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Constitutional Law - Immigration Law: Determination of Paternity for Illegitimate Children, Constitutional Issue or Biological Fact

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CONSTITUTIONAL LAW—IMMIGRATION LAW: DETERMINATION OF PATERNITY FOR ILLEGITIMATE CHILDREN, CONSTITUTIONAL ISSUE OR BIOLOGICAL FACT?

Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001)

I. FACTS

Petitioner, Tuan Ahn Nguyen (Nguyen), was born in Saigon, Vietnam, on September 11, 1969, to co-petitioner, Joseph Boulais (Boulais), a United States citizen, and Hung Thi Nguyen, a Vietnamese citizen.[1] Boulais and Nguyen's mother were never married.[2] Boulais was born in the United States, but after his discharge from the United States Army, he relocated to Vietnam and worked for a military contractor.[3] Not long after Nguyen's mother and Boulais ended their relationship, Nguyen's mother abandoned him.[4] Nguyen then moved in with the family of Boulais' new Vietnamese girlfriend.[5] In June of 1975, Nguyen, then almost six years old, came to the United States under the Indo-China Migration and Refugee Assistance Act.[6] He was considered a legal, permanent U.S. resident and was raised in the State of Texas by Boulais.[7]

On August 28, 1992, Nguyen, age twenty-two, pleaded guilty in a Texas state court to two counts of felony sexual assault on a child.[8] He was

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1. Brief for Petitioners at 4, Nguyen v. Immigration & Naturalization Serv., 208 F.3d 528 (5th Cir. 2000) (No. 99-2071).

2. *Id.*

3. *Id.* at 7-8.

4. Nguyen v. Immigration & Naturalization Serv. (INS), 208 F.3d 528, 530 (5th Cir. 2000).

5. Nguyen v. INS, 533 U.S. 53, 57 (2001).

6. Petitioner's Brief at 4-5, *Nguyen* (No. 99-2071). The Indo-China Migration and Refugee Assistance Act of 1975 applied to any alien who was a native or citizen of Vietnam, Laos, or Cambodia. *See* 8 U.S.C. § 1255 (2000) (stating the Act was humanitarian in nature, developing special criteria for eligibility allowing a larger number of Indo-Chinese refugees to qualify for admission into the United States). This Act was enacted in response to the large amount of displaced Indo-Chinese people during the Vietnam War, as well as the civil unrest within their respective countries. *Id.* It allowed the adjustment of an alien's status to a permanent resident of the United States. *Id.*

7. Petitioner's Brief at 5, *Nguyen* (No. 99-2071).

8. *Nguyen*, 208 F.3d at 530.

sentenced to eight years in prison on each count.[9] While confined in a Huntsville, Texas, prison, a United States Immigration and Naturalization Service (INS) agent interviewed him.[10] Nguyen told the agent how he had arrived in the United States and that he was a Vietnamese citizen.[11] The INS agent submitted his report and on April 4, 1995, the INS began deportation proceedings against Nguyen.[12] The INS determined that Nguyen was an alien[13] convicted of two crimes of moral turpitude[14] and an aggravated felony, thus deportable under 8 U.S.C. § 1227(a)(2)(A).[15] In later proceedings, Nguyen would attempt to alter his position, claiming United States citizenry.[16] However, at his deportation hearing, Nguyen again testified that he was a Vietnamese citizen.[17] Based on Nguyen's testimony, the immigration judge ruled Nguyen was an alien and, thus, deportable.[18]

Nguyen appealed his order of deportation to the Appeals Court of the Board of Immigration.[19] In 1998, while twenty-eight-year-old Nguyen

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9. *Id.* Nguyen completed these sentences while his case was on appeal and was held by the Immigration and Naturalization Service (INS) pending the Supreme Court's decision. *Report and Analysis of Immigration and Nationality Law*, 24 INTERPRETER RELEASES 1021 (2001).

10. *Nguyen*, 208 F.3d at 530.

11. *Id.*

12. *Id.*

13. Alien is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2000).

14. "Moral Turpitude . . . refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *In re* Short, 20 I. & N. Dec. 136, 139 (1989); *see also* BLACK'S LAW DICTIONARY 1026 (7th ed. 1999).

15. *Nguyen*, 208 F.3d at 530-31; *see also* Immigration & Nationality Act of 1952, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1227 (2000)). Section 1227(a)(2)(A) states:

> (i) Crimes of moral turpitude. Any alien who . . . is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) 8 USC § 1255(j)) after the date of admission, and . . . is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.
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> (ii) Multiple criminal convictions. Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.
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> (iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.

Id.

16. Nguyen v. INS, 533 U.S. 53, 53, 57 (2001).

17. *Id.* at 57. Neither the court opinions nor the court briefs indicated why Nguyen told the INS agent that he was a Vietnamese citizen, because he had not resided there since he was five years old. *Id.*

18. *Id.*

19. *Id.*

awaited his appeal, Boulais arranged for DNA testing and obtained a paternity order in a Texas civil court.[20] The Board dismissed Nguyen's appeal because Boulais had not met the requirements as a citizen father for a child born out of wedlock to a non-citizen mother overseas, as defined in 8 U.S.C. § 1409(a) of the Immigration and Nationality Act.[21]

Section 1409(a) states that the paternity of a child must be established by "clear and convincing evidence" prior to the child's eighteenth birthday.[22] There are three ways to prove paternity under § 1409(a).[23] One, at the time of the child's birth, the father must be a United States citizen, who has agreed in writing to provide financial support until his child turns eighteen.[24] Two, the father may establish paternity of a child who is under the age of eighteen and is residing with the father.[25] Three, the father can also acknowledge, under oath, the child's paternity, or paternity can be established by adjudication of a competent court.[26]

Nguyen and Boulais appealed the dismissal to the Fifth Circuit Court of Appeals, arguing that § 1409's different requirements[27] for unmarried citizen fathers whose children are born abroad violated their rights under the equal protection guarantees of the Fifth Amendment.[28] The court in *Nguyen* rejected the constitutional challenge to § 1409(a).[29] The court used the reasoning from the plurality opinion in *Miller v. Albright*,[30] in which three years earlier the Supreme Court had upheld the constitutionality of § 1409.[31] The Fifth Circuit held that § 1409 is constitutional,[32] meeting the heightened scrutiny standard set forth in the landmark case, *United States v.*

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20. *Id.*

21. *Id.*; *see also* Immigration and Nationality Act of 1952, 66 Stat. 163, (codified as amended in scattered sections of 8 and 42 U.S.C.).

22. 8 U.S.C. §1409(a) (2000). Clear and convincing evidence is defined as "evidence indicating that the thing to be proved is highly probable or reasonably certain" BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

23. 8 U.S.C. § 1409(a).

24. *Id.*

25. *Id.*

26. 8 U.S.C. § 1409(a)(4).

27. Under § 1409(c), a child born outside the United States of an unmarried woman, acquired at birth the nationality of his or her mother, as long the mother had been physically present in the United States or its possessions for a continuous period of one year. 8 U.S.C. § 1409(c).

28. Nguyen v. INS, 208 F.3d 528, 530 (5th Cir. 2000); *see also* U.S. CONST. amend. V. "No person shall be. . .deprived of life, liberty, or property, without due process of law." *Id.*

29. *Nguyen*, 208 F.3d at 535-36.

30. 523 U.S. 420 (1998).

31. *Miller*, 523 U.S. at 424.

32. *Nguyen*, 208 F.3d at 535-36 (citing *Miller*, 523 U.S. at 436-38 (1998)).

Virginia.[33] The Fifth Circuit stated that because Boulais did not meet INS guidelines for establishing Nguyen's paternity prior to his eighteenth birthday, Nguyen did not meet the criteria for citizenship.[34] The Fifth Circuit granted the INS's motion to dismiss the appeal.[35]

Boulais and Nguyen appealed to the United States Supreme Court, and on September 26, 2000, it granted their petition for writ of certiorari.[36] Writing for the majority, Justice Kennedy stated certiorari was granted to resolve the questions left unanswered in *Miller v. Albright*.[37] Nguyen challenged Congress's ability to make a statutory distinction between unwed fathers and mothers, while maintaining their rights to equal protection, guaranteed under the Fifth Amendment's Due Process Clause.[38]

In a five-four decision, the Court *held* that § 1409 was constitutional.[39] The Court in *Nguyen v. INS*[40] found that gender distinction is not forbidden under the principle of equal protection and Congress can utilize these distinctions when granting citizenship to illegitimate children born abroad, upholding the constitutionality of §1409.[41] Justice Kennedy stated, "[t]he difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender."[42]

II. LEGAL BACKGROUND

In order to better understand the implications of the *Nguyen* decision, it is important to first to explore the roots of immigration and gender discrimination and their impact on modern Supreme Court decisions.[43]

A. HISTORICAL OVERVIEW OF IMMIGRATION AND NATURALIZATION LAW

The United States Constitution gives Congress the power "[t]o establish an Uniform Rule of Naturalization . . . throughout the United

33. 518 U.S. 515 (1996).
34. *Nguyen*, 208 F.3d at 535-36.
35. *Id.* at 536.
36. Nguyen v. INS, 530 U.S. 1305 (2000).
37. Nguyen v. INS, 533 U.S. 53, 56 (2001).
38. *Id*.at 73.
39. *Id.* at 58-59.
40. 533 U.S. 53 (2001).
41. *Nguyen*, 533 U.S. at 73.
42. *Id.*
43. *See infra* Part II.A-B

States."[44] The Constitution further empowers Congress under the Necessary and Proper Clause "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[45]

The Supreme Court has upheld this sovereign power to regulate naturalization throughout the history of the United States, giving substantial deference to Congress and offering some guidance on naturalization issues.[46] The questions of determining which people are citizens of the United States and how those people obtain the right to remain in this country have not been easily resolved by Congress and the courts.

The Fourteenth Amendment of the Constitution states, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[47] The first laws that Congress enacted to control naturalization were used to prevent certain classes of aliens from residing in the United States.[48]

The Alien and Sedition Acts of 1798 were passed by Congress to forbid French immigrants from entering the country, fearing their radical political ideas would corrupt the country.[49] Although these acts were short in duration, this marked the turn of the twentieth century, which produced similar exclusionary laws, most of which were affirmed by the Supreme Court.[50] These naturalization laws excluded the Chinese,[51] Native Americans,[52] African Americans,[53] as well as many other Asian and

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44. U.S. CONST. art. I, § 8, cl. 4.

45. U.S. CONST. art. I, § 8, cl. 18.

46. *See e.g.*, McCulloch v. Maryland, 17 U.S. (1 Wheat) 316, 413-14 (1819) (holding that the necessary and proper clause is defined as "the means necessary to an end . . . [that employs] any means calculated to produce the end"); *see also* INS v. Chada, 462 U.S. 919, 940-41 (1983) (stating the plenary power of naturalization is extensive as long as Congress possesses "substantive legislative jurisdiction, [and] so long as the exercise of that authority does not offend some other constitutional restriction" (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976))).

47. U.S. CONST. amend. XIV, §1.

48. Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution & Undocumented Aliens in the 1990s,* 30 CASE W. RES. J. INT'L L. 58, 79-95 (1998).

49. *Id.* at 80.

50. *Id.* at 86-93 (citing Fong Yue Ting v. United States, 149 U.S. 698, 703-17 (1893)).

51. The Chinese Exclusion Case, 130 U.S. 581, 609-11 (1889). The Supreme Court held that Congress had the inherent power to exclude any alien it saw fit, even if it meant excluding an entire class of skilled or unskilled Chinese persons from citizenship. *Id.*

52. Elk v. Wilkins, 112 U.S. 94, 108-10 (1884). John Elk, a Native American who had denounced his tribal relationships and submitted himself to the jurisdiction of the United States, was not allowed to vote by Wilkins, a registrar. *Id.* The Supreme Court stated:

> an Indian cannot make himself a citizen of the United States without the consent and cooperation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good

European immigrants from obtaining citizenship.[54] Two years after the adoption of the Fourteenth Amendment, Congress finally permitted the conveying of citizenship on any person born within the United States, not just those who were born white and free.[55]

The leading case of this "New Citizenship" under the Fourteenth Amendment was *United States v. Wong Kim Ark*.[56] The Court held that a child of any race or nationality born in this country was a citizen.[57] This applied whether or not the child's parents had become citizens of the United States, as long as the parents had a permanent residence in the United States and were conducting business in the United States.[58] The Court affirmed that birth and naturalization were the only avenues of obtaining citizenship.[59] More importantly, once a person was a citizen, the only way that citizenship could be lost was by expatriation of the citizen, not by any act of Congress.[60]

In the early 1900s, Congress did not readily ease its restrictions on immigration and naturalization, leading to increased judicial involvement.[61] However, the Court's rulings in *Oceanic Steam Navigation Co. v. Stranahan*[62] and *United States v. Ginsberg*[63] continued to demonstrate that congressional power over immigration was all-encompassing.[64] The Court in *Ginsberg* reaffirmed that no alien had the slightest right to citizenship,

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reason why he should be made a citizen of the United States, but does not of itself make him one.

Id. at 109.

53. Dred Scott v. Sandford, 60 U.S. (1 How.) 393, 411-13 (1856). The Court stated "[i]t is obvious that [African American slaves] were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union." *Id.* at 411-12.

54. Curran, *supra* note 48, at 92-93.

55. United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898).

56. 169 U.S. 649 (1898).

57. *Wong Kim Ark*, 169 U.S. at 703-04.

58. *Id.* at 705.

59. *Id.* at 704.

60. Expatriation is a voluntary act of abandoning one's country and allegiance to it and becoming the citizen of another country. BLACK'S LAW DICTIONARY 598 (7th ed. 1999). The Court held expatriation was a "natural and inherent right" of all people. *Wong Kim Ark*, 169 U.S. at 704.

61. *Wong Kim Ark*, 169 U.S. at 704.

62. 214 U.S. 320 (1909).

63. 243 U.S. 472 (1917).

64. *See* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339-42 (1909) (deciding that Congress's plenary power to regulate alien admissions also allows it to create regulations and impose penalties on ship captains who fail to inspect their passengers for contagious diseases); *see also* United States v. Ginsberg, 243 U.S. 472, 474 (1917) (examining whether a certificate of citizenship can be revoked or cancelled on the grounds it was illegal because the resident was not qualified to become a citizen).

via naturalization, unless all statutory conditions and requirements were met.[65] These rulings established that the courts do not have the authority to sanction changes or modifications of the statutes, but must enforce the legislature's will, because enforcement is critical to maintaining public welfare.[66] This "hands off" approach was reverberated in *Harisiades v. Shaughnessy*,[67] in which the Supreme Court upheld the deportation of legal resident aliens because of their membership in the Communist Party.[68] Justice Frankfurter stated in his concurrence:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.[69]

Historically, it was the plenary power of Congress to regulate immigration that had been primarily challenged.[70] However, in the development of modern immigration law, it was not the plenary power aspect, but rather the means that Congress chose to implement that power that had been challenged.[71] The Court has held that the exercise of this congressional authority to restrict immigration into this country must not override any other constitutional right of its citizens.[72] Violations often involve an encroachment on the citizen's rights under the Fifth Amendment's Due Process Clause.[73] The Due Process Clause provides, in part, that no person shall "be deprived of life, liberty, or property, without due process of law."[74] It is these continuous conflicts between citizens' constitutional rights and strong governmental interests in controlling immigration into this country that provide the basis for modern immigration law.

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65. *Ginsberg*, 243 U.S. at 475.

66. *Id.* at 474.

67. 342 U.S. 580 (1952).

68. *Harisiades*, 342 U.S. at 584-85 (holding that naturalization conveys all the citizenship's rights and privileges, the government only assumes a "honest assumption of undivided allegiance to our Government").

69. *Id.* at 596-97 (Frankfurter, J., concurring).

70. INS v. Chada, 462 U.S. 919, 940 (1983).

71. *Id.* at 940-41.

72. *Id.* at 941.

73. U.S. CONST. amend. V.

74. *Id.*

B. DEVELOPMENT OF MODERN IMMIGRATION AND NATURALIZATION LAW (1952 TO 2001)

In 1952, Congress enacted the Immigration and Nationality Act.[75] This Act was a comprehensive series of laws detailing who is a citizen and, subsequently, who is not and thus subject to deportation.[76] Congress asserted in 8 U.S.C. § 1401 that citizenship is only available through these provisions.[77] Citizenship can be bestowed on those persons born abroad of citizen parents if at least one of them resided in the United States prior to the child's birth.[78] A person born abroad can also obtain citizenship if one parent is a U.S. citizen and the other is a U.S. national[79] who had been physically present in the United States within the past year.[80] The third and final way to obtain citizenship is when a child is born abroad to one citizen parent and one alien parent, and the citizen parent had been physically living in the United States for a total period not less than five years, with the periods of honorable military service included in this requirement.[81] This method was utilized in Nguyen's case.[82]

1. Immigration Requirements for Unwed Parents

The Immigration and Nationality Act created additional requirements for unmarried fathers of children born abroad under 8 U.S.C. § 1409.[83] The

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75. Immigration & Nationality Act of 1952, 66 Stat. 163 (codified as amended in scattered sections of 8 and 42 U.S.C.).

76. *Id.*

77. 8 U.S.C. § 1401 (2000).

78. *Id.* § 1401(c).

79. A national of the United States is "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2000).

80. *Id.* § 1401(d).

81. *Id.* § 1401(g). Congress seemed especially concerned with the relationship between an illegitimate child and the natural mother, and it chose not to give that same preferential treatment to the father. *See* S. REP. NO. 1057, at 4 (1957).

82. Petitioners' Brief at 7-8, *Nguyen*, (No. 99-2071).

83. 8. U.S.C. § 1409 (2000). Section 1409 states:

> (a) The provisions . . . shall apply as of the date of the birth to a person born out of wedlock if—
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> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
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> (2) the father had the nationality of the United States at the time of the person's birth,
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> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years–
>
> (A) the person is legitimized under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or

Act established a distinction between citizens who are married and unmarried, and also between the genders of citizen parents.[84] To convey United States citizenship to a child born abroad, an unmarried citizen father must establish paternity in writing or by genetic testing or court order, as well as pledge his support for the child until he or she reaches the age of majority.[85] This must all be completed prior to his child being granted citizenship.[86]

This is in stark contrast to an unmarried mother whose child is born abroad.[87] That child acquires at birth the nationality of his mother.[88] If the mother is a United States citizen, the sole requirement for the child's United States citizenship is that the mother must have previously been "physically present in the United States or one of its outlying possessions" for a period of 365 consecutive days.[89]

The Immigration and Nationality Act's requirement of paternal acknowledgement and support was not a concept unique to children born abroad.[90] Congress's underlying policy on immigration promotes self-sufficiency for aliens.[91] Self-sufficiency was defined as an alien not relying on the federal government to meet the alien's basic needs, but utilizing his or her own capabilities as well as receiving help from private organizations and the alien's own family.[92]

2. *Immigration Requirements for Support and Paternity*

A good example of support requirements is the immigration sponsorship program.[93] Under 8 U.S.C. § 1154, a United States citizen or employer

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(C) the paternity of the person is established by adjudication of a competent court.

. . .

(c) Not withstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Id.

84. *Id.* § 1409(a).
85. *Id.* Under immigration law, the age of majority is eighteen years old. *Id.*
86. *Id.* § 1409(a)-(c).
87. *Id.* § 1409(c).
88. *Id.*
89. *Id.*
90. *Id.*
91. 8 U.S.C. §1601(1) & (2) (2000).
92. *Id.*
93. *Id.* § 1154(a)(1)(A) (2000).

can petition the U.S. Attorney General that an alien is entitled, by reason of his or her relationship, to entry into the United States.[94] Under this program, no affidavit of support can be accepted unless the sponsor can maintain the alien's annual income in America at 125% of the poverty line.[95] This support is legally enforceable against the sponsor, with the potential for the sponsor being held responsible for the alien's welfare until the alien becomes a naturalized citizen.[96] Also scattered throughout the United States Code is the requirement of paternity testing.[97] Under the Food Stamp Program, an administering state agency, prior to the distribution of federal dollars, must establish paternity of a child for the purposes of obtaining support.[98] Failure or refusal to do so by the applicant, without good cause, would disqualify the child from eligibility.[99] There is not a determination of maternity by virtue of testing "absent" mothers under this statute.[100]

3. *Evolution of Modern Gender and Parental Rights*

These distinctions between gender and parental rights have also evolved in the jurisprudence of the Supreme Court over the last fifty years, allowing more individualization of parental rights and responsibilities.[101] *Fiallo v. Bell*[102] first dealt with discrimination based on gender and illegitimacy and its infringement upon due process rights of citizens and their families.[103] The Court found part of the original Immigration and Nationality Act unconstitutional because it exempted illegitimate children and their fathers from receiving the preferences awarded to legitimate

94. *Id.* § 1154. Some examples of the types of relationship that qualify are marriage or intent to marry; sponsorship by siblings, grandparents, or legal guardians; and sponsorship by employers, such as a professional hockey team sponsoring a professional athlete. *Id.*

95. 8 U.S.C. § 1183a(a)(1)(A) (2000). The poverty line is the "level of income equal to the official poverty line . . . that is applicable to a family of the size involved" which is revised annually by the Department of Health and Human Services. 8 U.S.C. § 1183a(h). The 2001 federal poverty guidelines are $8,590 a year (gross income) for a single person and $17,650 for a family of four. 2001 Federal Poverty Guidelines for the Forty-eight Contiguous States and the District of Columbia, 66 Fed. Reg. 10,695, 10,695 (Feb. 16, 2001).

96. 8 U.S.C. § 1183a.

97. 7 U.S.C. § 2015 (2000).

98. *Id.*

99. *Id.*

100. *Id.*

101. *See infra* Part II.B.3-4.

102. 430 U.S. 787 (1977).

103. *Fiallo*, 430 U.S. at 794. The appellants in *Fiallo* were three sets of unmarried fathers and their illegitimate children who challenged the constitutionality of 8 U.S.C. § 1401(b)(1) & (2) (2000). *Fiallo*, 430 U.S. at 790-91.

children of both citizens and resident aliens.[104] In *Caban v. Mohammed*,[105] the Court held that unwed mothers and fathers both have the right to block the adoption of their child.[106] *Caban* overturned a New York statute[107] because it made an arbitrary distinction, disadvantaging a group of "good fathers" their parental rights.[108] The statute allowed the mother to terminate the father's paternal rights without his consent.[109] Justice Stewart wrote in his dissent, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[110]

Justice Stewart's realization that the now unencumbered right of unmarried fathers to block adoptions could cause problems, came to fruition just four years later, when the Court decided *Lehr v. Robertson*.[111] The Court tailored the *Lehr* decision more narrowly than *Caban*, holding that when a parent never establishes any kind of personal or financial relationship with the child, the Equal Protection Clause does not preclude the state from creating separate rights for the absent parent.[112] Justice Stewart, now speaking for the majority, wrote:

> the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life.'"[113]

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104. *Id.* at 799-800.

105. 441 U.S. 380 (1979).

106. *Caban*, 441 U.S. at 394. Mr. Caban, who had maintained a close relationship with his two children despite the termination of his relationship with his children's mother, had his paternal rights and obligations terminated by the husband of the children's mother adopting the children without his consent. *Id.* at 383-87.

107. N.Y. DOM. REL. LAW § 111(1)(d) & (e)(amended 1980) (current version McKinney 1999).

108. *Caban*, 441 U.S. at 394. The court indicated that a good father would admit his paternity and establish a substantial relationship with his child. *Id.* at 393-94.

109. *Id.; see also* N.Y. DOM. REL. LAW § 111(1)(d) & (e).

110. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

111. Lehr v. Robertson, 463 U.S. 248 (1983).

112. *Lehr*, 463 U.S. 266-68. Lehr, an unmarried father who had not supported his daughter, publicly identified himself as the father and had rarely seen her in the two years since her birth. *Id.* at 249-52. He protested his daughter's adoption because he was not given notice and a chance for a hearing. *Id.*

113. *Id.* (citing Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) (quoting Wisconsin v.Yoder, 406 U.S. 205, 231-33 (1972))).

4. *Standard of Review for Parental Discrimination*

The standard of review used in the aforementioned cases, as well as that used historically by the Supreme Court in gender discrimination cases, was intermediate scrutiny.[114] Established in 1976 by *Craig v. Boren*,[115] the "intermediate scrutiny standard" states that in order for a law to withstand a constitutional challenge, the gender classifications must "serve important governmental objectives" and must also be "substantially related to achievement of those objectives."[116]

It was not until *United States v. Virginia* that a majority of the Supreme Court heightened the standard of review for gender discrimination cases to "exceedingly persuasive justification."[117] The majority in *Virginia* emphasized that qualified persons may not be excluded based on "fixed notions concerning the roles and abilities of males and females."[118] It was this use of the heightened standard that fueled an intense debate among the Justices in *Miller v. Albright*.[119]

5. *Miller v. Albright*

Lorelyn Miller challenged the constitutionality of §1409 because it did not limit the time a mother had to prove her child was a citizen.[120] Miller claimed this violated her Fifth Amendment Due Process rights because her father only had until she reached the age of eighteen to establish paternity.[121] The majority found that her argument of paternal discrimination in immigration law ignored the differences between substantive and procedural limitations in terms of the differences found between men's and

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114. *See infra* Part II.B.4.

115. 429 U.S. 190 (1976).

116. *Boren*, 429 U.S. at 197; *see also* United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring). A working definition of an unconstitutional classification is those persons placed by a statute into different classes based solely on criteria wholly unrelated to the statute's objective. Reed v. Reed, 404 U.S. 71, 78 (1971).

117. *Virginia*, 518 U.S. at 534. Exceedingly persuasive justification demands, "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

118. *Id.* at 541.

119. Miller v. Albright, 523 U.S. 420, 434-35 (1998). *Miller* was a plurality opinion, with five separate opinions being written between the nine Justices. *Id.* Justice Stevens announced the judgement of the Court and delivered an opinion joined by Chief Justice Rehnquist. *Id.*

120. *Id.* at 424. Lorelyn Miller was born in the Philippines in 1970. *Id.* at 425-26. Her father, Charlie Miller, a military solider, was stationed at a base in the Philippines at the time of her conception, but he had very little contact with his daughter. *Id.* It was only after his daughter's petition for citizenship was rejected by the INS that Mr. Miller filed a petition acknowledging his paternity in a Texas court. *Id.* at 425-26.

121. *Id.* at 424.

women's roles in the childbirth process.[122] The Court stated that the woman's substantive conduct was completed at birth, whereas the father can complete his acknowledgement of paternity at anytime within the first eighteen years of the child's life.[123]

The Court also held that 8 U.S.C. § 1409 of the Immigration and Nationality Act served two important governmental interests.[124] The first important interest was the promotion of a healthy relationship between parent and child and the development of a bond while the child was still a minor.[125] Justice Stevens stated the fact that the bonds may not be fully realized does not lessen the importance of that governmental interest.[126]

The Court found that the second important interest was that an illegitimate child claiming to be an United States citizen by birth, in reality, "shares a blood relationship with an American citizen."[127] The Court held that the mother's blood relationship was readily established at the time of birth due to the usual presence of medical personnel and establishment of hospital records.[128] The testimony of the physicians and nurses present at the child's birth would address the identity of the natural mother, as well as the subsequent written documentation of that birth.[129] The Court found this proof to be sufficient to establish maternity but an unnecessary formality, due to these basic biological facts regarding the mother's role in a child's birth.[130]

The Court also stated that the use of genetic paternity testing, such as DNA, was not a relevant issue because it was not required under the statute.[131] The statute required the establishment of paternity by the "clear and convincing evidence" standard to discourage fraud.[132] The Court stated that those individuals who become citizens are more likely to develop ties with the country.[133] The Court also found that any additional steps that

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122. *Id.* at 434-35.
123. *Id.*
124. *Id.* at 435.
125. *Id.*
126. *Id.* at 439-40.
127. *Id.* at 435.
128. *Id.* at 436-37.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 437. The State Department wrote in a letter to Miller's attorney in *Miller* stating that "clear and convincing evidence" was established when the father satisfied both requirements: physical presence in the United States as a citizen and sufficient evidence of access to the mother at the probable time of conception. *Id.* at 425 n.2.
133. *Id.* at 439.

fathers needed to take to determine paternity were "well tailored" to meet those interests.[134]

The Court in *Miller v. Albright* also addressed Miller's argument that discrimination of unmarried fathers was gender stereotyping.[135] The Court held that the innate nature of paternity requires formal proof, and Congress's assumption that "fathers are less likely than mothers to have the *opportunity* to develop relationships, [not just] less likely to take advantage of that opportunity when it exists," was an accurate one.[136] The Supreme Court affirmed the court of appeal's decision and Miller's equal protection challenge was dismissed.[137]

This fractured opinion in *Miller* split the circuits, with the Ninth Circuit[138] and the Second Circuit[139] holding portions of § 1409(a) unconstitutional because the statute violated the Fifth Amendment's Due Process Clause, in direct conflict with the Supreme Court precedent in *Miller.*[140] The Fifth Circuit in *Nguyen* and the Tenth Circuit followed *Miller* and found § 1409 constitutional.[141] This split in the circuits only added more fuel to the debate of gender bias in immigration laws.[142] The Supreme Court granted certiorari in *Nguyen v. INS* to reach a majority consensus on

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134. *Id.* at 440.

135. *Id.* at 442.

136. *Id.* at 444.

137. *Id.* at 445.

138. *See* United States v. Ahumada-Aguilar, 189 F.3d 1121, 1125 (9th Cir. 1999) (holding § 1409(a)(3) & (4) unconstitutional). Ironically, the 9th Circuit had upheld the constitutionality of § 1409 the previous year in *United States v. Viramontes-Alvarado*, 149 F.3d 912, 914 (9th Cir. 1998). Circuit Judge Kleinfield in his dissent in *Ahumada-Aguilar* stated "we considered the matter, subsequent to *Miller*, in *Viramontes-Alvarado* . . . [and] under *Miller*, the statute was not unconstitutional. Yet today, we hold that it is. This is a surprising approach to precedent." *Ahumada-Aguilar*, 189 F.3d at 1127 (Kleinfield, J., dissenting).

139. *See* Lake v. Reno, 226 F.3d 141, 143 (2d Cir. 2000) (holding that § 1409(a) was unconstitutional, violating the Fifth Amendment due process rights of Lake).

140. Miller v. Albright, 523 U.S. 420, 445 (1998). Both of the circuit cases were granted certiorari by the Supreme Court, but their rulings were held pending the outcome of *Nguyen.* United States v. Ahumada-Aguilar, 121 S. Ct. 2518 (2001); *see also* Ashcroft v. Lake, 121 S. Ct. 2518 (2001). The judgements of both cases were subsequently vacated and remanded back to their respective circuits for consideration after the *Nguyen* decision. *Ahumada-Aguilar,* 121 S. Ct. at 2518; *Lake,* 121 S. Ct. at 2518.

141. Nguyen v. INS., 208 F.3d 528, 535-36 (5th Cir. 2000); *see also* Terrell v. INS, 157 F.3d 803, 809 (10th Cir. 1998).

142. *See generally* Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1 SUP. CT. REV. (1998); *see also* Debra L. Satinoff, Comment, *Sex-based Discrimination in U.S. Immigration Law: The High Court's Lost Opportunity to Bridge the Gap Between What We Say and What We Do,* 47 AM. U. L. REV. 1353 (1998).

this issue and solve any remaining questions left unanswered by the *Miller* decision.[143]

III. ANALYSIS

Justice Kennedy delivered the Court's opinion, which Chief Justice Rehnquist, and Justices Stevens, Scalia, and Thomas joined.[144] In a five-to four-decision, the Supreme Court upheld the constitutionality of 8 U.S.C. § 1409 of the Immigration and Nationality Act and the gender distinction used by the INS in granting citizenship to children born abroad to unmarried parents.[145] Justice Scalia, joined by Justice Thomas, wrote a short concurrence stating that the Court did not have the power to grant the relief of citizenship requested by the plaintiff because that power was exclusively left to Congress.[146] Justice O'Connor dissented and was joined by Justices Souter, Ginsberg, and Breyer.[147] Justice O'Connor stated that the majority failed to use the *United States v. Virginia* standard of heightened scrutiny for sex-based classifications.[148] She stated the governmental interests met by the statute's classification failed to satisfy the "exceedingly persuasive justification" standard, and she would find the statute unconstitutional.[149]

A. THE MAJORITY OPINION

Justice Kennedy began the opinion by directly discussing the heart of the petitioners' claim, the requirements and constitutionality of § 1409(a).[150] He first closely examined the statutory requirements in situations when the child's father is a citizen and the mother is an alien, the circumstance of Nguyen's case.[151] Justice Kennedy found that because Boulais had not established paternity of Nguyen before he turned eighteen, Nguyen did not meet the necessary requirements of clause four of § 1409(a)

143. Nguyen v. INS, 533 U.S. 53, 56 (2001). The Supreme Court chose to hear the *Nguyen* case, because unlike in *Miller* and the three other lower court decisions, Nguyen's father, Boulais was also a party to the case, which eliminated the standing issue. *Id.* This made *Nguyen* the best possible scenario to reach a solid resolution to this constitutional issue of gender disparity in immigration law. *Id.* at 58.; *see also* Miller v. Albright, 523 U.S. 420, 445 (1998).

144. *Nguyen*, 533 U.S. at 57.

145. *Id.* at 58-59; *see also* 8 U.S.C. § 1409 (2000).

146. *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring).

147. *Id.* at 74 (O'Connor, J., dissenting).

148. *Id.*; *see also* United States v. Virginia, 518 U.S. 515, 555-56 (1996).

149. *Nguyen*, 533 U.S. at 95-97.

150. *Id.* at 58; *see also* 8 U.S.C. § 1409(2).

151. *Nguyen*, 533 U.S. at 59-60.

and that the failure to meet all the conditions made Nguyen ineligible for citizenship.[152]

Justice Kennedy then evaluated the constitutionality of § 1409 by utilizing the "heightened" scrutiny standard from *United States v. Virginia* for suspect gender classifications.[153] Section 1409(a) must serve "important governmental objectives" and the discriminatory means must be "substantially related to the achievement of those objectives." [154] Justice Kennedy concluded that the heightened scrutiny standard was satisfied because § 1409 implicates Congress's Immigration and Naturalization plenary power.[155] Justice Kennedy stated that normally a statute of this type would be subjected to a more deferential standard, but regardless of the level of scrutiny, § 1409 would pass because of the important governmental interests involved in immigration regulation.[156]

Justice Kennedy remarked that citizen mothers can choose where their children are born because they have the means to do so, but unmarried fathers generally cannot control this.[157] He also noted that even though the unmarried citizen father will have to fulfill some requirements before a child born overseas can become a citizen, the statute does not impose any limitations on when the child of an American citizen can establish citizenship.[158] This assertion of citizenship by a child is identical in the statute for both genders, regardless of age.[159] These conditions were reasonably imposed on fathers, because fathers have eighteen years to comply.[160] Justice Kennedy stated that the relevant distinction at issue was the legitimization of a child by his or her father, via a declaration of paternity.[161] This legitimization was "justified by two important government objectives."[162]

The first governmental interest examined by the majority was the importance of ensuring that an actual biological relationship exists between the citizen parent and child.[163] The mother's relationship is verified at the child's birth, by virtue of hospital records or other witnesses who can testify

152. *Id.* at 60.
153. *Id.* (citing *Virginia*, 518 U.S. at 533).
154. *Id.* (quoting *Virginia*, 518 U.S. at 533).
155. *Id.* at 61 (citing Miller v. Albright, 523 U.S. 420, 434 n.11 (1998)).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 61-62.
160. *Id.* at 62.
161. *Id.*
162. *Id.*
163. *Id.*

that the citizen mother gave birth to the child.[164] An unmarried citizen father, on the other hand, does not need to be present at birth.[165] The father's presence also does not ensure his absolute paternity of that child.[166] The father's claims of paternity must be determined by some other measure under § 1409, primarily medical or legal in nature.[167] Justice Kennedy stated that Congress does not require deoxyribonucleic acid (DNA) testing,[168] but it made available three options of legitimization: DNA testing, an oath of paternity, or a court order of paternity.[169] These options were found inherently reasonable by the Court.[170] Justice Kennedy stated that a "hollow and neutral" law imposing the same requirements on citizen mothers would not remedy an unlawful gender distinction.[171] Justice Kennedy declared that gender distinctions requiring the establishment of paternity, but not maternity, take into account real biological differences between men and women and the unique role of women in terms of childbirth.[172]

The second governmental interest furthered by § 1409 was the assurance that the citizen parent and his child have some "demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of real everyday ties that provide a connection between child and citizen parent."[173] A mother knows of the child's existence at birth and has an opportunity to develop a real and meaningful relationship.[174] Inevitably, this opportunity does not always exist for an unwed father, due to the nine-month time period between conception and birth.[175] Justice Kennedy discussed the ease of foreign travel today by civilian Americans travelling alone.[176] Justice Kennedy stated that the principles of equal protection do not impose on

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 63.

168. Genetic paternity testing is done in laboratories that typically use blood samples or cells scraped from inside the cheeks of the potential father, child, and natural mother. Miller v. Albright, 523 U.S. 420, 438 n.13 (1998).

169. Nguyen v. INS, 533 U.S. 53, 63 (2001).

170. *Id.*

171. *Id.* at 64.

172. *Id.*

173. *Id.* at 64-65 (citing Miller v. Albright, 523 U.S. 420, 438-40 (1998)).

174. *Id.* at 65.

175. *Id.*

176. *Id.* at 66 (citing U.S. DEPT. OF COMMERCE, 1999 PROFILE OF U.S. TRAVELERS TO OVERSEAS DESTINATIONS 1 (2000)). The report stated that in 1999, Americans made over 25 million trips abroad, spending an average of 15.1 nights out of the country. *Id.* This does not include the almost 34 million visits by Americans to Canada and Mexico. *Id.*

Congress the need to ignore the facts that children are born of short-term relationships and the fathers may not know the children exist.[177]

Section 1409 ensured the opportunity for the development of emotional ties between foreign-born children and their fathers, which is critically important to creating an initial point of contact equal to that of mother and child at birth.[178] Justice Kennedy stated that Congress was "well within its authority" to make this limitation before "[committing] this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process." [179]

Having found the governmental interests were important, Justice Kennedy then looked at whether the means used to further that objective were substantially related to that end.[180] Justice Kennedy looked again at § 1409 and the requirement that granting of citizenship occurs before the child reaches his or her eighteenth birthday.[181] The majority compared this to other immigration statutes concerning the children of married and naturalized citizens and found that the age limit of eighteen was consistent throughout immigration law.[182]

Justice Kennedy also addressed Nguyen's claim that knowledge of a child's birth does not guarantee the establishment of a parental bond, thus the idea that men are less willing to develop a relationship with their children must be considered a stereotype.[183] The majority stated that the actual proof of whether a relationship was substantial, would be subjective and Congress used a more reliable, objective standard to ensure at least the opportunity to develop that relationship.[184] Justice Kennedy stated that just because the opportunity for a father and child to develop a bond does not realize a positive relationship every time, that does not mean it fails under

177. *Id.*

178. *Id.* at 66-67.

179. *Id.* at 67.

180. *Id.* at 68.

181. *Id.* at 65-69.

182. *Id.* at 69; *see also* 8 U.S.C. § 1431 (2000) (stating that a child, who is born abroad of a citizen and non-citizen parent, will become a citizen if, prior to the child's eighteen birthday, the non-citizen parent becomes a naturalized citizen of the United States and the child resides in the United States); *see* 8 U.S.C. § 1432 (2000) (stating that a child born of two non-citizen parents abroad will become a citizen if both of the child's parents become naturalized citizens of the United States and the child resides with his parents in the United States prior to his or her eighteenth birthday).

183. *See Nguyen*, 533 U.S. at 69 (discussing the stereotype that unmarried fathers are less qualified than mothers to make decisions regarding their children's welfare); *see also* Caban v. Mohammed, 441 U.S. 380, 394 (1979)

184. *Nguyen*, 533 U.S. at 69.

an equal protection challenge.[185] The obligations put on a citizen father are minimal under § 1409, with no "inordinate or unnecessary hurdles," because the father has eighteen years to accomplish them.[186]

In addition, Justice Kennedy noted that under modern immigration law, this statute was not the only way for Nguyen to become a citizen.[187] Under 8 U.S.C. § 1423 and § 1427, an adult or child that did not qualify under these guidelines, but who has substantial ties to the United States, may apply to be a citizen in his or her own right.[188] However, due to § 1427's "good moral character" requirement, Nguyen would be barred because of the seriousness of his criminal offenses.[189]

The last issue the Court examined was the remedy sought by Nguyen and Boulais, the granting of citizenship.[190] Justice Kennedy stated that even if the Court had found the statute in part or in its entirety unconstitutional, it could not grant the petitioners' request for citizenship.[191] Article I, Section 8 of the Constitution grants Congress the exclusive power of conveying citizenship.[192] Justice Kennedy saw the intent of Congress to be very clear when enacting the Immigration and Nationality Act, stating that this Act was the "sole procedure" of naturalization.[193]

In conclusion, the Court held that failing to acknowledge the most basic biological differences between men and women would risk watering down the concept of equal protection.[194] The main concern of Justice Kennedy was that a mechanical classification of gender differences might obscure those distinctions that are truly prejudicial or misconceptual in nature.[195] The majority found differences of men and women in the bearing

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185. *Id.*

186. *Id.*

187. *Id.* at 71.

188. *Id.*; *see also* 8 U.S.C. §§ 1423, 1427 (2000).

189. 8 U.S.C. § 1427(a). "Good moral character" is defined under the Immigration and Nationality Act as a person who is not a: (1) habitual drunkard, (2) person convicted of a crime of moral turpitude or controlled substance crime, (3) gambler whose income is derived primarily from illegal gambling activities, (4) gambler who has committed more than gambling offenses, (5) person who has given false testimony to obtain the benefits of this Act, (6) person who has been incarcerated for an aggregate period of 180 days or more regardless of the offense, or (7) person who has been convicted of an aggravated felony. 8 U.S.C. § 1101(f) (2000); *see also* Nguyen v. INS, 208 F.3d 528, 530 (5th Cir. 2000).

190. Nguyen v. INS, 533 U.S. 53, 71 (2001).

191. *Id.* at 72. The Supreme Court's inability to provide a remedy in this case was the only premise of Justice Scalia's brief concurrence. *Id.* at 74 (Scalia, J. concurring). Justice Scalia stated that citizenship was only to be determined by Congress. *Id.*

192. *Id.* at 72; *see also* U.S. CONST. art. I, § 8, cl. 4.

193. *Nguyen,* 533 U.S. at 72; *see also* 8 U.S.C. §1421 (2000).

194. *Nguyen,* 533 U.S. at 73.

195. *Id.*

of children to be real.[196] Gender distinctions are not forbidden under equal protection and did not hinder Congress in addressing the problem of granting citizenship to children born abroad of unwed parents.[197]

B. JUSTICE O'CONNOR'S DISSENT

Justice O'Connor began her dissent by discussing the development and components of the heightened scrutiny standard as applied to gender-based classifications.[198] Justice O'Connor stated that statutes based on sex, even if they accurately depict the way that the majority of men and women behave, deny individuals opportunities when viewed in isolation.[199] Justice O'Connor argued that our nation has a history of stereotyping and generalizing based solely on sex, which "reflect and reinforce 'fixed notions concerning the roles and abilities of males and females.'"[200] It is because of this past history that the government must show an "exceedingly persuasive justification" for any statute that uses gender classifications.[201] The government had the complete burden of showing that the classification "serves an important governmental objective" and that the means employed to promote those objectives "are substantially related to the achievement of those objectives."[202]

Justice O'Connor also stated that the government's justification for a gender-based classification must be important and genuine in nature, not created exclusively for use in its defense.[203] Overbroad generalizations which rely on the differing "talents, capacities, or preferences of males and females" are not permitted, even if they have supporting empirical data.[204] In looking at this type of case, the Court must look beyond the government justification to the gender classification itself and determine its actual stated purpose, not just accept a rationalization for actions based on different grounds.[205] Justice O'Connor stated that the integral variable was a

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196. *Id.*

197. *Id.*

198. *Id.* at 74 (O'Connor, J., dissenting).

199. *Id.*

200. *Id.* (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

201. *Id.* at 74-75.

202. *Id.* at 60-61 (quoting *Hogan*, 458 U.S. at 724). Under rational basis scrutiny, the plaintiff has the burden of proving the statute is unconstitutional. *Id.* at 75. The state does not have to provide any evidence that the statute has any rational relation to the classification. *Id.*

203. *Id.*

204. *Id.* at 76; *see also* United States v. Virginia, 518 U.S. 515, 533 (1996).

205. Nguyen v. INS, 533 U.S. 53, 76-77 (2001) (O'Connor, J., dissenting); *see also Virginia*, 518 U.S. at 535-36.

required connection between the stated means and the ends served.[206] The statute deemed discriminatory must be "'substantially' related to an actual and important government interest."[207]

Justice O'Connor then challenged the majority's claim that the heightened scrutiny standard was followed, because she stated that the standard used deviated from heightened scrutiny's original principles.[208] The first deviation was that the majority failed to elaborate on its first governmental interest, insuring that a biological connection between the parent and child exists.[209] The majority did not identify the importance of that interest, nor did it demonstrate that this was the intent of Congress.[210] Justice O'Connor identified the major defect in the first governmental interest as being that the "discriminatory means" did not fit the "asserted end."[211]

Justice O'Connor stated that the existence and certainty of the DNA testing option has eliminated the need for not only court-ordered legitimization, but also for the age limit of eighteen.[212] She looked specifically at § 1409(a)(4),[213] in which there is no requirement of paternity testing, only court adjudication or a written declaration of paternity.[214] She found it was difficult to visualize how that clause furthered an important government interest in the determination of paternity.[215]

Justice O'Connor stated that the best way to eliminate these gender classifications was to move towards gender-neutral alternatives, which do not trigger heightened scrutiny.[216] Justice O'Connor stated that requiring both unwed parents to provide proof of parentage would better serve the

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206. *Nguyen*, 533 U.S. at 77.
207. *Id.*
208. *Id.* at 78-79.
209. *Id.* at 79.
210. *Id.*
211. *Id.*
212. *Id.* at 80.
213. 8. U.S.C. § 1409(a)(4) (2000). Section 1409(a)(4) states:
(a) The provisions . . . shall apply as of the date of the birth to a person born out of wedlock if . . .
(4) while the person is under the age of 18 years—
(A) the person is legitimated under the law of the person's residence or domicile,
(B) the father acknowledges paternity of the person in writing under oath, or
(C) the paternity of the person is established by adjudication of a competent court.
Id.
214. Nguyen v. INS, 533 U.S. 53, 80 (2001) (O'Connor, J., dissenting).
215. *Id.* at 80-81.
216. *Id.* at 83. Justice O'Connor stated that the appropriate gender-neutral alternative would be requiring both parents to prove their parenthood within a specific time period of the child's birth, such as thirty days or by the child's eighteenth birthday. *Id.* at 81.

government's asserted end of having children with identified parents, whether by legal documentation or DNA testing.[217]

Justice O'Connor then looked at the majority opinion's second important government interest, the demonstrated opportunity to develop a parent-child relationship.[218] She did not find this second interest to be sufficient under heightened scrutiny, because it focused just on the opportunity to develop a relationship, rather than requiring an actual developed relationship.[219] She stated that this watered down the "weight of the interest."[220] Justice O'Connor focused on the age limitation of the statute, finding that a determination of paternity before age eighteen did not further the interests of Boulais and Nguyen because they had been living together since Nguyen was six.[221] Because of the age limitation and Boulais' failure to abide by this statute, Nguyen is now eligible for deportation even though he has lived in the United States since childhood.[222]

Justice O'Connor stated that this situation in *Nguyen* would be eliminated under a gender-neutral classification, giving fathers and mothers the same opportunity, requiring only "that the parent be present at birth or have knowledge of birth."[223] The requirement of an affirmative act by the father and not the mother is inconsistent with equal protection under the law.[224] Justice O'Connor stated that the majority failed to show that the gender classification has a "close and substantial bearing" on the actual result, depending on the facts of the case which must be proved by the government.[225] The majority's holding that formal proof of a relationship would be subjective and difficult to prove was rejected by Justice O'Connor.[226] She concluded that administrative difficulties in carrying out the statutory terms have never been a sufficient justification for allowing a gender-based discrimination to stand.[227]

According to Justice O'Connor, the history of this Act showed that it was discriminatory in nature because it mandates that the child take the nationality of the unwed mother and frees the father of any responsibility,

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217. *Id.* at 83.
218. *Id.* at 83-84.
219. *Id.* at 84.
220. *Id.*
221. *Id.* at 85; *see also* Petitioner's Brief at 8, *Nguyen* (No. 99-2071).
222. Nguyen v. INS, 533 U.S. 53, 85 (2001).
223. *Id.* at 86.
224. *Id.*
225. *Id.* at 84.
226. *Id.* at 88.
227. *Id.*

unless he performs an affirmative act to establish paternity.[228] Justice Kennedy concluded that the affirmative act required of fathers was minimal and does not create an "inordinate and unnecessary hurdle."[229] However, Justice O'Connor stated that a facially discriminatory law is not redeemed just because the barrier created by the statute was not insurmountable.[230] She did concede that the "failure to recognize relevant differences [between the genders] is out of line with the command of equal protection," but she continued to assert that only those sex-based differences that survive heightened scrutiny should be allowed.[231]

The last two issues addressed by Justice O'Connor were determining a remedy for the plaintiff and congressional deference toward immigration issues.[232] The existence of the severability clause[233] in the Act indicates that one clause can be found unconstitutional without harming the Act as a whole.[234] Another potential court action would be an extension,[235] which would void the injury of future parties not involved in this specific case.[236] Extension would then allow Congress to revise the statute ensuring the gender classification complies with the Constitution.[237]

Lastly, Justice O'Connor distinguished the long-standing Court deference to congressional power over immigration, stating that this "case is not about the admission of aliens, but . . . whether an individual is a citizen in the first place."[238] Justice O'Connor stated that because the Act governed the granting of citizenship at birth, the deference of Congress did not apply, only the ordinary standards under equal protection review.[239]

In conclusion, Justice O'Connor looked to the long line of gender discrimination cases, which had applied heightened scrutiny to determine if

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228. *Id.* at 89-91.

229. *Id.* at 93.

230. *Id.* at 94 (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

231. *Id.*

232. *Id.*

233. A severability clause is defined as "[a] provision that keeps the remaining provisions of a . . . statute in force if any portion of that . . . statute is judicially declared void or unconstitutional." BLACK'S LAW DICTIONARY 1378 (7th ed. 1999).

234. Nguyen v. INS, 533 U.S. 53, 95 (2001); The Immigration and Nationality Act provides that "if any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." Immigration and Nationality Act of 1952, § 406, 66 Stat. 166, 281.

235. Extension is defined as "[a] period of additional time to take an action, make a decision." BLACK'S LAW DICTIONARY, 604 (7th ed. 1999).

236. Nguyen v. INS, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting).

237. *Id.*

238. *Id.*

239. *Id.* at 97.

a constitutional violation has occurred.[240] Justice O'Connor stated that this case was in error and considered it a deviation from those sex-based classification cases and thus respectfully dissented.[241]

IV. IMPACT

Immigration law has long been the subject of intense scrutiny, and the plurality's decision in *Miller* "fanned the flames" that the *Nguyen* Court is now attempting to extinguish.[242] Immediately following the *Nguyen* decision, the Court vacated the Ninth Circuit decision in *United States v. Ahumada-Aguilar*[243] and the Second Circuit decision in *Ashcroft v. Lake*[244] and remanded them back to their respective circuits for reconsideration in light of the *Nguyen* decision.[245]

A. POST-*NGUYEN* DECISIONS

The permissibility of a gender distinction under equal protection in the *Nguyen* case has already had an impact across the nation. Since it was decided on June 11, 2001, there have been twelve other lower court decisions that have made mention of *Nguyen*.[246] In only a short time, the Court's decision has impacted a wide variety of constitutional areas.[247]

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240. *Id.* at 97.

241. *Id.*

242. *Id.* at 97; *see generally* Miller v. Albright, 523 U.S. 420 (1998).

243. 533 U.S. 913 (2001).

244. 533 U.S. 913 (2001).

245. United States v. Ahumada-Aguilar, 533 U.S. 913 (2001); Ashcroft v. Lake, 533 U.S. 913 (2001).

246. Amador v. Hartford, 21 Fed. Appx. 68, 70 (2d Cir. 2001); Barton v. Ashcroft, 171 F. Supp. 2d 86, 89-90 (D. Conn. 2001); Batista v. Ashcroft, 270 F.3d 8, 14 (1st Cir. 2001); Breyer v. Meissner, 2001 U.S. Dist. LEXIS 18705, at *28 n.8 (E.D. Pa. Nov. 16, 2001); Gerber v. Hickman, 264 F.3d 882, 891 (9th Cir. 2001); Krishman v. Massanari, 158 F. Supp. 2d 67, 73 (D.D.C. 2001); Laro v. New Hampshire, 259 F.3d 1, 14 (1st Cir. 2001); Richland Bookmart v. Nichols, 2002 U.S. App. LEXIS 879, at *15 (6th Cir. Jan. 23, 2002); Saunders v. White, 2002 U.S. Dist. LEXIS 3573, at *110-*11 (Mar. 4, 2002); Tappe v. Alliance Capital Mgmt., 177 F. Supp. 2d 176, 182-83 (S.D.N.Y. 2001); United States v. Cervantes-Nava, 281 F.3d 501, 505 (5th Cir. 2002); Webster v. Ryan, 729 N.Y.S.2d 315, 334-35 (N.Y. Fam. Ct. 2001).

247. In *Laro v. New Hampshire*, 259 F.3d 1 (2002), the court affirmed the holding in *Nguyen* that "pregnancy is one immutable characteristic that distinguishes men from women and consequently has definite real life consequences." *Laro*, 259 F.3d at 14. In *Gerber v. Hickman*, 264 F.3d 882, 891 (9th Cir. 2001), the court using *Nguyen's* basic premise on gender classifications stated that prison officials "cannot ignore the biological differences between men and women." *Gerber*, 264 F.3d at 891. The court held the warden must treat male and female inmates as equal as possible, based on the biological differences the Supreme Court held appropriate in *Nguyen*, and this will not violate their rights under equal protection. *Id.* at 890-92. *Amador v. Hartford*, *Batista v. Ashcroft*, *Krishman v. Massanari*, *Richland Bookmart v. Nichols*, *Saunders v. White*, and *Tappe v. Alliance Capital Mgmt.* will not be discussed in detail as the *Nguyen* case was only mentioned in each case as a secondary source of information on the issue of gender discrimination. *Amador*, 21 Fed Appx. at 70; *Batista*, 270 F.3d at 14; *Krishman*, 158 F. Supp. 2d

In *Barton v. Ashcroft*,[248] the District Court of Connecticut discussed *Nguyen*'s upholding of § 1409 as a parallel to the immigration statute in question, 8 U.S.C. § 1432, which gave automatic citizenship to a child born abroad when one or both of the child's parents become United States citizens.[249] The court stated that § 1432 promoted the same important governmental interests of ensuring that a biological relationship exists and of demonstrating the potential for a parent and child relationship.[250] The court found these interests to be important because not only does it give the child ties to the parent, but also to the United States.[251]

In *Breyer v. Meissner*,[252] the District Court for the Eastern District of Pennsylvania distinguished the INS's use of the *Nguyen* decision.[253] In *Breyer*, the district court found that this case was about the expatriating acts of Mr. Breyer as a German solider assigned to "Death's Head."[254] The INS argued that even if Mr. Breyer's expatriation was found to be involuntary, due to his conscription into the Nazi German Army during World War II, the court lacked the power to declare Mr. Breyer a citizen, for that was Congress's power alone.[255] The district court reasoned that in *Nguyen*, because Nguyen was found not to be a citizen at birth, due to the Court's upholding the constitutionality of gender distinction in the Immigration and Nationality Act, Nguyen's only option to obtain citizenship was through naturalization.[256] However, the government's use of the word, "expatriation," in *Breyer* infers that Mr. Breyer was a citizen at his birth by virtue of his mother's United States citizenship, thus undermining *Nguyen*'s relevance to the case.[257]

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at 73; *Nichols*, 2002 U.S. App. LEXIS 879, at *15; *Saunders*, 2002 U.S. Dist. LEXIS 3573, at *110-*111; and *Tappe*, 177 F. Supp. 2d at 183.

248. 171 F. Supp. 2d 89 (D. Conn. 2001).

249. *Barton*, 171 F. Supp. 2d at 89-90; *see also* 8 U.S.C. § 1432(a)(3) (2000) (repealed Oct. 30, 2001, 114 Stat. 1631) (current version at 8 U.S.C. § 1431 (2000)). Five days after the *Barton* decision, Congress repealed § 1432 and consolidated its requirements into § 1431 and added conditions to the automatic conveying of citizenship to children by stipulating this conveyance must occur before the age of eighteen and the child must be "residing in the United States in the legal and physical custody of the citizen parent" at the time of that conveyance. *Id.* § 1431(a)(3).

250. *Barton*, 171 F. Supp. 2d at 89-90.

251. *Id.*

252. 2001 U.S. Dist. LEXIS 18705 (E.D. Pa. Nov. 16, 2001).

253. *Breyer*, 2001 U.S. Dist. LEXIS 18705, at *28 n.8; *see also* Nguyen v. INS, 533 U.S. 53, 72 (2001).

254. *Breyer*, 2001 U.S. Dist. LEXIS 18705, at *29.

255. *Id.* at *28, n.8

256. *Id.*

257. *Id.*

Webster v. Ryan,[258] is the most expansive review of the *Nguyen* decision thus far.[259] A New York family court held that "a child has an independent constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship."[260] The court examined the *Nguyen* case, stating that the Supreme Court ignored a more "family approach."[261] The *Webster* court reasoned that *Nguyen* can be looked at as a case that allows the right of a child to establish his or her own citizenship, by virtue of the child's citizen father.[262] The court expanded on this idea stating that the Supreme Court should have allowed a "tolling provision," giving the child a reasonable amount of time to establish citizenship once he or she had reached the age of eighteen.[263] The court concluded that the law looks "much different when viewed through the constitutional eyes of a child."[264]

B. ILLEGITIMACY—UNDERLYING ISSUE OF *NGUYEN*

The issue of an illegitimate child's rights, separate of his or her citizen father, was not addressed by the Court in *Nguyen* and has not been thoroughly addressed in general terms by the Supreme Court since the 1989 plurality opinion in *Michael H. v. Gerald D.*[265] One of the first "pro-child" decisions came in 1972, in *Weber v. AETNA Casualty & Surety.*[266] The Court held in *Weber* that condemning a child on the basis of his or her birth is illogical and unjust.[267] A year later in *Gomez v. Perez*,[268] the Court struck down a state action, stating that once a judicially enforceable right, such as child support, is determined for a illegitimate child, there is no "constitutionally sufficient justification for denying such an essential right."[269]

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258. 729 N.Y.S.2d 315 (N.Y. Fam. Ct. 2001).

259. *Webster*, 729 N.Y.S.2d at 334-35.

260. *Id.* at 316.

261. *Id.* at 334. The "family approach" decides cases looking through the eyes of children. *Id.* The court must examine why a child's right to citizenship should be altered by which parent was a citizen at the child's birth. *Id.*

262. *Id.* at 334.

263. *Id.* at 334-35.

264. *Id.* at 335.

265. 491 U.S. 110 (1989).

266. 406 U.S. 164 (1972).

267. *Weber*, 406 U.S. at 175-76 (holding that denying children their parent's workmen's compensation death benefits solely because they are illegitimate violates the Equal Protection Clause of the Fourteenth Amendment).

268. 409 U.S. 535 (1973).

269. *Gomez*, 409 U.S. at 538.

Yet a little over fifteen years after *Gomez*, the plurality opinion of *Michael H. v. Gerald D* decided against the establishment of a child's right.[270] The Court upheld a California law that denied a third party the right to establish paternity of a child born to a married couple, because under the law a child is presumed to be the husband's child.[271] This was despite blood test results obtained by the mother and the natural father, showing that he was in fact the father of the child.[272] Also, the natural father had lived periodically with the mother and daughter, held the child out as his own, aided in her support, and more importantly, the daughter considered Michael H. her father.[273] This was evidenced by the daughter who, via a guardian-at-litem, also sued to uphold her equal protection rights to maintain a relationship with her natural father.[274] The Court held that she was not illegitimate, and she was entitled to maintain her relationship with her "legal" parents.[275] The Court based its opinions on California's legislative intent and determined the integrity and privacy of the family was overriding social policy and should not be disturbed.[276] The Court upheld the constitutionality of the law.[277]

The issue of illegitimacy has recently been brought into the forefront. On February 4, 2002, the Fifth Circuit Court of Appeals decided *United States v. Cervantes-Nava*,[278] which challenged § 1409(c) of the Immigration and Naturalization Act, pertaining to the issue of children born out of the country to citizen mothers.[279] Section 1409(c) stated in order for an illegitimate child to acquire citizenship at birth, the child's mother must be a citizen and be physically present for a continuous period of one year at the child's birth.[280] In contrast, a legitimate child of a citizen mother had to prove that she maintained a United States residence for ten years, with five

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270. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

271. *Id.* The only people who could rebut this presumption under California law were the mother and presumed father of the child. *Id.* at 152-53. (Brennan, J., dissenting). The law also limited these challenges to circumstances involving issues of sterility, of parents living apart, or when the husband denies paternity. *Id.*; *see also* CAL. EVID. CODE § 621(c) (West 1989).

272. *Michael H.*, 491 U.S. at 114-15.

273. *Id.*

274. *Id.* at 130-31.

275. *Id.*

276. *Id.* at 119-20.

277. *Id.*

278. 2002 U.S. App. LEXIS 1661 (Feb. 4, 2002).

279. *Cervantes-Nava*, 2002 U.S. App. LEXIS 1661 at *5-*6; *see also* 8 U.S.C. § 1409(c) (2000).

280. 8 U.S.C. § 1409(c).

of those years occurring after the child's mother attained the age of fourteen.[281]

The plaintiff claimed that § 1409(c) violated his right to equal protection, because his mother did not fulfill those requirements.[282] The Fifth Circuit examined whether the courts may sever portions of the Immigration and Naturalization Act, finding those specific portions unconstitutional.[283] This severance could be done in a manner that expanded citizenship, a question that was reserved by the *Nguyen* court, or the court could find the entire statute unconstitutional.[284] However, the court ultimately held that neither option would cure his status as an alien, which had been proven by the government beyond a reasonable doubt.[285] The court left the constitutionality of classification by illegitimacy within § 1409(c) unresolved.[286]

C. ILLEGITIMACY AND NORTH DAKOTA LAW

These types of laws are not a rarity. A similar law exists in North Dakota that states that a father is presumed to be the natural father to a child if the parents are married at the time of birth.[287] The laws of the State of North Dakota on their face appear more flexible, stating that the presumption may be overturned by another court decree establishing paternity by another man.[288] The presumption must be overturned only by clear and convincing evidence.[289] The most recent challenge to this law was in 1993, in *B.H. v. K.D*[290] when the North Dakota Supreme Court addressed a constitutional challenge of sexual discrimination by an unmar-

281. *Id.* § 1401(g) (2001).

282. *Cervantes-Nava*, 2002 U.S. App. LEXIS 1661 at *10-*12.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at *11-*12.

287. N.D. CENT. CODE § 14-17-04 (1999). Section 14-17-04 states that a man is presumed the father of a child, if the man and child's mother are married to each other when the child is born or if the child is born within 300 days after the marriage is terminated by death, annulment, divorce or legal separation. *Id.* The man is also presumed to be the father if: (1) the man acknowledges his paternity in writing with the N.D. Dept. of Health, (2) the man is put on the birth certificate as the father with his consent, (3) the man is required to pay child support under a written promise or voluntary court order, (4) man takes his child into his home while under the age of eighteen, and acknowledges he is the father, (5) man acknowledges the paternity of the child in writing to the N.D. Dept of Health and the natural mother does not dispute it, (6) genetic testing shows he is not excluded and has more than a ninety-five percent probability of parenting the child. *Id.*

288. *Id.* § 14-17-04(2).

289. Clear and convincing evidence would seem to indicate, under section 14-17-04 (1)(f), that a genetic test finding the statistical probability of paternity ninety-five percent or higher would rebut a presumption of paternity. N.D. CENT. CODE § 14-17-04 (1)(f) (1999).

290. 506 N.W.2d 368 (N.D. 1993).

ried male attempting to determine paternity of a married couple's young daughter.[291] This ruling, which denied standing to the third party male, effectively negated any opportunity to challenge this presumption of paternity by a "potential" father unless he has the genetic testing at hand.[292] The North Dakota Century Code states in section 14-17-02 that "a parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents."[293] The ruling in *B.H. v. K.D.* does appear to establish a precedent that nullifies the intent of the North Dakota statute and, more importantly, denies the opportunity of a child to determine his or her true parentage.[294] As in *Nguyen,* the issue of bias in laws due to illegitimacy seems to have yet to be resolved.[295]

V. CONCLUSION

The Court's decision in *Nguyen* stated that failing to acknowledge the most basic biological differences between men and women waters down the concept of equal protection.[296] The Court held that it was permissible for Congress to address complex issues in immigration and naturalization by using gender distinctions.[297] The Court allowed these distinctions as long as the means used to further the government's objective of determining actual paternity and creating an opportunity to establish a parent/child

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291. *B.H.*, 506 N.W.2d at 376. The plaintiff (B.H.) had originally petitioned to the district court to order the genetic testing, which was granted, and the defendants appealed to the North Dakota Supreme Court. *Id.* at 371. The mother admitted that she and the third party had been sexually active around the time of her daughter's conception. *Id.* This was prior to the mother's marriage to the presumed father. *Id.* at 370-71. The Court in examining the plaintiff's assertion of gender discrimination in the determination of paternity stated:

> The differences [between men and women] are the very foundation of the classification. Here, they are obvious. The woman carries the child through pregnancy. When born of her, the fact of motherhood is obvious. Not so the man. The proof of fatherhood or the proof of the lack thereof, must come from an external source. The entire classification within the Act is premised on this basic and obvious distinction, it is not invidious, but "realistically reflects the fact that the sexes are not similarly situated" in the circumstances. Men do not bear children and give birth to them.

Id. The court continued that to determine the existence or nonexistence of the mother would be absurd and presumptuous. *Id.* The North Dakota Supreme Court seemed to stagnate on the standing issue of a third party male against a married couple in a paternity. *Id.* The court held that the male party, who is not the "presumed father" by virtue of marriage to the mother, can not bring a challenge unless he has blood tests that prove he is the natural father. *Id.* at 375. In Justice Meschke's dissent, he found that this ruling allows the mother to "pick" who she wants to be the father, stepping all over the procedural rights of the "potential" father who is willing to be involved in his child's life. *Id.* at 384 (Meschke, J., dissenting).

292. *Id.* at 375.

293. N.D. CENT. CODE § 14-17-02 (2001).

294. *B.H.*, 506 N.W.2d at 376.

295. *Id.*

296. Nguyen v. INS, 533 U.S. 53, 73 (2001).

297. *Id.*

relationship in children born abroad of United States citizens are substantially related to that end.[298] The Court has, for now, put to rest the issue of paternity determination of an illegitimate child born overseas by upholding the constitutionality of § 1409 and resolving the split in the circuits.[299] However, it is the underlying issue of continued discrimination of illegitimate children that is looming on the Supreme Court's horizon, as well as in the State of North Dakota's Supreme Court's future, and will need to be resolved to insure equal protection for citizens of all ages.[300]

Darla J. Schuman[*]

298. *Id.* at 70.

299. *Id.* at 73.

300. *See supra* notes 278-286 and accompanying text.

[*] In dedication to my dear family and friends, thank you so much for all your support and guidance during a seemingly never-ending probe into the world of immigration. Special thanks to Professor Kathryn Rand for putting me and keeping me on the right track.