. *NGUYEN V. INS*

In 2001, three years after *Miller*, the Supreme Court once again took up the issue of the constitutionality of section 1409(a) in *Nguyen v. INS*.[99] In 1969, Joseph Boulais fathered Tuan Anh Nguyen with a Vietnamese woman.[100] The relationship between Boulais and the child's mother disintegrated, and from early infancy Nguyen lived with Boulais.[101]

---

[88] *Id.*

[89] *Id.* at 436-38.

[90] *Id.*

[91] *Id.* at 438.

[92] *Id.* at 437-40.

[93] *Id.* at 437.

[94] *Id.*

[95] *Id.* at 438.

[96] *Id.* at 434, n.11; *see* Kristin Collins, Note, *When Fathers Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1703 (2000) (discussing Justice Stevens' plurality opinion arguing section 1409 withstands heightened scrutiny).

[97] *Miller*, 523 U.S. at 435-40.

[98] Nguyen v. INS, 533 U.S. 53, 58 (2001).

[99] *Id.* at 56.

[100] *Id.*; Petitioners' Brief at 4, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

[101] *Nguyen*, 533 U.S. at 57; Petitioners' Brief at 4, *Nguyen* (No. 99-2071).

Boulais later married another Vietnamese citizen.[102] When South Vietnam's defeat was imminent, six year old Nguyen escaped with his step-mother's family.[103] Thereafter, Nguyen lived with his father in Texas, becoming a lawful permanent resident.[104]

In 1992, at age twenty-two, Nguyen pleaded guilty in Texas state court to two counts of sexual assault on a child.[105] The court sentenced Nguyen to eight years in prison.[106] Three years after Nguyen's criminal sentence, the INS initiated deportation proceedings against him.[107] For reasons unclear in the record, Nguyen testified he was a Vietnamese citizen, and the immigration judge found him deportable.[108] Nguyen then appealed to the Board of Immigration Appeals, this time claiming American citizenship.[109]

In 1998, as the appeal was pending, Boulais obtained an order of parentage from a Texas court based on DNA testing proving his paternity.[110] However, the Board dismissed Nguyen's appeal, rejecting his claim to citizenship because his father failed to comply with 8 U.S.C. § 1409 by not legitimating him by his eighteenth birthday.[111] Together, Nguyen and Boulais appealed to the Court of Appeals for the Fifth Circuit.[112]

On appeal, the petitioners argued that section 1409(a)(3) - (4) violated equal protection by providing different rules for citizen fathers and citizen mothers.[113] The court rejected the claim.[114] Nguyen and Boulais then petitioned the United States Supreme Court.[115]

The Supreme Court granted certiorari in *Nguyen* to determine whether the distinction made in section 1409(a) was unconstitutional.[116] In *Miller*,

---

[102] Petitioners' Brief at 4, *Nguyen* (No. 99-2071).

[103] *Id.*

[104] *Nguyen*, 533 U.S. at 57.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* The Court noted the importance of Boulais' participation in the suit, commenting that in *Miller* some justices believed the child did not have standing to raise the equal protection claim. *Id.* at 58.

[113] *Id.*; Petitioners' Brief at 11, *Nguyen* (No. 99-2071).

[114] *Nguyen*, 533 U.S at 58.

[115] *Id.*

[116] *Id.* at 56-57.

due to the splintered opinion, the Court did not definitively decide the issue.[117] Here, in a five to four vote, the Supreme Court held that section 1409(a) was consistent with the Equal Protection Clause of the Fourteenth Amendment.[118] Justice Kennedy, writing for the majority, determined that the statute withstood the heightened scrutiny required for sex-based classifications.[119] Kennedy reasoned that two important governmental objectives justified the imposition of the special requirements for paternal relationships.[120]

The first objective was to ensure that a biological parent-child relationship existed.[121] The majority concluded that because the father need not be present at birth, it was logical to require more proof of paternity than maternity.[122] A woman delivers the child, and thus her maternal relationship is clear from birth.[123] However, a man's presence in the hospital is not proof of paternity — he could be a brother or friend, rather than the father.[124] The majority thus believed that men and women were not similarly situated with regard to proof of parenthood.[125] Therefore, the Court concluded that different rules for establishing paternity were justified.

The petitioners argued that the requirement that fathers provide clear and convincing evidence of fatherhood was sufficient proof of paternity.[126] Construing the petitioners' argument as mandating DNA testing, the Court countered that Congress was not constitutionally required to choose one particular mechanism to prove paternity.[127] The majority stated that section 1409(a)(4) represented Congress' reasonable belief that satisfying one of the listed alternatives would establish a blood link between father and child.[128]

The majority also recognized the legitimacy of the governmental objective of ensuring that the child and father had an opportunity to develop a concrete relationship.[129] The assumption was that such a

---

[117] *Id.* at 58.
[118] *Id.* at 59.
[119] *Id.* at 60-61.
[120] *Id.* at 62.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 63.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 64-65.

relationship would result in a relationship with the United States.[130] The majority reasoned that the extra requirements were necessary to further these interests.[131] The Court stated that a simple DNA test would not meet the government interest of ensuring that a personal, rather than merely biological, relationship existed.[132] The majority cited the ease of travel and the number of American men working overseas as proof of the need for more stringent proof of paternity requirements.[133] While women overseas inevitably know of their pregnancy, men might return to the United States before learning of it.[134]

The majority concluded that the means Congress selected to further the objective was substantially related to the end.[135] It stated that it was not surprising that Congress required an opportunity for a parent-child relationship to develop.[136] The majority rejected the petitioners' argument that the statute did not guarantee a personal mother-child relationship.[137]

The petitioners also argued section 1409(a) reflected a stereotype that women were more likely than men to develop personal relationships with their children.[138] However, the majority believed this argument misconstrued both the nature of the governmental objective at issue and the equal protection analysis.[139] While Congress could have opted for a case-by-case analysis of citizenship claims, the majority identified the appropriate objective as the opportunity for a relationship to develop, not the existence of one.[140] The enacted scheme served that objective.[141] Furthermore, the majority stated the statute met the equal protection standard because it was substantially related to the achievement of that objective.[142] Thus, the Court upheld 8 U.S.C. § 1409(a).[143]

---

[130] *Id.*

[131] *Id.*

[132] *Id.* at 67.

[133] *Id.* at 65.

[134] *Id.* Justice Kennedy even wrote that a woman could save a lock of hair for DNA testing years later. *Id.*

[135] *Id.*

[136] *Id.* at 68.

[137] *Id.* at 69.

[138] *Id.* at 68.

[139] *Id.* at 69.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 70.

[143] *Id.* at 73.

III. ANALYSIS

When illuminated by heightened scrutiny, section 1409(a) must fail.[144] The Supreme Court inconsistently applied the test, reaching a mistaken conclusion.[145] In addition, the majority neglected to consider Nguyen's argument that the section unlawfully discriminates against children born out of wedlock.[146] Regrettably, the Supreme Court often inequitably applies heightened scrutiny to rules facially involving biological differences between the sexes.[147]

A. Section 1409(a) Cannot Withstand Heightened Scrutiny

A party seeking to uphold a sex-based classification must demonstrate an "exceedingly persuasive justification" for the classification.[148] The party must show the means employed substantially relate to important governmental objectives.[149] Section 1409(a) fails this test because the discriminatory classification is not substantially related to the stated governmental objectives.[150]

The Supreme Court ruled that the statute promoted two governmental objectives.[151] The first was to ensure that a biological relationship exists between the parent and child.[152] The second objective was to ensure the opportunity for a relationship to develop between the parent and the child, which results in ties to the United States.[153]

---

[144] *See id.* at 79 (O'Connor, J., dissenting) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[145] *Id.* (O'Connor, J., dissenting).

[146] Nguyen v. INS, 533 U.S. 53, 56-74 (2001); Appellant's Reply Brief at 5, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

[147] *See, e.g.*, Rainey v. Chever, 527 U.S. 1044 (1999) (upholding state law imposing support obligations on non-custodial fathers, but not mothers, because mothers have unique role in giving birth to child); Michael M. v. Super. Ct., 450 U.S. 464 (1981) (holding statutory rape law restricting definition to act committed against females constitutional because one purpose was to prevent teenage pregnancies and only females become pregnant); Geduldig v. Aiello, 417 U.S. 484 (1974) (allowing state disability insurance program to exempt pregnancy-related disabilities from coverage because program did not exclude all women while covering all men).

[148] United States v. Virginia, 518 U.S. 515, 532-33 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (citations omitted).

[149] *Hogan*, 458 U.S. at 724.

[150] *See* Clay M. West, Note, Nguyen v. INS: *Is Sex Really More Important Now?*, 19 YALE L. & POL'Y REV. 525, 531 (2001) (stating that Fifth Circuit opinion improperly concluded section 1409(a) withstands heightened scrutiny).

[151] *Nguyen*, 533 U.S. at 62.

[152] *Id.*

[153] *Id.* at 69.

Nguyen and Boulais argued against the alleged necessity of the requirements to prove a biological link between parent and child.[154] They reasoned that advances in science, such as more accurate DNA testing, make it possible to establish a biological relationship by clear and convincing evidence.[155] It proved to be an unfortunate example, however, as Justice Kennedy seized upon it to defeat the argument.[156]

The Court stated the Constitution does not mandate that Congress choose a specific mechanism to establish paternity.[157] However, the petitioners' argument did not propose to limit what serves as clear and convincing evidence.[158] Rather, the petitioners argued that after a court has received clear and convincing evidence of paternity, it need not seek more.[159] Thus, the additional provisions required under section 1409(a) do little to further the alleged governmental interest of ensuring a biological link between father and child.[160]

The second asserted governmental interest is close to an argument advanced by the INS.[161] According to the Court, section 1409(a)(4) substantially furthers the goal of ensuring the opportunity for a familial relationship between father and child.[162] Such a relationship consists of "real, everyday ties" providing a connection not just between the child and parent, but also the United States.[163] Thus, the government has an interest in not only ensuring the existence of a biological relationship, but also that of a real parental relationship. The Court concluded that the statutory provisions ensure an opportunity for a relationship to develop, something scientific proof cannot do.[164]

As Justice O'Connor stated in her dissent, the INS did not rely on this justification in its brief.[165] The INS asserted a need for a real relationship,

---

[154] *See* Petitioners' Opening Brief at 21-24, *Nguyen* (No. 99-2071).

[155] *Id.*

[156] *Nguyen*, 533 U.S. at 63.

[157] *Id.*

[158] Petitioners' Opening Brief at 21-24, *Nguyen* (No. 99-2071).

[159] *Id.*; *see also Nguyen*, 533 U.S. at 80-81 (O'Connor, J., dissenting) (highlighting that clear and convincing evidence alone will ensure biological link).

[160] *Id.* (O'Connor, J., dissenting).

[161] *Id.* at 64; *see also* Respondent's Brief at 11, *Nguyen* (No. 99-2071) (setting forth governmental interest of ensuring recognized relationship between parent and child, and thus United States).

[162] *Nguyen*, 533 U.S. at 64-65.

[163] *Id.*

[164] *Id.* at 65.

[165] *See Nguyen*, 533 U.S. at 79 (O'Connor, J., dissenting) (highlighting INS' reliance on need to ensure relationship between parent and child and need to prevent statelessness of out-of-wedlock children).

not the mere opportunity for one.[166] Requiring an opportunity for a relationship is weaker than requiring an actual relationship.[167] Furthermore, the INS does not require the "real, everyday ties" which the majority promoted.[168] Indeed, Nguyen serves as a perfect example of the possibility for a real relationship to develop while still failing to provide the necessary proof under section 1409(a).[169]

Finally, the majority's dismissal of sex-neutral alternatives is troubling.[170] Heightened scrutiny requires a demonstration that the discriminatory means are substantially related to the alleged important governmental interests they purport to serve.[171] When sex-neutral alternatives exist, such as requiring all parents to submit proof of parentage, it seems unlikely that the discrimination is substantially related to an important objective.[172]

Some might argue that the Court should be more deferential to Congress' plenary powers in immigration and naturalization matters.[173] This argument is predicated on the concept that Congress controls all citizenship matters not resolved by the Constitution.[174] The plenary

---

[166] *See* Respondent's Brief at 16, *Nguyen* (No. 99-2071) (discussing desire of Congress to ensure real relationship between father and child); *see also Nguyen*, 533 U.S. at 84 (O'Connor, J., dissenting) (stating that majority's rendition of argument is actually weaker than interest stated by INS).

[167] *Nguyen*, 533 U.S. at 84 (O'Connor, J., dissenting).

[168] *See id.* (O'Connor, J., dissenting) (pointing out that INS does not require real, everyday ties between parent and child).

[169] *Id.* (O'Connor, J., dissenting).

[170] *See id.* at 64 (arguing sex specific terms are necessary due to biological differences between men and women); *id.* at 69 (reasoning Congress declined to write sex-neutral statute because it is easier to require more of men); *see also id.* at 88 (O'Connor, J., dissenting) (noting majority's impermissible justification of sex-based classification on grounds of administrative convenience).

[171] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[172] *Nguyen*, 533 U.S. at 89 (O'Connor, J., dissenting) (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152 (1980) and Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973)).

[173] *See id.* at 71-72 (recognizing INS' argument that Court must defer to Congress); Miller v. Albright, 523 U.S. 420, 453 (Scalia, J., concurring) (stating that Court cannot provide relief because only Congress may confer citizenship); *see also* Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 348-55 (2001) (reviewing Supreme Court's history of deferring to Congress over immigration matters).

[174] *Nguyen*, 533 U.S. at 72. *See generally* Satinoff, *supra* note 1, at 1356-57 (noting Justice Scalia's concurring opinion in *Miller* largely existed because he and Justice Thomas believed only Congress may confer citizenship); Silbaugh, *supra* note 18, at 1144 (discussing Supreme Court's application of lower standard in *Fiallo v. Bell* because Congress has broad plenary powers in immigration matters); Collin O'Connor Udell, Miller v. Albright: *Plenary Power, Equal Protection, and the Rights of An Alien Love Child*, 12 GEO. IMMIGR. L.J. 621, 622-26 (1998) (discussing history of Congress' plenary powers in immigration matters).

powers doctrine is not stagnant, however. This is especially true considering its basis in international law, which matures with time.[175]

Regardless, the issue in *Nguyen* precedes the issues of immigration and naturalization.[176] The issue is whether the applicant is a citizen in the first place, for example, at the moment of birth.[177] Deference to Congress only applies if the individual is an alien at birth.[178] Because the statute addresses the issue of conveyance of citizenship at birth, it does not implicate Congress' immigration and naturalization powers.[179] Thus, heightened scrutiny applies, just as it would to any other sex-based classification.[180]

B. Discrimination Against the "Bastards"

The Court also failed to recognize the discriminatory effect of section 1409(a) on illegitimate children.[181] While Nguyen raised the issue, the Court chose not to address it.[182] In failing to do so, the Court lost a valuable opportunity to clarify that discrimination against illegitimate children is unconstitutional.

---

[175] *See* Chin, *supra* note 27, at 59-60.

[176] *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting).

[177] *Id.* (O'Connor, J., dissenting), *see* Romero, *supra* note 173, at 348 (noting Constitution specifically gives Congress power over naturalization, and Supreme Court implies Congress' power over immigration issues by reference to other explicit powers).

[178] *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting).

[179] *Id.* (O'Connor, J., dissenting).

[180] *Id.* (O'Connor, J., dissenting).

[181] *See* Appellant's Brief, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071) (arguing section 1409 unlawfully discriminates on basis of sex); *see also* Appellant's Reply Brief at 5, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071) (citing trend of non-discrimination toward illegitimate children).

[182] *Nguyen*, 533 U.S. at 53; Appellant's Reply Brief at 5, *Nguyen* (No. 99-2071).

The Court has a long history of equitable treatment of children.[183] With such strong preferences toward supporting children regardless of their parents' marital status, it is difficult to understand why the Court did not seize upon the opportunity to again declare such discrimination unconstitutional. The Court previously stated that illegitimate children are persons within the meaning of the Equal Protection Clause.[184] Further, the Court has noted that illegitimate children are entitled to the same benefits given to children generally.[185]

Yet, in *Nguyen*, the Court failed to address the issue. By setting forth different standards for conveyance of citizenship to illegitimate children, section 1409(a) creates a discriminatory distinction.[186] Congress itself rejected discrimination against fathers and their illegitimate children when setting up the new statutory scheme; indeed, that was the very motive behind the amendment.[187] In *Nguyen*, the Court had the opportunity to enforce this legislative intent, and it should have done so.

Some might argue that this would circumvent the important governmental interest of ensuring a real and biological relationship between the parent and the child.[188] However, currently acceptable evidence of paternity does not ensure a real and biological relationship between parent and child. For example, a birth certificate is sufficient

---

[183] *See, e.g.*, Pickett v. Brown, 462 U.S. 1 (1983) (holding that two-year statute of limitation on paternity and support actions involving illegitimate children denies them equal protection of law); Mills v. Habluetzel, 456 U.S. 91 (1982) (striking down one year statute of limitation on paternity suits where child is born out-of-wedlock); Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating law preventing illegitimate children from inheriting intestate only from their mothers when legitimate children could inherit intestate from both their mothers and fathers); Jimenez v. Weinberger, 417 U.S. 628 (1974) (holding Social Security statute preventing illegitimate children dependent on disabled parent from receiving disability insurance benefits as violative of equal protection); Gomez v. Perez, 409 U.S. 535 (1973) (holding law denying right of paternal support to illegitimate children while granting that right to legitimate children unconstitutional); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (holding welfare program providing benefits only to married families violates equal protection for illegitimate children); Levy v. Louisiana, 391 U.S. 68 (1968) (rejecting law preventing illegitimate children from recovery in wrongful death actions).

[184] *Levy*, 391 U.S. at 70.

[185] *Gomez*, 409 U.S. at 538.

[186] *See generally* Augustine-Adams, *supra* note 18, at 136 (arguing for equal treatment of illegitimate children).

[187] REPORT, *supra* note 45, at 24. Congress unfortunately retained some discriminatory language; however, the record is clear that the intent behind the amendment was to remove the ill effects on illegitimate children. *Id.*

[188] *See* Nguyen v. INS, 533 U.S. 53, 68 (2001) (stating that Congress has right to ensure opportunity for relationship between father and child to develop).

evidence of maternity.[189] It is strange that a simple piece of paper might serve such an important function because formal legal documentation of birth may be lost or never issued.[190] Thus, they do not guarantee a relationship and are therefore not more effective than sex-neutral alternatives.[191] Unfortunately, the Court never addressed why a birth certificate suffices to show a relationship between mother and child, but "clear and convincing proof" of paternity does not do the same for fathers.[192]

C. Discrimination Justified in Biologically Based Decisions

The Supreme Court reached the wrong conclusion in *Nguyen v. INS*. Unfortunately, the decision is not surprising given the Court's history on issues involving sex-based classifications with a biological basis.[193] Many legal analysts have examined the Court's use of sex stereotyping.[194] The Court has no difficulty striking down clearly discriminatory laws and policies, such as exclusion of one sex from an educational institution.[195] However, when the sex discrimination is based on biological factors, the Court has traditionally attempted to justify the distinctions.[196]

---

[189] Indeed, a birth certificate often lists both parents; yet, while it suffices as proof of motherhood, it is not admissible to prove paternity. *See High Court Needs to be Enlightened on Subject of Fathers' Rights*, MILWAUKEE JOURNAL SENTINAL, June 17, 2001, at K7034 (commenting that birth certificate should be admissible proof of paternity).

[190] *Nguyen*, 533 U.S. at 81 (O'Connor, J., dissenting).

[191] *See id.* at 81-82 (O'Connor, J., dissenting) (discussing impact of availability of sex-neutral alternatives on equal protection analysis).

[192] *See supra* note 189.

[193] *See* NANCY LEVIT, THE GENDER LINE 66-69 (1998) (describing historical United States Supreme Court decisions in which Court relied on sex as biological category).

[194] *See* Augustine-Adams, *supra* note 18, at 110-11 (noting Court's emphasis on relation of giving birth to development of social ties); Case, *supra* note 72, at 1449-50 (discussing use of gender stereotypes to justify sex-based rules); Collins, *supra* note 96, at 1708 (recognizing sex-based parenting laws do not undergo appropriate equal protection review); Kelly, *Republican Mothers*, *supra* note 1, at 569-70 (discussing gender bias in immigration law).

[195] *See* United States v. Virginia, 518 U.S. 515 (1996) (ruling that policy of excluding women from Virginia Military Institute violated equal protection); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding state-supported university's policy of excluding males from enrolling in its nursing school violated Equal Protection Clause).

[196] *See* Michael M. v. Super. Ct., 450 U.S. 464 (1981) (upholding California's statutory rape law definition of unlawful sexual intercourse as 'an act of sexual intercourse with a female' because one purpose of statute was prevention of teenage pregnancy); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding California's disability insurance could exclude from coverage disabilities relating to pregnancy and childbirth because not all women get pregnant); *see also* Augustine-Adams, *supra* note 18, at 101 (highlighting Justice Stevens' concern in *Miller v. Albright* that biological differences matter for single men and women in a way that justifies different rules for conferring citizenship on children).

One scholar notes that for centuries, constitutional jurisprudence focused on a biological model of sex.[197] In an early case, the Court denied a woman's admission to the bar, holding that the Fourteenth Amendment did not cover the right to practice law.[198] An examination of Supreme Court sex discrimination jurisprudence reveals a number of cases in which the Court has accepted sex-based classifications.[199]

For example, the Court has upheld a statute defining statutory rape as a sexual act taking place on a female.[200] Reasoning that one purpose for the law is the prevention of teenage pregnancy, the Court found the sex distinction permissible.[201] Similarly, the Court has upheld California's disability insurance policy excluding disabilities relating to pregnancy from coverage.[202] The Court found that because the exclusion did not exclude all women from coverage while covering all men, the Constitution allowed the distinction.[203]

The Supreme Court used similar rationale in *Nguyen v. INS*.[204] First, the Court reasoned that the additional demands placed upon fathers are necessitated by the fact that fathers, as opposed to mothers, need not be present at birth.[205] The majority reasoned that the requirements are necessary to serve the governmental interest of ensuring a biological parent-child relationship exists.[206] However, the Court ignored the improbability that the INS would be aware of and record exactly who

---

[197] LEVIT, *supra* note 193 and accompanying text, at 66; *see also* Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1737 (1991) (noting sex-based differences are historical justifications for sex-based disparities).

[198] *See* LEVIT, *supra* note 193, at 66 (citing Bradwell v. Illinois, 83 U.S. 130 (1873)).

[199] *See generally* Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding selective service system excluding women from enrollment because women are not eligible for combat); *Michael M.*, 450 U.S. 464 (holding statutory rape law constitutional although it defines act as taking place with female); Dothard v. Alabama, 433 U.S. 321 (1977) (upholding statute excluding women from prison guard employment where such employment would involve interaction with male inmates because woman's ability to maintain security would be reduced by her womanhood); *Geduldig*, 417 U.S. 484 (allowing California's disability insurance policy exclusion of disabilities resulting from pregnancy); Goesert v. Cleary, 335 U.S. 464 (1948) (upholding Michigan statute forbidding female bartenders unless they are wife or daughter of male owner because bartending by women might give rise to social and moral problems); Muller v. Oregon, 208 U.S. 412 (1908) (upholding Oregon statute regulating length women's work days in certain establishments because difference in bodily structure between sexes justifies such protection).

[200] *Michael M.*, 450 U.S. at 470-71.

[201] *Id.*

[202] *Geduldig*, 417 U.S. 484.

[203] *Id.* at 496-97.

[204] Nguyen v. INS, 533 U.S. 53 (2001).

[205] *Id.* at 61.

[206] *Id.* at 62.

was present in the birthing chamber.[207] As Justice O'Connor highlighted in her dissent, the uniqueness of birth as a verification of parentage is only apparent to those actually present at the moment of birth.[208]

Congress' concern with obtaining assurance of a real, biological relationship between parent and child is thus not promoted by a statute containing a sex-based classification.[209] Indeed, even the majority recognized the existence of sex-neutral alternatives, such as simply requiring both genders to submit proof of parenthood.[210] Strangely, the Court rushed by the existence of sex-neutral alternatives, characterizing them as "hollow neutrality."[211] Normally, the existence of at least comparable sex-neutral alternatives to a sex-based classification serves as powerful persuasion for rejecting that distinction.[212] Here, it inimitably justified it.[213]

Second, the Court reasoned that the statute ensures an opportunity for a relationship to develop between the child and parent, and thus, the United States.[214] The majority reasoned that in the case of the citizen mother, there is an opportunity for such a relationship from the fact of birth.[215] For the father, there is no such certainty.[216]

However, the INS asserted a need for a real parental relationship, not the mere opportunity for one.[217] Clearly, an "opportunity" for a relationship does little to ensure the alleged governmental objective.[218] Many children with this supposed opportunity are separated from their parents at an early age, and never see a relationship develop.[219] Even

---

[207] *Id.* at 82 (O'Connor, J., dissenting).

[208] *Id.* (O'Connor, J., dissenting); *see also* Augustine-Adams, *supra* note 18, at 106-109 (discussing ambiguity of parental relationship for both genders).

[209] *Nguyen*, 533 U.S. at 82 (O'Connor, J., dissenting).

[210] *Id.* at 64.

[211] *Id.*

[212] *Id.* at 81 (O'Connor, J., dissenting); *see supra* notes 170-72 and accompanying text.

[213] *Id.* (O'Connor, J., dissenting).

[214] *Id.* at 64-65; *see* Augustine-Adams, *supra* note 18, at 110-11 (noting Court condones concept that biology dictates nature of relationship between child and country because "perceived potential for social ties . . . determines citizenship").

[215] *Nguyen*, 533 U.S. at 65. *But see* Catherine MacKinnon, *Can Fatherhood Be Optional?*, N.Y. TIMES, June 17, 2001, at 4-15 (commenting that with new medical technologies, biological mother is not necessarily present at birth).

[216] *Nguyen*, 533 U.S. at 65.

[217] *Id.* at 84 (O'Connor, J., dissenting); Respondents' Brief at 11, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

[218] *Nguyen*, 533 U.S. at 84 (O'Connor, J., dissenting).

[219] *Id.* (O'Connor, J., dissenting).

accepting the majority's terminology, the statute remains deficient.[220] As previously mentioned, Nguyen and Boulais demonstrate the possibility that, even without statutory proof, a real parental relationship may develop.[221]

Finally, the Court again relied too strongly on the event of birth as a means of explaining the necessity of the extra requirements.[222] Undeniably, Congress could simply require that the parent have been present at birth, or known of it.[223] Instead, the statute distinguishes between men and women on account of sex.[224]

The reliance on sex may be a proxy for what is actually gender stereotyping.[225] The statute assumes women are natural caretakers, and that men are less likely to be active in their children's lives. Stereotyping is usually considered an "imperfect proxy," and thus, an overbroad generalization.[226] When the Court finds a "perfect proxy," or a rule that is true of all or none of one gender, the Court usually determines the rule can withstand constitutional scrutiny.[227] In *Nguyen*, the Court relied upon the proxy of childbirth; because only women give birth, only women may convey citizenship at that moment.[228] However, just because something is true of all does not make it morally right.[229]

---

[220] *Id.* (O'Connor, J., dissenting).

[221] *Id.* (O'Connor, J., dissenting).

[222] *Id.* at 86 (O'Connor, J., dissenting).

[223] *Id.* (O'Connor, J., dissenting).

[224] *Id.* (O'Connor, J., dissenting).

[225] *Id.* at 88-89 (O'Connor, J., dissenting); *see also* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 167-68 (1992) (discussing nature of discrimination based on proxy traits and stereotypes); Kelly, *Republican Mothers*, *supra* note 1, at 571 (noting *Miller* majority failed to "distinguish biological realities from societal stereotypes"); E.J. Dionne, *A Ruling Rooted in Stereotypes*, THE RECORD (Bergen County, N.J.), June 18, 2001, (noting majority's opinion reflected stereotype that men lack opportunity to develop relationships with their children); MacKinnon, *supra* note 215 (observing majority assumed "motherhood is passive, automatic and natural while fatherhood is active, voluntary and legal").

[226] Case, *supra* note 72, at 1449.

[227] *See id.* at 1457-60 (describing "perfect proxy" cases in which Supreme Court upheld sex-classifications, such as *Michael M. v. Super. Ct.*, 450 U.S. 464 (1981) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975)).

[228] *See Nguyen*, 533 U.S. at 62 (stating that female's presence at birth is verifiable from birth itself and is documented, whereas male's presence does not provide incontrovertible proof of fatherhood); *see also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 914-15 (2002) (noting Court uniquely relies upon pregnancy as fundamental difference between genders which justifies differential treatment).

[229] *See* Alexander, *supra* note 225, at 168-73 (describing moral issues with proxy discrimination).

Fortunately, the Court has invalidated many rules containing such proxies, properly characterizing them as impermissible stereotyping.[230] In *Nguyen*, however, the Court refuted the allegation that the statute stereotyped parents.[231] In doing so, the Court seemingly misconstrued the traditional understanding of the term stereotype.[232] In *Nguyen*, the Court claimed that the statute reflected the concept that women have a unique opportunity in the moment of birth to form a bond with their child.[233] According to the Court, that opportunity is exclusive to women; therefore, reliance upon it does not reflect a stereotype that women form stronger bonds with their children than do men.[234] In previous cases, however, the Court recognized that stereotypes might have empirical support, and thus appear rational.[235] Regardless of such support, stereotypes are impermissible because there are usually more accurate and neutral options.[236] Because section 1409 relies on impermissible stereotypes, it should be struck down.[237]

CONCLUSION

Nguyen v. INS was wrongly decided. By relying too heavily on "basic biological differences," the majority ignored the obvious — those differences do not provide the necessary proof of parentage.[238] Furthermore, section 1409 also unlawfully discriminates against illegitimate children. It is unfortunately clear that the current Court will

---

[230] *See* Case, *supra* note 72, at 1450 (noting that most sex-classifications struck down by Court in last twenty-five years contained near-perfect proxies).

[231] *Nguyen*, 533 U.S. at 68.

[232] *Nguyen*, 533 U.S. at 68; *see also id.* at 89-90 (O'Connor, J., dissenting) (demonstrating majority's definition of stereotype does not justify sustaining law relying on such stereotypes).

[233] *See Nguyen*, 533 U.S. at 68; *id* at 89-90 (O'Connor, J., dissenting) (observing that majority employs different definition of stereotypes in *Nguyen* than in past cases).

[234] *Id.* at 68.

[235] *Id.* (O'Connor, J., dissenting) (citing J.E.B. v. Alabama, 511 U.S. 127, 139 n.11 (1994); Craig v. Boren, 429 U.S. 190, 201 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)).

[236] *Id.* at 90 (O'Connor, J., dissenting). The Court rejected such stereotypes in United States v. Virginia, 518 U.S. 515 (1996); J.E.B. v. Alabama, 511 U.S. 127 (1994); Craig v. Boren, 429 U.S. 190 (1976); and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[237] *Id.* at 90 (O'Connor, J., dissenting); *see* Satinoff, *supra* note 1, at 1363, quoting Miller v. Christopher, 96 F.3d 1467, 1477 (D.C. Cir. 1996) (Wald, J., concurring), (noting judicial recognition that decisions regarding section 1409 and section 1409 itself sanction stereotypes); West, *supra* note 150, at 537 (noting section 1409 equates sex with impermissible stereotypical gender generalizations).

[238] *Nguyen*, 533 U.S. at 73.

not provide the appropriate remedy.[239] Paradoxically, if Joseph Boulais had abandoned his son in Vietnam, and an American couple had adopted him, Tuan Anh Nguyen would be a citizen.[240]

At least some members of Congress have recognized this inequity. On January 7, 2003, U.S. Representative Sheila Jackson-Lee (D-Tex) introduced the Father's Equity Act to amend section 1409.[241] The proposed amendment would remove the requirement of financial support and allow the establishment of paternity at any time, rather than only prior to the child's eighteenth birthday.[242] In addition, the amendment would permit the children of deceased U.S. citizens to gain citizenship.[243] This proposed amendment is an important step forward in

---

[239] *See id.* at 61 (noting that statute involves Congress' immigration and naturalization power).

[240] Following the strengthening of the deportation laws, foreign-born adoptees risked deportation for petty offenses. Congress responded with legislation conveying citizenship to any child adopted by Americans, including those adopted prior to enactment of the law. *See* Bruce Finley, *Adoptive Families Celebrate Citizenship Law*, THE DENVER POST, Feb. 28, 2001, at B-01.

[241] H.R. 88, 108th Cong. (1st Sess. 2003). The proposed amendment reads:

> Section 309(a) of the Immigration and Nationality Act (8 U.S.C. § 1409(a)) is amended —
>
> (1)in paragraph (2), by adding 'and' at the end;
>
> (2)by striking paragraph (3);
>
> (3)in paragraph (4), by striking 'while the person is under the age of 18 years —' and inserting 'at any time —'; and
>
> (4)by redesignating paragraph (4) as paragraph (3)
>
> Sec. 3. Clarification Regarding Deceased Parents of Children Born Abroad and Out of Wedlock
>
> Section 309 of the Immigration and Nationality Act (8 U.S.C. § 1409) is amended by adding at the end the following:
>
> '(d)Nothing in this section shall be construed to preclude a person who is a citizen or national of the United States by virtue of a provision of this section from establishing such status under this title after the death of the person's father, mother, or parents.'
>
> Sec. 4. Effective Date
>
> The amendments made by this Act shall apply to persons born out of wedlock who are alive on or after the date of the enactment of this Act." *Id.*

[242] *Id.*

[243] *Id.*

immigration law. Congress should approve the amendment to eliminate the clear sex discrimination in the current act.[244]

[244] *See* Dionne, *supra* note 225 (urging Congress to equalize citizenship laws); Linda K. Kerber, *Top Court Took a Step Back on Gender Bias*, BOSTON GLOBE, June 23, 2001, at A14 (calling for congressional action).

***