SEX-BASED CITIZENSHIP CLASSIFICATIONS AND THE "NEW RATIONALITY"

*Martha F. Davis**

ABSTRACT

In the 2001 case, *Nguyen v. INS*, the United States Supreme Court purported to exercise intermediate scrutiny while upholding a sex-based citizenship classification. Yet, as many commentators—including the dissenting Justices—have pointed out, the scrutiny exercised in that case bore few of the hallmarks of heightened review. Rather than hold the government to a tight fit between statutory ends and means, the majority accepted stereotypes and post hoc rationalizations to uphold distinctions between mothers and fathers for purposes of transmitting derivative citizenship to their out-of-wedlock, foreign-born children.

In the 2016 Term, in *Lynch v. Morales-Santana*, the Supreme Court again considers sex-based classifications in the context of U.S. citizenship law. At issue are the different physical presence requirements for mothers and fathers imposed as a prerequisite to sharing derivative citizenship. Again, those seeking relief from the statute's discriminatory requirements will argue for intermediate scrutiny. Yet intermediate scrutiny is not the only standard for evaluating sex-based citizenship laws. "Rational basis with bite" has attracted increasing attention in recent years, being utilized in a series of decisions striking down classifications based on sexual orientation.

This article will examine sex-based citizenship challenges, including *Nguyen* and *Morales-Santana*, through the lens of this new rational basis review. Arguments of irrationality have been successful in expanding individual rights based on sexual orientation and disability, among others. Other high courts and international governing bodies around the world have rejected sex-based

* Martha F. Davis is Associate Dean for Experiential Education and Professor of Law at Northeastern University School of Law. She thanks Jennifer True, Ellen Dexter, and Antonia Kirkland for their assistance with the preparation of this article.

citizenship laws as irrational. Perhaps this new rationality standard should be seriously developed as an approach to challenging the sex-based classifications that remain embedded in U.S. citizenship law.

I. INTRODUCTION

In recent decades, the United States Supreme Court has been deeply divided in its analysis of sex-based citizenship laws, failing to achieve a majority in one case, failing to resolve another, and issuing a 5-4 decision in a third case over a powerful dissent.[1] In the 2016 Term, another sex-based citizenship law case is before the Court, this time heard by an eight-Justice panel that may again be confounded.[2] Perhaps because of the Court's failure to draw clear lines in this area, the cases keep coming. In many instances, the challenges arise in removal proceedings, where citizenship could provide the litigant with a permanent defense to deportation.[3] As such, the cases raise significant questions about the contours of congressional plenary power over immigration.[4] At the same time, these cases also engage the interest of women's rights advocates committed to finally bring to a close the decades-long struggle of women to achieve equal U.S. citizenship.[5]

The issue of sex-based classifications in citizenship law has long been a central concern of feminists worldwide.[6] Indeed, because of the way in which such domestic classifications interact across national borders, feminists across the globe have often coordinated their campaigns, working in tandem to accord women full citizenship status in their respective countries.[7]

---

[1] *See* Flores-Villar v. United States, 564 U.S. 210, 210 (2011); Nguyen v. INS, 533 U.S. 53, 55 (2001); Miller v. Albright, 523 U.S. 420, 459 (1998).

[2] Morales-Santana v. Lynch, 804 F.3d 521, 525 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

[3] *See, e.g.*, Lake v. Reno, 226 F.3d 141, 142 (2d Cir. 2000), *vacated*, Ashcroft v. Lake, 533 U.S. 913, 913 (2001); *but see Miller*, 523 U.S. at 427, 445 (affirming a petition for derivative citizenship).

[4] *See, e.g.*, *Nguyen,* 533 U.S. at 72–73; *Miller,* 523 U.S. at 459; United States v. Flores-Villar, 536 F.3d 990, 996 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011).

[5] *See* Erin Chlopak, Comment, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967, 990–93 (2002) (describing feminist reactions to the *Nguyen v. INS* decision as well as international implications of the decision).

[6] *See*, *e.g.*, CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 196–97 (1998) (describing domestic and international feminist activism addressing this issue in the 1920s and 1930s); Comm. on Feminism & Int'l Law, Int'l Law Ass'n, *69th Conference: Final Report on Women's Equality and Nationality in International Law*, 69 INT'L L. ASS'N REP. CONF. 248, 264, 265 (2000) (reporting on citizenship and women's equality worldwide).

[7] *See*, *e.g.*, Comm. on Feminism & Int'l Law, *supra* note 6, at 249; Martha F. Davis, *Not so*

In the U.S., sex-based citizenship classifications have their origins in the U.S. Constitution itself, which from its inception accepted different citizenship obligations and rights based on sex.[8] During the first wave of the women's movement, even as women's rights expanded in other respects, sex-based citizenship distinctions imposed personal burdens on many of the activists themselves.[9] For example, under a U.S. law enacted in 1907—the Expatriation Act—a U.S. citizen woman was compelled to relinquish her citizenship upon marriage to a foreign citizen.[10] United States citizen men were not subject to any similar strictures. Many prominent American women were caught up by this policy change, including Gladys Vanderbilt, who married an Austrian count (who later served as ambassador to the U.S.).[11] Several leaders of the National Women's Party were also personally affected, including the charismatic suffragette and New York University Law graduate Inez Milholland Boissevain, who married a Dutch citizen.[12]

Repealing this facially discriminatory law was a key goal for the National Women's Party, particularly after women's suffrage was secured by the Nineteenth Amendment to the U.S. Constitution in 1920.[13] Finally, in September 1922, Congress passed the Cable Act, granting U.S. citizen women the right (albeit with some limitations) to retain their citizenship after marriage to an alien.[14]

More than a decade later, in 1934, Congress followed this repeal with a revision to the law that, for the first time, accorded citizen mothers the right to pass citizenship to their marital and, tacitly, non-marital foreign-born children—so-called "derivative

Foreign after All: Alice Paul and International Women's Rights, 16 NEW ENG. J. INT'L & COMP. L. 1, 1–3 (2010) (describing women's international activism on citizenship issues in the early twentieth century); EQUALITY NOW, THE STATE WE'RE IN: ENDING SEXISM IN NATIONALITY LAWS 5–6 (2016), http://www.equalitynow.org/sites/default/files/Nationality Report_EN.pdf (exemplifying international women's groups' ongoing concern with citizenship discrimination).

[8] *See* U.S. CONST. amend. XIX (showing that a constitutional amendment was required to establish a woman's right to vote in state and federal elections); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 33–34, 36 (1998) (describing the systematic exclusion of women from constitutional rights and responsibilities, including citizenship).

[9] *See* Nancy F. Cott, *Justice for All? Marriage and Deprivation of Citizenship in the United States*, *in* JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 77, 89 (Austin Sarat & Thomas R. Kearns eds., 1996) (describing the impact of citizenship restrictions on women activists).

[10] *See generally* BREDBENNER, *supra* note 6, at 47 (describing the impact of the Expatriation Act).

[11] *See* J. STANLEY LEMONS, THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S 65 (1973).

[12] *See id.*; Davis, *supra* note 7, at 4; Phyllis Eckhaus, *Restless Women: The Pioneering Alumnae of New York University School of Law*, 66 N.Y.U. L. REV. 1996, 1997 (1991).

[13] *See* Davis, *supra* note 7, at 5.

[14] *See* BREDBENNER, *supra* note 6, at 96–97 (describing the impact of the Cable Act of 1922).

citizenship"—on equal terms with fathers.[15] Yet within six years, the Nationality Act of 1940 adopted the basic distinctions that persist in the law today, enshrining different standards for citizen fathers and citizen mothers to extend derivative U.S. citizenship to their out-of-wedlock, foreign-born children.[16] Subsequent revisions to the law in 1952 and 1986 shifted some of the requirements imposed on mothers and fathers but did not alter this fundamental sex-based structure.[17]

The citizenship laws are complex and the sex-based distinctions embedded in them are not always easy to parse. Yet it is clear that under current law, mothers and fathers are subject to different time frames and other disparate criteria for demonstrating a parental relationship with their out-of-wedlock, foreign-born child who seeks U.S. citizenship.[18] For example, a citizen mother's relationship with her child is assumed and there is no statutory time limit for proving the relationship, while a father must establish paternity and provide an affidavit of support before the child turns eighteen.[19]

Similarly, citizen mothers and citizen fathers are subject to different standards for proving their own relationships with the United States as a prerequisite for sharing citizenship with their child.[20] Both citizen mothers and citizen fathers are subject to certain residency requirements in order to establish their connections to the United States, but the requirements for citizen fathers are considerably more onerous.[21] As described more fully below, these sex-based citizenship laws have persisted despite the heightened scrutiny that is now regularly accorded laws that rely on overt sex-based classifications and sex stereotypes.[22]

---

[15] *See* Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 100–01 (1934) (offering a first-hand account of the Citizenship Act of 1934); *see also* Miller v. Albright, 523 U.S. 420, 466 (1998) (Ginsburg, J., dissenting) (focusing on the act's legislative history).

[16] *See Miller*, 523 U.S. at 466–67 (Ginsburg, J., dissenting); Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2182, 2188–89 (2014).

[17] *See Miller*, 523 U.S. at 467–68 (Ginsburg, J., dissenting); Collins, *supra* note 16, at 2211, 2226 & n.364.

[18] *See* 8 U.S.C. §§ 1401(d), (g) (2012); *id.* § 1409(a). For example, for a non-marital child born abroad after 1986, a father can transmit citizenship only if he can establish his physical presence in the United States for a total of five years, two of which must be after the father turned fourteen. A mother need only establish her presence in the United States for one year prior to the birth.

[19] 8 U.S.C. § 1409(a)(4); Nguyen v. INS, 533 U.S. 53, 73 (2001) (upholding a sex-based law); *but see Nguyen*, 533 U.S. at 88–89 (O'Connor, J., dissenting) (discussing the basis of law in stereotypes regarding parental relationships).

[20] *See* 8 U.S.C. § 1401(e); *id.* § 1409(a).

[21] *See* Brief for Professors of History, Political Science, and Law as Amici Curiae Supporting Respondent at 19–20, 25, Lynch v. Morales-Santana, No. 15-1191 (Mar. 22, 2016).

[22] *See*, *e.g.*, Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and*

Given the failure of intermediate scrutiny to fully eliminate these facially sex-based laws, an obvious question is: how would sex-based citizenship laws fare under a different constitutional approach, i.e., the heightened rationality standard sometimes called "rational basis with bite?" To examine this issue, I begin by reviewing the Supreme Court litigation challenging sex-based citizenship laws over the past two decades, examining the Court's purported application of heightened scrutiny to these laws.[23] Next, I return to the early years of constitutional sex discrimination jurisprudence and the genesis of intermediate scrutiny to ask whether such heightened scrutiny helps or hinders litigants challenging sex-based citizenship laws.[24] I then turn to examine the biting form of rational basis review, referencing the importance of human dignity and liberty that has gained new force in recent years.[25] I apply these observations concerning rational basis review to a sex-based citizenship case currently pending before the Supreme Court, *Lynch v. Morales-Santana*, and to an earlier case, *Nguyen v. INS*, in which the Supreme Court upheld sex-based citizenship classifications.[26] Finally, I conclude that heightened scrutiny for sex-based classifications—a level of scrutiny that is riddled with exceptions to take account of biological differences, cultural privacy norms, and historical acceptance of discrimination—may simply be a standard that is too compromised for a contemporary review of sex-based citizenship classifications resting on age-old stereotypes.[27] In contrast, the cleaner and more robust "rational basis with bite" may, as a practical matter, offer a more searching approach to reviewing sex-based citizenship classifications. Drawing on this discussion, I offer some brief closing thoughts on the future of the "tiered" analytical approach to claims of equal protection violations.

at Home, 36 HARV. J. L. & GENDER 405, 406–08 (2013) (reviewing the application of heightened scrutiny to sex-based citizenship laws); *see also* Kristin Collins, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1673–74 (2000) (reviewing the application of heightened scrutiny to sex-based citizenship laws).

[23] *See infra* Part II; s*ee generally* Antognini, *supra* note 22, at 454–55 (discussing the relevancy of custody in addressing citizenship issues from the perspective of family law and child custody).

[24] *See infra* Parts II(B)–(D).

[25] *See infra* Part III.

[26] *See infra* Parts II(B), (D).

[27] *See infra* Part IV; *see also* Note, A *Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1412 (1982) ("[S]tandards of middle level review give the courts relatively little guidance in individual cases."); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998) (discussing the unpredictability of intermediate scrutiny).

II. HISTORY OF U.S. SUPREME COURT LITIGATION CHALLENGING SEX-BASED CITIZENSHIP CLASSIFICATIONS

Challenges to sex-based citizenship classifications are complicated by several factors, including both the doctrine of Congress' plenary authority over immigration and issues of standing.[28] The plenary power doctrine argues for judicial deference to congressional and executive decision-making in the area of immigration insofar as it is an aspect of foreign affairs;[29] the question of whether that deference extends beyond immigration to citizenship laws has never been resolved.[30] Standing questions arise in these cases when the challenge is brought by the child rather than the citizen parent, i.e., the citizen whose rights are directly affected by the sex-based classification.[31] Even if the Court overcomes those hurdles, the question of remedy looms large.[32] At issue is whether the Court should extend the more onerous requirements to mothers, or equalize parents under the more lenient requirements currently applied to mothers.[33] But at the core of these challenges is the question of whether sex-based citizenship classifications pass constitutional muster under the Equal Protection Clause.[34] Below, I briefly lay out the case law of the past two decades that addresses this central question.

---

[28] *See* Nina Pillard, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 835, 839 (2002) (providing a discussion of the plenary power doctrine in the case of *Nguyen v. INS*). The standing issues raised by these sorts of claims were extensively discussed in Justice O'Connor's concurrence, joined by Justice Kennedy, in *Miller*. *See* Miller v. Albright, 523 U.S. 420, 445–46 (1998) (O'Connor, J., concurring). These two Justices opined that children did not have standing to raise the sex discrimination claims of their parents, except in circumstances in which the parent confronted a "genuine obstacle" to participation in the suit. *See id.* at 448 (citation omitted).

[29] *See, e.g.*, David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 39–41, 48 (2015) (discussing the link between immigration issues and foreign affairs).

[30] *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 61, 71–72 (citing *Miller*, 523 U.S. at 434 n.11) (explaining, without deciding, that intermediate scrutiny applied to the case); Martin, *supra* note 29, at 31, 39–41, 48 (discussing the plenary power doctrine more generally).

[31] *See* discussion *supra* note 28 and accompanying text.

[32] *See Nguyen*, 533 U.S. at 94, 95 (O'Connor, J., dissenting) (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring)) (showing how remedial issues were discussed extensively by the dissenting Justices in *Nguyen*).

[33] *See* Brief for Constitutional Law, Federal Courts, Citizenship, and Remedies Scholars as Amici Curiae Supporting Respondent at 1, 8, 9, Lynch v. Morales-Santana, No. 15-1191 (Mar. 22, 2016) (providing a further discussion of remedial issues in these cases).

[34] *See* Collins, *supra* note 22, at 1671, 1673–74.

A. Miller v. Albright

The case of *Miller v. Albright* was initiated by a father who sought to establish paternity and share derivative citizenship with his adult daughter, born out of wedlock in the Philippines years before.[35] Under the applicable law, a father was required to establish paternity prior to the child's eighteenth birthday.[36] Unfortunately, Mr. Miller and his daughter did not establish a personal relationship until she reached adulthood, and Mr. Miller failed to begin to file the requisite paperwork until his daughter was age twenty-one.[37] In contrast to Mr. Miller's predicament, a citizen mother could have established the existence of a maternal relationship at any point during the child's life.[38] Quite literally, if Mr. Miller had been a U.S. citizen mother instead of a citizen father, he could have shared derivative citizenship with his daughter.[39]

The *Miller* case came before the Supreme Court in 1997 and was decided in 1998.[40] In considering the case, the Court split along a number of fault lines, none of which ultimately commanded a majority, but with enough concurrences to allow Justice Stevens' plurality opinion to at least render a decision on the matter.[41]

Two of the Justices who concurred with Justice Stevens' plurality opinion—Justices Scalia and Thomas—were persuaded by the Court's earlier ruling in *Fiallo v. Bell*,[42] a related but not identical case, involving the criteria for issuing immigrant visas.[43] In *Fiallo*, the Court upheld a law which treated non-marital children and their mothers differently than non-marital children and their fathers for purposes of special preference immigration visas.[44] With a 6-3 vote, the *Fiallo* majority concluded that because of Congress' plenary

---

[35] *Miller*, 523 U.S. at 425–26.

[36] *Id.* at 426.

[37] *See id.* at 424–25.

[38] *Compare* 8 U.S.C. § 1409(a)(4) (2012) (focusing on a citizen father), *with id.* § 1409(c) (focusing on a citizen mother).

[39] *See Miller*, 523 U.S. at 433–34.

[40] *Id.* at 420.

[41] *See id.* at 422. The deep splits in the *Miller* Court prompted Maryland law professor Maxwell Stearns to ask whether Justices should switch votes in such circumstances to ensure a majority opinion. *See* Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 128–29 (1999).

[42] Fiallo v. Bell, 430 U.S. 787 (1977).

[43] *See Miller*, 523 U.S. at 455 (Scalia, J., concurring) (citing *Fiallo*, 430 U.S. at 792) (supporting the assertion that the Court could not remedy inequality in this instance).

[44] *See Fiallo*, 430 U.S. at 798, 799–800; *see also* Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright*,* 1998 SUP. CT. REV. 1, 2 (discussing *Fiallo* as the backdrop to *Miller*).

power over immigration decisions, the challenged statute should not be subject to heightened scrutiny.[45] A dissenting opinion in *Fiallo*, written by Justice Thurgood Marshall, took issue with this conclusion, opining that the law addressed the rights of citizens to family reunification beyond the scope of plenary power.[46] Justices Marshall and Brennan would have held the law to some higher level of scrutiny, and they concluded that the law could not be sustained under that higher standard.[47] Building on the *Fiallo* majority in their *Miller* opinion, Justices Scalia and Thomas would have effectively extended the scope of the plenary power doctrine even further, to hold that the Court had no power to override a congressional statute involving citizenship.[48] Further, Justices Scalia and Thomas opined that the Court had no power to grant the remedy sought, since citizenship could not be conferred by a court.[49] Based on their conclusions, these two Justices declined to consider the merits of Mr. Miller's claim.[50]

Justices O'Connor and Kennedy also failed to reach the merits of the *Miller* case, instead concluding that the proper party—the father—was not before the Court.[51] Mr. Miller's daughter, these Justices concluded, could not mount a sex discrimination claim since the discrimination fell only on her father, the citizen parent.[52] These two Justices therefore upheld the classification under rational basis review, while at the same time indicating in dicta that the case might have been resolved differently were a proper party before the Court.[53] "It is unlikely," wrote Justice O'Connor, "that any gender classifications based on stereotypes can survive heightened scrutiny . . . ."[54]

The two remaining opinions in *Miller* addressed the merits of the sex discrimination claim but reached opposite conclusions. Writing the plurality opinion, Justice Stevens, joined by Chief Justice Rehnquist, found that the sex-based distinctions in the law were not based on stereotypes and that they passed muster under heightened scrutiny.[55] Justices Ginsburg, Souter, and Breyer joined in two

[45] *See Fiallo*, 430 U.S. at 787, 793–94, 799–800.
[46] *See id.* at 800 (Marshall, J., dissenting).
[47] *See id.* at 810, 811, 816.
[48] *See Miller*, 523 U.S. at 459 (Scalia, J., concurring).
[49] *See id.* at 454–55.
[50] *See id.* at 453.
[51] *See id.* at 445–46 (O'Connor, J., concurring).
[52] *See id.*
[53] *See id.* at 451.
[54] *Id.* at 452.
[55] *See id.* at 433. The opinion does not clearly state the level of scrutiny employed, but the

different dissenting opinions—one written by Justice Ginsburg and the other written by Justice Breyer—to argue that the law had its origins in sex-stereotyped thinking, and that the government's justifications did not have the requisite fit with the statutory means to pass muster under heightened scrutiny.[56]

In the end, the lower court's decision upholding the law was affirmed, but without a unifying rationale that commanded a majority of the Court.[57] All seven of the Justices who addressed the issue, however, assumed that the law would be sustained if it were subjected to rational basis review.[58]

B. Nguyen v. INS

Given the Court's deep split and unsatisfying non-decision in *Miller v. Albright*, the constitutionality of the paternity establishment provisions of 8 U.S.C. § 1409 remained open to future challenge.

The *Nguyen* case, decided in 2001, arose out of Texas.[59] In some respects, the facts were less sympathetic than those in *Miller*. Nguyen and his biological father, Joseph Boulais, raised the challenge to the sex-based citizenship law as a defense to Nguyen's deportation after a felony conviction: Nguyen, a twenty-two-year-old, was convicted of statutory rape.[60] As an alien, born out of wedlock in Vietnam, he was subject to deportation after serving his sentence for the conviction.[61]

In other respects, however, Nguyen's story was compelling. Though born abroad, he was raised from age six in the United States by his American citizen father.[62] His Vietnamese mother apparently left shortly after his birth in Vietnam, leaving Nguyen's father, Mr.

citations and language of the opinion suggest that intermediate scrutiny is the standard adopted by these two Justices. *See, e.g.*, *id.* at 439, 440.

[56] *See id.* at 460 (Ginsburg, J., dissenting); *id.* at 471–72 (Breyer, J., dissenting).

[57] *See id.* 444–45 (plurality opinion).

[58] *See id.* at 436–37 ("There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective. . . . Nevertheless, petitioner reiterates the suggestion that [the law] is irrational . . . . We respectfully disagree."); *id.* at 451–52 (O'Connor, J., concurring) ("I believe [the law] passes rational scrutiny . . . ."); *id.* at 484, 485 (Ginsburg, J., dissenting) (stating that while the interests asserted are important, the law is not tailored or proportional to withstand heightened scrutiny).

[59] *See* Brief for Respondent at 5, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

[60] *See id.*; Brief for Petitioner at 6, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

[61] *See* Brief for Petitioner, *supra* note 60, at 4, 6; *see, e.g.*, 8 U.S.C. § 1227(a)(2)(A) (2012) (describing classes of deportable aliens, including those convicted of certain felonies).

[62] *See* Brief for Petitioner, *supra* note 60, at 4, 5.

Boulais, as the primary caretaker.[63] There was no serious question that the citizen father had a parental relationship with his son—the two lived together as a family since 1975 and Boulais supported Nguyen throughout his minority.[64] But because Nguyen's father did not take the step of formally establishing paternity prior to Nguyen's eighteenth birthday, Nguyen could not claim citizenship as a defense to his deportation.[65] As in *Miller*, had Nguyen's citizen father been instead a citizen mother, she could have established the parental relationship at any point in Nguyen's life, including during or even after the deportation proceeding, thereby conferring derivative citizenship on Nguyen, retroactive to his date of birth.[66]

In the *Nguyen* case, the Court reached a decision, albeit a surprising one in light of Justices Kennedy's and O'Connor's dicta in *Miller*. The majority opinion in *Nguyen*, written by Justice Kennedy, assumed for purposes of the decision that the applicable standard of review was the heightened scrutiny generally accorded to sex-based classifications.[67] This assumption left for another day the question of whether a citizenship law should be given deference and held to a lower standard based on Congress' plenary power over immigration.

Turning to the central issue of whether the sex-based classification met heightened scrutiny, Justice Kennedy fixed on the significance of the gestation process and the "event of birth" itself as criteria for ensuring that the out-of-wedlock child had a sufficient opportunity to form a "meaningful relationship" with his or her U.S. citizen parent, and thereby with the United States itself.[68] As Justice Kennedy opined regarding the significance of the birth event:

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

[63] *See* Nguyen v. INS, 208 F.3d 528, 530 (5th Cir. 2000), *aff'd*, 533 U.S. 53 (2001); Brief for Petitioner, *supra* note 60, at 4.

[64] *See* Brief for Petitioner, *supra* note 60, at 5.

[65] *See id.* at 5, 6, 9.

[66] *See id.* at 6.

[67] *See* Nguyen v. INS, 533 U.S. 53, 56, 60–61 (2001) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[68] *See Nguyen*, 533 U.S. at 64–65.

identity.[69]

Justice Kennedy and the rest of the *Nguyen* majority were particularly concerned about the possibility that citizen fathers of non-marital children might be members of the U.S. armed forces, whose relationship with both their child's mother and the foreign nation of the child's birth would be fleeting.[70] Wrote Justice Kennedy: "One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries."[71] According to the majority, requiring U.S. fathers and their children seeking derivative citizenship to meet more stringent standards is appropriate given these circumstances.[72] The Court concluded that the challenged sex-based classifications here met the intermediate scrutiny standard.[73]

The *Nguyen* case triggered a strong dissent from Justice O'Connor, joined by three other Justices.[74] The dissenters accused the majority of relaxing the heightened scrutiny standard beyond recognition, and of ignoring the ways in which current technologies such as DNA testing can be deployed to support sex-neutral policy approaches.[75] Particularly poignant was the fact that Joseph Boulais had himself bucked the stereotypes of "uninvolved fathers" by caring for his non-marital child from birth, yet he received no relief.[76]

C. United States v. Flores-Villar

The *Flores-Villar* case, decided in 2011, also centered on the legality of a removal proceeding but given the resolution in *Nguyen* upholding legitimation requirements, the case challenged a different aspect of the same sex-based citizenship law.[77] Beyond the differential parental-establishment provisions upheld in *Nguyen*, 8 U.S.C. § 1401(a)(7) and § 1409(c) of the immigration law also dictate

[69] *Id.* at 65.

[70] *See id.* at 65–66.

[71] *Id.* at 65.

[72] *See id.* at 73 ("[T]he principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.").

[73] *See id.* at 70 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[74] *See Nguyen*, 533 U.S. at 74 (O'Connor, J., dissenting).

[75] *See id.* at 97 ("No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications."); *see also id.* at 81 ("Modern DNA testing, in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time.").

[76] *See id.* at 89.

[77] *See* United States v. Flores-Villar, 536 F.3d 990, 993 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011).

different physical presence requirements for mothers and fathers who are seeking to share derivative citizenship with their foreign-born, out-of-wedlock child.[78] Flores-Villar challenged these provisions.

The *Flores-Villar* case arose in the context of a criminal proceeding in which Ruben Flores-Villar was charged with illegally returning to the U.S. following a deportation.[79] Flores-Villar argued that he should be entitled to derivative citizenship through his citizen father, thus invalidating the underlying deportation order.[80] However, his U.S. citizen father had not met the requirement of five years of physical presence in the United States after his fourteenth birthday, mandated by the applicable statute.[81] In fact, since Flores-Villar's father was only sixteen at the time of his son's birth, he could not have met this requirement.[82] The father would, however, have met the one-year physical presence requirement that the statute imposed on a citizen mother seeking citizenship for her non-marital, foreign-born child.[83]

The Court of Appeals for the Ninth Circuit held that the *Nguyen* decision controlled the outcome of this case, and upheld the differential sex-based physical presence requirements.[84] The Supreme Court accepted the petition for a writ of certiorari.[85] However, Justice Elena Kagan had worked on the case as solicitor general prior to her nomination to the Supreme Court, and she recused herself from consideration of the case.[86] Following briefing and oral argument, the Court issued a per curiam two-sentence ruling.[87] Noting a 4-4 split between the Justices, the equally divided Court affirmed the lower court without opinion, effectively upholding

[78] *See id.* at 993–94. In terms of statutes, 8 U.S.C. § 1401(a)(7) requires that a father be physically present in the United States for five years after his fourteenth birthday as a prerequisite to sharing derivative citizenship. *See id.* at 994 (citing 8 U.S.C. § 1401(a)(7) (2012)). Additionally, 8 U.S.C. § 1409(c), which has not been amended, requires that a mother be physically present in the United States for one year prior to the birth. *Flores-Villar*, 536 F.3d at 995 (citing 8 U.S.C. § 1409(c)).

[79] *See Flores-Villar*, 536 F.3d at 994.

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See id.* at 995.

[84] *See id.* at 993, 997.

[85] Flores-Villar v. United States, 559 U.S. 1005, 1005 (2010).

[86] *See* Flores-Villar v. United States, 564 U.S. 210, 210 (2011); Tony Mauro*, Kagan Recuses in Ten More Cases*, BLT: BLOG LEGALTIMES (Sept. 10, 2010), http://legaltimes.typepad.com /blt/2010/09/kagan-recuses-in-ten-new-cases.html.

[87] *See Flores-Villar*, 564 U.S. at 210; Morgan G. Miranda, *A (Stateless) Stranger in a Strange Land:* Flores-Villar *and the Potential for Statelessness under U.S. Law*, 15 J. GENDER RACE & JUST. 379, 383 (2012).

the sex-based law.[88]

D. Lynch v. Morales-Santana

In 2015, the Court of Appeals for the Second Circuit again considered the same sex-based physical presence requirements that had been challenged in *Flores-Villar*.[89] Luis Ramon Morales-Santana was born in 1962 in the Dominican Republic to a U.S. citizen father and a mother who was a citizen of the Dominican Republic.[90] When Morales-Santana's parents were later married, Morales-Santana was "legitimat[ed]."[91] But as with Flores-Villar, the immigration law in effect at the time of Morales-Santana's birth stipulated that a child born abroad to an unwed citizen father and a non-citizen mother could only qualify for derivative citizenship if the citizen father was physically present in the United States for a certain period—in this case, the applicable law required a father's physical presence totaling ten years at some point prior to the child's birth, with at least five of those years after the father turned fourteen.[92] Because Morales-Santana's father left Puerto Rico twenty days before his nineteenth birthday to take a job in the Dominican Republic, he did not meet the statutory requirements to transfer derivative citizenship to Morales-Santana.[93]

In 2000, Morales-Santana was placed in removal proceedings because he had been convicted of various felonies.[94] He applied to have the removal withheld, arguing that he had derivative citizenship from his father, and the case made its way to the Second Circuit.[95]

Unlike the Ninth Circuit, the Court of Appeals for the Second Circuit found that these sex-based physical presence requirements were different from the sex-based legitimation requirements at issue in *Nguyen*, and that *Nguyen*'s ruling focusing on the biological differences involved in paternity establishment and legitimation did

---

[88] *Flores-Villar*, 564 U.S. at 210. This non-opinion did not prevent law review commentators from analyzing the case, though. *See*, *e.g.*, Jeffrey Hochstetler, *A Father's Presence:* Flores-Villar v. United States *and Equal Protection*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 142, 155 (2011); Miranda, *supra* note 87, at 383.

[89] *See* Morales-Santana v. Lynch, 804 F.3d 521, 525 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

[90] *See id.* at 524.

[91] *Id.* (alteration in original) (quoting 8 U.S.C. § 1409(a) (2012)).

[92] *See Morales-Santana*, 804 F.3d at 524.

[93] *See id.* at 525.

[94] *See id.* at 524.

[95] *See id.* at 524–25.

not control.[96] The Second Circuit ruled in favor of Morales-Santana's eligibility for citizenship.[97] This created a split between the circuits given the contrasting Ninth Circuit decision in *Flores-Villar*.[98] The U.S. Supreme Court once again accepted a writ of certiorari to resolve a circuit conflict concerning sex-based citizenship laws.[99]

The applicable standard of review presented a threshold issue. In *Morales-Santana*, as in the three preceding sex-based citizenship law cases, the U.S. government argued that no more than a "facially legitimate and bona fide reason" for the statute should be required to sustain it, because of the plenary context in which Congress' regulation of citizenship law purportedly operates.[100] In opposition, respondent Morales-Santana argued that citizenship is different, not encompassed within Congress' plenary power, and that full-fledged heightened scrutiny, i.e., intermediate scrutiny, should be applied to resolve a challenge to those sex-based citizenship laws.[101]

At the time of *Morales-Santana's* oral argument, the Court had not yet settled the issue of the level of scrutiny for citizenship laws, an issue that was unresolved in *Miller* and explicitly left open in *Nguyen*.[102] But under the current doctrinal approach, it may not matter. Because of the *Nguyen* majority's willingness to accept at face value the government's focus on biological differences as the critical determining factor in the statute, the Court found that the distinctions challenged there passed muster even under heightened scrutiny.[103] And if they passed muster under heightened scrutiny, they surely would also have been found rational. In short, the *Nguyen* decision teaches that even heightened scrutiny may be insufficient to strike down sex-based classifications in citizenship law.

---

[96] *See id.* at 530, 531.

[97] *Id.* at 538.

[98] *Compare supra* notes 84–88 and accompanying text (discussing the Ninth Circuit's ruling in *Flores-Villar*), *with supra* notes 96–97 and accompanying text (discussing the Second Circuit's ruling in *Morales-Santana*).

[99] *See* Lynch v. Morales-Santana, 136 S. Ct. 2545, 2545 (2016); *see also* Allissa Wickham, *2nd Circ. Axes Citizenship Rule Weighted against Fathers*, LAW360 (July 8, 2015), http://www.law360.com/articles/676918/2nd-circ-axes-citizenship-rule-weighted-against-fathers (noting the circuit split).

[100] Brief for Petitioner at 17, Lynch v. Morales-Santana, No. 15-1191 (Mar. 22, 2016).

[101] Brief for Respondent at 15–17, Lynch v. Morales-Santana, No. 15-1191 (Mar. 22, 2016).

[102] *See supra* notes 53–58, 67–73. However, as the Court of Appeals for the Second Circuit noted in *Lake v. Reno*, five of the nine Justices who split across concurring and dissenting opinions in *Miller* would have applied heightened scrutiny. *See* Lake v. Reno, 226 F.3d 141, 147–48 (2d Cir. 2000); *see also* Nguyen v. INS, 533 U.S. 53, 61 (2001) (citing Miller v. Albright, 523 U.S. 420, 434 n.11 (1998)) (determining that the Court need not resolve whether heightened scrutiny applies).

[103] *Nguyen*, 533 U.S. at 61, 64 (citing *Miller*, 523 U.S. at 434 n.11, 436).

III. EVERYTHING OLD IS NEW AGAIN: THE IRRATIONALITY OF TREATING FATHERS AND MOTHERS DIFFERENTLY FOR PURPOSES OF DERIVATIVE CITIZENSHIP

Given this background, it is counter-intuitive to suggest that rational basis review might provide a strategic option for feminists challenging these laws. Intermediate scrutiny is generally viewed as the higher, more stringent standard, more likely to result in striking an offending law or policy.[104] Yet that is exactly what this article suggests. Recent case law involving marriage equality has demonstrated the strength of the "rational basis with bite" ("RBWB") standard.[105] Compared to the RBWB approach, the current version of intermediate scrutiny is riddled with exceptions and limitations—exceptions that inhibit the standard's utility as a tool for evaluating the few remaining sex-based laws, many of which are ostensibly framed by biological differences between the sexes.[106] Indeed, a number of observers have commented on the relative strength of this "new rational basis" review, with some suggesting that it is a more potent and demanding standard of review than intermediate scrutiny insofar as it seems to regularly lead to successful challenges to discriminatory laws.[107]

Importantly, this "new rational basis" review, i.e., RBWB, is also the "old" rational basis review that was once applied to sex-based classifications.[108] Case law that reviewed sex-based classifications prior to the emergence of intermediate scrutiny jurisprudence confirms that so-called "rational basis review" need not necessarily lead to upholding such classifications.[109]

Given the continued evolution of the traditional tiers of scrutiny, this article suggests that the application of RBWB analysis in sex discrimination equal protection cases be revisited.[110] Below, I

---

[104] *See* Brian L. Frye, Eldred *& the New Rationality*, 104 KY. L.J. ONLINE 1, 17–18 (2015).

[105] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015) (citations omitted); United States v. Windsor, 133 S. Ct. 2675, 2696 (2013); Lawrence v. Texas, 539 U.S. 558, 583 (2003) (citations omitted); *see also* Frye, *supra* note 104, at 13 (noting the emergence of a new rationality standard); Maxwell L. Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. (forthcoming 2017) (manuscript at 1, 4–5), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2745369 (arguing for the existence of five tiers of scrutiny, with RBWB ranked as more stringent than intermediate scrutiny).

[106] *See*, *e.g.*, Geduldig v. Aiello, 417 U.S. 484, 486, 494–95, 496–97 (1974) (citations omitted) (finding that pregnancy discrimination is not discrimination on the basis of sex).

[107] *See*, *e.g.*, Stearns, *supra* note 105 (manuscript at 4).

[108] *See id.* (manuscript at 11).

[109] *See id.*

[110] *See* Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481, 484–85, 491–93 (2004) (providing more analysis on the evolution of the three tiers and calling for a single

consider in greater detail how a challenge to the types of laws at issue in *Miller*, *Nguyen*, *Flores-Villar*, and *Morales-Santana* might fare under this increasingly important and effective type of heightened rational basis review.

A. The Importance of Reed *and* Frontiero

Feminist lawyers, particularly Justice Ruth Bader Ginsburg in her role as a leading ACLU lawyer, fought long and hard to achieve strict scrutiny for sex-based classifications.[111] They modeled their step-by-step campaign on the successful work of the NAACP Legal Defense and Educational Fund to achieve strict scrutiny for race-based classifications.[112] The feminist litigation campaign fell short of its ultimate goal, but nevertheless achieved judicial recognition that discrimination based on sex warrants skeptical scrutiny and can be upheld only with an "exceedingly persuasive justification."[113] As a member of the Supreme Court, Justice Ginsburg has continued to invoke the strongest forms of heightened scrutiny when examining sex-based classifications, and has hinted at her belief that the question of whether the strictest form of scrutiny might apply to such classifications is yet to be completely resolved or foreclosed.[114]

Prior to the Court's articulation of the intermediate scrutiny standard, however, at least two Supreme Court cases applied rational basis review to strike down sex-based classifications: *Reed v. Reed*[115] and *Frontiero v. Richardson*.[116]

In *Reed v. Reed*, the Court unanimously found that one such sex-based classification, an Idaho state law giving men precedence over

level of scrutiny).

[111] *See* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 159, 162–63 (2002) (detailing Justice Ruth Bader Ginsburg's time as a ACLU lawyer); Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41, 42 (2013) (discussing Justice Ruth Bader Ginsburg's fight to achieve strict scrutiny for sex classifications).

[112] *See* Michael J. Klarman, *A Celebration of Justice Ruth Bader Ginsburg: Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J. L. & GENDER 251, 254 (2009) ("Ginsburg . . . acknowledged . . . [that she was] 'inspired by the NAACP Legal Defense and Education Fund's example.'").

[113] *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730–31 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[114] *See*, *e.g.*, United States v. Virginia, 518 U.S. 515, 519, 533 (1996) (Ginsburg, J.) ("The State must show '*at least* that the [challenged] classification [meets the intermediate scrutiny standard] . . . .'" (emphasis added)).

[115] Reed v. Reed, 404 U.S. 71, 75–77 (1971).

[116] Frontiero v. Richardson, 411 U.S. 677, 688, 690–91 (1973).

women as estate trustees, was irrational.[117] The Court began by identifying the question presented: "[W]hether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the state statute]."[118] Importantly, the Court concluded that there was "some legitimacy" to the government's assertion that the scheme reduced the workload of the probate courts.[119] But "some legitimacy" was not enough to meet the rationality standard applied in the case.[120] The Court continued: "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ."[121] A more persuasive explanation was required, even under rational basis review.

The Court continued in this vein in *Frontiero v. Richardson*. The question presented concerned "the right of a female member of the uniformed services to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and medical and dental benefits under [federal statutes] . . . on an equal footing with male members."[122] The government argued that "administrative convenience" and efficiency supported the rigid categories, since most dependents were female.[123]

The *Frontiero* Court split on the issue of the standard of review, but ultimately struck down the statute on grounds of irrationality.[124] Eight Justices were prepared to strike down the statute—the sole dissenter was Justice Rehnquist—but only four Justices adopted heightened scrutiny.[125] An eloquent, and much-quoted, opinion by Justice Brennan noted the "romantic paternalism" that often put women in a cage rather than on a pedestal, and concluded that sex should be treated comparably to other suspect classifications.[126] Justice Brennan was joined by Justices Douglas, White, and Marshall.[127] The other four Justices, including Justice Stewart,

[117] *See Reed*, 404 U.S. at 76–77.
[118] *Id.* at 76.
[119] *See id.*
[120] *See id.* at 76–77.
[121] *Id.* at 76.
[122] Frontiero v. Richardson, 411 U.S. 677, 678 (1973).
[123] *See id.* at 688–89.
[124] *See id.* at 690–92.
[125] *See id.* at 677.
[126] *See id.* at 677, 684, 688.
[127] *See id.* at 678.

whose terse concurrence was critical to the ultimate judgment, found that the law at issue was irrational, citing *Reed v. Reed*.[128] As in *Reed*, administrative convenience, even when based on social realities, was insufficient to meet even rational basis review.[129]

B. The Increased Bite of Rational Basis

During the period when *Reed* and *Frontiero* were decided, "rational basis review" was generally quite deferential to the government's proffered rationale for a challenged statute.[130] In striking down laws based on rational basis review, rather than upholding them, *Reed* and *Frontiero* were regarded as aberrations.[131] Yet especially after *Frontiero*'s flirtation with heightened scrutiny, it seemed unsurprising when a majority of the Supreme Court in *Craig v. Boren*—reviewing sex discrimination in the regulation of beer sales—approved the application of heightened scrutiny to sex-based classifications.[132] As the *Craig* Court explained, to be upheld, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[133]

Cases following *Craig* applied this heightened "intermediate" scrutiny to strike down a number of sex-based classifications in areas such as education and jury selection.[134] However, the Court also used the loose, intermediate nature of the standard to carve out a number of exceptions in which sex-based classifications might still be permitted. In *Rostker v. Goldberg*,[135] a case which is still good law despite the changes in women's military participation that could undermine its rationale, the Court deferred to the government and found that sex-based military assignments were sufficient to justify sex-based selective service laws, even under heightened scrutiny.[136]

---

[128] *See id.* at 691 (Stewart, J., concurring) (citing Reed v. Reed, 404 U.S. 71 (1971)); *id.* at 691–92 (Powell, J., concurring) (citing *Reed*, 404 U.S. at 71).

[129] *See Frontiero,* 411 U.S. at 690–91 (citing *Reed*, 404 U.S. at 76, 77).

[130] *See, e.g.*, Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 L. & INEQ. 381, 403–04 & n.143 (1994).

[131] *See*, *e.g.*, *id.* at 391 n.59.

[132] *See* Craig v. Boren, 429 U.S. 190, 197–98, 200 (1976); *see also id.* at 218 (Rehnquist, J., dissenting) (alleging that the majority applied intermediate scrutiny).

[133] *Id.* at 197 (majority opinion).

[134] *See, e.g.*, J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 146 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 721–22, 723 (1982).

[135] Rostker v. Goldberg, 453 U.S. 57 (1981).

[136] *See id.* at 69–71, 83 ("No one could deny that under the test of *Craig v. Boren*, . . . the Government's interest in raising and supporting armies is an 'important governmental interest.'").

In *Geduldig v. Aiello* and *Bray v. Alexandria Women's Health Clinic*,[137] the Court formulated the position that pregnancy-based discrimination was not equivalent to sex-based discrimination for equal protection purposes.[138] In *Geduldig*, where the claim arose under the Constitution, the Court upheld pregnancy-based classifications as valid under rational basis review, concluding that pregnancy-based distinctions are "noninvidious" and therefore not subject to heightened scrutiny.[139] In *Bray*, a case charging that a conspiracy to frustrate abortions violated the Ku Klux Klan Act, the Court confirmed its view that pregnancy-based distinctions are not sex-based.[140] Writing for the majority in *Bray*, Justice Scalia quoted the *Geduldig* Court to underscore his position: "While it is true, . . . that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[141]

During the same period that intermediate scrutiny developed, however, rational basis review did not remain static. Rather, the RBWB standard continued to develop in cases in which no traditional suspect class was identified. In *U.S. Department of Agriculture v. Moreno*,[142] the Court struck down food stamp restrictions on households with "unrelated persons" based on its assessment that the policies were motivated by animus against "hippies."[143] In *City of Cleburne v. Cleburne Living Center*,[144] the Court used rational basis review to strike down a zoning law that discriminated on the basis of disability.[145] Most recently, the Court declined to extend heightened scrutiny to classifications based on sexual orientation, while at the same time using rational basis review to strike down restrictive marriage and tax laws.[146] In making these rulings, the Court illuminated the relevant inquiry when rationality is at issue. In particular, the Court examined whether discriminatory rules are

[137] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

[138] *See id.* at 271; Geduldig v. Aiello, 417 U.S. 484, 486, 494 (1974).

[139] *See Geduldig*, 417 U.S. at 496.

[140] *See Bray*, 506 U.S. at 267, 271.

[141] *Id.* at 271 (quoting *Geduldig*, 417 U.S. at 496 n.20).

[142] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[143] *See id.* at 534.

[144] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

[145] *See id.* at 435; *see also* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 614–15 (1999) (providing an analysis of *Cleburne*'s impact).

[146] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2682 (2013) (applying rational basis review to a tax law case); Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 543–44, 547 (2016) (discussing the application of rational basis review to sexual orientation claims).

based on "bare animus," striking them when the challenged rules or practices and the lines drawn to enforce them seem motivated by fear or stereotypes rather than rational policy goals.[147] As a result of these cases, at least one commentator suggested that the RBWB standard is actually a higher standard of review than intermediate scrutiny[148]—not least because RBWB generally results in striking discriminatory laws and policies.

The issue of animus has been central to recent rational review cases, yet it has not figured prominently in the Court's sex discrimination jurisprudence. In theory, the heightened scrutiny accorded sex-based classifications would help "smoke out" illicit motivations.[149] In practice, however, the Court has often fixed on the fit between ends and means, taking at face value the explanations of efficiency, administrative convenience, or innate biological differences offered by the government for using sex as a criteria in, among others, derivative citizenship laws.[150] In this respect, the simpler and more straightforward inquiry of rational basis review has been more effective in recent years at protecting, and in some instances expanding, important individual rights.

In fact, there is a strong argument that sex-based citizenship laws would fall under the current, aggressive version of rational basis review that is applied in cases of sexual orientation discrimination. In *Obergefell v. Hodges*, for example, the Court did not require explicit evidence of hateful statements or acts in order to establish animus, but found ample evidence of it through the persistence of unjustified inequalities and ignorance fueling same-sex marriage restrictions, looking to the history of discrimination based on sexual orientation.[151] Even though, as the dissenters pointed out, there was likely no conscious animus in the minds of those who drafted the challenged marriage laws—same-sex marriage would be far from

[147] *See, e.g.*, *Windsor*, 133 S. Ct. at 2693 ("[B]are congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." (citing *Moreno*, 413 U.S. at 534–35)); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (citing *Moreno*, 413 U.S. at 534); Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, SCOTUSBLOG (Aug. 23, 2011), http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/ ("[T]he Court opts for rational basis 'with bite' when it discerns animus against a group.").

[148] *See* Stearns, *supra* note 105 (manuscript at 4–5).

[149] *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We apply strict scrutiny to all racial classifications to '"smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."' (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989))).

[150] *See*, *e.g.*, Nguyen v. INS, 533 U.S. 53, 62, 64–65 (2001).

[151] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2603–04 (2015) (citations omitted) (providing a historic perspective on equal protection claims).

their experiences and outside of their imaginations—the impact of the restrictive laws was to show animus through the persistent denial of individuals' access to a central legal right.[152] As the Court's majority concluded, this "hindsight" evidence of animus was sufficient to disallow the restrictions on same sex marriage: "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[153]

Similarly, in the laws at issue in *Miller*, *Nguyen*, *Flores-Villar*, and *Morales-Santana*, women and men are treated differently because of long-accepted norms of family structure and parental roles that were not questioned by the laws' drafters but that would be unacceptable today.[154] Indeed, in *Obergefell*, the Court re-characterized a parallel set of sex-based classifications in marriage—a norm that existed at one time in the twentieth century—as "invidious," adding: "These classifications denied the equal dignity of men and women."[155] The *Obergefell* Court rejected claims that marriage lines could rationally be drawn to favor those couples that could procreate, instead noting that "[t]he constitutional marriage right has many aspects, of which childbearing is only one."[156]

Sex-based classifications in citizenship laws are of a piece. Just as in *Obergefell*, these laws serve to unnecessarily elevate sex-based distinctions as a legal criterion, thereby denying an important individual right to a class of citizens based on their sex. Indeed, one might paraphrase *Obergefell* to observe that "[parenthood] has many aspects, of which . . . [the event of birth] is only one."[157] In *Obergefell*, the Court looked behind admitted biological differences to accord equal dignity to the relationships of the couples involved.[158] Under RBWB, the Court might approach sex-based citizenship classifications from the same, broader perspective.

Likewise, the same variety of animus identified in *Obergefell*—a sort of conscious disregard or unthinking acceptance of discrimination—is also front and center in the derivative citizenship litigation. Historians have repeatedly shown that embedded sexual

[152] *See id.* at 2623 (Roberts, C.J., dissenting); *see also id.* at 2613 ("Marriage did not come about as [the] . . . result of a prehistoric decision to exclude gays and lesbians.").

[153] *Id.* at 2603 (majority opinion).

[154] *See* Collins, *supra* note 16, at 2136–37.

[155] *Obergefell*, 135 S. Ct. at 2603.

[156] *Id.* at 2601.

[157] *See id.*

[158] *See id.* at 2590–91.

stereotypes and assumptions shaped the sex-based citizenship laws, and that these discriminatory assumptions remain in the law today, tacitly accepted by the lawmakers who might change these laws.[159] After *Obergefell* and *Windsor*, this is discriminatory animus that would be sufficient to upend the sex-based citizenship laws under RBWB review, despite the arguments put forth by the government concerning administrative convenience, expense, and uncontestable sexual differences.

C. The Relevance of Dignity and Liberty to Citizenship Law

The recent sexual orientation cases have been particularly expansive in their description of the human dignity issues at stake when laws discriminate on the basis of such sexual orientation. Human dignity is a central concern when access to marriage is restricted, according to the *Obergefell* majority, and it also played an important role in the *Lawrence* and *Windsor* decisions.[160]

These cases suggest that identifying a dignitary injury can be a component of finding irrationality.[161] Certainly, such dignitary concerns are present in the sex-based citizenship cases.[162] As a threshold matter, denial of equality may itself be a violation of individual dignity.[163] Further, national citizenship is an undeniably important, and closely guarded, individual right, bound up closely with individual dignity. Indeed, unlike marriage, birthright citizenship is explicitly protected by the Constitution.[164] Not surprisingly, while recognizing the congressional power to shape access to citizenship, the Court has frequently acknowledged the importance of citizenship to individuals, and its special place as a

[159] *See* Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) ("Sex-based statutes . . . must be viewed . . . in the context of our Nation's 'long and unfortunate history of sex discrimination.'" (quoting J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 136 (1994))).

[160] *See generally* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (responding to Kenji Yoshino, *A New Birth of Freedom?;* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015)) ("*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* . . . ."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776 (2011) (discussing liberty-based dignity).

[161] *See Obergefell*, 135 S. Ct. at 2605 (quoting Schuette v. BAMN, 134 S. Ct. 1623, 1636–37 (2014)).

[162] *See*, *e.g.*, DEREK HEATER, A BRIEF HISTORY OF CITIZENSHIP 121 (2004); s*ee also* ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 139–40, 143 (2012) (discussing citizen rights relating to gender).

[163] *See*, *e.g.*, NICHOLAS SMITH, BASIC EQUALITY AND DISCRIMINATION: RECONCILING THEORY AND LAW 121, 123 (2011).

[164] *See* U.S. CONST. amend. XIV, § 1.

central legal right.[165] Citizenship is also recognized internationally as a core human right and an important element of human dignity vis-à-vis the nation-state.[166] When core issues of dignity are violated, and invidious animus—or at least, consciously accepted inequality—is the underlying rationale, RBWB is sufficient to strike down the offending statute, without the need to employ heightened scrutiny.[167]

D. Foreign Courts' Approaches to Sex-Based Classifications in Citizenship Laws

Interestingly, a series of foreign supreme courts, applying their own analyses to address sex-based citizenship laws, have found that such laws are irrational or lacking a reasonable basis.[168] For example, the Supreme Court of Canada struck down a law requiring that children born abroad to a Canadian mother undergo a security check when seeking citizenship, while those born abroad to a Canadian father were exempt from this requirement.[169] The court reviewed the sex-based classification under the nation's constitutional equality provision.[170] While agreeing that "establishing a commitment to Canada and safeguarding the security of its citizens" were "pressing" and "substantial" governmental objectives, the justices determined that the law was irrational.[171] "According to the court, 'the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nationbuilding or national security underlying the Citizenship

[165] *See, e.g.*, Rogers v. Bellei, 401 U.S. 815, 834–35 (1971) (quoting Schneider v. Rusk, 377 U.S. 163, 165 (1964)) (noting the dignity inherent to citizenship, whether through birth or naturalization); *Schneider*, 377 U.S. at 167 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963)) ("[Citizenship is] the 'most precious right . . . .'"); Perez v. Brownell, 356 U.S. 44, 63 (1958) (Warren, C.J., dissenting) (noting that the contour of citizenship rights is fundamental); Mackenzie v. Hare, 239 U.S. 299, 312 (1915) ("[C]itizenship is of tangible worth . . . .").

[166] *See, e.g.*, G.A. Res. 217 (III) A, art. 15, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to a nationality."). Note that international human rights law often uses "citizenship" and "nationality" interchangeably. *See, e.g.*, *Citizenship and Nationality*, INT'L JUST. RESOURCE CTR., http://www.ijrcenter.org/thematic-research-guides/nationality-citizenship/ (last visited Jan. 29, 2017); *see also* DALY, *supra* note 162, at 13 (noting the relationship between "membership" and "dignity").

[167] *See*, *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *see also* Yoshino, *supra* note 147 (arguing that the RBWB standard is sufficient to strike down marriage restrictions).

[168] This following discussion of foreign law is drawn from an amicus brief in the *Morales-Santana* case on which I served as counsel of record. *See* Brief for Equality Now et al. as Amici Curiae Supporting Respondent at 30–37, Lynch v. Morales-Santana, No. 15-1191 (Mar. 22, 2016).

[169] *See id.* at 30.

[170] *See id.*

[171] *Id.* at 31.

Act.'"[172]

The Supreme Court of Japan reached a similar conclusion in 2008.[173] "Specifically, the challenged law provided that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth could acquire Japanese nationality only if the parents married."[174] There was no marriage prerequisite for the out-of-wedlock child of a Japanese mother and a non-Japanese father.[175] The Japanese high court acknowledged the importance of ensuring ties between the out-of-wedlock child and Japan, but concluded that this rationale did not demonstrate the "reasonable relevance" required to pass constitutional muster.[176]

Finally, the Supreme Court of Nepal considered a sex-based citizenship law in 1994.[177] The court noted constitutional language suggesting that citizenship decisions are generally left to executive discretion.[178] However, the court opined that when the government policy violated a constitutional provision, it should demonstrate "reasonable cause" to support the policy.[179] In contrast, "the sex-based law at issue did not meet even the minimal test of reasonableness."[180]

IV. CONCLUSION

Feminist advocates and defense lawyers have been methodical about isolating *Nguyen* and attempting to restrict its precedential value to its specific facts involving the biological aspects of birth, paternity establishment, and citizenship.[181] Indeed, the Court has yet to follow the implications of *Nguyen* in subsequent cases, such as *Nevada Department of Human Resources v. Hibbs*,[182] involving sex stereotypes concerning caregiving.[183] That practice may continue.

[172] *Id.*
[173] *See id.* at 32.
[174] *Id.*
[175] *See id.*
[176] *See id.* at 32–33.
[177] *See id.* at 35 n.82, 39.
[178] *See id.* at 39.
[179] *See id.*
[180] *Id.*
[181] *See, e.g.*, Chlopak, *supra* note 5, at 997 (noting that the Court's superficial application rendered the decision hollow); *see also* Rachel K. Alexander, Nguyen v. INS*: The Supreme Court Rationalizes Gender-Based Distinctions in Upholding an Equal Protection Challenge*, 35 CREIGHTON L. REV. 789, 856 (2002) (noting that the case was a deviation and overall a questionable application of law).
[182] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).
[183] *See id.* at 736.

The case currently before the Court, *Morales-Santana*, presents facts involving physical presence that the Supreme Court may well find distinguishable from those in *Miller* and *Nguyen*, cases that were more closely aligned with physical differences.[184] Even hampered by the presence of only eight Justices, the respondent in *Morales-Santana* is hopeful that the arguments distinguishing *Nguyen* and supporting erasure of the distinctions between men's and women's physical presence requirements for purposes of derivative citizenship will prevail.[185]

But what about the *Nguyen* decision itself? The discussion above suggests that not only should it be isolated, but that the Court should reconsider its conclusions. First, the *Nguyen* decision is vulnerable even under the Court's RBWB review, given the poor fit between its ends and means. Second, the citizenship context mandates attention to the aspects of liberty and dignity that were ignored in *Nguyen*. The Court's decision in *Morales-Santana* may plant the seeds that will permit this eventual reconsideration.

Meanwhile, the very fact that RWBW review may provide a more fruitful platform for scrutinizing sex-based citizenship laws calls into question the continued reliance on the traditional three-tiered framework of constitutional equal protection analysis. Many alternatives have been suggested, from Professor Stearns' five-tier framework, to proposals that center on dignity rather than tier-based analysis.[186] The ongoing challenges to sex-based citizenship laws may provide an appropriate vehicle for testing out some of these alternative analytical frames in the context of sex discrimination.

As we look ahead to the potential of a more conservative, nine-Justice Supreme Court under a new presidential administration, some advocates may be concerned about raising new theories to address sex discrimination. Why not instead stick with intermediate scrutiny and try to strengthen it from within? But as set out above, the intermediate scrutiny analysis, always harder to pin down than its strict and rational siblings, seems to have run its course in a number of areas where sex discriminatory laws persist. A new

[184] *See, e.g.*, Morales-Santana v. Lynch, 804 F.3d 521, 525 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (discussing *de minimis* absences); Nguyen v. INS, 533 U.S. 53, 57 (2001) (discussing that the petitioner did not enter the country until six years of age); Miller v. Albright, 523 U.S. 420, 425 (1998) ("At least until after her [twenty-first] birthday, . . . [petitioner] never lived in the United States.").

[185] *See* Garrett Epps, *Testing Federal Power over Immigration*, ATLANTIC (Oct. 24, 2016), http://www.theatlantic.com/politics/archive/2016/10/testing-federal-power-over-immigration/505232/.

[186] *See, e.g.*, Stearns, *supra* note 105 (manuscript at 4–5); Yoshino, *supra* note 160, at 755, 776.

analysis is needed to address particularly those areas such as sex-based citizenship laws, military decision-making, and pregnancy-related regulation, where deference to government and biologically-tinged generalizations hold courts back from true heightened scrutiny. Rational basis with bite, successfully employed to address same-sex discrimination and developed in a context with powerful popular support, may prove to be an alternative worth exploring.