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2002]

THE "INTELLIGENT WICKEDNESS"¹ OF U.S. IMMIGRATION LAW
CONFERRING CITIZENSHIP TO CHILDREN BORN ABROAD
AND OUT-OF-WEDLOCK: A FEMINIST PERSPECTIVE

I. INTRODUCTION

United States citizenship laws treat women as sexually responsible beings while condoning the sexual irresponsibility of men.² The significance of this critique is that citizenship laws define us as citizens and as a nation.³

1. See William Lloyd Garrison, *Intelligent Wickedness*, in FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 86-89 (Miriam Schneir ed., 1992) (quoting speech given by Garrison in response to criticism of Seneca Falls Declaration of Sentiments at convention in 1853).

There is such a thing as intelligent wickedness, a design on the part of those who have the light to quench it, and to do the wrong to gratify their own propensities, and to further their own interests. So, then, I believe, that as man has monopolized for generations all the rights which belong to woman, it has not been accidental, not through ignorance on his part; but I believe that man has done this through calculation, actuated by a spirit of pride, a desire for domination which has made him degrade woman in her own eyes, and thereby tend to make her a mere vassal.

Id. at 87-88.

2. See *Miller v. Albright*, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting) (criticizing plurality's upholding of citizenship law that differentially regulates ability of unwed citizen parents to convey citizenship to their children born abroad and out-of-wedlock).

3. See Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93, 94 (2000) (contrasting analysis of *Miller v. Albright*, 523 U.S. 420 (1998), against similar citizenship cases in Japan, Bangladesh, Botswana and Canada). The formal model of citizenship has taken on renewed salience in domestic and international affairs as countries, like the United States, increasingly restrict movement in response to international terrorism, such as the September 11, 2001 attacks on the World Trade Center and the Pentagon. See *id.* (noting importance of citizenship laws). For example, in response to the September 11, 2001 terrorism attacks, President George W. Bush restricted the issuance of foreign student visas as a means of tightening U.S. borders. See *The FOX 10 O'clock News* (FOX television broadcast, Oct. 29, 2001) (reporting President Bush's response to terrorism attacks).

The effect of gendered citizenship laws is felt not only by aliens, but also by U.S. citizens and frequently at the most personal level. See 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, 560 (2000) (noting that scholars have ignored evaluating pervasiveness of gender biases in immigration law). Domestically, immigration laws are used to deport non-citizens, often unjustly. See generally Matthew J. Droskoski, Casebrief, *Criminal Aliens Get Pinched: Sandoval v. Reno, AEDPA's and IIRIRA's Effect on Habeas Corpus Jurisdiction*, 45 VILL. L. REV. 711 (2000) (discussing judicial review of deportation orders pursuant to Antiterrorism and Effective Death Penalty Act of 1996 and Illegal Immigration Reform and Immigrant Responsibility Act of 1996). Internationally, such laws curb the flow of aliens seeking refuge within the United States. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987) (examining definition of "refugee" in United Nations Protocol Relating to Status of Refugees where aliens were seeking asylum

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In the United States, there are only two sources of citizenship: birth and naturalization.⁴ Citizenship at birth either derives from place of birth (*jus soli*) or from parentage (*jus sanguinis*).⁵ When citizenship stems from parentage, U.S. citizenship laws differentiate the power of unwed American parents to convey formal citizenship to their out-of-wedlock children born abroad on the basis of gender.⁶ The distinction drawn by U.S. citizenship laws is gendered subordination that is not by chance, but rather is a result

or withholding from deportation); see also United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (acknowledging problem posed because of new refugee situations that have developed since Geneva Convention was originally adopted). In light of the growing restrictions upon immigration, how nations delineate the procedures to acquire formal citizenship is even more vital.

To ensure some semblance of consistency, countries individually ratify treaties in which they promise to abstain from upholding laws, including citizenship laws, that discriminate on the basis of sex. See Brief of Amici Curiae Equality NOW at 5-12, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (arguing that International Covenant on Civil and Political Rights in conjunction with comments made by Human Rights Committee requires United States to strike down 8 U.S.C. § 1409(a)). Under Article VI of the Constitution, all treaties entered into by the United States are deemed to be "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Accordingly, the United States Supreme Court has previously looked to international law when faced with an issue on the interpretation of the Immigration and Nationality Act. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999) (turning to United Nations Protocol Relating to the Status of Refugees and to Office of United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Defining Refugees (Geneva 1979) for definition of refugee); *Cardoza-Fonseca*, 480 U.S. at 436-40 (turning to same treaty when distinguishing between two standards for refugees seeking asylum). As such, international law strongly argues against upholding gender-based conveyance of U.S. citizenship under § 1409(a). See Brief of Amici Curiae Equality NOW at 3, *Nguyen* (No. 99-2071) (arguing that finding of unconstitutionality would serve as model for other countries).

4. See *United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898) (explaining that persons born outside of United States only acquire citizenship by birth pursuant to acts of Congress); see also *Miller*, 523 U.S. at 423 (citing *Wong Kim* and explaining that Fourteenth Amendment is source of conveying citizenship by birth) (citation omitted). The Fourteenth Amendment primarily relies upon *jus soli* citizenship rules to convey citizenship at birth. See U.S. CONST. amend. XIV, § 1 (stating that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ."). This type of citizenship is granted to persons based on their place of birth. See 8 U.S.C. § 1401(a) (1994) (conveying citizenship at birth to persons born in United States); BLACK'S LAW DICTIONARY 868 (7th ed. 1999) (defining *jus soli*). U.S. citizenship for children born abroad and out-of-wedlock, however, is granted on the basis of parentage, known as *jus sanguinis* citizenship. See 8 U.S.C. § 1409 (1994) (conveying citizenship at birth to children born abroad and out-of-wedlock if one parent is U.S. citizen); BLACK'S LAW DICTIONARY 868 (defining *jus sanguinis*). For a further discussion of *jus soli* and *jus sanguinis* citizenship rules, see *infra* note 18 and accompanying text.

5. See Augustine-Adams, *supra* note 3, at 95 n.1 (explaining that while United States primarily uses *jus soli*, it also uses *jus sanguinis* citizenship rules).

6. See 8 U.S.C. § 1409 (allowing women to convey citizenship automatically, but requiring men to satisfy additional requirements). For a further discussion of the language of § 1409, see *infra* notes 25-29 and accompanying text.

of calculated manipulation prompted by a desire for domination.⁷ This manipulation, termed “intelligent wickedness” by some feminist theorists,⁸

While the term “gender” is often used interchangeably with the term “sex,” this Comment will not equate these terms as one and the same. See BLACK’S LAW DICTIONARY 480 (defining sex discrimination as “[d]iscrimination based on gender, esp. against women. — Also termed *gender discrimination*.”). In this Comment, the term “gender” implicates more than the “sum of the peculiarities of structure and function that distinguish a male from a female organism.” BLACK’S LAW DICTIONARY 1379. Instead, to be gender female means having an identity imposed externally that people have ascribed to you, rather than possessing an identity that you are born with. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 7 (1987) (“For the female, subordination is sexualized in a way that dominance is for the male, as pleasure as well as gender identity, as femininity.”).

Furthermore, this Comment intentionally utilizes the term “out-of-wedlock children” rather than “illegitimate children” because the latter term is disputed.

7. See CATHERINE A. MACKINNON, DIFFERENCE AND DOMINANCE: ON SEX DISCRIMINATION 32-34 (1984) (exploring feminist legal theories, known as difference and dominance theories, which hold that reality is constructed to support men’s lives and, at most, women’s biological differences are relegated to footnotes). MacKinnon notes that:

Under the sameness [or dominance] standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both. . . . Approaching sex discrimination in this way—as if sex questions are difference questions and equality questions are sameness questions—provides two ways for the law to hold women to a male standard and call that sex equality.

Id. at 34. MacKinnon explains that there are two alternate paths to equality for women: they can either be the same as men or be different from men. See *id.* at 33 (discussing notion that equality calls for sameness but sex requires recognition of differences). Gender neutrality, the leading path, ascribes by the former approach. See *id.* (characterizing it as “the single standard philosophically”). In contrast, equal protection rules also recognize and account for biological differences, such as pregnancy (a “doctrinal embarrassment”), through special benefit rules or special protection rules legally. See *id.* (characterizing this path as “the double standard philosophically”). “For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.” *Id.* at 39.

8. See Garrison, *supra* note 1, at 86-89 (blaming men for subordination of women). Namely, William Lloyd Garrison emphasized that what men have done is make women look at themselves differently through the eyes of men. See *id.* at 87-88. Moreover, Virginia Woolf posits the correlate; that is, men insist upon the inferiority of women, making them like mirrors, to enlarge themselves. See Virginia Woolf, *A Room of One’s Own*, in FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS, *supra* note 1, at 347, 347 (claiming mirrors are essential to all violent and heroic action). Specifically, she comments that “[w]omen have served all these centuries as looking glasses possessing the magic and delicious power of reflecting the figure of man at twice its natural size. Without that power probably the earth would still be swamp and jungle. The glories of all our wars would be unknown.” *Id.* at 346.

Men have normalized the oppression of women and condoned retribution for their resistance of it through the development of cultural norms and its incorpora-

imposes and manages unjust gender schemas.⁹

tion in the law. For instance, Islamic fundamentalist regimes, such as the Taliban, use the rhetoric of religion to ban Afghan women from obtaining education, medical care or emulating anything that resonates in Western values. See *Primetime Thursday* (ABC television broadcast, Nov. 1, 2001) (relating story of one underground woman doctor who was about to graduate from medical school when Taliban came into power; she stated, "I want to be an educated person and also a political person. . . . I feel that I don't belong here. I feel that this is not my country."); Kathy Pollitt, *The Way We Live Now: Questions For Sajeda Hayat and Sehar Saba; Tearing at the Veil*, N.Y. TIMES, May 14, 2000, § 6 (Magazine), at 23 (questioning two women representatives of Revolutionary Association of Women of Afghanistan (RAWA)). The Taliban is not alone in deterring their women from the path of education. The Masai tribe, one of the forty-two tribes in Kenya, routinely practices genital cutting and early marriage of "their most precious and pliable resources, their daughters," as young as nine to the older men within their tribe. See Ian Fisher, *Sometimes a Girl's Best Friend Is Not Her Father; Kajiado Journal*, N.Y. TIMES, Mar. 2, 1999, at 4 ("[The Masai] feel that when a girl goes to school she gets spoiled because she gets to a point where she is equal to the men. But she's not supposed to be equal."). Consequently, one Kenyan boarding school in the town of Kajiado has erected chain-linked fences topped with barbed wire to deter Masai fathers from stealing their daughters away. See *id.* (discussing suspicion surrounding education for girls).

Should these women resist their oppression, they risk having acid thrown in their face, being stoned to death or killed at the hands of their own family members. See, e.g., Kristen Golden, *Rana Hussein: A Voice for Justice*, Ms., July/August 1998, at 36, 36-39 (reporting on honor killings for women who have been victims of rape and incest, as well as those who have committed adultery); Pollitt, *supra* at 23 (asking about ramifications for being in RAWA if caught by Taliban); Liz Welch, *Facing the World*, Ms., June/July 1999, at 33, 33-35 (discussing acid attacks on Bangladeshi women and explaining that "[w]ith acid, they usually aim for the face. It symbolizes beauty. Taking away beauty takes away the woman's value.').

Moreover, the legal system in many countries supports the socialized subordination and oppression of women. For example, the Jordanian Penal Code, established in 1960, uses the law of provocation to provide a reduction in penalty for a man who kills to restore the honor that was lost by his wife committing adultery. See Golden, *supra* at 36 (explaining that Jordanian men who are convicted of honor killings generally serve as little as three months to one year in prison). A little closer to home, the U.S. 19th century common law's marital tort immunity is rooted in the English common law doctrine of chastisement under which husbands were legally allowed to subject their wives to corporal punishment so long as it was reasonable. See Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (characterizing preservation of chastisement through transformation).

9. The term "gender schemas" refers to the internalization of typical sex-based female and male characteristics and behaviors by adults to "construct an identity that is consistent with social concepts of gender." See SANDRA BEM, *LENSES OF GENDER* 138-39 (1998) (discussing gender formation). Furthermore, this term alludes to the way these gender-based attributes have structured mainstream thought and ideologies that are reflected back to us in legal doctrines and moral philosophies. See MACKINNON, *supra* note 7, at 32 (holding mainstream doctrine of law of sex discrimination responsible for ineffectiveness of sex equality laws in "getting women what we need and are socially prevented from having on the basis of a condition of birth . . ."). When our laws and moral ideologies support gender schemas, they are further integrated, reinforced, imposed and managed into our psyche. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *FEMINISM IN OUR TIME, THE ESSENTIAL WRITINGS, WORLD WAR II TO THE PRESENT*, *supra* note 1, at 310, 325 (asking society to examine how heterosexuality has been organ-

United States citizenship laws and the United States Supreme Court's interpretation of these laws perpetuate a core gender schema that women must be sexually responsible, whereas men are allowed to be sexually irresponsible.¹⁰ Historically, women's sexual responsibility originated from the principles of coverture.¹¹ The U.S. common law doctrine of coverture

ized, managed, imposed and propagandized through lower female wage scales, pink collar ghettos, withholding of education from women, sexual double standard, idealization of heterosexuality in art and literature, foot binding, chastity belts, punishment for adultery and use of brides for dowry). In response to the gender schema that assumes that women value morality differently than men, MacKinnon responds:

Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. . . . All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.

MACKINNON, *supra* note 7, at 39.

In upholding the gender-based distinctions within U.S. citizenship laws on the basis of biology, the United States Supreme Court, in *Nguyen v. INS* and *Miller v. Albright*, continued the cycle of imposing and managing gender schemas of female sexual responsibility and male sexual irresponsibility. *See generally* *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (holding that U.S. citizenship law, which makes it more difficult for fathers than for mothers to convey citizenship to children born abroad and out-of-wedlock, did not violate Fifth Amendment's equal protection guarantee); *Miller*, 523 U.S. 420, 420 (1998) (finding § 1409(a) did not violate equal protection jurisprudence on various grounds). Furthermore, in doing so, the Supreme Court failed to consider the growing international and national deference for equal parental responsibility and served to entrench gender schemas that absolve men of this responsibility. *See* Brief of Amici Curiae Equality NOW at 2-3, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (arguing that § 1409(a) irrationally formalizes traditional gender schemas about parenting).

10. *See Nguyen*, 121 S. Ct. at 2065-66 (upholding statute making it more difficult for child born abroad and out-of-wedlock to American father to claim citizenship through that father under equal protection guarantee of Fifth Amendment); *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting) (explaining that "mothers, as a rule, are responsible for a child born out of wedlock; [unwed] fathers . . . ordinarily, are not"); Ethan Bronner, *Lawsuit on Sex Bias by 2 Mothers, 17; Pregnancy Kept Them From Honor Society, the Girls Contend*, N.Y. TIMES, Aug. 6, 1998, at A14 (discussing sex discrimination law suit against school board brought by two unwed mothers who were allegedly denied admission into National Honor Society because of pregnancy). The lawyer for one of the unwed mothers characterized the situation as: "It's making a girl wear a scarlet P and bear the burden for something that is a joint activity. No boy is being left out of the society for having engaged in premarital sex." *Id.* (quoting American Civil Liberties Union attorney representing one of plaintiffs). The ACLU became interested in this case because only the student mothers were excluded from admission into the National Honor Society, not the student fathers who also engaged in the premarital sex. *See id.* (explaining that pregnancy has been controversial issue for membership in National Honor Society before this case). Consequently, the ACLU viewed this as sex discrimination, actionable under "Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the [Fourteenth] Amendment. . . ." *Id.*

11. For a further discussion, see *infra* notes 34-45 and accompanying text. Because the strict English common law doctrine of coverture held that an out-of-

regarded out-of-wedlock children as the sole responsibility of unwed mothers, while marital children were the property of fathers.¹² In 8 U.S.C. § 1409(a), Congress adopted the principles of coverture into U.S. citizenship laws.¹³ More recently, in June 2001, the Supreme Court further perpetuated these gender schemas in its interpretation of section 1409(a) by: (1) using biology as a pretext for treating women and men differently in their ability to transmit citizenship to their children, and (2) manipulating equal protection jurisprudence to free fathers from the responsibility of

wedlock child was “nullius fillius,—the son of no one,” neither unwed parent had responsibility towards that child. *See* *Friesner v. Symonds*, 20 A. 257, 259 (N.J. Prerog. Ct. 1890) (noting that because mother of out-of-wedlock child is its natural guardian, she must support child); *see also* *State v. Tieman*, 73 P. 375, 376 (Wash. 1903) (explaining that, in absence of statute, putative father has no legal obligation to support his out-of-wedlock child). American common law’s adoption of this doctrine, however, recognized early on that a mother of an out-of-wedlock child is its natural guardian, and thus has a duty to support and care for the child. *See Friesner*, 20 A. at 259 (granting letters of guardianship to applicant).

12. *See, e.g.*, Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1680 (2000) (noting that coverture set default rules for obtaining property and status through fathers within marriage; outside marriage, children gained property and status through mothers). *See generally* Brief of Amici Curiae National Women’s Law Center at 13-16, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (tracing origins of § 1409(a) back to common law doctrine of coverture).

13. *See* 8 U.S.C. § 1409 (1994) (discussing nationality at birth and collective naturalization for children born out of wedlock); *see also Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting) (criticizing plurality’s holding for shaping governmental policy to fit and reinforce gender schemas prevalent throughout U.S. history). Section 1409 provides, in pertinent, that:

The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, 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,

(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. . . .

(c) Notwithstanding the provision of subsection (a) of this section, a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Id.

caring for and supporting their out-of-wedlock children born abroad.¹⁴

The Supreme Court maintained the gender biases in section 1409(a)(4), both conceptually and practically.¹⁵ Conceptually, the Court manipulated the equal protection precedent to maintain outdated gender schemas; while practically speaking, the Court formulated motherhood to be biological and fatherhood to be legal.¹⁶ By adhering to the principles of gender essentialism, the Court impacts parenthood by adopting a monolithic notion of women's and men's experiences that requires no further justification.¹⁷ While the United States is not alone in passing gender-based *jus sanguinis*¹⁸ citizenship laws, it may, however, be in the minority

14. *Cf. Nguyen*, 121 S. Ct. at 2066 (classifying concerns of gender schemas as mechanistic classifications). For a further discussion of the Court's analysis, see *infra* notes 137-87 and accompanying text.

The truth gone unheard by the Supreme Court is that mothers and fathers create citizens through their children because § 1409(a) instills parents with that power, "not because biology requires or justifies any particular rule." See Augustine-Adams, *supra* note 3, at 135. William Lloyd Garrison professed that when truth is offered, the response by tyrants is defensiveness and silence. See Garrison, *supra* note 1, at 89.

How has this Woman's Rights movement been treated in this country, on the right hand and on the left? This nation ridicules and derides this movement, and spits upon it, as fit only to be cast out and trampled underfoot. This is not ignorance. They know all about the truth. It is the natural outbreak of tyranny. It is because the tyrants and usurpers are alarmed. They have been and are called to judgment, and they dread the examination and exposure of their position and character.

Id. Likewise, the Supreme Court's response to the equal protection challenge of § 1409(a) resonates in defensiveness. See *Nguyen*, 121 S. Ct. at 2066 (dismissing truth as mechanistic contentions that "obscure those misconceptions and prejudices that are real").

15. For a further discussion of the Supreme Court's holdings in *Nguyen* and *Miller* and the practical impact of those holdings, see *infra* notes 137-208 and accompanying text.

16. See Augustine-Adams, *supra* note 3, at 99 (finding that gender essentialism perpetuates continued use of gender schemas to create exclusive, discriminatory nations and offering reformed U.S. citizenship law that rejects "a construction of fatherhood as legal and motherhood as biological"). For a further discussion, see *infra* notes 137-208 and accompanying text.

17. In this Comment, the term "gender essentialism" is used to describe the tendency to adopt monolithic notions of women's and men's experiences that are allegedly grounded in biology, thus requiring no further justifications. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (criticizing gender essentialism for excluding other facets of experience, such as race, class and sexual orientation).

18. Latin for "right of blood," *jus sanguinis* citizenship permits a child to acquire citizenship based upon a parent's citizenship. See BLACK'S LAW DICTIONARY 868 (7th ed. 1999) (defining term). This is the most commonly followed citizenship rule internationally. See *id.* (noting prevalence of citizenship rule). The United States follows this rule in granting citizenship to children born abroad and out-of-wedlock. See 8 U.S.C. § 1409 (providing citizenship to foreign-born out-of-wedlock children on basis of U.S. parentage). The United States, however, primarily grants citizenship based upon *jus soli* principles. See U.S. CONST. amend. XIV, § 1 (deeming all persons born or naturalized in United States as citizens); 8 U.S.C. § 1401(a) (1994) (stating qualifications to be deemed nationals and citizens at

in upholding such laws on the basis of biology.¹⁹ Furthermore, in light of recent developments in international law, the United States may be forced to reconsider section 1409(a).

This Comment evaluates the Supreme Court's calculated manipulation in upholding the legitimation requirement in section 1409(a)(4). Part II examines the text of the statute in light of its origins.²⁰ Furthermore, Part II notes the controversial impact of the plenary power doctrine on equal protection jurisprudence.²¹ Part III describes the two equal protection challenges to section 1409.²² Part IV explores the conceptual and practical implications of the Court's holding.²³ Finally, Part V discusses the potential for reform of section 1409(a) upon ratification of a treaty aimed at eliminating discrimination against women.²⁴

birth). *Jus soli*, which is Latin for "right of soil," determines citizenship by place of birth. See BLACK'S LAW DICTIONARY 868 (defining term). Consequently, virtually all those born within the territories of the United States, including illegal aliens, are deemed U.S. citizens at birth. See Augustine-Adams, *supra* note 3, at 95 n.1 (applying principles of *jus soli* citizenship to U.S. citizenship law).

Unlike the United States (which primarily conveys citizenship based upon *jus soli*), there are countries, such as Bangladesh, Pakistan, Japan and Germany, which only convey citizenship based upon *jus sanguinis* principles. See Hosokawa Kiyoshi, *Japanese Nationality in International Perspective*, in NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 177-253 (Ko Swan Sik ed., 1990) (discussing Japanese citizenship laws); Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U. J. INT'L L. & POL. 35, 55 n.106 (1990) (explaining that German adherence to *jus sanguinis* citizenship means that children born to alien parents within Federal Republic of Germany do not acquire German citizenship); UNICEF, THE PROGRESS OF NATIONS 9 (1998), available at <http://www.unicef.org/pon98/pon98.pdf> (noting that Bangladesh and Pakistan continue to convey citizenship according to father's nationality).

19. See Brief of Amici Curiae Equality NOW at 21-23, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (exploring trend). Many countries amended their citizenship laws in response to ratification of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), including Japan in 1985, Switzerland in 1985, Italy in 1987, Vietnam in 1988, Luxembourg in 1989, Malta in 1989, Thailand in 1991, India in 1992, South Africa in 1994 and Botswana in 1995. See UNICEF, *supra* note 18, available at <http://www.unicef.org/pon98/pon98.pdf> at 9 (explaining that because of growing power of CEDAW, many patriarchal citizenship laws have been amended to allow women to convey citizenship to their children as required by Article 9 of CEDAW). In light of this growing legislative trend to amend citizenship laws to grant parents the equal right to convey citizenship to their children, the United States may be in the minority in upholding its gender-based discriminatory citizenship laws.

20. For a further discussion of the text and history of § 1409, see *infra* notes 25-62 and accompanying text.

21. For a further discussion of the impact of the plenary power doctrine on equal protection jurisprudence, see *infra* notes 63-92 and accompanying text.

22. For a further discussion on *Nguyen* and *Miller*, see *infra* notes 93-136 and accompanying text.

23. For a further discussion, see *infra* notes 137-208 and accompanying text.

24. For a further discussion, see *infra* notes 209-23 and accompanying text.

II. BACKGROUND

A. *Plain Language of Section 1409*

Title 8 U.S.C. § 1401(g) states that citizenship will be conferred at birth to an out-of-wedlock child born abroad if the child's parent is a U.S. citizen that has lived in the United States for at least five years.²⁵ This provision, however, does not confer citizenship unless the requirements of 8 U.S.C. § 1409 are satisfied.²⁶ Under section 1409, an unwed citizen mother automatically conveys citizenship to her foreign-born child upon proof of U.S. nationality at the time of the child's birth and prior physical presence in the United States for one year.²⁷ For the citizen father, however, sections 1409(a)(1), (a)(3) and (a)(4) impose three additional requirements. The unwed American father must: (1) prove biological fatherhood by clear and convincing evidence; (2) provide a written statement that he will provide financial support while the child is a minor; and (3) legitimate, adjudicate or formally acknowledge paternity before the child reaches eighteen years of age.²⁸ In essence, the unwed father must establish a biological, financial and legal relationship with the out-of-wedlock child to convey citizenship. In contrast, the unwed mother simply needs to establish a biological link to the child.²⁹

B. *Development of Section 1409(a)*

As evidenced by the legislative development and the statutory framework, section 1409(a) was designed to reinforce biased and suspect gender schemas pertaining to women with children born out-of-wedlock.³⁰ Although the statute on its face appears to give an unwed mother the superior right to automatically convey citizenship to her child, the provision is

25. See 8 U.S.C. § 1401 (1994) (providing for nationality at birth and collective naturalization).

26. See 8 U.S.C. § 1409(a) (1994) (applying to § 1401(g)).

27. See 8 U.S.C. § 1409(c) (conveying citizenship to foreign-born out-of-wedlock child of citizen mother). While proving maternity is not explicitly required by this provision, the Supreme Court seems to presume that it must be met. See *Nguyen v. INS*, 121 S. Ct. 2053, 2061 (2001) (explaining that mother's status is uniquely verifiable from event of birth and most often documented by birth certificates or hospital records); *Miller v. Albright*, 523 U.S. 420, 436 (1998) (same).

28. See 8 U.S.C. § 1409(a)(1) (requiring that unwed father establish biological relationship with out-of-wedlock child in order to convey citizenship); 8 U.S.C. § 1409(a)(3) (requiring that unwed father establish financial relationship with out-of-wedlock child in order to convey citizenship); 8 U.S.C. § 1409(a)(4) (requiring that unwed father establish legal relationship with out-of-wedlock child in order to convey citizenship).

29. See 8 U.S.C. § 1409(c) (qualifying citizenship for out-of-wedlock child born to citizen mother). The language of the statute presumes that an unwed citizen mother will establish biological maternity before conveying citizenship. See *id.* (failing to explicitly require proof of maternity).

30. For a further discussion of the development of § 1409, see *infra* notes 31-62 and accompanying text.

actually an extension of the doctrine of coverture.³¹ Under this doctrine, an unwed father has no responsibility for his out-of-wedlock child absent legitimation; thus, to convey citizenship, he must first legitimate paternity.³² In contrast, because coverture places sole responsibility for an out-of-wedlock child on the unwed mother, legitimation is unnecessary for her to convey citizenship. Additionally, the predecessor to section 1409 adopted the common law doctrine of coverture, thus signifying an attempt to preserve and reinforce the gender-based schemas about unwed mothers and fathers.³³

1. *Common Law Tradition of Coverture*

Under the common law doctrine of coverture, married women did not legally exist.³⁴ Their legal identity was merged with their husbands, giving the husbands complete legal control over their wives and marital children.³⁵ Consequently, fathers had no responsibility for their out-of-wedlock children unless they chose to legitimate them; these children were the sole responsibility of their mother.³⁶

Because under English common law, a bastard³⁷ child was “nullius filius,—the son of no one,” neither parent had to support such a child.³⁸

31. See Brief of Amici Curiae National Women’s Law Center at 17-18, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (applying doctrine of coverture to U.S. citizenship statute relating to out-of-wedlock children). For a further discussion on the doctrine of coverture, see *supra* note 11 and accompanying text.

32. See Brief of Amici Curiae National Women’s Law Center at 19, *Nguyen* 121 S. Ct. 2053 (applying doctrine of coverture to U.S. citizenship statute relating to out-of-wedlock children).

33. See Collins, *supra* note 12, at 1690 (noting that Nationality Act of 1940 was precursor to § 1409). For a further discussion of the Nationality Act of 1940, see *infra* notes 47-52 and accompanying text.

34. See 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (“By marriage, the husband and wife are one person in law: that is, the very being, or legal existence of the woman is suspended during the marriage. . .”).

35. See *id.* at *441-42 (explaining that husband had legal responsibility for wife’s actions, debts and maintenance and had custodial rights over child’s labor); Collins, *supra* note 12, at 1682 n.61 (citing same); see, e.g., *Jackson v. Jackson*, 8 Or. 402, 403 (Or. 1880) (explaining that under common law, “a father has the paramount right to the care and custody of his minor children, unless . . . he is a man of grossly immoral principles or habits, or that he has not the ability to provide for them, or that they have been ill-used by him”).

36. See Collins, *supra* note 12, at 1686-87 (noting that this rule reinforced coverture’s basic principle of patrilineal property and status transmission in marriage). These common law rules were designed to protect male rights by requiring property and status to be conveyed solely through legitimate inheritance; they prevented out-of-wedlock children from having any claims to a man’s inheritance absent legitimation. See *id.* at 1683-84 (“By setting the default rules concerning status transmission and custodial responsibility as it did, the coverture regime allowed men to remain sexually active outside of marriage and to bear virtually none of the material burdens. . .”).

37. This term is not used pejoratively, but rather in its historical context.

38. See *Hogan v. Hogan*, 44 S.W. 953, 954 (Ky. 1898) (disallowing out-of-wedlock child from inheriting property or status from his unwed mother); *In re Cady’s*

American common law's adoption of this doctrine, however, recognized "the mother of a bastard as its natural guardian, and as such . . . imposed upon her the duty of its maintenance, and [gave] her a right to its custody, and to its services."³⁹ In fact, early American common law established that, without a statutory duty, an unwed father had no legal obligation to support his non-legitimated out-of-wedlock child.⁴⁰

Early U.S. citizenship laws retained these gender-biased customs.⁴¹ For example, the first statute conferring citizenship to foreign-born children provided that only married citizen fathers could convey citizenship to their foreign-born marital children.⁴² Until the Nationality Act of 1940,

Estate, 12 N.Y.S.2d 750, 751 (N.Y. App. Div. 1939) (same); *Friesner v. Symonds*, 20 A. 257, 259 (N.J. Prerog. Ct. 1890) (noting that mother of out-of-wedlock child is its natural guardian, and thus must support child); *State v. Tieman*, 73 P. 375, 376 (Wash. 1903) (explaining that in absence of statute, putative father has no legal obligation to support his illegitimate child); *see also* Brief of Amici Curiae National Women's Law Center at 15, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (citing and discussing *Friesner*).

39. *Friesner*, 20 A. at 259; *see* Brief of Amici Curiae National Women's Law Center at 15, *Nguyen* (No. 99-2071) (quoting same); Collins, *supra* note 12, at 1682-83 (discussing role of coverture and parental responsibility in American history).

40. *See, e.g.*, *Glidden v. Nelson*, 15 Ill. App. 297, 300 (Ill. App. Ct. 1884) (ruling on bastardy proceeding); *Beckett v. State ex rel. Rothert*, 30 N.E. 536, 537 (Ind. App. 1892) (same); *Tieman*, 73 P. at 376 (same); *see also* Brief of Amici Curiae National Women's Law Center at 15-16, *Nguyen* (No. 99-2071) (citing *Glidden* and *Beckett* as support); Collins, *supra* note 12, at 1683 n.67 (noting statutory departures from American common law).

41. *See* Brief of Amici Curiae National Women's Law Center at 16, *Nguyen* (No. 99-2071) (noting that early statutes allowed citizenship to be conveyed only by married citizen fathers); Collins, *supra* note 12, at 1685 (explaining that coverture was automatically implicated in U.S. *jus sanguinis* citizenship). In 1907, Congress enacted a statute that was subsequently upheld by the Supreme Court whereby women citizens automatically relinquished their U.S. citizenship upon marriage to alien men. *See* Act of Mar. 2, 1907, § 3, 34 Stat. 1228, 1228 ("[A]ny American woman who marries a foreigner shall take the nationality of her husband."); *MacKenzie v. Hare*, 239 U.S. 299, 312 (1915) ("[O]ur construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship.").

42. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (providing for citizenship for foreign-born children provided that this right "shall not descend to persons whose fathers have never been resident in United States"); *see also* *Miller v. Albright*, 523 U.S. 420, 461 (1998) (Ginsburg, J., dissenting) (explaining that father's residency requirement indicates congressional intent to acquire citizenship only through father). This was in concert with English law at that time. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 50-51 (12th ed. 1873) ("[T]o entitle a child born abroad to the rights of an English natural born subject, the father must be an English subject; and if the father be an alien, the child cannot inherit to the mother, though she was born under the King's allegiance."). Additionally, women risked their own U.S. citizenship when they married foreigners. *See* *Miller*, 523 U.S. at 463 (Ginsburg, J., dissenting) (finding women's inability to convey their citizenship was one of many gender-based distinctions employed by our immigration laws). In 1934, married citizen mothers were granted the ability to convey citizenship to their children. *See* Act of May 24, 1934, § 1, 48 Stat. 797, 797 (allowing both married citizen parents to convey citizenship).

citizenship laws were silent on the issue of citizenship for foreign-born out-of-wedlock children.⁴³ Despite this official silence, the State Department permitted foreign-born out-of-wedlock children to acquire citizenship through their citizen mothers on the basis that the unwed mother “stands in the place of the father.”⁴⁴ Consistent with coverture principles, unwed citizen fathers, however, could not convey citizenship to their foreign-born out-of-wedlock children absent legitimation.⁴⁵

2. *Nationality Act of 1940*

First codified in 1940, the discriminatory gender classifications of section 1409 have their roots in the doctrine of coverture. The Nationality Act of 1940 (1940 Act) comprehensively codified all existing citizenship, immigration and naturalization laws.⁴⁶ The legislative history for the 1940

43. Initially, Congress did not differentiate between foreign-born marital children and foreign-born out-of-wedlock children. See *Miller*, 523 U.S. at 462 (Ginsburg, J., dissenting) (noting that only citizen fathers could convey citizenship to their marital and legitimated out-of-wedlock children). In 1934, Congress permitted foreign-born children to acquire citizenship from either a citizen mother or father. See Act of May 24, 1934, § 1 (terminating discrimination against citizen mothers of children born abroad). In 1940, Congress repealed its earlier provision on conveying citizenship to foreign-born children, and in its place enacted new provisions that distinguished between foreign-born marital children and foreign-born out-of-wedlock children. See Nationality Act of 1940, ch. 876, §§ 201-205, 54 Stat. 1138-40; Brief of Amici Curiae National Women’s Law Center at 17 n.15, *Nguyen* (No. 99-2071) (discussing legislative development of § 1409); *Miller*, 523 U.S. at 466 (Ginsburg, J., dissenting) (noting that 1940 Act allowed foreign-born marital children to gain citizenship from either parent equally, but “established a different regime for children born out of wedlock, one that disadvantaged United States citizen fathers and their children”); Brief of Amici Curiae National Women’s Law Center at 17 n.15, *Nguyen* (No. 99-2071).

44. See HOUSE COMM. ON IMMIGRATION AND NATURALIZATION, 76TH CONG., REPORT PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, PART ONE: PROPOSED CODE WITH EXPLANATORY COMMENTS 18 (Comm. Print 1939); see also *Miller*, 523 U.S. at 463 (Ginsburg, J., dissenting) (noting that Attorney General ultimately rejected State Department’s reasoning as it was incompatible with § 1993, which allowed conveyance of citizenship to children born out-of-wedlock if legitimated by father). The Nationality Act of 1940 settled the dispute and allowed unwed mothers to convey citizenship to their children born out-of-wedlock. See Nationality Act §§ 201-205.

45. See *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong. 431 (1940) [hereinafter *1940 Hearings*] (requiring father to legitimate paternity, but finding mother is bound to support child without any similar affirmative, legally identifiable steps).

46. See Nationality Act §§ 201-205 (establishing existing citizenship, immigration and naturalization laws; H.R. REP. NO. 82-1365, at 27 (1952) (“The 1940 act combined all substantive and procedural requirements for naturalization.”); Brief of Amici Curiae National Women’s Law Center at 17, *Nguyen* 121 S. Ct. 2053 (explaining that President Roosevelt selected members from Department of State, Department of Labor and Attorney General’s Office “to study the existing laws governing nationality, and to prepare a draft code embodying such changes and additions as might seem desirable, together with a report explaining the issues.”) (quoting *1940 Hearings*, *supra* note 45, at 235). The members of these depart-

Act does not verify that the legitimation requirement was based on a perceived need to prove biological parenthood and/or foster ties between the child, the parent and the United States.⁴⁷ Rather, the legislative history reveals that the disparate treatment found in the present-day section 1409 harmonized the principles of coverture which assigned unwed mothers and fathers different care-taking responsibilities for their out-of-wedlock children.⁴⁸

Consequently, while married citizen parents were equally able to convey citizenship to their foreign-born marital children, the 1940 Act required unwed citizen fathers to first legitimate paternity to convey citizenship to their foreign-born out-of-wedlock children.⁴⁹ The 1940 Act only allowed citizenship to pass from an unwed mother to her child when paternity was not legitimated.⁵⁰ Distinguishing between marital and out-of-wedlock children in this manner reinforced the gender schemas stemming from the assignment of rights and responsibilities for out-of-wedlock

ments presented a proposal of the 1940 Act (1940 proposal) to the President, who in turn conveyed it to Congress on June 13, 1938. See Brief of Amici Curiae National Women's Law Center at 18 n.17, *Nguyen* (No. 99-2071).

47. See Collins, *supra* note 12, at 1692 (using history to show that gender-based regulation of U.S. citizenship was not grounded in mother's unique biological role in childbirth).

48. For a further discussion on the principles of coverture, see *supra* notes 34-45 and accompanying text. The 1940 proposal justified allowing unwed citizen mothers to convey citizenship to their foreign-born out-of-wedlock children by stating:

[I]t may be said that the Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling is based . . . on the ground that the mother in such a case stands in the place of the father. . . . [U]nder American law the mother "has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian." This rule seems to be in accord with the old Roman law and with the laws of Spain and France.

1940 Hearings, *supra* note 45, at 431; see Brief of Amici Curiae National Women's Law Center at 18, *Nguyen* (No. 99-2071) (citing same). Concerns regarding proof of biological parenthood and/or fostering ties between the foreign-born out-of-wedlock child and the United States were raised with respect to other provisions encompassed by the 1940 Act. See Brief of Amici Curiae National Women's Law Center at 23-24, *Nguyen* (No. 99-2071) (noting that 1940 Act imposed residency requirements as condition of retaining citizenship in order to address concerns over fostering ties).

49. See *Miller v. Albright*, 523 U.S. 420, 466 (1998) (Ginsburg, J., dissenting) (explaining that legitimated out-of-wedlock children acquired citizenship generally under local law of place of birth). In addition to requiring legitimation during the child's minority, the 1940 Act also required a five-year residency requirement within the United States before the child reached the age of twenty one. See *id.*

50. See *id.* (explaining that, absent legitimation, out-of-wedlock children could acquire citizenship from unwed mother provided that she was U.S. citizen at time of child's birth and had previously resided in United States).

children under the doctrine of coverture.⁵¹

3. 1986 Amendments to Section 1409(a)

The essence of section 1409(a) has remained largely unchanged since the adoption of the 1940 Act.⁵² In 1986, Congress merely made procedural amendments to the way unwed fathers could convey citizenship to their foreign-born out-of-wedlock children.⁵³ Nevertheless, Congress preserved

51. For a discussion on the assignment of rights and responsibilities, see *supra* notes 34-45 and accompanying text. See Collins, *supra* note 12, at 1693 (explaining that women's responsibility for out-of-wedlock children "did not simply derive from social custom: Women had (and continue to have) a legal duty to care for children born out of wedlock, while men did (and do) not"). To date, even though state laws have abandoned these gendered principles in their child custody laws, federal citizenship laws have not. See, e.g., ARIZ. REV. STAT. § 25-501 (2000) (finding noncustodial parents now have equal responsibilities to provide child support); CAL. FAM. CODE § 3900 (1994); CONN. GEN. STAT. ANN. § 46b-84 (1995); DEL. CODE ANN. tit. 13 § 501 (1999) (same); FLA. STAT. ch. 61.13 (1997) (same); MASS. GEN. LAWS ANN. ch. 208 § 28 (1998) (same); N.Y. FAM. CT. ACT § 413 (McKinney 1999) (same); TEX. FAM. CODE ANN. § 154.001 (Vernon 1996) (same); see also Brief of Amici Curiae National Women's Law Center at 19, *Nguyen* (No. 99-2071) (citing same).

52. See *Miller*, 523 U.S. at 467 (Ginsburg, J., dissenting) (noting that subsequent legislation retained gender lines drawn in 1940 Act); Brief of Amici Curiae National Women's Law Center at 20, *Nguyen* (No. 99-2071) (same).

53. See *Miller*, 523 U.S. at 467-68 (Ginsburg, J., dissenting) (permitting legitimation of paternity to be substituted by written acknowledgement of financial responsibilities under oath or adjudication of paternity by court order). In 1986, Congress amended the language of the Immigration and Nationality Act (INA) primarily to streamline administration of § 1409 and to "conform [it] with opinions of the United States Supreme Court in nationality cases." *Administration of the Immigration and Nationality Laws: Hearings on H.R. 4823, H.R. 4444, and H.R. 2184 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 99th Cong. 144 (1986) [hereinafter *1986 Hearings*] (statement of Joan Clark, Assistant Secretary of State for Consular Affairs) (discussing H.R. 4444).

Assistant Secretary Clark's written statement contains the only substantive discussion about why unwed fathers are required to establish a biological, financial and legal relationship with their out-of-wedlock children. See Brief of Amici Curiae National Women's Law Center at 20-21, *Nguyen* (No. 99-2071). Assistant Secretary of State for Consular Affairs, Joan Clark, explained the need for the 1986 amendments:

[The purpose of the proposed amendment is] to permit an illegitimate child of an American citizen father to acquire U.S. citizenship based on the father's formal written acknowledgment of paternity, or a court adjudication of paternity. This proposal would simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock, to an American citizen father, by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction. To deter fraudulent claims, however, the fact that a blood relationship exists between the U.S. citizen father and the child would have to be shown by clear and convincing evidence. Moreover, the child's father, if living, must agree to provide for the child's financial support. The purpose of this clause is to facilitate the enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states.

the disparate rules for unwed mothers and fathers as they had existed under the common law and the 1940 Act.⁵⁴

The primary purpose of the 1986 amendments was to simplify the legitimation requirement that previously required knowledge of the complex rules for legitimation in different jurisdictions.⁵⁵ Under the State Department's proposal, which became section 1409(a)(4), an unwed father could either formally acknowledge the minor's paternity in writing or adjudicate paternity by court order in place of legitimation.⁵⁶ The Department further proposed requiring unwed fathers to agree in writing to financially support their out-of-wedlock children so that these children would not become a financial burden on the states.⁵⁷ This proposal became section 1409(a)(3).⁵⁸ Finally, to deter fraudulent claims, the Department proposed an additional requirement that was codified into section 1409(a)(1).⁵⁹ Under section 1409(a)(1), a biological father-child relationship must be proven by clear and convincing evidence.⁶⁰

Given the additional requirement of proving a biological relationship under section 1409(a)(1), the legislative history is silent as to what further purpose is served by requiring unwed fathers, but not unwed mothers, to also legitimate paternity. Moreover, the development of section 1409(a)(4) demonstrates an absence of any interest by the State Department or Congress in fostering ties between foreign-born out-of-wedlock children and their citizen fathers, and in turn, the United States.⁶¹ What the legislative history does reveal is that the gendered stratification of sec-

1986 Hearings, *supra*, at 150. The Judiciary Committee recommended enactment of the State Department's proposed changes to the present-day § 1409 without amendment. See H.R. REP. NO. 99-916, at 1, 3; 12-13 (1986) (submitting bill containing 1986 amendments to Congress); see also Brief of Amici Curiae National Women's Law Center at 21-22, *Nguyen* (No. 99-2071) (explaining that Assistant Secretary Clark's statement was incorporated into record).

54. See Brief of Amici Curiae National Women's Law Center at 22, *Nguyen* (No. 99-2071) (concluding that Congress agreed to maintain basic gender-based framework).

55. See 1986 Hearings, *supra* note 53, at 150 (providing Assistant Secretary Clark's explanation on purpose of 1986 amendments).

56. See *id.* (providing alternate options to satisfy requirement of legitimation); Brief of Amici Curiae National Women's Law Center at 22, *Nguyen* (No. 99-2071) (same).

57. See 1986 Hearings, *supra* note 53, at 150 (adding additional requirement to grant citizenship to foreign-born out-of-wedlock children of citizen fathers); Brief of Amici Curiae National Women's Law Center at 22, *Nguyen* (No. 99-2071) (discussing additional requirement).

58. See 8 U.S.C. § 1409(a)(3) (1994).

59. See 1986 Hearings, *supra* note 53, at 150 (providing Assistant Secretary Clark's explanation on purpose of 1986 amendments); Brief of Amici Curiae National Women's Law Center at 22, *Nguyen* (No. 99-2071) (same).

60. See 8 U.S.C. § 1409(a)(1) (requiring unwed father to establish biological relationship in order to convey citizenship to out-of-wedlock child).

61. For a further discussion of legislative intent, see *supra* notes 52-60 and accompanying text.

tion 1409 is rooted in the common law's outmoded stereotypes.⁶²

C. Equal Protection

No provision of the U.S. Constitution explicitly directs the federal government to provide equal protection to all persons under the law.⁶³ The Supreme Court, however, has expanded application of the Fourteenth Amendment's equal protection guarantee to the Due Process Clause of the Fifth Amendment's on the basis that those similarly situated should be treated alike.⁶⁴ Thus, for equal protection challenges to federal laws that classify on the basis of sex, such as section 1409, courts must decide if the governmental interest legitimately justifies the line-drawing at issue.⁶⁵

1. Levels of Judicial Review

Depending upon the classification targeted by the contested federal law, a court will employ one of three levels of equal protection review.⁶⁶ The most demanding review, strict scrutiny, is applied when the classification affects a fundamental right or distinguishes on the basis of race.⁶⁷ Strict scrutiny requires the government to demonstrate that the federal law is narrowly tailored to achieve a compelling state interest.⁶⁸ Rational basis, on the other hand, minimally requires that the means adopted by the federal law be rationally related to a legitimate governmental purpose.⁶⁹ Between these two extremes is intermediate scrutiny. This re-

62. See Brief of Amici Curiae National Women's Law Center at 22-23, *Nguyen* (No. 99-2071) (critiquing origins of § 1409).

63. See, e.g., Nikki Ahrenholz, Comment, *Miller v. Albright: Continuing to Discriminate on the Basis of Gender and Illegitimacy*, 76 DENV. U. L. REV. 281, 282-89 (1998) (discussing equal protection jurisprudence comprehensively).

64. See *id.* at 282 n.10 (discussing equal protection under Fifth Amendment).

65. See *id.* at 282 (identifying need for appropriate government purpose).

66. See *id.* (explaining levels of scrutiny).

67. See *id.* (discussing levels of equal protection scrutiny).

68. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications, including benign ones, are subject to strict scrutiny); *Bernal v. Fainter*, 467 U.S. 216 (1984) (applying strict scrutiny to classifications based on alienage unless political function exception applies); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (applying strict scrutiny to strike down affirmative action plan for medical school admission where race-based quotas were utilized); *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to facially-neutral, race-based statutory classification banning interracial marriages); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (utilizing strict scrutiny to strike down segregation in schools); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding under strict scrutiny legal restrictions that curtailed civil rights of Japanese Americans by placing them in detention camps).

69. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (holding that although homosexuality is not fundamental right, it is deserving of equal protection under rational basis review); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (holding mental retardation is not quasi-suspect classification requiring intermediate scrutiny, but looking closely at state interest under rational

quires the classification to be substantially related to achieving the important governmental objectives.⁷⁰

Presently, the Supreme Court applies intermediate scrutiny to classifications based upon sex.⁷¹ Under this standard, those seeking to defend the statutory classification must demonstrate an exceedingly persuasive justification that is substantially related to achieving the genuine and important governmental interest.⁷² Namely, the Court has specified that the justifications sustaining the discriminatory classification “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”⁷³ Moreover, the justifications cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,”⁷⁴ even if they enjoy empirical support.⁷⁵

basis review); *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 266-68 (1977) (establishing factors to determine if facially-neutral statute with discriminatory effect has intent to discriminate, thus warranting scrutiny higher than rational basis); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (applying rational basis review to facially neutral statutes that allegedly have discriminatory impact on race absent showing of intent to discriminate); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (applying rational basis review because wealth is not suspect classification).

70. *See, e.g., United States v. Virginia*, 518 U.S. 515, 529 (1996) (requiring “an exceedingly persuasive” governmental justification to uphold gender-based classification); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that although education is not fundamental right, it is deserving of intermediate scrutiny if statute imposes absolute ban on education of children of illegal aliens); *Lalli v. Lalli*, 439 U.S. 259, 275-76 (1978) (applying intermediate scrutiny to statutory classification based on illegitimacy where statute required illegitimate children to receive formal order of paternity during father’s lifetime in order to inherit from father); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (adopting intermediate scrutiny as standard of review for gender-based classification that prohibited sale of near-beer to males under twenty-one years of age and women under eighteen years of age); *Fronterio v. Richardson*, 411 U.S. 677, 682 (1973) (applying strict scrutiny to gender-based classification that required military women to show that their husbands are actually dependents but did not require military men to make any such showing); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (applying intermediate scrutiny to strike down statute that gave preference to male estate administrators over female administrators).

71. *See Nguyen v. INS*, 121 S. Ct. 2053, 2059 (2001) (requiring gender-based classifications to possess important governmental interests that are substantially related to achieving those objectives in order to withstand equal protection scrutiny); *Virginia*, 518 U.S. at 516 (requiring “exceedingly persuasive” governmental interest for gender-based classifications to survive equal protection scrutiny).

72. *See Virginia*, 518 U.S. at 516 (arguing, possibly, for higher showing under intermediate scrutiny).

73. *Id.* at 533.

74. *Id.*

75. *See Nguyen*, 121 S. Ct. at 2067 (O’Connor, J., dissenting) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994), *Craig v. Boren*, 429 U.S. 190, 199 (1976), and *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975), for proposition that empirical support of stereotypes does not validate gender-based classifications).

2. *Impact of Equal Protection Jurisprudence on Immigration Law*

To date, immigration jurisprudence exemplifies one of the few instances where Congress, with the Court's approval, has succeeded in evading the constitutional precept of equality for all persons under the law.⁷⁶ The principles of immigration law are chiefly based upon the Equal Protection Clause despite the Constitution's failure to mention immigration or define citizenship.⁷⁷ In 1886, the Court clarified that the phrase "any person" in the Due Process Clause protected aliens and citizens alike.⁷⁸ Therefore, aliens and citizens are deserving of equal protection under the law. The plenary power doctrine, however, limits the equal protection guarantee by giving Congress nearly exclusive power to decide immigration and naturalization claims.⁷⁹ Based on judicial deference to this power, the Supreme Court has limited its review to what appears to be rational basis scrutiny in immigration and nationality cases employing sex-based classifications.⁸⁰

The first clarification of the plenary power doctrine within the equal protection context was in *Fiallo v. Bell*.⁸¹ The provision at issue in *Fiallo* denied the out-of-wedlock children of American fathers the same preferential status for obtaining immigration visas afforded to the similarly-situated children of American mothers.⁸² The *Fiallo* Court faced an equal protection challenge to an immigration statute (implicating rational basis review pursuant to Congress' plenary power) that employed a sex-based

76. See 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, 1354 (1998) (pointing to Court's reluctance to interfere in matters implicating Congress' plenary power). Two provisions of the Immigration and Nationality Act still differentiate on the basis of gender. See, e.g., 8 U.S.C. § 1101(b)(1)(D) (1994) (differentiating between mothers and fathers for purpose of obtaining special immigration visas for their illegitimate foreign-born children); 8 U.S.C. § 1409 (1994) (differentiating between mothers and fathers for purpose of conveying U.S. citizenship to their illegitimate foreign-born children).

77. See Ahrenholz, *supra* note 63, at 288 (discussing history of U.S. immigration and nationality laws).

78. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."); see also H.R. REP. NO. 82-1365, at 25-26 (1952) (discussing implication of Court's opinion in *Yick Wo* on citizenship for foreign-born children).

79. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (recognizing that Congress' power to exclude or expel aliens is well established); accord *Kleindienst v. Mandel*, 408 U.S. 753, 769-70; *Galvan v. Press*, 347 U.S. 522, 531 (1954); see also *Miller v. Albright*, 523 U.S. 420, 456 (1998) (Scalia, J., concurring) (same); Ahrenholz, *supra* note 63, at 288 (same).

80. See *Fiallo*, 430 U.S. at 795 (deferring to plenary power in context of sex-based immigration statute).

81. 430 U.S. 787 (1977).

82. See *Fiallo*, 430 U.S. at 788-92 (holding that because Congress' power to expel or exclude aliens is largely immune from judicial review, 8 U.S.C. §§ 101(b)(1)(D) and 1101(b)(2), do not warrant more searching judicial scrutiny); see also Satinoff, *supra* note 76, at 1358-59 (discussing same).

classification (warranting intermediate scrutiny).⁸³

The *Fiallo* Court reviewed the statute as an immigration law, not as one employing a sex-based classification.⁸⁴ Deferring to Congress' plenary power, the Court required the government to show a "facially legitimate and bona fide reason" for the sex-based classification to survive judicial scrutiny.⁸⁵ Several lower courts have equated this test with rational basis review.⁸⁶ A few courts have read this standard as being even less stringent than rational basis.⁸⁷

In its deference to the Court, the *Fiallo* Court declined to apply intermediate scrutiny to the sex-based immigration law.⁸⁸ The Court ignored its own precedent set one year earlier, in *Craig v. Boren*,⁸⁹ where the Court held that intermediate scrutiny applied to sex-based classifications challenged under the Equal Protection Clause.⁹⁰ Unlike classifications warranting rational basis review, sex-based classifications carry a "strong presumption" of invalidity under intermediate scrutiny.⁹¹ Accordingly, an equal protection challenge to a sex-based classification in a non-immigration context is likely to prevail over one implicated in immigration law.⁹²

III. EQUAL PROTECTION CHALLENGES TO SECTION 1409(A) (4)

Recently, the Supreme Court addressed equal protection challenges to section 1409(a) (4).⁹³ In both cases the Court fashioned legitimate gov-

83. See Satinoff, *supra* note 76, at 1359 (providing overview of federal gender-based immigration cases subject to equal protection challenges and discussing *Fiallo*).

84. See *Fiallo*, 430 U.S. at 792 (recognizing at outset Court's limited judicial power over immigration law).

85. *Id.* at 794; see Satinoff, *supra* note 76, at 1359 n.29 (explaining that Court formally adopted standard in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

86. See *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995) (finding "facially legitimate and bona fide reason" test equivalent to rational basis review); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990) (same); see also Satinoff, *supra* note 76, at 1359 (same).

87. See *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982) (stating that congressional action must be "so baseless" as to be invalid); Satinoff, *supra* note 76, at 1359 n.32 (pointing to language in *Fiallo* for proposition that *Fiallo* also finds its standard as easier to meet than rational basis review) (citation omitted).

88. See *Fiallo*, 430 U.S. at 794 ("[T]his Court has resolved similar challenges to immigration legislation . . . and has rejected the suggestion that more searching judicial scrutiny is required."); see also Satinoff, *supra* note 76, at 1360 (same).

89. 429 U.S. 190 (1976).

90. See *Craig*, 429 U.S. at 197-98 (discussing gender classifications and whether they serve important governmental objectives); see also Satinoff, *supra* note 76, at 1360 (discussing same).

91. See *United States v. Virginia*, 518 U.S. 515, 532 (1996) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994)); see also Satinoff, *supra* note 76, at 1360 n.37 (noting same).

92. See Satinoff, *supra* note 76, at 1360-61 (noting tension caused by plenary power between immigration and sex-based equal protection challenges).

93. Both *Miller* and *Nguyen* raised the question of whether differential treatment of mothers and fathers under federal citizenship law violated the equal pro-

ernmental interests premised upon biological determinism to sustain the gender-based classifications.⁹⁴ When the issue was first presented, in *Miller v. Albright*,⁹⁵ the plurality explained that “the biological differences between single men and single women” justify Congress’ concern for a class of potential citizens born abroad and out-of-wedlock to alien mothers and to American men who are unaware of their children’s existence.⁹⁶ Most recently, in a five-to-four decision,⁹⁷ the Court in *Nguyen v. INS*⁹⁸ similarly used the differences between women and men “in relation to the birth process” to uphold the sex-based statutory classification under intermediate scrutiny.⁹⁹ Consequently, in each of these cases, the Court fractured

tection guarantee of the Fifth Amendment. *See generally* *Nguyen v. INS*, 121 S. Ct. 2053 (2001); *Miller v. Albright*, 523 U.S. 420 (1998). The petitioners in both cases argued that requiring heightened statutory hurdles for American fathers to convey citizenship solely because they are the male parent sanctioned outmoded gender stereotypes. *See Nguyen*, 121 S. Ct. at 2063 (dismissing petitioner’s argument); *Miller*, 523 U.S. at 442-45 (dismissing notion that § 1409 is based on gender stereotypes, such as American fathers are breadwinners who play no role in child rearing duties and unwed mothers will have more emotional connection to out-of-wedlock children than unwed fathers).

94. For a further discussion, see *infra* notes 102-36 and accompanying text.

95. 523 U.S. 420 (1998).

96. *See Miller*, 523 U.S. at 439, 445 (explaining that differential regulation is justified because U.S. servicemen may return to United States at end of their tour of duty without being aware of their children’s existence due to nine-month gestation period).

97. The line up of the *Nguyen* Court was very similar to that in *Miller*, with Justice O’Connor as the swing vote. *Compare Miller*, 523 U.S. at 420-23, with *Nguyen*, 121 S. Ct. at 2057 (showing that two out of nine justices changed positions). The *Miller* plurality opinion was written by Justice Stevens, with whom Chief Justice Rehnquist joined. *See Miller*, 523 U.S. at 423. Justices O’Connor and Kennedy concurred primarily because the citizen father was not a co-petitioner. *See id.* at 422. Justices Scalia and Thomas concurred because they felt petitioner’s injury was not redressable. *See id.* at 422-23. The *Nguyen* majority, consisting of Chief Justice Rehnquist and Justices Kennedy, Stevens, Scalia and Thomas, upheld the statute under intermediate scrutiny. *See Nguyen*, 121 S. Ct. at 2057. Justices Scalia and Thomas again concurred because they found only Congress was able to confer *jus sanguinis* citizenship. *See id.* at 2066. Because *Nguyen* did not suffer the same standing issues of *Miller*, O’Connor was required to evaluate the statute in light of the intermediate equal protection jurisprudence. Consequently, the *Nguyen* dissent consisted of Justices O’Connor, Souter, Ginsburg and Breyer. *See id.* at 2057. In sum, Justices Kennedy, Scalia and Thomas found § 1409(a)(4) survives under mid-tier review, whereas Justice O’Connor found the level of equal protection scrutiny fatal to the provision.

Comparing the language used by Stevens’ plurality opinion in *Miller* with Kennedy’s majority opinion in *Nguyen* reveals that it was merely semantics that compelled the 5-4 decision; the substantive “legitimate” governmental interests remained unchanged between the two opinions. Justice Kennedy’s opinion merely refrains from characterizing the conferral of automatic citizenship as a “reward” for the mother deciding against abortion. *Cf. Miller*, 523 U.S. at 433-34 (stating that § 1409(c) rewards mothers for giving birth).

98. 121 S. Ct. 2053 (2001).

99. *See Nguyen*, 121 S. Ct. at 2062, 2066 (finding that ease of travel and increased willingness of Americans to travel abroad has produced even more substantial grounds to justify statutory distinction).

along the antediluvian lines dividing sex-based equal protection law and feminist legal theory—disagreeing as to what extent inherent biological differences justify sex-based differential treatment of parents.¹⁰⁰ Furthermore, in each subsequent instance, the Court avoided resolving the twenty-five year old *Fiallo* struggle between immigration law and gender-based equal protection jurisprudence.¹⁰¹

A. *Miller v. Albright*

The petitioner in *Miller* was an out-of-wedlock Philippine-born daughter of a former American soldier.¹⁰² Because her mother raised her in the Philippines, her unwed citizen father was unaware of her existence until after her twenty-first birthday.¹⁰³ Consequently, when she applied for U.S. citizenship, the State Department denied her petition as her father had failed to legitimate her before the age mandated by the Immigration and Nationality Act.¹⁰⁴ After a change of venue, the United States District Court for the District of Columbia dismissed her suit because the petitioner (without her father as co-petitioner) lacked standing.¹⁰⁵ Then, after the *Fiallo* decision,¹⁰⁶ the United States Court of Appeals for the

100. Compare *id.* at 2060-66 (justifying differential treatment of mothers and fathers based on biology), and *Miller*, 523 U.S. at 434-41 (same), with *Nguyen*, 121 S. Ct. at 2075-77 (O'Connor, J. dissenting) ("Section 1409(a)(4) is thus paradigmatic of a historic regime that left women with responsibility and freed men from responsibility, for nonmarital children."), and *Miller*, 523 U.S. at 460-71 (Ginsburg, J., dissenting) (holding that United States' historical ill-treatment of foreign-born children calls for skeptical examination of government's claimed interest in gender line-drawing); see also Collins, *supra* note 12, at 1671 n.8 (discussing *Nguyen* and *Miller*).

101. Each time, the Court explicitly failed to say what impact *Fiallo* had on the outcome of an equal protection challenge to this gendered immigration statute. Cf. *Nguyen*, 121 S. Ct. at 2059 (declining to address *Fiallo* because § 1409 survives under intermediate scrutiny). For a further discussion of the citizen versus alien debate created by *Fiallo*, see Satinoff, *supra* note 76, at 1378-84 (arguing that, in *Miller*, if petitioner's father had been deceased and Court had granted petitioner third-party standing, § 1409(a)(4) would not have been upheld; "[t]he courts seemingly have allowed a procedural technicality to overshadow the substantive constitutional issue of equality between the sexes").

102. See *Miller*, 523 U.S. at 424-25 (noting facts).

103. See *id.* at 425 (stating facts).

104. See *id.* (noting that unwed father did not acknowledge paternity until after petitioner reached age of majority).

105. See *id.* at 426-27 (noting procedural posture). After the State Department rejected her application, the petitioner and her citizen father filed an amended complaint in the United States District Court for the Eastern District of Texas, seeking a judgment declaring her a citizen of the United States. See *id.* at 426. The district court dismissed the complaint, however, as the father lacked standing and transferred the case to the District Court for the District of Columbia. See *id.* at 427. The District Court for the District of Columbia then dismissed her suit for lack of standing because she failed to demonstrate that the court had the power to redress her injury by granting her citizenship. See *id.*

106. See *Miller v. Christopher*, 96 F.3d 1467, 1471 (D.C. Cir. 1996) (finding *Fiallo* applicable because *Fiallo* involved equal protection challenge to immigration

District of Columbia found that, while she had standing, section 1409 was “entirely reasonable” given that “[a] mother is far less likely to ignore the child she carried in her womb,” while a putative father “‘is very often totally unconcerned because of the absence of any ties to the mother.’”¹⁰⁷

In deciding on the issue of equal protection, the *Miller* Court never reached a majority.¹⁰⁸ Instead, a plurality found that section 1409(a)(4)’s additional requirement that unmarried U.S. fathers, but not similarly-situated mothers, legitimate parentage did not violate any equal protection guarantees.¹⁰⁹ Because the citizen father was not a co-petitioner, four justices, in two different opinions, found the governmental interests sufficient to uphold the disparate provision.¹¹⁰ In a second concurrence, two more justices found that the petitioner’s injury was unredressable as only Congress had the power to confer *jus sanguinis* citizenship.¹¹¹ In sum, because the *Miller* Court was so splintered, it could not conclusively resolve the question of whether the sex-based classification of section 1409(a)(4) violated the equal protection guarantee.¹¹²

statute that denied same preferential immigration status to foreign-born illegitimate children of U.S. fathers).

107. *Id.* at 1472 (quoting *Parham v. Hughes*, 441 U.S. 347, 355 n.7 (1979)); see *Satinoff*, *supra* note 76, at 1363 (citing same). Thus, the D.C. Circuit held that this immigration provision did not violate the Equal Protection Clause because the government had a “legitimate and bona fide reason” for the gender-based classification. See *Miller*, 96 F.3d at 1472 (upholding application of 8 U.S.C. § 1409(a)).

108. For a further discussion on the plurality and concurring opinions in *Miller*, see *infra* notes 109-12 and accompanying text.

109. See *Miller*, 523 U.S. at 433-45 (Stevens, J., plurality opinion) (finding that statute served important governmental interests).

110. See *id.* at 440 (Stevens, J., plurality opinion) (finding means employed by § 1409(a)(4) to be well-tailored to serving important governmental interests); see also *id.* at 451-52 (O’Connor, J., concurring) (finding that § 1409(a)(4) passes rational basis scrutiny). In the plurality opinion, Justice Stevens, joined by Chief Justice Rehnquist, held that while petitioner had standing, without her father as co-petitioner to invoke federal jurisdiction, § 1409(a)(4)’s requirement is eminently reasonable. See *id.* at 433-45 (stating basis for holding). In the concurrence, joined by Justice Kennedy, Justice O’Connor found petitioner lacked standing to raise a gender-based equal protection claim triggering intermediate scrutiny. See *id.* at 445-51 (O’Connor, J., concurring) (reasoning that this provision is sustainable under rational basis review). Rather, “she can only argue that § 1409 irrationally discriminates between illegitimate children of citizen fathers and citizen mothers.” *Id.* at 451.

111. See *id.* at 452-59 (Scalia, J., concurring) (finding that federal court lacks power to grant declaratory judgment). Because the plenary power doctrine severely limits the exercise of judicial power over immigration and naturalization issues, Justice Scalia, with whom Justice Thomas joined, concurred in dismissing petitioner’s complaint on the grounds that her injury was not redressable. See *id.* (“Our 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.”) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

112. See *Nguyen v. INS*, 121 S. Ct. 2053, 2058 (2001) (“The constitutionality of the distinction between unwed fathers and mothers was argued in *Miller*, but a majority of the Court did not resolve the issue.”). While the *Miller* Court did not

The *Miller* plurality found that a strong governmental interest justified the sex-based distinction for conferral of citizenship.¹¹³ According to the plurality, a mother should be bestowed a “reward” for her decision to forgo an abortion.¹¹⁴ In contrast, the plurality found that because an American father does not have to “participate in the decision to give birth” and is not burdened with having to raise the child, he should not be similarly rewarded.¹¹⁵ For this reason, the plurality held that section 1409(a)(4) operates as the “rough equivalent” for proving biological paternity—the first legitimate governmental interest.¹¹⁶

Then, the *Miller* plurality turned to the second governmental interest—fostering ties between the child and the father, and, in turn, the United States.¹¹⁷ In the context of explaining the importance of this interest, the plurality turned to the sexual irresponsibility of men.¹¹⁸ The plurality explained that because of the nine-month gestation period, Congress was rightfully concerned that the American servicemen stationed abroad could have unknowingly fathered out-of-wedlock children and, thus, unknowingly conveyed U.S. citizenship to persons that had no ties to the country.¹¹⁹ For the *Miller* plurality, it was reasonable to condition the award of citizenship on legitimation; “an act that demonstrates, at a mini-

conclusively resolve the issue, six justices did find it perfectly acceptable to construct an exclusive and discriminatory nation by barring the entry of the illegitimate children of American fathers unless they are first legitimated. See Augustine-Adams, *supra* note 3, at 100-01 (discussing breakdown of *Miller* plurality).

113. See *Miller*, 523 U.S. at 436-38 (discussing important governmental interests).

114. See *Miller*, 523 U.S. at 433 (justifying disparate regulation on basis of biological determinism).

If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion—an alternative that is available by law to many, and in reality to most, women around the world. She must then actually give birth to the child. Section 1409(c) rewards that choice and that labor by conferring citizenship on her child.

Id. at 433-34.

115. See *id.* at 434-35 (justifying disparate regulation on basis of biological determinism).

If the citizen is the unmarried male, he need not participate in the decision to give birth rather than to choose an abortion; he need not be present at the birth; and for at least 17 years thereafter he need not provide any parental support, either moral or financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child pursuant to § 1409(a). . . . It seems obvious that the burdens imposed on the female citizen are more severe than those imposed on the male citizen by § 1409(a)(4), the only provision at issue in this case.

Id. at 434.

116. See *id.* at 436 (dismissing as hollow gender-neutral alternative of requiring formal documentation of paternity within thirty days irrespective of sex).

117. See *id.* at 438-41 (explaining holding).

118. See *id.* (stating holding).

119. See *id.* at 438-39 (noting that when petitioner was born in 1970, 683,000 military servicemen were stationed abroad in Far East and women comprised only one percent of all U.S. servicemen in armed forces).

mum, the possibility that those who become citizens will develop ties with this country—a requirement that performs a *meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers.*¹²⁰

B. *Nguyen v. INS*

Three years after *Miller*, the Court got a second chance to resolve the equal protection issue in *Nguyen*.¹²¹ The *Nguyen* case was brought by a Vietnamese-born son and the unwed American father who raised him in the United States since age six.¹²² Only after the twenty-eight year-old son, Nguyen, was facing deportation from the United States as a result of a criminal conviction did his father attempt to convey citizenship.¹²³ He established biological paternity through DNA testing and obtained an or-

120. *Id.* at 439 (emphasis added). The plurality dismissed the notion that fathers are less likely than mothers to develop ties with their children as a product of “overbroad stereotypes about the relative abilities of men and women.” *See id.* (explaining holding). Rather, Justice Stevens opined that given the vast number of U.S. servicemen abroad who may not even be aware of the existence of their children due to the nine-month gestation interval, Congress was legitimately concerned about conferring U.S. citizenship to these illegitimate children at birth. *See id.* The *Nguyen* Court expressed this same concern in its analysis. *See Nguyen v. INS*, 121 S. Ct. 2053, 2061-62 (2001) (noting that in 1999, 252,763 out of 1,385,703 U.S. servicemen were stationed abroad).

121. *See Nguyen*, 121 S. Ct. at 2057 (“This case presents a question not resolved by a majority of the Court in a case before us three Terms ago” in *Miller*). *Miller*’s failure to resolve the constitutionality of differentiating between unwed fathers and mothers resulted in a circuit split. *Compare Nguyen v. INS*, 208 F.3d 528, 533-35 (5th Cir. 2000) (upholding § 1409(a) on equal protection grounds), *with Lake v. Reno*, 226 F.3d 141, 147-50 (2d Cir. 2000), *vacated by* 121 S. Ct. 2518 (2001) (striking down provision), *and United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1126-27 (9th Cir. 1999), *vacated by* 121 S. Ct. 2518 (2001) (same).

122. *See Nguyen*, 121 S. Ct. at 2057-58 (noting facts). Co-Petitioner Joseph Boulais raised his out-of-wedlock, Vietnamese-born son, Petitioner Tuan Anh Nguyen, from infancy. *See id.* at 2057. Because Nguyen claimed U.S. citizenship through his father, § 1409 imposed additional requirements upon his conferral of citizenship. *See id.* at 2058-59 (discussing statutory requirements for conferral of *jus sanguinis* citizenship). Section 1409(a)(3), however, was inapplicable to Nguyen as the 1986 amendment added this provision after Nguyen’s birth, thus allowing him to opt out of satisfying this requirement. *See id.* at 2059 (recognizing that Nguyen falls within transitional rule, allowing him to elect application of pre-1986 version which contained no parallel to § 1409(a)(3)). Consequently, in order for Nguyen to gain *jus sanguinis* citizenship, § 1409(a)(4) had to be satisfied. *See id.* (noting facts). Mr. Boulais did formally acknowledge paternity, but not before Nguyen was in his twenties. *See id.* at 2057.

123. *See id.* (stating facts). Title 8 U.S.C. § 1227(a)(2)(A) authorizes deportation by INS of an alien who has been convicted of two crimes involving moral turpitude, as well as one aggravated felony. *See* 8 U.S.C. §§ 1227(a)(2)(A)(ii) and (iii) (1994 ed., Supp. IV).

In 1992, Nguyen pled guilty to two counts of sexual assault on a child and was sentenced to eight years in prison on each count. *See Nguyen*, 121 S. Ct. at 2057 (noting facts). Although in the present case Nguyen argued that he was a U.S. citizen at the deportation hearing, he testified that he was a Vietnamese citizen. *See id.* (noting facts).

der of parentage from a Texas court.¹²⁴ Nevertheless, because his son had already reached the age of majority, the Board of Immigration Appeals (BIA) deemed the son a non-citizen subject to deportation.¹²⁵ Thus, even though the father raised and supported his son in the United States since he was six, failure to satisfy section 1409(a)(4) within the time period prescribed barred conferral of citizenship to Nguyen and subjected him to deportation.¹²⁶

Both father and son appealed the decision of the BIA ordering Nguyen's deportation to the United States Court of Appeals for the Fifth Circuit.¹²⁷ The Fifth Circuit deemed the son a non-citizen for failure to satisfy section 1409(a)(4).¹²⁸ While the father had standing to bring the equal protection challenge to the statute, the Fifth Circuit rejected the constitutional challenge to section 1409(a)(4).¹²⁹ Resolving the standing issue of *Miller*, both father and son went before the Supreme Court on appeal.¹³⁰ In holding that section 1409(a) was consistent with the equal protection guarantee of the Fifth Amendment, the Supreme Court continued to focus on the same "basic biological differences" used by the *Miller* plurality as a means to uphold the gender subordination.¹³¹

The *Nguyen* Court declared that Congress' decision to require proof of "a paternal relationship, but not a maternal one" is rooted in the significantly different nature of relationships that mothers and fathers have with

124. *See id.* (noting facts).

125. *See id.* (noting facts); *see also* Editorial, *Gender Bias in Immigration Law*, N.Y. TIMES, Jan. 15, 2001, at A14 (reporting on oral arguments heard by United States Supreme Court).

126. *See Nguyen*, 121 S. Ct. at 2057 (noting facts).

127. *See id.* at 2058 ("The father is before the Court in this case; and, as all agree he has standing to raise the constitutional claim, we now resolve it.").

128. *See id.* (noting facts).

129. *See id.* (discussing facts).

130. *See id.* (setting-forth facts).

131. *See id.* at 2066 ("To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it."). The *Nguyen* Court used much of the reasoning put forth in *Miller* in its own analysis. For example, both Courts grounded the same purported legitimate justifications in the biology of birth. *Compare Miller*, 523 U.S. at 436-39 (noting importance of proving biological parent-child relationship and of fostering ties between child and nation), *with Nguyen*, 121 S. Ct. at 2060-63 (finding two governmental interests: (1) proof of biological paternity, and (2) fostering ties between parent and child and nation and child). With respect to the first governmental objective, both Courts dismissed the argument that it is irrational to require legitimation when § 1409(a)(1) already requires proof of paternity by clear and convincing evidence, such as gender-neutral DNA testing. *See Miller*, 523 U.S. at 438 (finding that neither § 1409(a)(1) mandates DNA test nor does Constitution require Congress to elect one particular mechanism); *accord Nguyen*, 121 S. Ct. at 2060-61.

their potential citizen children at birth.¹³² Namely, in satisfying the first governmental interest (proof of biological parenthood), the Court noted that mothers and fathers are not similarly situated.¹³³ While the mother-child blood relation is uniquely “verifiable from the birth itself,” a father-child blood relation is not.¹³⁴ Consequently, fathers can avail themselves to the gender-based options presented by section 1409(a)(4).

Relying on the plurality analysis in *Miller*, the *Nguyen* Court reiterated the same second important governmental interest.¹³⁵ Specifically, the Court articulated that legitimation provides the foreign-born out-of-wedlock child and the citizen father with a “demonstrated *opportunity or potential*” to develop a meaningful relationship comprised of “the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”¹³⁶

IV. ANALYSIS

The *Nguyen* Court’s narrow upholding of the statute under equal protection jurisprudence makes a troubling yet powerful statement.¹³⁷ First, by upholding section 1409(a)(4) under intermediate scrutiny, the Court departed from its own sex-based equal protection precedent.¹³⁸ Second, the practical impact of the Court’s holding is the reinforcement and management of gender roles with profound consequences for both citizen parents and their children.¹³⁹ Specifically, section 1409(a) maintains the gender schemas of single women as sexually responsible and the corollary of single men as sexually irresponsible.¹⁴⁰ Thus, motherhood becomes

132. See *Nguyen*, 121 S. Ct. at 2060 (declaring explicitly that requirement of paternal relationship, but not maternal relationship, was warranted by two important governmental interests).

133. See *id.* (explaining that mother’s presence at birth proves maternity, whereas father’s presence at birth is not conclusive proof of paternity).

134. See *id.* (discussing importance of proving existence of biological parent-child relationship).

In the case of the mother, the relation is verifiable from the birth itself. The mother’s status is documented in most instances by the birth certificate or hospital records. . . . In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood.

Id.

135. See *id.* at 2061-62 (explaining holding).

136. *Id.* at 2061 (emphasis added).

137. For a further critique of the Court’s analysis in upholding the statute, see *infra* notes 138-87 and accompanying text.

138. For a further discussion of the inconsistency under Supreme Court precedence, see *infra* notes 141-87 and accompanying text.

139. For a further discussion, see *infra* notes 188-208 and accompanying text.

140. See *Nguyen*, 121 S. Ct. at 2062 (“One concern in [requiring legitimation of paternity to foster ties between citizen father and alien child] has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.”); *Miller*, 523 U.S. at 438-39 (explaining that facts of *Miller* provide ready example of concern that American servicemen will unknowingly fa-

biologically mandated and fatherhood legally determinative for immigration purposes. Fundamentally, the Court finds the biological tie is insufficient to establish fatherhood.

A. *Section 1409(a)(4) Does Not Survive Under Intermediate Scrutiny*

The Court's blatant departure from its own precedent reveals that section 1409's gender-based classification is socially constructed, not biologically mandated. As discussed previously, section 1409(a)(4)'s legitimation requirement finds its roots in coverture, a socially-constructed doctrine.¹⁴¹ Instead of looking to these origins, both *Nguyen* and *Miller* invented two *post hoc* justifications based on biology to support the sex-based oppression.¹⁴² In both cases, the Supreme Court maintained that legitimation of paternity was necessary to establish a blood relation between the citizen father and the out-of-wedlock child.¹⁴³ Furthermore, under the Court's reasoning, section 1409(a)(4) provides the citizen father with the opportunity to develop a relationship with the out-of-wedlock child, thus allowing the potential citizen to also develop ties to the United States.¹⁴⁴

Contrary to the Court's holding, legislative history sheds no light on Congress' actual intent in requiring legitimation of paternity.¹⁴⁵ What history does reveal is that legitimation of paternity was a means by which unwed fathers voluntarily took responsibility for their out-of-wedlock children; in its absence, legitimation acted as a hook by which to burden unwed mothers with care-taking responsibilities.¹⁴⁶ In sum, legitimation supported biased stereotypes about women as care-givers and reinforced their legal subservience to men.¹⁴⁷ It is well established that the Court forbids the government from discriminating on the basis of generalizations about the respective abilities of women and men.¹⁴⁸ In ignoring the true origins of the legitimation requirement, the Court, in essence, sanc-

ther and unknowingly convey citizenship to children born out-of-wedlock who have no ties to fathers or nation).

141. See *Nguyen*, 121 S. Ct. at 2060 ("In the case of the mother, the [blood] relation is verifiable from the birth itself."); *Miller v. Albright*, 523 U.S. 420, 436-37 (1998) (utilizing same concept).

142. For a further discussion, see *infra* notes 151-87 and accompanying text.

143. For a further discussion on the legitimacy of proving biological parenthood as a governmental interest, see *infra* notes 151-74 and accompanying text.

144. For a further discussion on the second governmental interest, see *infra* notes 173-87 and accompanying text.

145. For a further discussion on the legislative intent of § 1409, see *supra* notes 46-62 and accompanying text.

146. For a further discussion on the doctrine of coverture and its role within the statutory development of § 1409, see *supra* notes 30-51 and accompanying text.

147. For a further discussion on the doctrine of coverture and its role within the statutory development of § 1409, see *supra* notes 30-51 and accompanying text.

148. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cautioning courts against adopting gender-based classifications premised upon overbroad stereotypes).

tioned such discrimination in its citizenship laws.¹⁴⁹ Furthermore, the two legislative justifications put forth by the Court belie the requisite sufficiency of fit between the means employed and the purported end.¹⁵⁰

1. *First Governmental Interest*

With regards to proving biological parenthood, the *Miller* plurality and the *Nguyen* majority both point to the biology of birth to substantiate the subordination of parental status.¹⁵¹ Although the *Nguyen* Court declared assuring biological parenthood to be an important governmental interest, the Court offered no proof that this was indeed Congress' intent in enacting section 1409(a)(4) and failed to explain the importance of this interest.¹⁵² The only validation of this governmental interest comes from the *Miller* plurality, which cited to *Fiallo* for support.¹⁵³ A closer look at *Fiallo* reveals, however, an important distinction ignored by both *Miller* and *Nguyen*. *Fiallo* explicitly states that "it is not the judicial role in [immigration] cases . . . to probe and test the justifications for the legislative decision."¹⁵⁴ While that may be true for an equal protection challenge to an immigration statute (requiring rational basis review), the same does not hold true here. The *Nguyen* Court upholds section 1409(a)'s sex-based classification under heightened equal protection scrutiny.¹⁵⁵ As such, a closer examination and testing of the important governmental justifications are not only warranted, but are mandated by equal protection jurisprudence.¹⁵⁶

149. For a further discussion on the origins of the legitimation requirement, see *supra* notes 34,62, *infra* notes 157-165, 174-76 and accompanying text.

150. For a further discussion on the breakdown between the means and the asserted end, see *infra* notes 166-72, 177-87 and accompanying text.

151. See *Nguyen v. INS*, 121 S. Ct. 2053, 2060 (2001) ("In the case of the mother, the [blood] relation is verifiable from the birth itself."); *Miller v. Albright*, 523 U.S. 420, 436-37 (1998) (utilizing same concept).

152. See *Nguyen*, 121 S. Ct. at 2069 (O'Connor, J., dissenting) (hypothesizing that importance of governmental interest was rooted in preventing fraudulent conveyances of citizenship).

153. See *Miller*, 523 U.S. at 436 (ensuring "reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective") (citing *Trimble v. Gordon*, 430 U.S. 762, 770-71 (1977); *Fiallo v. Bell*, 430 U.S. 787, 799 n.8 (1977)).

154. *Fiallo*, 430 U.S. at 799.

155. See *Nguyen*, 121 S. Ct. at 2059 (finding that provision withstands intermediate scrutiny). The disparities between the level and type of scrutiny warranted for an immigration statute as compared with a gender-based statute are so great as to affect the outcome of an equal protection challenge. For a further discussion, see *supra* notes 66-92 and accompanying text. Consequently, by failing to say what impact *Fiallo* has on the outcome of a gender-based equal protection challenge to this immigration statute, the *Miller* plurality and the *Nguyen* majority did a great disservice to future equal protection jurisprudence surrounding immigration law.

156. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (finding inquiry into actual purposes underlying legislative provision relevant); see also *Nguyen*, 121 S. Ct. at 2067 (O'Connor, J., dissenting) (comparing judicial review under intermediate scrutiny with rational basis review). "[T]he mere recitation of a benign,

Looking closely at the first governmental interest invalidates the Court's claim that legitimation is substantially related to ensuring corroboration of biological parenthood.¹⁵⁷ Pointing to the scant legislative history, "[i]t is difficult to see what [legitimation] accomplishes in furtherance of 'assuring that a biological parent-child relationship exists,' that section 1409(a)(1) does not achieve on its own."¹⁵⁸ Thus, in addition to establishing a legal relationship by legitimation, an unwed citizen father must establish a biological relationship by means of clear and convincing evidence under section 1409(a)(1).¹⁵⁹ If corroboration of biological parenthood is indeed important, then section 1409(a)(1) accomplishes that legislative purpose, making section 1409(a)(4)'s legitimation requirement redundant and superfluous.¹⁶⁰

In fact, legislative history reveals that the legitimation requirement originated from an adoption of the coverture principles.¹⁶¹ As developed into section 1409(a)(4), the three legitimation options merely simplified the previously complex legitimation rules.¹⁶² Moreover, when the statute was amended in 1986, corroboration of biological paternity by means of clear and convincing evidence was added to deter fraudulent claims.¹⁶³ The Court legislated *post hoc* in holding that proof of biological parenthood is an important and genuine governmental interest substantially related to section 1409(a)(4).¹⁶⁴ "Because § 1409(a)(4) adds little to

compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.'" *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)). For a further discussion on intermediate scrutiny, see *supra* notes 66-75 and accompanying text.

157. For a further discussion, see *infra* notes 158-72 and accompanying text.

158. *Nguyen*, 121 S. Ct. at 2069 (O'Connor, J., dissenting) (noting insufficiency of fit between means used and asserted end). When faced with this argument, both Courts summarily rejected it on the basis that § 1409(a)(1) does not mandate a DNA test or any other genetic testing to establish a blood relationship. *See id.* at 2060-61 (noting that Congress is free to "elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might not be the most scientifically advanced method."); *Miller*, 523 U.S. at 437-38 (explaining that Congress could permit genetic proof of paternity instead of legitimation in future).

159. For a further discussion on the text of § 1409, see *supra* notes 25-29 and accompanying text.

160. *See Nguyen*, 121 S. Ct. at 2070 (O'Connor, J., dissenting) (finding it logical to accept legitimation as means of satisfying § 1409(a)(1)).

161. For a further discussion on the doctrine of coverture, see *supra* notes 35-62 and accompanying text.

162. For a further discussion on the 1986 amendments, see *supra* notes 52-62 and accompanying text.

163. *See Nguyen*, 121 S. Ct. at 2070 (O'Connor, J., dissenting) (discussing Assistant Secretary Clark's statement before Judiciary Committee).

164. *But cf.* *Miller v. Albright*, 523 U.S. 420, 435 (1998) (citing 1986 Hearings, *supra* note 53, at 150, 155 for proposition that § 1409(a)(1)'s requirement of establishing biological parenthood by clear and convincing evidence was "an ancillary measure, not a replacement for proof of paternity by legitimation"). Assistant Secretary Clark, in her statement to the Judiciary Subcommittee, explained that the proposed legitimation options found in § 1409(a)(4) eliminated "the necessity of

the work that § 1409(a)(1) does on its own, it is difficult to say that § 1409(a)(4) 'substantially furthers' an important governmental interest."¹⁶⁵

Even assuming *arguendo* that proving biological parenthood is a legitimate governmental interest, the use of biology by the Supreme Court further belies the fit between the means used and the asserted end.¹⁶⁶ *Miller* and *Nguyen* both justified legitimation of paternity on the basis that a mother's relation to the child is uniquely "verifiable from the birth itself," but a father's is not.¹⁶⁷ Both opinions, however, failed to show that such a relationship is "uniquely verifiable by the INS, [or] that any greater verifiability warrants a sex-based, rather than a sex-neutral statute."¹⁶⁸ Namely, the Court found no fault with the INS accepting documentation for mothers, but not for fathers, in the form of foreign hospital records or birth certificates.¹⁶⁹ Despite the known unreliability of foreign birth certificates and hospital records, the same documentation is incontrovertible proof of biological parenthood for the mother, but not the father.¹⁷⁰ Furthermore, the *Nguyen* majority and *Miller* plurality both conceded that this legislative goal could easily be achieved in a sex-neutral manner.¹⁷¹ Consequently, dictating that unwed fathers prove biological fatherhood (by

determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction. To deter fraudulent claims, however, the fact that a blood relationship exists between the U.S. citizen father and the child would have to be shown by clear and convincing evidence." *1986 Hearings*, *supra* note 53, at 150. As a result, the State Department's proposal added the requirement found in § 1409(a)(1) of establishing a blood relationship by clear and convincing evidence. See H.R. REP. NO. 99-916, at 12-13 (adopting State Department's proposal without amendment). This scant legislative history does not appear to support the proposition that proving biological parenthood was a primary purpose of § 1409(a)(4), which requires fathers to legitimate paternity. As such, the *Nguyen* Court asserted this as an important governmental interest without citing any authority or legislative history in support. See *Nguyen*, 121 S. Ct. at 2060.

165. *Nguyen*, 121 S. Ct. at 2070 (O'Connor, J., dissenting).

166. For a further discussion, see *infra* notes 167-72 and accompanying text.

167. See *Nguyen*, 121 S. Ct. at 2060 (finding father's presence at birth not incontrovertible proof of fatherhood); *Miller*, 523 U.S. at 436 (same).

168. *Nguyen*, 121 S. Ct. at 2070 (O'Connor, J., dissenting).

169. See *id.* at 2060 (noting unique verifiability of mother-child relation is documented by birth certificate or hospital records); *cf. id.* at 2070 (O'Connor, J., dissenting) (critiquing majority for not questioning verification through such means). The Court overlooked the reality that a mother-child blood relationship is "immediately obvious" only at the moment of birth, not thereafter. See Augustine-Adams, *supra* note 3, at 107 n.33 (citing cases of baby-switching mistakes made by hospitals).

170. See UNICEF, *supra* note 18, available at <http://www.unicef.org/pon98/pon98.pdf> at 10-11 (studying birth registration process in various countries); Augustine-Adams, *supra* note 3, at 107-08 (finding registration of child's birth in foreign countries to be tentative rather than reliable).

171. See *Nguyen*, 121 S. Ct. at 2061 (citing *Miller's* sex-neutral example that Congress could have alternatively required all parents to prove biological parenthood in order to convey citizenship); *Miller*, 523 U.S. at 436 (discussing same sex-neutral alternative).

clear and convincing evidence) and legal fatherhood (by means of legitimation, adjudication or formal acknowledgement of paternity) “to ensure an [equally] acceptable documentation” is not substantially related to the goal of assuring a biological parent-child relationship.¹⁷²

2. *Second Governmental Interest*

With regards to the second governmental interest, the Court again turned to the biology of birth to justify subordinating parental status.¹⁷³ First, the Court again offered no proof that the opportunity to foster ties between the potential citizen, the citizen parent and the United States was Congress’ aim in enacting section 1409(a)(4).¹⁷⁴ Instead, the *Nguyen* Court proclaimed to “ascertain the purpose of [section 1409(a)(4)] by drawing logical conclusions from its text, structure, and operation.”¹⁷⁵ Consequently, the Court felt free to legislate *post hoc* the “opportunity or potential” to foster such ties without grounding it in any evidence.¹⁷⁶ Second, it is only by diluting the governmental interest to require only a demonstrated “opportunity” to develop such a relationship, rather than requiring an actual relationship, that the asserted ends fit with the means used under intermediate scrutiny.¹⁷⁷ As a result, the Court denied its own precedent admonishing against such practices.¹⁷⁸

Furthermore, the *Nguyen* Court characterizes legitimation of paternity as an “unremarkable step” which functions as a “reasonable substitute” for the opportunity “inherent in the event of birth.”¹⁷⁹ Thus, under the Court’s analysis, the affirmative act of legitimation puts a father on the same footing as a mother giving birth. Even assuming *arguendo* that fostering ties is an important governmental interest, how does legitimation, in-

172. See *Nguyen*, 121 S. Ct. at 2060 (explaining that legitimation options were designed to ensure equally acceptable documentation of paternity).

173. See *id.* at 2061-62 (discussing congressional concern for class of out-of-wedlock citizens born abroad to American servicemen and alien mothers); *Miller*, 523 U.S. at 438-39 (same). There are no congressional hearings or other forms of legislative history supporting the same argument that appears in *Nguyen* and *Miller*.

174. See *Nguyen*, 121 S. Ct. at 2061 (failing to cite to any authority underlying second purported governmental interest); *Miller*, 523 U.S. at 438 (same).

175. *Nguyen*, 121 S. Ct. at 2063.

176. Compare *id.* at 2061 (citing to Stevens’ plurality opinion in *Miller* as support for proposition), with *Miller*, 523 U.S. at 438 (pointing to no other sources to uphold proposition that fostering ties between out-of-wedlock child and parent, and, in turn, United States, is important governmental interest).

177. Compare *Nguyen*, 121 S. Ct. at 2064 (stating that § 1409(a)(4) should not be invalidated because Congress elected to advance less demanding governmental interest); with *id.* at 2071-72 (O’Connor, J., dissenting) (“The majority’s asserted end, at best, is a simultaneously watered-down and beefed-up version of this interest.”).

178. For a further discussion, see *supra* notes 71-75 and accompanying text. See *Nguyen*, 121 S. Ct. at 2071-72 (O’Connor, J., dissenting) (explaining that majority’s focus on “opportunity or potential” to develop ties is type of hypothesized rationale that is insufficient under intermediate scrutiny).

179. See *Nguyen*, 121 S. Ct. at 2062 (explaining holding).

cluding a child obtaining an order of paternity from a court over the express objection of the father, serve as a reasonable substitute for “the opportunity manifest between mother and child at the time of birth?”¹⁸⁰ The answer is that it is not a substitute at all, let alone a reasonable one.

Legitimation fails as a reasonable substitute because it is based on unproven gendered hypotheses.¹⁸¹ Specifically, the assumption is that the act of birth creates the opportunity to foster ties between parent and child.¹⁸² The assumption, however, does not require that such ties ever develop, as in the case of *Nguyen*.¹⁸³ There, the mother of Vietnamese descent abandoned the child at birth.¹⁸⁴ Even assuming she were the citizen parent who abandoned her child, that child would be considered a U.S. citizen even if that child never establishes ties with the country.¹⁸⁵ In contrast, citizenship did not convey even though Nguyen’s father did establish a strong relationship with Nguyen, who lived in the U.S. since age

180. See *id.* (explaining holding); *Miller*, 523 U.S. at 486 (Breyer, J., dissenting) (finding that adjudication “does little to assure any tie” develops between parent and child).

181. For a further discussion, see *infra* notes 182-87 and accompanying text.

182. See *Nguyen*, 121 S. Ct. at 2061 (finding that because of biology, father is not presented with same opportunity as mother to bond with child); *Miller*, 523 U.S. at 438 (same). Somehow, the Court equated taking affirmative actions of legitimation with giving birth and used biology as a means of subordinating parental status. See *id.* at 485 (Breyer, J., dissenting) (criticizing fit between means used and purported end of statute). In *Miller*, Justice Breyer noted that the validity of § 1409(a)(4) depended on “the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children.” *Id.* at 482-83 (Breyer, J., dissenting). Furthermore, Justice Ginsburg noted that the law in treating mothers and fathers differently was “shaping government policy to fit and reinforce the stereotype or historic pattern.” *Id.* at 460 (Ginsburg, J., dissenting). This Court has long recognized that the government should not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Following the reasoning of the Court, all foreign-born children of unmarried American mothers embody the United States nation at birth. The children of unmarried American fathers, however, are incapable of similarly personifying the U.S. without legitimation. See Augustine-Adams, *supra* note 3, at 111 (“The nation is, thus, marked not just with biological ties but also with social ties, those social ties that [Miller] believed unmarried men do not and perhaps cannot provide.”).

183. See *Miller*, 523 U.S. at 485 (Breyer, J., dissenting) (finding that mere knowledge of birth by mother does not necessitate development of ties between parent and child).

The presumption that fathers have an inherently less natural relationship with their children than mothers is belied by the facts of *Nguyen* where the father served as the primary caregiver. To penalize him as a father by placing additional obligations on him solely because he is the male parent is unjust. The law is also out of sync with the nationally and internationally recognized need for the elimination of gender stereotypes and runs contrary to the proactive measures governments have committed to promote equality between men and women.

184. See *Nguyen*, 121 S. Ct. at 2057 (noting facts).

185. See *Miller*, 523 U.S. at 439-40 (finding that failure to establish ties with citizen parent and United States does not qualify legitimacy or importance of interest).

six.¹⁸⁶ Because of the Court's reliance on biology, the "very event of birth" satisfies for the mother but not the father the opportunity to foster ties, even if that opportunity is never realized.¹⁸⁷

B. *Practical Impact of Upholding Section 1409(a)(4) on the Basis of Biology*

In *Miller* and *Nguyen*, the Court purposefully grounded the requirements for *jus sanguinis* citizenship in the biology of birth and then essentialized those requirements on the basis of gender to justify subordinating parental status.¹⁸⁸ Specifically, in adhering to gender essentialism grounded in biology, the Court adopted a monolithic notion of women's and men's experiences which required no justification for the differential treatment.¹⁸⁹ Consequently, the practical effect of the Court's analysis in upholding section 1409(a) on these grounds is the reinforcement and management of gender schemas, which profoundly impact both citizen parents and their foreign-born out-of-wedlock children.¹⁹⁰

In particular, section 1409(a) maintains the gender schemas of unwed women as sexually responsible and unwed men as sexually irresponsible.¹⁹¹ As such, when unwed American mothers automatically convey citizenship to their foreign-born out-of-wedlock children, they also take on the financial debt for supporting these children (making them sexually responsible).¹⁹² In contrast, unwed American fathers cannot convey citizenship unless they first establish a biological,¹⁹³ financial¹⁹⁴ and legal¹⁹⁵ relationship with their foreign-born out-of-wedlock children. Without these affirmative acts, unwed American fathers can withhold conveyance of citizenship and skirt their financial responsibility for supporting their

186. See *Nguyen*, 121 S. Ct. at 2057-58 (noting facts). For a further discussion, see *supra* note 126 and accompanying text.

187. See *Nguyen*, 121 S. Ct. at 2062. For a further discussion, see *supra* notes 180-86 and accompanying text.

188. For a further discussion, see *infra* notes 189-97 and accompanying text.

189. For a discussion on gender essentialism, see *supra* note 17 and accompanying text.

190. For a further discussion, see *infra* notes 191-208 and accompanying text.

191. See *Nguyen*, 121 S. Ct. at 2062 (grounding importance of second governmental interest in concern for sexual irresponsibility of American servicemen stationed abroad); *Miller*, 523 U.S. at 438-39 (same).

192. See *Nguyen*, 121 S. Ct. at 2076 (O'Connor, J., dissenting) (explaining that § 1409(a) functions to place burden of out-of-wedlock children on unwed mothers).

193. See 8 U.S.C. § 1409(a)(1) (1994) (requiring unwed citizen fathers to establish blood relation to child by clear and convincing evidence).

194. See § 1409(a)(3) (requiring unwed citizen father, unless deceased, to submit written statement agreeing to provide financial support while out-of-wedlock child is minor).

195. See § 1409(a)(4) (requiring unwed citizen father to legitimate, formally acknowledge or adjudicate paternity while child is minor).

children.¹⁹⁶ With these steps, those fathers wishing to overcome their gender schema of sexual irresponsibility are burdened more than their similarly-situated women counterparts. In sum, while unwed citizen mothers must be sexually responsible, unwed citizen fathers need not be and are statutorily discouraged to be similarly sexually responsible.¹⁹⁷

The reinforcement and management of these gender schemas has realistic implications on the children born abroad and out-of-wedlock.¹⁹⁸ Mainly, the statute perpetuates dead-beat dads by imposing the three additional requirements for fatherhood.¹⁹⁹ While statistics confirm the rise in single-parent families, recent studies have begun to examine the harsh consequences of such a family structure on the out-of-wedlock children.²⁰⁰ Withholding of U.S. citizenship denies the out-of-wedlock children of citizen fathers the same "opportunity or potential" for emotional and financial support available to the children of unwed mothers who acquire automatic citizenship at birth.²⁰¹ For example, if a citizen father actively chooses not to fulfill the requirements for conferring citizenship on his foreign-born out-of-wedlock child, the child is precluded from utilizing domestic child support laws.²⁰² Consequently, section 1409(a)(4) per-

196. See Collins, *supra* note 12, at 1682 (finding § 1409(a) coercive because it assumes and perpetuates full responsibility for out-of-wedlock children to mothers, leaving similarly-situated men free from burdens of parenthood).

197. See *id.* (finding § 1409(a) coercive).

198. For a further discussion, see *infra* notes 199-208 and accompanying text.

199. See § 1409 (requiring additional steps be taken before child can acquire citizenship from citizen father); UNICEF, THE PROGRESS OF NATIONS 1996: *Absent Fathers Linked to Economic Pressures*, available at <http://www.unicef.org/pon96/inabsent.htm> (last visited Jan. 20, 2002) (discussing economic pressures borne by unwed mothers generally, and comparatively based upon race) [hereinafter UNICEF 1996].

200. See Brief of Amici Curiae National Women's Law Center at 9-10, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) ("According to the Census Bureau, in 1998 there were 14 million parents raising their minor children whose other natural parent did not live with them."); UNICEF 1996, *supra* note 200, available at <http://www.unicef.org/pon96/inabsent.htm> (discussing economic pressures associated with lack of father's presence in home).

Only 10 industrialized nations have recent statistics on the numbers of children growing up without a father in the home. At the foot of the list is the United States with 21.2% of its children living in solo-mother families. At the opposite end of the scale, only 4.4% of Italian children are in homes without a father. The steep rise in solo-parent families began in the 1960s. . . . The most obvious result [of this trend] is a rise in mothers and children living in poverty. In the US, a child living in a solo-mother family is five times as likely to live below the national poverty line, as defined by the Luxembourg Income Study.

Id.

201. See *Nguyen v. INS*, 121 S. Ct. 2053, 2061 (2001) (explaining that legitimation provides unwed father same "opportunity or potential" to develop meaningful relationship with foreign-born out-of-wedlock child that unwed mother has as result of giving birth).

202. Domestic laws are unavailable to persons located in foreign countries. Consequently, domestic laws cannot reach the unwed citizen fathers to require child support. The foreign-born out-of-wedlock Ameriasian children of American

petuates the gender schema of sexual irresponsibility for men.

For unwed citizen parents, the reinforcement and management of these gender schemas also functions to make fatherhood a legal choice, but relegates motherhood to a function of biology.²⁰³ Specifically, the Court's ruling in *Miller* and *Nguyen* proposes that biological differences matter for single women and men in conveying citizenship, not for all women and men.²⁰⁴ Married women and men are not similarly subject to the Court's biological determinism because Congress has statutorily rejected subordinating their parental status.²⁰⁵

The biological link between unwed mothers and their children is socially meaningful to the United States, thus citizenship laws grant unwed women the power to sire citizens.²⁰⁶ In contrast, the United States finds the same biological link between unwed fathers and their children to be immaterial absent legitimation. Consistent with the arcane principles of coverture, the notion that a father has to legally create a relationship with his child through affirmative steps implicates the absence of any real relationship.²⁰⁷ While biology may be the obvious defense to section 1409, it does not dictate that we uphold a mother-child relationship to the detriment of a father-child relationship.²⁰⁸

V. OPPORTUNITY FOR REFORM

Conceptually, recognizing that section 1409(a) exists as a matter of choice not dictated by biology requires that society not solely burden women with sexual responsibility.²⁰⁹ Furthermore, the practical implications of upholding the provision are so severe that Congress must revisit this issue.²¹⁰ Given Congress' broad plenary power to decide immigration and

servicemen are particularly disadvantaged because few can locate or gain support from their citizen fathers. See, e.g., Joseph M. Ahern, Comment, *Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Americans*, 1 PAC. RIM. L. & POL'Y J. 105, 112 (1992) (explaining that only fifteen percent of these Filipino-American children have acquired U.S. citizenship through their unwed citizen fathers).

203. See Augustine-Adams, *supra* note 3, at 98-99 (noting that naturalized approaches to gender reinforce gender stereotypes and make fatherhood legal and motherhood natural).

204. See *id.* at 101-02 (finding *Miller* plurality naturalized motherhood to justify exclusion of children born out-of-wedlock to American men).

205. See Act of May 24, 1934, § 1 (terminating discriminatory treatment of married citizen mothers and allowing them to convey citizenship to their foreign-born children). Congress statutorily ended discrimination faced by married citizen mothers in 1934 "to establish complete equality between American men and women in matter of citizenship for themselves and for their children." S. REP. NO. 73-865, at 1 (1934).

206. See Augustine-Adams, *supra* note 3, at 104 (explaining consequences of essentialism).

207. See *id.* (explaining consequences of essentialism).

208. See *id.* at 135-37 (finding essentialism harmful).

209. See *id.* at 135 (finding essentialism harmful).

210. For a further discussion, see *supra* notes 188-208 and accompanying text.

naturalization issues, the legislature certainly has the right to revisit this gendered subordination of parental status.²¹¹

Even if the legislature does not voluntarily wish to revisit this provision, section 1409(a) may be called into question if the United States ratifies the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²¹² CEDAW is an international multilateral treaty that binds virtually all member countries.²¹³ Presently, the United States is not bound by CEDAW as it has signed, but not yet ratified, the treaty.²¹⁴

If ratified, Congress will likely have to revisit section 1409(a) since it appears to be incompatible with CEDAW's aim.²¹⁵ Targeting the tie be-

211. For a further discussion on the plenary power doctrine, see *supra* notes 76-92 and accompanying text.

212. See Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 20378, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (last visited Feb. 13, 2002) (utilizing preamble to outline need for equality of women in areas of civil rights, reproductive rights and human rights) [hereinafter CEDAW On-line]. Specifically, Article 9 of CEDAW seeks equality for women and men with regard to their own nationality and that of their children. See CEDAW On-line, *supra*, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Article 9) ("States Parties shall grant women equal rights with men with respect to the nationality of their children.").

Several countries have acknowledged their international obligation to change their discriminatory citizenship laws by withdrawing reservations to Article 9 of CEDAW following such legislative changes. For a discussion on these countries, see *supra* note 19, and accompanying text. In 1999, the Republic of Korea withdrew its reservation to Article 9 following a change in its Nationality Act, which had previously required children born to a Korean mother and foreign father to take the nationality of their father. See United Nations Office of the High Commissioner for Human Rights, *Declaration and Reservations to CEDAW*, available at http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm.

213. See *Convention on the Elimination of Discrimination Against Women*, in 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DECEMBER 2000, at 228-29 [hereinafter *CEDAW Status*] (indicating that CEDAW has been signed by United States); see also Brief of Amici Curiae Equality NOW at 12-13, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (No. 99-2071) (discussing provisions of CEDAW).

214. See *CEDAW Status*, *supra* note 213, at 229 (indicating that CEDAW has been signed by United States). The United States (signed July 17, 1980), Afghanistan (signed August 14, 1980) and Sao Tome and Principe (signed October 31, 1995) are the only remaining countries that have signed CEDAW, but have not yet agreed to be bound by ratification, accession or succession. See *id.* at 228-29 (providing breakdown of status of 166 party countries).

215. For a further discussion on the provisions and goals of CEDAW, see *infra* notes 216-19 and accompanying text. In Article 9, CEDAW specifically requires participant countries to "grant women equal rights with respect to the nationality of their children." CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Article 9). While there is some indication that in 1980 the legislature may have found the U.S. federal citizenship laws to be consistent with Article 9, much has changed since then. See Multilateral Convention on the Elimination of All Forms of Discrimination Against Women, Executive R, 1980 U.S.T. Lexis 150, at *26-27 (Letter of Submittal by Pres. Carter with accompanying Memorandum of Law by Edmund Muskie, Oct. 23, 1980) (finding

tween discrimination and women's reproductive rights, the preamble explicitly proclaims that "the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole."²¹⁶ The preamble also formally recognizes the historic role culture and tradition play in the subjugation of women by demanding "a change in the traditional role of men as well as the role of women in society and in the family."²¹⁷

As such, CEDAW grants the power to "take all appropriate measures" necessary to achieve full equality between women and men.²¹⁸ This includes enacting legislation that modifies existing discriminatory social and cultural gender schemas so as to eliminate any customs and practices "based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."²¹⁹

The grant of such extensive power combined with the mandate of Article 9, which demands equality for women with regard to their own nationality and that of their children, enables Congress to modify section

no potential areas of concern requiring implementing legislation or reservations, declarations and understandings with respect to Article 9). This change in times is evidenced by the concern expressed by at least four current Justices of the Supreme Court in *Miller* and *Nguyen*. Justices O'Connor, Souter, Ginsburg and Breyer in *Nguyen*, and Justices Ginsburg, Souter and Breyer in *Miller* found § 1409(a)'s requirement for legitimation of paternity (but not maternity) to be a form of latent discrimination against women. See *Nguyen v. INS*, 121 S. Ct. 2053, 2075-76 (2001) (O'Connor, J., dissenting) ("Section 1409(a)(4) is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."); *Miller v. Albright*, 523 U.S. 420, 460-69 (1998) (noting that historical disregard or respect for mother-child relationship and for children born abroad "counsels skeptical examination" of purported justifications). Consequently, if CEDAW is ratified, it appears likely that at least four current Justices on the Supreme Court will support reconsideration of the impact of § 1409(a).

216. CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Preamble); see Brief of Amici Curiae Equality NOW at 12-13, *Nguyen* (No. 99-2071) (citing same).

217. CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Preamble); see Brief of Amici Curiae Equality NOW at 12-13, *Nguyen* (No. 99-2071) (citing same). The desire to nullify old gender schemas necessitates placing common responsibility on women and men "in the upbringing and development of their children . . ." CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Article 5); see Brief of Amici Curiae Equality NOW at 12-13, *Nguyen* (No. 99-2071) (citing same).

218. See CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Preamble, Article 5, Article 7, Article 8) ("Determined to implement the principles set forth in [this treaty] and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations."); see Brief of Amici Curiae Equality NOW at 12-13, *Nguyen* (No. 99-2071) (citing same).

219. CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Article 5); see Brief of Amici Curiae Equality NOW at 12-13, *Nguyen* (No. 99-2071) (citing same).

1409(a) appropriately.²²⁰ If Congress does revisit this issue, voluntarily or due to CEDAW's ratification, one such appropriate revision could be to allow a foreign-born child of a U.S. citizen to claim citizenship irrespective of the citizen parent's sex.²²¹ Under this revision, any foreign-born child of a citizen parent could apply for citizenship based upon clear and convincing evidence demonstrating a blood relationship between the potential citizen child and the citizen parent.²²² Such a proposal meets the mandates of Article 9, satisfies proof of biological parenthood and deters fraudulent citizenship claims while demanding both women and men be sexually responsible beings.²²³ Consequently, there still exists a viable opportunity to reform 8 U.S.C. § 1409(a).

VI. CONCLUSION

In conclusion, the Supreme Court, with Congress' consent, acted to uphold and reinforce the gender-based schemas perpetuated by section 1409(a). A close examination of *Miller* and *Nguyen* confirms that grounding the criteria for *jus sanguinis* citizenship in the biology of birth and then

220. See CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (Preamble, Article 9) (stating, in preamble, CEDAW's determination "to adopt the measures required" to eliminate discrimination "in all its forms and manifestations," including Article 9's mandate to provide women and their children with equality in acquiring citizenship).

221. Alternatively, Congress could require U.S. women to meet the heightened requirements applied to U.S. men to convey citizenship. This alternative, however, would be as problematic as the current rule because it would make women sexually irresponsible as well as men. See Augustine-Adams, *supra* note 3, at 136 (proposing revised *jus sanguinis* citizenship law for United States). Also, it would be more exclusionary than our existing law. See *id.* In contrast, by allowing fathers the ability to convey citizenship on the same generous terms as women would serve to include the children of color who are disproportionately excluded under the present rule. See *id.*

222. In essence, this proposal recommends retaining § 1409(a)(1), but applying it equally to both women and men. For a discussion on the requirements unwed citizen mothers must currently meet to convey citizenship to foreign-born out-of-wedlock children, see *supra* note 27 and accompanying text.

223. See 8 U.S.C. § 1409(a)(1) (requiring proof of clear and convincing evidence of blood relationship from foreign-born out-of-wedlock children of unwed citizen fathers); 1986 Hearings, *supra* note 53, at 150 (proposing what is now § 1409(a)(1) to deter fraudulent claims); *Nguyen*, 121 S. Ct. at 2070 (O'Connor, J., dissenting) (finding it logical that clear and convincing evidence of blood relationship meets legislative goal of proving biological parenthood). Because this proposal establishes a unitary standard to convey citizenship to all foreign-born out-of-wedlock children, it treats all women, men and their children equally in satisfaction of CEDAW. See CEDAW On-line, *supra* note 212, available at <http://fletcher.tufts.edu/multi/texts/BH769.txt> (satisfying Article 9). Finally, as discussed in the previous section, allowing citizenship to convey automatically upon clear and convincing evidence of biological parenthood destroys the gender schema of unwed men as sexually irresponsible. See Augustine-Adams, *supra* note 3, at 138-39 (proposing revised *jus sanguinis* citizenship rule for United States). For a further discussion on gender schemas and the practical implications of the Court's holdings, see *supra* notes 188-208 and accompanying text.

gendering that discrimination is a calculated social choice unrelated to biological dictates.²²⁴ This social choice has profound repercussions for the citizen parents and their out-of-wedlock children. Recognition of this intelligent wickedness mandates we not socialize our nation to burden only women with the responsibility for their sexual choices.

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224. See Augustine-Adams, *supra* note 3, at 98 (comparing *Miller* to foreign case law of Botswana, Canada, Bangladesh and Japan reveals that social meaning ascribed to biology girds U.S. citizenship law).

