How Strong Is Your American Blood

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HOW STRONG IS YOUR AMERICAN BLOOD?

Mary-Anne is from a small province in the Philippines and is attending university on scholarship. Mary-Anne is dating the love of her life, Joe, an American businessman currently assigned to the Philippines. With only a few years left to finish her degree, Mary-Anne is excited for what the future will hold for her and Joe. Then suddenly Mary-Anne's whole world changed. Joe is reassigned back to the states and despite his promises to return, Mary-Anne is unable to contact him. Mary-Anne soon finds out that she is pregnant and tries tirelessly to connect with Joe but he does not reply to any of her messages or letters. Unable to keep up with her classes while working, Mary-Anne loses her scholarship and is no longer able to afford tuition. Mary-Anne is forced to return to her province where she works in a rice field while her baby, Richard, stays with Mary-Anne’s family.

Mary-Anne is struggling to provide for Richard. Like any parent, Mary-Anne wants Richard to live a better life than her. Mary-Anne knows that life in America would open a whole new world of opportunities for Richard. Mary-Anne scrounges up enough money to submit a United States passport application on behalf of Richard. After waiting several months, Mary-Anne is notified that Richard’s application is denied because Joe is not recognized as Richard’s father. Therefore, Richard is unable to claim United States citizenship. If the roles were reversed and Mary-Anne was an American assigned to the Philippines while Joe was a Filipino national, Richard would have United States citizenship from the date of his birth, no questions asked.

I. INTRODUCTION

The Supreme Court has recognized the same constitutional protections to children born out of wedlock as those born in wedlock.1

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However, the Immigration and Nationality Act ("INA"), which governs immigration and naturalization in the United States and has been codified by Congress, continues to make the distinction between children born abroad to married and unmarried parents with only one United States citizen parent in determining citizenship. Congress has long established that children born within United States territory obtain citizenship regardless of the status of their parents. While the statute governing birth-right citizenship does not specify the relationship of the parent or defines what the term parent means, a later statute titled "Children Born Out of Wedlock" indicates that lawmakers intended the requirement for birth-right citizenship apply only to children born of married parents. The Supreme Court has not supported classification has no legitimate state interest. See Jimenez, 417 U.S. at 632 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 169, 175-76 (1972)).


[A] person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or outlying possession.

8 U.S.C. § 1401(d) (LEXIS through Pub. L. No. 115-82); see also Miller v. Albright, 523 U.S. 420, 421 (1998) (justifying necessity of having two standards depending on how many parents are citizens); Montana v. Kennedy, 366 U.S. 308, 312 (1961) (distinguishing standards for transmitting citizenship when both parents or only one is a citizen). However, foreign born children born to unmarried parents must establish their relationship to their U.S. citizen parent with a different standard to claim birth right citizenship. See 8 U.S.C. § 1409(a)-(c) (LEXIS through Pub. L. No. 115-117).

3 See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); 8 U.S.C. § 1401 (2006) (considering person born in U.S. and subject to its jurisdiction as U.S. citizen at birth); United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (distinguishing being born in United States and being subject to jurisdiction of the United States). Wong Kim Ark was born in the Unites States to parents of Chinese descent who were residents of the United States but still considered "subjects of the Emperor of China" at the time of Wong Kim Ark’s birth. Id. at 652. Wong Kim Ark left the United States with every intention of returning, but was denied entry on "the sole ground that he was not a citizen of the United States." Id. at 653. The Supreme Court recognized the historical background behind the Fourteenth Amendment and the foundational requirement of the U.S. legal system in requiring a child born, like Wong Kim Ark, to acquire United States citizenship at birth. Id. at 693-94.

gender neutral constitutional protections in a citizen’s ability to transmit citizenship to a child born abroad out of wedlock.\(^5\) The Supreme Court

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

8 USC § 1401(g); see also Ablang v. Reno, 52 F.3d 801, 805 (9th Cir. 1995) and cert. denied, 516 U.S. 1043 (1996) (explaining necessity of legitimizing). The court determined that establishing paternity is required because:

In the case of legitimate children, most states make a presumption of paternity (rebuttable or otherwise) that determines the husband to be the child’s legal father. When children are born out of wedlock, there is no such presumption, and the Government naturally requires proof of paternity before determining someone to be the legal father.

\[^5\] Ablang, 52 F.3d at 805 (alteration in original).

5 See 8 U.S.C. § 1409(c) (LEXIS through Pub. L. No. 115-117) (explaining requirements to transmit citizenship from citizen mother to child born abroad out of wedlock). The statute provides:

[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.; 8 U.S.C. § 1409(a)(1)-(4) (LEXIS through Pub. L. No. 115-117) (explaining requirements to transmit citizenship from citizen father to child born abroad out of wedlock). Specifically,

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 [8 USCS §1401(c)-(g)], and of paragraph (2) of section 308 [8 USCS §1408(2)], shall apply as of the date of birth of a person born out of wedlock if—

1) [A] blood relationship between the person and the father is established by clear and convincing evidence,
2) [T]he father had the nationality of the United States at the time of the person’s birth,
3) [T]he 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) [W]hile 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. The Court has previously recognized that the application of different requirements for mothers and fathers “is neither surprising nor troublesome.” See Nguyen v. INS, 533 U.S. 53, 63 (2001) (citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) and F.S. Royster Guano
recently addressed the issue of whether the statute governing the
transmission of citizenship to a child born abroad to a United States citizen
father and non-citizen mother violates the Equal Protection Clause of the
Fifth Amendment.\(^6\)

This Note will explore the purpose of Congress’ distinction in the
transmission of citizenship to children born abroad to unmarried parents
when only one parent is a United States citizen, and the history of such
legislation.\(^7\) Next, this Note will examine the Supreme Courts analysis of
the Equal Protection Clause in \textit{Morales-Santana}.\(^8\) This Note will then argue
that the Supreme Court properly upheld the judgment of the Second Circuit
in its finding that 8 U.S.C. §1409(a) and (c) violated the Fifth Amendment
guarantee of equal protection.\(^9\) Ultimately, the Note will argue in favor of
establishing requirements for birth-right citizenship children to receive the
same treatment regardless of which parent holds United States citizenship.\(^10\)

II. HISTORY

The Fourteenth Amendment established citizenship for all those
“born or naturalized in the United States, and subject to the jurisdiction” of
the United States.\(^11\) However, transfer of citizenship when a child is born

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\(^7\) See \textit{infra} Part II.

\(^8\) See \textit{infra} Part III.

\(^9\) See \textit{infra} Part IV.

\(^10\) See \textit{infra} Part IV.

\(^11\) See U.S. CONST. art. I, § 8, cl. 4 (granting Congress power to “establish a uniform rule of naturalization”); U.S. CONST. amend. XIV (creating general definition of citizenship); see also Rogers v. Bellei, 401 U.S. 815, 828-29 (1971) (acknowledging citizenship was referenced but originally undefined in Constitution); Afroyim v. Rusk, 387 U.S. 253, 268 (1967) ("[h]old[ing] that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race."). Compare United States v. Wong Ark Kim, 169 U.S. 649, 705 (1898) (establishing citizenship at birth if born within territory, even with non-citizen parents) and Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (establishing protection of non-citizens by the Fourteenth Amendment within U.S. territory) \textit{with} Lem Moon Sing v. United States, 158 U.S. 538, 543 (1895) (construing Nishimura Eikiu v. United States, 142 U.S. 651, 659 (1892)) ("[E]very sovereign nation has the power, inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe . . . .") , Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude
outside the continental United States and its territories is exclusively defined by statute. The standard for transmitting citizenship becomes more complicated when American citizens have children abroad because courts and legislators have historically treated children of American citizens born abroad differently in terms of how to transmit citizenship. Even before the

or to expel aliens ... is vested in the political department of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations ...”), and Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (recognizing government has unfettered authority to exclude non-citizens from American territory). The Supreme Court recognized that the language of the Fourteenth Amendment and the legislation that gave birth to the Fourteenth Amendment intended to apply to all those seeking the protection of the court system regardless of citizenship. See Yick Wo, 118 U.S. at 369. In Chae Chan Ping, also known as The Chinese Exclusion Case, the Court considered what the federal government could do regarding immigration under the Constitution. See Chae Chan Ping, 130 U.S. at 604. The Court acknowledged the federal government’s authority to regulate immigration based on “national security, sovereignty over its own territory, and self-preservation.” See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 551-52 (1990) (citing Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889)). The Chae Chan Ping Court specifically noted that:

The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.

Chae Chan Ping, 130 U.S. at 606-607.

12 See 8 USC § 1401(g) (LEXIS through Pub. L. No 115-117) (outlining requirements to transmit birth-right citizenship when only one parent is U.S. citizen); 8 U.S.C. § 1409(a) and (c) (LEXIS through Pub. L. No. 115-117) (defining requirements for transmission of citizenship for children born abroad out of wedlock); see also LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 43 (1998) (“Courts have held that there is no implicit constitutional right to transmit citizenship to one’s children; the transmission is guided by specific legislation.”).

13 See Wauchope v. U.S. Dept. of State, 985 F.2d 1407, 1414 (9th Cir. 1993) (alteration in original) (applying easier standard while recognizing “a more traditional (and hence more rigorous) standard of scrutiny” of statutes). The Ninth Circuit Court of Appeals recognized that § 1993 of the Revised Statutes of 1874 which only allowed United States citizen fathers to transmit citizenship to foreign born children and not United States citizen mothers is unconstitutional. Id. at 1418. In Wauchope, the court recognized that a higher level of scrutiny was required to review the legislation should have been reviewed with a higher level of scrutiny if not for Congress’s plenary power over immigration. Id. at 1414. However, the court found even in applying the facially legitimate standard, the statute determining birth-right citizenship was unconstitutional. Id. at 1418; see also Thomas Aleinikoff ET AL., IMMIGRATION & CITIZENSHIP: PROCESS & POLICY, 8 (5th ed. 2003) (recognizing inconsistent legislation and application of amended statutes). See, e.g., Matthews 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, 769-70 (1972) (“[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.”); Boutilier v. INS, 387 U.S. 118, 123 (1967) (reaffirming Congressional “plenary power to make rules for the admission of aliens” and exclusion); see also Martha F. Davis, Sex-Based Citizenship Classifications and the “New Rationality,” 80 ALB. L. REV. 851, 856 (2017) (“The plenary power doctrine argues for judicial deference to congressional and executive decision-making in the area...
formal adoption of birth-right citizenship into the Constitution, Congress extended citizenship to children born outside United States territory.\textsuperscript{14} To this day, the basis of the statute regulating birth-right citizenship, \textit{jus sanguinis}, is the gender of the citizenship holder when a child is born to unmarried parents despite several revisions to the statute.\textsuperscript{15} For much of

of immigration insofar as it is an aspect of foreign affairs; the questions of whether that deference extends beyond immigration to citizenship laws has never been resolved.\textsuperscript{16}); Hiroshi Motomura, \textit{Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation}, 100 \textit{Yale L.J.} 545, 547 (1990) ("The plenary power doctrine's contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and exclusive authority over immigration decisions.").

\textsuperscript{14} See \textit{Naturalization Act of March 26, 1790}, ch. 3, \textsection 1, 1Stat. 103 (repealed 1795) (establishing paternal ties to U.S. for transmission of citizenship to children born abroad). Congress specified that:

\[ \text{[C]hildren of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident of the United States . . . .} \]


\textsuperscript{15} See \textit{8 U.S.C. \textsection 1409(a)} (1952) (requiring citizen father to establish paternity prior to illegitimate child's twenty-first birthday when born abroad); \textit{contra} Citizenship and Naturalization Act of May 24, 1934, ch. 344, 48 Stat. 797 (limiting transmission of citizenship based on married United States citizen parent gender neutral). Specifically, the statute permits:

\[ \text{Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child.} \]

\textit{Citizenship and Naturalization Act of May 24, 1934}, ch. 344, 48 Stat. 797; \textit{see also} \textit{Wauchope v. U.S. Dept. of State}, 985 F.2d 1407, 1413, n. 2 (9th Cir. 1993) (referencing Immigration and Nationality Act of 1952, 79 Stat. 911) ("The statute granted such status to the mothers of illegitimate citizen or permanent lawful resident children, to the illegitimate children of citizen or permanent lawful resident mothers, and to all parents and children of citizens or permanent residents where the child were legitimate."). The First Circuit affirmed the district court's refusal to allow the defendant in \textit{United States v. Guerrier} the opportunity to present evidence of citizenship because the defendant lacked evidence that his father satisfied the United States residency requirement. \textit{See 428 F.3d 76, 80 (1st Cir. 2005).} The \textit{Guerrier} court recognized that without evidence that the appellant biological father satisfied the residency requirement only applicable to determining whether a United States citizen father could transmit citizenship, the appellants "derivative citizenship defense would necessarily fail." \textit{See Guerrier}, 428 F.3d at 80. \textit{See generally LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES} 43 (1998) ("At the turn of the twenty-first century, traditional marriage relations continue to play a significant role in the ability of citizens to transmit birthright citizenship to their children . . . .").
American history, the statute regulating the transmission of United States citizenship favored citizen fathers.16

A. Prior to 1934

Congress first addressed the issue of whether a child born abroad to a United States citizen parent will obtain citizenship when enacting immigration legislation in 1790, which included a separate clause requiring fathers to affirmatively establish United States citizenship prior to the birth of the foreign born child.17 As legislation evolved, Congress imposed restrictions on a United States citizen father’s ability to transmit citizenship to a child born abroad while mothers were prevented from transmitting citizenship to their children born abroad entirely.18 It was not until 1934 that

16 See Act of March 26, 1790, ch 3, 1 Stat. 103 (repealed January 29, 1795) (“That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.”); Tuan Anh Nguyen v. INS, 533 U.S. 53, 60 (2001) (recognizing § 1409(a) imposes requirements on noncitizen mother are rarely asked of citizen mothers); Wauchope v. U.S. Dept. of State, 985 F.2d 1407, 1412 (9th Cir. 1993) (recognizing Revised Statutes of 1874 provided right to citizen men and not citizen women); see also Martha F. Davis, Sex Based Citizenship Classifications and the “New Rationality,” 80 ALB. L. REV. 851, 853 (2016/2017) (“In the U.S., sex-based citizenship classifications have their origins in the U.S. Constitution itself, which from its inception accepted different citizenship obligations and rights based on sex.”).

17 See Act of March 26, 1790, ch 3, 1 Stat. 103 (granting foreign born children birth right citizenship if fathers lived in the U.S.); see also Morrison v. California, 291 U.S. 82, 85 (1934) (recognizing citizen father requirement at birth and “upon reaching the age of majority”); Weedin v. Chin Bow, 274 U.S. 657, 662, 666 (1927) (emphasizing status of father at time of birth dictates transmission of citizenship); see also THOMAS ALEINIKOFF ET AL., IMMIGRATION & CITIZENSHIP: PROCESS & POLICY, 32 (5th ed. 2003) (recognizing interest in deterring expatriates from transmitting citizenship indefinitely without contact with United States for generations); Martha F. Davis, Sex-Based Citizenship Classifications and The “New Rationality”, 80 ALB. L. REV. 851, 853 (2017) (“In the U.S., sex-based citizenship classifications have their origins in the U.S. Constitution itself, which from its inception accepted different citizenship obligations and rights based on sex.”).

18 See Act of Congress April 14, 1802, 2 Stat. 153 (requiring citizen fathers physically reside in U.S. before birth of foreign born to transmit citizenship). Specifically, the statute provided:

[T]he children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States.

Id.; Montana v. Kennedy, 366 U.S. 308, 311 (1961) (“[R]ecogniz[ing] that until the 1934 Act the transmission of citizenship to one born abroad was restricted to the child of a qualifying American father, and withheld completely from the child of a United States citizen mother and an alien father.”); see also Martha F. Davis, Sex-Based Citizenship Classifications and the “New Rationality”, 80 ALB. L. REV. 851, 853 (2017) (highlighting 1907 requirement for United States citizen women to relinquish citizenship upon marrying non-citizen); see also Linda K. Kerber, NO
there was an overarching shift in policy towards disfavoring American citizen fathers.\(^{19}\)

Despite attempting to address transmission of citizenship throughout the nineteenth century, Congress only placed more restrictions on United States citizenship descending from citizen fathers while completely ignoring such transmission of citizenship from citizen mothers.\(^{20}\)

The Court first addressed the issue of the gender distinction in section 1409 which found that there was an important government interest in the gender distinction.\(^{21}\) The Court found the “biological differences

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\(^{19}\) See Miller, 523 U.S. at 466 (dissent, Ginsberg, J.) (“The 1940 Act preserved Congress’ earlier recognition of parental equality in regard to children born in wedlock, but established a different regime for children born out of wedlock, one that disadvantaged United States citizen fathers and their children.”); Wauchope v. U.S. Dept. of State, 985 F.2d 1407, 1413-14, 1418 (9th Cir. 1993) (recognizing preferential treatment of legitimate children of United States citizen fathers unconstitutional); see also Linda K. Kerber, No CONSTITUTIONAL RIGHT TO BE LADIES 44 (1998) (“[N]one of these statutes was retroactive, and an adult legitimately born abroad in 1933 or earlier who wishes to claim birthright citizenship has had difficulty claiming it through a mother.”).

\(^{20}\) See Act of Feb. 10, 1855, ch. 71, 10 Stat. 604 (permitting *jus sanguinis* to foreign born children of U.S. citizens). Specifically, the statute recognized that:

\[
\text{[P]ersons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.}
\]


\(^{21}\) See Miller, 523 U.S. at 421 (identifying two of governments important interests). The majority reasoned that:

\[
\text{[E]nsuring reliable proof that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen; encouraging the development of a healthy relationship between the citizen parent and the child while child is a minor and fostering ties between child and United States.}
\]

Id. In *Miller*, the petitioner argued that the gender-based classifications used in § 1409(a)(4) violated equal protection without justification. *Id.* at 423. The Court reasoned that the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen, regardless of the gender of the citizen parent. *Id.* at 433. The majority emphasized that the requirement for transmitting birth-right citizenship was to ensure that the blood ties between the U.S. citizen and foreign-born child to encourage parent-child relationship. *Id.* at 434-36. The majority rationalized that formal recognition of the relationship between the U.S. citizen parent and the foreign-born child is required to establish the legal relationship between the two. *Id.* at 440.
between single men and women provide a relevant basis for differing rules governing their ability to confer citizenship on children born out of wedlock in foreign land."\(^\text{22}\) Despite the majority claiming the distinction was "biological differences" and not generalizations, Justice Ginsburg argued the distinction "fit and reinforce a stereotype or historic pattern" and further noted that "mothers . . . are responsible for a child born out of wedlock; fathers unmarried to the child's mother, ordinarily, are not."\(^\text{23}\)

**B. The Balance Tilts with the Nationality Act of 1940**

Congress made a significant shift in how they viewed children born abroad with the Act of May 24, 1934.\(^\text{24}\) While this change only applied to

The paternity test was seen as reliable proof of a biological relationship between the citizen father and the foreign-born child that was equivalent to the mother's presence at the birth of the foreign-born child. \(\text{id. at 445.}\)

\(^{22}\) See Miller, 523 U.S. at 433 ("joint conduct of a citizen and an alien that result in conception is not sufficient to produce an American citizen, regardless of the citizen parent gender."). Contra Miller, 523 U.S. at 469 (Ginsburg, J., dissenting) (emphasizing flaws in government's argument). Justice Ginsburg specifically noted, "[e]ven if one accepts at face value the governments rationale it is surely based on generalization (stereotypes) about the way women (or men) are." \(\text{id.}\) "These sex-based citizenship laws have persisted despite the heightened scrutiny that is now regularly accorded laws that rely on overt sex-based classifications and sex stereotypes." Martha F. Davis, *Sex-Based Citizenship Classifications and the "New Rationality,"* 80 ALB. L. REV. 851, 854 (2017).

\(^{23}\) See Miller, 523 U.S. at 460 (Ginsburg, J., dissenting) (alleging statute is improperly based on traditional gender roles).

\(^{24}\) See Act of May 24, 1934, ch. 344, §1, 48 Stat. 797 (recognizing U.S. citizen parents have equal ability to transmit citizenship to children born abroad). Congress recognized the implication that both parents had in transmitting citizenship in that:

Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall [sic] not descend unless the child comes to the United States and resides there in for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

\(\text{Id. (emphasis added); Miller, 523 U.S. at 465 (1998) (Ginsburg, J. dissent) ("In 1934, Congress moved in a new direction. It terminated the discrimination against United States citizen mothers in regard to children born abroad."); Rogers v. Bellei, 401 U.S. 815, 826 (1971) (establishing ability of foreign born children to claim citizenship through U.S. citizen mothers). While the Act of May 24, 1934 only applied to married parents, it was the first time that Congress recognized a woman's equal ability to transmit citizenship. See Martha F. Davis, Sex-Based Citizenship Classifications and The "New Rationality", 80 ALB. L. REV. 851, 853-43 (2017).}\)
children born abroad to married parents, the Nationality Act of 1940 addressed the issue of children born to unmarried parents.\textsuperscript{25} For the first time, the rules governing citizenship were more favorable to citizen mothers and only required the mother to hold citizenship at the time of the child’s birth.\textsuperscript{26} However, a citizen father would need to physically reside in the United States prior to the birth of the child, and also legitimize the child before recognizing birth-right citizenship.\textsuperscript{27} Since the Nationality Act of 1940, Congress has made minor changes to the statute but the requirement that citizen fathers must take affirmative steps to transmit citizenship to out of wedlock foreign born children, while citizen mothers may transmit citizenship through simply satisfying the resident requirement, still persists.\textsuperscript{28} These subsequent revisions to the Nationality Act of 1940 shifted some of the requirements, but did not alter “the fundamental sex-based structure” which required different standards for “citizen fathers and citizen mothers to extend derivative citizenship to their out-of-wedlock foreign born children.”\textsuperscript{29}

C. How the Supreme Court has Interpreted Gender Distinction in the

\begin{footnotesize}

\textsuperscript{25} See Nationality Act of 1940, Pub. L. No. 82-414, § 205, 54 Stat. 1137 (1940) (establishing illegitimate children born abroad to at least one citizen parent may acquire citizenship). Despite the progress that was being made for the women’s rights movement, the distinction between the rights of citizen mothers and fathers persisted. See Martha F. Davis, Sex Based Citizenship Classifications and The “New Rationality”, 80 ALB. L. REV. 851, 854 (2017). The equality that was recognized in transmitting citizenship to foreign born children when the U.S. citizen was married did not extend to situations where foreign born children were born abroad to one U.S. parent that was not married. \textit{Id.}

\textsuperscript{26} See Nationality Act of 1940, Pub. L. No. 82-414, § 205, 54 Stat. 1137 (1940) (articulating more leniency toward married citizen mothers). The Nationality Act of 1940 states the following:

\begin{quote}
In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child’s birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.
\end{quote}

\textit{Id.}

\textsuperscript{27} See Nationality Act of 1940, Pub. L. No. 82-414, §205, 54 Stat. 1137 (1940) (specifying duration for residency requirement).


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Immigration Context

The United States Constitution prohibits the denial of “equal protection of the laws” and the Supreme Court has invalidated laws when they discriminate solely based on race and gender. The Supreme Court has recognized that the Equal Protection Doctrine and standards used to regulate states under the Fourteenth Amendment are also applicable under the “equal protection component” of the Fifth Amendment’s Due Process Clause for the federal government. Prior to 1970s, the Court would uphold a statute even if it promoted sexist stereotypes, so long as there was a rational basis for the distinction. The Supreme Court has recognized certain situations where such gender-based classifications may be upheld, such distinctions must “serve important governmental objectives and that the discriminatory means employed must be substantially related to achieve those objectives.”

The different components of the gender-based transmission of birthright citizenship for a child born abroad to unwed parents has been

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31 See U.S. CONST. amend V (recognizing due process required for everyone); see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (recognizing Fifth Amendment “does not contain an equal protection clause as does the Fourteenth Amendment . . . .”). While the federal government is not bound by the Equal Protection Clause of the Fifth Amendment, discrimination does violate an individuals right to due process. See Bolling, 347 U.S. at 499.


Congress’ decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth. Specifically, the imposition of the requirement for a paternal relationship but not a maternal one, is justified by important government objectives.

Nguyen, 533 U.S. at 62.
challenged several times. However, even when the lower circuit courts of appeals determined a portion of the statute violates equal protection, the Supreme Court has overturned or the Court is unable to reach a majority on appeal. The Supreme Court previously held the distinctions within the statute are not based on a stereotype but on the physical differences between the sexes. The Supreme Court has found different requirements for a paternal relationship but not a maternal one, is justified by two important government objectives: "(1) importance of assuring that a biological parent-child relationship exists; and (2) importance of ensuring relationship between child and citizen parent and connection to the U.S."

34 See, e.g., Nguyen, 533 U.S. at 93 (challenging residency requirement when paternity has been acknowledged); Miller, 523 U.S. at 423 (challenging statutes on grounds of equal protection); Weedin v. Chin Bow, 274 U.S. 657, 658-60 (1927) (discussing paternal residency requirement).

35 Compare Lake v. Reno, 226 F.3d 141, 148 (2nd Cir. 2000) (recognizing paternity requirement to confer citizenship violated equal protection), with Nguyen, 533 U.S. at 73 (holding gender distinction does not violate equal protection affirmative actions required by citizen father).

36 See Nguyen, 533 U.S. at 68 (claiming distinction is not "irrational or improper."). The Court in Nguyen recognized the following: § 1409 addresses an undeniable difference in the circumstance of the parents at the time a child is born, it should be noted, furthermore, that the difference does not result from some stereotype . . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father.

Id. The Court found the sex-based distinction passed the heightened scrutiny analysis and the distinction is appropriate given the situation. Id. The Court stated:

In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship. The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the [nine]-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity.

Id. at 65. The Court also argued the gender-based distinction was appropriate given the impact it would have on members of the armed forces. Id.; see also Martha F. Davis, Sex-Based Citizenship Classifications and the "New Rationality", 80 ALB. L. REV. 851, 861 (2017) ("According to the majority, requiring U.S. fathers and their children seeking derivative citizenship to meet more stringent standards is appropriate given these circumstances.").

37 See Nguyen, 533 U.S. at 62-68 (reasoning statute supported important government objectives). The Court stated:

The imposition of a different set of rules for making [the] legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective . . . . the use of gender specific terms takes into account a biological
III. PREMISE OF THE PAPER

Luis Ramon Morales-Santana claimed that he was entitled to the protection of United States citizenship on grounds that he acquired citizenship from his father at birth. \(^{38}\) Morales-Santana was born in the Dominican Republic to a Puerto Rican born father and Dominican mother. \(^{39}\) Morales-Santana’s application to the Board of Immigration Appeals’ (BIA) was denied. \(^{40}\) At Morales-Santana’s birth, the statute required that a citizen father physically reside in the continental United States or territory for “at least ten years, with at least five of those years occurring after the age of fourteen” to be eligible to transmit birth-right citizenship to foreign born out of wedlock children. \(^{41}\) However, a citizen mother had the ability to transmit citizenship as long as she lived in the United States or United States territory for at least one year prior to the birth of the child. \(^{42}\) While Morales-Santana’s father left Puerto Rico twenty days before his nineteenth birthday, not meeting the five year residency requirement, Morales-Santana prevailed in

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\(^{38}\) See Sessions v. Morales-Santana, No. 15-1191, 2017 U.S. LEXIS 3724, at *9 (June 12, 2017) (explaining Morales-Santana’s argument). “In 2000, Morales-Santana was placed in removal proceedings after being convicted of “various felonies” to which he applied for withholding of removal.” See Morales-Santana v. Lynch, 804 F.3d 521, 524 (2d Cir. 2015). If Morales-Santana were able to establish that he did receive birthright citizenship, deportation proceedings would be terminated, and therefore only face the consequences for his convictions. Id.


\(^{40}\) See Morales-Santana, 804 F.3d at 523 (finding Morales-Santana did not satisfy requirements for derivative citizenship thus subject to deportation). Morales-Santana’s father left Puerto Rico just twenty days before he would have satisfied the residency requirement. See Sessions, 2017 U.S. LEXIS 3724, at *9. As a defense, Morales-Santana argued that he should not be subject to removal proceedings on grounds that he obtained “derivative citizenship at birth via his father.” Morales-Santana, 804 F.3d at 524. An immigration judge denied his withholding of removal application and the Board of Immigration Appeals (BIA) rejected his motion to reopen “based on a violation of equal protection and newly obtained evidence relating to his father.” Id. at 525.

\(^{41}\) See Morales-Santana, 804 F.3d at 527 (citing 8 U.S.C. § 1409(a)) (“Because five of those years must follow the father’s fourteenth birthday, an unwed citizen father cannot transmit his citizenship to his child born abroad to a non-citizen mother before the father’s nineteenth birthday.”).

\(^{42}\) See id. (recognizing U.S. citizen mother may transmit citizenship if she moved from U.S. after first birthday).
his argument that the different physical presence requirement imposed on unwed mothers and fathers violated equal protection.\footnote{See id. at 523-25 (recognizing gender-based exception enacted by Congress for unwed citizen mothers). As the Second Circuit Court of Appeals recognized, and the Supreme Court affirmed:}

IV. ANALYSIS

A gender-based distinction may be upheld if there is an "exceedingly persuasive justification for the distinction."\footnote{See Sessions, 2017 U.S. LEXIS 3724, at *26-28 (dismissing government’s argument that statute ensures connection). Additionally, the government argued that they only a “facially legitimate and bona fide reason” is necessary for the designation included in the statute. See Brief for Petitioner at 35, Lynch v. Morales-Santana, 804 F.3d 521 (2015) (No. 15-1191) (Aug. 19, 2016).} The government argued the gender-based differences are justified because the statute avoids statelessness while also ensuring a sufficient connection between the child and the United States.\footnote{See Sessions, 2017 U.S. LEXIS 3724, at *18 (establishing level of scrutiny applied to statute); Miller, 523 U.S. at 482 (Ginsburg, J., dissenting) (emphasizing standard of review applicable); Wauchope v. U.S. Dept. of State, 985 F.2d 1407, 1412 (1993) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (establishing standard for evaluating equal protection violation based on gender). The Court recognized the following:}

Morales-Santana's mother, rather than his father, [had] been a citizen continuously present in Puerto Rico until 20 days prior to her nineteenth birthday, she would have satisfied the requirements to confer derivative citizenship on her child. It is this gender-based difference in treatment that Morales-Santana claims violated his father's right to equal protection.

\textit{Id.} at 527.

\footnote{The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification . . . . The burden is met only by showing at least that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”}


\footnote{See Sessions, 2017 U.S. LEXIS at *9-10 (“We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons ‘the equal protection of the laws.’”). Despite the government’s efforts, both the Supreme Court and the Second Circuit Court of Appeals concluded “neither interest is advanced by the statute’s gender-based physical
court appropriately applied heightened scrutiny in evaluating the distinction based on gender in transmitting citizenship at birth.48

A. Governmental objectives

1. Statelessness

The government argues that they had an interest in preventing statelessness and that the statute clearly defines what qualifies an individual for United States citizenship.49 The government claims that the statute is designed to allow citizenship to be conveyed without an affirmative act by the mother to provide citizenship to a foreign-born child in a nation that only recognizes citizenship through paternity.50 Despite this circular argument, the appeals court recognized statelessness as a valid government objective.51 However, statelessness is not a valid government objective to justify the gender-based distinction present in the statute.52

2. Sufficient Connection between child-to-father and father-to-United States

The government argues that requiring the father to recognize a foreign-born child is necessary to establish that a real relationship between father and son exists, both genetically and emotionally.53 Establishing paternity alone is considered insufficient to prevent transmission of presence requirement." Morales-Santana, 804 F.3d at 528. While the Court upheld the appeals court’s decision finding the statute a violation of equal protection there is still a question regarding the requirements for transmitting birthright citizenship to a foreign-born child to unwed parents. See Sessions, 2017 U.S. LEXIS at *9-10. The Court recommended that the highest level of the residency requirements apply to both U.S. citizen fathers and mothers but, Congress decides what requirements apply. Id. at 37-38.

48 See Sessions, 2017 U.S. LEXIS at *18 (explaining level of scrutiny required).
49 See Sessions, 2017 U.S. LEXIS 3724, at *28-29 (articulating government’s motive to prevent statelessness of foreign born children of unwed citizen mothers); see also Rogers v. Bellei, 401 U.S. 815, 842 (1971) (Black, J., dissenting) (quoting Slaughter House Cases, 16 Wall. 36, 73 (1873)) (recognizing importance of defining citizenship).
50 See Sessions, 2017 U.S. LEXIS 3724, at *30 (rejecting government’s argument that statelessness equals valid risk).
51 See United States v. Flores-Villar, 536 F.3d 990, 996 (9th Cir. 2008) (identifying statelessness as important interest).
53 See Nguyen v. INS, 533 U.S. 53, 67 (2001) (requiring parent have relationship with child and not just share DNA).
birthright citizenship. The government argues foreign-born children must demonstrate a stronger connection to the United States than just a blood connection to an American father but being born of a citizen mother who has spent only a year in the United States is sufficient. There are scenarios in which an American father may not have met the residence requirement, like Morales-Santana’s father, but have maintained a close relationship with their child, yet these men are still unable to convey citizenship to their foreign-born children because they have not satisfied the residential requirement prior to the child’s birth.

B. Substantially Related

The Supreme Court has established that distinctions between genders may be permitted if it “advances the objectives in a manner consistent with the Equal Protection Clause.” The government argues that the gender-based residency requirement is related to the government’s interest in preventing statelessness and fostering ties between the foreign-born child and the citizen parent as well as the connection to the United States. The statute only allowed a U.S. citizen father to confer citizenship to a foreign-born child born out of wedlock if the father was at least nineteen years old. The Court correctly emphasizes that the gender-based means employed by the statute requirements do little to achieve the government’s objectives.

C. Perpetuating Gender Discrimination, the “role” of a Mother

The statute distinguishes United States citizen parents who give birth to child abroad out of wedlock based on their gender which violates the

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54 See id. at 67 (cautioning risk of biological connection to citizen father with no relationship). In Nguyen, the Supreme Court noted that a biological connection between the foreign-born child to the unwed citizen father does not guarantee the citizen father knows of the child. Id.


56 See id. at 28 (noting foreign born child of unwed citizen mother may claim citizenship without relationship to mother).


59 See Morales-Santana, 804 F.3d at 527 (noting children born to eighteen-year-old citizen father cannot acquire birth-right citizenship).

60 See Sessions, 2017 U.S. LEXIS 3724, at *27 (noting “the gender based means scarcely serve the posited end.”).
Equal Protection Clause. The Supreme Court has previously ruled that allowing a gender distinction in transmitting birthright citizenship to a child born abroad to unwed parents and only one U.S. citizen parent is permissible and not a violation of Equal Protection because it is supported by important government interests. As stated above, these interests are not important and such ideology is founded upon impermissible stereotypes of gender roles. Additionally, the Court permitted the distinction to persist based on the biological differences between men and women.

61 See 8 U.S.C. §1409(a)-(c) (applying gender-based distinctions); see also Reed v. Reed, 404 U.S. 71, 77 (1971) ("By providing dissimilar treatment of men and women who are thus similarly situated, the challenged section violates Equal Protection Clause.").

62 See Nguyen, 533 U.S. at 62 ("Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth. Specifically, the imposition of the requirement for a paternal relationship, but not a maternal one, is justified by two important governmental objectives.").

63 See Miller, 523 U.S. at 433-34 (suggesting U.S. citizen mothers make choice whereas citizen father may not be involved); see also Martha F. Davis, Sex-Based Citizenship Classifications and the "New Rationality", 80 ALB. L. REV. 851, 871 (2016/2017) (citing Kristin A. Collins, Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation, 123 YALE L.J. 2134, 2136-37 (2014)) ("[I]n the laws at issue in Miller, Nguyen, Flores-Villar, and Morales-Santana, women and men are treated differently because of long-accepted norms of family structure and parental roles that were not questioned by the laws' drafters but that would be unacceptable today.").

64 See Nguyen, 533 U.S. at 61 (emphasizing citizen mother, but not father, has option to have baby in U.S. or abroad). Specifically, the Court in Nguyen states:

[A] citizen mother expecting a child and living abroad has the right to re-enter the United States so the child can be born here and be a 14th Amendment citizen. From one perspective, then, the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so. This equivalence is not a factor if the single citizen parent living abroad is the father. For, unlike the unmarried mother, the unmarried father as a general rule cannot control where the child will be born.

Id. The Court in Nguyen also reasoned that fathers were required to take additional steps to establish relationship with a child because the relationship between child and mother can be established at birth itself while the father does not have to be present. Id. at 62. The fathers presence at the child's birth does not necessarily mean that he is the father. Id. See also, Lehr v. Robertson, 463 U.S. 248, 251 (1983) (adopting different standards for notifying mother of adoption than fathers for children out of wedlock); Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.").
D. Influence of the military on statute and the Courts judgments

The actions of the U.S. military have historically shaped statutes enacted by Congress. In Miller, the Court recognized that the presence of the military throughout the world impacted the facts of the case as well as on the statute governing birthright citizenship. The Court recognized the impact of having a large number of U.S. citizens enter a foreign country and return to the U.S. by virtue of their military service created a legitimate concern for Congress. Essentially, Congress is concerned about the risk of having male citizens enter a foreign country and potentially create attenuated ties to the United States. However, this concern does not extend to female United States citizens.

V. CONCLUSION

The Supreme Court’s, latest ruling indicates a shift in the Courts approach to Equal Protection in the immigration context, as they would to any other equal protection issue. The Courts most recent ruling is an indication that progress is being made, and immigration is catching up with modern times in recognizing the government objectives for gender-based

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66 See Miller, 523 U.S. at 439 (citation omitted) (“In 1970, when petitioner was born, about 683,000 service personnel were stationed in the Far East, 24,000 of whom were in the Philippines.”).

67 See Miller, 523 U.S. at 439 (“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.”).

68 See Miller, 523 U.S. at 439 (recognizing reasonableness of birthright citizenship for children of unwed parents to relationship with citizen parent). The Court noted:

It was surely reasonable when the INA was enacted in 1952, and remains equally reasonable today, for Congress to condition the award of citizenship to such children on an act that demonstrates, at a minimum, the possibility that those who become citizens will develop ties with this country—a requirement that performs a meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers.

Id.

69 See Nguyen, 533 U.S. at 65 (identifying young men as justification for statute). The Court noted “[o]ne concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.” Id.
distinctions as unconstitutional. However, the Court’s ruling has also created an uncertainty in the laws governing birthright citizenship.

The statute that exists at the time of birth dictates which birthright citizen statutes apply. Now that the Supreme Court has identified the gender-based distinctions established in §1409 as unconstitutional, it is unclear what standard should be applied. The Supreme Court suggests in Morales-Santana that when a child is born out of wedlock to only one citizen parent, the citizen parent satisfy the minimum residency requirement regardless of which parent holds the citizenship. The Supreme Court further recommended that the longer of the residency requirements in the current legislation be applied. Additionally, the Court failed to specify whether this ruling is retroactive. While in theory the Supreme Court’s ruling in Morales-Santana is beneficial, it is unclear whether Richard can benefit from this ruling.

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