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# GENDER INEQUALITY IN IMMIGRATION LAW: WHY A PARENT'S GENDER SHOULD NOT DETERMINE A CHILD'S CITIZENSHIP

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## INTRODUCTION

“There are ‘two sources of citizenship, and two only: birth and naturalization.’”<sup>1</sup> Under the Fourteenth Amendment of the United States Constitution, individuals born in the United States are citizens by birth.<sup>2</sup> Individuals born outside the United States can become citizens if they are naturalized within the United States.<sup>3</sup> However, some individuals born outside the United States are automatically citizens at birth, by virtue of the citizenship of the individual’s parents.<sup>4</sup> This is called derivative citizenship.<sup>5</sup> To confer derivative citizenship to a child born abroad, the citizen parents must have been physically present in the United States for a certain period of time.<sup>6</sup> For unwed parents, the process of conferring citizenship becomes more complex.<sup>7</sup> In that context, whether or not a child born abroad is considered a citizen is determined largely by the gender of the United States citizen parent.

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<sup>1</sup> *Miller v. Albright*, 523 U.S. 420, 423 (1998) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)).

<sup>2</sup> U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

<sup>3</sup> *Id.* (“All persons . . . naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

<sup>4</sup> *See* 8 U.S.C. § 1401(c) (2012).

<sup>5</sup> *Morales-Santana v. Lynch*, 804 F.3d 520, 524 (2d Cir. 2015) (“Unlike citizenship by naturalization, derivative citizenship exists as of a child’s birth or not at all.”).

<sup>6</sup> *See* 8 U.S.C. § 1401(c).

<sup>7</sup> *See id.* §§ 1401, 1409(c).

Consider the following hypotheticals as an illustration. *X* was born outside the United States, but was brought to the United States a few days after his birth by his father, a United States citizen. *X* was raised by his father in the United States. Years later, *X* is convicted of various crimes and is subjected to a deportation proceeding. *X* wishes to assert as a defense to the deportation that he is a citizen by birth because of the derivative citizenship his father conferred to him. However, because *X*'s father only lived in the United States for nine years prior to *X*'s birth, he does not meet the ten-year physical presence requirement imposed on fathers in order to confer citizenship on a child. Therefore, *X* is not considered a citizen and is deported.

Next, consider *Y*. *Y* was also born outside the United States, but unlike *X*, *Y* lives abroad for most of his life. *Y* eventually moves to the United States and shortly thereafter is convicted of various crimes and subjected to a deportation proceeding. *Y* asserts the defense of derivative citizenship and is successful. This is because *Y*'s mother, a United States citizen, lived in the United States for one year when she was a child, although she never lived in the United States again after that. Because there is a one-year physical presence requirement imposed on mothers, as opposed to ten years imposed on fathers, *Y* is considered a citizen by birth. Therefore, *Y* is a citizen and is not deported.

Both scenarios illustrate that an individual's derivative citizenship is based on the gender of that individual's citizen parent. For example, in the first hypothetical, if *X*'s mother, instead of his father, were the United States citizen, *X* would have been considered a citizen. Similarly, in the second hypothetical, if *Y*'s father, instead of his mother, were the United States citizen, *Y* would not have been considered a citizen. Although *X* and *Y* may not be the most sympathetic defendants, there is an inherent inequality in the law that governs their citizenship. The law takes two similarly situated groups, (1) unwed citizen mothers of a child born abroad and (2) unwed citizen fathers of a child born abroad, and makes durational distinctions based on the gender of that parent. Thus, the effect of the law is to favor the citizenship of a child whose mother is a United States citizen, even if she had only lived in the United States for one year, over the citizenship of a child whose father is a United States citizen, even if he resided there for a much longer duration.

The specific statutory provisions illustrated above are modeled after §§ 1401(a)(7) and 1409(a) of the Immigration and Nationality Act of 1952 (“INA”).<sup>8</sup> The INA imposes a ten-year durational requirement on an unwed citizen father of which five of those years must be obtained after the father is fourteen years old, but imposes a one-year durational requirement on an unwed mother, without any limitation on when that one year occurred.<sup>9</sup> This Note analyzes the United States Supreme Court’s jurisprudence with regard to gender-based distinctions in the INA as well as the current circuit split over the constitutionality of §§ 1401(a)(7) and 1409(a). This Note concludes that the distinctions in §§ 1401(a)(7) and 1409(a) impermissibly discriminate on the basis of gender and, therefore, violate the Constitution’s guarantee of equal protection.

Part I provides a background of equal protection principles, including the well-established standard the Supreme Court uses in analyzing gender discrimination claims. Part I also illustrates Supreme Court precedent by discussing three important cases dealing with gender discrimination in the INA. Part II presents §§ 1401(a)(7) and 1409(c) and describes the current split of authority among the circuit courts over the constitutionality of those provisions. Part III details why the gender-based distinctions in the INA are unconstitutional and proposes a gender-neutral solution to remedy the constitutional violation.

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<sup>8</sup> See 8 U.S.C. §§ 1401(a)(7), 1409(c) (1952). Unless otherwise noted, “[§§] 1401(a)(7)” and “[§] 1409(c)” refer to the provisions of the 1952 Act.

<sup>9</sup> Section 1401(a)(7) states:

The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

*Id.* § 1401(a)(7). Section 1409(c) provides the physical presence requirement for citizen mothers:

Notwithstanding [Section 1409(a)(7)], a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been physically present in the United States or one of its outlying possession for a continuous period of one year.

*Id.* § 1409(c).

## I. GENDER DISCRIMINATION IN IMMIGRATION LAW

A. *Equal Protection Principles and Standards of Review*

When a federal law is challenged for discriminating or creating classifications based on gender, that law is subject to a heightened, or intermediate, form of review<sup>10</sup> to determine whether it violates the Fifth Amendment's guarantee of equal protection.<sup>11</sup> Under this standard of review, the government must show that the "classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"<sup>12</sup> The justification for the classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation."<sup>13</sup> Further, the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>14</sup>

Since the 1970s, the United States Supreme Court has struck down many laws on equal protection grounds,<sup>15</sup> and has only held that gender discrimination was permissible in a few

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<sup>10</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 531, 533 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>11</sup> Claims against the federal government alleging a violation of equal protection are brought under the Fifth Amendment. Unlike the Fourteenth Amendment, which contains an explicit mention of equal protection, the Fifth Amendment's guarantee of equal protection is implicit in its Due Process Clause. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."). Equal protection claims brought against the federal government are analyzed the same way as equal protection claims brought against state governments are analyzed. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

<sup>12</sup> *Virginia*, 518 U.S. at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also *Hogan*, 458 U.S. at 718; see generally *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>15</sup> See, e.g., *Virginia*, 518 U.S. at 519; *Hogan*, 458 U.S. at 733 (finding a violation of equal protection where a male was denied admission to an all-female nursing school); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (finding Oklahoma's statute, which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18, violated the Equal Protection Clause of the Fourteenth Amendment).

circumstances.<sup>16</sup> Specifically, when gender based distinctions are present in immigration laws, the Court has been reluctant to find violations of equal protection.<sup>17</sup> Because immigration statutes are traditionally reviewed under a lower, deferential form of scrutiny,<sup>18</sup> the Court is faced with the dilemma of deciding whether to review the law under this lower form of scrutiny or to review the law under intermediate review.<sup>19</sup>

### B. Gender Discrimination in Immigration Statutes and the Court's Jurisprudence

#### 1. Deferring to Congress's Broad Immigration Powers To Justify a Gender Based Distinction

For the first time in *Fiallo v. Bell*,<sup>20</sup> the Supreme Court was presented with an equal protection challenge to an immigration policy that contained a gender-based classification for deciding whether or not to grant “special preference immigration status” to aliens who qualified as “children” or “parents” of United States

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<sup>16</sup> The Court has upheld gender discrimination when the classification is based on biological differences. See generally *Nguyen v. INS*, 533 U.S. 53 (2001); *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

<sup>17</sup> See *Nguyen*, 533 U.S. at 73; *Miller v. Albright*, 523 U.S. 420, 445 (1998); *Fiallo v. Bell*, 430 U.S. 787, 799–800 (1977).

<sup>18</sup> See *Fiallo*, 430 U.S. at 792; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 94, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore is subject only to narrow judicial review” and “the federal power over aliens is ‘quite broad, almost plenary,’ and therefore the classification need[] only a rational basis.” (quoting *Mow Sun Wong v. Hampton*, 333 F. Supp. 527, 531 (N.D. Cal. 1971)).

<sup>19</sup> There are stark differences in reviewing a statute under rational basis as opposed to reviewing a statute under intermediate scrutiny. First, the burden is placed on different parties. *Nguyen*, 533 U.S. at 75 (O’Connor, J., dissenting) (“[U]nder heightened scrutiny, [t]he burden of justification is demanding and it rests entirely on [the party defending the classification].” Under rational basis scrutiny, by contrast, the defender of the classification ‘has no obligation to produce evidence to sustain the rationality of a statutory classification.’” (first quoting *Virginia*, 518 U.S. at 533; then quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Another difference is the scope of the judicial inquiry into the statute’s purpose. *Id.* at 76–77 (“[Under heightened scrutiny,] the court must inquire into the actual purposes of the discrimination, [while under rational basis review, a court may] hypothesize interests that might support legislative distinctions.”). A third significant difference is the fit between the means used and the ends served. *Id.* at 77 (“Under heightened scrutiny, the discriminatory means must be ‘substantially related’ to an actual and important governmental interest. Under rational basis scrutiny, the means need only be ‘rationally related’ to a conceivable and legitimate state end.”).

<sup>20</sup> 430 U.S. 787 (1977).

citizens.<sup>21</sup> Because of the way “child” was defined in the statute,<sup>22</sup> all American citizens were entitled to bring their alien children to the United States, except fathers of illegitimate children.<sup>23</sup> Similarly, all citizens were entitled to bring their alien parents to the United States, except for those citizens who were illegitimate children desiring to bring their fathers.<sup>24</sup> The appellants, three sets of unwed fathers and their illegitimate children, had sought a special immigration preference either as an alien father or alien child by virtue of their relationship with the citizen or resident child or parent.<sup>25</sup> They were each denied this preference.<sup>26</sup> The appellants sought an injunction against enforcement of the statutory provision and challenged the provision for violations of equal protection and due process.<sup>27</sup>

The Court denied the appellants’ challenge and refused to review the statute with a higher form of scrutiny.<sup>28</sup> The Court explained that past cases “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.”<sup>29</sup> The Court instead applied a

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<sup>21</sup> *Id.* at 788.

<sup>22</sup> 8 U.S.C. § 1101(b)(1)(D) (1970). “Child” is defined in part as “an unmarried person under twenty-one years of age who is . . . an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother.” *Id.* (emphasis added).

<sup>23</sup> *Fiallo*, 430 U.S. at 803 (Marshall, J., dissenting).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 790 (majority opinion).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 791. More specifically, the appellants argued:

[T]he statutory provisions (i) denied them equal protection by discriminating against natural fathers and their illegitimate children “on the basis of the father’s marital status, the illegitimacy of the child and the sex of the parent without either compelling or rational justification”; (ii) denied them due process of law to the extent that there was established “an unwarranted conclusive presumption of the absence of strong psychological and economic ties between natural fathers and their children born out of wedlock and not legitimated”; and (iii) “seriously burden[ed] and infringe[d] upon the rights of natural fathers and their children, born out of wedlock and not legitimated, to mutual association, to privacy, to establish a home, to raise natural children, and to be raised by the natural father.”

*Id.* (quoting Brief for Appellants at 11–12, *Fiallo v. Bell*, 430 U.S. 787 (1977), No. 75-6297, 1976 WL 181349).

<sup>28</sup> *Fiallo*, 430 U.S. at 795.

<sup>29</sup> *Id.* at 792 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

“facially legitimate and bona fide” standard<sup>30</sup> and deferred to Congress’ judgment in enacting the statute, stating that “[t]his distinction is just one of many drawn by Congress pursuant to its determination to provide some but not all families with relief from various immigration restrictions.”<sup>31</sup> The Court reasoned that since these distinctions were “policy questions entrusted exclusively to the political branches of our Government,” the Court had “no judicial authority to substitute [its] political judgment for that of Congress.”<sup>32</sup> The Court therefore upheld the challenged provisions under this deferential form of review.<sup>33</sup>

## 2. Using Biological Differences To Justify a Gender-Based Distinction

More than two decades later, in *Miller v. Albright*, a fractured Court upheld the constitutionality of § 1409(a)(4) of the Immigration and Nationality Act, which required an unwed citizen father to establish paternity of his child before the child’s eighteenth birthday in order to confer citizenship on that child.<sup>34</sup> The law did not impose any similar affirmative steps to be taken by the mother in order to establish a relationship with the child and thus, was challenged for impermissibly discriminating on the

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<sup>30</sup> *Id.* at 794–95 (stating that when legislative immigration power is exercised “on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against [the interest asserted by the challenging party]”).

<sup>31</sup> *Id.* at 797. The Court then described the other distinctions Congress created in the statute for determining whether the alien can qualify for preferential status. *See id.* at 797–98 (“Congress has decided that children, whether legitimate or not, cannot qualify for preferential status if they are married or are over 21 years of age.”); *id.* at 798 (“Legitimated children are ineligible for preferential status unless their legitimation occurred prior to their 18th birthday and at a time when they were in the legal custody of the legitimating parent or parents.”); *id.* (“Adopted children are not entitled to preferential status unless they were adopted before the age of 14 and have thereafter lived in the custody of their adopting or adopted parents for at least two years.”); *id.* (“[S]tepchildren cannot qualify unless they were under 18 at the time of the marriage creating the stepchild relationship.”).

<sup>32</sup> *Id.* at 798.

<sup>33</sup> *Id.* at 799–800.

<sup>34</sup> *Miller v. Albright*, 523 U.S. 420, 424–26 (1998); *see also* 8 U.S.C. § 1409(a)(4) (1988). The precise question to be decided by the Court was “whether the requirement in § 1409(a)(4)—that children born out of wedlock to citizen fathers, but not citizen mothers, obtain formal proof of paternity by age 18, either through legitimation, written acknowledgement by the father under oath, or adjudication by a competent court—violates the Fifth Amendment.” *Miller*, 523 U.S. at 432.



basis of gender.<sup>35</sup> The plurality opinion, written by Justice Stevens, was joined only by Chief Justice Rehnquist.<sup>36</sup> Justice Stevens explained that the three government interests advanced—“[E]nsuring reliable proof of a biological relationship between the potential citizen and its citizen parent . . . encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor[,] and the related interest in fostering ties between the foreign-born child and the United States”—were all important and the means provided by the statutory provision were “well tailored to serve those interests.”<sup>37</sup> Further, Justice Stevens opined that § 1409(a)(4) was not based on a stereotypical gender-based classification and that the biological differences between men and women “provide a relevant basis for differing rules for governing their ability to confer citizenship on children born [out of wedlock].”<sup>38</sup> Therefore, unlike in *Fiallo*, where the Court upheld the statute under a rationality review, here, the Court upheld the statute under a more heightened scrutiny, examining the interests and the means, but ultimately concluding that it was constitutional.<sup>39</sup>

Justice O'Connor filed a concurring opinion in which Justice Kennedy joined, concluding that the petitioner did not have standing to raise her father's gender discrimination claim.<sup>40</sup> Justice Scalia also filed a concurring opinion in which Justice Thomas joined, explaining that the Court had “no power to provide the relief requested” by the petitioner because of Congress's broad immigration power.<sup>41</sup> Two separate dissents were filed, one by Justice Ginsburg in which Justices Souter and Breyer joined,<sup>42</sup> and another by Justice Breyer in which Justices Ginsburg and Souter joined.<sup>43</sup> Justice Ginsburg would have struck down the provision for impermissibly discriminating based on gender stereotypes.<sup>44</sup> Justice Breyer would have

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<sup>35</sup> *Miller*, 523 U.S. at 426.

<sup>36</sup> *See id.* at 423–45.

<sup>37</sup> *Id.* at 436, 438, 440.

<sup>38</sup> *Id.* at 444–45.

<sup>39</sup> *Id.* at 437–45.

<sup>40</sup> *See id.* at 445–52 (O'Connor, J., concurring).

<sup>41</sup> *See id.* at 452–59 (Scalia, J., concurring).

<sup>42</sup> *See id.* at 460–71 (Ginsburg, J., dissenting).

<sup>43</sup> *See id.* at 471–90 (Breyer, J., dissenting).

<sup>44</sup> *Id.* at 460 (Ginsburg, J., dissenting).

similarly found gender discrimination after applying heightened scrutiny.<sup>45</sup> This scattered plurality opinion left open the questions of whether § 1409(a)(4) violated equal protection principles and which form of scrutiny should be applied to such provision.

Recognizing the conflict between the circuit courts since the *Miller* decision,<sup>46</sup> only three years later, in *Nguyen v. INS*, the Supreme Court again was faced with deciding the constitutionality of § 1409(a)(4).<sup>47</sup> In a five to four split, the Court concluded that § 1409(a)(4) did not violate the guarantee of equal protection.<sup>48</sup> The majority opinion, led by Justice Kennedy, classified this distinction as gender based and applied heightened scrutiny.<sup>49</sup> The Court held that both governmental interests asserted:

[A]ssuring that a biological parent-child relationship exists . . . [and] ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent, and, in turn, the United States[,]<sup>50</sup>

were important, and that the means chosen to further those interests were substantially related to the end.<sup>51</sup>

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<sup>45</sup> *Id.* at 477–78 (Breyer, J., dissenting).

<sup>46</sup> *Nguyen v. INS*, 533 U.S. 53, 58 (2001) (recognizing that “[s]ince *Miller*, the Courts of Appeal have divided over the constitutionality of § 1409” and therefore “granted certiorari to resolve the conflict”).

<sup>47</sup> See 8 U.S.C. § 1409(a)(4) (2012). The statute required that the father satisfy one of three options before the child’s eighteenth birthday in order for the child to obtain citizenship: (1) “the person is legitimated under the law of the person’s residence or domicile”; (2) “the father acknowledges paternity of the person in writing under oath, or”; (3) “the paternity of the person is established by adjudication of a competent court.” *Id.*

<sup>48</sup> *Nguyen*, 533 U.S. at 58–59.

<sup>49</sup> *Id.* at 60–61. The Court applied heightened scrutiny, but did not categorically declare that gender discrimination in immigration statutes must be subjected to heightened scrutiny. The Court simply analyzed the statute under heightened scrutiny first, and after finding that it survived, concluded that it must necessarily survive rational basis review, the lowest standard, as well. *Id.* at 61 (“[W]e conclude that § 1409 satisfies [heightened scrutiny]. Given that determination, we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’[s] immigration and naturalization power.”).

<sup>50</sup> *Id.* at 62, 64–65.

<sup>51</sup> *Id.* at 70.

As to the first interest, assuring that a biological parent-child relationship exists, the Court explained that mothers and fathers are not similarly situated in this respect, because the mother's relation to the child is "verifiable from the birth itself," while the father "need not be present at the birth," and his presence "is not incontrovertible proof of fatherhood."<sup>52</sup> The Court noted that "the use of gender specific terms takes into account a biological difference between the parents,"<sup>53</sup> which in its past decisions has been a permissible basis for distinctions based on gender.<sup>54</sup>

As to the second interest, the Court explained that "the opportunity for a meaningful relationship between [a] citizen [mother]" and a child born abroad "inheres in the very event of birth," whereas the opportunity does not always exist for the father because "it is not always certain that the father will know that the child was conceived, nor is it always clear that even the mother will be sure of the father's identity."<sup>55</sup> The Court went on to state, "[w]ithout an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship."<sup>56</sup> The Court concluded its equal protection analysis by stating that the means employed were "'substantially related to the achievement of the governmental objective[s] in question"<sup>57</sup> without giving much further explanation to how the means were substantially related. The Court explained that given the determination that § 1409(a)(4) passed heightened scrutiny, it "need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress'[s] immigration and naturalization power."<sup>58</sup>

Justice O'Connor dissented, criticizing the Court's failed attempt at heightened scrutiny review.<sup>59</sup> She noted the majority's failure to inquire into the actual purpose of

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<sup>52</sup> *Id.* at 62-63.

<sup>53</sup> *Id.* at 64.

<sup>54</sup> *See generally* Michael M. v. Superior Court, 450 U.S. 464 (1981).

<sup>55</sup> *Nguyen*, 533 U.S. at 65.

<sup>56</sup> *Id.* at 66.

<sup>57</sup> *Id.* at 70 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

<sup>58</sup> *Id.* at 60-61.

<sup>59</sup> *Id.* at 74 (O'Connor, J., dissenting) ("While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is stranger to our precedents.").

§ 1409(a)(4), and stated that the majority instead “hypothesize[d] about the interests served by the statute.”<sup>60</sup> Justice O’Connor further explained that the “gravest defect” in the majority’s reliance on the government’s asserted interests was the “insufficiency of the fit between § 1409(a)(4)’s discriminatory means and the asserted end.”<sup>61</sup> She also opined that the existence of comparable sex-neutral alternatives has provided a reason to reject a gender-based classification and that the statute appeared to perpetuate a stereotype about fathers and their relationship with their children.<sup>62</sup> All of this combined, supported her dissenting argument that the majority failed to properly scrutinize § 1409(a)(4).

## II. THE CIRCUIT SPLIT OVER THE CONSTITUTIONALITY OF §§ 1401(A)(7) AND 1409(C)

### A. *The Challenged Statutory Provisions*

The constitutionality of §§ 1401(a)(7) and 1409(c) of the INA is the subject of the current split of authority between the United States Court of Appeals for the Ninth Circuit’s opinion in *United States v. Flores-Villar*,<sup>63</sup> and the Second Circuit’s opinion in *Morales-Santana v. Lynch*.<sup>64</sup> In both cases, the petitioners claim that the INA provisions, which impose different physical presence requirements for conferring derivative citizenship on a child based on a parent’s gender, constitute violations of equal protection.<sup>65</sup> Section 1401(a)(7) states:

The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the

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<sup>60</sup> *Id.* at 78.

<sup>61</sup> *Id.* at 80.

<sup>62</sup> *Id.* at 82, 88–89.

<sup>63</sup> 536 F.3d 990 (9th Cir. 2008).

<sup>64</sup> 804 F.3d 520 (2d Cir. 2015).

<sup>65</sup> See *Morales-Santana*, 804 F.3d at 523–24; *Flores-Villar*, 536 F.3d at 993. *Morales-Santana* was born in 1962 and thus challenges the 1952 version of the INA, whereas *Flores-Villar* was born in 1974 and thus challenges the 1970 edition of the INA. See *Morales-Santana*, 804 F.3d at 524 (“The law in effect at the time of birth governs whether a child obtained derivative citizenship as of his or her birth.”). The current statute provides for a physical presence term of five years for unwed citizen fathers, two of which are attained after the age of fourteen, and a term of one year for unwed citizen mothers. See 8 U.S.C. §§ 1401(g), 1409(c) (2012).

United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.<sup>66</sup>

The statute, at first glance, appears to apply equally to all parents, whether male or female. However, an exception to this durational requirement is provided in § 1409(c) for unwed citizen mothers:

Notwithstanding [§ 1409(a)(7)], a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possession *for a continuous period of one year*.<sup>67</sup>

Thus, the effect of the statute is to impose a one-year physical presence requirement on the mother if she was a United States citizen, and a ten-year requirement on the father if he was the United States citizen, in order to confer derivative citizenship to the child. Presented with the exact same constitutional question, the Ninth and Second Circuits arrived at different conclusions.<sup>68</sup>

#### *B. The Ninth Circuit Finds No Violation of Equal Protection*

In *United States v. Flores-Villar*, the appellant, Ruben Flores-Villar, was born in Mexico to a sixteen-year-old United States citizen father and a non-United States citizen mother.<sup>69</sup> Flores-Villar was brought to San Diego when he was two months old and was subsequently raised there by his father and grandmother.<sup>70</sup> After being convicted of a number of crimes and being removed from the United States on several occasions, Flores-Villar was charged with being a deported alien found in

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<sup>66</sup> 8 U.S.C. § 1401(a)(7) (1952). The versions of the INA provisions discussed in this note, 1952 and 1970, are identical. Compare 8 U.S.C. §§ 1401(a)(7), 1409(c) (1970), with 8 U.S.C. §§ 1401(a)(7), 1409(c) (1952).

<sup>67</sup> 8 U.S.C. § 1409(c) (1952).

<sup>68</sup> See discussion *infra* Sections II.B–C.

<sup>69</sup> *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd per curiam*, 564 U.S. 210 (2011) (4-4 decision).

<sup>70</sup> *Id.*

the United States after deportation.<sup>71</sup> He moved to present evidence that he was a United States citizen by way of derivative citizenship from his father.<sup>72</sup> The district court denied the motion and convicted Flores-Villar.<sup>73</sup> He appealed his conviction and challenged §§ 1401(a)(7) and 1409(c) on the grounds that the provisions constituted violations of equal protection.<sup>74</sup>

In its analysis, the Court of Appeals for the Ninth Circuit relied almost exclusively on the United States Supreme Court's opinion in *Nguyen v. INS*, which held that § 1409(a)(4) of the INA, requiring unwed citizen fathers, but not unwed citizen mothers, to legitimize the child in order to confer citizenship on that child, was constitutional.<sup>75</sup> The court considered the government's first interest—assuring a link between the unwed citizen father and the United States, to the child<sup>76</sup>—and analogized it to the interest advanced in *Nguyen*.<sup>77</sup> The court reasoned that although the means employed by the provision in *Nguyen* and the provision in this case are different, “the government's interests are no less important, and the particular means no less substantially related to those objectives, than in *Nguyen*.”<sup>78</sup> The court quoted the Supreme Court's reasoning in *Nguyen*: “Unlike an unwed mother, there is no assurance that the father and his biological child will ever meet, or have the kind of contact from which there is a chance for a meaningful relationship to develop.”<sup>79</sup> However, the court gave no explanation as to why the means were no less important, nor did it address how the physical presence requirement at issue here was substantially related to the government's interest in assuring a link between the father, the United States, and the child,<sup>80</sup> or how the distinction between mothers and fathers was justified by this interest.

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<sup>71</sup> *Id.* Flores-Villar was charged with violating 8 U.S.C. § 1326(a) and (b).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 994–95.

<sup>75</sup> *Id.* at 995–98.

<sup>76</sup> *Id.* at 995–96.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 996.

<sup>79</sup> *Id.* at 995.

<sup>80</sup> The Court briefly states, “[t]he residence differential . . . furthers the objective of developing a tie between the child, his or her father, and this country.” *Id.* at 997.

The Ninth Circuit then addressed the next asserted interest—avoiding statelessness.<sup>81</sup> Quoting a prior opinion, the court stated, “[o]ne obvious rational basis for a more lenient policy towards illegitimate children of U.S. citizen mothers is that illegitimate children are more likely to be ‘stateless’ at birth.”<sup>82</sup> In explaining how the means substantially relate to the end, the court simply stated, “[t]he residence differential is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth.”<sup>83</sup> Finding that the statute withstood heightened scrutiny, the court held that §§ 1401(a)(7) and 1409(c) did not violate equal protection.<sup>84</sup>

The Supreme Court granted certiorari and affirmed the decision of the Ninth Circuit in a 4-4 split without publishing an opinion.<sup>85</sup> Justice Kagan took no part in the consideration of the case.<sup>86</sup> However, since a 4-4 split does not establish a precedent,<sup>87</sup> lower courts are free to choose whether to follow the decision reached in *Flores-Villar*.<sup>88</sup>

### C. *The Second Circuit Finds a Violation of Equal Protection*

Recently, in *Morales-Santana v. Lynch*, the Court of Appeals for the Second Circuit decided the constitutionality of the same provisions of the INA that were challenged in *Flores-Villar*, but came to the opposite result.<sup>89</sup> The petitioner, Morales-Santana, was born in the Dominican Republic to a Dominican mother and a United States citizen father.<sup>90</sup> His father, who was born in

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<sup>81</sup> *Id.* at 997; see *Morales-Santana v. Lynch*, 804 F.3d 520, 531 (2d Cir. 2015) (“[A] child born out of wedlock abroad may be stateless if he is born inside a country that does not confer citizenship based on place of birth and neither of the child’s parents conferred derivative citizenship on him.”).

<sup>82</sup> *Flores-Villar*, 536 F.3d at 996.

<sup>83</sup> *Id.* at 997.

<sup>84</sup> *Id.*

<sup>85</sup> 564 U.S. 210 (2011).

<sup>86</sup> *Id.*

<sup>87</sup> See *United States v. Pink*, 315 U.S. 203, 216 (1942) (“[T]he lack of an agreement by a majority of the Court on principles of law involved prevents it from being an authoritative determination for other cases.”).

<sup>88</sup> Recently, the Supreme Court granted certiorari in the *Morales-Santana* case, and will hear oral arguments on November 9, 2016. Regardless of the Court’s decision, Section III.B asserts that there should be a new, gender-neutral provision, which would better serve the purposes of the statute.

<sup>89</sup> *Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015).

<sup>90</sup> *Id.* at 524.

Puerto Rico and obtained United States citizenship pursuant to the Jones Act,<sup>91</sup> resided in Puerto Rico until twenty days before his nineteenth birthday.<sup>92</sup> In 2000, Morales-Santana was subjected to removal proceedings after being convicted of various felonies.<sup>93</sup> After his application for withholding of removal based on derivative citizenship was denied, Morales-Santana filed a motion to reopen based on a violation of equal protection.<sup>94</sup> The Board of Immigration Appeals denied his motion, and the Second Circuit was asked to review the Board's decision.<sup>95</sup>

At the outset, the court declared that it would apply “heightened scrutiny” to the law because it discriminates based on gender.<sup>96</sup> The court rejected the government's request to review the provision under rational basis like in *Fiallo*, distinguishing the rights at issue.<sup>97</sup> In *Fiallo*, Congress's “‘exceptionally broad power’ to admit or remove non-citizens” was implicated, while here, the issue is a claim of “pre-existing citizenship at birth,” which does not implicate Congress's power to admit or remove non-citizens.<sup>98</sup>

The court then closely examined the importance of each interest, reflective of true heightened scrutiny review.<sup>99</sup> The Government asserted two interests in support of the statute's gender-based distinction: (1) ensuring a sufficient connection between the child and the United States, and (2) preventing statelessness.<sup>100</sup> The court recognized the first interest as important, however, it pointed out the Government's failure to justify the provision's differential treatment of mothers and

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<sup>91</sup> See 8 U.S.C. § 1402 (2012) (“All persons born in Puerto Rico on or after April 11, 1899 . . . are declared to be citizens of the United States.”).

<sup>92</sup> *Morales-Santana*, 804 F.3d at 524. If Morales-Santana's father stayed in Puerto Rico past his nineteenth birthday, Morales-Santana would have been able to claim derivative citizenship through him. See § 1401(a)(7) (stating that a person can claim derivative citizenship if that person was “born outside the . . . United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or period totaling not less than ten years, at least five of which were after attaining the age of fourteen years”).

<sup>93</sup> *Morales-Santana*, 804 F.3d at 524.

<sup>94</sup> *Id.* at 524–25.

<sup>95</sup> *Id.* at 523.

<sup>96</sup> *Id.* at 528.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (quoting *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)).

<sup>99</sup> *Id.* at 530–35.

<sup>100</sup> *Id.* at 530–31.



fathers.<sup>101</sup> The court found that there was no reason that unwed fathers would need more time in the United States than unwed mothers would need to ensure a connection to the United States.<sup>102</sup> Therefore, it concluded that “the statute’s gender-based distinction is not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States.”<sup>103</sup> The court addressed the fact that its decision conflicted with the Ninth Circuit’s opinion in *Flores-Villar* and stated, “The Ninth Circuit provided no explanation for its conclusion, and the Government provides none here.”<sup>104</sup>

The court then turned to the Government’s second asserted interest, preventing statelessness, and again agreed that the interest was important.<sup>105</sup> However, the court found that preventing statelessness was not Congress’s actual purpose in establishing the physical presence requirements of the INA, and further that, even if it was, the gender-based distinctions in the statute were not substantially related to preventing statelessness.<sup>106</sup> The court noted that the availability of gender-neutral alternatives persuaded it in its finding that the means were not substantially related to the ends, and ultimately, that the statutory provisions could not survive intermediate scrutiny.<sup>107</sup>

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<sup>101</sup> *Id.* at 530 (“[The Government] offers no reason, and we see no reason, that unwed fathers need more time than unwed mothers in the United States prior to their child’s birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad.”).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 531.

<sup>104</sup> *Id.* at 530.

<sup>105</sup> *Id.* at 531. Preventing statelessness is a well-established and important governmental interest. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160–61 (1963).

<sup>106</sup> *Morales-Santana*, 804 F.3d at 531; *see also id.* at 532–33 (“Neither the congressional hearings nor the relevant congressional reports concerning the 1940 Act contain any reference to the problem of statelessness for children born abroad. The congressional hearings concerning the 1952 Act are similarly silent about statelessness as a driving concern.”); *id.* at 533 n.10 (“Although [a Senate Report dated January 29, 1952] reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal.”).

<sup>107</sup> *Id.* at 535. The Court noted prior case law indicating that the availability of gender-neutral alternatives meant that the statute could not survive intermediate scrutiny. *See id.* at 534; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) (invalidating a gender-based classification where a gender-neutral approach would serve the needs of both classes); *Orr v. Orr*, 440 U.S. 268, 282–83 (1979) (“A gender-

The court concluded by describing the remedy to be administered after a finding that the statutory provisions were unconstitutional.<sup>108</sup> It noted that “binding precedent . . . caution[ed] [the court] to extend rather than contract benefits in the face of ambiguous congressional intent”<sup>109</sup> and, therefore, severed the ten-year requirement, requiring every unwed citizen parent to satisfy the one-year requirement instead.<sup>110</sup> The effect of this severance confirmed Morales-Santana’s citizenship as of his birth.<sup>111</sup>

### III. DIFFERENT PHYSICAL PRESENCE REQUIREMENTS FOR UNWED MOTHERS AND FATHERS IN THE IMMIGRATION AND NATIONALITY ACT VIOLATES BASIC EQUAL PROTECTION PRINCIPLES AND SHOULD BE REPLACED BY A GENDER-NEUTRAL PROVISION

#### A. *Intermediate Scrutiny Should Be Applied in Reviewing §§ 1401(a)(7) and 1409(c) of the INA*

The first problem that arises in analyzing the constitutionality of the gender-based derivative citizenship provisions of the INA is that there is still no established United States Supreme Court precedent for the level of scrutiny to be used.<sup>112</sup> Although the *Miller* court analyzed the provision at issue under intermediate scrutiny, it only issued a plurality decision and thus no precedent was established.<sup>113</sup> Similarly, although the *Nguyen* Court decided the constitutionality of the

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based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.”).

<sup>108</sup> *Morales-Santana*, 804 F.3d at 535–37.

<sup>109</sup> *Id.* at 537 (“Indeed, we are unaware of a single case in which the Supreme Court has contracted, rather than extended, benefits when curing an equal protection violation through severance.”).

<sup>110</sup> *Id.* at 535–36.

<sup>111</sup> *Id.* at 538.

<sup>112</sup> Similarly to the *Nguyen* court, the *Flores-Villar* court decided the constitutionality under intermediate scrutiny, but does not categorically decide that intermediate scrutiny is the form of review that should apply. *See United States v. Flores-Villar*, 536 F.3d 990, 997 (9th Cir. 2008) (“Accordingly, we conclude that even if intermediate scrutiny applies, §§ 1401(a)(7) and 1409 survive . . . [and §§] 1401(a)(7) and 1409 satisfy rational basis review as well.”); *Nguyen v. INS*, 533 U.S. 53, 61 (2001) (“Given [the] determination [that the statute withstands heightened scrutiny], we need not decide whether some lesser degree of scrutiny pertains . . .”).

<sup>113</sup> *Miller v. Albright*, 523 U.S. 420, 423 (1998).

statute under intermediate scrutiny, it did not categorically declare intermediate scrutiny to be the applicable standard.<sup>114</sup> Instead, the Court explained that since the statute passed the intermediate form of scrutiny, it would necessarily pass a lower form of scrutiny.<sup>115</sup>

Despite this lack of precedent, §§ 1401(a)(7) and 1409(c) should be reviewed under intermediate scrutiny. First, it is important to note that these provisions do not implicate “Congress’s ‘exceptionally broad power’ to admit or remove non-citizens,” like the provisions in *Fiallo* did.<sup>116</sup> Instead, §§ 1401(a)(7) and 1409(c) would confirm an individual’s “pre-existing citizenship” and thus would not involve any questions of admission or removal of noncitizens.<sup>117</sup> Thus, the review of §§ 1401(a)(7) and 1409(c) are not governed by the deferential standard of review in *Fiallo*.<sup>118</sup> Second, all gender-based classifications are reviewed under intermediate scrutiny.<sup>119</sup> The provisions at issue explicitly make the physical presence requirement for an unwed citizen mother one year, and make the requirement for an unwed citizen father ten years.<sup>120</sup> Therefore, because this classification is made on the basis of gender, it is subject to intermediate review.<sup>121</sup> The government must show that the physical presence requirements serve “important

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<sup>114</sup> See *Nguyen*, 533 U.S. at 61; *supra* note 58 and accompanying text. Because the court found that the statute did not pass intermediate scrutiny, it follows that the statute would not survive a lower form of scrutiny, therefore, the court did not need to decide which form of scrutiny applied, as the statute would fail both.

<sup>115</sup> *Id.* at 60–61 (explaining that given the determination that § 1409(a)(4) passed heightened scrutiny, it “need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress[s] immigration and naturalization power”).

<sup>116</sup> *Morales-Santana*, 804 F.3d at 528 (quoting *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)). The provision at issue in *Fiallo* granted special preference immigration status to aliens who qualified as “children” or “parents” of United States citizens. See *Fiallo*, 430 U.S. at 788.

<sup>117</sup> *Morales-Santana*, 804 F.3d at 528; see also *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 881–82 (W.D. Tex. 2015) (“Petitioner claims that under a constitutional interpretation of the challenged statutes, he is a citizen as of the date of his birth. He is not challenging the denial of an application for immigration status or any other government action that could be said to implicate the congressional ‘power to admit or exclude foreigners’ at issue in *Fiallo*.”).

<sup>118</sup> *Morales-Santana*, 804 F.3d at 528.

<sup>119</sup> *United States v. Virginia*, 518 U.S. 515, 531, 533 (1994).

<sup>120</sup> See 8 U.S.C. §§ 1401(a)(7), 1409(c) (2012).

<sup>121</sup> *Virginia*, 518 U.S. at 531, 533.

governmental objectives” and that those requirements are “substantially related to the achievement of [the important governmental] objectives.”<sup>122</sup>

The physical presence requirements of §§ 1401(a)(7) and 1409(c) do not survive intermediate review because the requirements are not substantially related to the government’s asserted interests: (1) ensuring a sufficient connection between the child born abroad and the United States, and (2) preventing statelessness.<sup>123</sup> Although the prevention of statelessness has been recognized as an important governmental interest,<sup>124</sup> this interest does not justify the different physical presence requirements.<sup>125</sup> Statelessness is defined as a lack of any nationality.<sup>126</sup> A child born out of wedlock is stateless when, for example, the child is born in “a country that does not confer citizenship based on place of birth and neither of the child’s parents conferred derivative citizenship” on that child.<sup>127</sup> While the one-year requirement imposed on unwed citizen mothers may further the interest of preventing statelessness when the child is born to an unwed citizen mother, it does not further the interest of preventing statelessness when the child is born to an unwed citizen father. This durational requirement for unwed mothers is premised on the idea that “children of unwed citizen mothers fac[e] a greater risk of statelessness than the children of unwed citizen fathers.”<sup>128</sup> However, there is no support for this view.<sup>129</sup>

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<sup>122</sup> *Id.* at 533 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

<sup>123</sup> *Morales-Santana*, 804 F.3d at 527–28; *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008).

<sup>124</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160–61 (1963); *Morales-Santana*, 804 F.3d at 531.

<sup>125</sup> The court in *Morales-Santana* discredits the prevention of statelessness as the purpose of the statute. 804 F.3d at 531–34. However, a Senate Report dated January 29, 1952 mentions statelessness. *See id.* at 533 n.10 (“This provision establishing the child’s nationality as that of the . . . mother *regardless of legitimation or establishment of paternity* is new. It [e]nsures that the child shall have a nationality at birth.”). Thus, since there is some evidence that preventing statelessness may have been a purpose in enacting § 1409(c), this Note does not discredit that purpose, but instead, shows why the different physical presence requirements do not substantially further that purpose.

<sup>126</sup> The UN Refugee Agency, *Ending Statelessness*, UNHCR, <http://www.unhcr.org/en-us/stateless-people.html> (last visited Feb. 10, 2017).

<sup>127</sup> *Morales-Santana*, 804 F.3d at 531.

<sup>128</sup> *Id.* at 533.

<sup>129</sup> Brief of Amici Curiae Scholars on Statelessness in Support of Petitioner at 28, *United States v. Flores Villar*, 536 F.3d 990 (9th Cir. 2008) (No. 07-50445), 2010

In fact, the opposite appears to be true. Notably, a large number of countries do not confer citizenship on a child born to an unwed mother, leaving the child stateless if the United States citizen father cannot meet the ten-year durational requirement imposed by the statute.<sup>130</sup> To apply the one-year durational requirement only to United States citizen mothers does not remedy the problem of statelessness and, therefore, is not substantially related to that interest.

Similarly, the government's asserted interest in ensuring a sufficient connection between the child born abroad and the United States is not substantially furthered by the different physical presence requirements. Like the prevention of statelessness, it is clear that this interest is also important.<sup>131</sup> However, there is no justification for imposing a longer physical presence requirement on the father. If the government believes that a child's father must reside in the United States for ten years to ensure a connection between the child and the United States, how does it follow that a mother only needs to reside for one year in order to ensure this same connection?<sup>132</sup> There is simply "no reason[] that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad."<sup>133</sup>

Further, the government's justification in support of the different physical presence requirements is misplaced. In both circuit cases, the government relied on *Nguyen* in arguing that the longer durational requirement imposed on unwed citizen fathers is justified by biological differences between males and females.<sup>134</sup> The government explained that while the opportunity for a connection with the United States "inheres in the very event of birth" for the child of an unwed citizen mother, the same

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WL 2569160 ("There is no support for the . . . assertion that the risk of statelessness for non-marital children of U.S. mothers was or is much higher than for U.S. fathers of non-marital children born abroad, or indeed any higher at all.").

<sup>130</sup> *Id.* at 23–28.

<sup>131</sup> *Morales-Santana*, 804 F.3d at 530 ("As both parties agree, [the] interest [of ensuring a sufficient connection between the child and the United States] is important.").

<sup>132</sup> Not to mention, this single year of residency could have occurred when the mother was one year old.

<sup>133</sup> *Morales-Santana*, 804 F.3d at 530.

<sup>134</sup> *Id.*; Brief for United States at 21, *United States v. Flores-Villar*, 536 U.S. 990 (9th Cir. 2008) (No. 07-50445), 2010 WL 3392008.

opportunity does not exist for a child of an unwed citizen father, because there is no assurance that the father will even know about his child.<sup>135</sup> Under these circumstances, the government explained there would be no opportunity for a connection between the father and child and, in turn, the United States.<sup>136</sup> But this argument is irrelevant to the provisions at issue. Here, the father has already taken the affirmative step of legitimizing the child as required by the previous provisions of the statute.<sup>137</sup> Because of this, the child knows of both the father and the mother. The opportunity for a relationship to develop with the parent and, in turn, the United States, is equally present. Therefore, to impose a longer physical presence requirement on the father does not further the interest of assuring a connection between the child and the United States.

Finally, the availability of gender-neutral alternatives is generally fatal to intermediate scrutiny analysis.<sup>138</sup> With regard to §§ 1401(a)(7) and 1409(c), there have been at least two instances in which gender-neutral legislation has been proposed, but both times these proposals have not been incorporated into the INA.<sup>139</sup> One example dates as far back as 1933, in a letter written by Secretary of State Cordell Hull to the Chairman of the House Committee on Immigration and Naturalization.<sup>140</sup> Secretary Hull proposed a gender-neutral alternative to the INA provisions suggesting that a child born out of wedlock abroad to an American parent who has resided in the United States be a citizen by birth if there is “no other legal parent under the law of the place of birth.”<sup>141</sup> Also in 1933, a bill was presented to

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<sup>135</sup> *Nguyen v. INS*, 533 U.S. 53, 65 (2001).

<sup>136</sup> *Id.*

<sup>137</sup> 8 U.S.C. § 1409(a)(4) (2012). These provisions requiring an unwed father to prove paternity were held to be constitutional in *Nguyen*. The statute required that the father satisfy one of three options before the child’s eighteenth birthday in order for the child to obtain citizenship: (1) “the person is legitimated under the law of the person’s residence or domicile”; (2) “the father acknowledges paternity of the person in writing under oath, or”; (3) “the paternity of the person is established by adjudication of a competent court.” *Id.*

<sup>138</sup> See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); see also *Morales-Santana*, 804 F.3d at 534.

<sup>139</sup> See *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 887 (W.D. Tex. 2015) (“In the lead-up to what would become the 1934 Act, Congress was twice presented with gender-neutral bills that would have addressed the problem of statelessness with respect to mothers as well as fathers.”).

<sup>140</sup> *Morales-Santana*, 804 F.3d at 534.

<sup>141</sup> *Id.*

Congress providing for citizenship of a child born abroad if that child's "father or mother is at the time of the birth of such child a citizen of the United States."<sup>142</sup> Because of this availability of gender-neutral alternatives as well as the failure of the physical presence requirements to substantially further the government's interests, §§ 1401(a)(7) and 1409(c) fail intermediate scrutiny review and therefore are unconstitutional.

### B. A Gender-Neutral Solution

While the *Morales-Santana* court reached the right conclusion of unconstitutionality, the remedy provided by the court was insufficient. The *Morales-Santana* court severed the ten-year physical presence requirement and left the one-year requirement to apply to all unwed parents.<sup>143</sup> Although this remedy is consistent with equal protection principles, it is not sufficient to serve the purposes of the statute. Instead, Congress should create a new, gender-neutral statute that would effectuate both the prevention of statelessness and the assurance of a sufficient connection between the child and the United States.

The current statute, as amended in 1986, provides for a physical presence term of five years for unwed citizen fathers, two of which are attained after the age of fourteen, and a term of one year for unwed citizen mothers.<sup>144</sup> Thus, the gender-based

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<sup>142</sup> *American Citizenship Rights of Women: Hearing on S. 992, S. 2760, S. 3968 and S. 4169 Before the Subcomm. of the Comm. on Immigration, 72nd Cong. 2* (1933).

<sup>143</sup> See *Morales-Santana*, 804 F.3d at 535–36. The remedial options of the courts are limited by the severance provisions in the statute. *Id.* at 536 (alteration in original) ("The 1952 Act contains a severance clause that provides: 'If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act . . . shall not be affected thereby.'"). Thus, courts can only do so much to remedy the problem of gender discrimination. *Id.* ("The clause makes clear that only one of the provisions in § 1409, rather than both, should be severed.").

<sup>144</sup> 8 U.S.C. § 1401(g) (2012) states:

The following shall be nationals and citizens at birth: . . . a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

While U.S.C. § 1409(c) still states:

Notwithstanding [8 U.S.C. § 1406(g),] a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the

distinctions are still present in the statute today. The first part of the gender-neutral solution would be to impose the five-year term on any unwed citizen parent, regardless of gender. There is no exact formula for how long a parent must live in the United States in order to assimilate the values of the United States and therefore promote a connection between the child and the United States. However, a term of five years is a reasonable amount of time. It is a compromise between the onerous ten-year requirement imposed by the 1952 Act and the lax one-year requirement resulting from the *Morales-Santana* decision. A five-year term is also consistent with the physical presence requirement for naturalization, which requires a person seeking citizenship to live in the United States for five years prior to their application.<sup>145</sup>

Although the five-year physical presence requirement would substantially further the government's interest in assuring a connection between the child and the United States, it would not adequately address the problem of statelessness. For example, the problem of statelessness would still persist if the United States citizen parent does not meet the five-year requirement, and the child is born in a country that does not recognize citizenship by place of birth. This concern can be alleviated by creating an exception that would apply only if the citizen parent did not meet the five-year physical presence requirement and there was no other way to confer citizenship of another country on the child. In that case, the exception would provide for a one-year physical presence requirement on the United States citizen parent in order to confer derivative citizenship to the child. Although a one-year term may be insufficient to ensure a connection between the child and the United States, it would apply only in the limited circumstance just described, and thus would not pose too much of a threat to that interest.

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nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

See *supra* note 65.

<sup>145</sup> 8 C.F.R. § 316.2(a)(3) (2016) (“[T]o be eligible for naturalization, an alien must establish that he or she . . . [h]as resided continuously within the United States . . . for a period of at least five years after having been lawfully admitted for residence.”).



In sum, the proposed statute would appear as follows:

(1) The following shall be nationals and citizens of the United States at birth: . . . a person born outside the United States and its outlying possessions to parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(2) Notwithstanding section (1), a person born outside the United States and out of wedlock to a United States citizen parent shall be held to have acquired at birth the nationality of that parent if the parent had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year, and no other citizenship of such child can be attained in any other manner.

Thus, this general five-year requirement and the one-year exception would adequately serve both interests of ensuring a sufficient connection between the child and the United States and preventing statelessness.

#### CONCLUSION

Recall the hypothetical in the Introduction of this Note. Under the new proposed statute, *X* would be a citizen of the United States regardless of his citizen parent's gender. Under the general rule, *Y* would not be a citizen of the United States, unless there was no other way to confer citizenship on him. If that were the case, then *Y* would be a citizen based on the one-year residency of his parent, regardless of that parent's gender. As this Note discussed, laws such as §§ 1401(a)(7) and 1409(c) of the INA cannot withstand equal protection analysis because they impermissibly discriminate based on gender. If the United States wishes to grant citizenship to a certain class of citizens, it must do so without gender distinctions, absent an important interest that is substantially furthered by the distinction. Because preventing statelessness and ensuring a connection between a child born abroad and the United States are not substantially furthered by the gender based distinctions in the INA, §§ 1401(a)(7) and 1409(c) are unconstitutional and should be remedied by a gender-neutral statute.