NGUYEN V. INS: THE SUPREME COURT RATIONALIZES GENDER-BASED DISTINCTIONS IN UPHOLDING AN EQUAL PROTECTION CHALLENGE

INTRODUCTION

In 1973, the United States Supreme Court, in Frontiero v. Richardson, announced that classifications based on gender were suspect, like those classifications based on race, alienage, and national origin, and warranted a heightened level of scrutiny. The Court noted gender, like other suspect classifications, was an "immutable characteristic determined solely by the accident of birth." The Court further noted gender could be distinguished from non-suspect classes, such as intelligence or physical disability, because a person's gender frequently bore no relationship to the person's ability to perform in or contribute to society.

Since Frontiero, the Court has stated that an "open question" remains as to whether gender is truly a suspect classification. However, the Court has also used definitive language outlining gender as suspect in its decisions. More importantly, the Court's traditional approach has been to subject gender-based classifications to a heightened or "intermediate" scrutiny.

In Miller v. Albright, the Supreme Court rejected an equal protection challenge to the gender-based classification in 8 U.S.C. § 1409 ("1409"), a statute drawing distinctions between citizenship requirements for children of alien fathers and citizen mothers as opposed to children of alien mothers and citizen fathers, through the application

4. Id.
5. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 26 (1993) (stating question of gender being suspect was open); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) (stating Court did not need to determine if gender was a suspect class).
of intermediate scrutiny. The Court’s decision, however, was so severely splintered that the opinion failed to fashion any meaningful precedent regarding gender-based immigration law. In refusing to hold the statute unconstitutional, the lead plurality and dissenting opinions split along a long-standing rift in gender equal protection jurisprudence. The Court divided as to the extent to which male and female reproductive roles justify gender-based classifications. Despite the Court’s reassurances, the decision in Miller openly justified a statute which furthered assumptions about mothers’ inherent nurturing ability and fathers’ wayward natures.

To govern the conferral of citizenship to persons at birth and through naturalization, Congress has enacted a collection of statutes through the Nationality and Naturalization Subchapter of Title 8 of the United States Code. Within that Subchapter, § 1401 governs persons becoming citizens at birth. Section 1401 provides that persons born outside the United States are citizens at birth if (1) both parents are citizens whom have resided within the United States prior to the person’s birth; (2) one parent is a citizen who has been present in the United States for a continuous year and the second parent is a United States national but not a citizen; or (3) one parent is an alien and the other a citizen who has been present in the United States for a cumulative five years prior to the person’s birth. If the child is born out of wedlock, § 1409 is applicable and distinguishes between genders. If only the person’s father is capable of transmitting citizenship, §1409 provides that persons born outside the United States gain United States citizenship as of their date of birth if (1) the existence of a blood relationship between father and child is proven through clear and convincing evidence; (2) the father is a United States citizen at the time of the child’s birth; (3) the father has agreed, in writing, to financially support the child until age eighteen; and (4) while the child is under age eighteen, the child is formally legitimated, the father ac-

18. Id.
knowledges paternity under oath and in writing, or the child's paternity is established through a court proceeding.\textsuperscript{20} If the nonmarital child born abroad has a mother who is a citizen, the child obtains United States citizenship at birth if the mother has been present in the United States for a continuous year at any time prior to her child's birth.\textsuperscript{21}

In \textit{Nguyen v. INS},\textsuperscript{22} the Supreme Court again considered § 1409 and again rejected a constitutional challenge.\textsuperscript{23} Although the defender of a gender-based classification such as the classification in § 1409 must satisfy a demanding burden, the Court glossed over the crucial matter of the burden of proof and went on to uphold the classification.\textsuperscript{24} The Court determined that Congress based the statute on important governmental objectives substantially related to the statute's means.\textsuperscript{25}

This Note will first examine the Supreme Court's application of the intermediate scrutiny test to § 1409 by reviewing the facts and holding of \textit{Nguyen v. INS}.\textsuperscript{26} Second, this Note will investigate the Court's historical treatment of gender-based classifications, including the advent of the intermediate scrutiny test, by reviewing a line of gender-based equal protection cases.\textsuperscript{27} Third, this Note will argue that the Court's analysis of § 1409 amounted to a misapplication of the intermediate scrutiny test.\textsuperscript{28} This Note will argue the Court misapplied the test at each of three elements, including burden of proof, sufficiency of ends, and sufficiency of means.\textsuperscript{29} Finally, this Note will conclude that the Court's misapplication of the intermediate scrutiny test constituted a reversion to a rational basis review for a gender-based classification.\textsuperscript{30}

**FACTS AND HOLDING**

In \textit{Nguyen v. INS},\textsuperscript{31} the United States Supreme Court determined the gender-based classification in § 1409 did not violate the Equal Protection Clause of the Fifth Amendment.\textsuperscript{32} Petitioner Tuan Ahn

In 1992, twenty-two-year-old Nguyen pled guilty to two counts of felony sexual assault on a child in Texas state court. The court sentenced Nguyen to sixteen years in prison, eight years for each count. Three years later, while Nguyen was serving his sentence, the Immigration and Naturalization Service (“INS”) began deportation proceedings against Nguyen because he was an alien convicted of two or more crimes of moral turpitude and an aggravated felony. An immigration judge conducted two hearings to determine Nguyen's eligibility for deportation. At the first hearing, Nguyen challenged the show cause order for his deportation by arguing he was a United States citizen. At the second hearing, Nguyen admitted he was a Vietnamese citizen and that he had been convicted of crimes.

33. Nguyen, 121 S. Ct. at 2057.
34. Id.
35. Nguyen v. INS, 208 F.3d 528, 530 (5th Cir. 2000), aff'd, 121 S. Ct. 2053 (2001).
36. Nguyen, 208 F.3d at 530.
37. Id.
38. Id.
39. Nguyen, 121 S. Ct. at 2057.
40. Id.
41. Id. Sections 1227(a)(2)(A)(ii) and (iii) of 8 U.S.C. provide:
Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
(2) Criminal offenses
(A) General crimes
(ii) Multiple criminal convictions
Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.
(iii) Aggravated felony
Any alien who is convicted of an aggravated felony at any time after admission is deportable.
42. Nguyen, 208 F.3d at 530-31.
43. Id. at 530.
involving moral turpitude and aggravation. Basing his decision on Nguyen's testimony, the judge found Nguyen deportable.

Nguyen appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA"). While the appeal was pending, Boulais procured a parentage order from a Texas state court after DNA testing. Nguyen and Boulais, however, did not receive the DNA results until after Nguyen had filed his brief outlining his citizenship argument with the BIA. Nguyen subsequently filed a supplemental brief including evidence of the parentage order. Despite this new evidence, the BIA rejected Nguyen's citizenship claim for failing to meet the requirements of 8 U.S.C. § 1409(a) and dismissed the appeal.

Nguyen appealed the BIA's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit stated the court would lack jurisdiction, pursuant to § 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, if Nguyen had

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44. Id.
45. Id. at 531.
46. Nguyen, 121 S. Ct. at 2057.
47. Id.
48. Nguyen, 208 F.3d at 531.
49. Id.
50. Nguyen, 121 S. Ct. at 2057. 8 U.S.C. § 1409 governs nationality and naturalization of children born abroad and out of wedlock. It provides:

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and 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.

51. Nguyen, 121 S. Ct. at 2058. Shortly thereafter, Nguyen and Boulais filed a habeas petition in federal district court to challenge the BIA's order. Nguyen, 208 F.3d at 531. Nguyen and Boulais also requested a declaratory judgment on the citizenship issue. Id. Because of the varied nature of the pending district court requests, the magistrate judge agreed to stay the matter until the Fifth Circuit issued a ruling on Nguyen's appeal. Id. at 528, 531. The INS moved to dismiss the appeal based on lack of jurisdiction. Id. at 531.
committed the predicate offenses and was an alien. The court noted § 309 "completely foreclose[d]" the court's jurisdiction to review decisions of the BIA if the person subject to deportation had committed specified crimes such as crimes of moral turpitude or aggravated felonies. Neither party disputed Nguyen had been convicted of two crimes involving moral turpitude and aggravation; and the "threshold question," therefore, became whether Nguyen was an alien or a United States citizen.

Nguyen claimed he acquired United States citizenship at birth pursuant to 8 U.S.C. § 1401. Section 1401 provides citizenship for persons born outside the United States if one parent is a citizen who has been present within the United States for at least five years. However, the court noted § 1401 did not apply because the Immigration and Nationality Act specifically provided an exception, in § 1409, for children born abroad out of wedlock.

Section 1409 provides:

Children born out of wedlock
(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and 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,

55. *Id.* at 531.
56. *Id.* at 532 (quoting 8 U.S.C. § 1401 (1994)).
57. 8 U.S.C. § 1401 (1994). Section 1401(g) provides:
   (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.
58. 8 U.S.C. § 1401 (g).
59. *Nguyen*, 208 F.3d at 532.
(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.59

Section 1409 allows for nonmarital children of citizen mothers to automatically acquire citizenship at birth, while children with citizen fathers must have their citizenship established through affirmative steps.60 The Fifth Circuit observed Boulais failed to "legitimize" Nguyen's citizenship before his eighteenth birthday, as the statute required.61 However, in recognizing this failure, Nguyen and Boulais argued § 1409 violated the Fifth Amendment's guarantees to equal protection of the law by making it more onerous for citizen fathers to pass citizenship to their foreign-born, nonmarital children than for citizen mothers to do the same.62

The Fifth Circuit recognized the Supreme Court, in Miller v. Albright,63 had previously addressed an equal protection challenge to § 1409.64 The Court in Miller, however, provided only fractured opinions; some Justices addressed the equal protection argument while others addressed standing.65 In the court's discussion of equal protection, the Fifth Circuit noted the Miller Court outlined several "important governmental objectives" that § 1409 served.66 The Fifth Circuit cited objectives from Miller, including ensuring reliable proof of the existence of a biological relationship between the parent citizen and the child, perpetuating healthy relationships between parent and child during the child's age of minority, and encouraging ties between the United States and the foreign-born child.67 The court noted the plurality opinion in Miller found § 1409 well-tailored for meeting these important governmental objectives.68

Relying on the plurality opinion from Miller, the Fifth Circuit determined § 1409 was constitutional.69 Moreover, the court found Nguyen had not met the criteria for citizenship outlined in § 1401, and

60. Nguyen, 208 F.3d at 533.
61. Id. at 528, 533.
62. Id. at 533.
64. Nguyen, 208 F.3d at 528, 533.
65. Id. at 533. Because the Fifth Circuit recognized a standing issue might be present from the varied opinions in Miller, the Fifth Circuit first addressed whether Boulais, as the father of a person subject to deportation, had standing to sue. Id. at 533-34. The court allowed Boulais to represent his interests in the suit. Id. at 534. Thus, the Court determined Boulais was a proper party to challenge the constitutionality of § 1409. Id.
66. Nguyen, 208 F.3d at 528, 535.
67. Id. (citing Miller v. Albright, 523 U.S. 420, 436, 438 (1998)).
68. Id. at 535 (citing Miller, 523 U.S. at 440).
69. Id. at 528, 535.
Boulais did not establish Nguyen's paternity before Nguyen attained the age of majority.\textsuperscript{70} As such, because Nguyen retained his status as an alien, the court could not review the BIA's final deportation order.\textsuperscript{71} Thus, the Fifth Circuit granted the INS' motion to dismiss Nguyen's appeal.\textsuperscript{72} Nguyen petitioned the Supreme Court for writ of certiorari, challenging the requirements in § 1409(a)(4) and its three subparts as violations of the Equal Protection Clause of the Fifth Amendment.\textsuperscript{73}

The United States Supreme Court granted Nguyen's petition for certiorari and affirmed the Court of Appeal's decision.\textsuperscript{74} Justice Anthony M. Kennedy, writing for the Court, outlined the factual background of the case and the requirements imposed by § 1409.\textsuperscript{75} The Court stated Boulais had failed to satisfy the requirements in either § 1409(a)(3), where the father must agree in writing to financially support the child until the child reaches age eighteen, or § 1409(a)(4), in which the child in question must be legitimated in one of three ways before the age of eighteen.\textsuperscript{76} The Court discussed whether § 1409(a)(3) applied, and decided it did not because Congress adopted the statute after Nguyen's birth, and instead turned to a discussion of whether § 1409(a)(4) and its three subparts could overcome constitutional scrutiny for gender-based classifications.\textsuperscript{77}

In order for a gender-based classification to withstand an equal protection challenge, the Court asserted "it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."\textsuperscript{78} The Court concluded § 1409 survived heightened scrutiny, and thus did not examine the statute under the less stringent standards stemming from Congress' power over immigration and naturalization.\textsuperscript{79}

In determining how § 1409 met the requirements of the heightened scrutiny test, the Court outlined two important governmental interests justifying the gender-based classification found in the statute.\textsuperscript{80} The Court noted the government had two important inter-

\textsuperscript{70} Id. at 535-36.
\textsuperscript{71} Id. at 531, 536.
\textsuperscript{72} Id. at 528, 536.
\textsuperscript{73} Nguyen, 121 S. Ct. at 2058.
\textsuperscript{74} Id. at 2053, 2066.
\textsuperscript{75} Id. at 2057-59.
\textsuperscript{76} Id. at 2058-59.
\textsuperscript{77} Id. The Court noted Nguyen fell within a transitional rule allowing him to elect to be subject to either the original version of § 1409 or the amended version including the new subsection (a)(3). Id. at 2059.
\textsuperscript{78} Nguyen, 121 S. Ct. at 2059 (citations omitted).
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 2059-60.
These interests were (1) the assurance of an actual biological relationship between parent and child; and (2) the assurance of an opportunity or potential to develop "real, everyday ties" providing a connection between the child and the citizen parent and between the child and the United States.82

In terms of the first objective, assuring an actual parent-child biological relationship, the Court noted the mother-child relationship was verifiable from the child's birth.83 According to the Court, the mother's status was usually documented by a birth certificate, hospital record, or witnesses to the birth.84 The Court stated, however, nothing compelled the father's presence at his child's birth; and, even if the father was present at the birth, his physical presence was not incontrovertible proof of his paternity.85 The Court reasoned because fathers and mothers were situated differently with regard to proof of parentage, the imposition of different rules to each gender was "neither surprising nor troublesome" under a constitutional perspective.86 The Court noted Congress designed §1409's three provisions requiring fathers to establish paternity in order to ensure acceptable documentation of paternity in furtherance of the government's objective.87

As for the second objective, ensuring opportunities for the development of sincere ties between parent and child as well as child and the United States, the Court stated an opportunity for mother and child to develop a meaningful relationship occurred in the very event of birth.88 The same would not be true, according to the Court, for an unwed father.89 The Court noted that, given the time passing between conception and birth, it is not certain a father will even know he and the child's mother conceived a child.90 Likewise, the Court reasoned a mother may possibly be unaware of the identity of her child's father.91

81. Id. at 2060-61.
82. Id.
83. Id. at 2060.
84. Id.
85. Id. (citation omitted).
86. Id. (citations omitted). The Court also outlined how gender-neutral terms would insist only on a hollow neutrality. Id. at 2061. Instead, gender-specific terms would be permissible because of the physical reality of the mother's presence at her child's birth. Id.
87. Nguyen, 121 S. Ct. at 2060.
88. Id. at 2061.
89. Id.
90. Id. The Court opined, given the reality many Americans may travel abroad for short periods of time, it is a realistic possibility such a father will not know of his child's conception. Id. at 2061-62.
91. Nguyen, 121 S. Ct. at 2061.
The Court also addressed the issue of DNA testing and its effect on the second governmental objective.92 Justice Kennedy, in writing for the Court, determined the father's paternity could be established in the father's absence and without his knowledge.93 As such, the Court reasoned proof of paternity did nothing to ensure meaningful contact between fathers and their minor children.94 In the absence of such meaningful contact, the Court explained nothing required Congress to force the United States to embrace a child as a citizen or to offer the child the full protection of the United States; an unquestionable right to enter its borders; or full rights of participation in the country's political process.95 Having concluded that providing parent and child with an opportunity to develop a meaningful relationship was an important governmental objective, the Court turned to the question of whether the means employed in the statute were substantially related to that objective.96 The Court determined the means adopted by Congress were appropriate.97

The Court noted Congress' objectives in providing the opportunity for a relationship to occur before the child reached eighteen was unsurprising.98 The Court opined the nature of the objective, requiring only an opportunity for a relationship and not an actual relationship, allowed an "exceedingly persuasive" fit between the end and means.99 Justice Kennedy, in writing for the Court, stated, "It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond."100 Hence, the Court resolved § 1409 satisfied the heightened scrutiny test.101

The Court also noted the minimal obligations imposed upon fathers wishing to pass citizenship onto their children.102 The Court opined Boulais could have formally legitimated Nguyen, made a written acknowledgment of him under oath, or obtained a court order of

92. Id. at 2062.
93. Id.
94. Id.
95. Id.
96. Id. at 2063.
97. Id.
98. Id. The Court outlined other sections pertaining to naturalization requiring action before the child reaches the age of majority. Id. (citations omitted).
99. Nguyen, 121 S. Ct. at 2064 (citation omitted).
100. Id.
101. Id.
102. Id. The Court also noted § 1409 is not the only means by which a child with a citizen father can obtain United States citizenship. Id. at 2065. A child failing to comply with § 1409, if the child has ties to the United States, may seek citizenship independently. Id. (citations omitted).
parentage sometime between the time of Nguyen's birth and his eighteenth birthday.\textsuperscript{103} The Court noted Boulais either failed to pursue or was ignorant of his options for transmitting his citizenship to his son.\textsuperscript{104} The Court resolved, however, such omissions did not justify the nullification of Congress' statutory scheme.\textsuperscript{105} Thus, the Court rejected Nguyen's constitutional challenge.\textsuperscript{106}

Justice Sandra Day O'Connor, joined by Justices David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer, dissented, challenging the Court's decision based on a misapplication of the heightened scrutiny test.\textsuperscript{107} Justice O'Connor noted heightened scrutiny bore substantially different requirements from rational basis review.\textsuperscript{108} According to Justice O'Connor, a state actor seeking to defend a gender-based classification carried the burden of proving an "exceedingly persuasive justification" for such a classification under heightened scrutiny.\textsuperscript{109} In order to meet this burden, Justice O'Connor noted, the state actor must show how the classification furthers an important governmental objective substantially related to the means employed by the statute.\textsuperscript{110}

In her analysis of the Court's application of heightened scrutiny, Justice O'Connor noted how a proposed important governmental objective must include the statute's actual purposes, not hypothesized or invented purposes.\textsuperscript{111} Justice O'Connor opined a legislature could not premise objectives on overbroad generalizations relating to the different capacities, talents, or preferences of males and females, even if empirical evidence supported those generalizations.\textsuperscript{112} Moreover, Justice O'Connor noted the government's objectives must bear a substantial relation to the means employed in the classification itself.\textsuperscript{113} Justice O'Connor observed that if a state actor demonstrated impor-

\begin{itemize}
\item \textsuperscript{103} Nguyen, 121 S. Ct. at 2064-65.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id. at 2065.
\item \textsuperscript{106} Id. at 2058.
\item \textsuperscript{107} Id. at 2066 (O'Connor, J., dissenting).
\item \textsuperscript{108} Id. at 2067 (O'Connor, J., dissenting).
\item \textsuperscript{109} Id. at 2066-67 (O'Connor, J., dissenting) (citations omitted). In a situation governed by rational basis review, however, the state actor does not carry an obligation to prove the classification's rationality. Id. at 2067 (O'Connor, J., dissenting) (citation omitted).
\item \textsuperscript{110} Nguyen, 121 S. Ct. at 2067 (O'Connor, J., dissenting) (citations omitted).
\item \textsuperscript{111} Id. (O'Connor, J., dissenting) (citations omitted). In rational basis review, it is not relevant to make inquiries into what reasoning or facts underlie the statute. Id. (O'Connor, J., dissenting) (citations omitted).
\item \textsuperscript{112} Nguyen, 121 S. Ct. at 2067 (O'Connor, J., dissenting) (citations omitted). Meanwhile, under rational basis review, the use of stereotypes and generalizations are tolerable, unless such classifications are irrational or arbitrary. Id. (O'Connor, J., dissenting) (citations omitted).
\item \textsuperscript{113} Id. at 2068 (O'Connor, J., dissenting) (citation omitted).
\end{itemize}
tant government objectives that were substantially related to the classification's means, the state actor would have met the burden of proving an exceedingly persuasive justification.\textsuperscript{114}

Justice O'Connor averred the Court misapplied the heightened scrutiny test by glossing over the burden of proof, failing to rely on actual purpose review, failing to mark a sufficient relation between the means and ends of the classification, and relying on overbroad gender-based generalizations.\textsuperscript{115} In her dissent, Justice O'Connor stated the majority's two important governmental purposes, assuring an actual biological relationship between parent and child, and ensuring an opportunity for ties to develop between parent and child were strikingly different from the actual purposes listed by the INS.\textsuperscript{116} The INS proposed that \$ 1409 pursued two governmental objectives: (1) assuring nonmarital children born abroad develop sufficiently recognizable or formal relationships with their citizen parent and the United States during the child's minority; and (2) preventing statelessness in nonmarital children born abroad.\textsuperscript{117} As such, Justice O'Connor reasoned the Court failed to sufficiently demonstrate the named objectives were actual legislative purposes.\textsuperscript{118}

Justice O'Connor noted several ways in which the classification's means bore no substantial relationship to the important governmental interests.\textsuperscript{119} For example, she stated how, even if it might be important to ensure the opportunity for parent and child to form relationships, the requirement that the court secure proof of such opportunity before the child reached the age of eighteen did not further the asserted interest.\textsuperscript{120} Likewise, Justice O'Connor proposed that the means and ends were not substantially related because a child might obtain a court order of parentage without an affirmative act by the parent or even over a parent's objection.\textsuperscript{121} Additionally, a child who has an opportunity to create ties with a parent may never realize an actual relationship therefrom.\textsuperscript{122}

In terms of overbroad gender-based generalizations, Justice O'Connor noted mere presence at birth may not provide a mother (or a father) with an opportunity to bond with a child.\textsuperscript{123} Justice O'Connor observed, a mother's physical presence at the child's birth may not

\textsuperscript{114} Id. at 2066-67 (O'Connor, J., dissenting) (citations omitted).
\textsuperscript{115} Id. at 2068-69, 2074. (O'Connor, J., dissenting) (citations omitted).
\textsuperscript{116} Id. at 2069, 2071-72 (O'Connor, J., dissenting).
\textsuperscript{117} Id. at 2069 (O'Connor, J., dissenting) (citation omitted).
\textsuperscript{118} Id. at 2069, 2071 (O'Connor, J., dissenting).
\textsuperscript{119} Id. at 2072-75 (O'Connor, J., dissenting).
\textsuperscript{120} Id. at 2072 (O'Connor, J., dissenting).
\textsuperscript{121} Id. (O'Connor, J., dissenting) (citation omitted).
\textsuperscript{122} Id. (O'Connor, J., dissenting) (citation omitted).
\textsuperscript{123} Id. at 2073 (O'Connor, J., dissenting).
yield an opportunity for a mother-child relationship to develop if the child is removed for reasons of neglect or abuse or is separated by some tragedy. Rather, the distinction impermissibly relied on "the very stereotype the law condemns" by assuming "mothers are significantly more likely than fathers . . . to develop caring relationships with their children." Instead, Justice O'Connor contended a gender-neutral alternative would more closely fit Congress' purported important governmental objectives as proposed in the Court's opinion. Justice O'Connor noted how the Court raised the possible applicability of a gender-neutral means, but instead dismissed the alternatives as irrelevant. Justice O'Connor also noted the Court admitted Congress might have opted to dismiss the requirements of § 1409 if the child or parent evidenced a relationship, but speculated Congress refused to do so by reason of intrusiveness or evidentiary difficulties. In response, Justice O'Connor recognized the Court had repeatedly refused to justify gender-based classifications on the basis of administrative convenience. Moreover, Justice O'Connor opined that no reason existed to think administrative convenience was a concern so powerful as to justify gender-based discrimination, especially where the ends-means fit of the classification was so poor.

In sum, Justice O'Connor remarked no one should mistake the Court's analysis for a careful exercise of equal protection analysis. She noted the Court's decision was a deviation from cases vigilantly applying heightened scrutiny and represented an aberration. As such, Justice O'Connor would have reversed the Fifth Circuit's judgment.

BACKGROUND

A. 8 U.S.C. § 1409 and Other Historically Significant Citizenship Laws

In 1790, Congress enacted the first statute governing the citizenship of children born abroad. The statute provided citizenship for

124. Id. (O'Connor, J., dissenting).
125. Id. at 2074 (O'Connor, J., dissenting) (citations omitted).
126. Id. at 2072 (O'Connor, J., dissenting).
127. Id. at 2074 (O'Connor, J., dissenting).
128. Id. (O'Connor, J., dissenting).
129. Id. (O'Connor, J., dissenting).
130. Id. (O'Connor, J., dissenting) (citations omitted).
131. Id. at 2078 (O'Connor, J., dissenting).
132. Id. at 2078-79 (O'Connor, J., dissenting).
133. Id. at 2066 (O'Connor, J., dissenting).
children born outside the United States to citizen parents, unless the child's father had never been a United States resident.135 Similar statutes passed in 1795 and 1802 also conditioned the conferral of citizenship to children born outside the United States upon the father's United States residence.136 The language of each statute Congress enacted was ambiguous, however.137 The statutory language "children of citizens" could have been read to include children of citizen mothers or citizen fathers, so long as the father had once resided within the United States.138 In 1855, Congress enacted a statute specifying that a child born outside the United States shall be deemed a United States citizen only if the child's father was a citizen at the time of the child's birth.139 This statute, codified as § 1993 of the Revised Statutes, did not differentiate between children born to married parents or children born out of wedlock.140

In 1934, Congress changed the statutory scheme relating to the citizenship of children born abroad by amending § 1993.141 The amended version of § 1993 conferred citizenship on children born outside the United States if the child's father or mother was a United States citizen at the time of the child's birth.142 The purpose of this amendment, as noted in the House and Senate Reports, was to "estab-

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135. Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. The statute provided: And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose father have never been resident in the United States.

Id.


137. Id. (Ginsburg, J., dissenting).

138. Id. (Ginsburg, J., dissenting) (citation omitted).

139. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604. The statute provided: That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

Id.

140. Miller, 523 U.S. at 462 (Ginsburg, J., dissenting) (citation omitted).

141. Id. at 465 (Ginsburg, J., dissenting) (citing Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797).

142. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797. The statute provided: Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after
lish complete equality between American men and women in the matter of citizenship for themselves and for their children.”

Congress, in 1940, enacted further statutes governing the conferral of citizenship to children born abroad. Unlike the amended version of § 1993, however, the Nationality Act of 1940 included a host of regulations specifying particular situations in which children became United States citizens. Section 205 of the statute provided citizenship specifically for children born out of wedlock when someone established paternity of the child during the child’s minority by legitimation or adjudication by a competent court. Furthermore, § 205 drew a gender line by allowing, in the absence of legitimation or adjudication of the child’s paternity, citizenship for a child born abroad and out of wedlock to a citizen mother if the mother had previously resided in the United States. The rationale for allowing citizenship to transmit through the citizen mother involved the rule that “under American law the mother [had] a right to custody and control of such child as against the putative father, and [was] bound to maintain it as its natural guardian.”

Subsequent legislation continued to employ the gender lines drawn by the Nationality Act of 1940. Section 309 of the Immigration and Nationality Act of 1952, codified as 8 U.S.C. § 1409, originally provided citizenship for children born out of wedlock if someone established the child’s paternity through legitimation before the child turned twenty-one. Moreover, the original § 1409 stated a nonmarital child born outside the United States would gain the mother’s citizenship, if the mother was a United States citizen who previously resided in the United States for at least a continuous

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the child’s twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

Id.

143. Miller, 523 U.S. at 466 (Ginsburg, J., dissenting) (citations omitted).
145. Miller, 523 U.S. at 466 (Ginsburg, J., dissenting).
148. Nguyen, 121 S. Ct. at 2075-76 (O'Connor, J., dissenting) (quoting To Revise and Codify the Nationality Laws of the United States, Hearings on H.R. 6127 Before the House Committee on Immigration and Naturalization, 76th Cong. 431 (1945)).
149. Miller, 523 U.S. at 467 (Ginsburg, J., dissenting).
150. Current version at 8 U.S.C. § 1409 (1994). The original statute’s text provided:

(a) The provision of paragraphs (3), (4), (5), and (7) of section 301(a), and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

Id.
Although the original § 1409 drew a gender-based distinction in the area of citizenship for children born out of wedlock abroad, the House Report noted one purpose of the amendments to the Immigration and Nationality Act was to eliminate discrimination between genders.152

After amendments in 1981 and 1986, § 1409 currently provides:

Children born out of wedlock
(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and 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.153

Thus, a nonmarital child born outside the United States today is deemed a United States citizen if (1) the child's mother is a United States citizen who has been present in the United States for a continuous year at any time prior to the child's birth; or (2) if the child's father is a United States citizen and the child meets the four requirements imposed in § 1409.154

B. THE SUPREME COURT'S DIFFICULTY IN SETTLING ON A TEST FOR GENDER-BASED CLASSIFICATIONS

I. The First Approach—The Requirement for Rationality

In 1971, the United States Supreme Court in Reed v. Reed,155 determined a statute providing dissimilar treatment for similarly-situated men and women violated the Equal Protection Clause of the

154. 8 U.S.C. § 1409.
Fourteenth Amendment. In Reed, Sally Reed filed a petition in probate court to seek designation as administratrix of her deceased son’s estate. Before the hearing on Sally Reed’s petition, Cecil Reed, the deceased child’s father, also filed a petition to become administrator of the estate. The probate court held a hearing regarding the petitions, and applied Idaho Code sections 15-312 and 15-314. Section 15-312 provided the hierarchy for determination of proper parties to administer estates, including in relevant part, mothers and fathers. Section 15-314 provided, in situations when multiple, equally-entitled persons petitioned to be administrator the state prefers males over females. The probate court noted Sally and Cecil Reed were equally qualified for the administrator position, but appointed Cecil because of the Idaho law preferring males to females.

Sally Reed appealed the probate court’s decision to the District Court of the Fourth Judicial District of Idaho, attacking the constitutionality of section 15-314. The court held section 15-314 violated the Equal Protection Clause of the Fourteenth Amendment. Cecil Reed appealed to the Idaho Supreme Court, claiming the district court erred in its evaluation of the statute’s constitutionality. The Idaho Supreme Court determined the statute was neither unconstitutionally illogical nor arbitrary because it served only to resolve disputes between applicants otherwise qualified under section 15-312. The court opined the legislature based the gender-based classification on the state’s legitimate interests in promoting prompt estate administration and curtailing litigation relating to the appointment of estate administrators, and therefore the statute was constitutional.

Sally Reed appealed for review by the United States Supreme Court, which noted probable jurisdiction. The Supreme Court reversed the decision of the Idaho Supreme Court, concluding the gender preference established by section 15-314 in favor of male administrator applicants violated the Equal Protection Clause of the

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157. Reed, 404 U.S. at 71-72.
158. Id. at 72.
159. Id.
160. Id. at 72-73 (citation omitted).
161. Id. at 73 (citation omitted).
162. Id.
163. Id.
164. Id.
166. Reed, 465 P.2d at 635, 638.
167. Id. at 639.
168. Reed, 404 U.S. at 71, 74.
Fourteenth Amendment.\textsuperscript{169} Chief Justice Warren E. Burger, in delivering the Court's opinion, reasoned that giving mandatory preference to males in determining who shall be an estate's administrator was an arbitrary classification forbidden by the Equal Protection Clause.\textsuperscript{170}

The Constitution, the Court recognized, does not altogether forbid States from classifying classes of persons.\textsuperscript{171} Rather, the Equal Protection Clause prohibits the classification of persons based on criteria entirely unrelated to a statute's objective.\textsuperscript{172} Legislatures, the Court proclaimed, must create reasonable rather than arbitrary classifications bearing a fair and substantial relationship to the statute's objective, such that the statute treats all similarly-situated persons equally.\textsuperscript{173} With regard to section 15-314, the Court asked whether a statute classifying administration applicants on the basis of gender bore a "rational relationship" to a state objective.\textsuperscript{174}

The Court reasoned the objective, as announced by the Idaho Supreme Court, of reducing the probate court's workload by limiting controversies was not completely illegitimate.\textsuperscript{175} Rather, the important question was whether section 15-314 advanced the objective consistently with the Equal Protection Clause.\textsuperscript{176} The Court held the statute was inconsistent with the Equal Protection Clause because it treated similarly-situated men and women differently.\textsuperscript{177} Thus, the Court reversed the Idaho Supreme Court's rejection of Sally Reed's constitutional challenge.\textsuperscript{178}

2. The Movement to Strict Scrutiny

In 1973, in \textit{Frontiero v. Richardson},\textsuperscript{179} the Supreme Court subjected a gender-based classification to strict judicial scrutiny in order to invalidate it under the Fifth Amendment.\textsuperscript{180} In \textit{Frontiero}, a female lieutenant in the United States Air Force sought increases in quarters, housing, and medical allowances for her dependent husband.\textsuperscript{181} Although the Defense Department would have automatically granted allowances to a serviceman with a dependent wife, the De-
fense Department denied Frontiero’s application for failure to demonstrate how her husband was dependent on her. Frontiero and her husband filed suit in the District Court for the Middle District of Alabama contending the statutes unreasonably discriminated between married male and female servicepersons.

The district court determined the statutory scheme constitutional. The court utilized a rational basis test, noting a court will uphold a classification unless the legislation lacks a rational relation between its means and a legitimate governmental end. The court noted Congress established the presumption in favor of male servicepersons in order to avoid a substantial administrative burden. This objective, according to the district court, was not unconstitutional. Rather, because the classification did not foreclose a female serviceperson’s opportunity to obtain benefits, the statute merely denied Frontiero a windfall. Frontiero appealed to United States Supreme Court, arguing the classification violated her rights under the Fifth Amendment.

The United States Supreme Court reversed the district court’s decision, concluding a statute classifying on the basis of gender and having no purpose other than to procure administrative convenience violated the Fifth Amendment. Writing for the Court, Justice William J. Brennan, Jr., noted classifications based upon gender, like those based on alienage, national origin, and race are inherently suspect and are therefore subject to strict scrutiny. The Court justified the application of strict scrutiny in gender-based equal protection cases through its decision in Reed v. Reed. After a review of the facts in Reed, the Court noted it was justified in departing from the traditional rational-basis approach in cases presenting gender-based classifications.

182. Id. The denial of Frontiero’s allowance increase was based on 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, which permit allowance increases for a male serviceperson claiming his wife as a dependent without providing proof of her dependency. Id. at 678 (citations omitted).
186. Id. at 207.
187. Id.
188. Id. at 207-08.
189. Frontiero, 411 U.S. at 679.
190. Id. at 677, 690-91.
191. Id. at 678, 682.
192. Id. at 682.
193. Id.
The Court outlined the country's long history of gender discrimination, remarking about paternalistic attitudes rooted in United States jurisprudence for over a hundred years. The Court also noted how, like race and national origin, gender was an immutable characteristic occasioned only by accident of birth. Moreover, the Court reasoned gender was a suspect classification, like race and national origin, because gender characteristics bear no relationship to a person's ability to contribute to or perform in society. The Court noted statutory gender classifications relegated entire classes of persons to an inferior legal status without taking into account the class members' actual capabilities. Thus, the Court concluded gender-based classifications, like those based on alienage, race, or national origin, were inherently suspect. Therefore, the Court applied strict judicial scrutiny.

Based on the factual situation, the Court noted the statutes commanded dissimilar treatment for similarly-situated persons. The Court observed differential treatment of males and females, as conceded by the United States, served no purpose other than to foster administrative convenience. The Court noted the classification's sole purpose was administrative convenience, and because the classification had no other purpose, combined with the fact the statutory scheme drew distinct lines on the basis of gender, the distinction was the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." Therefore, the Court concluded the military's disparate treatment of male and female servicepersons was unconstitutional under the Fifth Amendment and reversed the district court.

3. A Return to Rational Basis

In 1974, in Kahn v. Shevin, the Supreme Court reverted to its use of the test outlined in Reed when determining a gender-based classification was within constitutional limits for equal protection. Mel Kahn, a widower living in Florida, applied for a property tax exempt-

194. Id. at 684.
195. Id. at 686.
196. Id. (citation omitted).
197. Id. at 686-67.
198. Id. at 688.
199. Id.
200. Id. (citing Reed, 404 U.S. at 77).
201. Id.
202. Id. at 690 (citing Reed, 404 U.S. at 76).
203. Id. at 679, 690-91.
tion normally given to widows. The Dade County Tax Assessor's Office denied the application, based on Florida Statute section 196.202 because it provided an exemption for widows but not for widowers. Kahn sought a declaratory judgment on the constitutionality of the statute from the Circuit Court for Dade County, Florida. The circuit court held the statute's gender-based classification violated the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court of Florida reversed the circuit court's decision, determining the statute was a means of acknowledging the different economic capabilities of males and females. The court recognized the decision in Reed, and applied the rational basis test. The court determined the object of the statute was to reduce the tax burden on widows, and thereby reducing inequalities between the economic capabilities of men and women. This object, the court noted, “certainly” bore a fair and substantial relationship to a female property owner's ability to pay property taxes. Thus, the court reasoned finding equality between genders would rest on fiction, not fact; and the statute, as such, was a valid legislative enactment. Kahn appealed to the United States Supreme Court, challenging the statute's constitutionality on equal protection grounds.

The United States Supreme Court accepted the appeal and affirmed the Florida Supreme Court's decision, noting differential treatment between widows and widowers bore a fair and substantial relationship to the state's interests in cushioning the financial impact of a female-citizen's husband's death. Justice William O. Douglas, writing for the Court, distinguished Frontiero, stating the Florida statute's disparate treatment of males and females was reasonable and noting the purpose of the statute was not solely the furtherance of administrative convenience. Asserting that states have great leeway in classifying for tax purposes, the Court observed the issue was not whether the statute could have been better drafted, but whether

206. Kahn, 416 U.S. at 352.
207. Id. The Court noted Florida has provided some sort of tax exemption for widows since 1885, and the current law, Fla. Stat. section 196.202, provided a $500 annual exemption. Id.
208. Kahn, 416 U.S. at 352.
209. Id.
211. Kahn, 273 So. 2d at 73 (quoting Reed, 404 U.S. at 76).
212. Id.
213. Id.
214. Id. at 73-74.
216. Id. at 351, 355-56 (citations omitted).
217. Id. at 355.
the statute was constitutional.\textsuperscript{218} As such, the Court determined the statute was well within constitutional limits because the differing treatment of widows and widowers was fairly related to the state's interest in cushioning the financial impact of the death of a female-citizen's husband.\textsuperscript{219}

Justice William J. Brennan, Jr., with whom Justice Thurgood Marshall joined, dissented, reasoning courts must subject a statute making classifications based on immutable characteristics, such as gender, to strict scrutiny.\textsuperscript{220} Justice Brennan noted, in statutes posing gender-based classifications, the state has the burden to prove the challenged statute serves a compelling interest which the state cannot accomplish through a more carefully-tailored classification or through less drastic means.\textsuperscript{221} Justice Brennan conceded the statute served a compelling interest, but argued the statute was invalid because the interest might have been better served through a more narrowly drafted statute.\textsuperscript{222} He suggested the statute use alternative means of classification, which might better narrow the class of affected persons to those whom have experienced past discrimination.\textsuperscript{223} According to Justice Brennan, however, the statute as drafted failed to meet the requirements of equal protection.\textsuperscript{224}

4. Revisiting Strict Scrutiny

In 1975, in \textit{Weinberger v. Wiesenfeld},\textsuperscript{225} the Supreme Court invalidated a statute allowing Social Security benefits for widows, but not widowers.\textsuperscript{226} In \textit{Weinberger}, a widower named Stephen Wiesenfeld attempted to collect survivors' benefits pursuant to 42 U.S.C. § 402(g) for himself and his infant son after his wife died in childbirth.\textsuperscript{227} Although his infant son was eligible for benefits, the Social Security office informed Wiesenfeld he did not qualify for the benefits because he was not a widow.\textsuperscript{228} Had he been a woman, Wiesenfeld would have been eligible to collect.\textsuperscript{229}

Wiesenfeld filed suit in the District Court for the District of New Jersey on behalf of himself and other widowers similarly situated, ar-

\begin{itemize}
  \item \textsuperscript{218} \textit{Id.} at 355, 356 n.10.
  \item \textsuperscript{219} \textit{Id.} at 355-56.
  \item \textsuperscript{220} \textit{Id.} at 357 (Brennan, J., dissenting).
  \item \textsuperscript{221} \textit{Id.} at 357-58 (Brennan, J., dissenting).
  \item \textsuperscript{222} \textit{Id.} at 358 (Brennan, J., dissenting).
  \item \textsuperscript{223} \textit{Id.} at 360 (Brennan, J., dissenting).
  \item \textsuperscript{224} \textit{Id.} (Brennan, J., dissenting).
  \item \textsuperscript{225} 420 U.S. 636 (1975).
  \item \textsuperscript{227} \textit{Weinberger}, 420 U.S. at 639-40.
  \item \textsuperscript{228} \textit{Id.}
  \item \textsuperscript{229} \textit{Id.} at 640-41.
\end{itemize}
arguing § 402(g) violated the Fifth Amendment. The district court asserted that unless the legislature premised the statute on an inherently suspect classification, like race or national origin, or concerned a fundamental interest, like the right to vote or to appeal a criminal conviction, courts would uphold the classification unless it bore no rational relationship to any legitimate government interest. If the statute violated equal protection, the court maintained, when examined under the least stringent standard, then the court would not need to proceed to any level of heightened scrutiny. As such, the court proceeded to apply the rational basis test and determined the classification was Congress' rational attempt at protecting females and their families who have lost their male supporter.

Next, the district court turned to a higher level of scrutiny. The court noted affirmative legislation may fulfill a compelling governmental interest to remedy past discrimination. However, the court reasoned, a statute cannot survive heightened scrutiny if that statute discriminates against members of the group the legislature intended the statute to protect. The court reasoned § 402, although enacted to remedy past discrimination against women, served to discriminate against women because it denied the male surviving spouse of a female wage earner, such as Paula Wiesenfeld, the benefits which would have been received by a female surviving spouse. As such, since the statute in question served to discriminate against the class § 402(g) was meant to protect (women), the district court found the section violated the Fifth Amendment's command for equal protection.

The United States Supreme Court accepted the appeal and affirmed the district court's decision, determining the gender-based classification was gratuitous. Justice William J. Brennan, Jr., writing for the Court, determined the classification at bar was indistinguishable from the classification invalidated by the Court in *Frontiero*. The Court noted Congress premised the classification on the notion

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230. *Id.* at 638, 641.
233. *Id.* at 989-90.
234. *Id.* at 990.
235. *Id.* at 991 (citations omitted).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Weinberger,* 420 U.S. at 636, 639, 646.
240. *Id.* at 636, 653.
241. *Id.* at 637, 642-43.
men are more likely to support their spouses and children than women.\textsuperscript{242} This notion, the Court observed, was not without empirical support.\textsuperscript{243} However, even considering empirical support, the Court determined such a gender-based generalization should not function to deprive working women of financial protection for their families, \textit{vis a vis} benefits for females but not males, as was the case with § 402(g).\textsuperscript{244} Justice Brennan noted the classification was gratuitous because, if drafted without the gender-based classification, § 402(g) would only, in practice, provide benefits to men similarly situated to the women intended to benefit from the gender-based statute.\textsuperscript{245} Rather, because the statute treated similarly-situated men and women differently, § 402(g) was unconstitutional.\textsuperscript{246}

5. Reverting to Rational Basis

Also in 1975, in \textit{Stanton v. Stanton},\textsuperscript{247} the United States Supreme Court concluded a statute setting different ages of majority for males and females violated the Equal Protection Clause of the Fourteenth Amendment regardless of the test used to analyze the statute.\textsuperscript{248} In \textit{Stanton}, Thelma and James Stanton commenced divorce proceedings in the District Court of Salt Lake County.\textsuperscript{249} The parties stipulated as to child support, property, and alimony.\textsuperscript{250} Thelma Stanton retained custody of the children, and the divorce court ordered James to pay child support to Thelma.\textsuperscript{251} When the couple’s younger child, a daughter, attained the age of eighteen, James discontinued support payments.\textsuperscript{252} Thelma moved the divorce court for a judgment providing support for the children after each attained the age of eighteen.\textsuperscript{253} However, because Utah Code Annotated section 15-2-1 provided that males attained majority at age twenty-one and females at age eighteen, the divorce court concluded that nothing required James to pay support for a female child who had attained the age of majority.\textsuperscript{254}

Thelma Stanton appealed the divorce court’s decision to the Supreme Court of Utah, arguing the extension of the minority period for
males was discriminatory and served to deny equal protection. The Supreme Court of Utah affirmed the district court's ruling, stating no basis existed that would justify the court's conclusion the statute was unconstitutional. The court determined it could sustain a classification with a reasonable basis related to the statute's purposes. The court remarked that a widely-accepted idea supported the statute: females tend to mature and marry earlier than males. On the basis of this principle, coupled with a desire to engage in deference to the legislature, the court resolved that the statute was constitutional. Thelma Stanton petitioned the United States Supreme Court for review, arguing the lengthened age of minority for males violated equal protection.

The United States Supreme Court accepted the petition and reversed the Supreme Court of Utah's decision, concluding the statute failed to provide equal protection, regardless of what test the Court utilized to analyze the statute. Justice Harry A. Blackmun, writing for the Court, remarked it was unnecessary to consider whether a gender-classification was inherently suspect. Instead, the Court noted the controlling nature of Reed and the requirement that a classification be reasonable, as well as related to the statute's objectives. The Court concluded the difference between male and female children did not warrant a statutory classification. There was nothing rational, the Court observed, in basing a statute on "old notions" relegating females to the home and males to the marketplace. Thus, the Court concluded the statute, at least in the context of child support, could not survive any test given the statute's unconstitutionality under the rational basis test.

C. Settling on a Specialized Test for Gender-Based Classifications—Intermediate Scrutiny

In 1976, in Craig v. Boren, the United States Supreme Court concluded two Oklahoma statutes allowing the sale of 3.2% beer to

255. Id.
257. Stanton, 517 P.2d at 1012 (citations omitted).
258. Id. at 1012.
259. Id. at 1012-13.
260. Stanton, 421 U.S. at 7, 10, 13.
261. Id. at 7, 17-18.
262. Id. at 13 (citations omitted).
263. Id. at 13-14 (quoting Reed, 404 U.S. at 76).
264. Id. at 14.
265. Id. at 14-15 (citation omitted).
266. Id. at 17.
males aged twenty-one and over and females aged eighteen and over denied equal protection of the law to the classified males.\textsuperscript{268} In \textit{Craig}, a male between the ages of eighteen and twenty-one and a licensed vendor of 3.2\% beer brought suit in the District Court for the Western District of Oklahoma, arguing that Oklahoma Statute Title 37, sections 241 and 245 invidiously discriminated against males aged eighteen to twenty.\textsuperscript{269}

The District Court for the Western District of Oklahoma upheld the constitutionality of the statutes, holding the statutes to be parts of a “rational legislative judgment.”\textsuperscript{270} The district court noted three primary reasons for upholding the statutes: (1) the legislative judgment upon which the legislature based the challenged classification was made with a rational basis; (2) the classification was directly related to an evident legislative objective, public protection; and (3) the statutes concerned the regulation of alcoholic beverages, which was an area falling within the state’s police power and the Twenty-first Amendment.\textsuperscript{271} Citing the Supreme Court’s decision in \textit{Reed}, the district court found the classification reasonable, as well as fairly and substantially related to the state’s interest in enhancing traffic safety.\textsuperscript{272} Accordingly, the court upheld the statutes and dismissed the plaintiffs’ action.\textsuperscript{273}

The plaintiffs appealed, and the Supreme Court reversed the district court’s decision, concluding the statutes served to deny males aged eighteen to twenty equal protection of the laws.\textsuperscript{274} Justice William J. Brennan, Jr., writing for the Court, noted past cases established that gender-based classifications must serve “important governmental objectives and must be substantially related to [the] achievement of those objectives” in order to withstand a constitutional challenge.\textsuperscript{275} The Court stated important governmental objectives did not include administrative ease or convenience.\textsuperscript{276}

In terms of the achievement of important governmental objectives, the Court noted gender was an inaccurate proxy for justifying statutory schemes utilizing archaic and overbroad generalizations.\textsuperscript{277}

\textsuperscript{269} \textit{Craig}, 429 U.S. at 191-92.
\textsuperscript{271} Walker, 399 F. Supp. at 1307.
\textsuperscript{272} \textit{Id.} at 1309-11, 1314 (citing Kahn, 416 U.S. at 355; Reed, 404 U.S. at 76).
\textsuperscript{273} \textit{Id.} at 1314.
\textsuperscript{274} \textit{Craig}, 429 U.S. at 210.
\textsuperscript{275} \textit{Id.} at 191, 197. The Court did not cite any specific cases. \textit{Id.} at 197.
\textsuperscript{276} \textit{Craig}, 429 U.S. at 198 (citing Schlesinger v. Ballard, 419 U.S. 498, 506-07 (1975); \textit{Frontiero}, 411 U.S. at 690; Stanley v. Illinois, 405 U.S. 645, 656 (1972)).
\textsuperscript{277} \textit{Id.} (citations omitted).
Similarly, the Court observed courts have rejected statutory schemes based on increasingly outdated misconceptions about a female’s role in the home instead of in the marketplace as being excessively loose-fitting characterizations. The weak congruence between gender and any gender-based generalization, the Court opined, made it necessary for legislatures to redraft statutes in gender-neutral fashions or to adopt procedures for help in identifying instances when the generalizations comport with fact.

The Court accepted, for purposes of equal protection analysis, the government’s interest in promoting traffic safety. However, the Court observed the government’s statistics correlating traffic safety with the statutes’ classification could not support a conclusion the classification was closely related to the traffic safety goal. Rather, the Court determined the relationship between gender and the government’s interest in traffic safety was too tenuous to satisfy the requirement the state actor show a substantial relationship between the interest and the achievement of an important governmental interest. Thus, the Court held the statutes invidiously discriminated against males aged eighteen to twenty in violation of the Equal Protection Clause of the Fourteenth Amendment.

In 1979, in *Caban v. Mohammed*, the Supreme Court invalidated a statute distinguishing between the adoption rights of unmarried mothers and unmarried fathers on equal protection grounds. Factually, Abdiel Caban and Maria Mohammed sired two children together. After parting with Caban, Mohammed and her new husband filed a petition to adopt the two children. Caban and his new wife cross-petitioned for the children’s adoption. After a hearing, a New York Surrogate granted the Mohammeds’ adoption petition, effectually cutting off Caban’s parental rights. The Surrogate noted because the natural mother, Mohammed, refused to consent to Caban’s adoption of the children, the law foreclosed Caban’s right to

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278. *Id.* at 198-99 (citing *Stanton*, 421 U.S. at 14-15; *Taylor v. Louisiana*, 419 U.S. 522, 535 n.17 (1975)).
279. *Id.* at 199 (citations omitted).
280. *Id.* at 199.
281. *Id.* at 200.
282. *Id.* at 204.
283. *Id.* at 192, 204.
286. *Caban*, 441 U.S. at 382.
287. *Id.* at 382-83.
288. *Id.* at 383.
289. *Id.* at 383-84.
adoption. The Surrogate found the Mohammeds qualified to adopt the children and granted their adoption petition.

Caban appealed the Surrogate’s decision to the New York Supreme Court, Appellate Division, arguing the statute was unconstitutional because it denied equal treatment to fathers and mothers of children born out of wedlock. The New York Supreme Court affirmed the Surrogate’s decision, stating a previous New York Court of Appeals decision had foreclosed the constitutional challenge. The New York Court of Appeals also affirmed the Surrogate’s decision, citing the same decision as the supreme court. Caban appealed the decision to the United States Supreme Court, challenging the constitutionality of New York Domestic Relations Law section 111 because it required a child’s mother’s consent to an adoption but required no consent from a father.

The United States Supreme Court accepted the appeal and reversed the New York Court of Appeal’s decision, finding section 111 unconstitutional based on the distinctions the statute drew between the adoption rights of unmarried fathers and unmarried mothers. Justice Lewis F. Powell, Jr., delivering the Court’s opinion, observed a gender-based classification needs to serve important governmental objectives and bear a substantial relationship to the achievement of those objectives. The Court noted the existence of an important governmental objective, providing adoptive homes for nonmarital children, but found the classification and the objective did not bear a substantial relationship to one another. Instead, the Court reasoned the classification was an example of an overbroad generalization.

The Court rejected the argument that natural mothers, absent extenuating circumstances, bear closer relationships to their children than do natural fathers. Rather, Justice Powell determined maternal and paternal roles were of equal importance. The Court noted

290. Id. at 384. Because Mohammed withheld consent relating to Caban’s adoption request, the Surrogate only considered evidence regarding the Mohammeds’ qualifications for adoption. Id.
293. In re David Andrew C., 391 N.Y.S.2d at 846-47.
295. Caban, 441 U.S. at 380-81, 388.
296. Id. at 380, 382, 385, 394.
297. Id. at 381, 388 (quoting Craig, 429 U.S. at 197).
298. Id. at 391.
299. Id. at 394 (citations omitted).
300. Id. at 388-89.
301. Id. at 389.
the statute served to discriminate against unmarried fathers even when the fathers have demonstrated significant paternal interests in their children.\textsuperscript{302} As such, the Court concluded the distinction bore no substantial relationship to the objective of providing homes for nonmarital children and found the statute violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{303}

In 1981, in \textit{Michael M. v. Superior Court of Sonoma County},\textsuperscript{304} the Supreme Court upheld a California statute making males alone criminally liable for engaging in sexual acts with female partners under the age of eighteen.\textsuperscript{305} In \textit{Michael M.}, someone filed a complaint against Michael M., alleging he engaged in unlawful sexual acts with a female under eighteen, a violation of California Penal Code section 261.5.\textsuperscript{306} Michael M. asserted the statute unlawfully discriminated against him on the basis of his gender.\textsuperscript{307} Both the trial court and the California Court of Appeal rejected Michael M.’s argument.\textsuperscript{308}

Michael M. appealed to the Supreme Court of California, arguing the statute violated his right to equal protection because the statute prosecuted only males while protecting females.\textsuperscript{309} The court rejected Michael M.’s constitutional challenge, stating that although the classification was obviously discriminatory an important governmental interest justified the statutory scheme.\textsuperscript{310} The California legislature, the court noted, based the statute on the immutable physical fact that only females may become pregnant.\textsuperscript{311} After observing the problems associated with unwed teenage pregnancies, the court determined the classification was reasonable because legislatures could impose criminal sanctions on males alone when males were the only persons capable of bringing about the results the legislature sought to avoid.\textsuperscript{312} The court further reasoned the legislature could have either adopted a gender-neutral statute or chosen to amend the present statute in a gender-neutral fashion, but the legislature was not constitutionally compelled to take such action.\textsuperscript{313} Thus, the court determined the

\textsuperscript{302} Id. at 394.
\textsuperscript{303} Id. at 382, 385, 391, 394.
\textsuperscript{304} 450 U.S. 464 (1981).
\textsuperscript{306} Michael M., 450 U.S. at 466.
\textsuperscript{307} Id. at 467.
\textsuperscript{308} Id.
\textsuperscript{309} Michael M. v. Superior Court of Sonoma County, 601 P.2d 572, 572, 574 (Cal. 1979), aff’d, 450 U.S. 464 (1981).
\textsuperscript{310} Michael M., 601 P.2d at 574.
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 574-75.
\textsuperscript{313} Id. at 576.
state's important interest in preventing pregnancies in unwed teenage girls warranted the classification.\textsuperscript{314}

Michael M. petitioned the United States Supreme Court for review, arguing penalties for males only violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{315} The United States Supreme Court accepted Michael M.'s petition and affirmed the California Supreme Court's decision, holding the statute bore a sufficient relationship to the state's interest in preventing nonmarital teenage pregnancies as to pass constitutional muster.\textsuperscript{316} Justice William H. Rehnquist, writing for the Court, noted its unsettled history in determining the proper approach and analysis for use in cases involving gender-based classifications.\textsuperscript{317} The Court observed, in cases concerning gender-based distinctions, the classification must bear a substantial relation to an important governmental objective.\textsuperscript{318} Moreover, the Court remarked, legislatures could not make overbroad generalizations about gender when those generalizations were unrelated to actual differences between the genders.\textsuperscript{319}

The Court determined, in the case of California Penal Code section 261.5, the state had a strong interest in preventing nonmarital teenage pregnancies.\textsuperscript{320} Virtually all the significant and harmful consequences of teenage pregnancy, the Court opined, fell on young women.\textsuperscript{321} The prevention of such pregnancies, the Court held, had a sufficient relationship to the statute's classification and, as such, the Court determined the statute was constitutional.\textsuperscript{322}

Justice William J. Brennan, Jr., joined by Justices Byron R. White and Thurgood Marshall, dissented, noting the Court should not deem a statute constitutional unless the statute's gender-based classification bore a sufficient relationship to the state's purported interest in preventing teenage pregnancies.\textsuperscript{323} Justice Brennan noted the Court mandated the "mid-level constitutional scrutiny" test in 1976.\textsuperscript{324} The plurality opinion, Justice Brennan opined, placed too much emphasis on the importance of preventing pregnancies and not

\begin{footnotes}
\item[314] Id. at 574, 575.
\item[315] Michael M., 450 U.S. at 464, 466.
\item[316] Id. at 464, 467, 470, 472-73.
\item[317] Id. at 468.
\item[318] Id. at 468-69 (citing Craig, 429 U.S. at 197; Reed, 404 U.S. at 76).
\item[319] Id. at 469 (quoting Parham v. Hughes, 441 U.S. 347, 354 (1979)).
\item[320] Id. at 466, 470.
\item[321] Id. at 473.
\item[322] Id. at 472-73.
\item[323] Id. at 488-89 (Brennan, J., dissenting).
\item[324] Id. at 488 (Brennan, J., dissenting).
\end{footnotes}
enough emphasis on the relationship between the statute’s means and the goal.\textsuperscript{325}

In order to pass the mid-level test, Justice Brennan argued, the State of California needed to prove a gender-neutral statute would have been less effective in preventing teenage pregnancies.\textsuperscript{326} The state, according to Justice Brennan, had the burden of proving there were fewer teenage pregnancies under California’s gender-based statute than if the law were gender neutral.\textsuperscript{327} Justice Brennan determined the state had not proven the classification was substantially related to achieving a state goal of preventing pregnancies.\textsuperscript{328} As such, Justice Brennan would have held the statute in violation of equal protection and reversed the California Supreme Court.\textsuperscript{329}

In 1982, in Mississippi University for Women v. Hogan,\textsuperscript{330} the United States Supreme Court held Mississippi University for Women’s (“MUW”) policy denying males the opportunity to earn credit from the School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{331} The Mississippi Legislature created MUW in 1884.\textsuperscript{332} Since that date, MUW’s School of Nursing expanded from offering only two-year degrees to offering four-year and graduate degrees but had always limited enrollment to women.\textsuperscript{333} In 1979, Joe Hogan, a registered nurse, applied for admission to MUW’s School of Nursing to earn a four-year baccalaureate degree.\textsuperscript{334} Although Hogan was a qualified applicant, MUW denied his admission solely because of his gender.\textsuperscript{335} MUW informed Hogan that he was eligible to audit courses he was interested in but could not enroll to receive credit.\textsuperscript{336}

Hogan sued MUW in the United States District Court for the Northern District of Mississippi, arguing MUW’s single-gender policy violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{337} The district court denied Hogan’s request for preliminary injunctive relief, concluding MUW’s women-only policy bore a rational

\textsuperscript{325} Id. at 488-89 (Brennan, J., dissenting).
\textsuperscript{326} Id. at 490 (Brennan, J., dissenting).
\textsuperscript{327} Id. at 491 (Brennan, J., dissenting).
\textsuperscript{328} Id. at 490, 496 (Brennan, J., dissenting).
\textsuperscript{329} Id. at 496 (Brennan, J., dissenting).
\textsuperscript{330} 458 U.S. 718 (1982).
\textsuperscript{331} Miss. Univ. for Women v. Hogan, 458 U.S. 718, 718, 731 (1982).
\textsuperscript{332} Hogan, 458 U.S. at 719-20. The school was originally known as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi. Id.
\textsuperscript{333} Hogan, 458 U.S. at 720.
\textsuperscript{334} Id.
\textsuperscript{335} Id. at 720-21.
\textsuperscript{336} Id. at 721.
\textsuperscript{337} Id.
relationship to legitimate state interests in supplying female students with the greatest range of educational opportunities. When Hogan failed to offer evidence to the contrary, the district court entered summary judgment in favor of MUW.

Hogan appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit determined the district court erred in applying the rational basis test in a gender-discrimination case. Instead, the court noted, the proper test provided gender-based classification must bear a substantial relationship to an important government objective. In the case of MUW's single-gender program, the court agreed the state had an interest in providing education for its citizens. However, this interest, the court resolved, did not bear a substantial relationship to the classification because MUW provided educational opportunities for female students only. Thus, because the state bore the burden of passing constitutional muster, the Fifth Circuit determined the state's maintenance of MUW as a single-gender institution denied Hogan equal protection of the law required by the Fourteenth Amendment.

MUW petitioned the Supreme Court for review, and the Court granted certiorari.

The United States Supreme Court affirmed the Fifth Circuit's decision, holding MUW's policy excluding males from enrolling in the School of Nursing for credit violated the Equal Protection Clause. Justice Sandra Day O'Connor, writing for the Court, noted the party seeking to uphold a gender-based classification carried the burden of proving an "exceedingly persuasive justification" for the distinction. The party meets this burden, the Court observed, only when the party shows the classification serves important governmental objectives bearing a substantial relationship to the means employed by the classification. The Court reasoned legislatures must not base statutory

338. Id. The district court also stated MUW's single-gender policy was not arbitrary because single-gender schools were consistent with the respected theory that single-gender educations provide unique benefits to students. Id.
341. Hogan, 646 F.2d at 1116, 1118.
343. Id. at 1119 (citation omitted).
344. Id.
345. Id. at 1116, 1119.
346. Hogan, 458 U.S. at 718, 723.
347. Id. at 718, 723, 731.
348. Id. at 719, 724 (citing Kirchberg, 450 U.S. at 461; Personnel Administrator v. Feeney, 442 U.S. 256, 273 (1979)).
349. Id. at 724 (citing Wengler, 446 U.S. at 150).
objectives on fixed notions regarding the abilities and roles of males and females or archaic or stereotypical ways of thinking.\textsuperscript{350}

Specifically, the Court noted the exclusion of males from MUW's School of Nursing did not compensate for past discriminatory barriers faced by females, but rather perpetuated a stereotypic view that nursing is a woman's job only.\textsuperscript{351} The Court observed MUW's policy of excluding men from enrolling for credit also failed the second part of the equal protection test, in that the state could not prove the classification was substantially related to the state's purported interest in remedying past discrimination.\textsuperscript{352} To the contrary, the Court remarked, MUW's policy allowing men to audit classes undermined the claim that males' presence on campus adversely affected female students.\textsuperscript{353} Accordingly, the Court concluded MUW fell far short of proving the exceedingly persuasive justification required to sustain the gender-based classification.\textsuperscript{354}

In 1996, in \textit{United States v. Virginia},\textsuperscript{355} the Supreme Court considered another single-gender classification in an educational setting and concluded Virginia Military Institute's ("VMI") policy excluding women from the citizen-soldier training program violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{356} After a female high-school student seeking admission to VMI complained to the Attorney General, the United States sued VMI and the Commonwealth of Virginia in the United States District Court for the Western District of Virginia, claiming VMI's male-only admission policy denied entrants equal protection under the Fourteenth Amendment.\textsuperscript{357}

The district court upheld VMI's single-gender admission policy, noting a substantial body of "exceedingly persuasive" evidence supporting the benefits accruing to students under single-gender education programs.\textsuperscript{358} The Supreme Court's decision in \textit{Hogan} guided the district court's decision, including the application of the intermediate scrutiny test.\textsuperscript{359} The court noted that the Supreme Court's decision in \textit{Hogan} involved MUW's exclusion of men from the School of Nursing being unnecessary to reach MUW's educational objectives.\textsuperscript{360} The

\begin{itemize}
  \item \textsuperscript{350} Id. at 724-25.
  \item \textsuperscript{351} Id. at 729.
  \item \textsuperscript{352} Id. at 727, 730.
  \item \textsuperscript{353} Id. at 730.
  \item \textsuperscript{354} Id. at 731.
  \item \textsuperscript{355} 518 U.S. 515 (1996).
  \item \textsuperscript{356} United States v. Virginia, 518 U.S. 515, 515, 520, 534 (1996).
  \item \textsuperscript{357} Virginia, 518 U.S. at 523.
  \item \textsuperscript{359} Virginia, 766 F. Supp. at 1410.
  \item \textsuperscript{360} Id. at 1411 (quoting Hogan, 458 U.S. at 731).
\end{itemize}
court observed, on the other hand, the record in VMI's case was replete with evidence proving single-gender education was beneficial to both females and males.\textsuperscript{361} Likewise, the court noted MUW's affirmative action justification in \textit{Hogan} failed both parts of the intermediate scrutiny test, while VMI's diversity objective and classification satisfied the test.\textsuperscript{362} The court determined VMI's exclusion of women met the requirement that a gender-based classification serve an important governmental objective and for that objective to be met by the means of the classification.\textsuperscript{363}

The United States appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, contending educational diversity was not a legitimate interest and VMI had not sufficiently justified its male-only admission policy.\textsuperscript{364} The Fourth Circuit vacated the district court's opinion and remanded the case for further proceedings, determining VMI had adequately defended the single-gender policy but failed to explain how one single-gender institution furthered educational diversity.\textsuperscript{365} The court noted it was not requiring VMI to admit women, but was only remanding the case to the district court for further determination of a course of action that would support educational diversity in a manner consistent with the Fourteenth Amendment.\textsuperscript{366}

On remand to the United States District Court for the Western District of Virginia, the State proposed a remedial plan creating a program parallel to VMI's citizen-soldier program but solely for women.\textsuperscript{367} The Virginia Women's Institute for Leadership ("VWIL") involved a four-year college experience provided in an all-female environment at Mary Baldwin College.\textsuperscript{368} After noting the differences and similarities between VMI and VWIL, the district court approved the plan, noting the plan satisfied the standards for constitutionality under the Equal Protection Clause.\textsuperscript{369}

\textsuperscript{361} \textit{Id.}
\textsuperscript{362} \textit{Id.} The district court reasoned the judicial system and educational experts recognized educational diversity as a legitimate objective. \textit{Id.} Moreover, the court opined the only means by which single-gender diversity could be obtained was through a single-gender admission policy. \textit{Id.}
\textsuperscript{363} \textit{Virginia}, 766 F. Supp. at 1415.
\textsuperscript{365} \textit{Virginia}, 976 F.2d at 891, 899-900.
\textsuperscript{366} \textit{Id.} at 900. The court of appeals noted Virginia might have chosen to admit women, establish parallel programs or institutions, or abandon state support for VMI. \textit{Id.}
\textsuperscript{368} \textit{Virginia}, 852 F. Supp. at 476.
\textsuperscript{369} \textit{Id.} at 473, 476-84.
The United States appealed the district court's approval of Virginia's remedial plan, arguing the plan did not remedy the denial of VMI's unique educational experience to women. The Fourth Circuit affirmed the district court's plan approval, inquiring whether the state had a legitimate and important interest in providing single-gender education, whether the classification bore a sufficient relationship to the interest, and whether the resulting mutual exclusion of each gender from the other's institution allowed the achievement of substantively comparable benefits. As to each part of the "special intermediate scrutiny test," the court first determined the objective of providing single-gender educational opportunities fell within the government's range of providing its citizens with higher educational opportunities. The court also reasoned the state could not have adopted more direct means of achieving single-gender educational opportunities than by excluding persons of the opposite gender from each institution.

Moreover, the court opined the plan offered sufficiently comparable opportunities for both genders. Thus, the court stated the plan met the special intermediate scrutiny test and affirmed the district court's approval of the plan. The United States petitioned for writ of certiorari, arguing the single-gender policy violated equal protection.

The United States Supreme Court granted certiorari and reversed the court of appeal's final judgment approving the plan and affirmed the court of appeal's original invalidation of VMI's male-only admission program. Justice Ruth Bader Ginsburg delivered the Court's opinion, concluding Virginia had not shown an exceedingly persuasive justification for excluding women from VMI's citizen-soldier program and noted the poor fit between VMI's constitutional violation and the proposed remedy.

In relation to VMI's original male-only admission policy, the Court found the record presented no persuasive evidence the policy furthered the state's educational diversity objective. The Court reasoned, if the state's objective was to advance a genuine array of

371. Virginia, 44 F.3d at 1229, 1232, 1237.
372. Id. at 1239.
373. Id.
374. Id. at 1241.
375. Id. at 1241-42.
376. Virginia, 518 U.S. at 515, 530.
377. Id. at 515, 524, 528, 558.
378. Id. at 519, 534, 555-56.
379. Id. at 539.
educational opportunities, a plan affording unique educational advantages to males only did not serve the objective. The Court remarked that however liberally VMI's admissions plan served the state's sons, it made no provisions whatsoever for the state's daughters. This, the Court observed, was not equal protection.

As for Virginia's plan to create a separate program for women as a remedy for VMI's denial of equal protection for women, the Court noted the violation required a remedy that closely conformed to the constitutional violation. The Court stated the constitutional violation created by VMI's admission policy was the categorical exclusion of women from an educational opportunity afforded only to men. The Court reasoned a proper remedy for an invalid exclusion would need to eliminate past discriminatory effects and bar similar future discrimination. The plan to implement a separate program for women, the Court determined, offered no cure at all for the advantages and opportunities VMI's policy withheld from women who desired an education at VMI and could make the grade. As such, the Court opined Virginia could not offer qualified women desiring an education at VMI anything less than the VMI education itself and reversed the Fourth Circuit's final judgment.

D. Rational Basis Analysis Today—An Economic Rights Case

In FCC v. Beach Communications, Inc. the United States Supreme Court upheld a federal statute requiring certain cable providers to obtain franchises while excluding other cable providers because the underlying rationales for the statute were sufficiently arguable under the rational basis test. In Beach, the Federal Communications Commission ("FCC") addressed the application of the franchising requirement in 47 U.S.C. § 522(7) to satellite master antenna television ("SMATV") facilities. Under the FCC's statutory interpretation, Beach, an operator of such a SMATV facility, would have been subject to franchising.
Beach petitioned the United States Court of Appeals for the District of Columbia ("D.C. Circuit"), arguing nothing existed to justify the distinction between quasi-private, external SMATV and wholly-private, internal systems the statute already exempted.\(^{392}\) After being unable to find a rational basis for distinguishing between quasi-private, external SMATV facilities but not wholly-private, internal facilities, the court of appeals remanded the case to allow the FCC to consider what rational basis existed for the classifications in the franchising requirement.\(^{393}\)

After remand, the FCC returned the record to the D.C. Circuit and was unable to provide any justifying reasons for the distinction between facilities.\(^{394}\) The court reasoned it could conceive of no reason why a quasi-private, external SMATV facility and not a wholly-private facility was subject to local cable franchising.\(^{395}\) The court noted neither type of facility used a public right-of-way and no basis existed to assume the SMATV facility was more similar to a traditional cable system than was a wholly-private facility.\(^{396}\) Thus, the court of appeals held the statute violated the Fifth Amendment’s Equal Protection Clause.\(^{397}\)

Because the D.C. Circuit invalidated an act of Congress, the United States Supreme Court granted certiorari and reversed the court of appeal’s decision, determining the very existence of arguable statutory rationales sufficiently satisfied the rational basis test.\(^{398}\) Justice Clarence Thomas, writing for the Court, noted on rational-basis review a statutory classification warrants a strong presumption of validity requiring the statute’s challenger to meet the burden of negating every conceivable basis supporting the classification.\(^{399}\) Moreover, the Court observed, because the Court never required a legislature to articulate the reasons underlying the statute’s enactment, actual legislative motivations were entirely irrelevant for constitutional inquiries.\(^{400}\) Rather, the Court reasoned, if any conceivable state of facts providing a rational basis for the classification existed, the Court must uphold the statute against the equal pro-

\(^{392}\) Beach Communications, Inc. v. FCC, 959 F.2d 975, 976, 985-86 (D.C. Cir. 1992).
\(^{393}\) Beach, 959 F.2d at 987.
\(^{395}\) Beach, 965 F.2d at 1105.
\(^{396}\) Id.
\(^{397}\) Id. at 1104.
\(^{398}\) Id. at 1104.
\(^{400}\) Id. at 315 (citing U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).
tection challenge. Applying the rational basis principles, the Court concluded the distinction was constitutional, based on two conceivable rationales for the classification. As such, the Court upheld the statutory distinction and reversed the D.C. Circuit.

E. THE COURT'S FIRST LOOK AT 8 U.S.C. § 1409

In 1998, in *Miller v. Albright*, the United States Supreme Court upheld 8 U.S.C. § 1409, a statute drawing distinctions between citizenship requirements for children of alien fathers and citizen mothers as opposed to children of alien mothers and citizen fathers. In *Miller*, Petitioner Miller was a nonmarital child born in the Philippines to an American father and a Filipino mother. Miller's mother raised her in the Philippines, where she lived until after her twenty-first birthday. Miller's father was an American serviceman stationed in the Philippines at the time of Miller's conception.

In 1991, Miller applied to the United States State Department for citizenship registration. The State Department denied her application, and she reapplied after her father obtained a Voluntary Paternity Decree from a Texas court in July of 1992. The State Department denied Miller's reapplication because the Texas paternity decree did not satisfy the age requirements set forth in 8 U.S.C. § 1409.

In 1993, Miller and her father filed suit against the Secretary of State in the United States District Court for the Eastern District of Texas, requesting the court enter a judgment declaring Miller a United States citizen. Miller and her father alleged § 1409 violated Miller's father's rights to equal protection because the section differentiated between citizen parents on the basis of gender. The District Court for the Eastern District of Texas concluded Miller's father was present at her birth or returned to the Philippines after his tour of duty. Nothing indicated Miller's father and mother were never married. Miller was twenty-two when her father petitioned the Texas state court for a paternity decree.

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402. *Id.* at 317-20.
403. *Id.* at 307, 320.
407. *Id.* at 425.
408. *Id.* Miller's father and mother were never married. *Id.* Nothing indicated Miller's father was present at her birth or returned to the Philippines after his tour of duty. *Id.*
410. *Id.*
411. *Id.* at 426-27. Miller was twenty-two when her father petitioned the Texas state court for a paternity decree. *Id.* at 424, 426.
413. *Id.*
lacked standing, dismissed him as a party, and transferred the case to the District Court for the District of Columbia based on improper venue.\textsuperscript{414} The Secretary of State filed a motion to dismiss for lack of subject matter jurisdiction arguing Miller lacked standing due to her failure to demonstrate a redressable injury.\textsuperscript{415} The district court granted the motion to dismiss.\textsuperscript{416}

Miller appealed the district court’s dismissal of her case to the United States Court of Appeals for the District of Columbia ("D.C. Circuit"), arguing the court erred in determining she lacked standing to challenge the constitutionality of § 1409.\textsuperscript{417} The D.C. Circuit held Miller had standing to pursue her claim but rejected her constitutionality challenges to § 1409 and found she failed to meet § 1409’s citizenship requirements.\textsuperscript{418} The court reviewed the requirements of § 1409 and found Congress’ demand for special evidence of ties between nonmarital children and their fathers reasonable.\textsuperscript{419} Mothers, the court remarked, were far less likely to disregard children they have carried in their wombs than were natural fathers, since natural fathers may not have even been aware of their children’s existence.\textsuperscript{420} The court noted, while the district court’s dismissal of Miller’s claim was erroneous, Miller’s constitutional challenges were meritless.\textsuperscript{421}

Miller petitioned the United States Supreme Court for writ of certiorari, which the Court granted to discuss whether the distinction between nonmarital children of citizen mothers and nonmarital children of citizen fathers violated the Equal Protection Clause of the Fifth Amendment.\textsuperscript{422} The Supreme Court affirmed the D.C. Circuit's decision, noting the well-tailored fit between § 1409’s classification and various important governmental objectives.\textsuperscript{423} Justice John Paul Stevens, announcing the Court’s judgment, observed if a nonmarital child’s mother is a United States citizen, the mother must choose whether to carry the child to term and give birth.\textsuperscript{424} Section 1409, the Court remarked, served to reward the mother’s labor and choice by bestowing citizenship on her child.\textsuperscript{425} However, the Court determined if the nonmarital child’s father is the citizen, the father need not par-

\begin{itemize}
\item \textsuperscript{414} Id. at 426-27.
\item \textsuperscript{415} Miller v. Christopher, 870 F. Supp. 1, 3 (D.D.C. 1994).
\item \textsuperscript{416} Miller, 870 F. Supp. at 3.
\item \textsuperscript{418} Miller, 96 F.3d at 1470, 1473.
\item \textsuperscript{419} Id. at 1468, 1472.
\item \textsuperscript{420} Id. at 1472.
\item \textsuperscript{421} Id. at 1473.
\item \textsuperscript{422} Miller, 523 U.S. at 428.
\item \textsuperscript{423} Id. at 420, 435, 438, 440, 445.
\item \textsuperscript{424} Id. at 423, 433.
\item \textsuperscript{425} Id. at 433-34.
\end{itemize}
take in the decision to give birth, be present at the birth, or provide parental support for at least seventeen years after the child’s birth. Rather, the Court noted, under § 1409 the father may retroactively confer citizenship on his child so long as the father acknowledged paternity while the child was a minor. The Court reasoned the child might even obtain an adjudication on paternity absent the father’s acts or even permission. Therefore, the Court determined § 1409’s respective requirements for mothers and fathers imposed obviously more-severe burdens on the citizen mother than on the citizen father.

The Court noted three important governmental objectives served by § 1409, including assuring biological relationships between child and parent, encouraging the development of healthy relationships between child and parent, and promoting ties between the United States and the foreign-born child. The Court determined, not only did strong interests justify the additional requirements imposed on citizen fathers, but the particular means employed by §1409 were well-tailored for service of those interests. The Court also opined the citizen parent’s gender was not the factor determining how Congress conferred citizenship on children, but rather was just an event giving rise to the legal relationship between child and parent. As such, the Court affirmed the D.C. Circuit’s judgment and upheld the constitutionality of §1409.

Justice Ruth Bader Ginsburg, joined by Justices David H. Souter and Stephen G. Breyer, dissented, determining §1409 unconstitutionally classified parents on the basis of gender and reinforced overbroad generalizations that mothers are responsible for nonmarital children while fathers are not. Even if generalizations held true for many or most persons, Justice Ginsburg noted, courts did not permit gender-based classifications when legislatures could draw more accurate lines.

Justice Ginsburg outlined the history of United States statutes governing citizenship of foreign-born children. Justice Ginsburg noted the first statutes based citizenship requirements on the father's

426. Id. at 434.
427. Id. (citing 8 U.S.C. § 1409(a)(4)(B) (1994)).
428. Id.
429. Id.
430. Id. at 436, 438.
431. Id. at 440.
432. Id. at 443.
433. Id. at 427, 445.
434. Id. at 460 (Ginsburg, J., dissenting).
435. Id. (Ginsburg, J., dissenting).
436. Id. at 461-68 (Ginsburg, J., dissenting).
citizenship status. Justice Ginsburg remarked that, in 1934, Congress proceeded in a new direction by allowing citizenship for children born abroad if either the child’s mother or father were American citizens. Justice Ginsburg observed that Senate and House Reports indicated the change was made to “establish complete equality between American men and women in the matter of citizenship for themselves and their children.” This equality, Justice Ginsburg noted, changed again in 1940 when Congress amended the legislation to allow the conferral of citizenship on children born abroad and out of wedlock if the child’s mother was a United States citizen. Justice Ginsburg observed that subsequent legislation, including the present version of § 1409, retained the gender lines Congress drew in the 1940 Act.

Justice Ginsburg opined the past treatment of children born abroad to citizen parents had induced a skeptical examination of the United States’ justification for § 1409’s gender-based classification. Justice Ginsburg reasoned that Congress, in the past, displayed little regard for the mother-to-child affiliation. According to Justice Ginsburg, even if the United States’ justification that mothers exhibit closer connections to children than fathers, the justification was surely based on generalizations about the roles of men and women. Justice Ginsburg cautioned that legislatures may not base gender classifications on fixed notions relating to the roles and abilities of females and males. As such, Justice Ginsburg determined the United States’ interest in fostering ties between citizen parents and children provided no basis for requiring that only citizen fathers formally assert parentage and consent to provide parental support.

Justice Stephen G. Breyer, with whom Justices David H. Souter and Ruth Bader Ginsburg joined, also dissented, determining the gender-based classification in § 1409 could not survive heightened scrutiny. If “undiluted” equal protection standards had been applied, Justice Breyer observed, the Court ought to have held § 1409 uncon-
Justice Breyer noted gender-based distinctions were subject to a strong presumption of unconstitutionality.\(^4\)\(^4\)\(^8\) Even then, Justice Breyer noted, the United States had to meet the demanding burden of proving an exceedingly persuasive justification for the classification.\(^4\)\(^4\)\(^9\) Justice Breyer reasoned that, in order to meet its burden the government must prove the classification furthered important government objectives substantially related to the classifications means.\(^4\)\(^5\)\(^1\)

Specifically, Justice Breyer reasoned the distinction in § 1409 depended on the generalization that mothers were significantly more likely than fathers to be the caretakers of their children or to develop nurturing relationships with their children.\(^4\)\(^5\)\(^2\) To illustrate the arbitrary nature of § 1409, Justice Breyer hypothesized that if a nonmarital child's non-caretaker parent were an American citizen, § 1409 would confer citizenship on the child of the female non-caretaker parent without formal acknowledgment while requiring a male non-caretaker parent to acknowledge the child.\(^4\)\(^5\)\(^3\)

In relation to the specific governmental objectives offered by the Court, Justice Breyer noted that assuring biological relationships and developing healthy parent-child relationships were important objectives, but he opined the relationship between § 1409's requirements and those particular objectives was a "total misfit."\(^4\)\(^5\)\(^4\) Justice Breyer observed that the Court suggested the requirement that the father acknowledge the child before the child reached eighteen helped document biological relationships between fathers and children in the same manner as birth certificates documented the blood relationship between mother and child.\(^4\)\(^5\)\(^5\) Even assuming the documentations were equivalent, Justice Breyer did not understand why acknowledgment need occur before the child reached eighteen.\(^4\)\(^5\)\(^6\) Moreover, Justice Breyer noted § 1409(a)(1) required proof of paternity through "clear and convincing evidence" making subsection (a)(4)'s requirements unnecessary to prove the existence of a biological relationship.\(^4\)\(^5\)\(^7\)

\(^{448}\) Id. at 471, 481 (Breyer, J., dissenting).
\(^{449}\) Id. at 482 (Breyer, J., dissenting) (citing Virginia, 518 U.S. at 532).
\(^{450}\) Id. (Breyer, J., dissenting) (citing Virginia, 518 U.S. at 533).
\(^{451}\) Id. (Breyer, J., dissenting) (citing Virginia, 518 U.S. at 533).
\(^{452}\) Id. at 482-83 (Breyer J., dissenting).
\(^{453}\) Id. at 483 (Breyer, J., dissenting).
\(^{454}\) Id. at 484 (Breyer, J., dissenting).
\(^{455}\) Id. (Breyer, J., dissenting).
\(^{456}\) Id. (Breyer, J., dissenting).
\(^{457}\) Id. at 485 (Breyer, J., dissenting).
Justice Breyer also observed the Court's purported concern for the establishment of relationships between parent and child. According to Justice Breyer, the distance between the objective of creating such relationships and requiring fathers to acknowledge their child's existence was far too great to fulfill the requirement for tailoring or proportionality. Justice Breyer argued a mother knowing of her child's birth may fail to care for or acknowledge the child while a father with strong ties to his child may lack knowledge or fail to comply with the statute's requirements. Furthermore, Justice Breyer noted, as the Court acknowledged, a child might obtain a paternity adjudication without the father's action or even permission.

Justice Breyer opined if Congress were interested in assuring the development of ties between citizen parents and their children, Congress might have enacted a "knowledge of birth" requirement instead of the present subsection (a)(4). Likewise, Justice Breyer suggested the statute could distinguish between noncaretaker and caretaker parents instead of classifying genders. But, Justice Breyer reasoned, the statute instead classified by gender and appeared rational only if one accepted the legitimacy of gender-based generalizations or stereotypes by equating gender with parental caretaking. Justice Breyer asserted that to equate gender with caretaking was constitutionally impermissible since either women or men may be caretakers. Thus, Justice Breyer determined he found no exceedingly persuasive justification for § 1409's gender based classification.

ANALYSIS

In 1973, in Frontiero v. Richardson, the Supreme Court announced that gender-based classifications were suspect, similar to classifications based on race, alienage, and national origin, and warranted a heightened level of scrutiny. The Court reasoned gender, like other suspect classifications, was an "immutable characteristic" fashioned only by the accident of birth. The Court further reasoned

458. Id. (Breyer, J., dissenting).
459. Id. (Breyer, J., dissenting).
460. Id. at 485-86 (Breyer, J., dissenting).
461. Id. at 486 (Breyer, J., dissenting).
462. Id. at 487 (Breyer, J., dissenting).
463. Id. (Breyer, J., dissenting).
464. Id. (Breyer, J., dissenting).
465. Id. at 487-88 (Breyer, J., dissenting) (citing Virginia, 518 U.S. at 546; J.E.B. v. Alabama, 511 U.S. 127, 146 (1994); Craig, 429 U.S. at 204; Weinberger, 420 U.S. at 635).
466. Id. at 471, 488 (Breyer, J., dissenting).
469. Frontiero, 411 U.S. at 686.
gender was distinguishable from non-suspect characteristics like intelligence or physical disability because gender was unrelated to the person’s ability to perform in or contribute to society.470 Prior to the Court’s decision in *Frontiero*, the Court analyzed gender-based classifications through rational basis review.471

During and immediately following the *Frontiero* decision, the Court wavered between strict scrutiny and rational basis review.472 In 1976, however, the Court invalidated a gender-based classification without using either rational basis review or strict scrutiny.473 In *Craig v. Boren*,474 the Court applied intermediate scrutiny in its analysis of a gender-based classification.475 Indeed, since *Craig*, the Court has even added new gradations to the intermediate scrutiny test used for gender-based classifications for application to other classifications, such as those based on disability or sexual orientation.476 Practitioners today consider intermediate scrutiny to be the “traditional” test for use in analyzing gender-based classifications.477

In *Nguyen v. INS*,478 the United States Supreme Court purported to apply the intermediate scrutiny test to the gender-based classification allowing citizen mothers to transfer their citizenship to their children automatically while requiring citizen fathers to act affirmatively before conferring their citizenship to their children.479 The Court de-

470. *Id.*
determined that for a statute's gender-based classification to survive equal protection scrutiny, the classification must serve important government objectives to which the discriminatory means are substantially related.\textsuperscript{480} In applying the intermediate scrutiny test, the Court noted two important governmental interests: (1) assuring parent and child share a biological relationship; and (2) encouraging the opportunity for the development of healthy parent-child relationships.\textsuperscript{481} The Court observed these interests were substantially related to the distinction in § 1409(a)(4).\textsuperscript{482}

While the Court contended that its analysis of § 1409 complied with the intermediate scrutiny test, its application of the test was misapplied.\textsuperscript{483} In misapplying the intermediate scrutiny test, the Court retrogressed into an application of rational basis review.\textsuperscript{484} First, this Analysis will examine each element of the traditional intermediate scrutiny test, including the burden of proof, the requirement for important ends, and the requirement for sufficiently-related means, and explain how the Court mishandled each element.\textsuperscript{485} Second, this Analysis will discuss how the Court's treatment of the gender-based classification in § 1409 constituted a reversion to rational basis review.\textsuperscript{486}

\section*{A. The Court's Misapplication of Intermediate Scrutiny in \textit{Nguyen}}

In order to survive a constitutional challenge, the defender of a gender-based classification must meet the burden of proving the classification serves important governmental ends and that those ends are sufficiently related to the classification's discriminatory means.\textsuperscript{487} However, in using impersonal constructions to establish what elements of the test needed to be met, the Court in \textit{Nguyen} glossed over the crucial matter of the burden of proof.\textsuperscript{488}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{480} \textit{Nguyen}, 121 S. Ct. at 2059 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
\item \textsuperscript{481} \textit{Id.} at 2060-61.
\item \textsuperscript{482} \textit{Id.} at 2060-61, 2063.
\item \textsuperscript{483} See infra notes 487-686 and accompanying text.
\item \textsuperscript{484} See infra notes 687-715 and accompanying text.
\item \textsuperscript{485} See infra notes 487-686 and accompanying text.
\item \textsuperscript{486} See infra notes 687-715 and accompanying text.
\item \textsuperscript{488} See infra notes 489-508 and accompanying text.
\end{itemize}
\end{footnotesize}
1. The Court Glossed Over The Burden of Proof With Impersonal Constructions

When courts review challenges to gender-based classifications, the state actor bears the burden of proving the permissibility of drawing the distinction on gender lines. Instead of requiring the INS to meet this burden in *Nguyen*, the Court glossed over the burden of proof and injected impersonal constructions such as "it must be established." Despite the Court's language in *Nguyen*, past cases reveal the state actor meets the burden of proof by showing the challenged classification furthers important governmental interests and the classification's means are substantially related to the important interests.

For example, in *Mississippi University for Women v. Hogan*, the Court stated the party defending a gender-based classification carries the burden of proving the statute has an exceedingly persuasive justification. To meet this justification, the Court noted, the state actor had to show the classification furthered an important governmental interest that is substantially related to the means employed in the statute. In *Hogan*, Mississippi University for Women ("MUW") bore the burden of proving the University's policy of excluding men from the nursing school was substantially related to an important governmental interest. The Supreme Court recognized the argument MUW advanced to justify the single gender policy, including the interest MUW held out as important. After considering the interests MUW asserted as important and the purported relationship between the classification and those interests, the Court concluded MUW fell "far short" of establishing an exceedingly persuasive justification for the single-gender admissions policy.

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490. *Nguyen*, 121 S. Ct. at 2059 (using impersonal construction "it must be established" in place of language referencing state actor bears burden of proof); *Nguyen*, 121 S. Ct. at 2069 (O'Connor, J., dissenting) (stating Court's opinion glossed over crucial matter of burden of proof).
495. *Id.* at 724, 727.
496. *Id.* at 727.
497. *Id.* at 731.
Likewise, in *United States v. Virginia*[^498^] the Court noted the State of Virginia maintained the burden of showing the Virginia Military Institute's ("VMI") policy excluding women from admission was substantially related to some important governmental interest.[^499^] The Court reviewed each of the state's arguments, including that the single-gender policy furthered educational diversity and created a unique environment for teaching students character development and leadership skills.[^500^] Finally, the Court concluded the State failed to meet its burden of overcoming an equal protection challenge.[^501^]

Although the Court in *Hogan* and *Virginia* focused on the burden of proof as the yardstick for measuring each respective state actor's success in the case, the Court in *Nguyen* glossed over the burden of proof in its analysis.[^502^] In *Hogan* and *Virginia*, the Court analyzed arguments set forth by the respective state actors to determine whether the classifications could survive and whether the state actors had met their burdens.[^503^] Under intermediate scrutiny, the demanding burden rests entirely on the state actor.[^504^] It is only in lesser forms of review that the state actor has no burden to produce evidence in order to sustain a classification.[^505^] In *Nguyen*, the Court's use of impersonal constructions such as "it must be established" glossed over the critical matter of the burden.[^506^] The Court's opinion made no mention of arguments advanced by the INS in support of § 1409 and made no corresponding mention of analysis as to whether the INS' arguments satisfied any burden.[^507^] As such, the Court failed to require the INS to prove justifications for § 1409's gender-based distinction as


[^500^]: Virginia, 518 U.S. at 534-35.

[^501^]: Id.

[^502^]: See *Hogan*, 458 U.S. at 731 (stating MUW had failed in the case by failing to meet the burden of proof); *Virginia*, 518 U.S. at 534 (stating Virginia lost the case by failing to meet burden of proof); *Nguyen*, 121 S. Ct. at 2069 (O'Connor, J., dissenting) (stating Court glossed over critical matter of burden of proof); *Nguyen*, 121 S. Ct. at 2059 (using impersonal construction "it must be established" in place of burden of proof language).

[^503^]: *Hogan*, 458 U.S. at 727, 731 (reviewing arguments advanced by MUW and concluding MUW fell "far short" of meeting burden of proof); *Virginia*, 518 U.S. at 534, 535 (reviewing arguments advanced by State and concluding State failed to meet burden of proof).

[^504^]: *Nguyen*, 121 S. Ct. at 2067 (O'Connor, J., dissenting) (quoting *Virginia*, 528 U.S. at 533).

[^505^]: Id. (O'Connor, J., dissenting) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

[^506^]: See *Nguyen*, 121 S. Ct. at 2059-60 (using impersonal construction "it must be established" in place of burden of proof); Id. at 2069 (O'Connor, J., dissenting) (stating Court glossed over critical matter of burden of proof).

[^507^]: *Nguyen*, 121 S. Ct. at 2057-66.
past equal protection cases involving intermediate scrutiny have done.\textsuperscript{508}

2. Ends—The Court Did Not Demonstrate How Governmental Objectives Were Actual and Sufficiently Important

In order to survive a constitutional challenge, intermediate scrutiny demands the defender of a gender-based classification offer a governmental objective with sufficient importance as to justify the use of a gender-based distinction.\textsuperscript{509} The important governmental objective must reflect actual state purposes, not rationalizations for discriminatory actions.\textsuperscript{510} The state actor must offer genuine grounds, which are not invented post hoc or hypothesized in response to pending litigation.\textsuperscript{511} In Nguyen, the Court failed to show how sufficient ends justified the classification in (a) not demonstrating that the purported governmental objectives were actual purposes; and (b) not demonstrating the objectives' importance.\textsuperscript{512}

a. Important governmental interests must involve actual legislative purposes

In prior gender-based cases, the Supreme Court has required the important governmental interests justifying gender-based classifications to involve actual legislative purposes.\textsuperscript{513} For instance, in Virginia, the Supreme Court considered whether the state’s purported interests in providing diversity to students and developing character and leadership skills justified the state’s single-gender admissions policy at VMI.\textsuperscript{514} The Court noted equal protection required the state’s justifications for the policy to be actual state purposes, not just rationalizations for state actions.\textsuperscript{515} The Court observed the state currently lacked a single-gender higher education institution for wo-

\textsuperscript{508} Compare Hogan, 458 U.S. at 731 (stating the state actor specifically failed to meet the burden of justifying the single-gender admissions policy) and Virginia, 518 U.S. at 534 (stating the state actor specifically failed to justify VMI’s single-gender admissions policy after an equal protection challenge) with Nguyen, 121 S. Ct. at 2059-64 (using impersonal constructions instead of language requiring the INS to justify the gender-based classification).

\textsuperscript{509} Nguyen, 121 S. Ct. at 2068 (O'Connor, J., dissenting) (citing Virginia, 518 U.S. at 533).

\textsuperscript{510} Nguyen, 121 S. Ct. at 2067-68 (O'Connor, J., dissenting) (quoting Virginia, 518 U.S. at 535-36).

\textsuperscript{511} Id. at 2067 (O'Connor, J., dissenting) (quoting Virginia, 518 U.S. at 533).

\textsuperscript{512} See Nguyen, 121 S. Ct. at 2069-64 (outlining two governmental interests without examining actual legislative purposes or explaining interests' importance); Id. at 2069 (O'Connor, J., dissenting) (stating Court hypothesized statute's purposes, did not examine actual purposes, and did not explain interests' importance).

\textsuperscript{513} See infra notes 514-18 and accompanying text.

\textsuperscript{514} Virginia, 518 U.S. at 535.

\textsuperscript{515} Id. at 535-36.
As such, the Court reasoned the state readily promoted single-gender educational opportunities for men under the guise of educational diversity but did not offer the same single-gender opportunities for women. Therefore, the Court determined furthering educational diversity was not an actual purpose of the single-gender admissions policy at VMI.

In *Nguyen*, the Court outlined two governmental interests furthered by § 1409. Although the state suggested § 1409 served two separate interests, the Court independently noted the government had interests in (1) assuring the existence of a biological parent-child relationship; and (2) ensuring opportunities for parents and children to develop healthy relationships. In support of the government’s interest in ensuring opportunities for healthy parent-child relationships to develop, the Court cited the opinion in *Miller v. Albright*, a case also analyzing the constitutionality of § 1409.

In *Miller*, the Court noted that gender-based distinction in § 1409 furthered the government’s interest in the development of healthy parent-child relationships. Like the Court in *Nguyen*, however, the *Miller* Court did not pinpoint the interest in the government’s brief justifying the gender-based classification or in § 1409’s legislative history. Instead, the *Miller* Court proposed, “It was surely reasonable when [§ 1409] was enacted in 1952, and remains equally reasonable today, for Congress to condition the award of citizenship to such children on an act that demonstrates, at a minimum, the possibility that those who become citizens will develop ties with this country—a requirement that performs a meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers.” Similarly, the *Nguyen* Court’s focus on the assurance of opportunities for the development of relationships appeared, as Justice O’Connor noted, to be the type of hypothesized rationalization insufficient to survive heightened scrutiny rather than Congress’ actual concern.

516. *Id.* at 538.
517. *Id.* at 539.
518. *Id.*
519. *Nguyen*, 121 S. Ct. at 2059-60.
520. *Id.* at 2060-61.
524. Compare *Miller*, 523 U.S. at 438-40 (noting importance of healthy relationships between parent-child without determining if legislature actually had purpose in mind), with *Nguyen*, 121 S. Ct. at 2061-64 (noting importance of allowing opportunities for healthy parent-child relationships to develop without determining if legislature actually had purpose in mind).
Moreover, § 1409's historical background indicates that Congress did not intend § 1409 to help ensure opportunities for parent-child relationships to develop.\footnote{527} For most of the United States' past, Congress exhibited no high respect or regard for the mother-child affiliation and did not enact statutes conferring citizenship based on the mother's citizenship until 1934.\footnote{528} The history of § 1409 reveals the law concerning the conferral of citizenship on nonmarital children born abroad has wavered.\footnote{529} At one time, Congress conferred citizenship on children based on the father's residency status and citizenship.\footnote{530} Later Congress conferred citizenship to nonmarital children born abroad if \textit{either parent} was a citizen.\footnote{531} Congress enacted the gender-neutral amendment in order to establish equality between men and women concerning the citizenship of their children.\footnote{532} The law again changed, into its present form, basing the automatic conferral of citizenship to nonmarital children born abroad only if the mother was a citizen.\footnote{533} The legislative history of § 1409 indicates Congress made this change based on the notion that the mother has a right to control and custody of a nonmarital child as against the father, and the mother is bound to maintain the child and to be the child's natural guardian.\footnote{534} Thus, the statute's history does not reveal a focus on biological or social relationships as the actual state interest, but instead reflects the old notions that mothers are relegated to caring for their nonmarital children.\footnote{535}

Thus, unlike the \textit{Virginia} Court, the \textit{Nguyen} Court did nothing to demonstrate Congress actually intended § 1409 to further objectives outlined by the Court.\footnote{536} In terms of the Court's first justification, assuring biological relationships existed between the child and citizen parent, the Court made no mention that Congress actually intended to assure such relationships existed.\footnote{537} The Court's opinion did not discuss any legislative history of § 1409 or similar background mate-

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\footnote{527. See infra notes 528-35 and accompanying text.}
\footnote{528. \textit{Miller}, 523 U.S. at 461-68 (Ginsburg, J., dissenting) (citations omitted).}
\footnote{530. \textit{Act of Feb. 10, 1855}, ch. 71, § 1, 10 Stat. 604.}
\footnote{531. \textit{Act of May 24, 1934}, ch. 344, § 1, 48 Stat. 797.}
\footnote{532. \textit{Miller}, 523 U.S. at 466 (Ginsburg, J., dissenting) (citations omitted).}
\footnote{533. 8 U.S.C. § 1409 (1994).}
\footnote{534. \textit{Nguyen}, 121 S. Ct. at 2075-76 (O'Connor, J., dissenting) (citation omitted).}
\footnote{535. \textit{Id.} (O'Connor, J., dissenting) (citation omitted).}
\footnote{536. \textit{Nguyen}, 121 S. Ct. at 2059-64 (determining government had important interests in promoting § 1409 without demonstrating actual purposes).}
\footnote{537. \textit{Nguyen}, 121 S. Ct. at 2057-66.
Even the INS' brief did not propose Congress intended § 1409(a)(4) to help assure proof of biological relationships between citizen parent and child. In its own right, § 1409(a)(1) already requires proof by clear and convincing evidence of a blood relationship between father and child.

In terms of the Court's second proposed objective, encouraging the opportunity for the development of healthy parent-child relationships, the Court again failed to demonstrate Congress intended to foster this objective. The Court did not cite § 1409's statutory legislative history or other historical facts to prove Congress' intent was to allow parents and children opportunities to develop relationships. Thus, although the Court previously has emphasized the necessity of finding whether a proposed objective was Congress' actual concern, the Nguyen Court did not discuss whether the two proposed interests were actual legislative purposes.

b. Gender-based classifications must further a sufficiently important governmental interest

In past cases dealing with gender-based classifications, the Court has required the classification to further an important governmental interest. However, in outlining the government's interests in assuring the existence of biological relationships and ensuring opportunities for parent-child relationships to develop, the Court made no mention of what made the interests important.

For example, in Craig v. Boren, the Court considered whether a statute prohibiting the sale of 3.2% beer to males under age twenty-one and to females under age eighteen could survive equal protection scrutiny. The Court stated that a statute must, among other things, further an important governmental interest before a court will

538. Id.
539. Id. at 2069 (O'Connor, J., dissenting) (citation omitted).
541. Nguyen, 121 S. Ct. at 2061-64 (outlining two governmental interests without examining actual legislative purposes or explaining interests' importance); Id. at 2071 (O'Connor, J., dissenting) (stating Court hypothesized statute's purposes, did not examine actual purposes, and did not explain interests' importance).
542. Id. at 2061-64.
543. See supra notes 513-42 and accompanying text.
544. Hogan, 458 U.S. at 724; Virginia, 518 U.S. at 533; Miller, 523 U.S. at 482 (Breyer, J., dissenting).
545. Nguyen, 121 S. Ct. at 2059-64 (outlining two governmental objectives without elaborating on importance); Id. at 2069 (O'Connor, J., dissenting) (stating Court failed to adequately explain importance of purported interests).
uphold the statute over an equal protection challenge.\textsuperscript{548} In order to be important, the Court noted a governmental interest cannot rest solely on administrative ease and convenience.\textsuperscript{549} In \textit{Craig}, the state actor proposed the statute furthered traffic safety.\textsuperscript{550} The State introduced evidence demonstrating statistics for males and females aged eighteen to twenty regarding traffic accidents, traffic-related deaths, and arrests for driving under the influence.\textsuperscript{551} The Court accepted that the furtherance of traffic safety was an objective of sufficient importance, noting that the protection of the public's health, safety, and welfare represented an important function of local and state governments.\textsuperscript{552}

Unlike the Court in \textit{Craig}, the Court in \textit{Nguyen} held no discussion of what made each interest important.\textsuperscript{553} The Court addressed the first interest, assuring biological relationships, by stating only that fathers and mothers were not similarly situated in terms of the ability to prove biological parenthood.\textsuperscript{554} The Court noted Congress' imposition of different requirements for each parent was neither troublesome nor surprising from a constitutional viewpoint.\textsuperscript{555} The Court observed that Congress designed § 1409(a)(4) to ensure citizen fathers could properly document paternity of their children.\textsuperscript{556} In \textit{Craig}, the Court noted the state had an important interest in promoting traffic safety as a part of the state's protection of public health, safety, and welfare.\textsuperscript{557} Unlike \textit{Craig}, however, the Court in \textit{Nguyen} did not provide any reasons as to why proof of biological relations was an important governmental objective.\textsuperscript{558} Instead, the Court described how proving a biological link was physically easier for mothers than for fathers.\textsuperscript{559} As Justice O'Connor observed, while the Court omitted any justification for the first governmental objective, the importance

\begin{footnotesize}
\begin{enumerate}
\item \textit{Craig}, 429 U.S. at 197 (citing Reed, 404 U.S. at 75).
\item \textit{Id.} at 198.
\item \textit{Id.} at 199.
\item \textit{Id.} at 200-03.
\item \textit{Id.} at 199-200.
\item \textit{Compare Craig}, 429 U.S. at 198-200 (determining state's interest in promoting traffic safety was an important part of protecting public, health, safety, and welfare) \textit{with Nguyen}, 121 S. Ct. at 2059-64 (determining government had important interests in assuring the existence of biological relationships and ensuring opportunities for social relationships without discussing importance of interests).
\item \textit{Nguyen}, 121 S. Ct. at 2060-61.
\item \textit{Id.} at 2060.
\item \textit{Id.}
\item \textit{Craig}, 429 U.S. at 199-200.
\item \textit{Compare Craig}, 429 U.S. at 199-200 (stating state's interest in promoting traffic safety was an important part of protecting public health, safety, and welfare) \textit{with Nguyen}, 121 S. Ct. at 2060-61 (stating only that government's interest in ensuring the existence of biological relationships was important).
\item \textit{Nguyen}, 121 S. Ct. at 2060-61.
\end{enumerate}
\end{footnotesize}
of proving paternity presumably laid in preventing fraudulent citizenship conferrals.\textsuperscript{560}

Regarding the second interest, ensuring opportunities for the development of parent-child relationships, the Court also made no mention of how the opportunity qualified as important if no actual relationship developed.\textsuperscript{561} The Court’s justification of why the opportunity for the development of parent-child relationships was sufficiently important to satisfy intermediate scrutiny included a recitation of how the opportunity occurred inherently for the mother with the birth of her child but the same opportunity did not result in the case of unwed fathers.\textsuperscript{562} The Court also listed statistics concerning the advent of frequent overseas travel.\textsuperscript{563} The Court noted equal protection analysis did not require Congress to ignore such statistics.\textsuperscript{564} Rather, the Court proposed, “To the contrary, these facts demonstrate the critical importance of the Government’s interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth.”\textsuperscript{565} The Court, however, did not elaborate further on how the opportunity for parents and children to develop a relationship was important other than stating the objective was important.\textsuperscript{566}

In her dissent, Justice O’Connor recognized the difficulty in understanding how a person profited from a demonstrated opportunity for relationships to develop in absence of the development of the actual relationship.\textsuperscript{567} Justice O’Connor reasoned, if a foreign-born child was raised in a foreign country without postbirth contact with the child’s citizen parent, the child would never realize an opportunity to develop a relationship with that parent.\textsuperscript{568} The never-realized opportunity, Justice O’Connor opined, was irrelevant to whether conferral of citizenship on that child was appropriate.\textsuperscript{569} Likewise, when a child and citizen parent develop an actual relationship, the relationship itself is what made conferral of citizenship on the child appropri-

\textsuperscript{560} \textit{Nguyen}, 121 S. Ct. at 2069 (O’Connor, J., dissenting).
\textsuperscript{561} \textit{Nguyen}, 121 S. Ct. at 2061-64 (stating providing opportunities for parent-child relationships to develop was important without stating how); \textit{Id.} at 2072 (O’Connor, J., dissenting) (stating Court’s second purported interest had questionable importance in absence of actual parent-child relationships).
\textsuperscript{562} \textit{Id.} at 2061-62.
\textsuperscript{563} \textit{Id.} (citations omitted).
\textsuperscript{564} \textit{Id.} at 2062.
\textsuperscript{565} \textit{Id.}
\textsuperscript{566} \textit{Id.} at 2061-63.
\textsuperscript{567} \textit{Id.} at 2072 (O’Connor, J., dissenting).
\textsuperscript{568} \textit{Id.} (O’Connor, J., dissenting).
\textsuperscript{569} \textit{Id.} (O’Connor, J., dissenting).
ate, regardless of how or when the opportunity for the relationship originated.570

Past precedent applying intermediate scrutiny required the proposed important governmental interest to be both actually and sufficiently important.571 The Court, for both the government's purported interests in assuring the existence of biological relationships and ensuring opportunities for parents and children to develop healthy relationships, rationalized the interests underlying § 1409 and failed to adequately inquire into the statute's actual purposes.572 Similarly, the Court neglected to fully explain the importance of the interests allegedly served by the provisions of § 1409.573 Therefore, the Court in Nguyen failed to adequately set forth how the INS had met the ends requirement of the intermediate scrutiny test.574

3. Means—The Classification in § 1409 Is Not Substantially Related to the Achievement of Important Governmental Objectives

When a gender-based classification has been challenged for denial of equal protection, the state actor must prove the means employed by the statute are substantially related to actual and important governmental objectives.575 A legislature cannot premise the relationship between the statute's means and ends on fixed notions concerning the roles and abilities of females and males.576 Likewise, because intermediate scrutiny requires a tight fit between means and ends, the availability of gender-neutral alternatives is a powerful reason to reject a gender-based classification.577 Thus, the state actor cannot overcome a constitutional challenge without first showing the legislature could not effectively achieve its goals through a gender-neutral classification.578

In Nguyen, the Court proposed two important governmental objectives substantially related to the classification Congress employed in § 1409: (1) assuring biological relationships; and (2) ensur-

570. Id. (O'Connor, J., dissenting).
571. See Virginia, 518 U.S. at 535 (stating proposed governmental interest must be an actual purpose); Craig, 429 U.S. at 197 (stating proposed governmental interest must be sufficiently important).
572. See supra notes 513-42 and accompanying text.
573. See supra notes 544-70 and accompanying text.
574. See supra notes 509-73 and accompanying text.
575. Id. at 2068 (O'Connor, J., dissenting) (citing Virginia, 518 U.S. at 533).
577. Nguyen, 121 S. Ct. at 2068 (O'Connor, J., dissenting).
ing opportunities for parent-child relationships to develop.\textsuperscript{579} The means-ends relationship for the gender-based classification in § 1409, however, is impermissible in three ways.\textsuperscript{580} The gender-based classification in § 1409 (a) involves an impermissible overbroad generalization; (b) fails to exhibit a substantial relationship between the classification's means and objectives; and (c) fails to be more effective than a gender-neutral counterpart.\textsuperscript{581}

a. Section 1409 furthers an impermissible overbroad generalization

Past Supreme Court decisions dictate that legislatures cannot premise the relationship between the statute's means and ends on fixed notions concerning the roles and abilities of females and males.\textsuperscript{582} In \textit{Nguyen}, the Court upheld § 1409's gender-based classification despite relying on fixed notions about the roles of mothers and fathers with relation to their nonmarital children.\textsuperscript{583} In \textit{Caban v. Mohammed},\textsuperscript{584} the Court considered whether a section of the New York Domestic Code distinguishing between adoption rights of unmarried fathers and unmarried mothers could survive an equal protection challenge.\textsuperscript{585} In \textit{Caban}, the statute at issue allowed for the adoption of a nonmarital child only if the mother consented, but did not require such consent from the father.\textsuperscript{586} The Court reasoned the classification was an example of an impermissible overbroad generalization.\textsuperscript{587} The Court rejected the argument that natural mothers, absent extenuating circumstances, bore closer relationships to their children than did natural fathers.\textsuperscript{588} Instead, the Court determined maternal and paternal roles were of equal importance.\textsuperscript{589} The Court noted the statute served to discriminate against unmarried fathers, even when the fathers have demonstrated significant paternal interests in their children.\textsuperscript{590} As such, the Court concluded the distinction bore no

\textsuperscript{579} \textit{Nguyen}, 121 S. Ct. at 2060-65.
\textsuperscript{580} \textit{See infra} note 581 and accompanying text.
\textsuperscript{581} \textit{See infra} notes 582-681 and accompanying text.
\textsuperscript{582} \textit{See infra} notes 584-91 and accompanying text.
\textsuperscript{583} \textit{Nguyen}, 121 S. Ct. at 2058 (holding § 1409(a) consistent with Equal Protection Clause); \textit{Id.} at 2074 (O'Connor, J., dissenting) (quoting \textit{Miller}, 523 U.S. at 482-83 (Breyer, J., dissenting)) (stating Court's purported important governmental objectives based on generalization about male and female roles).
\textsuperscript{584} 441 U.S. 380 (1979).
\textsuperscript{586} \textit{Caban}, 441 U.S. at 385.
\textsuperscript{587} \textit{Id.} at 394.
\textsuperscript{588} \textit{Id.} at 388-89.
\textsuperscript{589} \textit{Id.} at 389.
\textsuperscript{590} \textit{Id.} at 394.
substantial relationship to the objective of providing homes for nonmarital children and found the statute unconstitutional.\textsuperscript{591}

In \textit{Nguyen}, the Court's contention that § 1409(a)(4)'s requirements were substantially related to assuring opportunities for parent-child relationships found support, not in female/male biological differences, but in an overbroad generalization.\textsuperscript{592} As was the case in \textit{Caban}, the \textit{Nguyen} decision involved the generalization that mothers are more likely than fathers to form caring relationships with their children.\textsuperscript{593} Although the issues in \textit{Caban} and \textit{Nguyen} were similar because each involved a statute affecting only the rights of fathers of nonmarital children, the Court did not extend the \textit{Caban} decision that maternal and paternal roles were of equal importance to the situation in \textit{Nguyen}.\textsuperscript{594}

In \textit{Nguyen}, the Court actually addressed the issue of whether the government's interest in providing opportunities for parent-child relationships to develop was, indeed, an overbroad generalization.\textsuperscript{595} In denying \textit{Nguyen}'s claim that § 1409(a)(4) rested on an overbroad generalization, the Court defined a "stereotype" as a "frame of mind resulting from irrational or uncritical analysis."\textsuperscript{596} However, as Justice O'Connor noted, the Court misconstrued the significance of the term stereotype.\textsuperscript{597} In past cases, Justice O'Connor noted, the Court has recognized that stereotypes, although empirically grounded, may be rational and impermissible at the same time.\textsuperscript{598} In fact, Justice O'Connor observed, many gender-based classifications laden with stereotypes may apply to many or most individuals.\textsuperscript{599} But even when the generalization is empirically supported, the Court has rejected

\textsuperscript{591} \textit{Id.} at 382, 394.

\textsuperscript{592} \textit{Nguyen}, 121 S. Ct. at 2074 (O'Connor, J., dissenting) (quoting Miller, 523 U.S. at 482-83 (Breyer, J., dissenting)).

\textsuperscript{593} \textit{Compare Caban}, 441 U.S. at 389 (determining statute distinguishing between rights of fathers of nonmarital children and rights of mothers of nonmarital children could not survive equal protection challenge) \textit{with Nguyen}, 441 U.S. at 2066 (determining statute granting automatic citizenship to nonmarital children born abroad if mother is U.S. citizen but requiring fathers of nonmarital children born abroad to legitimate child before child may obtain citizenship survived equal protection challenge).

\textsuperscript{594} \textit{Compare Caban}, 441 U.S. at 389 (determining statute distinguishing between rights of fathers of nonmarital children and rights of mothers of nonmarital children could not survive equal protection challenge) \textit{with Nguyen}, 441 U.S. at 2066 (determining statute granting automatic citizenship to nonmarital children born abroad if mother is U.S. citizen but requiring fathers of nonmarital children born abroad to legitimate child before child may obtain citizenship survived equal protection challenge).

\textsuperscript{595} \textit{Nguyen}, 121 S. Ct. at 2063.

\textsuperscript{596} \textit{Id.}

\textsuperscript{597} \textit{Id.} at 2074-75 (O'Connor, J., dissenting) (citations omitted).

\textsuperscript{598} \textit{Id.} (O'Connor, J., dissenting) (citations omitted).

\textsuperscript{599} \textit{Id.} at 2075 (O'Connor, J., dissenting) (quoting \textit{Miller}, 523 U.S. at 460 (Ginsburg, J., dissenting)).
statistics that classified overbroadly by gender if more accurate and impartial distinctions might have been made.\footnote{600}{Id. (O'Connor, J., dissenting) (quoting Miller 523 U.S. at 460 (Ginsburg, J., dissenting)).}

The classification in § 1409 improperly rests on the familiar generalization that mothers bear the responsibility for children born out of wedlock, while unmarried fathers, ordinarily, do not.\footnote{601}{Miller, 523 U.S. at 460 (Ginsburg, J., dissenting).} Section 1409's gender-based classification is only rational if one accepts the legitimacy of generalizations equating gender with caretaking.\footnote{602}{Id. at 487 (Breyer, J., dissenting).} However, for much of the United States' past, Congress showed no high respect or regard for the mother-child affiliation and did not enact citizenship statutes to reflect respect for the mother-child relationship until 1934.\footnote{603}{Id. at 461 (Ginsburg, J., dissenting) (citing Act of Mar. 26, 1790, ch. 3, 1 Stat. 104).}

The historical treatment of children born abroad to United States citizens demands skeptical examination of the Court's purported desire for fostering opportunities for parents and children to develop relationships.\footnote{604}{Act of Mar. 26, 1790, ch. 3, 1 Stat. 104.} In 1790, Congress enacted the first statute governing the conferral of citizenship to children born abroad.\footnote{605}{Miller, 523 U.S. at 468-69 (Ginsburg, J., dissenting).} The statute provided citizenship for children born outside the United States to citizen parents, unless the child's father had never resided within the United States.\footnote{606}{Id. at 461 (Ginsburg, J., dissenting) (citing Act of Mar. 26, 1790, ch. 3, 1 Stat. 104).} Similar statutes passed in 1795 and 1802 also conditioned the conferral of citizenship upon the father's United States residence.\footnote{607}{See supra notes 603-08 and accompanying text.} In 1855, Congress enacted a statute providing citizenship to children born outside the United States only if the child's father was specifically a citizen at the time of the child's birth.\footnote{608}{Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.} Thus, for 144 years, statutes governing the conferral of citizenship to children born abroad based such conferral either on the father's citizenship or residency status.\footnote{609}{Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.}

In 1934, Congress changed the statutory scheme relating to the citizenship of children born abroad by conferring citizenship on children born outside the United States if either the child's father or mother was a United States citizen at the time of the child's birth.\footnote{610}{Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.} This equality did not last long because, in 1940, Congress enacted sections 201 and 205 of the Nationality Act of 1940 providing citizenship...
specifically for children born out of wedlock when the paternity of the child was established during the child's minority by legitimation or adjudication by a competent court.\textsuperscript{611} Furthermore, § 205 drew a gender line by allowing, in the absence of legitimation or adjudication of the child, citizenship for a nonmarital child born abroad to a citizen mother if the mother had previously resided in the United States.\textsuperscript{612} The rationale for allowing citizenship to transmit through the citizen mother involved the practice that "under American law the mother has a right to custody and control of such child as against the putative father, and is bound to maintain it as its natural guardian."\textsuperscript{613}

Thus, the history of the conferral of citizenship on nonmarital, foreign-born children proves that for most of the United States' past, Congress exhibited little respect or regard for the mother-child affiliation.\textsuperscript{614} As Justice O'Connor's dissent noted, § 1409 is actually representative of a historical scheme leaving the responsibility for nonmarital children with the mother and freeing unmarried fathers.\textsuperscript{615} However, today's state child custody and support laws, unlike § 1409, no longer assume mothers are bound to serve as guardians for nonmarital children.\textsuperscript{616} The Nguyen Court, however, rather than confronting the generalization that mothers must care for children while fathers may ignore them, relied on generalizations the law condemned, lent credibility to the generalization, and helped to convert the Court's assumption about the roles of women as mothers into a self-fulfilling prophecy.\textsuperscript{617} In fact, contrary to the Court's generalization that mothers are more likely to care for their nonmarital children, Boulais reared Nguyen, while Nguyen lacked any contact or relationship with his natural mother.\textsuperscript{618}

The classification in § 1409 is also based on an overbroad generalization because the classification supports the idea that a mother's presence at her child's birth provides sufficient opportunity for her to develop a relationship with the child, while a father's presence at the same birth would not offer such an opportunity.\textsuperscript{619} A mother whose child is removed for abuse, neglect, or tragedy may not ever have an opportunity to develop a relationship with the child, although she was

\textsuperscript{611} Nationality Act of 1940, ch. 2, § 205, 54 Stat. 1139-40.
\textsuperscript{612} Id.
\textsuperscript{613} Nguyen, 121 S. Ct. at 2075-76 (O'Connor, J., dissenting) (quoting To Revise and Codify the Nationality Laws of the United States: Hearings on H.R. 6127 Before the House Committee on Immigration and Naturalization, 76th Cong. 431 (1945)).
\textsuperscript{614} Miller, 523 U.S. at 468 (Ginsburg, J., dissenting).
\textsuperscript{615} Nguyen, 121 S. Ct. at 2076 (O'Connor, J., dissenting).
\textsuperscript{616} Id. (O'Connor, J., dissenting).
\textsuperscript{617} Id. at 2074 (O'Connor, J., dissenting) (citations omitted).
\textsuperscript{618} Id. (O'Connor, J., dissenting).
\textsuperscript{619} Id. at 2073 (O'Connor, J., dissenting).
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present at the child’s birth.620 Meanwhile, nothing exists to stop fathers who are present at their children’s birth from having an opportunity to develop relationships on similar terms.621 Thus, the physical differences between males and females, aside from bolstering generalizations, do not justify the gender-based classification in § 1409.622 Fathers, no less than mothers, have constitutionally protected rights to the care, custody, companionship, and management of their children.623 Fathers’ rights warrant deference and, absent powerful competing interests, protection.624

b. The means in § 1409 bear no substantial relationship to the purported governmental interests

The Court’s support of the classification in § 1409 was also flawed because the classification’s means bore no substantial relationship to the government’s purported interests in assuring biological relationships and ensuring opportunities for parent-child relationships to develop.625 In Michael M. v. Superior Court of Sonoma County,626 the Court stated intermediate scrutiny required a gender-based classification to bear a substantial relationship to some important governmental interest.627 In Michael M., the Court considered whether a California statutory rape statute penalizing only males bore a substantial relationship to an important governmental interest.628 The Court recognized the state’s strong interest in preventing teenage pregnancies.629 The Court determined only females could become pregnant and females disproportionately suffer the emotional, physical, and psychological consequences of sexual activity.630 The statutory rape law, the Court noted, protected females from sexual relations at an age when the consequences of the behavior were particularly severe.631 The Court determined the legislature had the authority to punish only the male for committing statutory rape because males suffer few consequences of the conduct.632 As such, the Court held the statute was substantially related to the state’s interest in

620. Id. (O'Connor, J., dissenting).
621. Id. (O'Connor, J., dissenting).
622. Id. (O'Connor, J., dissenting) (citing Virginia, 518 U.S. at 533).
624. Weinberger, 420 U.S. at 652 (citing Stanley, 405 U.S. at 651).
625. See infra notes 626-65 and accompanying text.
629. Id. at 470.
630. Id. at 471.
631. Id. at 471-72.
632. Id. at 473.
preventing teenage pregnancy to survive a constitutional challenge.\footnote{633}

In \textit{Nguyen}, the first important governmental objective the Court advanced and determined was substantially related to §1409(a)(4)'s means was assuring the existence of a biological citizen parent-child relationship.\footnote{634} Generally, Justice O'Connor's dissent noted the "gravest defect" in the Court's rationale was the insufficient fit between the statute's means and the end interest in assuring the biological relationship existed.\footnote{635} The Court reasoned the child-parent relationship was verifiable in the case of mothers from the birth alone since the mother's status was, in most instances, documented by a birth certificate or hospital record.\footnote{636} However, the Court seemed to implicitly acknowledge that the mother's status would not always be formally documented in any way.\footnote{637} The Court also implicitly conceded that the father's status may be documented on the birth certificate along with the mother's.\footnote{638}

Thus, unlike the situation in \textit{Michael M.} where the physical realities of conception justified punishing only males for statutory rape, nothing in the physical birthing process justifies the requirement that males take additional steps to document their status as a child's father.\footnote{639} The requirements placed upon fathers in §1409(a)(4) do not equalize any disparity in mothers' and fathers' abilities to document biological relationships because birth certificates do not invariably carry the mother's correct name or invariably omit the father's name.\footnote{639}

Moreover, §1409(a)(1) contained a provision requiring proof of paternity by "clear and convincing evidence."\footnote{641} In other words, a father or child wishing to establish paternity in order to obtain citizenship would have to, independent of §1409(a)(4), establish proof of a biological relationship by clear and convincing evidence.\footnote{642} As Justice O'Connor reasoned, it was difficult to see what the requirements of §1409(a)(4) accomplished toward assuring the existence of biological

\footnote{633}{\textit{Id.} at 472-73.\textbf{\footnote{634}}Nguyen, 121 S. Ct. at 2060-61.\textbf{\footnote{635}}\textit{Id.} at 2069 (O'Connor, J., dissenting).\textbf{\footnote{636}}\textit{Id.} at 2060.\textbf{\footnote{637}}\textit{Id.} at 2070 (O'Connor, J., dissenting).\textbf{\footnote{638}}\textit{Id.} (O'Connor, J., dissenting).\footnote{639}{\textit{Compare Michael M.}, 450 U.S. at 471-473 (determining statute's punishment of males only was substantially related to goal of reducing teenage pregnancy because females only suffer consequences) \textit{with Miller}, 523 U.S. at 484 (Breyer, J., dissenting) (noting birth certificates and like documentation did not invariably list mother's correct identity or omit father's identity).\footnote{640}{\textit{Miller}, 523 U.S. at 484 (Breyer, J., dissenting).\textbf{\footnote{641}}8 U.S.C. § 1409(a)(1).\textbf{\footnote{642}}8 U.S.C. § 1409.}
parent-child relationships which § 1409(a)(1) did not achieve alone.\textsuperscript{643} In order to get to the requirements in § 1409(a)(4), a person wishing to confer citizenship on a nonmarital foreign-born child would need to meet the requirement in (a)(1) to prove paternity by clear and convincing evidence.\textsuperscript{644}

Similarly, Justice O'Connor noted it was difficult to comprehend why § 1409(a)(4)'s time limitation, requiring affirmative actions to be taken before the child reached the age of eighteen, substantially furthered the government's interest in assuring the existence of biological relationships.\textsuperscript{645} In its analysis, the Court did not discuss what purposes were served by requiring fathers to legitimate their children prior to age eighteen.\textsuperscript{646} Even if § 1409(a)(4) helped fathers to document their paternal status, nothing explained why such documentation should be required before the child reaches age eighteen.\textsuperscript{647} If Congress' concern was to prevent paternity claims based on stale evidence, § 1409(a)(4) would be unnecessary because modern DNA testing would provide unparalleled accuracy and would negate any threats on evidence of paternity made by the passage of time.\textsuperscript{648} Likewise, another subsection of § 1409 already required proof of paternity through clear and convincing evidence.\textsuperscript{649} This section, § 1409(a)(1), demonstrates no time limit by which such evidence must be secured.\textsuperscript{650} Thus, it is difficult to understand why § 1409(a)(4)'s time limitation substantially furthers the government's interest in ensuring the existence of biological relationships.\textsuperscript{651} In sum, contrary to the Court's conclusion, the fit between § 1409(a)(4)'s means and ends was too attenuated to survive intermediate scrutiny.\textsuperscript{652}

The second important governmental objective the Court advanced and decided was substantially related to the means employed in § 1409(a)(4) was the encouragement of opportunities for citizen parents and their children to develop healthy relationships.\textsuperscript{653} In relation to the statute's ends-means fit, the Court asserted, "It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that

\textsuperscript{643} \textit{Nguyen}, 121 S. Ct. at 2069 (O'Connor, J., dissenting).
\textsuperscript{644} 8 U.S.C. § 1409.
\textsuperscript{645} \textit{Nguyen}, 121 S. Ct. at 2069-70 (O'Connor, J., dissenting).
\textsuperscript{646} \textit{Id.} at 2057-66.
\textsuperscript{647} \textit{Miller}, 523 U.S. at 484 (Breyer, J., dissenting).
\textsuperscript{648} \textit{Nguyen}, 121 S. Ct. at 2070 (O'Connor, J., dissenting).
\textsuperscript{649} 8 U.S.C. § 1409(a)(1).
\textsuperscript{650} 8 U.S.C. § 1409(a)(1).
\textsuperscript{651} \textit{Nguyen}, 121 S. Ct. at 2069-70 (O'Connor, J., dissenting).
\textsuperscript{652} \textit{Id.} at 2069 (O'Connor, J., dissenting).
\textsuperscript{653} Id. at 2061.
A bare assertion something is "almost axiomatic" cannot be a substitute for the demanding burden a state actor bears in defending a gender-based classification. Simply because a discriminatory policy seeks to foster the opportunity for beneficial happenings is irrelevant to whether the policy actually furthers the opportunity sought.

Far from being axiomatic, the relationship between fostering an opportunity for a relationship to develop and the fruition of an actual relationship is only a contingent proposition. The Court's sweeping claim the relationship between the classification's means and ends was axiomatic was not a substitute for careful intermediate scrutiny analysis. The Court's reliance on the mother's inherent presence at her child's birth as a justification for imposing additional requirements on unmarried fathers does not show how the statute's means and ends were substantially related.

For example, a mother who knows of her child's birth may nevertheless fail to care for or acknowledge the child. Yet a child with a citizen mother is automatically granted citizenship at birth if the mother had been present in the United States for one year. A father with firm ties to his child may lack knowledge of § 1409's requirements and fail to confer citizenship on his child. Such was the case in Nguyen, where Boulais reared his son Nguyen without contact from Nguyen's mother. Section 1409's purported assurance in promoting opportunities for fathers and children to develop relationships is further weakened because a father with weak connections to his child might readily comply with § 1409's requirements and thus confer citizenship onto his child. In fact, a child who had no opportunity to develop a bond with his father may obtain citizenship under § 1409(a)(4) through a court's paternity adjudication absent the father's action or even permission.

654. Id. at 2064.
655. Id. at 2073 (O'Connor, J., dissenting) (citing Virginia, 518 U.S. at 533).
656. Id. (O'Connor, J., dissenting).
657. Id. (O'Connor, J., dissenting).
658. Id. (O'Connor, J., dissenting).
659. See infra notes 660-65 and accompanying text.
660. Miller, 523 U.S. at 485-86 (Breyer, J., dissenting).
662. Miller, 523 U.S. at 485-86 (Breyer, J., dissenting).
664. Miller, 523 U.S. at 486 (Breyer, J., dissenting).
665. Nguyen, 121 S. Ct. at 2072 (O'Connor, J., dissenting) (quoting Miller, 523 U.S. at 486 (Breyer, J., dissenting)).
c. The Court impermissibly ignored superior gender-neutral alternatives

Equal protection jurisprudence provides that the existence of superior or comparable gender-neutral alternatives is a compelling reason to reject gender-based classifications. As an additional flaw in §1409's means-ends fit, the *Nguyen* Court casually dismissed relevant and available gender-neutral alternatives. If the relationship between gender and the trait or characteristic gender purportedly represents is weak, legislatures must either realign their laws in a gender-neutral mode or adopt procedures to identify circumstances where facts truly underlie the gender-centered generalization. Therefore, the Court impermissibly rejected the availability of gender-neutral alternatives in its analysis of §1409(a).

As the multiple dissents in both *Nguyen* and *Miller* noted, gender-neutral alternatives exist and could easily exceed, or at least replicate, whatever fit existed between §1409(a)(4)’s requirements and the government’s interest in providing opportunities for parent-child relationships to develop. When the statute is drafted with a gender-based classification, the statute does not substantially further the government’s purported interest in assuring opportunities for parent-child relationships to develop. The gender-based distinction allows for automatic citizenship conferral on the child of a mother who knows of her child’s birth but nevertheless failed to care for or acknowledge the child. Likewise, the statute, couched in gender terms, denies citizenship to a child who has firm ties to his father if the father lacks knowledge of the §1409’s requirements or fails to act. Such was the case in *Nguyen*, where Boulais reared his son Nguyen without contact from Nguyen’s mother.

However, the statute could, for example, be couched in terms of caretaker and noncaretaker parents. Under the current version of §1409(a)(4), if the citizen parent was also the caretaker parent, a caretaker father would be required to acknowledge his child, even

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666. *Id.* at 2070 (O’Connor, J., dissenting).
667. *Id.* at 2069 (O’Connor, J., dissenting).
668. *Craig*, 429 U.S. at 199.
669. See infra notes 670-81 and accompanying text.
670. *Nguyen*, 121 S. Ct. at 2072 (O’Connor, J., dissenting) (stating gender-neutral alternatives would be preferable to §1409’s gender-based classification); *Miller*, 523 U.S. at 482-84 (Breyer, J., dissenting) (stating gender-neutral alternatives would be preferable to §1409’s gender-based classification).
671. See supra notes 625-65 and accompanying text.
673. *Id.* (Breyer, J., dissenting).
674. *Nguyen*, 208 F.3d at 530.
though an obvious relationship has developed.676 Likewise, if the citizen parent were the noncaretaker parent, the statute would automatically grant citizenship to a child who had no relationship with his noncaretaker mother.677 Viewed in the caretaker/noncaretaker context, the placement of additional burdens on a caretaker father serves no purpose at all.678

Congress could also formulate the statute to substitute a requirement for the parent to be present at birth, which would provide the opportunity for a relationship as the Court asserted, or require the parent have knowledge of the child’s birth.679 At a minimum, Congress could require the citizen parent to prove the existence of an opportunity for relationship or actual relationship through proof of presence at or knowledge of the child’s birth.680 However, instead of addressing the applicability of available gender-neutral alternatives, the Court casually dismissed them as irrelevant.681

In sum, the Court’s opinion in Nguyen demonstrated analytical failures in all three components of intermediate scrutiny.682 The Court glossed over the critical burden of proof.683 The Court touted two important governmental objectives without establishing the objectives’ importance or confirming the objectives involved Congress’ actual purposes.684 As Justice O’Connor noted, the Court’s gravest defect lay in the Court’s failure to prove § 1409’s means were substantially related to the important governmental objectives.685 The Court also ignored the statute’s underlying impermissible generalizations and casually dismissed the applicability of superior gender-neutral alternatives.686

B. THE COURT’S MISAPPLICATION OF INTERMEDIATE SCRUTINY IN NGUYEN CONSTITUTED A RETURN TO RATIONAL BASIS REVIEW

The significance of the Court’s failures in establishing the three elements of intermediate scrutiny was to relegate a gender-based classification to rational basis review.687 According to Justice O’Connor,
No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny. I trust the depth and vitality of these precedents will ensure that today's error remains an aberration.

In *Nguyen*, the Court's analysis of § 1409 followed rational basis review.

In cases involving equal protection challenges warranting rational basis review, the Court has determined the Equal Protection Clause forbids classifications when the distinction is based on criteria entirely unrelated to the government's objective. For example, in *Reed v. Reed*, the Supreme Court determined a statute discriminating between otherwise similarly-situated male and female candidates for estate administration was unconstitutional. The Court observed a gender-based distinction would be permissible if the state, in promoting the distinction, had an objective that was rationally related to the classification. The Court determined the state's interest in reducing the probate court's workload was not completely illegitimate. Rather, the question remained as to whether the state's interest was rationally related to the means employed in the classification.

Another good example of the Court's application of rational basis review, although not addressing a gender-based classification, occurred in *FCC v. Beach Communications, Inc.*, where the Court upheld a federal statute requiring certain cable providers to obtain franchises while excluding others. The Court upheld the classification with rational basis review because the statute had some arguable underlying rationale. In *Beach*, the Federal Communications Commission ("FCC") addressed the application of the franchising requirement in 47 U.S.C. § 522(7) to satellite master antenna television ("SMATV") facilities. The Court noted that on rational-basis review a statutory classification warrants a strong presumption of valid-

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689. See infra notes 690-715 and accompanying text.
690. See *Reed*, 404 U.S. at 75-76.
693. *Id.* at 76.
694. *Id.*
695. *Id.*
699. *Id.* at 311.
ity requiring the statute's challenger to meet the burden of negating every conceivable basis supporting the classification. Moreover, the Court observed, because the Court never required a legislature to articulate the reasons underlying the statute's enactment, actual legislative motivations were entirely irrelevant for constitutional inquiries. Rather, the Court reasoned, if any conceivable state of facts providing a rational basis for the classification existed, the Court must uphold the statute against the equal protection challenge. Applying the rational basis principles, the Court concluded the distinction was constitutional, based on two conceivable rationales for the classification.

In Nguyen, the Court's analysis of the challenged statute followed the rational basis test. First, under rational basis review, it is the challenger of a classification who bears the burden of proof and not the state actor. In Nguyen, the Court glossed over the burden of proof, taking the pressure off the INS to prove the existence of an important governmental interest as well as its relationship to the means Congress employed in the statute.

Moreover, rational basis is tolerant of lesser objectives and hypothesized interests than intermediate scrutiny. Like the Court in Reed, the Nguyen Court proposed interests without discussing the interests' importance. The Reed Court determined the state had an interest that was not completely illegitimate. Likewise, the Court in Nguyen advanced two governmental objectives but failed to explain the objectives' importance or demonstrate that the objectives were indicative of Congress' actual intent. The Court validated §1409 because conceivable, rational interests supported it, just as was the case in Beach where the Court applied rational basis review.

701. Id. at 315 (citing Fritz, 449 U.S. at 1979).
703. Id. at 320.
704. See infra notes 705-15 and accompanying text.
706. See supra notes 489-508 and accompanying text.
707. Beach, 507 U.S. at 313, 315.
708. Reed, 404 U.S. at 76.
709. See supra notes 509-74 and accompanying text.
710. Compare Beach, 507 U.S. at 315 (determining statute survived equal protection challenge because rational interests existed) with Nguyen, 121 S. Ct. at 2059-64 (determining statute survived equal protection challenge through two purported interests without stating importance of interests).
The *Nguyen* Court also impermissibly justified the classification in § 1409, despite the classification's weak relationship to the government's purported interests and despite the classification's reliance on overbroad generalizations about the roles of women as mothers and men as fathers. Only under rational basis are such overbroad generalizations permissible. In failing to demonstrate how § 1409's means and ends are substantially related, the Court allowed a statute with a weak ends/means relationship to survive scrutiny, much like the *Reed* Court did in applying rational basis review to a gender-based classification distinguishing between male and female candidates for estate administration positions. By misapplying the intermediate scrutiny test, the Court accepted only rational interests for the distinction in § 1409 and determined the classification was constitutional based on a weak fit between ends and means. In doing so, the Court relegated a gender-based classification to rational basis review in contravention of twenty-five years of precedent applying intermediate scrutiny to gender-based classifications.

**CONCLUSION**

In *Nguyen v. INS*, the United States Supreme Court upheld the constitutionality of 8 U.S.C. § 1409, the statute requiring fathers of nonmarital children born abroad to take affirmative steps to confer citizenship on their children while requiring no affirmative steps from citizen mothers. Although the person, Nguyen, claiming citizenship was raised in the United States by his citizen father from the age of six, the Court denied Nguyen citizenship absent further legitimation steps as required in § 1409. While the Court claimed to apply intermediate scrutiny to the gender-based classification, it actually relegated the classification to a rational basis review.

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711. *See supra* notes 582-665 and accompanying text.
713. *Compare Nguyen*, 121 S. Ct. at 2069 (O'Connor, J., dissenting) (stating Court's gravest defect lay in the insufficiency of fit between statute's means and ends) and *Reed*, 404 U.S. at 76 (stating Court's inquiry equal protection challenge was whether means and ends bore a rational relationship).
714. *Compare Beach*, 507 U.S. at 315 (determining statute survived equal protection challenge because rational interests existed) *with Nguyen*, 121 S. Ct. at 2059-64 (determining statute survived equal protection challenge through two purported interests without stating importance of interests); *see supra* notes 505-70, 621-61 and accompanying text (arguing § 1409's classification weakly fit objective advanced by Court's opinion).
715. *See supra* notes 687-714 and accompanying text.
719. *Id.* at 2057, 2060-61.
720. *See supra* notes 687-715 and accompanying text.
This particular case provided the Court with a prime opportunity to strike down the gender-based distinction in § 1409 because of the particular fact pattern. In this case, the evidence revealed Nguyen could only be denied citizenship because his father was ignorant of the requirements posed upon him by the statute. Nguyen was raised by his father since birth and had lived in the United States since the age of six. Thus, there was no dispute that Nguyen and Boulais shared amply-evidenced biological and social relationships and that Nguyen had, at the time of the Supreme Court's decision, a twenty-six year relationship with the United States directly.

Aside from the particular fact pattern of the case, the Court also had numerous reasons to strike down the law. For example, the legislative history of the statute revealed that it was based on the premise that mothers were responsible for nonmarital children while fathers were not. Hence, it could not have been Congress' actual intent to maintain the statute for reasons purported by the INS. Along the same line, the Court could have struck down the law on the basis that the means and ends were insufficiently related and were premised on the overbroad generalization that fathers bear weak relations to their nonmarital children. However, despite these reasons, the Court chose to uphold the law and did so through a questionable application of the intermediate scrutiny test.

By allowing the state actor/defender to escape the burden of proof, and by allowing the statute to pass the test despite its weak ends, means, and ends/means fit, the Court harkened back to the days when it did not consider gender a suspect classification. Although the Court has stated that there is an open question as to gender's status as a suspect classification, it continues to use the "suspect classification" language in decisions and continues to apply intermediate scrutiny to such classifications. The Nguyen decision, however, was a deviation from that language relegating the rights of unmarried fathers to the same test applied to economic and other non-fundamental rights.

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