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

DEBRA L. SATINOFF*

TABLE OF CONTENTS

Introduction 1354
I. The Tension Between Congress' Historic Plenary Power Over Immigration and Modern Gender-Based Equal Protection 1358
A. Federal Cases Regarding Equal Protection Challenges to Gender-Based Immigration Laws 1358
1. Overview 1358
2. *Miller v. Albright*—background 1361
B. Congress' Unrestrained Power Over Immigration 1364
C. The Constitutional Basis for Protecting Aliens 1367
1. The right to citizenship 1367
2. The Fifth Amendment as applied to non-citizens 1368
D. Gender Equal Protection Analysis 1370
1. The traditional mid-tier analysis 1370
2. The new implications for gender-based equal protection under *United States v. Virginia* 1371
II. Analysis of Gender-Based Immigration Law Cases 1373
A. The Citizen Versus Person Debate in *Fiallo v. Bell* 1373
1. The majority opinion 1374
2. Justice Marshall's dissent 1376

* Note & Comment Editor, *The American University Law Review*, J.D. Candidate, May 1999; A.B., 1995, *Washington University* in St. Louis. I would like to thank Candace Kovacic-Fleischer, Professor of Law, *American University, Washington College of Law*, for reviewing various drafts of this Comment and providing me with invaluable advice. I would also like to thank Tina R. Goldstein for her advice and encouragement throughout the writing process. This Comment is dedicated with love and gratitude to my parents, Marcia and Martin Satinoff.

B. Third-Party Standing as a Technique to Avoid Citizen Versus Person Debate 1378
1. *Elias v. United States Department of State* 1378
2. *Wauchope v. United States Department of State* 1380
C. When Citizens Are Not Joined in the Action, Courts Appear to Scrutinize the Legislation Less 1381
D. When the Rights of Citizens and Aliens Are Inextricably Bound, the Citizen Versus Alien Distinction Should Not Excuse Discrimination 1383
1. Arguments for uniformly applying mid-tier scrutiny 1383
2. War babies and irresponsibility 1384
III. Applying Mid-tier Scrutiny to Section 309 of the Immigration and Nationality Act 1386
A. Lurking Problems with Paternity Testing 1387
B. Establishing Close Ties Between Parent and Child, and Early Ties to This Country 1388
IV. Remedy 1390
A. A Remedy Based on the Least-Restrictive Means Analysis in *United States v. Virginia* 1390
B. Model Legislation—Implementing a Discovery Rule 1390
Conclusion 1391

INTRODUCTION

In the 1952 House Report on the Immigration and Nationality Act ("INA"),[1] Congressman Emanuel Celler announced, "[o]n the one hand we publicly pronounce the equality of all peoples, . . . on the other hand, in our immigration laws, we embrace in practice these very theories we abhor and verbally condemn."[2] Even today, immigration continues to be one of the few areas of law where Congress, with the consent of the Court, has succeeded in circumventing the very standard of constitutional protection it claims to respect.[3] Al-

1. H.R. REP. NO. 82-1365 (1952).

2. *Id.* at 1751 (statement of Rep. Celler) (referring to the inconsistencies between Congress' explicit rejection of discrimination based on race and national origin on the one hand, and its continued endorsement of a discriminatory quota system established in the 1924 Immigration and Nationality Act on the other). Cellar explained that of the statutorily available 154,000 annual quotas, 109,400 of them were allotted to England, Ireland, and Germany (many of which were unused), while most of the other countries in eastern and southern Europe were allotted less than 7,000 per country. *See id.* The anomaly Cellar pointed out with respect to discrimination by ethnic origin was arguably abolished by the 1965 Amendment to the Immigration and Nationality Act of 1952. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, 911-12 (codified as amended at 8 U.S.C. § 1152(a) (1994)) (replacing the quota system based on nationality or birth place with immigration preferences based on other factors including familial relationships with American citizens and employment skills). Sex-based discrimination, however, continues to exist in the Immigration and Nationality Act. *See infra* note 26 and accompanying text (indicating gender-based classifications are still contained in sections 101 and 309 of the Immigration and Nationality Act).

3. *See* H.R. REP. NO. 82-1365, at 1654. Congress explained its authority to regulate immi-

though often expressing disapproval of certain facially discriminatory immigration laws,[4] the Court has repeatedly cloaked its reluctance to intervene[5] in these matters with rhetoric regarding foreign policy implications,[6] the political nature of immigration decisions[7] and the plenary power of Congress.[8]

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gration:

> The powers and authority of the United States, as an attribute of sovereignty, either to prohibit or regulate immigration of aliens are plenary and Congress may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt, and so long as such agencies do not transcend *limits of authority*... their judgment is not open to challenge or review by courts.

Id. (citing Kaorn Yamataya v. Fisher, 189 U.S. 86 (1903)) (emphasis added).

It is unclear, however, just what Congress' "limits of authority" are in making immigration policy. Arguably, the Fifth Amendment does not place meaningful constraints on Congress' law-making power in the immigration context. As Justice O'Connor recently noted, immigration law is "an area where Congress frequently must base its decisions on generalizations about groups of people," and thus Congress need not provide evidence to justify every statutory classification challenged under the Constitution's Equal Protection Clause. *See* Miller v. Albright, 118 S. Ct. 1428, 1446 (1998) (O'Connor, J., concurring) (citation omitted).

4. *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 216 (1953) ("Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.") (citation omitted); Galvan v. Press, 347 U.S. 522, 531-32 (1954) ("We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors... and must therefore under our constitutional system recognize congressional power in dealing with aliens...."). *But see* Gerald M. Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 324 (noting that ironically, one week before *Galvan v. Press* was decided, the Supreme Court overruled the landmark case *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954), thereby abolishing the "separate but equal" racial segregation policy in this country). Certainly, the Court, when dealing with racial discrimination, deemed itself "wiser and more sensitive to human rights" than its predecessors. *See* Rosberg, *supra*, at 324.

5. The term "intervene" in this context refers to the Court's refusal to apply traditional levels of constitutional scrutiny or any scrutiny at all to immigration laws.

6. *See* Fiallo v. Bell, 430 U.S. 787, 796 (1977) (noting immigration issues often involve relations with foreign powers, and therefore usually are not appropriate matters for the courts to decide); *Galvan*, 347 U.S. at 530 (finding that Congress' power to regulate the admission and deportation of aliens is essential to foreign relations and national security; thus, deporting aliens who were former Communist party members is within Congress' discretion regardless of whether it violates the First Amendment in a non-immigration context).

7. *See Fiallo*, 430 U.S. at 796 (noting that the same reasons that prevent the Judiciary from reviewing political questions, also mandate a limited review of immigration matters); Harisiades v. Shaughnessy, 342 U.S. 580, 587-89 (1952) (noting that the classification of aliens invokes political and economic concerns that are best left to Congress or the Executive Branch). As one scholar noted, "[t]he Court is undoubtedly fearful of becoming enmeshed in the process of formulating immigration policy. Too much judicial scrutiny could bring down the entire system of intricate and interconnected rules" governing the admission of aliens. *See* Rosberg, *supra* note 4, at 325.

8. *See Fiallo*, 430 U.S. at 796 ("The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification... [are] matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.") (citation omitted); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (stating that Congress has always had the power to enact laws governing the admission of aliens without judicial interference); Azizi v. Thornburgh, 908 F.2d 1130, 1133 (2d Cir. 1990) (noting that even though the right to marry is considered a substantive due process right, because Congress' power over immigration is plenary, an immigration statute affecting marriages must

Maintaining this hands-off approach to immigration, in 1996, the D.C. Circuit in *Miller v. Christopher*,[9] rejected a gender-based equal protection challenge to section 309 of the Immigration and Nationality Act.[10] Section 309 makes it substantially more difficult for the illegitimate children of American fathers to become United States citizens than the illegitimate children of American mothers.[11] In 1998, a sharply divided Supreme Court in *Miller v. Albright*,[12] also rejected the equal protection challenge to section 309.[13] Ironically, the Court's decision came just two years after *United States v. Virginia*,[14] a landmark gender-based equal protection decision ordering the Virginia Military Institute to admit women to its historically male-only college.[15]

The Supreme Court's decision in *Miller v. Albright*, however, is so severely splintered that it fails to set any meaningful precedent regarding gender-based immigration law. Justice Stevens, joined by Chief Justice Rehnquist, were the only members of the Court to uphold the constitutionality of section 309's sex-based classifications on substantive equal protection grounds.[16] Justices O'Connor and Kennedy concurred in result, but only because they believed the petitioner, an illegitimate child of an American citizen-father, did not have standing to raise a gender-based discrimination claim when the statute technically only classified American parents (and not their children) on the basis of gender.[17] Justices Scalia and Thomas also

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merely be "facially legitimate" to withstand a constitutional challenge); *see also* David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 838 (1998) (noting that "commentators observe that the plenary power doctrine has created a chasm between immigration law and the larger body of constitutional due process law") (citation omitted).

9. 96 F.3d 1467, 1472-73 (D.C. Cir. 1996), *aff'd on other grounds sub nom.* Miller v. Albright, 118 S. Ct. 1428 (1998).

10. *See* Immigration and Nationality Act § 309, 8 U.S.C. § 1409 (1994).

11. *See* 8 U.S.C. § 1409(a)(4) (1994) (stating that, among other things, an alien child born out of wedlock to an alien mother and American father must be legitimized by his American father before reaching 18 years of age in order to qualify for citizenship); *infra* notes 45-46 (describing the additional statutory burdens that alien children born out of wedlock to an American father and alien mother must meet in order to become United States citizens).

12. 118 S. Ct. 1428, 1432 (1998) (Stevens, J., joined by Chief Justice Rehnquist); *id.* at 1442 (O'Connor, J., concurring, joined by Justice Kennedy); *id.* at 1446 (Scalia, J., concurring, joined by Justice Thomas); *id.* at 1449 (Ginsburg, J., dissenting, joined by Justices Souter and Breyer); *id.* at 1455 (Breyer, J., dissenting, joined by Justices Souter and Ginsburg).

13. *See* 118 S. Ct. 1428 (1998), *aff'g on other grounds sub nom.* Miller v. Christopher, 96 F.3d 1467 (D.C. Cir. 1996).

14. 518 U.S. 515, (1996).

15. *See id.* at 557-58.

16. *See Miller*, 118 S. Ct. at 1432 (holding that the gender-based classifications in section 309 "are well supported by valid government interests. . . . [and are] neither arbitrary or invidious").

17. *See id.* at 1442-43 (O'Connor, J., concurring) (stating that because the statute does not accord differential treatment based on sex to sons and daughters of American citizens, the peti-

concurred in result, but only because they believed that Congress, and not the Court, had power to grant the petitioner citizenship.[18] Therefore, Justices Scalia and Thomas argued that the petitioner did not have standing, and that her complaint should have been dismissed.[19] Finally, Justices Souter, Ginsburg and Breyer, dissenting in two separate opinions, reasoned that section 309 is unconstitutional because its gender-based classifications violate the Equal Protection Clause.[20] The incredibly divided decision of the *Miller* Court indicates that there are many unresolved issues regarding the nexus between immigration law and gender-based equal protection law. Therefore, rather than focus on the five widely divergent opinions of the Supreme Court justices in *Miller v. Albright*, this Comment examines earlier gender-based immigration cases leading up to that decision.[21] Relevant analysis of the *Miller v. Albright* decision, however, will be included (primarily in footnotes) throughout the Comment.

Part I of this Comment explores the tension between immigration policies, which the Court is reluctant to review at all,[22] and gender-based legislation, which the Court mandates must be reviewed under heightened judicial scrutiny.[23] Part II provides a background to key cases involving gender-based immigration law, and explains the pertinent competing interests, including whether aliens seeking to immigrate are entitled to equal protection under the Fifth Amendment of the Constitution.

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tioner, a daughter, cannot raise a gender-based discrimination claim).

18. *See id.* at 1446 (Scalia, J., concurring) ("The complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.").

19. *See id.*

20. *See id.* at 1449 (Ginsburg, J., dissenting) (stating that section 309 "classifies unconstitutionally on the basis of gender in determining the capacity of a parent to qualify a child for citizenship"); *id.* at 1463 (Breyer, J., dissenting) (finding section 309 unconstitutional because there is "'no exceedingly persuasive' justification for the gender-based distinctions that the statute draws").

21. Justice Ginsburg, dissenting in *Miller*, discussed the history of the largely discriminatory treatment of foreign-born children of American citizens. *See id.* at 1450-54. Justice Ginsburg focused on immigration legislation that existed throughout the nineteenth and early twentieth centuries that only allowed children of married American fathers and foreign mothers (and not children of married American mothers and foreign fathers) to become citizens. *See id.* at 1450-51. Most of the laws that Justice Ginsburg referred to were amended in 1934 in an effort to promote equality between American men and women in matters of citizenship. *See id.* at 1452. She partook in this historical analysis to show that "[t]he history of the treatment of children born abroad to United States citizens parents counsels skeptical examination of the Government's prime explanation for the gender line drawn by § 1409—the close connection of mother to child, in contrast to the distant or fleeting father-child link." *Id.* at 1453-54. This Comment, however, focuses more generally on the historic tension between immigration law and gender-based equal protection jurisprudence, and the confusing case law that has emerged as a result of this tension.

22. *See supra* notes 6-8 and accompanying text.

23. *See infra* text accompanying notes 35-37 (defining heightened scrutiny).

Part III analyzes *Fiallo v. Bell*,[24] the last gender-based immigration case the Supreme Court decided (notwithstanding *Miller v. Albright*) and *Fiallo*'s subsequent impact on several lower court decisions in this area. Part III concludes that immigration laws classifying persons based on their gender should be subject to mid-tier scrutiny in accordance with all other gender-based laws. Moreover, Part III argues that the level of judicial scrutiny applied in immigration cases should not be determined by whether the law is technically labeled a "citizenship" law or a mere "immigration" law, or by whether a "citizen" or a mere "person" is party to the action.

Part IV analyzes section 309 of the INA under heightened scrutiny, and suggests that the law violates the Equal Protection Clause because it unjustifiably classifies American parents based on their sex. Part V recommends model legislation that recognizes that the blood relationship between an illegitimate child and his or her natural father may not be as easy to prove as the relationship between a similarly situated child and his or her mother. Instead of punishing these fathers and their children with an absolute ban on citizenship to children not legitimized by the age of eighteen, Congress should supplement section 309 with a discovery rule that would accommodate these physical differences.

I. THE TENSION BETWEEN CONGRESS' HISTORIC PLENARY POWER OVER IMMIGRATION AND MODERN GENDER-BASED EQUAL PROTECTION

A. *Federal Cases Regarding Equal Protection Challenges to Gender-Based Immigration Laws*

1. *Overview*

Although in the 1952 Immigration and Nationality Act Congress professed the goal of "eliminat[ing] discrimination between the sexes[,]"[25] at least two provisions of the INA continue to employ discriminatory gender-based classifications.[26] One such law, denying the

24. 430 U.S. 787 (1977).

25. H.R. REP. NO. 82-1365, at 1679 (stating that in addition to eliminating sex-based discrimination, other goals of the 1952 INA include: Eliminating race as a qualification for immigration, adding a system to give skilled aliens immigration preferences, and increasing background checks on prospective immigrants).

26. *See* Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(b)(1)(D) (1994) (distinguishing between illegitimate foreign-born children based on the sex of their parents for the purpose of obtaining special immigration visas); *id.* § 309 (codified as amended at 8 U.S.C. § 1409 (1994)) (distinguishing between illegitimate foreign-born children based on the sex of their parents for the purpose of obtaining U.S. citizenship).

illegitimate children of American fathers the same preferential immigration status afforded to the illegitimate children of American mothers,[27] became the subject of a major Supreme Court case, *Fiallo v. Bell*,[28] in 1977.

For the first time, the *Fiallo* Court dealt with an equal protection challenge to a law involving both an immigration policy (which the Court typically reviews using a low level of scrutiny) and a sex-based classification (which it typically reviews using a heightened level of scrutiny). The Court chose to review the statute as an immigration law, and accordingly held that the government simply had to show a "facially legitimate and bona fide reason" for the sex-based classification to survive the constitutional challenge.[29] Some lower courts have interpreted the "facially legitimate and bona fide" standard to be equivalent to a traditional "rational basis"[30] equal protection analysis where the government must show that a law or policy has a legitimate purpose and the classification rationally relates to that purpose.[31] Still, other courts seem to have interpreted the standard as being even less difficult to meet than rational basis.[32]

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27. *See* Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(b)(1)(D) (1976) (stating that the definition of a "child" under the INA includes "an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother"). Because immigration privileges were awarded based on other statutory provisions in the INA to children and parents falling within the definition of "child" stated above, illegitimate children of American fathers were always excluded from receiving these privileges. *See Fiallo*, 430 U.S. at 802-03 (Marshall, J., dissenting). Section 1101(b)(1)(D) was amended in 1986, nine years after the *Fiallo* decision. The amendment, however, did not abolish the gender-based classifications. *See* Immigration Reform and Control Act of 1986 § 315(a), Pub. L. No. 99-603, 100 Stat. 3439 (1986) (codified as amended 8 U.S.C. § 1101(b)(1)(D) (1994)) (adding the clause "or to its natural father if the father has or had a bona fide parent-child relationship with the person" after "natural mother").

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

29. *See id.* at 794-95. The "facially legitimate and bona fide standard" formally emerged in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). In that case, a non-resident alien from Belgium and several United States citizens challenged the constitutionality of a policy denying the alien temporary admission to the United States to speak at various American universities about his communist views. *See id.* at 764-69. The Court reaffirmed that aliens have no right to enter the United States. *See id.* Recognizing that the denial of the alien's temporary visa infringed on the First Amendment right to free speech of many United States citizens, the Court held that the government must at least put forth a "facially legitimate and bona fide reason" for its policy forbidding the alien's admission. *See id. But see id.* at 777 (Marshall, J., dissenting) ("I do not understand the source of this unusual standard .... Merely 'legitimate' governmental interests cannot override constitutional rights.").

30. *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (defining rational basis analysis under Equal Protection Clause).

31. *See* Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995) (stating that the facially legitimate and bona fide reason test is the same as the rational basis test used in equal protection cases); Azizi v. Thornburgh, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990) (noting that the facially legitimate and bona fide test is merely "descriptive language" for a typical rational basis analysis).

32. *See Fiallo*, 430 U.S. at 792 ("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.") (internal quotations and citations omitted);

The *Fiallo* Court explicitly rejected applying a heightened or mid-tier equal protection analysis[33] to the gender-based immigration statute, even though just one year earlier in *Craig v. Boren*[34] the Court held that mid-tier scrutiny applied to all gender-based classifications challenged under the Fourteenth or Fifth Amendment.[35] Mid-tier scrutiny requires the government to demonstrate that a challenged statute serves an important objective, and that the gender-based classification is substantially related to meeting that objective.[36] Under mid-tier scrutiny, in contrast to rational basis, there is a "strong presumption that gender classifications are invalid."[37] Consequently, one is far less likely to succeed in challenging an immigration law implicating a gender-based classification on equal protection grounds than if one challenged the exact same gender-based classifi-

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Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982) ("We do not know whether [a rational basis] test must be met to validate [immigration] legislation . . . because the Court teaches that we only have a limited judicial review").

33. *See Fiallo*, 430 U.S. at 794-95.

34. 429 U.S. 190 (1976).

35. *See id.* at 197-98. The Court in *Craig* based the mid-tier standard on several earlier gender-based equal protection cases that had employed a heightened scrutiny analysis to evaluate a gender-based classification. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 643-45 (1975) (holding that a law giving Social Security benefits to widow and her children, but not widower and his children, violated the Fourteenth Amendment); Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (invalidating a law that automatically gave spouses of male soldiers medical benefits, but only gave spouses of female soldiers such benefits upon proof of husband's financial dependency); Reed v. Reed, 404 U.S. 71, 75-77 (1972) (holding unconstitutional a law favoring fathers over mothers in the administration of a child's estate).

36. *See Craig*, 429 U.S. at 197-98.

37. United States v. Virginia, 518 U.S. 515, 532 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring)); *see also* Miller v. Albright, 118 S. Ct. 1428, 1445-46 (1998) (O'Connor, J., concurring) ("It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence.") (citation omitted); *cf.* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (explaining that under rational basis most classifications are presumptively non-discriminatory, and hence constitutional).

In *Miller v. Albright*, Justice Stevens purported to apply mid-tier scrutiny to § 309, noting that "citizenship laws" probably deserve more scrutiny than ordinary immigration laws. *See* 118 S. Ct. at 1434-35 (stating that *Fiallo* dealt with a statute granting "special immigration preference" to aliens, unlike *Miller* which deals with a law determining petitioner's citizenship, and, therefore, *Fiallo* did not necessarily dictate the outcome of the case). Despite the presumption that statutes analyzed under mid-tier scrutiny are invalid, Justice Stevens held that the gender-based classifications in § 309 were constitutional. *See id.* at 1437 n.11 ("Even if the heightened scrutiny that normally governs gender discrimination claims applied in this context" section 309 would be constitutional).

Five justices disagreed with Justice Stevens' mid-tier scrutiny analysis. *See id.* at 1445 (O'Connor, J., concurring) ("I do not share Justice Stevens' assessment that the provision withstands heightened scrutiny. . . ."); *id.* at 1454 (Ginsburg, J., dissenting) (noting that stereotypes about "the way women (or men) are . . . pervade the opinion of Justice Stevens, which constantly relates and relies on what 'typically,' or 'normally,' or 'probably' happens 'often'") (citation omitted); *id.* at 1457-58 (Breyer, J., dissenting) (noting that "like Justice O'Connor, I do not share, and thus I believe a Court majority does not share, Justice Stevens' assessment that the provision withstands heightened scrutiny") (internal quotations omitted).

cation in a non-immigration context.[38]

The *Fiallo* Court found that the unreliability of paternity testing and "a perceived absence in most cases of close family ties"[39] between putative fathers and their illegitimate children, constituted "facially legitimate" reasons for the more rigorous requirements imposed on the foreign-born illegitimate children of American fathers in obtaining preferential immigration visas.[40] Over a decade later, two circuit courts as well as two justices of the Supreme Court, adopted nearly the same *Fiallo* rationale to justify the tougher statutory requirements for citizenship imposed on foreign-born illegitimate children of American fathers, as compared to the requirements imposed on foreign-born illegitimate children of American mothers.[41] These circuit court cases will be analyzed in more detail in Part II. The fundamental issues these cases raise, however, can best be explained through a brief factual examination of *Miller v. Albright*,[42] the first case dealing with an equal protection challenge to a sex-based classification in an immigration law to reach the Supreme Court since *Fiallo*.[43]

2. Miller v. Albright—*background*

Miller involved a Fifth Amendment Equal Protection challenge[44] to section 309 of the Immigration and Nationality Act.[45] Specifically, the

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38. *See infra* notes 77-79 and accompanying text.

39. *See Fiallo*, 430 U.S. at 799.

40. *See id.*

41. *See* Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996); Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995); *infra* Part I.C (providing an analysis of *Miller v. Christopher* and *Ablang*); *see also Miller*, 118 S. Ct. at 1439 (noting that in addition to the important governmental interest in ensuring reliable genetic proof of paternity, the government has an interest in ensuring a "healthy relationship" between the citizen-parent and the child born out-of-wedlock before the child reaches eighteen). Justice Stevens further stated:

> When a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child.... By contrast, due to the normal interval of nine months between conception and birth, the unmarried father may not even know that his child exists, and the child may not know the father's identity.

Id.

42. 118 S. Ct. 1428 (1998).

43. 430 U.S. 787 (1977).

44. *See Miller*, 118 S. Ct. 1428; *see also infra* Part I.C.2 (discussing the applicability of the Fifth Amendment to aliens).

45. *See* 8 U.S.C. § 1409(a)-(c) (1994). If a child is born out of wedlock abroad, the following criteria must be met for the child to become a U.S. citizen:

> (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-

statute allows the foreign-born illegitimate children of American mothers to receive automatic American citizenship, while requiring the foreign-born illegitimate children of American fathers to meet several additional criteria to qualify for American citizenship, including: (1) clear and convincing evidence of a blood relationship between the father and child; (2) a father's written statement agreeing to provide financial support to the child until he or she is eighteen; and (3) a father's voluntary acknowledgment of his paternity under oath, or a court adjudication confirming that fact before the child reaches eighteen.[46]

The plaintiff in *Miller*, Lonera Penero ("Penero"), was the illegitimate Philippine-born daughter of a former American soldier and a Filipino mother.[47] Penero's father, living in the United States, did not recognize her as his daughter until several years after she reached the age of eighteen.[48] Penero subsequently applied for United States citizenship, but the State Department denied her application because her father failed to legitimize her prior to the age mandated in the INA.[49] Joined by her father, Penero first appealed her denial of citizenship to the United States District Court for the Eastern District of Texas.[50] In an unreported order, however, the dis-

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> (A) the person is legitimated under the law of the person's residence or domicile,
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> (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.
>
> (b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation.
>
> (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 . . . for a continuous period of one year.

Id.

46. *See id.* at (a)(1)-(4). The plaintiff in *Miller* would have been able to satisfy the requirement of § 1409(a)(4) by showing that she was legitimated before reaching age 21, rather than 18, because she fell under a narrow statutory age bracket specified in § 1409(a)(4), before it was amended prospectively in 1986. *See Miller*, 118 S. Ct. at 1433 n.3 (citing the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3657).

47. *See Miller*, 118 S. Ct. at 1432-33.

48. *See id.* at 1433 (noting Penero's father obtained a Voluntary Paternity Decree from a Texas state court declaring him the "biological and legal father of Lorelyn Penero") (citation and internal quotations omitted).

49. *Id.* at 1433 n.3. The plaintiff in *Miller* was 22 years old when she was recognized formally as a daughter of an American father. *See* Miller v. Christopher, 870 F. Supp. 1, 1 n.1 (D.D.C. 1994).

50. *See id.* at 1433; Miller v. Christopher, C.A. No. 6: 93 CV 39 (E.D. Tex. June 2, 1993) (unreported order), *cited in* Miller v. Christopher, 96 F.3d 1467, 1469 (D.C. Cir. 1996) (dismissing Penero's American father from the lawsuit for lack of standing).

trict court dismissed Penero's father for lack of standing, and consequently transferred the case to the District of Columbia because venue in the Eastern District of Texas was no longer proper.[51] The District Court for the District of Columbia dismissed the suit entirely holding that Plaintiff (without her father as co-plaintiff) lacked standing because she failed to demonstrate that the court had the power to redress her injury by granting her citizenship.[52] Penero subsequently appealed to the D.C. Circuit, and then to the Supreme Court.[53] Her father, however, was not a co-plaintiff in these actions.

The D.C. Circuit, following the *Fiallo* precedent, held that section 309 was "entirely reasonable"[54] because "[a] mother is far less likely to ignore the child she carried in her womb," whereas the putative father "is very often totally unconcerned because of the absence of any ties to the mother."[55] As Judge Patricia Wald pointed out, concurring in the D.C. Circuit's opinion in *Miller v. Christopher*, the majority opinion and the *Fiallo* decision upon which it was based, sanctioned "stereotypes" and "overbroad generalizations" about men and women.[56] Therefore, Judge Wald concluded, as did five of the Supreme Court justices in *Miller v. Albright*,[57] that under mid-tier scrutiny,[58] section 309 violated the Equal Protection Clause.[59] The gov-

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51. *See Miller*, 118 S. Ct. at 1433 (explaining procedural history of the case).

52. *See* Miller v. Christopher, 870 F. Supp. 1, 3 (D.D.C. 1994) (holding that Plaintiff did not demonstrate the "redressability" element of the standing inquiry because "courts do not have the power to confer citizenship in the absence of statutory authority") (citation omitted); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (holding that an essential element of constitutional standing is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will 'be redressed by a favorable decision'") (citation omitted).

53. *See* Miller v. Christopher, 96 F.3d 1467 (D.C. Cir. 1996), *cert. granted sub nom.* Miller v. Albright, 117 S. Ct. 1689 (1997).

54. *See Miller*, 96 F.3d at 1471-72.

55. *Id.*

56. *See id.* at 1477 (Wald, J., concurring).

57. *See Miller*, 118 S. Ct. at 1449-50 (Ginsburg, J., dissenting, joined by Justices Breyer and Souter) (noting that section 1409 "rests on familiar generalizations: mothers, as a rule, are responsible for a child born out of wedlock; fathers unmarried to the child's mother, ordinarily, are not."); *id.* at 1461 (Breyer, J., dissenting, joined by Justices Ginsburg and Souter) (noting that the statutory distinctions in § 1409 are based 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 1445-46 (O'Connor, J., concurring, joined by Justice Kennedy) (stating that under heightened scrutiny, gender classifications based on stereotypes are unconstitutional). *But see id.* at 1441-42 (Stevens, J., joined by Chief Justice Rehnquist) (arguing that the "gender equality principle" repudiating statutory classifications based on stereotypes "is only indirectly involved" in § 1409; but, maintaining that it is the important physical difference between men and women that justify the statute's classification).

58. *See infra* Part I.D.1 (discussing mid-tier scrutiny).

59. *See Miller*, 96 F.3d at 1477 (Wald, J., concurring) (noting that because *Fiallo* is a Supreme Court case that is "directly on point," she must find the statute constitutional anyway). *But see id.* at 1472 (stating that "even if... section 1409(a) were based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children, this argument should be addressed to the Congress rather than the courts") (internal

ernment argued, however, that regardless of whether the classification sanctioned stereotypes, non-resident aliens have no inherent right to citizenship by virtue of their birth to an American citizen abroad, and thus no right to equal protection under the Fifth Amendment.[60] Therein lie the fundamental conflicts.

The remaining sections in Part I provide background on the historical basis of Congress' plenary power over immigration, the constitutional debate over whether immigrants seeking to become citizens through their birthright are protected by the constitution, and the impact of *United States v. Virginia*[61] on modern gender-based equal protection law.

B. *Congress' Unrestrained Power Over Immigration*

Congress' power to regulate immigration is not explicitly enumerated in the Constitution.[62] Rather, the Supreme Court in the 1889 Chinese Exclusion Case[63] regarded Congress' authority to both admit and expel aliens at its discretion as "too clearly within the essential attributes of sovereignty to be seriously contested."[64] Throughout the twentieth century, the Court continued to reaffirm Congress' plenary power over aliens seeking admission to, and those already residing

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quotation and citation omitted).

60. *See Miller*, 118 S. Ct. at 1436 n.10 (citing Respondent's Brief at 11-12, *available in* 1997 WL 433315) (noting that the Court does not need to address the question of an extraterritorial alien's substantive rights under the Fifth Amendment until the Court resolves the predicate question of whether plaintiff is a citizen); *see also infra* Part I.C (discussing the application of the Fifth Amendment's Equal Protection Clause to non-citizens).

61. 518 U.S. 515, 556-58 (1996) (holding that the male-only admission policy at the Virginia Military Institute violated the Constitution's Equal Protection Clause).

62. *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 12 (1985) ("As regards immigration, the courts have admittedly built a constitutional jurisprudence wholly on extra constitutional foundations.") (footnote omitted). *But see* U.S. CONST. art. I, § 8, cl. 3 (Congress has the power "[t]o regulate Commerce with foreign Nations"); U.S. CONST. art. I, § 8, cl. 4 (Congress has the power "[t]o establish an uniform Rule of Naturalization").

63. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

64. *See id.* at 607 (upholding a constitutional challenge to Congress' Act of 1888 that prohibited Chinese laborers from re-entering the United States even though they had secured permission to return before the Act had passed); *see also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 863-64 (1989) (stating the Court in the Chinese Exclusion Case and subsequent cases thereafter deemed international law and the inherent power of all sovereigns to defend themselves against foreign invasion, as the primary source of Congress' plenary power over immigration). Prior to the Chinese Exclusion Case, the Court suggested in *Edye v. Robertson* ("Head Money Cases"), that Congress' plenary power over immigration stems from article I, section 8 of the Constitution, which grants Congress the power "[t]o regulate commerce with foreign nations." 112 U.S. 580, 592 (1884) (quoting U.S. CONST. art. I, § 8, cl. 3). Five years later, however, the Court implicitly replaced the rationale of the Head Money Cases with the sovereignty theory expressed in the Chinese Exclusion Case which still exists today. *See* Henkin, *supra* note 62, at 26-27.

in, the United States.[65] In times of war or political crisis, including the "Red Scare,"[66] claims that Congress' immigration laws should be subject to a more stringent review because they impugned the constitutional rights of United States citizens were dismissed by the Court.[67]

In contrast, other areas of the law where Congress' power typically has been considered plenary, are now subject to modern levels of judicial scrutiny when they implicate fundamental constitutional rights of citizens or use suspect classifications under the Equal Protection Clause.[68] For example, in *Rostker v. Goldberg*,[69] the Court questioned whether the Selective Service Act, requiring only men to register for draft, violated the Equal Protection Clause under the Fifth Amendment.[70] The Court, while acknowledging Congress' plenary power over the military,[71] determined that the courts should still apply a heightened level of constitutional scrutiny to gender-based classifications in laws involving the military.[72] The Court reasoned that apply-

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65. *See* Landon v. Plasencia, 459 U.S. 21, 34-35 (1982) (observing that the role of the judiciary with respect to immigration is limited and does not extend to displace congressional policy choices); Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (stating that Congress' power over immigration is very broad); Galvan v. Press, 347 U.S. 522, 530-31 (1954) (noting that regardless of the "harsh incongruity" resulting from the deportation of an alien who was "duped into joining the communist party," policies regarding the admission and deportation of aliens must remain exclusively with the political branches of government); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (recognizing their power over immigration has long been exercised by the political branches of government).

66. The Red Scare can be roughly defined as the years following World War II when the house and senate committees investigated and persecuted hundreds of suspected communists in the United States. *See* GRIFFIN FARIELLO, RED SCARE, MEMORIES OF THE AMERICAN INQUISITION—AN ORAL HISTORY 28-44 (1995). According to Fariello, the fear of Soviets infiltrating the United States affected all aspects of American life. *See id.* at 24-25. "State and federal investigators grilled suspected citizens on their reading habits, voting patterns, and church attendance. Support for racial equality became evidence of subversive leanings.... Neighbors informed on neighbors, students on their teachers." *Id.* at 25.

67. *See Galvan*, 347 U.S. at 532 (upholding a law that required a Mexican legal alien residing in the United States for thirty years, married to an American woman for twenty years and raising four American children, to be deported permanently from the United States for an alleged lawful two year involvement with Communist Party in mid-1940s). The *Galvan* Court noted that although a legal alien residing in the U.S. was a "person" under the Fifth Amendment and thus entitled to due process rights, Congress' power over aliens is "very broad, touching as it does basic aspects of national sovereignty... foreign relations and the national security." *See id.* at 530; *Mandel*, 408 U.S. at 765-66 (stating a similar proposition regarding Congress' power over aliens).

68. *See* Aleinikoff, *supra* note 64, at 865 ("Immigration law has remained blissfully untouched by the virtual revolution in constitutional law since World War II, impervious to developments in due process, equal protection and criminal procedure.").

69. 453 U.S. 57 (1981).

70. *See id.* at 59-61.

71. *See id.* at 66 (noting that article I, section 8 of the Constitution explicitly delegates to Congress authority for maintaining the armed forces).

72. *See id.* at 69-70, 83 (holding that under a heightened scrutiny analysis the Selective Service Act's gender-based classification was constitutional).

ing a uniform constitutional standard for all gender-based classifications prevented "levels of 'scrutiny' . . . [from becoming] facile abstractions used to justify a result."[73]

The reliance on the plenary power of Congress to protect the security of this nation through seemingly discriminatory immigration laws is no longer viable; at best, this reliance is a spill-over from decades where there was a perceived threat "from vast hordes of [Chinese] people crowding in upon us"[74] or from the "treachery [and] deceit"[75] of communist revolutionaries.[76] Yet, the Court continues to wave precedent from an era long past to justify, *inter alia*, Congress' preferences to admit heterosexuals rather than homosexuals,[77] and legitimate children rather than illegitimate children[78] into this country, where it probably would not have such flexibility to make these distinctions in the domestic sphere.[79]

73. *See id.* at 69-70. *But see Galvan*, 347 U.S. at 531 (acknowledging that even though the concept of substantive due process has expanded to limit all of Congress' determinations, including those made under the war power, it does not apply to the entry and deportation of aliens).

74. Chae Chan Ping v. United States, 130 U.S. 581, 605 (1889).

75. *See Galvan*, 347 U.S. at 529.

76. *See* Henkin, *supra* note 62, at 33-34 (explaining that discrimination based on race or ethnicity has little relationship to national security); David Cole, *Make Room for Daddy*, N.J.L.J., Oct. 13, 1997, at 27 ("[N]othing in foreign affairs or the process of sovereign self-definition calls for using sex as a proxy for family ties."). Recently, however, many concerns have been raised in the United States regarding the potential economic threat that new waves of immigrants pose to society. *See* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 742 (1998) (discussing new legislation to address Congress' growing concern with aliens who are likely to become public charges); William Branigin, *Income, Support Requirements Imposed on Immigrant Sponsors*, WASH. POST, Oct. 21, 1997, at A3 (describing new federal regulations that make it more difficult for low-income people to bring foreign relatives into the United States because the INS wants to ensure that taxpayers will not have to provide financial support to new immigrants). These economic concerns, however, do not justify discrimination in immigration based on the race, gender, sexuality, legitimacy, or ethnicity of an individual seeking to immigrate to the United States. *See* Cole, *supra*, at 27. In a related context, the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 prohibit American employers from discriminating against authorized aliens based on national origin or citizenship status. *See* Fred W. Alvarez & Jill A. Marsal, *Employment and Labor Relations Law for the Corporate Counsel and the General Practitioner*, SC63 A.L.I. 209, 219-22 (1998). The Immigration Act of 1990 states that discrimination in hiring, recruiting, referring for a fee or discharging any authorized individual is considered an unfair immigration-related employment practice. *See* 8 U.S.C.A. § 1324b(a)(1)(A)-(B) (West 1994 & Supp. 1998).

77. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982) (holding that a lawful gay marriage in Colorado of an alien to an American citizen does not qualify the alien for an extended visa as an "immediate relative" of his spouse).

78. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 799-800 (1977); Miller v. Christopher, 96 F.3d 1467, 1472-73 (D.C. Cir. 1996), *aff'd on other grounds sub nom.* Miller v. Albright, 118 S. Ct. 1428 (1998); Ablang v. Reno, 52 F.3d 801, 806 (9th Cir. 1995).

79. In *Miller v. Albright*, several justices noted that Congress continues to maintain plenary power over immigration. *See* 118 S. Ct. at 1437 n.11 (recognizing "[d]eference to the political branches" in matters of immigration); *id.* at 1446 (O'Connor, J., concurring) (noting immigration is an area of the law where Congress may make law based on generalizations); *id.* at 1447 (Scalia, J., concurring) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210

For instance, the Court in *Trimble v. Gordon*,[80] applying heightened scrutiny to an Illinois law, held statutory discrimination against illegitimate children to be unconstitutional.[81] Ironically, on the same day *Trimble* was decided, the Court held in *Fiallo v. Bell* that in the context of immigration, discrimination against foreign-born illegitimate children of American citizens was constitutional as long as the government had a mere "facially legitimate" reason for the law.[82] The Court's ambivalence appears to create inconsistent judicial answers to the question "what is discrimination?" that hinge on whether the offended class is an American citizen, or merely a "person"[83] under the law.

C. *The Constitutional Basis For Protecting Aliens*

1. *The right to citizenship*

There are only two methods by which a person may become a United States citizen.[84] Based on the feudal notion of *jus soli*, meaning citizenship determined by one's place of birth rather than one's descent,[85] the Fourteenth Amendment provides that a person born on United States territory automatically becomes an American citizen.[86] A person born outside the United States can also become a citizen through naturalization, a process that the Constitution explic-

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(1953)) ("Judicial power over immigration and naturalization is extremely limited.... 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"). Even Justice Breyer, who would have held section 309 unconstitutional, recognized that the "more lenient standard [of review] in matters of 'immigration and naturalization'" would apply in "a case involving aliens." *Id.* at 1459 (Breyer, J., dissenting) (citation omitted). Justice Breyer, however, believed that section 309 was not merely an immigration case involving aliens, but a case involving the conferral of citizenship at birth and therefore deserving of more careful scrutiny. *See id.* at 1458-60.

80. 430 U.S. 762 (1977).

81. *See id.* at 765-66 (addressing an Illinois statute that prevented illegitimate children from being heirs to their fathers' estates).

82. *See Fiallo*, 430 U.S. at 794-95. The Supreme Court in *Miller* did not hear arguments regarding the statutory distinctions between "illegitimate" and "legitimate" children that the *Fiallo* Court previously addressed. *See Miller*, 118 S. Ct. at 1434-35 (noting the Court only granted certiorari to the sex-based equal protection issue).

83. *See* U.S. CONST. amend. V (stating that the amendment applies to all "persons" and not merely to United States "citizens"); *infra* Part I.C (discussing the constitutional implications of the citizen-person distinction).

84. *See* United States v. Wong Kim Ark, 169 U.S. 649, 702-04 (1898) (detailing the constitutional provisions for acquiring United States citizenship).

85. *See* Rogers v. Bellei, 401 U.S. 815, 828 (1971) (describing the origins of America's philosophy regarding citizenship). Unlike the United States, most civil law countries base citizenship on the common law notion of *jus sanguinis*, literally meaning "the right of blood." In these countries, regardless of where one is born, citizenship descends through one's bloodline. *See* BLACK'S LAW DICTIONARY 862 (6th ed. 1990); *Miller*, 118 S. Ct. at 1459.

86. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States....").

itly delegates to Congress to control through legislation.[87] Therefore, an American citizen has no inherent right to transmit citizenship to his child born abroad absent statutory authorization from Congress.[88]

2. *The Fifth Amendment as applied to non-citizens*

Although the Fifth Amendment does not explicitly contain an Equal Protection Clause similar to that of the Fourteenth Amendment, which applies only to states,[89] the Court has incorporated equal protection into the Fifth Amendment's concept of due process.[90] The Fifth Amendment, applicable to federal laws, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[91] The words "person" and "citizen," however, are not defined, and the term "alien" is not even mentioned in the Constitution.[92] Certainly, if the framers intended "persons" to include only citizens, they could have specified this, because the term "citizen" appears in several other sections of the Constitution.[93]

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87. *See id.* art. I, § 8, cl. 4 (providing Congress power "[t]o establish an uniform Rule of Naturalization . . . throughout the United States"); INS v. Pangilinan, 486 U.S. 875, 883-85 (1988) (noting Congress has exclusive power to confer citizenship to persons born outside the United States); *cf.* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 635-36 (1994) (explaining that the Constitution's reference to "uniform" in describing naturalization means geographic uniformity across the states, and not equal treatment for every alien).

88. *Cf. Rogers*, 401 U.S. at 826-27, 836 (rejecting a due process challenge to an immigration law that allowed a child born abroad to one American parent to maintain United States citizenship status by fulfilling certain residency requirements before turning 28 years-old). Plaintiff in *Rogers* failed to fulfill the requirements of the statute, and thus, pursuant to federal law, his citizenship expired. *See id.*

89. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

90. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (applying equal protection requirements to the Federal Government through the Fifth Amendment's Due Process Clause).

91. U.S. CONST. amend. V.

92. *See Rogers*, 401 U.S. at 829 (suggesting the omission of a definition of citizenship in the original Constitution may have been related to a "desire to avoid entanglement in the then-existing controversy between concepts of . . . citizenship and . . . the status of Negro slaves").

93. *See* Henkin, *supra* note 62, at 12-15 (noting that the Constitution originally only referred to "citizens" in three major areas: when describing the qualifications for service in Congress, when describing the pre-requisites for becoming president, and when referring to the "Privileges and Immunities of Citizens in the several states") (citation omitted). Henkin further pointed out:

> The Bill of Rights . . . also does not specify whose rights it was designed to safeguard . . . . Do these provisions protect only "the people" who ordained and established the Constitution, and therefore perhaps only those who were eligible to vote to ratify the Constitution? Are the "people" protected by the fourth amendment [sic] different from the "persons" to whom the fifth amendment [sic] provides the protection . . . [from] deprivation of life, liberty, or property . . . ?

Id. at 14-15; *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990) (noting that while there is no conclusive proof, it appears that "the people" referred to in the First, Second, Fourth, Ninth and Tenth Amendments may be different from the "person" protected in the Fifth Amendment).

Precedent supporting the notion that both legal and illegal alien persons physically residing in the United States receive the protection of the Fourteenth and Fifth Amendments is well-established.[94] The more difficult question, however, involves whether aliens outside the United States seeking to become citizens are also entitled to the protection of the Fifth Amendment. It does not appear that the Court has ever fully addressed this question, as previous immigration cases involved either citizens or aliens that have lived in the United States.[95] Moreover, the Court declined the opportunity to decide this question in *Miller v. Albright*.[96]

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94. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding a Texas law denying undocumented aliens residing in the United States a free public education violated the Equal Protection Clause under the Fourteenth Amendment); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (stating that even those who are in the United States unlawfully or temporarily are entitled to constitutional protection under the Fifth Amendment); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.... [It applies] to all persons within the territorial jurisdiction....").

95. *See* Fiallo v. Bell, 430 U.S. 787, 790 (1977) (both aliens and citizens joined suit to challenge constitutionality of immigration law); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (both citizens and alien challenged the constitutionality of visa denial); Galvan v. Press, 347 U.S. 522, 523 (1954) (challenging the constitutionality of deportation of a legal alien residing in the United States for thirty-six years); Harisiades v. Shaughnessy, 342 U.S. 580, 581 (1952) (challenging constitutionality of a legal alien's deportation).

The Court, however, has addressed the question of whether nonresidents are protected by other parts of the Constitution. *See Verdugo-Urquidez*, 494 U.S. at 261 (holding the Fourth Amendment did not apply to search and seizure of property by United States agents when the property was owned by a nonresident alien living in a foreign country); *Rogers*, 401 U.S. at 816-17 (challenging unsuccessfully the constitutionality of an immigration law that stripped a foreign-born child of an alien-father and citizen-mother of his American citizenship because he did not fulfill certain residency requirements); Johnson v. Eisentrager, 339 U.S. 763, 777 (1950) (denying Fifth Amendment habeas corpus protection to an enemy alien that: (1) had never been to the United States; (2) had been captured and held as a prisoner of war outside the United States; (3) was tried and convicted by a military commission located outside the United States for offenses committed outside the United States; and (4) was imprisoned outside the United States).

In oral argument before the Supreme Court during *Miller v. Albright*, the Court questioned counsel for the petitioner as to whether an alien having no right to citizenship through her descent, and having never otherwise been to the United States, could raise a claim under the Fifth Amendment. One Justice suggested that *Rogers* was sufficient precedent to allow a nonresident alien to challenge a law under the Fifth Amendment. There was clearly confusion, however, as to whether the Court had ever decided this issue. *See* United States Sup. Ct. Official Tr., Miller v. Albright, No. 96-1060, 1997 WL 699809, at *25-26 (Nov. 4, 1997); *see also* Miller v. Albright, 118 S. Ct. 1428, 1445 (1998) (O'Connor, J., concurring) (stating "it is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States").

96. For example, Justice Stevens stated briefly in a footnote that the pressing question was whether or not the plaintiff was in fact a citizen or an alien, and not the more ambiguous question of whether an alien outside the United States has substantive rights under the Fifth Amendment. *See Miller*, 118 S. Ct. at 1436 n.10 (citing *Johnson*, 339 U.S. 763; *Verdugo-Urquidez*, 494 U.S. 259). Similarly, Justice O'Connor stated that she would simply "assume," without deciding, that the petitioner could raise a constitutional challenge. *See id.* at 1445 (O'Connor, J., concurring). Finally, Justice Scalia noted that because he believed that the petitioner had third-party standing to assert the constitutional rights of her father, the question of petitioner's own rights as an alien not living in the United States did not need to be resolved. *See id.* at 1447 n.1 (Scalia, J., concurring).

In lower federal court decisions, many courts have assumed "limited judicial responsibility"[97] to review the constitutionality of immigration (or citizenship) laws containing gender-based classifications, regardless of whether citizens, or alien-children of citizens assert the claim.[98] It is this limited review of gender classifications in immigration law, however, that appears to be "out of step with the Court's current refusal to sanction 'official action that closes a door or denies opportunity to women (or to men).'"[99]

D. *Gender Equal Protection Analysis*

1. *The traditional mid-tier analysis*

Mid-tier scrutiny applies to laws that categorize persons based on their sex.[100] The mid-tier equal protection analysis, as its name suggests, falls somewhere between a rational basis analysis,[101] applied to laws that classify persons based on factors such as social welfare[102] or age,[103] and a strict scrutiny analysis, typically applied to laws that classify persons based on race[104] or ethnicity.[105]

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97. *See, e.g.*, Elias v. United States Dep't of State, 721 F. Supp. 243, 248 (N.D. Cal. 1989) (quoting *Fiallo*, 430 U.S. at 793 n.5).

98. *See* Miller v. Christopher, 96 F.3d 1467, 1470 (D.C. Cir. 1996), *aff'd on other grounds sub nom.* 118 S.Ct. 1428 (1998); Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995); LeBrun v. Thornburgh, 777 F. Supp. 1204, 1209-10 (D.N.J. 1991) (assuming that because the Supreme Court allows illegal aliens residing in this country to challenge laws under the Fourteenth Amendment, then persons who may be citizens, but their citizenship is denied, can also challenge such laws); *Elias*, 721 F. Supp. at 245 ("[W]e note that plausible grounds may exist to at least support plaintiff's challenge on her own behalf").

99. *See Miller*, 96 F.3d at 1477 (Wald, J., concurring) (quoting United States v. Virginia, 518 U.S. 515, 532 (1996)).

100. *See* Craig v. Boren, 429 U.S. 190, 197-98 (1978) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

101. *See supra* notes 30-31 and accompanying text (describing rational basis test).

102. *See* Bowen v. Gilliard, 483 U.S. 587, 600-01 (1987) (denying equal protection challenge under rational basis to an amendment to the Aid to Families with Dependent Children program that reduced some families' benefits, but not others, based on the number of members in one's household).

103. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (upholding Massachusetts law requiring policemen to retire at age 50 as rationally based on state's desire to have young, physically fit persons protecting them).

104. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding Virginia statute that forbid inter-racial marriages violated Fourteenth Amendment because it has no "overriding purpose" except perhaps "White Supremacy"). Under strict scrutiny analysis, the government must show the challenged classification serves a compelling government interest, and the classification is the least restrictive way to accomplish the purpose of the legislation. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984).

105. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding restrictions on citizens of Japanese ancestry are subject "to the most rigid scrutiny"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (stating classifications based on ethnic origin are "odious to free people whose institutions are founded upon the doctrine of equality").

The case law applying mid-tier scrutiny to gender-based statutes and policies, however, has been notably inconsistent.[106] For the most part, the Court has continued to uphold gender-based classifications challenged under the Equal Protection Clause when it finds that either: (1) women deserve preferential treatment to remedy past discrimination;[107] or (2) men and women are not similarly situated as a result of physical differences.[108]

2. *The new implications for gender-based equal protection under* United States v. Virginia

Recently, the Supreme Court added yet another dimension to the gender equal protection analysis. In *United States v. Virginia*,[109] the Court held that the Virginia Military Institute ("VMI") did not have an "exceedingly persuasive justification"[110] for excluding women, and therefore the state institute's men-only admission policy violated the Equal Protection Clause of the Fourteenth Amendment.[111] As Justice Scalia pointed out in his dissent in *United States v. Virginia*,[112] and Professor Kovacic-Fleischer expanded upon in a recent article,[113] the Court "appears to raise gender equal protection analysis to the level of strict scrutiny"[114] without explicitly declaring it as such.[115] In essence, the Court ordered VMI to "accommodate"[116] for the physical

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106. *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (recognizing that the mid-tier standard is unclear); *see also* Candace Saari Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications For Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 868-69 & n.130 (1997) (describing mid-tier equal protection cases as a "confusing conglomeration" that has evoked criticism from legal commentators and justices alike).

107. *See* Kovacic-Fleischer, *supra* note 106, at 859, 868 and cases cited therein. For example, in *Califano v. Webster*, 430 U.S. 313, 318 (1977), the Court held that giving women certain Social Security benefits not given to men was permissible to "compensate women for past economic discrimination."

108. *See* Kovacic-Fleischer, *supra* note 106, at 859, 868 and cases cited therein; Michael M. v. Superior Court., 450 U.S. 464, 472-73 (1981) (upholding California law imposing criminal liability for statutory rape only on men). The Court in *Michael M.* found that the State's important governmental interest in enacting the law was to prevent teenage pregnancy. Therefore, the Court held that because women were punished enough by the "inescapably identifiable consequences of teenage pregnancy," the legislature was justified in making only men criminally liable for statutory rape. *See id.* at 473. *But see* United States v. Virginia, 518 U.S. 515, 533 (1996) (recognizing physical differences between men and women, yet still invalidating the Virginia Military Institute's male-only admission policy).

109. 518 U.S. 515 (1996).

110. *See Virginia*, 518 U.S. at 530 (stating that the party defending the sex-based classification has the burden of demonstrating this "exceedingly persuasive justification").

111. *See id.* at 518.

112. *See id.* at 566 (Scalia, J., dissenting)

113. *See* Kovacic-Fleischer, *supra* note 106, at 873-75 (noting the Court recognized that "VMI can achieve its purpose in a manner less restrictive than excluding all women.").

114. *See id.*

115. *See id.*

116. *See Virginia*, 518 U.S. at 550-51 & n.19 (stating that VMI must create a remedy for

differences between "capable"[117] women and men who want to attend VMI—a remedy that implies that the state must find "a least-restrictive-means"[118] to accomplish its stated purpose.[119] For example, the Court noted that VMI might need to build separate barracks to accommodate for women's privacy needs and adjust certain components of the physical training programs to accommodate for women's different athletic ability.[120] Traditionally, the remedy for equal protection violations in gender equal protection cases was to treat the excluded class identical to the opposite sex, or to abolish the law entirely.[121]

Finding the "least-restrictive-means" for accommodating the physical differences between men and women is especially applicable to immigration or citizenship laws, such as section 309 of the INA.[122] Under the "least-restrictive-means" approach, courts cannot avoid an equal protection analysis by merely asserting that "mothers and fathers of illegitimate children are not similarly situated" as the D.C. Circuit stated in *Miller v. Christopher*,[123] and Justice Stevens endorsed in *Miller v. Albright*.[124] This Comment recommends in Part IV, using *United States v. Virginia* as a model, a remedy that accommodates for

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"capable" women to enter the school even if that remedy involves altering some of the existing school programs).

117. *See id.* at 550 (defining "capable" as being able to perform "all individual activities required of a VMI cadet").

118. *See id.* at 566 (Scalia, J., dissenting) (arguing that prior to *Virginia*, this Court had never required a "least-restrictive means analysis" under mid-tier scrutiny); Kovacic-Fleischer, *supra* note 106, at 873-75.

119. *See Virginia*, 518 U.S. at 534-35 (noting that the State's alleged purpose for excluding women from VMI was to provide diversity in public education through single-sex education, and to teach leadership skills through an "adversative" method that was specifically designed for male students). The Court rejected the former justification as "benign" because "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State." *See id.* at 535. As to the latter justification, the Court essentially held that VMI had to adjust its adversative training program to accommodate both sexes. *See id.* at 550-51.

120. *See id.* at 550-51 n.19 (suggesting means for accommodating women's differences).

121. *See* Heckler v. Mathews, 465 U.S. 728, 738 (1984) (describing the two ways an unconstitutional statute could be remedied to achieve "equal treatment" between the sexes).

122. *See* Immigration and Nationality Act § 309, 8 U.S.C. § 1409 (1994).

123. 96 F.3d 1467, 1472 (D.C. Cir. 1996), *aff'd on other grounds sub nom.* Miller v. Albright, 118 S. Ct. 1428 (1998).

124. *See Miller*, 118 S. Ct. at 1442 (noting "[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands"). The Court in *Virginia* did acknowledge that physical differences between the sexes could still be a basis for classifying men and women based on their gender. These differences, however, could not be used "for the denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Virginia*, 518 U.S. at 533 (citations omitted); *see also* Kovacic-Fleischer, *supra* note 106, at 883 (arguing that after *United States v. Virginia*, the courts probably would not be able to justify differential treatment under the law based on gender by simply asserting, without further analysis, that men and women are physically "not similarly situated").

the physical differences between men and women with respect to child bearing without punishing the offspring of American fathers born out of wedlock.

II. ANALYSIS OF GENDER-BASED IMMIGRATION LAW CASES

The Supreme Court in *Miller v. Albright*[125] explicitly declined to base its decision on its earlier gender-based immigration case, *Fiallo v. Bell*.[126] The splintered *Miller* Court distinguished the case before it from *Fiallo* by stating that the latter only involved the grant of special immigration visas to illegitimate children of American parents, while *Miller* involved the actual grant of American citizenship to this same class of children.[127] Accordingly, Justice Stevens, delivering the opinion of the Court, stated *Fiallo* did not apply and instead he purported to apply heightened or mid-tier scrutiny to section 309.[128] Justice Stevens, somewhat ambivalently, also pointed out that "[d]eference to the political branches dictate[d] a 'narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'"[129]

Notwithstanding the way that the Court attempted to distinguish *Miller* from *Fiallo*, most of the issues and reasoning discussed in *Fiallo* re-emerged in *Miller*.[130] More importantly, by declining to address *Fiallo*, the *Miller* Court left the long-standing conflict between immigration law and gender-based equal protection law unresolved. This Comment, therefore, analyzes the *Fiallo* decision and its progeny, and suggests one approach to remedying the tension between the competing areas of law.

A. *The Citizen Versus Person Debate in* Fiallo v. Bell

As briefly described above, in *Fiallo v. Bell*,[131] the Court rejected a

125. 118 S. Ct. 1428 (1998).

126. 430 U.S. 787 (1977).

127. *See Miller*, 118 S. Ct. at 1434-35 (distinguishing *Miller v. Albright* from *Fiallo v. Bell*); *id.* at 1458 (Breyer, J., dissenting) (same).

128. *See id.* at 1437 n.11 ("[W]e are persuaded that the requirement imposed by § 1409(a)(4) on children of unmarried male, but not female, citizens is substantially related to important governmental objectives.").

129. *See id.* at 1437 n.11 (quoting Mathews v. Diaz, 426 U.S. 67, 82 (1976)). *But see supra* note 37 (explaining that a majority of the *Miller* Court acknowledged that Justice Stevens did not apply the heightened scrutiny analysis to the statute properly).

130. For example, both courts had to decide: (1) whether heightened scrutiny should apply to gender-based classifications in a particular section of the INA, *see Miller*, 118 S. Ct. at 1437 & n.11; (2) whether problems with paternity testing justified Congress' differential treatment of the mothers and fathers of illegitimate children, *see id.* at 1437-39; and (3) whether the statutory distinctions between mothers and fathers were based on archaic stereotypes, *see id.* at 1441-42; *infra* Part II.A (discussing *Fiallo* case).

131. 430 U.S. 787 (1977).

constitutional equal protection challenge brought jointly by non-resident aliens and American citizens to section 101(b) of the INA,[132] which granted automatic preferential immigration status, not citizenship,[133] to the illegitimate foreign-born children of American mothers, but not to the illegitimate foreign-born children of American fathers.[134] Since this decision, many lower courts seem frustrated with the *Fiallo* Court's analysis,[135] and as a result, some courts appear to be looking to Justice Marshall's dissent in *Fiallo* for clues to escape the majority's holding.[136] The following three Sections analyze *Fiallo*, its dissent and its impact on the subsequent lower court decisions preceding the Court's splintered decision in *Miller v. Albright.*

1. *The majority opinion*

Notably, the majority opinion in *Fiallo* declined to ground its analysis on the difference between laws that classify citizens based on gender and those that classify non-resident aliens based on gender.[137]

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132. *See* Immigration and Nationality Act § 101(b), 8 U.S.C. § 1101(b)(1)(D) (1994).

133. *Cf. Miller*, 118 S. Ct. at 1436 (distinguishing between cases based on the denial of a visa application and those based on the government's refusal to acknowledge an individual's citizenship); Y.T. v. Bell, 478 F. Supp. 828, 832 (W.D. Pa. 1979) (distinguishing between laws that only govern immigration status as opposed to those that actually grant citizenship).

134. *See* 8 U.S.C. § 1101(b)(1)(D) (1976) (granting preferential immigration status to children). Section 101(b) defines children, for purposes of the INA:

> (1) The term 'child' means an unmarried person under twenty-one years of age who is-
>
> (A) a legitimate child; . . . or
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother.

Id.

135. *See, e.g.*, Wauchope v. United States Dep't of State, 985 F.2d 1407 (9th Cir. 1993); LeBrun v. Thornburgh, 777 F. Supp. 1204, 1209 (D.N.J. 1991); Elias v. United States Dep't of State, 721 F. Supp. 243 (N.D. Cal. 1989). For a discussion of these cases, *see infra* Parts II.B.1-2.

136. *See LeBrun*, 777 F. Supp. at 1211 (Marshall, J., dissenting) (explaining that even though the standard of review in immigration cases is purportedly limited, "courts must ensure that rights guaranteed by the Fifth Amendment have not been violated" (citing Fiallo v. Bell, 430 U.S. 787, 809-10 (1977))) (citations omitted); *Elias*, 721 F. Supp. at 248 (stating similarly to Justice Marshall that the legal issue in the case should be framed in terms of the rights of the American citizen-mother, and not the alien child seeking citizenship); *infra* Part II.B.1 (discussing *Elias* decision).

137. *See Fiallo*, 430 U.S. at 794, 795 n.6 (rejecting the argument that because the statute adversely affected the substantive rights of citizens, as opposed to non-resident aliens, a heightened level of judicial scrutiny should be applied). The Court swept this argument aside with what it considered to be overriding concerns regarding the "exercise of the Nation's sovereign power to admit or exclude foreigners." *See id.* Justice Marshall, in his dissent, however, framed the constitutional issue in this case around the rights of the citizens involved, not the aliens. *See infra* Part II.A.2.

Rather, the Court framed its equal protection analysis simply in the context of "immigration legislation,"[138] and therefore reviewed the law under the "facially legitimate and bona fide reason"[139] standard typically applied to all constitutional challenges to immigration laws.[140]

As a result, the Court's analysis centered more on justifying its very limited authority to review Congress' decisions with regard to immigration than it did on examining the discriminatory sex-based classification.[141] For example, the Court explained that Congress deserved wide latitude in creating immigration laws because of the complicated political and economic policies involved in the "line drawing" between immigrants afforded special preferences and those who were not.[142] Yet, every prior instance the Court cited referring to Congress' political line drawing between categories of aliens was based on traditionally neutral factors such as age or marital status, and not on suspect classifications such as the race, ethnicity,[143] or gender of the prospective immigrant or his or her sponsoring citizen-relative.[144]

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138. *See Fiallo*, 430 U.S. at 792 ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation.").

139. *See id.* at 794-95 (citing Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972)); *see also supra* note 29 (explaining the origin of the facially legitimate and bona fide standard).

140. *See Fiallo*, 430 U.S. at 794 ("[T]his Court has resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required.").

As discussed above, the Supreme Court in *Miller v. Albright* distinguished section 309 from section 101 (the statute in *Fiallo*) on the grounds that the former was a citizenship law and the latter was an immigration law. Thus, Justice Stevens, as well as Justice Breyer in his dissenting opinion, were able to avoid the "facially legitimate and bona fide reason" test applied in *Fiallo* and apply heightened scrutiny instead. *See* Miller v. Albright, 118 S. Ct. 1428, 1436 (1998) (citing Craig v. Boren, 429 U.S. 190, 193-197 (1976)); *id.* at 1459-60 (Breyer, J., dissenting).

141. *See Fiallo*, 430 U.S. at 791 ("Congress' power to fashion rules for the admission of aliens [i]s 'exceptionally broad'"); *id.* at 792 ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation . . . [it is] largely immune from judicial control") (citations and internal quotations omitted); *id.* at 793-94 (stating there was no precedent to suggest that "Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter this country"); *id.* at 795 n.6 ("[D]espite the impact of these classifications on the interest of those already within our borders, congressional determinations . . . are subject to only limited judicial review."). Marshall criticized the majority's purported "review" as nothing more than "abdication." *See id.* at 805 (Marshall, J., dissenting).

142. *See id.* at 798-99 (identifying various "lines" that Congress must draw between groups of people when it formulates immigration policy).

143. Congress abolished immigration quotas based on national origin in 1965 and replaced them with immigration preferences for family members and skilled workers. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (1994)). Nationality in some immigration procedures, however, is still a basis for classifying persons. *See* Lenni B. Benson, *Back to the Future Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1491 (1997) (noting that nationals of certain countries, such as Canada, are exempt from visa requirements, and that national origin often dictates differential treatment in political asylum decisions).

144. *See Fiallo*, 430 U.S. at 798. The Court explained that Congress also classifies the for-

2. *Justice Marshall's dissent*

Justice Marshall's dissent in *Fiallo*,[145] on the other hand, emphasized that "this case, unlike most immigration cases that come before the Court, directly involves the rights of citizens, not aliens."[146] In other words, Justice Marshall argued that because the statute was intended to keep the families of American citizens together,[147] and because citizens applied for the immigration privilege on behalf of their children,[148] the law must be subject to heightened scrutiny on the grounds that it infringed on the fundamental due process rights of citizens to live with their families.[149] Additionally, Justice Marshall argued that the classification was based on the citizen's gender, not the alien's gender.[150] Accordingly, the statute could also be analyzed as a violation of equal protection on the basis of an American citizen's gender, and therefore must be subject to mid-tier scrutiny.[151] Justice Marshall thereafter suggested that the government's justification for the statute—the perceived absence in closeness between fathers and illegitimate children—was "based on habit, rather than analysis" and could not withstand mid-tier scrutiny.[152]

Justice Marshall employed a logical approach. He found a way to apply heightened scrutiny to immigration laws by removing them

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eign-born children of Americans seeking to immigrate on the basis of their age, their marital status and their blood relationship with their citizen-parent. For example, step-children and adopted children of American citizens must meet immigration criteria different from natural children of an American citizen. *See id.*

145. *See* 430 U.S. at 800.

146. *Id.* at 806

147. *See id.* at 806, *reprinted in* 1957 U.S.C.C.A.N. 2020 (indicating Congress' objective to keep American families together (citing H.R. REP. NO. 85-1199, at 7 (1957)).

148. *See id.* at 806.

149. *See Fiallo*, 430 U.S. at 810; *cf.* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 771-83 (1996) (suggesting "a constitutionally humane approach" to resolving the tension between the competing interests of immigration law and family unity).

150. *See Fiallo*, 430 U.S. at 809 (noting that a "class of citizens" is being denied the "special privilege of reunification" with their families in this country because of their gender). Unfortunately, Justice O'Connor, concurring in *Miller*, did not follow Justice Marshall's reasoning because—even though the statute in *Miller* also classified citizens—unlike *Fiallo*, in *Miller* there were no American citizens challenging the statute. *See supra* notes 50-53 and accompanying text (explaining that the Plaintiff's citizen-father was not a party to the appeal in *Miller*).

151. *See Fiallo*, 430 U.S. at 809 (citing Califano v. Webster, 430 U.S. 313, 317 (1977)); *see also Califano*, 430 U.S. at 210-11 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (noting that mid-tier scrutiny requires the sex-based classification to serve important governmental interests and to be substantially related to that objective).

152. *See Fiallo*, 430 U.S. at 812 n.10 (citations omitted) (noting that perpetuation of stereotypes cannot be an important governmental interest under heightened scrutiny). Justice Marshall also analyzed the statute as a discriminatory classification based on the legitimacy of children. *See id.* at 813. In *Fiallo* some of the petitioners were illegitimate citizen-children seeking preferential immigration status on behalf of their alien-fathers. Therefore, Marshall could still focus on the illegitimacy issue without acknowledging the rights of aliens. *See id.* at 789, 809.

from the context of immigration per se and categorizing them as constitutional violations against citizens rather than "persons" or aliens.[153] In *Fiallo*, because both citizens and aliens were joined as plaintiffs,[154] this analysis was viable. Simply by focusing on the harm to the citizen-father, however, Justice Marshall circumvented the more vexing problem that was later left unresolved in *Miller v. Albright*—whether aliens challenging a law alone are entitled to raise constitutional challenges when their rights are intimately bound with those of a citizen.[155]

Therefore, as evidenced in a small line of lower court cases that has emerged since *Fiallo*, it appears that even Justice Marshall's analysis of the gender-based immigration law becomes problematic. To some extent, the outcomes of these cases appear to depend on the procedural issue of whether a citizen and an alien are party to the suit, or whether only the alien challenges the law.[156] Moreover, Justice Marshall's reasoning has not reconciled the situation whereby the Court has on the one hand espoused a very limited tolerance for sex-based discrimination within its borders, but has on the other hand condoned such treatment when it has occurred outside the physical boundaries of the country.[157]

153. *See id.* at 806-07 (suggesting that whether aliens have constitutional rights is irrelevant when an immigration law denies privileges to some American citizens and not to others).

154. *See id.* at 790 (describing appellants as three sets of unwed putative fathers and their illegitimate offspring; in each set, one person was an American citizen).

155. *See id.* at 807 ("It is irrelevant that aliens have no constitutional right to immigrate . . . [w]hen Congress draws such lines among *citizens* the Constitution requires that decision comport with Fifth Amendment principles of equal protection and due process.") (emphasis added); *supra* note 60 (discussing *Miller* Court's refusal to address an alien's rights under the Constitution).

156. *See infra* Part II.B (describing third-party standing as a means to avoid the question of an unadmitted alien's constitutional rights); *see generally* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 443 (1974) [hereinafter *Standing to Assert Constitutional Jus Tertii*] (describing how the Court's reluctance to grant constitutional *jus tertii* increases the risk of confusing substantive constitutional claims with procedural questions).

157. *See generally* Henkin, *supra* note 62, at 32 (arguing that although the Constitution does not give rights to persons abroad, it at least "requires[s] the United States government to respect those human rights, with which all men and women are endowed equally"). Interestingly, even the justices in *Miller v. Albright* that agreed that heightened scrutiny should apply to citizenship laws containing sex-based classification, apparently did not believe that heightened scrutiny should apply to similar immigration laws. *See* 118 S. Ct. 1428, 1437 n.11 (1998); *id.* at 1459-60 (Breyer, J., dissenting).

B. *Third-Party Standing as a Technique to Avoid Citizen Versus Person Debate*

1. Elias v. United States Department of State

In 1989, in *Elias v. United States Department of State*,[158] a California district court held unconstitutional an immigration statute that granted automatic citizenship to the foreign-born legitimate children of American fathers but did not allow American mothers to transmit this same right of citizenship[159] to their foreign-born legitimate children.[160] The Federal Government defended the statute on two grounds: (1) citizens do not have a constitutional right to transmit their citizenship to foreign born off-spring;[161] and (2) based on the very limited standard of judicial review in *Fiallo*, the court could not "reevaluate" an immigration law.[162] Rejecting the government's arguments as not "persuasive,"[163] the *Elias* court held the immigration law unconstitutional—a rare occurrence given the low level of scrutiny supposedly applied.[164] More important, however, is the manner in which the court framed the constitutional issue.

Similar to Justice Marshall's dissent in *Fiallo*,[165] the *Elias* court framed the equal protection issue in terms of the rights of the plaintiff's deceased citizen-mother rather than the plaintiff herself, a nonresident alien seeking citizenship. Thus, this court also avoided ruling on the more problematic issue of whether aliens challenging an immigration law alone are entitled to constitutional protection when their rights are directly defined by the sex of their citizen-parent.[166]

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158. 721 F. Supp. 243 (N.D. Cal. 1989).

159. *See supra* Part I.C.1 (noting the transmission of one's American citizenship to a foreign-born child is technically not a "right" unless Congress provides otherwise through legislation).

160. *See Elias*, 721 F. Supp. at 250; *see also* Section 1993 of the Revised Statute of 1874. This statute was amended prospectively in 1934 to allow either mothers or fathers of legitimate children to transmit citizenship to their foreign-born children as long as the parent met certain residency requirements. *See* Act of June 27, 1952, Pub. L. No. 82-414, ch. 1, 66 Stat. 235 (codified at 8 U.S.C. § 1401(a)(7) (1994)). The petitioner in *Elias* was born prior to 1934, therefore, the revised law did not apply to her. *See Elias*, 721 F. Supp. at 244.

161. *See Elias*, 721 F. Supp. at 247.

162. *See id.* at 248 (recognizing the government's argument that courts' limited review of immigration legislation prohibited a reevaluation of the statute).

163. *See id.* at 249 (reasoning the government had offered no rationale to explain its different treatment of men and women).

164. *See generally* Johnny C. Parker, *Equal Protection Minus Strict Scrutiny Plus Benign Classification Equals What? Equality of Opportunity*, 11 PACE L. REV. 213, 223 (1991) (comparing the outcomes of laws tested under a rational basis analysis with those under mid-tier and strict scrutiny).

165. *See* Fiallo v. Bell, 430 U.S. 787, 806-07 (1977).

166. *See Elias*, 721 F. Supp. at 245-46 ("[W]e note that plausible grounds may exist to at least support plaintiff's challenge on her own behalf . . . however, we now turn to assertions that . . . no other reviewing courts have assessed: that the statute discriminates against United States citizen females rather than the unadmitted alien."). As described above, the majority of

Procedurally, the court was able to join the plaintiff's deceased citizen-mother in the suit through a doctrine commonly known as *jus tertii*, or third-party standing.[167] *Jus tertii* standing is "not governed by a constitutional requirement but by self-imposed rules of discretion,"[168] whereby a claimant can assert the concomitant constitutional rights of third persons if there is some reason why the third party cannot assert his or her own rights.[169] For example, in *Craig v. Boren*,[170] a beer vendor challenged a 3.2 percent beer law setting the legal drinking age for women at eighteen, but for men at twenty-one.[171] The Court allowed the beer vendor to assert constitutional rights on behalf of all men between the ages of eighteen and twenty because the original plaintiff had since reached twenty-one, and therefore he could no longer claim injury under the law.[172]

The *Elias* court similarly allowed the plaintiff to assert the constitutional rights of her citizen-mother, as it would be impossible for her deceased mother to assert her own rights.[173] Thereafter, the court factually distinguished its case from *Fiallo*, noting that the Supreme Court dealt with immigration visas in that case, not citizenship laws.[174] Moreover, although the *Elias* court professed to apply the *Fiallo* legitimate bona-fide test,[175] it also cited rationale from a mid-tier scrutiny equal protection case, *Craig v. Boren*,[176] and a strict scrutiny substantive due process case, *Moore v. City of East Cleveland*,[177] to bolster its

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the Supreme Court in *Fiallo* had assessed the approach the *Elias* court used and rejected it, while Justice Marshall, dissenting in *Fiallo*, adopted it. *See supra* note 137 and accompanying text (noting *Fiallo* court refused to analyze immigration statute from the perspective of the citizens affected); *supra* notes 147-51 and accompanying text (describing Justice Marshall's approach to the statute which focused on the rights of citizens implicated by the immigration law, rather than the rights of aliens).

167. *See Elias*, 721 F. Supp. at 246-47 (acknowledging standing according to *jus tertii*).

168. *See* Craig v. Boren, 429 U.S. 190, 193 (1976) (noting the "salutary rule of self restraint" governing *jus tertii*); *Elias*, 721 F. Supp. at 246 (stating that the "barrier" preventing a person from asserting the rights of a third party is not mandated by the Constitution).

169. Three criteria must be met for the court to grant third- party standing: (1) litigant had suffered an "injury in fact"; (2) the litigant had a "close" relation to the third party; and (3) some hindrance precluded the third party from asserting his or her own rights. *See* Campbell v. Louisiana, 118 S. Ct. 1419, 1422-23 (1998) (citing Powers v. Ohio, 499 U.S. 400, 411 (1991) and Singleton v. Wulff, 428 U.S. 106 (1976)).

170. 429 U.S. 190 (1976).

171. *See id.* at 192.

172. *See id.* at 192-95.

173. *See Elias*, 721 F. Supp. at 247.

174. *See id.* at 249; *see also* Miller v. Albright, 118 S. Ct. 1428, 1436 (1998) (recognizing that citizenship laws and immigrations should be analyzed differently).

175. *See Elias*, 721 F. Supp. at 249-50 (noting that even under the limited review mandated by the *Fiallo* Court, the statute is unconstitutional).

176. 429 U.S. 190 (1976).

177. 431 U.S. 494, 499 (1977) (four justice plurality) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.") (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

reasoning.[178] Justice Marshall in his dissent in *Fiallo* cited these cases as well.[179]

2. Wauchope v. United States Department of State

In *Wauchope v. United States Department of State*,[180] the Ninth Circuit decided a nearly identical equal protection challenge to the one that the *Elias* court heard four years earlier, and also granted third-party standing to an alien-child on behalf of her deceased American citizen-mother.[181] The Ninth Circuit seemed to struggle with the *Fiallo* precedent requiring it to apply a mere rational basis test to a sex-based category under the Equal Protection Clause when both the rights of a citizen-parent and an alien-child were involved.[182] The court recognized that the child was not merely seeking to immigrate, as in *Fiallo*, but rather to become a citizen through her birthright: "[W]e should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny."[183] Ultimately, the court conceded that because the Supreme Court mandated a deferential standard for all immigration laws, it was bound to use a "facially legitimate and bona fide reason test."[184]

It appears, however, that the Ninth Circuit did not truly apply the test that it enunciated. First, the *Wauchope* court explained the factual reasons why it believed that the case warranted heightened scrutiny.[185] Secondly, and most importantly, the court, citing *Weinberger v. Wiesenfeld*,[186] a gender-based equal protection Supreme Court case

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178. *See Elias*, 721 F. Supp. at 250 (citing *Craig* and *Moore*); *see also Moore*, 431 U.S. at 499 (noting that when certain liberties protected by the Due Process Clause are intruded on by regulation, ordinary judicial scrutiny of such a regulation is insufficient).

179. *See* Fiallo v. Bell, 430 U.S. 787, 809-10 (1977) (Marshall, J., dissenting) (citing, among other cases, *Craig* and *Moore*).

180. 985 F.2d 1407 (9th Cir. 1993).

181. *See id.* at 1412-14; *see also supra* note 169 and accompanying text (explaining the criteria for granting third-party standing).

182. *See Wauchope*, 985 F.2d at 1410-11 (noting that it is not readily apparent that the "very deferential standard" of scrutiny applied in *Fiallo* should apply to the gender-based classifications in this case) (quoting Reply Brief for the United States at 5-6).

183. *See id.* at 1414 (noting that the court would prefer to use a higher level of scrutiny, but is ultimately bound by the Supreme Court to use the "facially legitimate and bona fide reason test"). As mentioned previously, several justices of the Supreme Court in *Miller v. Albright*, decided that citizenship statutes should be reviewed with more scrutiny than immigration statutes when a gender-based equal protection claim is raised. *See supra* note 37.

184. *See Wauchope*, 985 F.2d at 1414 (recognizing Congress' plenary powers in immigration legislation) (citations omitted).

185. *See id.* at 1413-14 ("Unlike the governmental decisions at issue in *Fiallo* and *Mandel*, Section 1993 represents not a Congressional determination that various aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance.").

186. 420 U.S. 636 (1975) (holding unconstitutional a Social Security provision that provided benefits only to widows who chose to remain at home as full-time caretakers of their chil-

that employed heightened scrutiny, decided that it did not need to accept the government's assumptions regarding the legislative purpose behind the statute.[187] Thereafter, the court investigated the government's facially legitimate purpose for discriminating against children of citizen-mothers—preventing dual citizenship—and concluded that it was no longer a rational interest.[188] The *Wauchope* court's analysis seems quite different from the "facially legitimate" standard the Supreme Court described in earlier immigration cases.[189] For example, when reviewing immigration laws, the Court stated in *Kleindienst v. Mandel*,[190] the "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. . . .[T]he courts will [not] look behind the exercise of that discretion."[191] The *Wauchope* court, at least to some extent, did "look behind" Congress' exercise of power.

C. *When Citizens Are Not Joined In the Action, Courts Appear to Scrutinize the Legislation Less*

Given the Ninth Circuit's emphasis on granting third-party standing on behalf of an American citizen in *Wauchope*,[192] and Justice Marshall's dissent in *Fiallo* focusing on the rights of the citizen rather than the unadmitted alien,[193] one wonders what happens if an alien alone challenges an immigration statute. Do these decisions mean that the immigration legislation would really be "wholly outside the

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dren, but not to similarly situated widowers who chose to be full-time caretakers of their children).

187. *See Wauchope*, 985 F.2d at 1415 (quoting *Wiesenfeld*, 420 U.S. at 648 n.16) (stating that the court, in absence of the statute's legislative history, "need not . . . accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation").

188. *See id.* at 1415-16. The court decided that although Congress had "appropriate concern" in preventing dual nationality, *see id.* at 1415 (quoting Rogers v. Bellei, 401 U.S. 815, 831 (1971)). The problem was not resolved by section 1993 which prevented legitimate foreign-born children of United States citizen-mothers and alien-fathers from becoming citizens, *see Wauchope*, 985 F.2d at 1415-16. The court supported its conclusions with careful research, *see id.* (citing Lester Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 104 (1934); Richard Flournoy, Jr., *Dual Nationality and Election*, 30 YALE L.J. 545, 548 (1921); A COLLECTION OF NATIONALITY LAWS OF VARIOUS COUNTRIES (Richard W. Flournoy, Jr. & Manley O. Hudson eds., 1929)).

189. *See supra* notes 6-8 (citing cases that describe the low-level of scrutiny afforded to immigration laws).

190. 408 U.S. 753 (1972) (involving constitutional challenge to immigration law that prevented Marxist journalist from receiving temporary visa to speak at various American universities).

191. *Mandel*, 408 U.S. at 769-70; *cf.* United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted) (noting that under mid-tier scrutiny the Court must determine whether the justification is "genuine, not hypothesized or invented post hoc").

192. *See Wauchope*, 985 F.2d at 1410-11 (justifying grant of third-party standing to alien-daughter on behalf of her deceased American mother).

193. *See supra* Part II.A.2.

power of [the] Court to control?"[194]

For example, in *Ablang v. Reno*,[195] a 1995 challenge to an immigration statute evincing sex-based discrimination, the Ninth Circuit distinguished *Wauchope* on two grounds: (1) in *Ablang* no citizen was party to the action even though the citizen-father was alive;[196] and (2) unlike dual nationality in *Wauchope*, the unreliability of paternity testing of illegitimate children was a facially legitimate reason for gender classifications.[197] The court did recognize that technological advances might have largely remedied Congress' concern with paternity testing,[198] and that other reasons for the statutory distinction might have been based on "overbroad and outdated stereotype[s] concerning the relationship of unwed fathers and their illegitimate children . . . ."[199] Instead of evaluating these arguments, however, the court, using the same language found in the *Miller v. Christopher* opinion one year later, simply noted that such arguments "should be addressed to the Congress rather than the courts,"[200] and held the statute was constitutional.[201]

The fact that a citizen was not joined in either *Ablang* or *Miller v. Christopher* did not change the court's stated "legitimate bona fide" scrutiny test. The absence of a citizen in these suits, however, did seem to affect the application of the test. In *Wauchope*, the Ninth Circuit concluded that it was irrational to deny citizenship to the legitimate children of one sex, but not to the other sex, based on the history of the dual citizenship theory.[202] In contrast, in *Ablang* and *Miller*

194. Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring). Justice Frankfurter explained Congress' unrestrained power in this area over aliens, and remarked that even if immigration laws were "cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism," the Court had no authority to intervene. *See id.*

195. 52 F.3d 801 (9th Cir. 1995).

196. *See id.* at 805 n.4.

197. *See id.* at 805; *see also id.* at 806 (noting that Congress' desire to promote early ties to this country was also a rational reason to distinguish between illegitimate children of American mothers and American fathers).

198. *See id.* at 805-06 (acknowledging "increasing use and reliability of blood and genetic testing to establish paternity").

199. *See id.* at 805 (quoting Fiallo v. Bell, 430 U.S. 787, 799 n.9 (1977)).

200. *See* Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996), *aff'd on other grounds sub nom.* Miller v. Albright, 118 S. Ct. 1428 (1998) (quoting *Fiallo*, 430 U.S. at 799 n.9).

The Ninth Circuit in *Ablang* also quoted *Weinberger v. Wiesenfeld*, 420 U.S 636, 648 n.16 (1975), noting that courts "need not in equal protection cases accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation." *Ablang*, 52 F.3d at 805. However, the *Ablang* court seemed to "accept at face value" the government's rationale, unlike the *Wauchope* court just two years earlier.

201. *See Ablang*, 52 F.3d at 806.

202. *See* Wauchope v. United States Dep't of State, 985 F.2d 1407, 1414-16 (9th Cir. 1993) (citing Lester Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 104 (1934)) (finding that Congress could not avoid dual nationality by only granting citizenship to the legitimate foreign-born children of American fathers because most countries now have some form of gender neu-

v. Christopher, where no citizens were joined, both courts refused to research the government's rationale.[203] The courts declined to even evaluate the advancements made in paternity testing technology during the intervening years between the *Fiallo* decision in 1977, and the *Ablang* and *Miller v. Christopher* decisions in 1995 and 1996, respectively.[204]

D. *When the Rights of Citizens and Aliens Are Inextricably Bound, the Citizen Versus Alien Distinction Should Not Excuse Discrimination*

1. *Arguments for uniformly applying mid-tier scrutiny*

In *Wauchope*, the court found that the interests of an American parent and his or her foreign-born child "coincide[d]," and were "equally as intense."[205] Yet, when the citizen was not technically joined through a "self-imposed"[206] procedural doctrine such as third-party standing, the substantive constitutional analysis in the lower court decisions appears to be different.[207]

If the citizen-father in *Miller v. Albright*, or even *Ablang v. Reno*, had been deceased, and the Court accordingly had granted the plaintiffs in these cases third-party standing, perhaps the challenged laws in these cases would have been struck down. The courts seemingly have allowed a procedural technicality to overshadow the substantive con-

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tral policy of *jus soli*, whereby there could be just as many children of American fathers with dual nationality as children of American mothers). *But see* Rogers v. Bellei, 401 U.S. 815, 832 (1971) (finding dual nationality is an appropriate concern of Congress because it fosters divided loyalty in a child). The *Bellei* Court noted that "[t]hese problems are particularly acute when it is the father who is the child's alien parent" and his family lives abroad. *See id.*

203. *See Miller*, 96 F.3d at 1472 ("[E]ven if... the requirements of section 1409(a) were 'based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children,' the Supreme Court specifically noted that 'this argument should be addressed to the Congress rather than the courts.'"); *Ablang*, 52 F.3d at 805.

> Appellants insist that the statutory distinction is based on an overbroad and outdated stereotype... and that existing administrative procedures, which had been developed to deal with the problems of proving paternity... could easily handle the problems of proof involved in determining the paternity of an illegitimate child. We simply note that this argument should be addressed to the Congress.

Fiallo, 430 U.S. at 799 n.9.

204. *See* Miller v. Christopher, 96 F.3d 1467, 1474-75 (1996) (Wald, J., concurring) (arguing that as early as 1983 Congress had recognized that paternity testing was reliable).

205. *Wauchope*, 985 F.2d at 1411 ("[T]he plaintiffs have suffered a concrete injury.... [m]oreover, their interests coincide with those of their mothers and are equally as intense.").

206. *See Standing to Assert Constitutional Jus Tertii*, *supra* note 156, at 425 (noting third-party standing is not a constitutional doctrine).

207. *See id.* at 431. The author of this Note criticized the Court for only allowing *jus tertii* standing in cases where a third party could not possibly assert his or her own rights. *See id.* The Court, the author explained, thus ignored "a large category of cases in which third parties can fully exercise their constitutional rights only through relationships with the class of persons to which the *jus tertii* claimant belongs." *Id.*

stitutional issue of equality between the sexes.[208]

Additionally, there is an implied "injury to [all] American citizens of the same . . . [sex] who are stigmatized by the classification."[209] In other words, legislation that discriminates against the natural fathers of illegitimate children because "[a] mother is far less likely to ignore the child she has carried in her womb . . . [and] even if conscious [of child's birth], [the father] is very often totally unconcerned because of the absence of any ties to the mother,"[210] is degrading not only to fathers of illegitimate foreign-born children seeking immigration privileges, but also to fathers of American children born out of wedlock. Regardless whether a citizen-parent is joined in these cases, the alien should be able to receive the level of judicial scrutiny afforded to citizens in the non-immigration context.

2. *War babies and irresponsibility*

Most petitioners who challenged the constitutionality of immigration statutes making is so difficult for the illegitimate children of

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208. In *Miller v. Albright*, Justice O'Connor, joined by Justice Kennedy, held that the plaintiff had not demonstrated that her citizen-father "confronted a 'genuine obstacle' to the assertion of his own rights" that rose to the level necessary to justify third-party standing. *See Miller v. Albright*, 118 S. Ct. 1428, 1443-44 (1998) (O'Connor, J., concurring). Accordingly, Justice O'Connor reasoned that plaintiff could not assert the gender-based equal protection challenge on behalf of her father. *See id.* at 1445. Therefore, Justice O'Connor reviewed the citizenship statute under a mere rational basis analysis, noting that the government "has no obligation to produce evidence to sustain the rationality of a statutory classification," particularly "when the classification is adopted with reference to immigration, an area where Congress frequently must base its decisions on generalizations about groups of people." *Id.* at 1446. It should be noted that O'Connor logically delineated why third-party standing was an essential consideration in determining the level of scrutiny applied, whereas the lower courts described above did not make such an analysis. Justice O'Connor admitted, however, that if the citizen-father had been a party to the action, she would have reviewed the statute using heightened scrutiny, and consequently found the statute unconstitutional. *See id.* at 1445 ("I do not share Justice Stevens' assessment that the provision [in section 1409] withstands heightened scrutiny."). Therefore, if Justices O'Connor and Kennedy had granted Penero third-party standing on behalf of her citizen-father, the plaintiff would have won her case by a five to four majority. *See id.* at 1456 (Breyer, J., dissenting, joined by Justices Souter and Ginsburg) (arguing that third-party standing was appropriate in this case because plaintiff had satisfied the criteria set forth in *Campbell v. Louisiana*, 118 S. Ct. 1419, 1428 (1998) and *Ohio v. Powers*, 499 U.S. 400, 411 (1991)). Specifically, Justice Breyer explained that plaintiff had suffered an injury in fact: She had a close relationship with her father, and her father had faced a "hindrance" that prevented him from asserting his own rights. *See Miller*, 118 S.Ct. at 1456. This hindrance occurred because plaintiff's father was wrongfully dismissed from the original district court action in Texas, and the case subsequently was transferred to the District Court for the District of Columbia. According to Justice Breyer, "appeals take time and money; the transfer of venue left the plaintiffs uncertain about where to appeal; the case was being heard with Lorelyn as plaintiff in any event; and the resulting comparison of costs and benefits (viewed prospectively) likely would have discouraged" the father's further participation. *Id.*

209. Rosberg, *supra* note 4, at 327. Although Rosberg referred to classifications by race and national origin, his argument is equally applicable to gender-based classifications.

210. *Miller*, 118 S. Ct. at 1434 (internal citations omitted) (citing Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996)).

American citizen-fathers to immigrate to the United States were children of American male soldiers stationed overseas.[211] In 1982, Congress recognized a special immigration category for Amerasian[212] children of United States citizen-soldiers born in Korea, Vietnam, Laos, Kampuchea, or Thailand between 1950 and 1982.[213] Congress passed the Amerasian Immigration Act in recognition of the unconscionable economic and social discrimination these illegitimate, often homeless, children experienced in their native countries because of their American face, as well as America's moral responsibility to its "sons and daughters."[214] The Act affords special permanent immigration visas, not citizenship, to illegitimate Amerasian children and makes it easier than under section 309 for these children to prove paternity.[215]

This Comment does not argue that the relaxed standards of paternity testing for Amerasian children should apply to all children born out of wedlock abroad, or even all "war babies" born in countries that

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211. *See Miller*, 96 F.3d at 1468 (father stationed in Philippines in the late 1960s); Ablang v. Reno, 52 F.3d 801, 802 (9th Cir. 1995) (father stationed in Philippines during World War II); LeBrun v. Thornburgh, 777 F. Supp. 1204, 1205 (D.N.J. 1991) (father stationed in France during World War II); Y.T. v. Bell, 478 F. Supp. 828, 829 (W.D. Pa. 1979) (father stationed in Japan during and following World War II).

212. Amerasians are "half-Asian, half-American children fathered by Americans while serving our country in Asia"). *See* 128 CONG. REC. 27, 271 (1982) (statement of Rep. Mazzoli).

213. *See* 8 U.S.C. § 1154(f) (1994). "The Attorney General may approve a petition for an alien under paragraph (1) if—(A) he has reason to believe that the alien (i) was born in Korea, Vietnam, Laos, Kampuchea, or Thailand . . ., and (ii) was fathered by a United States citizen." *Id.* § 1154(f)(2). At least one commentator has argued that the statute should be extended to cover children born in the Philippines. *See* Joseph M. Ahern, Comment, *Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Amerasians*, 1 PAC. RIM L. & POL'Y J. 105 (1992) (arguing the INA should be amended to include Filipino-Amerasians, because they also are discriminated against because of their Caucasian appearance).

214. *See* 128 CONG. REC. 27,270 (1982) (statement of Rep. Mazzoli) (stating the Amerasian Act "recognizes a moral responsibility that we have to these children who have been fathered by Americans aboard"); 127 CONG. REC. 1327-28 (daily ed. Jan. 29, 1981) (statement of Rep. McKinney) (arguing for the passage of the Amerasian Act to benefit our "Warrior's Children"). "Warrior's Children" is the title of an article written by David Devoss. *See* David DeVoss, "Warrior's Children," MONTHLY GEO., Nov. 1980, at 70-80 (1980) (describing the plight of Amerasian children of American soldiers living in Korea). DeVoss recounted in his article the statement of one such Amerasian child:

> In America I wouldn't have any problems, explains Paul (Kwang Gyun) Shin, a sepia-toned Amerasian who affects the swagger of the South Philadelphia dude he imagines his father to have been. 'I could stop fighting and wouldn't have to hear the word *twigi* [wild seed] every day. I love my mother, but I want my inheritance. If I have my father's face, I should be able to live in my father's country.

Id. at 74.

215. For example, the Amerasian Act does not place an 18 year-old age limit on establishing paternity. *See* 8 U.S.C. § 1154(f) (1994). Moreover, rather than establishing "clear and convincing" evidence of one's father's paternity as required by § 1401(a)(1), Amerasians only need to give the Attorney General "reason to believe" that an American is their father. *See id.* § 1154(f)(2)(A). Under the "reason to believe standard," a simple letter from a citizen-father acknowledging the child as his own would be sufficient proof of paternity. *See* 8 C.F.R. § 204.2(g) (1996).

do not discriminate against persons of mixed ethnicity.[216] For the purposes of this Comment, the Amerasian Act is described simply to point out Congress' recognition of America's collective responsibility to provide alien children born out of wedlock to American soldiers the opportunity to live in the United States.[217] Yet, by making tough standards for illegitimate children of American fathers (primarily soldiers) to immigrate, Congress, with approval from the courts,[218] condones the very irresponsibility it sought to remedy with the passage of the Amerasian statutes.[219] As a policy matter, therefore, there is no reason to subject immigration laws, classifying "one-half American"[220] children based on the sex of their American parent, to a lower level of scrutiny than similar laws in a non-immigration context evincing sex-based discrimination.

III. APPLYING MID-TIER SCRUTINY TO SECTION 309 OF THE IMMIGRATION AND NATIONALITY ACT

As discussed above, under a traditional mid-tier scrutiny equal protection analysis used to analyze gender-based legislation, the government or state has the burden of showing that the challenged statute serves an important governmental objective and that the gender-based classification is substantially related to that objective.[221] Laws

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216. The arguments for and against extending the benefits of the Amerasian Act to other countries are outside the scope of this Comment.

217. *See* 128 CONG. REC. 25,340 (1982) (statement of Sen. Hayakawa) ("[W]e as a nation have a responsibility to help these children. Whatever we do right or wrong, we are a nation with a conscience. We chose to participate militarily in Asia and we now have a moral responsibility to assist the human beings that are products of our involvement . . . .").

218. *See* Miller v. Albright, 118 S. Ct. 1428, 1439 (1998). The Court stated that the fact that 24,000 military personnel, mostly men, were stationed in the Philippines in 1970,

> coupled with the interval between conception and birth and the fact that military personnel regularly return to the United States when a tour of duty ends, suggest that Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about or be known by, their children.

Id.; *see also* Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996), *aff'd on other grounds sub nom. Miller*, 118 S. Ct. 1428 (noting the sex-based distinction in § 1409 "seems especially warranted where, as here, the applicant for citizenship was fathered by a U.S. serviceman while serving a tour of duty overseas"). *But see Miller*, 118 S. Ct. 1428, 1462-63 (Breyer, J., dissenting) (noting that section 309's purpose was probably not to remedy the "war baby" problem because the provision was originally adopted in the Nationality Act of 1940, before the United States even entered World War II).

219. *See supra* note 217; *see also* LeBrun v. Thornburgh, 777 F. Supp. 1204, 1206 (D.N.J. 1991) (noting that immigration statutes that discriminate against children born out of wedlock to American servicemen are "subject to the personal vagaries and consciences of their fathers . . . . [A father] could defeat his child's claim to citizenship merely by delaying the recognition of his responsibility").

220. *See* 128 CONG. REC. 25,340 (1980) (statement of Sen. Levin) (referring to Amerasian children born of an American father and Asian mother as "one-half American").

221. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (describing mid-tier scrutiny test).

that disadvantage men based on their sex are subject to the same level of scrutiny as those that discriminate against women.[222]

According to the D.C. Circuit, the objectives of the INA at issue in *Miller v. Christopher* included: (1) avoiding lurking problems with paternity testing;[223] (2) recognizing the inherently closer ties that exist between natural mothers and their foreign children born out of wedlock than exist between natural fathers and their foreign children born out of wedlock;[224] and (3) fostering early ties to this country.[225]

A. *Lurking Problems with Paternity Testing*

As part of the 1984 Child Support Enforcement Amendments,[226] Congress required states to abolish all laws requiring a statute of limitation on proof of paternity in order to continue to receive federal funds.[227] Congress determined that such statutes of limitation were no longer necessary to safeguard a man against "a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty" because genetic paternity testing has become so reliable.[228] Although the Supreme Court had commented that "lurking problems" with paternity testing may no longer be a rational government interest in the domestic

222. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) (ordering an all female public nursing school to admit men on an equal basis as women); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (invalidating a law that gave more favorable Social Security benefits to widows than widowers).

223. *See Miller*, 96 F.3d at 1472.

224. *See id.*; *see also* Parham v. Hughes, 441 U.S. 347, 355 (1979) (commenting that "mothers and fathers of illegitimate children are not similarly situated").

225. *See Miller*, 96 F.3d at 1472. In *Miller*, Justice Stevens essentially adopted the aforementioned purposes cited by the lower court. *See* Miller v. Albright, 118 S. Ct. 1428, 1438-39 (1998). He also suggested that section 309 was designed to reward, through the granting of citizenship, an unmarried female's choice to give birth to her child rather than have an abortion. *See id.* at 1437. Justice Stevens noted that unlike an unmarried mother, an unmarried father:

> 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).

Id.; *cf.* United States v. Virginia, 518 U.S. 515, 533 (1996) (noting that under mid-tier scrutiny justifications for a statute must be "genuine, not hypothesized or invented post hoc"). It is unlikely that abortion was a consideration of Congress in passing the 1952 INA, and Justice Stevens cites no support for his assumption.

226. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. § 1305 (1994)).

227. *See id.*; *Miller*, 96 F.3d at 1474-75 (Wald, J., concurring) (noting that amendments resulted from increased reliability of genetic testing as a method of establishing paternity).

228. *See* H.R. REP. NO. 98-527, at 38 (1983), *cited in Miller*, 96 F.3d at 1474-75 (Wald, J., concurring). *See generally* Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 B.Y.U. L. REV. 129 (1994) (describing the reliability of several scientifically accepted means of establishing parentage including various forms of blood testing and DNA testing).

context,[229] two Justices of the Court recently decided that in the context of immigration (involving international considerations) these lurking problems were not only a rational interest, but may even be an "important" interest.[230] On the other hand, three Justices of the *Miller* Court disagreed with Justice Stevens' analysis that the unreliability of paternity testing was an "exceedingly persuasive" justification for treating parents differently based on sex.[231]

B. *Establishing Close Ties Between Parent and Child, and Early Ties to This Country*

On numerous occasions, the Supreme Court has noted that neither the Federal Government nor the states may use stereotypes or "overbroad generalizations" about men and women to justify a gender-based classification.[232] The D.C. Circuit, however, claimed that a mother of a child born out of wedlock was more likely to have close ties to her child, while a putative father might be "totally unconcerned" with the child's welfare.[233] Not only is this based on stereotypical notions about parental suitability,[234] but it contradicts the

229. *See* Trimble v. Gordon, 430 U.S. 762, 772 (1977) (concluding that problems with paternity testing cannot be "made into an impenetrable barrier that works to shield otherwise invidious discrimination").

230. *See Miller*, 118 S. Ct. 1428, 1438-39.

231. *See id.* at 1462 (Breyer, J., dissenting, joined by Justices Souter and Ginsburg) (citing E. Donald Shapiro, et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 29 (1992) (noting that DNA testing provides inexpensive and reliable paternity determinations).

232. *See* United States v. Virginia, 518 U.S. 515, 541-42 (1996) (emphasizing that the government may not offer "judgments about people that are likely to . . . perpetuate historical patterns of discrimination" in order to sustain its burden under mid-tier scrutiny (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994))); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982) (stating gender-based scrutiny must be applied "free of fixed notions concerning the roles and abilities of males and females").

233. *See Miller*, 96 F.3d at 1472 (recognizing that a father may not even know of his child's existence).

234. *See id.* at 1475-76 (Wald, J., concurring).

In oral arguments before the Court in *Miller v. Albright*, Justice Breyer reasoned:

> First let's think of the noncaretaker parents who are both citizens. They're in the United States, the baby's over in the Philippines . . . why is there any reason in the world to believe that a noncaretaker father has less of a personal tie than a noncaretaker mother who's abandoned the child? . . . Let's imagine now that both citizens are caretakers, and what reason in the world is there to think that a caretaker mother has more of a connection with the child than a caretaker father, who after all is trying to bring up the child by himself? . . . [I]t seems to me this distinction is irrational, or close to it.

United States Sup. Ct. Official Tr., Miller v. Albright, No. 96-1060, 1997 WL 699809, at *40-41 (Nov. 4, 1997). Justice Breyer essentially restated this argument in his dissenting opinion in *Miller*. *See Miller*, 118 S. Ct. at 1461 (concluding that the gender-based classifications in § 1409(a) "depend for their validity upon the generalization that mothers are significantly more likely than fathers to care for their children").

premise behind *Stanley v. Illinois*,[235] in which the Supreme Court struck down an Illinois statute that contained an irrebuttable presumption in custody proceedings that unwed fathers who had lived with their children were unfit parents.[236]

Additionally, the courts in both *Miller v. Christopher* and *Ablang v. Reno* agreed that "a desire to promote early ties to this country and to those relatives who are citizens of this country is not an irrational basis for the [additional] requirements" for illegitimate children of American fathers.[237] While Congress may have believed that establishing early ties to this country before a child born out of wedlock reaches eighteen was an important governmental objective, it seems counter-intuitive that this goal could be reached by not requiring an alien child of an American mother born out of wedlock to establish his or her American citizenship before reaching eighteen as well. Thus the goal of early ties is not "substantially related" to the sex-based classification of the statute.

Under traditional mid-tier scrutiny, therefore, the gender-based classification of section 309 should be found unconstitutional.[238] Fraudulent claims involving paternity testing are no longer important government interests. Moreover, the alleged closer ties between a mother and her illegitimate child than between a father and his illegitimate child are premised on the same stereotypes that the Court has rejected in the past, and thus also cannot be important governmental interests. Finally, requiring an illegitimate alien child of an American father to satisfy the criteria of section 309 and apply for citizenship by the time he or she reaches eighteen, but not imposing similar constraints on illegitimate alien children of American mothers is not substantially related to the alleged important government interest of promoting early ties among all illegitimate children to this country.

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235. 405 U.S. 645, 649 (1972) (considering an equal protection challenge to Illinois statute that presumes unwed fathers are not fit for parenthood).

236. *See id.* at 656-58 (holding that even if it is true that many unwed fathers are "unsuitable and neglectful parents," that does not warrant a blanket exclusion denying all unwed fathers the opportunity to raise their children); Susan Beth Jacobs, Note and Comment, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 868 (1997) (noting that maternal preferences in custody battles have been abolished in most states in favor of awarding custody to the parent that the court finds meets the best interests of the child).

237. *See Miller*, 96 F.3d at 1472; Ablang v. Reno, 52 F.3d 801, 806 (9th. Cir. 1995).

238. This conclusion is consistent with the Supreme Court majority in *Miller v. Albright*. *See supra*, note 37 (noting that five of the nine justices in *Miller* believed that if heightened scrutiny was applied to INA § 309 the statute would be unconstitutional).

IV. REMEDY

A. *A Remedy Based on the Least-Restrictive-Means Analysis in* United States v. Virginia

It is impossible to ignore the physical differences between mothers and fathers involved in Congress' determination that fathers of illegitimate children must meet some additional criteria to transmit their citizenship to their foreign-born children.[239] Some fathers, particularly those of "war babies" do not even know they have children.[240] On the other hand, for mothers who give birth and invariably are listed on the child's birth certificate, such problems rarely exist.[241] It does not follow, however, that because mothers and fathers cannot be treated exactly equal because of these physical differences, that the statute cannot be designed to create more "equal results" so that American fathers and their illegitimate foreign children are not unnecessarily punished.[242] A discovery rule, as discussed below, provides a "least-restrictive means" of accommodating fathers and their illegitimate foreign-born off-spring,[243] similar to the Court's remedy in *United States v. Virginia*.[244]

B. *Model Legislation—Implementing A Discovery Rule*

The heightened requirements for illegitimate children of American fathers to become American citizens do not need to be abolished completely. Rather, the statute can "accommodate" for the physical differences between men and women by continuing to require clear

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239. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (noting that "[p]hysical differences between men and women . . . are enduring . . . . [they are] cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity"); Parham v. Hughes, 441 U.S. 347, 355 (1979) (recognizing mothers and fathers of illegitimate children are not necessarily similarly situated because the identity of natural father is often unknown).

240. *See Miller* at 1438 (noting public records such as hospital records and birth certificates often do not contain the name of an illegitimate child's father); *id.* at 1472 (stating that the sex-based distinction between mothers and putative fathers is "especially warranted" in cases where the father is a serviceman on an overseas tour of duty).

241. *See id.* at 1438; *Parham*, 441 U.S. at 355 n.7 (quoting Lalli v. Lalli, 439 U.S. 259, 268-69 (1978)).

242. *See* Kovacic-Fleischer, *supra* note 106, at 854-56. Professor Kovacic-Fleischer describes two basic types of gender equality theories. Under the equal treatment model, laws simply must treat all women and men equally irrespective of any differences between the sexes. *See id.* at 852. Alternatively, under the equal result theory, "governmental policies must recognize and accommodate inherent differences between the sexes" because "equal treatment in the face of these differences produces unequal results." *Id.* at 854.

243. *See Miller*, 118 S. Ct. at 1463 (Breyer, J., dissenting) (suggesting without explanation that Congress could simply replace section 1409(a)(4) with a "knowledge-of-birth" requirement).

244. *See supra* Part II.D.2 (outlining least-restrictive-means remedy).

and convincing proof of paternity through blood or DNA testing,[245] and replacing the statute of limitations currently set at eighteen years old with a discovery rule that begins operating after the child reaches eighteen.

For example, many states, including the District of Columbia, employ a discovery rule for exposure to toxic substances.[246] Instead of the statute of limitations running from the moment of exposure to a toxic substance (of which victims are often unaware), the statute of limitations is tolled until after a disease is discovered.[247] Similarly, unmarried fathers, sometimes unaware of the birth of their children, and illegitimate children born abroad, sometimes unaware of the identity of their natural fathers, deserve this same allowance.[248] The discovery rule does not necessarily foreclose Congress' alleged desire "to promote early ties to this country . . . ."[249] After the child is eighteen and discovers the location of his or her father, Congress could establish a reasonable length of time for completing necessary paternity requirements and applying for citizenship.

CONCLUSION

The line of cases that has emerged since *Fiallo v. Bell*, subjecting gender-based discrimination to a facially legitimate scrutiny test, has created an unsettling discrepancy between what we say and what we do in this country.[250] Recently, the Supreme Court, although purportedly not applying the *Fiallo* test, could not reach any consensus about how sex-based immigration or "citizenship" laws should be analyzed. Therefore, the Court lost the opportunity to rectify the gender-based discrimination in section 309 of the Immigration and Nationality Act, and overturn the *Fiallo* precedent. Regardless of whether one is a mere "person" or a citizen of the United States challenging a sex-based immigration law, and regardless of whether a law

245. *See* 8 U.S.C. § 1409(a)(1) (1994) (stating "a blood relationship between the person and the father is established by clear and convincing evidence").

246. *See* D.C. CODE ANN. § 12-311(a)(2) (1981) (stating the statute of limitations for injury related to asbestos exposure must commence within a year of the time the victim knew or should have known of his disability). *See, e.g.*, PA. STAT. ANN. tit. 77, § 1415 (West 1992); CAL. CIV. PROC. CODE § 340.2(a)(2) (West 1982 & Supp. 1998).

247. *See* D.C. CODE ANN. § 12-311(a)(2) (1981).

248. *See* Ablang v. Reno, 52 F.3d 801, 806 (9th Cir. 1995) (finding that requiring an illegitimate child born abroad to establish the paternity of her American father before she reached 18 was a "heavy burden").

249. *See* Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996), *aff'd on other grounds sub nom.*, Miller v. Albright, 118 S. Ct. 1428 (1998) (citing *Ablang*, 52 F.3d at 806).

250. *See* H.R. REP. NO. 82-1365, at 1751 (statement of Rep. Celler) (arguing the ethnic and racial discrimination in the 1952 Immigration and Nationality Act "points out the gap between what we say and what we do").

is technically a citizenship law or an immigration law, the Court should apply heightened scrutiny to laws that classify persons based on gender. Accordingly, under mid-tier scrutiny section 309 is unconstitutional. Following the Court's model in *United States v. Virginia,* a discovery rule added to section 309 of the Immigration and Nationality Act would accommodate for the physical differences between men and women, without harboring outdated stereotypes about their respective roles in society.