Nguyen v. INS: Is Sex Really More Important Now?

Clay M. West†

Nguyen v. INS, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3223 (U.S. Sept. 26, 2000) (No. 99-2071).

The interplay between citizenship statutes and the promotion of sex[1] equality has always held an uneasy truce under Equal Protection Clause jurisprudence. Prior to 1934, congressional citizenship statutes were strongly biased in favor of the father—only foreign-born children of citizen fathers could be considered U.S. citizens.[2] Starting in 1940[3] and continuing in the post-war 1952 overhaul[4] of the citizenship statute, Congress allowed the pendulum to swing in the other direction—against citizen fathers—partly in an attempt to limit citizenship claims from those "persons who would be a potential liability rather than an asset."[5] Out-of-wedlock foreign-born children with citizen mothers were granted automatic citizenship,[6] while out-of-wedlock foreign-born children with citizen fathers had to fulfill a number of requirements[7] to gain citizenship.

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† J.D. Candidate, Yale Law School, 2001.

1. Justice Scalia's dissent in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) nicely lays out the dichotomy between sex and gender.

> Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.

J.E.B., 511 U.S. at 157 n. 1 (Scalia, J., dissenting). This distinction will be followed here.

2. Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. The Acts of 1795, 1802, 1855, and 1874 all followed this premise. *Rogers v. Bellei*, 401 U.S. 815, 823-825 (1971) charts this development. While these statutes did not specifically address the issue of citizenship for children born out-of-wedlock, in practice they were included as long as they were later legitimated by marriage. 39 Op. Att'y Gen. 556 (1937).

3. Nationality Act of 1940, § 201(c), 54 Stat. 1138 (1940).

4. Immigration and Nationality Act, § 309, 66 Stat. 238 (1952) (codified at 8 U.S.C. 1409 (2000)).

5. H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940).

6. INA § 309(c), 8 U.S.C. § 1409 [hereinafter Section 1409]. In part this pro-mother bias of the 1952 statute was also an attempt to reduce the problem of statelessness, as other nations at the time often did not confer citizenship to the children of U.S. citizen mothers. S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952).

7. While the foreign-born out-of-wedlock child of a citizen father is still a minor, she must be legitimated, the father must acknowledge paternity, and the paternity must be acknowledged by a court. Further, she must establish a blood relationship by clear and convincing evidence, the father must have

zenship.

Since the failure of the Equal Rights Amendment in the late 1970's, theorists have taken different approaches on how best to promote sex equality—some arguing that statutes that rely on outmoded generalizations about sex should not survive,[8] others promoting an approach of treating the sexes differently.[9] Recently, in *Nguyen v. INS*,[10] the Fifth Circuit weighed in on this debate by holding that the citizenship statute did not violate the Equal Protection Clause, and that its distinctions did correspond to natural differences between the sexes and thus accomplished important governmental objectives.[11] Despite its reliance on Justice Stevens' plurality opinion in *Miller v. Albright*[12] in according deference to this area of express Congressional power, the Fifth Circuit underestimated the "exceedingly persuasive justification" standard[13] under the Equal Protection Clause being applied in sex discrimination cases by the Supreme Court and wrongly held that the statute survived heightened intermediate scrutiny. Ultimately, however, the Fifth Circuit did stumble onto a result that will likely be sustained by the Supreme Court—not because the statute survives Equal Protection analysis, but due to the fact that the Court will likely adopt the approach in Justice Scalia's *Miller* concurrence and hold that the Court has no power to confer citizenship upon Nguyen.[14]

Tuan Anh Nguyen was born in Vietnam in 1969 to an unmarried Vietnamese-citizen mother, who abandoned him at birth.[15] His father,[16] Joseph Boulais, is a U.S. citizen who raised Nguyen in Texas since 1975, when Nguyen was three years old. Nguyen has been a lawful permanent resident

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had the nationality at the time of the child's birth, and the father must agree in writing to support the child until the age of 18. *See* 8 U.S.C. § 1409(a).

8. *See, e.g.*, Iris Marion Young, *Humanism, Gynocentrism, and Feminist Politics*, HYPATIA: J. OF FEMINIST PHIL. (1985). *See also* United States v. Virginia, 518 U.S. 515, 540-546 (1996) ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."). These distinctions are considered unconstitutional under heightened or intermediate scrutiny. *See J.E.B.*, 511 U.S. 127.

9. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). More recent cases have likewise focused on a more performative conception of sex. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). For a good overview of this issue in the race context, where the parallel would be to "status-sex" as "sex" and "culture-sex" as "gender," see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991). Finally, Kristin Collins, Note, *When Father's Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L. J. 1669 (2000), provides a good overview of these issues in the context of citizenship statutes.

10. 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3223 (Sept. 26, 2000) (No. 99-2071).

11. *Id.* at 535.

12. 523 U.S. 420 (1998). Miller is important to the analysis here because it involved a challenge to the very same statutory provision that Nguyen is contesting. The case was decided on a third party standing issue, leaving the constitutionality of INA § 309 open.

13. United States v. Virginia, 518 U.S. 515, 531 (1996).

14. *Miller*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring).

15. Nguyen v. INS, 208 F.3d 528, 530 (5th Cir. 2000).

16. In February 1998 a Texas district court issued Boulais an "Order of Parentage" establishing that he is Nguyen's father. In December 1997 a DNA test also established Boulais' paternity. *See id.*

since that time.[17] However, his father did not take the affirmative steps to validate Nguyen's citizenship in the proper timeframe under the requirements of Section 1409(a).[18] In 1992, at the age of 22, Nguyen pled guilty to two felony counts of sexual assault, and was sentenced to prison for eight years.[19] Three years later, the Immigration and Naturalization Service (INS) instituted deportation proceedings against Nguyen.[20] This case arose from Nguyen and his father's efforts to block his deportation on the grounds that he is a citizen of the United States under a reading of the citizenship statute Section 1409(a) consistent with the Equal Protection Clause.[21]

An immigration judge first heard Nguyen's case in November 1996.[22] During the hearing, Nguyen conceded that he was a not a citizen of the United States and had committed the felonies of which he was accused. On this basis the judge ruled in January 1997 that Nguyen was deportable.[23] Nguyen next appealed to the Board of Immigration Appeals (BIA).[24] Although Nguyen filed a Texas district court "Order of Parentage" establishing Boulais' paternity, the BIA dismissed Nguyen's appeal first on June 2, 1998, and a reconsideration appeal on May 28, 1999. It cited Nguyen's failure to meet the requirements of Section 1409(a) and the mandates of *Miller v. Albright*.[25] On June 30, 1999, Nguyen and Boulais filed an appeal from the BIA ruling with the Fifth Circuit.[26] A habeas petition was also filed with the United States District Court challenging the deportation order,[27] but that action has been stayed pending the final resolution of the Fifth Circuit appeal[28]—now being considered at the United States Supreme Court.[29]

The Fifth Circuit granted a motion by the INS to dismiss Nguyen's ap-

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

18. Immigration and Nationality Act § 309(a)(4) (codified at 18 U.S.C. § 1409(a)(4) (2000)) requires that paternity be established before the child reaches the age of 18. *See supra* note 7 for the other requirements of § 1409.

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

20. *Id.* Immigration and Nationality Act § 241(a)(2)(A)(ii) and (iii) (codified at 8 U.S.C. §§ 1251(a)(2)(A)(ii) and (iii) (2000)) allows the INS to issue deportation proceedings against aliens convicted of two crimes involving moral turpitude or felonies. The INS proceedings against Nguyen began on April 4, 1995.

21. Afroyim v. Rusk, 387 U.S. 253 (1967) held that the 14th amendment bars Congress from depriving native-born or naturalized U.S. citizens of their citizenship. The deportation of a U.S. citizen (such as Nguyen) would also logically be prohibited under this ruling. *But see* Rogers v. Bellei, 401 US 815 (1971) (allowing withdrawal of citizenship from foreign-born children of U.S. nationals who do not fulfill a residency requirement).

22. *Nguyen*, 208 F.3d at 531.

23. *Id.*

24. *Id.*

25. 523 U.S. 420 (1998). The BIA characterized Miller as stating that "different proof requirements for the father, as opposed to the mother, did not represent an unconstitutional denial of equal protection." *See* Brief for Petitioner, at app. 16a, *Nguyen v. INS* (No. 99-2071).

26. Nguyen's appeal was filed pursuant to 8 U.S.C. § 1105(a)(5) (1994), which confers jurisdiction on the U.S. Courts of Appeal to hear appeals of deportation orders. *Nguyen*, 208 F.3d at 530.

27. Nguyen v. Reno, Civ. No. H-98-2086 (S.D. Tex. filed July 2, 1998).

28. *Nguyen*, 208 F.3d 528.

29. Nguyen v. INS, 121 S.Ct. 29 (2000).

peal. Writing for the panel, Judge Carl E. Stewart held that Section 1409(a)[30] was constitutional, and that Nguyen did not meet the requirements for citizenship described therein.[31] Because Boulais' "Order of Parentage" came nearly ten years after Nguyen had reached the age of 18—the statutory threshold before which paternity had to be established under Section 1409—Boulais was no longer able to pass his citizenship on to Nguyen.[32] As a non-citizen, Nguyen was subject to a statutory provision allowing aliens convicted of felonies to be deported.[33] The Board of Immigration Appeals effectively exercised this option when it rejected Nguyen's final appeal on May 28, 1999.[34] Moreover, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996[35] establishes that "there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed a criminal offense . . . ."[36] Fifth Circuit precedent interprets this language to preclude jurisdiction to review Board of Immigration Appeal decisions.[37] Accordingly, the Fifth Circuit panel concluded that as an alien, Nguyen's appeal was precluded by the IIRIRA and the INS's motion to dismiss was proper.

The linchpin of the court's decision rests on its determination that Section 1409(a) is constitutional, under which Nguyen readily falls within the category of "alien" and is deportable by statute.[38] The panel conceded that statutes premised on "outmoded generalizations about sex cannot survive heightened scrutiny."[39] It then looked to the issue of third-party standing—critical in the similar *Miller v. Albright*[40] just two years ago—to establish what level of scrutiny to apply to Nguyen's claim.[41] Namely, Section 1409(a) does not create sex-based distinctions among classes of children, only their parents.[42] The issue of standing is important because children without third-party standing[43] and whose citizen parent is not a co-plaintiff are deemed unable to raise the dis-

30. 8 U.S.C. § 1409.
31. *Nguyen*, 208 F.3d at 536; 8 U.S.C. § 1401.
32. *Id.*
33. *See supra* note 20.
34. *Nguyen*, 203 F.3d at 531.
35. Pub.L. No. 104-208, § 309(c)(4)(G), 110 Stat. 3009, 626-27, 8 U.S.C. § 1101 nt.
36. *Id.*
37. Lerma de Garcia v. INS, 141 F.3d 215, 216 (5th Cir. 1999). *Terrell v. INS*, 157 F.3d 806, 809 (10th Cir. 1998) also supports this notion.
38. *See supra* note 21.
39. *Nguyen*, 208 F.3d at 535 (citing United States v. Virginia, 518 U.S. 515, 540-46 (1996)).
40. 523 U.S. at 423.
41. *Nguyen*, 208 F.3d at 533.
42. United States v. Ahumada-Aguilar, 189 F.3d 1121, 1124 (9th Cir. 1999).
43. Justice O'Connor's *Miller* concurrence notes that children affected by INA § 309 may only address the sex discrimination claim of their parent through third party standing. Third party standing is not applicable when there is no "'genuine obstacle' to the assertion of [the parent's] assertion of his own rights that rises to the level of a hindrance." *Miller*, 523 U.S. at 447-48 (O'Connor, J., concurring) (citing the three-part test for a litigant to assert the rights of another person in *Powers v. Ohio*, 499 U.S. 400 (1991)). *See also* Barrows v. Jackson, 346 U.S. 249, 257 (1953) (noting that third-party standing may be given when it "would be difficult if not impossible for the person whose rights are asserted to present their grievance.").

crimination claim raising intermediate or heightened scrutiny generally applied to sex-discriminatory statutes.[44] Instead, they are only able to receive rational basis review of the statute because it "irrationally discriminates between illegitimate children of citizen fathers and citizen mothers."[45] But since Boulais (the father) is a named party in addition to Nguyen, this issue of standing is not determinative. The Fifth Circuit panel agreed, finding Boulais a proper party to challenge the constitutionality of Section 1409 and implicitly endorsing a heightened intermediate standard of review of the statute.[46]

The panel's next step was to apply this heightened intermediate standard of review under the Equal Protection Clause to Section 1409(a). The statute does in fact have a number of justifications beyond those purely resulting from "outmoded generalizations" about the sexes.[47] The Fifth Circuit panel cited to Justice Stevens' concurrence in *Miller* for a number of these rationales.[48] The first is that it ensures reliable proof of a biological relationship between the citizen parent and child.[49] Justice Stevens argued that this is more relevant for fathers because the blood relationship is not as evident for them as for mothers. Moreover, the statutory limit of eighteen years to prove this relationship may be envisioned as a means of guaranteeing that the paternity information is reliable.[50] A third objective of the statute is to foster ties between the foreign-born child and the United States by promoting a relationship between the minor

44. *Miller*, 523 U.S. at 451 (O'Connor, J., concurring). *See also Terrell*, 157 F.3d at 808, United States v. Ahumada-Aguilar, 189 F.3d 1121, 1126 (9th Cir. 1999).

45. *Miller*, 523 U.S. at 451. Given the fragmented nature of the opinion, it is difficult to state a clear rule as to the Court's position on third party standing. Justice O'Connor's concurrence, joined by Kennedy, presents a bright line rule that clearly makes the difference in *Nguyen*. Even so, it is likely that all seven of the other justices supported an even more relaxed standard for third-party standing, and would have accorded it to Miller here. *See Miller*, 523 U.S. at 432, 455 n. 1 (Scalia, J., concurring); *id.* at 473 (Breyer, J., dissenting).

46. *Nguyen*, 208 F.3d at 534.

47. *Id.*

48. *Id.* A number of justifications for the statute exist, beyond the three focused on by the Fifth Circuit *Nguyen* panel and Justice Stevens in *Miller*. Notably, Congressional hearings paid great deference to the issues of statelessness and dual nationality in writing the early versions of citizenship statutes. *See* Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings before the House Comm. On Immigration and Naturalization, 73d Cong., 1st Sess. 54-55 (1933) (discussing the statelessness problem in the context of English/American marriages). *See also* To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 43 (1945). A third justification is simply that the birth and raising of children constitutes a real difference between the sexes upon which a constitutional distinction can be made. *See* Lehr v. Robinson, 463 U.S. 248 (1993) (noting that legislatures may require unwed fathers to establish a relationship with the child as a condition of being treated on an equal plane with the mother); Parham v. Hughes, 441 U.S. 347 (1979) (highlighting the different legal situations of unwed fathers and unwed mothers); Quilloin v. Walcott, 434 U.S. 246 (1978) (establishing that a state may take into consideration under any standard of review that an unwed father has never exercised actual or legal custody over his child); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (holding distinctions based on real differences between the sexes do not violate heightened intermediate scrutiny).

49. *Miller*, 523 U.S. at 436.

50. *Id.* at 437-38. Of course, much of the relevance of this point precedes modern DNA testing.

child and its father through the process of establishing paternity.[51] All these objectives the Stevens plurality opinion in *Miller* established as cogent enough to meet even the heightened intermediate scrutiny of statutes that discriminate by sex.[52] The Fifth Circuit panel likewise found the Section 1409(a) statute as meeting this heightened intermediate level of constitutional scrutiny, and thus rejected Nguyen's deportation appeal.[53]

Nguyen v. INS[54] is important because it is an ideal test-case for the Supreme Court to reaffirm its commitment to the strong "exceedingly persuasive justification" language of *Virginia*[55] within the heightened intermediate level of scrutiny accorded to sex classifications—even in an area such as immigration traditionally accorded great deference to Congress.[56] Whether Nguyen is analyzed under the heightened intermediate scrutiny analysis accorded the Section 1409 sex distinction concerns expressed by at least five members of the Miller court[57] and the logical doctrinal progression of heightened scrutiny from its roots in *Reed*,[58] *Frontiero*,[59] and *Craig*[60] to the more recent *United States v. Virginia*,[61] or through the lens of Equal Protection analysis in *Fiallo*'s "facially legitimate and bona fide reason" standard,[62] both analyses point to a heightened standard that Section 1409 simply cannot overcome. Moreover, the progression of Equal Protection cases dealing with sex point to a standard that

51. *Id.*
52. *Id.* at 433-444.
53. *Nguyen*, 208 F.3d at 535.
54. *Id.*
55. 518 U.S. 515 (1996).
56. Congress' plenary power over immigration and naturalization is indeed strong. *Fiallo v. Bell*, 430 U.S. 787, (1977), states that "[o]ver no conceivable subject is the legislative power of Congress more complete than" the political decisions that are part of deciding who should share in the privileges, protections, and duties of citizenship. *United States v. Ginsburg*, 243 U.S. 472, 475 (1917), likewise reaffirms Congress' power here, noting that "no alien has the slightest right to naturalization unless all statutory requirements are complied with." *Fiallo* reconciles this judicial deference with traditional Equal Protection analysis by advocating a standard such that the citizenship statute will be upheld if the reviewing court can discern a "facially legitimate and bona fide reason" for Congress' decision. 430 U.S. at 794. *See also* Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (advocating an intermediate scrutiny standard of review, mitigated by the deference traditionally accorded to military judgments, for sex-related distinctions in a military context). Notably, however, the Fifth Circuit *Nguyen* panel declined to adopt this plenary deference to Congress and *Fiallo's* "facially legitimate and bona fide reason" standard – instead embarking strictly on a heightened intermediate scrutiny Equal Protection analysis. *See Nguyen*, 208 F.3d at 535.
57. The O'Connor concurrence, *Miller*, 523 U.S. at 445, the Ginsburg dissent, *id.* at 460, and the Breyer dissent, *id.* at 471, all point to at least five members of the Court who believe that the sex distinctions in Section 1409 do not survive heightened scrutiny. This point is obscured somewhat in the opinion because not all these justices believe that Miller deserves this heightened scrutiny because her father is not a named party, and she does not fulfill all the criteria of third party standing. *Id.* at 447 (O'Connor, J., concurring) (noting how *Powers v. Ohio*, 499 U.S. 400 (1991) had recently articulated the limits of third-party standing). Moreover, Justice Stevens' plurality opinion, joined by only Justice Rehnquist, does believe that Section 1409(a) survives heightened scrutiny. *Id.* at 438.
58. Reed v. Reed, 404 U.S. 71 (1971).
59. Frontiero v. Richardson, 411 U.S. 677 (1973).
60. Craig v. Boren, 429 U.S. 190 (1976).
61. 518 U.S. 515 (1996).
62. 430 U.S. at 794.

is now considerably higher than that existing when *Fiallo*[63] was decided in the immigration context, or even *Rostker*[64] in the military context. This newer heightened intermediate scrutiny standard, announced in *U.S. v. Virginia* and reaffirmed in the O'Connor concurrence,[65] Ginsburg dissent,[66] and Breyer dissent[67] in *Miller*, requires an "exceedingly persuasive justification" for sex-based distinctions that is also "substantially related to achievement of those objectives."[68] This standard is not that dissimilar from the strict standard used in cases dealing with racial distinctions[69] and most certainly disallows the justifications advanced by Justice Stevens in *Miller*.[70]

Under both theories, the Fifth Circuit Nguyen panel exhibits poor reasoning by conceding the third party standing issue to Nguyen and thus allowing heightened scrutiny analysis of the statute without seriously considering the ramifications of this level of scrutiny on the outcome of the constitutionality issue. Likewise, the panel ignores interpretations of *Miller* from other Circuits that note how Section 1409(a)'s sex distinctions do not survive a heightened standard of analysis.[71] Both logical errors lead to an under-appreciation of the strength of heightened intermediate scrutiny after *Virginia* and thus the improper conclusion that Section 1409(a) does survive even heightened scrutiny and is, as such, constitutional. However, this Case Note also argues that the Fifth Circuit *Nguyen* panel did reach an outcome in denying citizenship to Nguyen that will be supported by the Supreme Court.

While a polling of the individual justices in the fractured *Miller* opinion does lead one to suspect a strong reaffirmation of *Virginia*'s strong standard of heightened intermediate scrutiny review in *Nguyen*, the more important poll looks not at the standard of review, but rather at those who explicitly support a remedy of severance of the two sub-provisions of Section 1409 that add addi-

63. 430 U.S. 787 (1987).

64. Rostker v. Goldberg, 453 U.S. 57 (1981) (advocating deference to congressional military decisions, even in the heightened intermediate standard context).

65. *Miller*, 523 U.S. at 446.

66. *Id.* at 460.

67. *Id.* at 471.

68. *Mississippi Univ. for Women*, 458 U.S. at 724.

69. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (noting that strict scrutiny review is not "fatal in fact"); Regents of the University of California v. Bakke, 438 U.S. 265, 362 (disclaiming that such review is "strict in theory and fatal in fact."). However, it is likewise useful to note that no purposeful racial or ethnic classification has survived strict scrutiny since 1944.

70. *Miller*, 523 U.S. at 435.

71. *E.g.* United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) (using Justice O'Connor's concurring opinion in Miller as the foundation to conclude that where third-party standing is not an issue, the Court will find Section 1409(a) unconstitutional). The Fifth Circuit panel is aware of this case, however. They cite to it at *Nguyen*, 208 F.3d at 534. *See also* Breyer v. Meissner, 214 F.3d 416, 425 (2000) (interpreting the *Miller* plurality opinion as supporting a heightened scrutiny level of analysis for sex-based distinctions in citizenship and naturalization statutes).

tional citizenship transmission requirements for men.[72] In this category, only three justices explicitly support severance—the most likely remedy Nguyen faces to gain his U.S. citizenship.[73] While acknowledging a right without a remedy flies against the spirit of *Marbury v. Madison*,[74] it likewise enables the Court to not step back from the strong "exceedingly persuasive justification" language of *Virginia* while still showing deference to Congress' plenary power to regulate in the naturalization and citizenship area. The analysis here traces this progression of the standard of scrutiny accorded statutes that discriminate on the basis of sex through *Virginia*,[75] and how this heightened standard will impact the outcome of Nguyen's case.

The treatment of sex under the Equal Protection clause of the Fifth Amendment is best considered through the lens of one of the early cases to strike down a statute on the basis of sex, *Reed v. Reed*.[76] At issue was an Idaho statute that gave preferences to males as administrators of estates, even when an eligible female was equally qualified to act in that position.[77] Noting that the Fourteenth Amendment "does not deny to States the power to treat different classes of persons in different ways,"[78] the Court went on to prohibit different treatment "on the basis of criteria wholly unrelated to the objective of that statute."[79] Using rational review, the Court found that this mandatory preference given to members of one sex over another, "merely to accomplish the elimination of hearings on the merits,"[80] may not "lawfully be mandated solely on the basis of sex."[81] Though this language echoes strongly the very distinctions faced by Nguyen in Section 1409(a), nearly all the members of the *Miller* court found that the justifications advanced for the statute did in fact survive this rational basis review.[82]

Two years later in *Frontiero*,[83] the Court embraced what can best be de-

72. Specifically, Section 1409(a)(3) adds the requirement that the citizen father agree in writing to support the child until the age of 18. Section 1409(a)(4) requires that legitimation occur before the age of 18.

73. *Miller*, 523 U.S. at 488-89 (Breyer, J., dissenting). Breyer's dissent is joined by Justices Souter and Ginsburg.

74. 5 U.S. (1 Cranch) 137 (1803). *See also* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66 (noting that the power to enforce implies the power to grant a remedy); Davis v. Passman, 442 U.S. 228 (1979) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

75. 518 U.S. 515 (1996).

76. 404 U.S. 71 (1971).

77. Idaho Code §§ 15-312, 15-314 (1979). One can presume that Idaho's premise here is that women lack experience in business matters, especially relative to their male counterparts. *See* Craig v. Boren, 429 U.S. 190, 202 (1976).

78. *Reed*, 404 U.S. at 75.

79. *Id.* at 76.

80. *Id.*

81. *Id.* at 77.

82. *See supra* note 53. *See also Miller*, 523 U.S. at 452 (O'Connor, J., concurring).

83. Frontiero v. Richardson, 411 U.S. 677 (1973).

scribed as a strict scrutiny standard for evaluating these distinctions based upon sex. In a four-member plurality opinion authored by Justice Brennan, the Court lumped sex-based classifications in with those based on race, alienage, and national origin, finding all as worthy of being "subjected to close judicial scrutiny."[84] Noting that sex, like the traditional Equal Protection suspect statuses of race and national origin, is both immutable and "frequently bears no relation to ability to perform or contribute to society," Justice Brennan's plurality opinion draws on *Reed's* foundations to pronounce sex as one of the key statuses protected by strict scrutiny under the Equal Protection Clause of the Fifth and Fourteenth Amendments.[85] But not until *Craig v. Boren* three years later did sex receive its modern status as deserving of heightened intermediate—and not strict—scrutiny.[86] Perhaps lowering the bar somewhat in order to gain a majority opinion[87] for heightened scrutiny for sex,[88] *Craig* strikes down the state of Oklahoma's use of drunk-driving statistics to justify restrictions on alcohol sales to young males but not young females as "not substantially related to the achievement of the statutory objective."[89]

The point of this brief history of the level of scrutiny accorded to sex-based statutory classifications is to highlight that intermediate scrutiny is in fact a much more fluid standard than is commonly assumed.[90] The more modern pronouncement on heightened intermediate scrutiny accorded to sex-based differences is *United States v. Virginia*.[91] While taking care to distinguish sex from the strict scrutiny accorded race or national origin-based classifications, the opinion limits the sex-based classifications to those that serve "important

84. *Id.* at 682.

85. *Id.* at 686-87.

86. Craig v. Boren, 429 U.S. 190 (1976).

87. Note that *Frontiero* was only a plurality opinion.

88. A logical extension of some of Reva Siegel's arguments is that *Geduldig v. Aiello*, 417 U.S. 484 (1974), perhaps made it possible for the Court in *Craig* to establish this majority support for heightened intermediate status for sex-based discrimination by removing pregnancy and other sex-based performances from consideration under this standard. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 268-70, 355 (1992); Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2190, 2195 n. 281 (1996); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441, 448 n.29, 504 n.282, 521 (2000).

89. *Craig*, 429 U.S. at 204.

90. Other key cases supporting this point include: Califano v. Webster, 430 U.S. 313 (1977) (disallowing an Equal Protection claim that the Social Security Act unfairly advantages women over men in calculating retirement benefits); Orr v. Orr, 440 U.S. 268 (1979) (setting aside a state statute using sex as a proxy for need by requiring husbands, but not wives, to pay alimony upon divorce); Caban v. Mohammed, 441 U.S. 380 (1979) (striking down a state statute allowing unwed mothers to block the adoption of their child by withholding consent, but not giving unwed fathers this same privilege). *Cf. J.E.B.*, 511 U.S. 127 (1994) (noting that while the intermediate scrutiny test may not provide a clear standard in all cases, it still makes clear a strong presumption that sex classifications are invalid); *Mississippi Univ. for Women*, 458 U.S. 718 (1982) (noting that the burden of justification is demanding and rests entirely on the state).

91. 518 U.S. 515 (1996).

governmental objectives,"[92] with means "substantially related" to the ends,[93] the justification genuine,[94] not relying on "overbroad generalizations about the different talents, capacities, or preferences of males and females,"[95] and with the state bearing the burden to prove these justifications.[96] Namely, the Court builds on *J.E.B.*[97] to strengthen this intermediate scrutiny standard certainly beyond that of *Reed* and *Craig*, such that it is closer to the often-fatal strict scrutiny analysis.[98]

Differences, though, do exist between the sexes.[99] Gender theorists, as well as those dealing with issues of race and other protected statuses, have split on whether equal protection can better be achieved by highlighting these differences rather than promoting an inaccurate sameness.[100] The Court itself hasn't been much more consistent. In *Miller*, Justice Stevens' plurality opinion seems to identify pregnancy as one of the substantial real differences between the sexes.[101] Yet *Geduldig*, decided in 1974—just before Stevens was nominated to the Court—highlights the distinction between discrimination based on sex and discrimination based on pregnancy, and notes that pregnancy-based

92. *Virginia*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women*, 458 U.S. 718, 724 (1982) and *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

93. *Id.*

94. *Virginia*, 518 U.S. at 533 (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975)).

95. *Id. See also* Califano v. Goldfarb, 430 U.S. 199 (1977) (Stevens, J., concurring).

96. *See Mississippi Univ. for Women*, 458 U.S. at 724.

97. J.E.B. v. Alabama, 511 U.S. 127, 152 (1994) (holding that sex-based peremptory challenges in jury selection fail this heightened intermediate standard and thus violate the Equal Protection clause).

98. *See Virginia*, 518 U.S. at 596 (Scalia, J., dissenting) ("And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny."). This claim gains some credence from the Court's recent pronouncement on strict scrutiny in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). There, the Court held that strict scrutiny of race or national origin did not necessarily entail that such classifications would be "fatal in fact" to constitutionality of the statute in question. *Id.* at 237. *See* Patricia A. Carlson, *Recent Development:* Adarand Constructors, Inc. v. Pena: *The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423 (1996). In *Adarand*, Justice Stevens noted that it is anomalous to use both levels of review treating race and sex differently when addressing a singular affirmative action program. *Adarand*, 515 U.S. at 247 (1995) (Stevens, J., dissenting). Stevens also notes that "when a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency. *Id. See also* Eric C. Milby, Note, *Adarand Constructors, Inc. v. Pena: Signaling the End of Affirmative Action*, 6 WIDENER J. PUB. L. 263, 320-21 (1996) (noting that applying strict scrutiny to sex-based classifications would "require the Court to either repudiate the position that sex is not a 'suspect' class or to break from the analytical framework that equates 'quasi-suspect' classes with intermediate scrutiny.").

99. "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." United States v. Virginia, 518 U.S. at 533 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)).

100. See *supra* note 9. Note also the role of performativity in fashioning identity. *See, e.g.*, Rogers v. American Airlines, Inc., 527 F.Supp. 229 (S.D.N.Y. 1981) (disallowing the link between corn rows and race); United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (reversing a lower court's determination that the harsher penalty provisions applicable to crack relative to cocaine deprived blacks of equal protection); Hernandez v. New York, 500 U.S. 352 (1991) (affirming the New York Court of Appeals' determination that striking jurors on account of their ability to speak Spanish did not constitute unconstitutional race-based voir dire decisions); Geduldig v. Aiello, 417 U.S. 484 (1974) (noting that discrimination on the basis of pregnancy did not constitute sex-based discrimination).

101. *Miller*, 523 U.S. at 433.

discrimination does not violate the Equal Protection clause.[102] Likewise, *Califano v. Webster* endorsed the use of sex in distinguishing Social Security benefit levels so that women may be compensated somewhat for their lower earnings in their career.[103] But determining whether sex-based classifications are used to promote equal opportunity or perpetuate the inferiority of women (or men) is rarely so straightforward.[104] Difference or not, this tension has largely been resolved in much of the Court's post-1980 jurisprudence in favor of treating the sexes the same regardless of the remedial intentions involved.[105] Though the difference issue pervades Equal Protection caselaw and is ultimately determinative of whether given distinctions will survive heightened intermediate scrutiny review, the strengthening of the heightened intermediate scrutiny standard from *Reed* through *Virginia* minimizes the impact of highlighted differences. Gender theorists may still promote difference as the key to achieving equality, but the Court's jurisprudence has largely abandoned this approach.

The strongest argument that the rationales given by Stevens in *Miller* and relied upon by the Fifth Circuit panel in *Nguyen* do not survive heightened intermediate scrutiny, is that at least five members of the Court in *Miller* have seriously undercut Section 1409(a)'s justifications.[106] Justice Breyer's dissent is particularly potent in dissecting Justice Stevens' rationales[107] for the sex-based distinctions of Section 1409(a).[108] He begins with the statute's requirement that paternity be established before the child reaches the age of 18—the key to why Nguyen's father cannot simply establish paternity and transmit his citizenship now. This can be justified on the grounds of accuracy of paternity information, a point largely diminished by modern DNA testing.[109] Likewise, the claim that this requirement insures the establishment of relationships and ties—to the father and the United States—falls away on grounds of lack of

102. Geduldig v. Aiello, 417 U.S. 484, 495 (1974).

103. Califano v. Webster, 430 U.S. 313, 320 (1977).

104. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987). *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

105. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) ("[A]s the law currently stands, the Court will apply 'intermediate scrutiny' to cases of invidious gender discrimination . . . while applying the same standard for benign classifications as for invidious ones."). *See also* United States v. Virginia, 518 U.S. 515, 533 (1996); Quick v. Donaldson, 90 F.3d 1372 (8th Cir. 1996); Francis Achampong, *The Evolution of Same-Sex Sexual Harassment Law: A Critical Examination of the Latest Developments in Workplace Sexual Harassment Litigation*, 73 ST. JOHN'S L. REV. 701, 711 (1999).

106. *See supra* note 53. Notably, the O'Connor concurrence, *Miller*, 523 U.S. at 445, the Ginsburg dissent, *id.* at 460, and the Breyer dissent, *id.* at 471, all take this view.

107. Again, the statelessness and dual nationality justifications for Section 1409(a) are not stressed in Justice Breyer's dissent in *Miller*. It is a safe bet, however, that these justifications will play a more prominent role in the Court's decision in Nguyen's case.

108. Miller, 523 U.S. at 484-88.

109. *Id.* (citing Shapiro, Reifler, and Psome, *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J. LAW & HEALTH 1, 29 (1992-1993)).

tailoring and proportionality to the issue at hand.[110] Boulais raised Nguyen practically from birth—in the United States—certainly fulfilling all the ethical mandates of this justification, but did not comply simply because he did not realize the import of complying with the statute before Nguyen reached the age of 18.[111]

Yet no matter how much homage the Court pays to this heightened standard of scrutiny from *Virginia*, a better measure of the actual status of heightened intermediate scrutiny may be what relief Nguyen is finally afforded. Justice Scalia's *Miller* concurrence provides what this Case Note argues will be the controlling rationale in this case—that the Court is unable to sever the offending provisions of Section 1409 and confer citizenship upon Nguyen.[112] Scalia begins by distinguishing the distinctions in Section 1409 from the normal equal protection case; the statute simply does not subject one class to a restriction from which the other class is exempt.[113] Where both classes are subject to restrictions from which the other is exempt—as in Section 1409—eliminating one set of restrictions goes no further in advancing the mandates of the Equal Protection clause regarding the other class.[114] This quandary would leave the Court with having to choose between striking the limitations for both sexes, leaving no restrictions upon the citizenship of illegitimate children, or simply denying naturalization to all legitimate children.

Some of this conflict was foreshadowed in *INS v. Pangilinan*, which held that a "court has no discretion to ignore the defect and grant citizenship."[115] Since courts are then "without authority to sanction changes or modifications"[116] from the "terms and conditions specified by Congress"[117] regarding the conferral of citizenship, the severance debate can be crystallized into whether Congress had intended severability in case part of the statute were held unconstitutional. Scalia points to Section 1421(d) of the statute, which mandates that citizenship may only be conferred "under the conditions prescribed in this subchapter *and not* otherwise."[118] A general severance clause does govern the entire act[119]—one in which Breyer's dissenting opinion

110. *Id.* at 485.

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

112. *Miller*, 523 U.S. at 459 (Scalia, J., concurring).

113. *Id.* at 458 (citing Craig v. Boren, 429 U.S. 129, 191-192 (1976)). Namely, illegitimate children of citizen-fathers must meet the requirements of Section 1409(a) from which the illegitimate children of citizen-mothers are exempt, and illegitimate children of citizen mothers must meet the different requirements of Section 1409(c), from which the illegitimate children of citizen fathers are exempt. *Id.*

114. *Id.* at 459.

115. 486 U.S. 875, 884 (1988). Later, the opinion takes an even harsher stand. "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations. *Id.* at 885. *See also* Rogers v. Bellai, 401 U.S. at 830 ("[T]he Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent.").

116. United States v. Ginsburg, 243 U.S. 472, 474 (1917).

117. *Id.*

118. *Miller*, 523 U.S. at 457 (quoting 8 U.S.C. § 1421(d)) (emphasis added).

tire act[119]—one in which Breyer's dissenting opinion places great stock in deciding to award relief.[120] But Scalia's argument that the more specific Section 1421(d)'s call for non-severability governs the Act-wide general severability clause is strong[121] and is only explicitly rebutted by three members of the court.[122] And with non-severability governing the statute, Nguyen's call for citizenship under *Virginia's* heightened intermediate scrutiny will in all likelihood be met with deaf ears.

Is sex really more important now? From the standpoint of whether *Virginia's*[123] very strong "exceedingly persuasive justification" language remains the governing standard for sex-based classifications above and beyond that required in early heightened intermediate scrutiny cases, then the answer is a resounding yes. The citizenship statute at issue here effectively equates sex with financial support and caretaking—two generalizations that are expressly impermissible under the Court's recent jurisprudence.[124] The Fifth Circuit panel in Nguyen allows heightened intermediate scrutiny analysis of the Section 1409(a) statute without fully taking into account the broad implications of such a standard.[125] Moreover, the panel ignores the Ninth Circuit's *Ahumada-Aguilar*[126] and the Third Circuit's *Breyer*[127]—both noting how these sex distinctions in the citizenship laws do not survive the heightened intermediate level of scrutiny. These mistakes wrongly lead the Fifth Circuit to conclude that Section 1409 survives Equal Protection heightened intermediate scrutiny and Nguyen is subject to deportation as a non-citizen. The end-game of this constitutional error, though, is minimal, as Nguyen will likely be denied relief on the grounds that the Court is unable to sever the statute and thus grant him citizenship. As such, from the more practical relief-oriented standpoint of whether sex is more important now, the answer is only when the strong *Virginia* standard of heightened intermediate scrutiny doesn't clash other important objectives—notably the deference to Congress accorded to the areas of naturalization, immigration, and the military, among others.

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119. 66 Stat. 281, § 406. *See also* "Separability," Note, following 8 U.S.C. § 1101, p. 38.

120. *Miller*, 523 U.S. at 489-490.

121. *See, e.g.*, Morales v. Trans World Airlines Inc., 504 U.S. 374, 384-385 (1992).

122. Notably, Justices Breyer, Souter, and Ginsburg. *See Miller*, 523 U.S. at 489 (Breyer, J., dissenting).

123. 518 U.S. 515 (1996).

124. *See J.E.B.*, 511 U.S. at 139, n.11 (invalidating sex-based peremptory challenges "[e]ven if a measure of truth can be found in some of the sex stereotypes used to justify them"); *Miller*, 523 U.S. at 487 (Breyer, J., dissenting) (citing *Virginia*, 518 U.S. at 542, 546).

125. *Nguyen*, 208 F.3d at 534. Note that the standing issues behind this choice of level of scrutiny are not discussed at length here, largely because Boulais (Nguyen's father) is a named party in this suit and presumably negates all the standing issues Justice O'Connor had in *Miller*.

126. United States v. Ahumada-Aguilar, 189 F.3d 1121, 1125. *See supra* note 71.

127. Breyer v. Meissner, 214 F.3d 416 (2000). *See supra* note 71.