

# Crossing the Final Border: Securing Equal Gender Protection in Immigration Cases

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## CROSSING THE FINAL BORDER: SECURING EQUAL GENDER PROTECTION IN IMMIGRATION CASES

Michelle L. Sudano\*

Power without justice is soon questioned. Justice and power must be brought together, so that whatever is just may be powerful, and whatever is powerful may be just.

—Blaise Pascal<sup>1</sup>

### INTRODUCTION

Consider two men, both Mexican immigrants, both convicted of importing marijuana to the United States and both sentenced as drug offenders. The men are similarly situated in all important regards; the men are the same age, were both born in Mexico, and were brought to the United States when they were very young by a single, unwed parent. Both men were raised in the United States, but neither man formally applied for United States citizenship. The only relevant difference between the men is which parent possesses United States citizenship. In the first case, the offender's mother is a United States citizen; in the second case, the offender's father is a United States citizen. It would seem to most observers that the offenders' parentage should not matter to their sentences as long as both men were convicted of the same crime under the same circumstances. Here however, the stories of the two men diverge. The first offender, whose mother possesses United States citizenship, is sentenced for his crime, serves his time, and is released. The second man, whose father possesses United States citizenship, is sentenced for his crime, reported to immigration authorities, and deported. Though this seems inequitable and arbitrary, it is the current state of immigration law in the United States. The first offender is hypothetical; the second offender is Rubeen Flores-Villar.<sup>2</sup>

Although there was early hope that the Supreme Court would overturn Flores-Villar's deportation order,<sup>3</sup> his case continued a tradition of Supreme Court decisions

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<sup>1</sup> BLAISE PASCAL, THOUGHTS ON RELIGION AND OTHER SUBJECTS 265 (Edward Craig trans., 1829).

<sup>2</sup> Rubeen Flores-Villar was the plaintiff in the most recent challenge to 8 U.S.C. § 1409 (2006), a statute which allows for the above-described scenario. *See* United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008), *aff'd without opinion*, 131 S. Ct. 2312 (2011).

<sup>3</sup> *See, e.g.*, Sandra S. Park, *In Flores-Villar v. U.S., Court Should Overturn Law That Discriminates Against Fathers*, ACLU BLOG RTS. (Nov. 8, 2010, 3:43 PM), <http://www>

affirming Congress's power to regulate facially discriminatory immigration statutes.<sup>4</sup> Courts have been reluctant to interfere with immigration proceedings due to Congress's high level of discretion in international and political matters.<sup>5</sup> Though the Court does undeniably owe a high level of deference to Congress's plenary control over matters such as immigration law, this is not an absolute grant of power<sup>6</sup>—when Congress passes immigration laws that infringe upon other constitutional protections, the Court should retain the power to intervene.<sup>7</sup> The Court's continued inaction could lead to a judicial system that does not use its power to ensure the just outcome in all cases.<sup>8</sup>

The constitutionality of 8 U.S.C. § 1409,<sup>9</sup> the law allowing the disparate outcome described above, has been heard by the Supreme Court three times and the result has always been the same: the Court recognizes that the statute *does* produce an inequitable outcome for one class of potential United States citizens, but the Court

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[.aclu.org/blog/womens-rights/flores-villar-v-us-court-should-overturn-law-discriminates-against-fathers](https://www.aclu.org/blog/womens-rights/flores-villar-v-us-court-should-overturn-law-discriminates-against-fathers).

<sup>4</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (affirming Congress's ability to impose stricter standards on children born out of wedlock to citizen fathers, but not citizen mothers); *Miller v. Albright*, 523 U.S. 420 (1998) (affirming Congress's ability to impose stricter standards on children born abroad out of wedlock to citizen fathers, but not citizen mothers, in order to prove paternity); *Fiallo v. Bell*, 430 U.S. 787 (1977) (affirming Congress's ability to enact a law that excludes the relationship between an illegitimate child and his natural father—as opposed to his natural mother—in granting special preference immigration status to the child of a lawful resident).

<sup>5</sup> See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972) (“‘Over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))).

<sup>6</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (“The power of Congress in [regulating commerce] is broad and sweeping; where it keeps within its sphere and *violates* no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.” (emphasis added)). This statement implies that the Court reserves the right to intervene if a law is unconstitutional.

<sup>7</sup> See *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (“As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. . . . Congress may only ‘enforce’ the provisions of the amendments and may do so only by ‘appropriate legislation.’ Congress has no power under the enforcement sections to undercut the amendments’ guarantees of personal equality and freedom from discrimination.”).

<sup>8</sup> Immigration scholar Stephen Legomsky believes it is particularly important to ensure just outcomes in the immigration context, because “[a]n immigration law acts as a mirror. It reflects the qualities that we value or reject in others. For the same reason, immigration policies supply a litmus test. They offer the world a glimpse into our souls, an insight into what we truly believe.” Stephen E. Legomsky, *Immigration Policy from Scratch: The Universal and the Unique*, 21 WM. & MARY BILL RTS. J. 339, 366 (2012).

<sup>9</sup> 8 U.S.C. § 1409 (2006). In addition to 8 U.S.C. § 1409, this Note also considers 8 U.S.C. § 1401 (2006), which lays out the general requirements for parental transmission of citizenship. See 8 U.S.C. § 1401(c)–(e).

reasons that the justifications for 8 U.S.C. § 1409 are substantially related to the statute's outcomes.<sup>10</sup> Additionally, the Court notes the rich and voluminous history of decisions relating to immigration law.<sup>11</sup> Existing immigration jurisprudence has created a seemingly insurmountable stare decisis problem that prevents the Court from intervening in Congress's plenary immigration power to overturn 8 U.S.C. § 1409.<sup>12</sup> Numerous journal articles have predicted or advocated for a new judicial interpretation of the statute.<sup>13</sup> Though the articles generally make persuasive points, the Court has affirmed and reaffirmed its point despite any logic or social factors to the contrary.<sup>14</sup> The blatant gender discrimination in 8 U.S.C. § 1409 has caused authors to continue to write on the subject, because the outcome seems fundamentally wrong and unfair to so many. This Note attempts to make the argument that cases such as *Flores-Villar* should be evaluated in accordance with family law principles as opposed to immigration law alone. This, however, creates its own set of problems. Namely, how should courts go about reconciling the traditionally federal issue of immigration law with family law, which has been left solely to the discretion of the states?

Part I of this Note provides a brief description of U.S. immigration statutes and changes thereto over time, looking specifically at 8 U.S.C. § 1401 and 8 U.S.C. § 1409. Part II of this Note provides a brief history of the relevant Supreme Court cases dealing with 8 U.S.C. § 1409 and looks at how gender discrimination principles have been applied to three primary cases: *Miller v. Albright*,<sup>15</sup> *Nguyen v. INS*,<sup>16</sup> and *United States v. Flores-Villar*.<sup>17</sup> Part III of this Note discusses how immigration laws conflict with equal protection provisions and evaluates why immigration jurisprudence is an improper vehicle for the Court to overturn 8 U.S.C. § 1409, despite its inequitable outcome. Part IV considers the history of gender discrimination in family law and proposes family law as a vehicle that could lead the Court to a more careful scrutiny of the gender stereotypes at work in 8 U.S.C. § 1409. Part IV also considers changes in the social landscape and the development of new ideas about fathers' fundamental rights and discusses why these changes should lead to the Court reconsidering its position in future 8 U.S.C. § 1409 proceedings.

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<sup>10</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998); *Fiallo v. Bell*, 430 U.S. 787 (1977).

<sup>11</sup> See *Nguyen*, 533 U.S. at 58–59; *Miller*, 523 U.S. at 428–29; *Fiallo*, 430 U.S. at 792–96.

<sup>12</sup> See *infra* Part III.C.

<sup>13</sup> See, e.g., Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93 (2000); Stephen H. Legomsky, *Immigration Law and the Principle of Congressional Plenary Power*, 1984 SUP. CT. REV. 255; Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275 (2002).

<sup>14</sup> See *supra* note 10 and accompanying text.

<sup>15</sup> 523 U.S. 420 (1998).

<sup>16</sup> 533 U.S. 53 (2001).

<sup>17</sup> 536 F.3d 990 (9th Cir. 2008), *aff'd without opinion*, 131 S. Ct. 2312 (2011).

## I. STATUTORY DEVELOPMENTS IN IMMIGRATION LAW

In order to understand why *Flores-Villar* and its predecessors were resolved as they were, it is important to understand the underlying immigration statutes, as well the policy implications of such statutes. Certainly, the primary responsibility for creating immigration laws falls on Congress.<sup>18</sup> However, as with any other substantive area of law, the judicial branch retains the responsibility for ensuring that the text or application of a law does not fall astray of constitutional values.<sup>19</sup> The Court failed to do this by affirming, without opinion, the decision in *Flores-Villar*.<sup>20</sup> Though unjust from an equal protection standpoint, the decision was required in light of immigration law, suggesting that immigration law is no longer the appropriate lens for viewing cases such as *Flores-Villar*.

## A. Citizenship and Naturalization as Defined in the United States

Black's Law Dictionary defines a citizen as "[a] person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges."<sup>21</sup> Nationality is defined as "[t]he relationship between a citizen of a nation and the nation itself, customarily involving allegiance by the citizen and protection by the state; membership in a nation."<sup>22</sup> Though technically the terms have different meanings, the terms nationality and citizenship are generally used interchangeably,<sup>23</sup> as they are in this Note.

The United Nations Declaration of Human Rights requires that every person born have a nationality and prohibits arbitrary deprivation of nationality thereafter.<sup>24</sup> The Declaration, however, does not mandate the process through which citizenship must transfer to a child. Citizenship can be transmitted to a child through two methods: *jus sanguinis* (Latin: "right of blood")<sup>25</sup> or *jus soli* (Latin: "right of the soil").<sup>26</sup> If a child

<sup>18</sup> See U.S. CONST., art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . .").

<sup>19</sup> See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the principle of judicial review and the Court's ability to strike down unconstitutional laws).

<sup>20</sup> *Flores-Villar*, 536 F.3d 990 (holding that 8 U.S.C. §§ 1401 and 1409 do not violate the Equal Protection Clause).

<sup>21</sup> BLACK'S LAW DICTIONARY 278 (9th ed. 2009).

<sup>22</sup> *Id.* at 1123.

<sup>23</sup> See, e.g., *id.* ("[Nationality] is often used synonymously with *citizenship*.").

<sup>24</sup> Universal Declaration of Human Rights art. 15, G.A. Res. 217 (III) A, U.N. Doc. A/RES/60/1 (Dec. 10, 1948).

<sup>25</sup> BLACK'S LAW DICTIONARY, *supra* note 21, at 941 ("The rule that a child's citizenship is determined by the parents' citizenship. Most nations follow this rule.").

<sup>26</sup> *Id.* ("The rule that a child's citizenship is determined by place of birth. This is the U.S. rule, as affirmed by the 14th Amendment to the Constitution.").

is not born with the citizenship of the United States, the only way to obtain that citizenship is through the naturalization process.<sup>27</sup> Thomas Janoski lays out a good summary of the possible paths to naturalization:

Naturalization is the acquisition of citizenship . . . (2) by decree—going through varied naturalization processes; (3) by declaration—declaring oneself a citizen on the basis of marriage or adoption by a citizen; or (4) by being born to foreign parents on national soil.<sup>28</sup>

Comparing the methods above with the facts of the cases discussed in this Note, it is clear that only the second is viable for parties such as Flores-Villar. Since the cases this Note discusses deal exclusively with children born on foreign soil to United States citizen parents, the facts of the cases do not fit in with the fourth method above, but are actually an opposite situation; as the parties involved are the natural children of United States citizens, and still children at the time their citizenship status is relevant, adoption and marriage under the third method are also not options. Specifically, none of the cases this Note discusses consider the mechanisms for transmission of citizenship by adoption because the challenge to 8 U.S.C. § 1409 only arises when discussing the right of natural parents to transmit citizenship. Similarly, as 8 U.S.C. § 1409 deals with parental transmission of citizenship, it also does not extend to marital transmission.<sup>29</sup> Thus, the only way the children affected by 8 U.S.C. § 1409 can gain United States citizenship is through the second method of transmission: decree. Gaining citizenship through decree requires complying with statutory requirements established by Congress.<sup>30</sup> These immigration and naturalization statutes have changed markedly over time, in response to changing social and economic realities facing the nation.<sup>31</sup>

### *B. General Development of Immigration and Naturalization Law*

United States immigration law has its foundation and beginning in the Constitution, as an area of law to be regulated exclusively by Congress.<sup>32</sup> Though Congress retains plenary control over immigration matters, how Congress has chosen to regulate this branch of law has changed over time. Congress, for its part, has made numerous changes to immigration law in response to our changing views on race, gender and

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<sup>27</sup> See *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898) (“The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization.”).

<sup>28</sup> THOMAS JANOSKI, *THE IRONIES OF CITIZENSHIP* 27 (2010).

<sup>29</sup> 8 U.S.C. § 1409 (2006).

<sup>30</sup> See generally *infra* Part I.B.

<sup>31</sup> See *infra* Part I.B.

<sup>32</sup> See U.S. CONST. art. I, § 8, cl. 4; 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.”).

equality.<sup>33</sup> However, Congress has not always kept pace with changes in societal views.<sup>34</sup> The result is an area of law that is fractured, inconsistent and based on outdated gender stereotypes.<sup>35</sup> The following sections discuss the statutory development of 8 U.S.C. § 1409 over the past forty years.

### 1. Early Immigration Laws and Regulations

Initially, persons brought to the United States through the slave trade were not subject to immigration laws, but rather importation laws.<sup>36</sup> In the early twentieth century, Congress passed a law stating “[t]hat any American woman who marries a foreigner shall take the nationality of her husband.”<sup>37</sup> In 1922, Congress passed a law that automatically gave a child the citizenship of his or her father.<sup>38</sup> United States history is fraught with other examples of racist,<sup>39</sup> discriminatory,<sup>40</sup> and otherwise restrictive<sup>41</sup> laws dealing with immigration and naturalization of citizens. However, the important thing to note about all of these examples is that, as opinions changed, so too did the laws. Although 8 U.S.C. § 1409 *has* changed, the changes have not been important or timely enough to reflect the changing social schema of immigration and family law. Thus, 8 U.S.C. § 1409 strikes many as anachronistic or lacking in sound legal justification.<sup>42</sup>

### 2. Changes to 8 U.S.C. § 1401 and 8 U.S.C. § 1409 Over Time

When it was passed in 1952, 8 U.S.C. § 1401 required a married citizen parent to be in the United States for a minimum of ten years, at least five of those years after

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<sup>33</sup> See *infra* Part I.B.1.

<sup>34</sup> See *infra* Part IV.A.

<sup>35</sup> See *infra* Part IV.A.

<sup>36</sup> U.S. CONST. art. I, § 9, cl. 1 (leaving control for importation and naturalization of slaves to Congress).

<sup>37</sup> *Mackenzie v. Hare*, 239 U.S. 299, 307 (1915) (quoting Act of Mar. 2, 1907, ch. 2534, 34 Stat. 1228, Comp. Stat. 1913, § 3960 (1907)).

<sup>38</sup> *In re* Citizenship Status of Minor Children, 25 F.2d 210, 210 (D. N.J. 1928) (“Those born here are citizens of the United States, under the Constitution, regardless of the allegiance of their parents. Those born abroad will, as heretofore, take the nationality of their fathers.”).

<sup>39</sup> See U.S. CONST. art. I, § 9, cl. 1; Chinese Exclusion Act, ch. 1064, 25 Stat. 504 (1888) (limiting the annual number of immigrants from certain Asian nations). The constitutionality of the Chinese Exclusion Act was heard by the Court in several cases and upheld on the grounds that it did not violate any existing treaties with the Chinese government. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

<sup>40</sup> See, e.g., Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Friends Act, ch. 58, 1 stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 stat. 596 (1798). These acts are collectively known as “The Alien and Sedition Acts.”

<sup>41</sup> Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (preventing convicts and prostitutes from immigrating to the United States).

<sup>42</sup> See, e.g., *supra* note 3 and accompanying text.



attaining the age of fourteen, in order to transmit his or her U.S. citizenship to a child born outside of the United States.<sup>43</sup> This was subsequently amended in 1986 to require the married, citizen parent to be in the United States for a minimum of five years, at least two years of which were after attaining the age of fourteen, in order to transmit citizenship.<sup>44</sup> When dealing with married couples, these regulations apply equally regardless of whether the parent transferring U.S. citizenship is the child's mother or the father.<sup>45</sup>

As shown above, the relevant sections of the United States Code dealing with differing rights based on parentage of the immigrant have become more lax over time. However, changes to the law do not retroactively apply to people applying for United States citizenship; the law that was in effect at the time the person in question was born is the law that governs his or her subsequent immigration proceeding.<sup>46</sup> This rigidity means that parties, such as Flores-Villar, may continue to fall through the cracks for years after an immigration law has been changed.

Despite creating a marriage-dependent set of rules for transmission of citizenship, Congress recognized that not all children born outside the United States to a citizen parent would be born in wedlock.<sup>47</sup> Thus, Congress created separate provisions for unwed citizen mothers and unwed citizen fathers. Rather than being required to spend

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<sup>43</sup> Act of June 27, 1952, ch. 477, 66 Stat. 163, 235–36 (1952) (current version at 8 U.S.C. § 1401 (2006)). The Act read, in part:

(a) The following shall be nationals and citizens of the United States at birth:

....

(7) 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 a person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . .

*Id.* § 301(a)(7).

<sup>44</sup> 8 U.S.C. § 1401 (2006). The statute reads in part:

The following shall be nationals and citizens of the United States at birth:

....

(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.

*Id.* § 1401(g).

<sup>45</sup> *See id.*

<sup>46</sup> *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 72 (2001).

<sup>47</sup> 8 U.S.C.S. Prec. § 1421 (“Special rules apply when determining citizenship for those born outside the country to U.S. citizen parents. . . . They have included . . . special rules for children born out of wedlock outside the U.S. and certain provisions for children born in U.S. territories.”).



at least five years in the United States, unwed mothers only need to be in the United States for a continuous period of one year in order to transmit citizenship to a child.<sup>48</sup> If the citizen parent is an unwed father, he must meet additional requirements and take affirmative steps before he is able to transmit his U.S. citizenship to his child; in addition to meeting the physical presence requirement set out for married parents, an unwed U.S. citizen father must also prove a blood connection to the child, agree to provide support for the child and take steps to legitimize paternity before the child reaches eighteen years of age.<sup>49</sup> These requirements are more onerous than those placed on mothers, wed or unwed.<sup>50</sup> The gendered nature of the distinction between 8 U.S.C. § 1409(a) and 8 U.S.C. § 1409(c) opens the statutes up to scrutiny on the basis of gender discrimination.

## II. DEVELOPMENT OF THE CASE LAW ADDRESSING 8 U.S.C. § 1409

The Court has addressed three separate challenges to 8 U.S.C. § 1401 and 8 U.S.C. § 1409 on only marginally different facts, suggesting that the law is not settled in an adequate way.<sup>51</sup> The most recent case, *Flores-Villar*, was argued in the 2010 session.

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<sup>48</sup> See 8 U.S.C. § 1409(c). The subsection states:

Notwithstanding 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 a 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.*

<sup>49</sup> *Id.* § 1409(a). The subsection reads:

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
  - (A) the person is legitimated under the law of the person's residence or domicile,
  - (B) the father acknowledges paternity of the person in writing under oath, or
  - (C) the paternity of the person is established by adjudication of a competent court.

*Id.*

<sup>50</sup> See *id.* § 1409(c).

<sup>51</sup> See generally *Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420

*A. Background Case—United States v. Flores-Villar*

On June 13, 2011, the Supreme Court, in a four-to-four deadlock and without opinion, affirmed the Ninth Circuit's ruling in *United States v. Flores-Villar*.<sup>52</sup> Ruben Flores-Villar was born in Tijuana, Mexico on October 7, 1974, to unwed parents.<sup>53</sup> Flores-Villar's mother was a non-U.S. citizen and his father, Rueben Trinidad Floresvillar-Sandez, was a United States citizen.<sup>54</sup> Flores-Villar was brought to the United States by relatives shortly after his birth and was raised in San Diego, California.<sup>55</sup> In 1997, Flores-Villar was arrested for importation of marijuana and later charged with entering the United States illegally and scheduled for deportation.<sup>56</sup> At a subsequent deportation hearing, Flores-Villar appealed his deportability, arguing that he was a United States citizen.<sup>57</sup> Under Flores-Villar's argument, he was a citizen because his father and paternal grandmother were U.S. citizens who had spent enough time in the United States to transmit their U.S. citizenship to him, even though Flores-Villar himself had never taken affirmative steps to establish his U.S. citizenship.<sup>58</sup> The Ninth Circuit found that the then-applicable version of the immigration statute, 8 U.S.C. § 1409, did not allow Floresvillar-Sandez to transmit his U.S. citizenship to Flores-Villar.<sup>59</sup> Thus, the deportation proceeding against Flores-Villar was allowed to stand.<sup>60</sup>

As *Flores-Villar* illustrates, the hypothetical drug offender trying to gain citizenship through his mother would be bound by his mother's ability to satisfy the requirements of 8 U.S.C. § 1409(c), not 8 U.S.C. § 1409(a).<sup>61</sup> An unwed mother transmitting citizenship needs to be physically present in the United States for one year, while an unwed father needs to be present for five years (two of those years must occur after attaining fourteen years of age).<sup>62</sup> An unwed father also has to take additional affirmative

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(1998); *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd without opinion*, 131 S. Ct. 2312 (2011).

<sup>52</sup> 131 S. Ct. 2312 (2011).

<sup>53</sup> *Flores-Villar*, 536 F.3d at 994–95.

<sup>54</sup> *Id.* at 994.

<sup>55</sup> *Id.*

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

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 998–99.

<sup>59</sup> *Id.* at 993, 998–99. Technically, Floresvillar-Sandez fell through a gap in 8 U.S.C. § 1409 that made him ineligible to transfer his citizenship to Flores-Villar. The statute required a father to be in the United States for five years after attaining the age of fourteen. *See id.* at 993 (citing 8 U.S.C. §§ 1401(a)(7); 1409 (1974)). Floresvillar-Sandez was only sixteen when Flores-Villar was born, so it was physically impossible for him to have been present in the United States for long enough to meet the statute's requirements. *Id.* at 994, 998. *See supra* Part I.B.2 for an explanation of the statute applicable when Flores-Villar was born and its subsequent versions.

<sup>60</sup> *Flores-Villar*, 536 F.3d at 993–94.

<sup>61</sup> *See* 8 U.S.C. § 1409(a) (2006) (using the word “father” four times and never using the word “mother”).

<sup>62</sup> *Compare* 8 U.S.C. § 1409(c), *with* 8 U.S.C. § 1409(a), *and* 8 U.S.C. § 1401(g).

steps before he is able to transmit citizenship to a child.<sup>63</sup> In the situation described above, the hypothetical offender would be able to gain U.S. citizenship where Flores-Villar could not. Thus, two men, identically situated, except for the happy accident of their parentage, receive drastically different outcomes under the application of U.S. immigration law.

The sex of Flores-Villar, or any other similarly situated hypothetical offender, is not a factor in determining which standards govern his attainment of U.S. citizenship.<sup>64</sup> However, sex and gender are still facially codified in the relevant immigration provisions above. An unmarried female parent receives different treatment for her child than an unmarried male parent does. These disparate outcomes are the result of a codification of a gender stereotype treating U.S. citizens differently based on their sex.

### *B. Additional Case Law Addressing Gender Discrimination in Immigration Jurisprudence*

*Flores-Villar* was decided without opinion likely because the deadlocked court had nothing further to add to the debate.<sup>65</sup> Similar cases had been heard previously,<sup>66</sup> and despite some initial speculation, *Flores-Villar* would not be a case to make new law, but simply a case that relied on the existing bedrock of immigration law.

#### 1. *Fiallo v. Bell*

*Fiallo v. Bell*<sup>67</sup> was the first modern case to establish a precedent for *Flores-Villar*. *Fiallo* raised a Fifth Amendment challenge to the provision of the Immigration and Nationality Act of 1952 (INA),<sup>68</sup> which failed to confer a preferred immigration status on the illegitimate children of fathers who are United States citizens.<sup>69</sup> The Court determined that the INA did not violate the Fifth Amendment because the choice “not to accord preferential [treatment] to this particular class of aliens . . . remains one ‘solely for the responsibility of the Congress and wholly outside the power of this

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<sup>63</sup> Compare 8 U.S.C. § 1409(c), with 8 U.S.C. § 1409(a), and 8 U.S.C. § 1401(g).

<sup>64</sup> See 8 U.S.C. § 1409(a), (c) (drawing legal distinctions based upon the gender of the parent, but not of the child).

<sup>65</sup> See *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

<sup>66</sup> See *Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998); *Fiallo v. Bell*, 430 U.S. 787 (1977).

<sup>67</sup> *Fiallo v. Bell*, 430 U.S. 787 (1977). The *Fiallo* plaintiffs raised a challenge to a different provision of the Immigration and Nationality Act, 8 U.S.C. § 1121 (2006), which is not directly on point for purposes of this Note. However, a discussion has been included because the Court has relied on the logic in *Fiallo* when deciding *Miller*. See *Miller v. Albright*, 523 U.S. 420, 435–36 (1998).

<sup>68</sup> 8 U.S.C. § 1101(b); *Fiallo*, 430 U.S. at 788.

<sup>69</sup> *Fiallo*, 430 U.S. at 788–89.

Court to control.”<sup>70</sup> However, the Court upheld Congress’s law while agreeing with the petitioner families that the provision of the INA in question did not allow fathers to prove the strength of their relationships with their illegitimate children;<sup>71</sup> nor did the Court seem to believe there was much of a legitimate government interest furthered by the standard.<sup>72</sup> Even a slight government interest was sufficient due to Congress’s hefty power to legislate immigration issues.<sup>73</sup>

## 2. *Miller v. Albright*

The Court subsequently addressed the issue again in *Miller v. Albright*.<sup>74</sup> The Court distinguished *Miller* from *Fiallo* by determining that *Fiallo* dealt with extending citizenship rights to a specific class of illegitimate children,<sup>75</sup> while the petitioner in *Miller* was only asking the Court to “confirm her pre-existing citizenship rather than grant her rights that she does not now possess.”<sup>76</sup>

*Miller* dealt with a Filipino national who did not have a strong connection to her father or to the United States until after she had reached the age of majority.<sup>77</sup> The petitioner brought a Fifth Amendment due process challenge to the provision in 8 U.S.C. § 1409(a) requiring fathers, but not mothers, to take additional affirmative steps before transferring citizenship to an illegitimate child and requiring those steps to be taken before the child reaches twenty-one years of age.<sup>78</sup> In a notably fractured opinion, the Court upheld the constitutionality of 8 U.S.C. § 1409(a).<sup>79</sup>

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<sup>70</sup> *Id.* at 799 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

<sup>71</sup> *Id.* at 797–99.

<sup>72</sup> *Id.* at 798–99.

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

<sup>74</sup> 523 U.S. 420 (1998).

<sup>75</sup> *Id.* at 429. For a discussion of the idea that the only way for a person born outside the United States to obtain citizenship by birth is through an act of Congress, not a decision by the Court, see *United States v. Wong Kim Ark*, 169 U.S. 649, 702–03 (1898).

<sup>76</sup> *Miller*, 523 U.S. at 432.

<sup>77</sup> *Id.* at 425–26.

<sup>78</sup> See 8 U.S.C. § 1409(a)(3)–(4) (2006); *Miller*, 523 U.S. at 424.

<sup>79</sup> *Miller*, 523 U.S. at 445. Justice Stevens, writing for the Court and joined by Justice Rehnquist, found the statute proper under the Fifth Amendment. See generally *id.* at 428–45. Justices Scalia and Thomas concurred in the judgment, while noting that the Court lacked the power to grant citizenship as a remedy. *Id.* at 452–53 (Scalia, J., concurring). Justices O’Connor and Kennedy also concurred in the judgment, but believed that *Miller* did not have standing to raise the substantive legal claims because they depended too heavily on *Miller*’s father. *Id.* at 445–46 (O’Connor, J., concurring). Justice Ginsburg, joined by Justices Souter and Breyer, dissented, arguing that 8 U.S.C. § 1409(a) was unconstitutional. *Id.* at 460 (Ginsburg, J., dissenting). Justice Breyer, joined by Justices Ginsburg and Souter also dissented, on the grounds that the case deserved heightened scrutiny, and that 8 U.S.C. § 1409 violated the Equal Protection Clause. *Id.* at 471–72 (Breyer, J., dissenting).

### 3. *Nguyen v. INS*

*Nguyen v. INS* dealt with a Vietnamese national who was raised by his father in the United States from the age of six.<sup>80</sup> Petitioner, along with his father, brought a Fifth Amendment due process challenge to 8 U.S.C. § 1409, claiming that it impermissibly imposed different statutory requirements for a child's citizenship based on which parent is a U.S. citizen.<sup>81</sup> The Court held that *Nguyen* dealt with an issue not resolved by the majority in *Miller*.<sup>82</sup> However, both cases addressed the constitutionality of the same statute and the *Nguyen* court did not specify *which* issue was novel to the *Nguyen* case; it is more likely that the Court chose to hear *Nguyen* three terms after hearing *Miller* because it meant that the Court would have a chance to clarify the *Miller* ruling and eliminate the circuit split caused by the fractured opinion therein.<sup>83</sup> Additionally, Nguyen's father was a party to the suit, alleviating some of the standing concerns raised by *Miller*.<sup>84</sup>

### III. GENDER DISCRIMINATION LAW AS IT CONFLICTS WITH IMMIGRATION LAW

Although the power for intervention remains, courts have been reluctant to use their oversight role to influence gender protection laws falling under the broad umbrella of Congress's immigration law powers.<sup>85</sup> Commentators note that, although the gender disparities at work in 8 U.S.C. § 1409 likely would not withstand the heightened scrutiny normally applied to facially discriminatory statutes, the typical anti-gender discrimination rationales do not pull the same weight in immigration cases.<sup>86</sup> Thus, the history that follows suggests that *Flores-Villar* had already been decided long before it was even heard by the Court.

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<sup>80</sup> *Nguyen v. INS*, 533 U.S. 53, 57 (2001).

<sup>81</sup> *Id.* at 56–58.

<sup>82</sup> *Id.* at 56.

<sup>83</sup> Compare *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000), *aff'd*, 533 U.S. 53 (2001) (holding that the government had important interests and U.S.C. § 1409 was well-tailored to support those interests), with *Lake v. Reno*, 226 F.3d 141 (2nd Cir. 2000) (holding that 8 U.S.C. § 1409 did violate the Equal Protection Clause of the Fifth Amendment and that the Court could provide a remedy by recognizing citizenship conferred by birth, but not by conferring citizenship on a party), and *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999) (holding that heightened scrutiny applies and the additional paternal requirements under 8 U.S.C. § 1409 were unconstitutional where a party had standing to bring a case).

<sup>84</sup> See *Nguyen*, 533 U.S. at 57–58.

<sup>85</sup> See *supra* note 5; see also *supra* note 70.

<sup>86</sup> See Debra L. Satinoff, Comment, *Sex-Based Discrimination in U.S. Immigration Law*, 47 AM. U. L. REV. 1353, 1360–61 (1998).

*A. General Development of Gender Discrimination Law*

The Fourteenth Amendment states, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>87</sup>

Although the Fifth Amendment does not explicitly impose an equal protection guarantee on federal laws (such as those in the immigration realm), the Court has indicated that such a protection is at least implicitly present.<sup>88</sup> The promise of equal protection has long been used by the Supreme Court to overturn discriminatory laws.<sup>89</sup> Many of these laws were facially discriminatory, with the text of the statute itself containing language in violation of equal protection provisions.<sup>90</sup> 8 U.S.C. § 1409(a) is one of the few facially gender-discriminatory statutes remaining in effect.<sup>91</sup> Since 1971, the Court has struck down many statutes that discriminate on the basis of gender.<sup>92</sup>

Although most gender discrimination cases have traditionally been brought on behalf of women,<sup>93</sup> it should be noted that, “[t]he fact that a state statutory scheme

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<sup>87</sup> U.S. CONST. amend. XIV, § 1.

<sup>88</sup> *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (addressing segregation in the District of Columbia’s public schools and noting that “[i]n view of our decision that the Constitution prohibits states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government”); *see also* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding unconstitutional under the Fifth Amendment a military benefit scheme that gives different benefits based on gender).

<sup>89</sup> *See, e.g.*, *Frontiero*, 411 U.S. 677; *Reed v. Reed*, 404 U.S. 71 (1971) (holding that a provision of a state probate code giving preference to men over women when applying for appointment as administrator of an estate violates the Equal Protection Clause of the Fourteenth Amendment); *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregation of white and black children in public schools solely on the basis of race is an unconstitutional violation of the Fourteenth Amendment’s Equal Protection Clause).

<sup>90</sup> *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down an anti-miscegenation law that specifically referenced race).

<sup>91</sup> *See generally* Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases*, 178 A.L.R. FED. 25 (2008) (listing examples of cases in which the Supreme Court has upheld challenges to statutes that discriminate based on gender).

<sup>92</sup> *Id.* § 2[a].

<sup>93</sup> *See, e.g.*, *Frontiero*, 411 U.S. 677 (holding that benefits given by U.S. military to U.S. military family members cannot be distributed based on gender); *Reed*, 404 U.S. 71 (challenging Idaho probate code that gave preference to male estate executors).



expressly discriminates against men rather than women does not protect it from equal protection scrutiny under the Fourteenth Amendment to the United States Constitution."<sup>94</sup> As such, there have been gender discrimination cases brought by men.<sup>95</sup>

The Court has recognized that gender discrimination cases are worthy of more than rational basis review, however not worthy of the same strict scrutiny applied to race discrimination cases.<sup>96</sup> Consequently, the Court has developed a middle-tier, or heightened scrutiny level, that applies to gender-based discrimination cases; under heightened scrutiny, any discriminatory statute or action by the government must serve an important governmental purpose and be substantially related to that important government purpose.<sup>97</sup>

Though the heightened scrutiny standard has been consistently recognized since it was first announced in the 1970s, courts have sometimes found different applications for the standard, depending on the issue.<sup>98</sup> For example, the Court has traditionally been more deferential to statutes that treat the genders differently if there is a genuine difference between the two genders and if there is no evidence of a gender stereotype.<sup>99</sup> This unique application of the statutes comes from the principle in *City of Cleburne v. Cleburne Living Center, Inc.*<sup>100</sup> that the Constitution is meant to ensure that similarly situated persons are treated alike under the law.<sup>101</sup> By definition, a biological difference

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<sup>94</sup> Wooster, *supra* note 91, § 8.

<sup>95</sup> See generally *Craig v. Boren*, 429 U.S. 190 (1976). In this case, males challenged an Oklahoma law allowing 18-to-21-year-old women, but not men, to purchase 3.2% beer. *Id.* at 191–92. The Court held that the Oklahoma law was an unconstitutional violation of the Equal Protection Clause. *Id.* at 204.

<sup>96</sup> See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Classifications based on race or national origin . . . are given the most exacting scrutiny. Between [the] extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (“[G]ender-based discriminations must serve important governmental objectives and . . . the discriminatory means employed must be substantially related to the achievement of those objectives.”).

<sup>97</sup> See *Wengler*, 446 U.S. at 150.

<sup>98</sup> See generally Rachel K. Alexander, Case Note, *Nguyen v. INS: The Supreme Court Rationalizes Gender-Based Distinctions in Upholding an Equal Protection Challenge*, 35 CREIGHTON L. REV. 789 (2002).

<sup>99</sup> See, e.g., *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289–92 (1987) (extending additional benefits to women under Title VII to guarantee labor equality during pregnancy); see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”) *But cf.* *Craig v. Boren*, 429 U.S. 190, 199 (1977) (noting that the “difference between males and females, with respect to the purchase of 3.2% beer” does not warrant different treatment of the sexes).

<sup>100</sup> 473 U.S. 432 (1985).

<sup>101</sup> *Id.* at 439. The reasoning in *Cleburne* supports the premise that gender discrimination is permissible in cases where there is a physical and undeniable difference between the genders, rendering them dissimilarly situated. See, e.g., *Virginia*, 518 U.S. at 533.



between men and women means that they are not similarly situated and therefore, in some circumstances, it may be permissible to treat the two genders differently.<sup>102</sup>

The idea of similarly positioned parties receiving similar outcomes has often been at tension with the ideals of immigration law.<sup>103</sup> The Court has noted on multiple occasions that parties would receive different results in gender discrimination cases inside the umbrella of immigration law as compared to outside immigration law.<sup>104</sup> This is due to a long line of history supporting the Court's deference to Congress on matters dealing with aliens and international law.<sup>105</sup> The example posed in the introduction to this Note is a prime example of two parties, almost identically situated, who receive drastically disparate outcomes in cases inside and outside of immigration law. It bears exploring, then, how immigration cases apply, or rather fail to apply, the gender-based discrimination level of heightened scrutiny.

### *B. The Appropriate Level of Scrutiny for Gender Discrimination Cases Falling Under Immigration Law*

Traditionally, cases dealing with gender-based discrimination receive heightened scrutiny. However, this conflicts with the Court's desire to give extreme deference to Congress in issues dealing with immigration. As such, a lower standard was applied in the earlier immigration cases.<sup>106</sup> In *Miller* and *Nguyen* the Court nominally applied heightened scrutiny, but, as Justice O'Connor argued in her dissent to *Nguyen* and concurrence to *Miller*, applied it loosely and contrary to precedent.<sup>107</sup> For example,

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<sup>102</sup> See *Virginia*, 518 U.S. 515 (acknowledging that biological differences between men and women may require some different treatment in a military education setting).

<sup>103</sup> See *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

<sup>104</sup> Satinoff, *supra* note 86, at 1360–61 (“[O]ne is far less likely to succeed in challenging an immigration law implicating a gender-based classification on equal protection grounds than if one challenged the exact same-gender based classification in a non-immigration context.”).

<sup>105</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[T]he power to admit or exclude aliens is a sovereign prerogative.”); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.” (citations omitted) (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950); *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903))).

<sup>106</sup> See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792–96 (1977) (noting that immigration cases receive less judicial scrutiny).

<sup>107</sup> See *Nguyen v. INS*, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting); *Miller v. Albright*, 523 U.S. 420, 440 (1998); *id.* at 451 (O'Connor, J., concurring) (noting that § 1409 is upheld as constitutional because Miller's challenge only triggered rational basis scrutiny).

her dissent in *Nguyen* notes that the “majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.”<sup>108</sup> In a 1984 article on immigration and plenary power, Stephen Legomsky stated that “immigration is an area in which the normal rules of constitutional law simply do not apply.”<sup>109</sup>

Regardless of which level of scrutiny applies to gender discrimination cases in an immigration context,<sup>110</sup> in order for 8 U.S.C. § 1409 to be constitutional, any gender-based discrimination by the government at least needs to pass rational basis review, and therefore needs to be, at a minimum, rationally connected to a legitimate government interest.<sup>111</sup>

The government has laid out three possible interests advanced by 8 U.S.C. § 1409: ensuring that a biological tie exists between the child and the father,<sup>112</sup> ensuring that the child has a chance to form a relationship with the parent and the United States,<sup>113</sup> and preventing statelessness.<sup>114</sup> These government justifications were presented differently, or sometimes not presented at all, among the cases, so they are best analyzed individually, rather than as a component of each case.

### 1. Ensuring There Is a Biological Relationship Between the Father and Illegitimate Child

*Fiallo*, *Miller*, *Flores-Villar*, and *Nguyen* all addressed the desire to ensure that a blood relationship exists between a father and his illegitimate child.<sup>115</sup> Awarding citizenship to a child grants that child access to all legal protections and services of the United States, as well as full access to the political process.<sup>116</sup> With this in mind, Congress should certainly have the right to restrict conveyance of citizenship—however, those restrictions should be consistent across genders. 8 U.S.C. § 1409 does not require a mother to prove her maternity to a child in order to transmit her United States

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because § 1409 does not make gender-based distinctions but that § 1409 might not pass a heightened scrutiny test).

<sup>108</sup> *Nguyen*, 533 U.S. at 79 (O’Connor, J., dissenting). Justice O’Connor charged the majority opinion with failing to: adequately explain the importance of the government interests at issue, discuss whether there is a more germane basis of classification instead of sex, and determine whether the interests the government proposes are actually important. *Id.* at 79–80.

<sup>109</sup> Legomsky, *supra* note 13, at 260.

<sup>110</sup> For an evaluation of which level of scrutiny applies to cases dealing with gender discrimination in immigration statutes, see *supra* Part III.B.

<sup>111</sup> *See, e.g.*, U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

<sup>112</sup> *Nguyen*, 533 U.S. at 62.

<sup>113</sup> *Id.* at 64–65.

<sup>114</sup> *See Miller v. Albright*, 523 U.S. 420, 430 n.8 (1998).

<sup>115</sup> *See Nguyen*, 533 U.S. at 62; *Miller*, 523 U.S. at 435; *Fiallo v. Bell*, 430 U.S. 787, 798 (1977); *United States v. Flores-Villar*, 536 F.3d 990, 995–96 (9th Cir. 2008), *aff’d without opinion*, 131 S. Ct. 2312 (2011).

<sup>116</sup> *See, e.g., Nguyen*, 533 U.S. at 67.

citizenship to that child.<sup>117</sup> This does seem logical at first; a mother is necessarily present at the child's birth and knows of the child's existence.<sup>118</sup> However, approximately one-half of all child births in developing nations are not registered.<sup>119</sup> Though a mother knows of the birth of her child, and that the child is hers, it is likely that the mother has no legal documentation confirming the biological tie to her child.<sup>120</sup> Without such documentation, immigration officials in the United States cannot verify the maternity of a child, beyond taking the mother's word for it. Although mothers are taken at their word, immigration officials are not willing to take this step with fathers. Even if a father is present at the birth, if there is no birth certificate issued listing him as the father, he must take further affirmative steps under 8 U.S.C. § 1409 in order to verify his paternity.<sup>121</sup> These additional affirmative steps place two similarly situated unwed parents, both present at the birth of their child, in different legal positions based solely on their gender.

## 2. Ensuring the Opportunity for an Actual and Meaningful Bond to Develop Between the Child and the Father

The Court in *Nguyen* made the distinction between the *opportunity* for an actual relationship to develop between a child and her United States citizen parent, regardless of whether that relationship ever comes to fruition, and the absence of such an opportunity.<sup>122</sup> According to the Court's line of reasoning, the fact that the mother is present at birth is enough to trigger this opportunity, even if the mother does not have an *actual* relationship with that child after the day of the birth.<sup>123</sup> This argument was also present in *Miller*.<sup>124</sup> In *Miller*, the Court quoted the District of Columbia Circuit Court of Appeals' opinion, noting that "[a] mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence."<sup>125</sup> This statement represents a purely hypothetical and overly broad view of unwed fathers' response to their children. The Court offered no empirical proof that more fathers than mothers abandon their children born overseas; it just

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<sup>117</sup> See, e.g., *Flores-Villar*, 536 F.3d at 995; see also 8 U.S.C. § 1409(a) (explaining the additional steps a father must take to prove paternity).

<sup>118</sup> See, e.g., *Nguyen*, 533 U.S. at 68.

<sup>119</sup> U.N. High Comm'r for Refugees, *Birth Registration: A Topic Proposed for an Executive Committee Conclusion on International Protection*, ¶ 5, U.N. Doc. EC/61/SC/CRP.5 (Feb. 9, 2010) [hereinafter UNHCR], available at <http://www.unhcr.org/4b910bf19.pdf>.

<sup>120</sup> See, e.g., *id.* ¶¶ 3,5.

<sup>121</sup> See 8 U.S.C. § 1409(c) (mandating that a child born outside the United States, and out of wedlock "shall be held to have acquired at birth the nationality status of his mother"); see also 8 U.S.C. § 1409(a).

<sup>122</sup> See *Nguyen*, 533 U.S. at 67.

<sup>123</sup> See *id.*

<sup>124</sup> See *Miller v. Albright*, 523 U.S. 420, 427 (1998).

<sup>125</sup> *Id.* (quoting *Miller v. Christopher*, 96 F.3d 1467, 1472 (D.C. Cir. 1996), *aff'd sub nom.* *Miller v. Albright*, 523 U.S. 420, 427 (1998)).

stated that such behavior is common in men, especially those in the military, when living abroad.<sup>126</sup> Furthermore, *Flores-Villar* and *Nguyen* evince examples of cases where the child's father provided full support and the child had little or no interaction with his mother after birth.<sup>127</sup>

### 3. Preventing Statelessness

In *Miller*, the government cited the prevention of statelessness as a legitimate interest furthered by 8 U.S.C. § 1409.<sup>128</sup> The Court failed to address statelessness as a concern. The majority in *Nguyen* also ignored the statelessness issue, despite the fact that the government again raised it as a legitimate government interest.<sup>129</sup> The Ninth Circuit addresses and strongly supports the statelessness argument in *Flores-Villar*,<sup>130</sup> despite the fact that prior opinions failed to do so. Concerns about statelessness are legitimate and cannot be fully explained by constitutional law doctrine. Further review of statelessness law is required.

Immigration in the United States is framed around the permanent settler model: a model describing the formation and development of immigration policies in nations which were originally colonized through the displacement of indigenous populations.<sup>131</sup> Due to a shared sense of the immigrant mentality, "countries that develop through permanent settler colonization become the most receptive states toward immigrants of diverse races and ethnic groups. . . . Many ideologies have developed about settlement processes; some about offering a 'safe haven' for the poor and persecuted, others about the contributions of immigrants to building the nation."<sup>132</sup> Despite the general openness of the United States to receiving immigrants, particularly those fleeing statelessness, war or persecution,<sup>133</sup> the United States has not always favored immigrants from

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<sup>126</sup> *Id.* at 439.

<sup>127</sup> *See Nguyen*, 533 U.S. at 57 (noting that Nguyen lived with his father in the United States for most of his life); *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd without opinion*, 131 S. Ct. 2312 (2011) (noting that Flores-Villar was raised by his father and grandmother).

<sup>128</sup> *See Miller*, 523 U.S. at 430–31 n.8.

<sup>129</sup> *See Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting) ("Punctuating the disparity between the majority's and the INS' accounts of the governmental interests at stake is the majority's failure even to address the INS' second asserted rationale: that § 1409 prevents certain children from being stateless.").

<sup>130</sup> *See Flores-Villar*, 536 F.3d at 996–98.

<sup>131</sup> JANOSKI, *supra* note 28, at 12–14 (describing the process through which views and politics form in nations, like the United States, which were initially colonized through the displacement of indigenous peoples).

<sup>132</sup> *Id.* at 12–13.

<sup>133</sup> *See, e.g.*, Maria Otero, Under Sec'y for Democracy & Global Affairs, U.S. Department of State, Remarks on Statelessness and Gender Discrimination at the Refugees International Event, U.S. Inst. of Peace (Oct. 25, 2011) (transcript available at <http://www.state.gov/g/176132.htm>).

particular groups.<sup>134</sup> The ironic result of the United States' attempts to create an open door immigration policy is a system that favors unwed mothers and their children, despite attenuated connections to the nation, because there is a perception that these parties have nowhere else to go, while excluding parties, who in the case of Nguyen and Flores-Villar have very strong ties to the United States.

Statelessness is a serious concern for many nations.<sup>135</sup> The United Nations High Commissioner for Refugees (UNHCR) has listed prevention of statelessness through documentation as one of its Global Strategic Priorities.<sup>136</sup> The report cited a 2009 UNICEF study that found that roughly one-half of children in developing nations were not registered or provided with necessary citizenship documentation immediately after birth.<sup>137</sup> Though not always synonymous with statelessness, this lack of birth registration can increase the chances that a child's birth will not be recognized by a nation.<sup>138</sup> A lack of birth registration can also lead to difficulties accessing health and education services.<sup>139</sup> However, when describing how to attain goals related to increased documentation of children at birth, UNHCR states that registration should be facilitated through, "[n]on-discrimination, ensuring equal access to birth registration for all persons of concern to UNHCR, regardless of such factors as nationality, immigration status or marital status of the parents."<sup>140</sup>

The United States is not one of the nations on the UNHCR watch list for stateless persons.<sup>141</sup> However, the U.S. Department of State has taken a strong stance on the prevention of statelessness through increased registration.<sup>142</sup> As a nation working so vehemently to prevent statelessness, the United States should use its own immigration laws to set a positive example for developing nations. 8 U.S.C. § 1409, however, fails to comport with UNHCR goals in two ways. First, 8 U.S.C. § 1409 discriminates based on marital status of the parents, contrary to the UNHCR provisions disapproving of such immigration status laws.<sup>143</sup> Second, 8 U.S.C. § 1409 requires U.S. citizen mothers wishing to transfer citizenship to their children to have been physically present in the

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<sup>134</sup> See, e.g., JANOSKI, *supra* note 28, at 111–14.

<sup>135</sup> See, e.g., Otero, *supra* note 133.

<sup>136</sup> UNHCR, *supra* note 119, ¶ 5.

<sup>137</sup> *Id.* (citing UNICEF, STATE OF THE WORLD'S CHILDREN SPECIAL EDITION: CELEBRATING 20 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD, Tbl. 9 (2009)).

<sup>138</sup> See, e.g., P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 161–69 (2d ed. 1979) (describing “absolute statelessness,” obtained at birth, and “subsequent statelessness,” which happens after birth, due to some other condition, such as a territorial changes or a failure to register for nationality).

<sup>139</sup> UNHCR, *supra* note 119, ¶ 7(c) (describing the U.N.'s plan to integrate birth registration with “public programmes such as those relating to childbirth, maternal-infant care, immunization and education”).

<sup>140</sup> *Id.* ¶ 7(b).

<sup>141</sup> For the watch list, see UN HIGH COMM'R FOR REFUGEES STATISTICAL YEARBOOK 2010: STATISTICAL ANNEX tbl. 7 (2010), available at <http://www.unhcr.org/4ef9c7269.html>.

<sup>142</sup> See Otero, *supra* note 133.

<sup>143</sup> Compare 8 U.S.C. § 1409 (2006), with UNHCR, *supra* note 119, ¶ 7(b).

United States for at least one year.<sup>144</sup> Some women simply will not meet this physical presence requirement. However, statelessness is such a serious concern that it is unlikely that a mother's failure to meet the physical presence requirement will completely bar her child from attaining U.S. citizenship.<sup>145</sup>

8 U.S.C. § 1409 then, is rendered useless in preventing statelessness. In *Nguyen*, the government alluded to this in its brief by admitting that if forced to equalize immigration regulations with regard to unwed mothers and fathers, they would take away the current preference given to unwed mothers.<sup>146</sup> If the government actually believed that 8 U.S.C. § 1409 prevented statelessness, they would likely have defended the statute more zealously due to the importance of eliminating statelessness. By conceding that they would take away the preference to mothers, rather than extending it to fathers, the government has indicated that its interest in lowering the number of stateless children is a lower priority than the other interests the government has advanced in support of differing policies for maternal and paternal naturalization.<sup>147</sup>

### C. *The Insurmountable Problem of Stare Decisis in Immigration Law*

Though the Court has consistently deferred to Congress's supremacy on issues dealing with immigration law,<sup>148</sup> the opinions and rationale behind upholding the constitutionality of 8 U.S.C. § 1409(a) have been remarkably inconsistent and fractured among the Justices, and across the cases.<sup>149</sup> Also telling is the fact that the Court has heard challenges to different aspects of the case on three separate occasions in the past fifteen years; if the law were truly settled by Congress's extremely broad discretion in cases dealing with immigration and aliens, the Court likely would not have to address the same statute three times.<sup>150</sup> The Court, rather than recognizing that stare

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<sup>144</sup> See 8 U.S.C. § 1409(c).

<sup>145</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53, 71 (2001).

<sup>146</sup> Brief for the Respondent at 10, *Nguyen*, 533 U.S. 53 (No. 99-2071).

<sup>147</sup> Erin Chlopak, Comment, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967, 990 (2002). Chlopak notes:

The government's own brief . . . [concedes] that, if forced to equalize the maternal and paternal regulations, the "appropriate course would be to deny unwed mothers their current preference." By admitting its ultimate willingness to sacrifice the means by which § 1409 may prevent statelessness, the government casts doubt on the value of that goal and ultimately on the substantiality of the relationship between preventing statelessness and creating gender-based categories to do so.

*Id.* (footnote omitted) (quoting Brief for the Respondent at 10, *Nguyen*, 533 U.S. 53 (No. 99-2071)).

<sup>148</sup> See *supra* note 5; see also *supra* note 70.

<sup>149</sup> See *supra* Part II.

<sup>150</sup> Due to a variety of procedural questions and anomalies, the Court has yet to fully decide an immigration case dealing with 8 U.S.C. § 1409. Four Justices in *Miller* could not overcome the question of whether the plaintiff, without her father joined as a party, had standing to bring



decisis requires that immigration law trump gender discrimination concerns presented by *Flores-Villar*, has tried to use strong government interests as a vehicle to justify the disparate gender outcomes present in 8 U.S.C. § 1409. Though the Court is free to base its decision on a mix of stare decisis and strong governmental interests, deciding cases based on gender discrimination grounds has left the statute open to continued attacks on the legitimacy of the government's proposed interests. Alternatively, a strong stare decisis reading of the cases suggests that immigration law has closed the door on the equal protection concerns raised in response to 8 U.S.C. § 1409.<sup>151</sup> As such, litigants like *Flores-Villar* will need to seek a different vehicle to address the inequities presented by 8 U.S.C. § 1409.

### 1. Congress's Plenary Power in Immigration Law Is Not an Absolute Grant of Power

As noted in *Kleindienst v. Mandel*,<sup>152</sup> Congress has a markedly broad grant of power in matters dealing with immigration law.<sup>153</sup> However, the Court's role is to limit Congress's ability to pass laws that treat similar parties differently under immigration laws.<sup>154</sup> Congress's discretion is not complete and is at its weakest point when dealing

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the discrimination case. *See Miller*, 523 U.S. at 445–46 (O'Connor, J., concurring); *id.* at 454 n.1 (Scalia, J., concurring). Justice Kennedy, who authored the majority opinion, presumably decided that the standing issue was cured by the inclusion of Nguyen's father in the latter proceeding. *See Nguyen*, 533 U.S. at 58. Justice O'Connor does not specifically address the standing issue in her dissent, however she did reach the merits of the case, suggesting that she also believed the standing concerns from *Miller* were remedied by the inclusion of Nguyen's father in the case. *See id.* at 74–97 (O'Connor, J., dissenting). Justices Kennedy and O'Connor split on whether 8 U.S.C. § 1409 was constitutional, allowing the case to come out in favor of upholding the law. *See generally id.* Justice Kagan recused herself from the proceedings in *Flores-Villar*, resulting in a deadlocked court affirming the lower opinion without opinion. *See United States v. Flores-Villar*, 131 S. Ct. 2312, 2313 (2011).

<sup>151</sup> For a historical explanation of the evolution of stare decisis in modern common law, see generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659–81 (1999).

<sup>152</sup> 408 U.S. 753 (1972).

<sup>153</sup> *Id.* at 765–66. The Court held that:

[T]he power to exclude aliens is “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . .” The Court without exception has sustained Congress’ “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”

*Id.* (citing Brief for the United States at 20, *Kleindienst*, 408 U.S. 753 (No. 71-16), and *Boutilier v. INS*, 387 U.S. 118 at 123).

<sup>154</sup> *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). The Court wrote: “When Congress finds that a problem exists, we must give that finding due deference; but Congress



with laws that infringe on substantive rights under another area of law, or with another branch's ability to perform its constitutional functions.<sup>155</sup>

When addressing immigration due process concerns in *Galvan v. Press*,<sup>156</sup> Justice Frankfurter, writing for the court, explained:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," but a whole volume.<sup>157</sup>

However, *stare decisis* cannot forever be used as a crutch to maintain a law after the social justification for that law has crumbled.<sup>158</sup> Despite this consideration, the Court has recently cemented its position that, for the time being, *stare decisis* bars the modification of the discriminatory effect of 8 U.S.C. § 1409.<sup>159</sup>

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may not choose an unconstitutional remedy." *Id.* Though the issue at hand in *Citizens United* was a First Amendment challenge to a campaign finance law, the Court made a cogent point about the laws Congress chooses to pass: they do not have to be the best, or the only, solution to a problem identified by legislators, but they must abide by constitutional provisions. *See id.*

<sup>155</sup> *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 951 (1983) (detailing the long history of separation of powers as an "essential constitutional function[ ]"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–37 (1952) (Jackson, J., concurring) (describing the varying degrees of presidential power over an issue based on whether another branch of the government has expressly ruled on that issue).

<sup>156</sup> 347 U.S. 522 (1954).

<sup>157</sup> *Id.* at 530–31 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)) (citations omitted) (citing *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 155 (1919)).

<sup>158</sup> *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992). The Court held that:

[I]t is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether . . . facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

*Id.* (citations omitted).

<sup>159</sup> *See United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd without opinion*, 131 S. Ct. 2312 (2011).

## 2. The Court's Inability to Grant Citizenship as a Remedy

Even if the Court was to find that the provisions in 8 U.S.C. § 1409 are unconstitutional, the Court does not have the power to grant citizenship as a remedy.<sup>160</sup> Therefore, all the Court can do for parties like Flores-Villar is find the law unconstitutional and require Congress to revise the provisions. Due to the current makeup of the Court and the long history of upholding 8 U.S.C. § 1409, it is likely the Court is far from doing this. However, as the Second Circuit demonstrated in *Lake v. Reno*<sup>161</sup>, the Court is allowed to recognize citizenship conferred on a party by the nature of his or her birth,<sup>162</sup> only the Court's attempt to grant citizenship to parties who do not have standing under existing immigration laws is forbidden by the Constitution's grant of plenary power to Congress.<sup>163</sup>

The unusually high deference the Court grants Congress in matters relating to immigration has led the Court to uphold the facially discriminatory immigration provisions in 8 U.S.C. § 1409. If the Court ever wishes to correct the gender disparity in immigration law, its "whole volume"<sup>164</sup> of history is probably an incorrect vessel. The following sections analyze the changing social landscape that justify beginning a new volume of law—one that focuses on principles of family law over those of immigration law.

### IV. IMMIGRATION LAW AS IT RELATES TO FAMILY LAW AND THE HISTORY OF PATERNAL DISCRIMINATION

Considering 8 U.S.C. § 1409 in accordance with family law principles, and family law principles' higher deference to parental rights, is a better means for the Court to correct its past decisions, without interfering with Congress's plenary power over immigration issues. Additionally, finding an alternate method to correct the gender disparity of 8 U.S.C. § 1409 ensures horizontal equity between equally situated parties, regardless of whether the case involves immigration law.

#### *A. Stereotypes About the Role of Unwed Parents*

"The putative father often goes on his way unconscious of the birth of the child. Even if conscious, he is very often totally unconcerned because of the absence of any

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<sup>160</sup> *Miller v. Albright*, 523 U.S. 420, 456 (1998) ("Because only Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States, federal courts cannot exercise that power under the guise of their remedial authority. 'Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations.'" (quoting *INS v. Pangilinan*, 486 U.S. 875, 885 (1988))).

<sup>161</sup> 226 F.3d 141 (2d Cir. 2000).

<sup>162</sup> *See id.* at 149 (finding that the petitioner, pursuant to congressional enactment, is a U.S. citizen).

<sup>163</sup> *See supra* note 79 and accompanying text.

<sup>164</sup> *See Galvan v. Press*, 347 U.S. 522, 530–31 (1954); *supra* note 157 and accompanying text.

ties to the mother.”<sup>165</sup> This statement from *Miller* is indicative of the idea that fathers, if not forced through the bonds of marriage to interact with a child, will choose not to do so.<sup>166</sup> Such social observations are sometimes masked by physical differences in the parties in an attempt to treat similarly situated parties differently in immigration law.<sup>167</sup>

Professor Ann Wooster used the *Nguyen* case to provide an example where a true difference between the genders was relevant in an immigration context, quoting the Court in pertinent part that “the difference between men and women in relation to the birth process is a real one, and the principle of equal protection did not forbid Congress to address the problem at hand in a manner specific to each gender.”<sup>168</sup> There is certainly a biological difference between the genders. However, in the same opinion in which he wrote that “none of the premises on which the statutory classification is grounded can be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex,”<sup>169</sup> He also wrote two full pages discussing the irresponsibility of servicemen and the likelihood that they would not be involved in the day-to-day life of their children.<sup>170</sup> The Stevens majority also considered the fact that, because a mother is necessarily present at her child’s birth, she will be a more prevalent part of the child’s life than a father, who may choose, without biological necessity, to be at the birth of his child.<sup>171</sup> Essentially, Justice Stevens denied the presence of gender stereotypes in 8 U.S.C. § 1409, while writing an opinion rife with gender stereotypes. For example, “Men are not fathers in the relevant sense for U.S. citizenship until, as Justice Stevens states, ‘either the father or his child takes certain affirmative steps to create or confirm their relationship.’”<sup>172</sup>

Justice Stevens noted that “[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands.”<sup>173</sup> However, the differences that Justice Stevens highlighted are all social in nature. The *Miller* Court established citizenship for a mother as biological in nature. The *Miller* Court however, determined that a biological tie to a child was not enough to allow a father to transmit citizenship to a child.<sup>174</sup> The Court required *social* factors to determine that unwed fathers have a strong connection to the child.<sup>175</sup>

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<sup>165</sup> *Miller*, 523 U.S. at 428 (internal quotation marks omitted) (quoting *Parnam v. Hughes*, 441 U.S. 347, 355 n. 7 (1979)).

<sup>166</sup> *See, e.g., supra* notes 125–26 and accompanying text.

<sup>167</sup> *See supra* Part I.B.2.

<sup>168</sup> *See* Wooster, *supra* note 91, § 9 (quoting *Nguyen v. INS*, 533 U.S. 53, 73 (2001)).

<sup>169</sup> *Miller*, 523 U.S. at 444–45.

<sup>170</sup> *Id.* at 438–40.

<sup>171</sup> *Id.* at 438.

<sup>172</sup> Augustine-Adams, *supra* note 13, at 104 (quoting *Miller*, 523 U.S. at 424).

<sup>173</sup> *Miller*, 523 U.S. at 445.

<sup>174</sup> *Id.* at 429–30 (requiring the father to meet the residency requirements in 8 U.S.C. § 1409(a)).

<sup>175</sup> Augustine-Adams, *supra* note 13, at 104.

If there truly is a biological reason to distinguish between gender for unmarried men and women, why would the distinction not apply to married men and women? Specifically, why is it easier for a married citizen father to confer citizenship than an unwed citizen father?<sup>176</sup> Why is it more difficult for a married mother to transmit citizenship than an unwed mother?<sup>177</sup> This juxtaposition indicates that the congressional justification for 8 U.S.C. § 1409 is much more about social, rather than biological factors. Gender stereotypes about mothers and fathers have likely affected the legislation.

*B. Changing Importance of Marriage in Other Areas of Law*

Immigration legislation depends largely on the marital status of the parties involved.<sup>178</sup> With regard to documentation to reduce statelessness, however, UNHCR states that marital status should not be a factor in obtaining documentation for a child.<sup>179</sup> There is no language in the immigration statutes or the legislative history surrounding them that suggests marriage is a key factor in a party's immigration rights. The line is not straight either; unmarried mothers are in a better position than married mothers while unwed fathers are in a worse position than married fathers. This inequity suggests that the only time we value a father's parenting abilities is when he is married to a child's mother.<sup>180</sup> Should a couple choose not to marry, despite the presence of a child in the relationship, the mother will be given additional opportunity to transfer her citizenship to the child. The father, despite his ability to prove that he is the sole guardian and supporter of a child, will be forced to take additional steps to legitimize the citizenship of his child.<sup>181</sup>

In a wrongful death case dealing with the rights of a father who failed to legitimize his child, the Court wrote:

The appellant, as the natural father, was responsible for conceiving an illegitimate child and had the opportunity to legitimate the child but failed to do so. Legitimation would have removed the stigma of bastardy and allowed the child to inherit from the father in the same manner as if born in lawful wedlock. Unlike the illegitimate child for whom the status of illegitimacy is involuntary and immutable, the appellant here was responsible for fostering an illegitimate child and for failing to change its status. It is thus

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<sup>176</sup> *Id.* at 101–03.

<sup>177</sup> *Compare* 8 U.S.C. § 1401 (2006), *with* 8 U.S.C. § 1409(c) (2006).

<sup>178</sup> *See* 8 U.S.C. §§ 1401; 1409.

<sup>179</sup> *See supra* note 140 and accompanying text.

<sup>180</sup> *See, e.g.,* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 326 (2005) (discussing the varying legal definitions of fatherhood).

<sup>181</sup> *See* 8 U.S.C. § 1409(a) (2006).

neither illogical nor unjust for society to express its “condemnation of irresponsible liaisons beyond the bounds of marriage” by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child.<sup>182</sup>

There is a long history of legal presumptions against fathers in the family law context.<sup>183</sup> In fact, paternal rights were not expressly recognized by the Court until 1972.<sup>184</sup> Part of the rationale behind imposing an additional paternity requirement for fathers is the assumption that “[i]n almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child’s birth,” while “[u]nwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare.”<sup>185</sup>

In the United States, it is empirically true that it is easy to identify a child’s biological mother; new births are documented and recorded in approximately 98% of cases.<sup>186</sup> However the same is not true in the births of the kind at issue in these cases. As a result, the following assumptions are at least partially incorrect:

[A]ll [mothers] will be present at the event that transmits their citizenship to the child, that hospital records and birth certificates will normally make a further acknowledgment and formal proof of parentage unnecessary, and that their initial custody will at least give them the opportunity to develop a caring relationship with the child.<sup>187</sup>

It is, of course, possible to determine the maternity of a child through a DNA test or attempts to contact physicians or others present at the birth. However, the Court has indicated that this further step of DNA testing is unnecessary.<sup>188</sup> How then, are courts able to justify the same costs when it comes to establishing fathers’ paternity?

The answer likely stems from societal perceptions about the role unwed fathers play in their children’s lives. Because fathers are less likely to be present in their

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<sup>182</sup> *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (citations omitted) (citing GA. CODE ANN. § 74-103 (1978)).

<sup>183</sup> *See, e.g.*, Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parental Rights*, 40 UCLA L. REV. 637, 647–48 (1993).

<sup>184</sup> *Id.* at 647; *see also Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>185</sup> *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting).

<sup>186</sup> *See* UNICEF, *Birth Registration: Right from the Start*, 9 INNOCENTI DIG. 1, 8 (2002), available at [http://www.childinfo.org/files/birthregistration\\_Digestenglish.pdf](http://www.childinfo.org/files/birthregistration_Digestenglish.pdf) (noting that 2% of births in industrialized countries are unrecorded).

<sup>187</sup> *Miller v. Albright*, 523 U.S. 420, 444 (1998).

<sup>188</sup> *See id.* at 436 (dismissing the requirement for biological proof of motherhood because it “is immediately obvious and is typically established by hospital records and birth certificates”).

children's lives, the argument goes, the rare case when an unwed father seeks to establish paternity is worth the extra cost of investigation.<sup>189</sup> In arguing this point, the Court notes that 8 U.S.C. § 1409 is about the opportunity to form a relationship, rather than a parent's decision to take advantage of that opportunity, holding that "[t]hese assumptions are firmly grounded and adequately explain why Congress found it unnecessary to impose requirements on the mother that were entirely appropriate for the father."<sup>190</sup>

Immigration law is premised on often draconian views of nuclear families, gender roles and parenting.<sup>191</sup> Frequently, these laws do not reflect the reality of the "functional" families that care for children.<sup>192</sup> Although it would be difficult to undertake an extensive review of each individual family unit in order to ensure that a child petitioning for U.S. citizenship through her parent meets the requirements, there need to be more steps than currently exist.

Roughly one-third of American children are now born out of wedlock.<sup>193</sup> Of the roughly 34 million U.S. households with children under the age of eighteen, 33%, or about 11.1 million, are headed by a single parent.<sup>194</sup> Of those, 8.5 million households are headed by a single mother and about 2.6 million are headed by a single father.<sup>195</sup> Under the 2011 estimates, 8% of households with children, and around 23% of single-parent households, are headed by a father raising his children without day-to-day assistance from the mother.<sup>196</sup> The number of single-father households has increased from approximately 1.1% in 1970.<sup>197</sup>

In 1972, Justice Burger, dissenting in *Stanley v. Illinois*, levied a harsh criticism against unwed fathers, reflecting a commonly held view that fathers expressed little

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<sup>189</sup> For a discussion about the special class of fathers whose children were born outside the United States and who are "unable or unwilling" to claim paternity, see *Miller*, 523 U.S. at 443. The Court there held that "[a] congressional assumption that such a father and his child are especially unlikely to develop a relationship, and thus to foster the child's ties with this country, has a solid basis." *Id.*

<sup>190</sup> *Id.* at 444.

<sup>191</sup> Although 8 U.S.C. §§ 1401 and 1409 rely on marriage to determine citizenship requirements for children, only 25% of American children live in so-called nuclear families comprised of their married biological mother and father. See Murphy, *supra* note 180, at 327.

<sup>192</sup> Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 510 (2009).

<sup>193</sup> Jana Singer, *Marriage, Biology and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 246 (2006).

<sup>194</sup> U.S. CENSUS BUREAU, SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES: 2010 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (2011), available at [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_1YR\\_DP02&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_DP02&prodType=table).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Family Structure*, CHILD TRENDS DATABANK, <http://www.childtrendsdatabank.org/?q=node/231> (last visited Mar. 15, 2013).



care for their children born out of wedlock.<sup>198</sup> *Stanley* was decided just five years before *Fiallo* and demonstrates a commonly held point of view at a time when mothers did actually care for most children born out of wedlock.<sup>199</sup> However, the percentage of single-father-headed households has increased a great deal over the past forty years.<sup>200</sup> The more recent decisions of *Miller* and *Nguyen* relied on *Fiallo*,<sup>201</sup> and the underlying gender stereotypes, without considering family law developments over the past forty years.

*C. Gender Discrimination in 8 U.S.C. § 1409 as a Family Law Issue*

Though it is impossible to completely ignore the immigration implications of 8 U.S.C. § 1409, it should be equally impossible to ignore the family law implications of the statute. Indeed, family members are already given preference in some areas of immigration law.<sup>202</sup> The current status of immigration law, however, creates a perception that unification of families, and familial rights, are dependent upon gender

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<sup>198</sup> *Stanley v. Illinois*, 405 U.S. 645, 665–66 (Burger, C.J., dissenting) (1972). Justice Burger addressed the role of mothers as follows:

[T]he biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.

*Id.*

<sup>199</sup> See *Fiallo v. Bell*, 430 U.S. 787, 811 (1977) (Marshall, J., dissenting) (noting that Congress acted to benefit the child-mother relationship).

<sup>200</sup> See *supra* note 197 and accompanying text.

<sup>201</sup> The *Miller* plurality cites *Fiallo* six times. *Miller v. Albright*, 523 U.S. 420, 423, 428–29, 432, 455, 459 (1998). In *Nguyen*, the Court cites to *Fiallo* once, but only because the Court found there was no equal protection violation, before reaching the analysis of Congress's power in immigration cases. 533 U.S. 53, 73 (2001).

<sup>202</sup> See *Fiallo v. Bell*, 430 U.S. 787 (1977) (providing benefits to mothers but not fathers). According to Justice Marshall's dissent, special preferences for families were perfectly allowable. He stated:

There is no dispute that the purpose of these special preference provisions is to reunify families separated by the immigration laws. As Congress itself declared “[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended [in these provisions] to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”

*Id.* (quoting H.R. REP. NO. 1199, 85th Cong., 1st Sess., 7 (1957)).



or marital status, which is likely not the message Congress intended to send with the passage of 8 U.S.C. § 1409.

### 1. The Fundamental Right to Privacy Under Family Law

The issues impacting foreign-born children of U.S. citizens are not only immigration issues—they are family issues. It is impossible to assume that immigrant families are not affected by poverty, crime and the other concerns that come along with raising children in the United States.<sup>203</sup> Thus, it does not make sense to view family issues solely through the lens of immigration law. By taking a modern, inclusive view of 8 U.S.C. § 1409 as it relates to gender discrimination and the fundamental right to privacy in a family law context, the Court could reach a more equitable and just outcome in future cases involving 8 U.S.C. § 1409.

The Court has held that Congress and the states cannot pass laws limiting a family's right to choose to have,<sup>204</sup> how to educate,<sup>205</sup> or how to raise<sup>206</sup> their children, because such rights are fundamental and deserving of a particularly protective right to privacy analysis.<sup>207</sup> 8 U.S.C. § 1409 limits an equally private familial relationship: the ability of a father to choose where to raise a child. Either a father affected by the statute must take steps to claim and legitimize his child or that child cannot legally be raised in the United States.

### 2. Positive Developments in Paternal Rights

Despite some of the more draconian viewpoints expressed in *Stanley* and other cases in the 1970s, in 1975, the Court in *Weinberger v. Wiesenfeld*<sup>208</sup> noted that

[i]t is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father,

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<sup>203</sup> See, e.g., Mark Greenberg & Hedieh Rahmanou, *Four Commentaries: Looking to the Future, Commentary 1*, 14 FUTURECHILD. 139, 139 (2004), available at [http://futureofchildren.org/futureofchildren/publications/docs/14\\_02\\_08.pdf](http://futureofchildren.org/futureofchildren/publications/docs/14_02_08.pdf) (noting that approximately 25% of children living in poverty are immigrants or children of immigrants and proposing that “[a]ny national strategy for reducing child poverty, promoting child well-being, and helping low-wage workers advance must address the needs and circumstances of immigrants and their children”).

<sup>204</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming and clarifying a woman's right to an abortion without undue government interference).

<sup>205</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1932) (holding that public schools could not prohibit lessons from being taught in a language other than English).

<sup>206</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (recognizing parents' right to choose to place their children in a specialized school).

<sup>207</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (“The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”).

<sup>208</sup> 420 U.S. 636 (1975).

no less than a mother, has a constitutionally protected right to the “companionship, care, custody, and management” of “the children he has sired and raised.”<sup>209</sup>

The *Stanley* Court would likely have taken issue with the concept that fathers affected by 8 U.S.C. § 1409 were fathers who had “sired and raised” children under the *Weinberger* conception of the idea. However, Flores-Villar and Nguyen, were both “sired and raised” almost exclusively, by their fathers, under any definition of the terms.<sup>210</sup> By requiring fathers, but not mothers, to take additional affirmative steps to legitimize their children before fathers are able to transmit their citizenship to children, Congress is infringing upon fathers’ constitutional right to privacy.

#### *D. Toward a Unified Definition of Paternal Rights Under Immigration and Family Law*

Traditionally, immigration was strictly a federal issue and family law was a state law issue. However, there has been more and more overlap between the two in recent decades. Though not the primary focus in immigration law, Congress has included family-friendly provisions, such as reunification plans, in immigration law.<sup>211</sup> “While it is true that there is an underlying principle of family unification in immigration laws, there is at the same time specific direction as to what relationships are to be recognized for immigration benefits.”<sup>212</sup> These relationships are often quite narrow and frequently violate the family law tenet of acting in the best interest of a child.<sup>213</sup> Additionally, family and domestic relations courts are sometimes called on to interpret immigration issues.<sup>214</sup> As immigration and family law become more intertwined, should states have a larger say in the regulation of immigration law?<sup>215</sup>

<sup>209</sup> *Wiesenfeld*, 420 U.S. at 652 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

<sup>210</sup> *Nguyen*, 533 U.S. at 57; *Flores-Villar*, 536 F.3d at 994.

<sup>211</sup> *King*, *supra* note 192, at 525 n.51.

<sup>212</sup> *Matter of Repuyan*, 19 I. & N. 119, 121 (B.I.A. 1984).

<sup>213</sup> See BLACK’S LAW DICTIONARY 181–82 (9th ed. 2009) (defining the “best-interests-of-the-child doctrine” as “[t]he principle that courts should make custody decisions based on what ever best advances the child’s welfare, regardless of a claimant’s particular status or relationship with the child”).

<sup>214</sup> See generally Nikki Smith, *Children’s Rights Nationally and Internationally During the Deportation of Their Parents or Themselves: Does the Right to Sovereignty Trump the Best Interest of the Child?*, 5 CRIT: CRITICAL STUD. J. 1 (2012) (describing how state domestic relations courts often have to interpret federal immigration statutes in considering whether U.S. citizen children should remain in the United States or be deported along with alien parents).

<sup>215</sup> One area of this debate is highlighted particularly well by the case of Elián González. González, a six year old Cuban boy who captivated media attention in 2000, was forcibly removed from a relative’s home in Miami and sent back to Cuba to live with his father, in accordance with international family law and reunification principles. See generally Tim Padgett,

The Court has made it clear that state law does not supplant federal immigration law.<sup>216</sup> If, however, the state passes laws consistent with federal immigration policy, this overlap may act as an exception to Congress's plenary immigration power.<sup>217</sup> The Court has held that "[t]he State, of course, has a duty of the highest order to protect the interests of minor children. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."<sup>218</sup> Thus, it could stand to reason that states might have some leeway in legislating family law issues that also implicate immigration concerns. Indeed, the Court in *DeCanas* noted that "an independent review does not reveal[] any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general."<sup>219</sup> As family law begins to intermingle more and more with immigration law, the equal protection concerns expressed by *Flores-Villar* and its predecessors weave their way slowly, and almost imperceptibly, into the immigration framework. Thus, the best remedy for plaintiffs such as *Flores-Villar* might be no direct action at all.

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*After 10 Years, Revisiting the Elián González Fiasco*, TIME MAG., Apr. 22, 2010, <http://www.time.com/time/nation/article/0,8599,1983705,00.html>. On one side of the debate were those who believed that Elián's family (and therefore state law) should have controlled the debate, allowing Elián to stay with American relatives who were petitioning for his citizenship. See, e.g., William Glaberson, *The Elian Gonzalez Case: The Legal Questions; Court's Ruling Is Giving Experts Pause About Rights of Children to Be Heard*, N.Y. TIMES, Apr. 22, 2000, <http://www.nytimes.com/2000/04/22/us/elian-gonzalez-case-legal-questions-court-s-ruling-giving-experts-pause-about.html>. Others, like Attorney General Janet Reno, believed that despite family law concerns, the matter remained solely under the jurisdiction of federal immigration law. See also Sylvia Law, *Families and Federalism*, 4 WASH U. J.L. & POL'Y 175, 176 n.4 (2000).

<sup>216</sup> See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 358 (1976) (holding that, although the INA is not meant to entirely exclude states from the immigration process, even consistent state immigration laws must give way to paramount federal laws) *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.), *as recognized in* *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). *DeCanas* dealt with a California statute imposing civil fines on employers for hiring illegal immigrants at a time when there was no similar federal statute. See *DeCanas*, 424 U.S. at 352-53; see also *Whiting*, 131 S. Ct. at 1974. The state statute at issue in *DeCanas* was superseded by passage of the Immigration and Reform Control Act. *Whiting*, 131 S. Ct. at 1974. The logic behind *DeCanas*, however—the idea that states have an interest in regulating matters of state concern, even when they implicate some facet of immigration law—is still sound after the holding in *Whiting* and the passage of the Immigration and Reform Control Act. See also Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007) (describing the federal government's plenary control over immigration issues).

<sup>217</sup> See *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (noting that the states have some right to act with regard to immigrants and immigration policy "where such action mirrors federal objectives and furthers a legitimate state goal" (citing *DeCanas*, 424 U.S. 351 (1976))).

<sup>218</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>219</sup> *DeCanas*, 424 U.S. at 358.

Rather, all these parties can do is wait for the ideals of family law to seep deeper into the immigration law ideology.

#### CONCLUSION

Though the Court has had past opportunities to overturn 8 U.S.C. § 1409, it has deferred to congressional judgment thus far and refused to do so, alternately citing alleged legitimate government interests furthered by the statute. Due to the volumes of historical discretion granted to Congress in matters of immigration law, further immigration-based challenges to 8 U.S.C. § 1409 are likely to be futile. As immigration and foreign travel become increasingly possible, changing social factors and perceptions about fatherhood lead to more single-father-headed households. Therefore, the situation in *Flores-Villar* is likely to become more common. This increase in single-father-headed households, in conjunction with changing views on fathers and fatherhoods, leaves much to be desired under a statute that accords different rights to fathers and mothers based only on their gender. Thus, the Court has reached an impasse between an immigration statute that cannot be overturned without upsetting large amounts of precedent, and a fundamentally discriminatory outcome under that immigration statute.

Future challenges or modifications to 8 U.S.C. § 1409 should move away from the immigration line of cases and focus instead on the statute's family law and fundamental privacy implications. The more encompassing, and increasingly father-friendly, area of family law could provide the Court with the necessary vehicle to overturn or circumvent the statute in the future and secure a more just outcome for children born out of wedlock to U.S. citizen fathers.