
NOTES

LEVELING UP OVER PLENARY POWER: REMEDYING AN IMPERMISSIBLE GENDER CLASSIFICATION IN THE IMMIGRATION AND NATIONALITY ACT

*Sabina Mariella**

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INTRODUCTION

The gender classification of § 1409 of the Immigration and Nationality Act, (“INA”) which governs the statutory citizenship of foreign-born, illegitimate children, is blatant: it places hurdles before unmarried, male United States

* J.D. candidate, Boston University School of Law, 2016; B.A., Wake Forest University, 2013. I would like to thank Professor Kristin Collins for her guidance in developing this Note, and the staff members of the Boston University Law Review for all of their hard work.

citizens attempting to transmit citizenship to their foreign-born children, but not before similarly situated female citizens.¹ The government's reasons for creating such a distinction rely on the generalization that mothers are default caretakers of children born out of wedlock, whereas fathers must demonstrate that they are willing to assume that role. The justifications are outdated, contrary to legislative history, and by no means "exceedingly persuasive."² Notwithstanding the Supreme Court's rigorous articulation of intermediate scrutiny in *United States v. Virginia*,³ the Supreme Court has upheld § 1409 three times,⁴ and in 2014 denied a petition for certiorari that would have provided the Court with the chance to reexamine the provision's constitutionality.⁵ In light of new evidence concerning the origins of the statutory scheme of § 1409, however, the Second Circuit recently ruled that § 1409's gender-based distinction violates equal protection in *Morales-Santana v. Lynch*.⁶ Within weeks of that decision, the Western District of Texas came to the same conclusion in *Villegas-Sarabia v. Johnson*.⁷ Those opinions and the evidence cited therein are likely to lead to another petition of certiorari, and may very well lead the Court to reconsider its conclusions concerning the constitutionality of § 1409.

Countless scholars have examined § 1409 through the lens of equal protection, and have found that the Supreme Court has examined the INA in a different light than other statutes that similarly rely on outdated gender stereotypes.⁸ The purpose of this Note, however, is not to articulate the glaring

¹ Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1139 (codified at 8 U.S.C. § 1409 (2012)). This Note will refer to the provision at issue as "§ 1409," but many of the sources cited within this Note refer to the provision as "§ 309" in accordance with its codification in the INA.

² *United States v. Virginia*, 518 U.S. 515, 531-32 (1996) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1996); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136-37 (1994)) (holding that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action," and that the classification be substantially related to that justification).

³ *Id.*

⁴ See *infra* Section I.B (chronicling the Supreme Court's review of § 1409).

⁵ *Pierre v. Holder*, 135 S. Ct. 58 (2014) (denying certiorari).

⁶ 792 F.3d 256, 270 (2d Cir. 2015).

⁷ No. 5:15-CV-122-DAE, 2015 WL 4887462, at *1 (W.D. Tex. Aug. 17, 2015).

⁸ There is extensive literature examining the constitutionality of § 1409, and the roles of both the courts and Congress. See, e.g., Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405 (2013) (comparing the Court's treatment of challenges to § 1409 to its treatment of other cases dealing with unwed parents and their children); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014) [hereinafter Collins, *Illegitimate Borders*] (offering an extensive historical account of the racially nativist policies behind statutes governing the citizenship status of children born to American parents outside of the U.S.); Stephen Kanter, *Brevity is the Soul of Wit*: Nguyen

unconstitutionality of the gender classification of the INA. Instead, this Note assumes that § 1409 is unconstitutional under the heightened scrutiny afforded gender-based classifications, and, as explained below, specifically examines the role that the plenary power doctrine plays in the remedial context.

The judge-made plenary power doctrine affords Congress broad discretion in creating immigration and naturalization legislation and thus courts often grant extreme deference to Congress's choices when litigants challenge the constitutionality of such legislation.⁹ But § 1409 of the INA is neither an immigration statute nor a naturalization statute—it is a derivative citizenship statute that governs when foreign-born children acquire citizenship *at birth*, rather than when those foreign-born children may be admitted to or removed from the United States.¹⁰ Whether Congress's plenary power extends to the

is Dead, 16 LEWIS & CLARK L. REV. 1305 (2012) (arguing that the equally divided *Flores-Villar* Court signaled an implicit overruling of *Nguyen* and a stronger commitment to gender equality); Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. 181 (2000) (alleging that the *Miller* opinion suggests that in the immigration context, a father's parenting role is reduced to a financial obligation); Linda Kelly, *Republic Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557 (2000) (analyzing the power of gender stereotypes in immigration law generally); 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 (arguing against using the plenary power doctrine as a basis for deferential review of immigration legislation after *Miller*); Katharine B. Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999) (critiquing the *Miller* opinion from a family law perspective); Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000) [hereinafter Collins, *When Fathers' Rights are Mothers' Duties*] (exploring the effect of the historical doctrine of coverture on § 1409 and other parenting-related laws). Section I.A, *infra*, provides a brief summary of some of the arguments these scholars have posed.

⁹ See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 791-92 (1977) (recognizing that "Congress' power to fashion rules for the admission of aliens [is] 'exceptionally broad,'" and thus holding that § 101 of the Immigration and Nationality Act of 1952 was constitutional); *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002) (explaining that when the plenary power doctrine operates, "courts have sustained forms of discrimination and deprivations of process that would otherwise fail the constitutional laugh-test").

¹⁰ *Miller v. Albright*, 523 U.S. 420, 480 (1998) (Breyer, J., dissenting) (comparing the INA's definition of "naturalization" with the meaning of "citizenship at birth"); Brief for the National Immigrant Justice Center and the American Immigration Lawyers Ass'n as Amici Curiae Supporting Petitioner at 16, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (No. 09-5801) [hereinafter Brief for the National Immigrant Justice Center] (explaining that naturalization and citizenship are distinct statutory concepts).

regulation of citizenship, and thus to the provision at hand, is an open question.¹¹ Courts and the government, however, have assumed that Congress's plenary power does extend to citizenship, thus placing derivative citizenship in the same category as immigration and naturalization.¹² Accordingly, as then-Professor Cornelia Pillard and Professor Alexander Aleinikoff have recognized, the plenary power doctrine has resulted in a substantively diluted scrutiny of § 1409's gender classification, even though such sex-based classifications are typically reviewed under heightened scrutiny.¹³ For example, in *Nguyen v. INS*,¹⁴ an opinion analyzing a challenge to § 1409 in 2001, the Supreme Court purported to employ intermediate scrutiny *without* any such deference to Congress, yet still failed to hold the

¹¹ This distinction is not the focus of this Note, but it nevertheless provides a strong argument that the plenary power doctrine does not apply to § 1409 at all. For such an argument, see *Villegas-Sarabia*, 2015 WL 4887462, at *6-7 (stating that the petitioner is not challenging "the denial of an application for immigration status or any other government action that could be said to implicate the congressional 'power to admit or exclude foreigners'"); see also *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting) ("The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place."); *Miller*, 523 U.S. at 477-78 (Breyer, J., dissenting) (arguing that statutes that confer citizenship at birth do not "involve the transfer of loyalties that underlies the naturalization of aliens, where precedent sets a more lenient standard of review"); *Morales-Santana*, 792 F.3d at 264-65 ("Because Morales-Santana instead claims preexisting citizenship at birth, his challenge does not implicate Congress's 'power to admit or exclude foreigners"); Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in Flores-Villar v. United States*, 91 B.U. L. REV. 1485, 1487 (2011) [hereinafter Collins, *A Short History of Sex and Citizenship*] ("But derivative citizenship laws do not involve 'naturalization' in any traditional respect: the child who qualifies as a citizen under these laws is not considered a stranger to the nation who must shed one citizenship to don another. Rather, he or she is considered a citizen at birth, and no ceremonial attestation of national allegiance is required."). *Contra* Pillard & Aleinikoff, *supra* note 8, at 48 ("[D]espite our intuition that birthright citizenship is qualitatively different from naturalization or admission as an immigrant, it is difficult to construct a persuasive case for limiting the application of usual constitutional norms solely to [derivative citizenship] statutes.").

¹² Pillard & Aleinikoff, *supra* note 8, at 42 (citing *Rogers v. Bellei*, 401 U.S. 815, 830 (1971)) ("In confronting this conundrum, the Court has determined that such statutes must be exercises of the naturalization power."). Cornelia Pillard has subsequently been appointed to the United States Court of Appeals for the D.C. Circuit.

¹³ See, e.g., *id.* at 40 (explaining that the plenary power doctrine might result in the underenforcement of equal protection principles); see also Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 232 n.50 (2003) ("The doctrine may nevertheless have influenced the majority's willingness to sanction facial discrimination.").

¹⁴ 533 U.S. 53 (2001).

provision unconstitutional.¹⁵ Plenary power, however, also affects the debate in other ways.

The contribution of this Note to existing scholarship is to recognize that in addition to affecting the substantive question of whether § 1409 violates principles of equal protection, the plenary power doctrine has also affected what the Second Circuit has recently described as “the most vexing problem in this case”:¹⁶ the remedial options. Usually, when the Court holds that a statutory gender classification violates equal protection, it also provides for a temporary way to equalize the provision while Congress crafts a gender-neutral alternative to the discriminatory provision. The Court can achieve equality either by extending the benefit at hand to the group from whom it has been withheld—“leveling up”—or by denying both groups the benefit—“leveling down.”¹⁷ Either option would align the provision with formal equality: each group would have equal access to the contested benefit, and the impermissible gender-based classification would no longer exist.

In cases involving underinclusive statutes that violate equal protection, federal courts almost always level up and extend the benefit to the class from whom it has been withheld.¹⁸ In assessing the constitutionality of § 1409, however, the Supreme Court has hesitated to order a remedy that would extend, rather than nullify, the benefits of § 1409 currently afforded only to unmarried women. Because of Congress’s plenary power over immigration and naturalization, leveling up seems more “intrusive” than in other contexts where the benefit in question involves something other than citizenship, such as money. This Note argues that leveling up upon finding § 1409 unconstitutional need not be as intrusive as the government has suggested in its briefs. Specifically, this Note contends that: (1) the government has exaggerated the stated consequences of leveling up, and (2) the government has only discussed leveling up in its most extreme sense, and has not acknowledged that more modest extension remedies may be available to the Court.

¹⁵ *Id.* at 60-61.

¹⁶ *Morales-Santana*, 792 F.3d at 270.

¹⁷ See e.g., *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring) (“Where a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by [the] exclusion.”); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 247 (1931); *Nat’l Life Ins. Co. v. United States*, 277 U.S. 508, 534-35 (1928) (Brandeis, J., dissenting).

¹⁸ *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (recognizing that extension is ordinarily the proper remedy); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (“In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course.”).

Part I of this Note addresses the statute and briefly summarizes the problems scholars have recognized with § 1409's sex-based classification. Part II summarizes the two black-and-white remedial options available if § 1409 were declared unconstitutional—leveling up versus leveling down—and illustrates why leveling down has historically been the wrong answer.¹⁹ Part III addresses how plenary power colors the issue of remedies, why the government is so vehemently opposed to extending the benefit that the statute currently confers on women to men, and how the government has overstated the potential consequences of leveling up. Part IV suggests two intermediate remedies to demonstrate that in order to level up, the Court need not completely supersede Congress's plenary power over immigration, naturalization, and citizenship. Finally, Part V of this Note turns to Congress's responsibility to redraft § 1409 in a gender-neutral manner, and argues that leveling up is the best way to achieve gender equality.

I. THE IMMIGRATION AND NATIONALITY ACT AND ITS CHALLENGES

United States birthright citizenship is acquired in one of two ways. The Fourteenth Amendment provides for the first method—*jus soli* citizenship—in which persons born within the United States acquire citizenship automatically.²⁰ The second method applies to those born outside of the United States, who may only acquire citizenship by statute. Such statutory citizenship is commonly referred to as *jus sanguinis* or derivative citizenship.²¹ For children born outside of the United States to married parents, one of whom is a United States citizen, the applicable statutory provision is 8 U.S.C. § 1401(g). Section 1401(g) imposes a residency requirement on the citizen parent, which is currently five years, two of which must be after reaching the age of fourteen.²²

For children born outside of the United States to an unmarried citizen mother, the residency requirement of § 1401(g) does not apply. Instead, the applicable provision is the more generous 8 U.S.C. § 1409(c). Under that

¹⁹ While not expressly addressed in the Supreme Court's opinions, the parties have raised this issue in their briefings and at oral arguments. Transcript of Oral Argument at 20-26, 41-43, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (No. 09-5801) [hereinafter *Flores-Villar* Oral Argument]; Brief for the United States at 41-52, *Flores-Villar*, 131 S. Ct. 2312 (No. 09-5801) [hereinafter United States' Brief in *Flores-Villar*]; Brief for the National Immigrant Justice Center, *supra* note 10, at 14-15; Transcript of Oral Argument at 48-50, *Nguyen*, 533 U.S. 53 (No. 99-2071) [hereinafter *Nguyen* Oral Argument]; Brief for the Respondent at 45-49, *Nguyen*, 533 U.S. 53 (No. 99-2071) [hereinafter Respondent's Brief in *Nguyen*]; Brief for the Respondent at 46-49, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060) [hereinafter Respondent's Brief in *Miller*].

²⁰ U.S. CONST. amend. XIV, § 1, cl. 1; *see also* Collins, *A Short History of Sex and Citizenship*, *supra* note 11, at 1487.

²¹ Collins, *A Short History of Sex and Citizenship*, *supra* note 11, at 1487 n.14.

²² 8 U.S.C. § 1401(g) (2012).

provision, a mother need only have been “physically present in the United States or one of its outlying possessions for a continuous period of one year” in order to transmit citizenship to her foreign-born child.²³ In practice, the provision constitutes a near automatic transmission of *jus sanguinis* citizenship from the unmarried citizen mother to her foreign-born child.

When the foreign-born child’s citizen parent is an unmarried father, however, not only must the father satisfy the residency requirement of § 1401(g), but he must also fulfill the additional requirements of § 1409(a).²⁴ That provision requires: (1) clear and convincing evidence of a blood relationship between the father and child; (2) that the father was a citizen at the time of the child’s birth; (3) agreement in writing to provide financial support for the child during his or her minority; and (4) that the father, before the child’s eighteenth birthday, either legitimize the child, acknowledge paternity in writing under oath, or have a court adjudicate his paternity.²⁵ Again, the statute requires no affirmative action by an unmarried citizen mother, who need only have been present in the United States for a year in order to transmit citizenship to a foreign-born child.²⁶ The practical consequences of this distinction are immense. Not only does it diminish the right of fathers to transmit citizenship to their children, but it also inadvertently penalizes those children who have no choice in the marital status of their parents, or control over which parent happens to be a citizen.²⁷

A. *The Arguments for Unconstitutionality*

The sex-based classification of § 1409 treats two identically situated persons differently, and thus scholars have maintained that the provision raises serious equal protection concerns.²⁸ The classification is problematic for two distinct yet related reasons. First, § 1409 codifies stereotypes about parental roles. Requiring fathers to take affirmative steps and fulfill a longer residency requirement in order to transmit citizenship to foreign-born, nonmarital children relies on the assumption that those fathers are unlikely to choose to have more than attenuated relationships with such children.²⁹ Mothers, on the other hand, are assumed to be natural caregivers, and are much more likely to develop meaningful relationships with those children.³⁰ Thus, mothers do not

²³ *Id.* § 1409(c).

²⁴ *Id.* § 1409(a).

²⁵ *Id.*

²⁶ *Id.* § 1409(c).

²⁷ For an example of § 1409’s practical consequences and a description of whom it currently affects, see *infra* text accompanying notes 150, 198, 201.

²⁸ See *supra* note 8 and accompanying text.

²⁹ Brief for Professors of History, Political Science, and Law as Amici Curiae Supporting Petitioner at 20, *Flores-Villar v. U.S.*, 131 S. Ct. 2312 (2011) (No. 09-5801) [hereinafter Brief for Professors of History].

³⁰ *Miller v. Albright*, 523 U.S. 420, 482-83 (1998) (Breyer, J., dissenting).

need “to provide proof of maternity, pledge support for their minor children, satisfy a child residency requirement, or satisfy a lengthy age-delimited parental U.S. residency requirement”³¹

As Pillard and Aleinikoff have demonstrated, § 1409 is both overinclusive and underinclusive.³² It is overinclusive because it places hurdles in front of unwed citizen fathers that do in fact have relationships with their children that the provision is purportedly meant to promote.³³ At the same time, it is underinclusive because it fails to require anything of unwed citizen mothers who, contrary to prevailing stereotypes, have no relationship with their foreign-born children.³⁴

It is no longer accurate to say that unmarried fathers rarely choose to support and care for their children. In 2011, 23% of single-parent households in the U.S. were headed by a single father, compared to only 1.1% in 1970.³⁵ It is also inaccurate to say that a blood relationship between a mother and foreign-born child is always easier to prove than a blood relationship between a father and foreign-born child. Nearly one-third of all births abroad occur without birth certificates or proper documentation.³⁶ Even assuming *arguendo*, however, that it is true that very few unwed fathers of children born abroad raise those children, empirical support cannot justify sex-based classifications, especially when gender-neutral alternatives are available to achieve the government’s purported interests.³⁷ It is unnecessary and impermissible to equate “mothers” with “caretakers.” As Justices O’Connor and Breyer have argued, a gender-neutral statute, such as one that distinguishes between caretaker and noncaretaker parents, would achieve the same goals as § 1409

³¹ Brief for Professors of History, *supra* note 29, at 30.

³² Pillard & Aleinikoff, *supra* note 8, at 20.

³³ *See id.*

³⁴ *Id.* Regardless of whether men are present at the birth of their children, they may develop bonds with those children that are just as strong as the bonds between mothers and children. *See Caban v. Mohammed*, 441 U.S. 380, 389 (1979).

³⁵ Michelle L. Sudano, *Crossing the Final Border: Securing Equal Gender Protection in Immigration Cases*, 21 WM. & MARY BILL RTS. J. 957, 983 (2013).

³⁶ Pillard & Aleinikoff, *supra* note 8, at 27.

³⁷ *See, e.g., Nguyen v. INS*, 533 U.S. 53, 76 (2001) (O’Connor, J., dissenting) (citing *Craig v. Boren*, 429 U.S. 190, 199 (1976)) (“[O]verbroad sex-based generalizations are impermissible even when they enjoy empirical support.”); *Miller v. Albright*, 523 U.S. 420, 470 (1998) (Ginsburg, J., dissenting) (“[T]he Government’s observation that more United States citizen mothers of children born abroad out of wedlock actually raise their children than do United States citizen fathers . . . does not justify distinctions between male and female United States citizens who take responsibility, or avoid responsibility.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (“[T]he notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work . . .”).

currently does.³⁸ The statute therefore cannot permissibly classify parent-child relationships on the basis of sex and perpetuate stereotypes that should have been long ago abandoned.

The second problem with § 1409 is that the provision confers responsibilities on women based on the notion that children born out of wedlock are the sole responsibility of their mothers. This notion stems from the historical principle of coverture, as detailed in the work of Professors Kristin Collins, Martha Davis, and Laura Weinrib.³⁹ The statute frees men from responsibility if they prefer not to acknowledge their foreign-born children.⁴⁰ It is thus completely in the hands of the citizen fathers whether or not their foreign-born children will be able to successfully apply for United States citizenship later in life.⁴¹ Unwed citizen mothers who conceive a child abroad with a noncitizen, on the other hand, bear legal responsibility for their foreign-born children by the default assignment of their citizenship to their children at birth.⁴² The effect of the distinction therefore encourages men to conceive children outside of marriage, and compels women to bear the costs and the stigma of non-marital sex alone when men are unwilling to do so.

B. *The Opinions*

Despite the constitutional deficiencies of § 1409, the Supreme Court has sustained the provision on three occasions. Not one of these opinions satisfactorily concluded that § 1409 can survive the heightened scrutiny demanded of gender-based classifications. The first time the Supreme Court

³⁸ *Nguyen*, 533 U.S. at 81-83 (O'Connor, J., dissenting); *Miller*, 523 U.S. at 487 (Breyer, J., dissenting).

³⁹ Collins, *A Short History of Sex and Citizenship*, *supra* note 11, at 1495 (“[C]itizenship law perpetuates a system of sexual ethics that privileges men’s sexual prerogative outside marriage. . . . [And] the foreign mothers of nonmarital children fathered by Americans are left facing the burdens and social stigma of unwed motherhood alone.”); Collins, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 8, at 1685-93 (discussing the role of coverture in drafting American citizenship laws and the resulting gender classifications); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 82-84 (2003) (explaining that the doctrine of coverture allocated parental rights and responsibilities for “out-of-wedlock children” to the mothers because of the mothers’ “inherent connection to their children that unmarried men simply do not have”); Weinrib, *supra* note 13, at 251-52 (“From a family law relational perspective, § 1409(a) is reprehensible because it sanctions men’s sexual irresponsibility and allows men to objectify women by compelling them to bear the costs of sex.”). According to the principles of coverture, legitimate children were considered marital property belonging to husbands, and illegitimate children born out of wedlock were the responsibility of their mothers as “to protect men from unwanted paternal responsibilities.” Collins, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 8, at 1700.

⁴⁰ Collins, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 8, at 1700-01.

⁴¹ Pillard & Aleinikoff, *supra* note 8, at 22-23.

⁴² Collins, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 8, at 1702.

considered the constitutionality of § 1409 was in *Miller v. Albright*,⁴³ a 1998 decision issued only two years after the Court mandated a more rigorous application of heightened scrutiny to gender classifications in *United States v. Virginia*.⁴⁴ Justice Stevens's opinion for the Court in *Miller*, joined only by Justice Rehnquist, held that because women are always present at birth, and men often are not, the disparate requirements were substantially related to the government's interests in (1) ensuring a blood relationship between the parent and child, and (2) encouraging the opportunity for a parent-child relationship to develop while the child is a minor.⁴⁵ The opinion essentially relied on stereotypes, but was cloaked in a superficial examination of how men and women are not biologically similarly situated.⁴⁶

A majority of the justices stated in dicta that the provision could not withstand intermediate scrutiny.⁴⁷ The Court upheld the provision, however, because a majority of the justices did not think that the plaintiff had standing to bring an equal protection challenge.⁴⁸ If not for the issue of standing, the Court in 1998 likely would have struck down § 1409.

After *Miller*, a circuit split emerged as to § 1409's constitutionality. To resolve the conflict, the Supreme Court granted certiorari and issued another

⁴³ 523 U.S. 420 (1998). The Court addressed a similar challenge in 1977 in *Fiallo v. Bell*, 430 U.S. 787 (1977). In that case, the constitutional challenge was to § 1101, which provided special preferential immigration status to the children of citizen mothers, but not to children of citizen fathers. *Id.* at 788. The Court upheld the statute, but under a more deferential standard of review in light of Congress's plenary power over immigration and naturalization. *Id.* at 792 ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (internal quotation marks and citations omitted)).

⁴⁴ 518 U.S. 515, 532-33 (1996).

⁴⁵ *Miller*, 523 U.S. at 436, 438.

⁴⁶ See, e.g., Sudano, *supra* note 35, at 980.

⁴⁷ *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting) (recognizing that while the Court was divided regarding whether *Miller* had standing to sue, a majority of the Court agreed that "actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn," cannot survive heightened scrutiny). Justices Ginsburg, Souter, and Breyer dissented, finding that the statute's classification rests not on biological differences, but on "the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children." *Id.* at 482-83 (Breyer, J., dissenting). In Justice O'Connor's concurrence, joined by Justice Kennedy, she stated that while she did not believe the plaintiff had standing to sue, she did not agree with the majority's "assessment that the provision withstands heightened scrutiny. . . ." *Id.* at 451-52 (O'Connor, J., concurring).

⁴⁸ Justices O'Connor and Kennedy thought that *Miller* sought to bring a claim to vindicate the rights of her father, but could not satisfy the Court's requirements for third-party standing. *Id.* at 452 (O'Connor, J., concurring). Justices Scalia and Thomas concluded that the complaint should have been dismissed because the Court lacked the power to provide the relief requested—conferral of citizenship. *Id.* at 453 (Scalia, J., concurring). For a full discussion of this argument, along with a counterargument, see *infra* Section III.B.

opinion on the provision in *Nguyen v. INS*.⁴⁹ The Supreme Court again sustained the provision by a 5-4 vote.⁵⁰ Justice Kennedy wrote for the majority, seeming to apply intermediate scrutiny to uphold the provision's constitutionality.⁵¹ Unlike the *Miller* decision, *Nguyen* was not decided on standing grounds.⁵² The result was surprising because at least two circuit courts had understood the fractured *Miller* opinion to mean that § 1409 was unconstitutional.⁵³ As the dissenters pointed out, however, the *Nguyen* majority diluted the heightened standard of scrutiny articulated in *United States v. Virginia* without giving any explanation for doing so.⁵⁴ The purported important governmental interests at stake—assuring a biological relationship between parent and child and ensuring that parent and child have the opportunity to develop a relationship—were, and are, post hoc justifications of an impermissible gender classification. And as the Court stated in *United States v. Virginia*, justifications for a challenged gender-based classification “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”⁵⁵ The majority in *Nguyen* accepted the government's purported interests without examining the legitimacy of those interests or considering the *actual purposes* behind § 1409.⁵⁶ Such resignation to the stated governmental interests was a departure from precedent that required the Court to consider whether sex-based classifications are being used as a “proxy for other, more germane bases of classification.”⁵⁷ The majority also conceded that gender-

⁴⁹ 533 U.S. 53 (2001). The plaintiff in that case was Tuan Anh Nguyen, who was born in 1969 in Vietnam to a U.S. citizen father and a Vietnamese mother. *Id.* at 57.

⁵⁰ *Id.* at 56.

⁵¹ *Id.* at 60-61 (“The [challenged] classification serves ‘important governmental objectives and . . . the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996))).

⁵² *Id.*

⁵³ *Lake v. Reno*, 226 F.3d 141, 148 (2d Cir. 2000) (“As seven justices in *Miller* would have applied heightened scrutiny in these circumstances . . . we hold section 309(a) violates the equal protection rights of citizen fathers as guaranteed by the Fifth Amendment.”); *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122 (9th Cir. 1999) (“We agree [that § 1409(a)(3) and (a)(4) are unconstitutional] because a majority of the U.S. Supreme Court has effectively so declared.”).

⁵⁴ *Nguyen*, 533 U.S. at 74, 78-79 (O'Connor, J., dissenting) (arguing that the Court departed from heightened scrutiny of sex-based classifications by “gloss[ing] over the crucial matter of the burden of justification” and failing to consider the true purposes of § 1409).

⁵⁵ 518 U.S. 515, 533 (1996).

⁵⁶ In current, ongoing constitutional challenges to § 1409, the government stands behind the interests articulated in *Nguyen*. For a full examination of the actual purpose and legislative history of § 1409, see Collins, *Illegitimate Borders*, *supra* note 8.

⁵⁷ *Nguyen*, 533 U.S. at 79 (O'Connor, J., dissenting) (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)).

neutral alternatives were available for Congress to achieve its goals, yet dismissed those alternatives as irrelevant.⁵⁸ As Justice O'Connor pointed out, however, the availability of gender-neutral alternatives "is often highly probative of the validity of the classification" and usually results in the Court striking down the classification as unconstitutional.⁵⁹ While the majority's opinion seemed to address the constitutionality of § 1409 without explicitly according any special deference to Congress, its diluted application of equal protection analysis may have been the result of a hesitancy to abandon plenary power deference.⁶⁰

Only ten years after the *Nguyen* decision, the Court granted certiorari to reexamine the gender classifications of the INA in *Flores-Villar v. United States*.⁶¹ Although the specific statutory provision at issue in *Flores-Villar* was not the acknowledgement requirement of § 1409, but the residency requirement of § 1401(a)(7), the Ninth Circuit relied on *Nguyen* to find that the classification did not violate the Equal Protection Clause.⁶² *Flores-Villar* filed a petition for certiorari with the Supreme Court, and the Court affirmed, splitting 4-4.⁶³ The opinion is one line long: "The judgment is affirmed by an equally divided Court."⁶⁴ This statement provides no evidence as to over what the justices actually disagreed. The transcript of the oral argument before the Supreme Court, however, reveals a main point of concern that likely contributed to the weak decisions in *Miller* and *Nguyen*, as well. That concern pertains to what remedy would be afforded to the petitioner if a majority of the Court were indeed to find the provision to be unconstitutional. Justice Kennedy expressed this concern at oral argument:

⁵⁸ *Id.* at 63-64 (majority opinion).

⁵⁹ *Id.* at 78 (O'Connor, J., dissenting).

⁶⁰ Professor Peter Spiro, *supra* note 9, has argued that the *Nguyen* opinion pointed to a retreat from the plenary power doctrine. The opinion's diluted equal protection analysis, however, could be explained by the deference associated with plenary power, regardless of the absence of any explicit reference to the doctrine. See Nina Pillard, *Plenary Power Underground in Nguyen v. I.N.S.: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 847 (2001) (arguing that the *Nguyen* court was "employing the functional equivalent of plenary power deference without acknowledging that it [was] doing so").

⁶¹ 559 U.S. 1005 (2010). The petitioner, Ruben Flores-Villar, was born in Mexico in 1974 to a U.S. citizen father and a non-citizen mother. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008).

⁶² *Id.* at 993 ("[T]he answer follows from the Supreme Court's opinion in *Nguyen v. INS* . . . [where] the Court held that § 1409's legitimation requirements for citizen fathers, but not for citizen mothers, did not offend principles of equal protection.").

⁶³ *Flores-Villar v. United States*, 131 S.Ct. 2312, 2313 (2011). Justice Kagan recused herself because, before being appointed to the Court, she served as Solicitor General and wrote the government's brief in opposition to *Flores-Villar*'s petition for certiorari. See Collins, *A Short History of Sex and Citizenship*, *supra* note 11, at 1486 n.4.

⁶⁴ *Flores-Villar*, 131 S.Ct. at 2313.

We usually talk about substance first, remedy second. Do you think it's permissible, logically, for us to say that because the remedies here are so intrusive, that bears on our choice of whether or not we use intermediate or rational basis scrutiny, and because the remedies are so difficult, we are going to use rational basis scrutiny?⁶⁵

The remedies are “intrusive,” in the words of Justice Kennedy, because of Congress’s plenary power to regulate immigration and naturalization. While challenges to the statute arguably deal with the rights of citizens—unmarried citizen fathers—§ 1409 is a well-established piece of a naturalization scheme. If the Court were to find the provision unconstitutional, the potential result of removing the requirements of unmarried fathers would mean conferring citizenship “on thousands of foreign-born children with literally no connection to this country other than a blood relationship to a citizen father they have never known.”⁶⁶ Further, according to the government, federal courts do not have the “institutional competence” to remedy naturalization legislation while still accounting for the interests that Congress had in mind when enacting it.⁶⁷ In short, Congress is better equipped to construct and correct delicate schemes such as naturalization legislation, and the Court is therefore hesitant to “pull one strand if it will not be able to reweave the tapestry.”⁶⁸

II. REMEDIES: THE BLACK-AND-WHITE PICTURE

When the Supreme Court finds that a statute is unconstitutional, it cannot amend the statute, but must “serve as short-term surrogate for the legislature” and decide whether to extend or nullify the unconstitutionally discriminatory benefit.⁶⁹ This section illustrates how the Court has addressed this question in the past, and articulates reasons why the Court has generally preferred leveling up to leveling down.

⁶⁵ *Flores-Villar* Oral Argument, *supra* note 17, at 24; *see also* *Nguyen v. INS*, 533 U.S. 53, 72 (2001) (“There may well be potential problems with fashioning a remedy were we to find the statute unconstitutional.” (quoting *Miller v. Albright*, 523 U.S. 420, 451 (1998) (O’Connor, J., concurring))).

⁶⁶ Respondent’s Brief in *Miller*, *supra* note 19, at 47.

⁶⁷ *Id.* at 48. Sometimes, as was the case in *Heckler v. Mathews*, 465 U.S. 728, 734 (1984), the legislature will enact a specific severability clause that contemplates the invalidation of a particular provision of the statute and sheds light on the remedial option Congress prefers.

⁶⁸ Respondent’s Brief in *Miller*, *supra* note 19, at 47.

⁶⁹ Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 317 (1979); *see also* *Mathews*, 465 U.S. at 739 n.5 (“[T]he choice between ‘extension’ and ‘nullification’ is within the ‘constitutional competence of a federal district court.’” (quoting *Califano v. Westcott*, 443 U.S. 76, 91 (1979))); *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring) (stating the factors a court should consider in choosing between extension and nullification).

A. *The Options*

If the Court were to find § 1409 unconstitutional, it seems that it would have to replace the words “mother” and “father” with a gender-neutral term.⁷⁰ The Court would then have to choose to either “(1) nullify § 1409(c) and withdraw the benefit from children born abroad to unwed citizen mothers, or (2) extend § 1409(c) to apply to both men and women, thereby extending the benefit to children born abroad to unwed citizen fathers.”⁷¹ Depending on the Court’s choice, Congress can then respond by either repealing the extended provision or extending the nullified provision, as long as doing so would be constitutional.⁷²

In most Supreme Court opinions, the choice between extension and nullification is not discussed and only implicitly recognized. When considering *state* action or legislation, the Supreme Court, likely motivated by concerns sounding in federalism, has often avoided the question by remanding the remedial decision to state courts.⁷³ When the Supreme Court has reviewed a lower court’s finding that a *federal* statute violates equal protection, the Court has frequently affirmed without addressing that lower court’s order of extension rather than nullification. This was the case in *Weinberger v. Wiesenfeld*⁷⁴ and *Califano v. Goldfarb*,⁷⁵ both addressing challenges to gender-based distinctions between widows and widowers in the Social Security Act. In *Wiesenfeld*, the Court affirmed a District Court’s judgment that the Social Security Act’s provision regarding a mother’s insurance benefits violated the Equal Protection Clause of the Fifth Amendment in that it authorized benefits to widows with children in their care, but not to widowers with children in their care.⁷⁶ The Court, however, did not directly address the District Court’s decision to level up by enjoining the Secretary of Health, Education and

⁷⁰ For example, in *Califano v. Westcott*, 443 U.S. 76, 92 (1979), the Court extended social security assistance to children of unemployed fathers by replacing the “unemployed father” with “unemployed parent.”

⁷¹ Brief for the National Immigrant Justice Center, *supra* note 10, at 8. Justice Harlan analogized the difference between nullification and extension to the difference between an amputation and a graft. *Welsh*, 398 U.S. at 363-64 (Harlan, J., concurring).

⁷² *Flores-Villar* Oral Argument, *supra* note 19, at 20-21.

⁷³ See, e.g., *Orr v. Orr*, 440 U.S. 268, 283-84 (1979) (finding Alabama statute requiring men, but not women, to pay alimony unconstitutional and remanding to the Alabama courts to determine remedy); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975) (finding Utah statute requiring fathers to support female children until the age of eighteen, but male children until the age of twenty-one unconstitutional, and remanding to Utah courts to determine until what age fathers should be required to support their children); *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942) (finding Oklahoma statute requiring only certain classes of criminals to undergo sterilization unconstitutional, and remanding to Oklahoma courts to decide whether to “enlarge” or “contract” the class).

⁷⁴ 420 U.S. 636 (1975).

⁷⁵ 430 U.S. 199 (1977).

⁷⁶ *Wiesenfeld*, 420 U.S. at 637-39.

Welfare “from denying benefits . . . to widowers solely on the basis of sex and directing the [Secretary] to make payments to the plaintiff for such periods during which he would have been qualified to receive benefits but for [the unconstitutional provision].”⁷⁷ Similarly, in *Goldfarb*, the Supreme Court affirmed a judgment that the provision of the Social Security Act requiring widowers, but not widows, to show that they relied on their deceased spouse for at least half of their financial support in order to obtain benefits, was unconstitutional.⁷⁸ The Court again did not directly address the District Court’s order directing the Secretary to make payments to the plaintiff.⁷⁹

It is unclear why the decision to extend or nullify a benefit in question is more heavily debated and discussed by the parties and the Court in some cases, such as those dealing with the INA, but not in others, such as in *Wiesenfeld* and *Goldfarb*. One factor may be the nature of the contested benefit. In cases like *Wiesenfeld* and *Goldfarb*, extension of the benefit entails the expenditure of public funds to the aggrieved class, which Congress could “prospectively reduce, eliminate, or redistribute in response to a judicial expansion.”⁸⁰ For example, after the *Goldfarb* Court affirmed the District Court’s decision to level up, thus eliminating the dependency requirements for widowers’ benefits, Congress enacted an offset provision requiring benefits to be reduced by the amount of state government pensions that the applicant received in order to mitigate a drain on Social Security funds.⁸¹ In other cases, extension may involve granting a benefit that Congress cannot rescind, such as United States citizenship.⁸²

A second consideration, offered by Justice Ginsburg after briefing the case for extension in *Wiesenfeld* as an ACLU attorney, is “the size of the class extension would encompass, in comparison to the size of the class the legislature included.”⁸³ When a large class enjoys a benefit, and a member of a substantially smaller class seeks access to that benefit, it would be peculiar for

⁷⁷ *Wiesenfeld v. Sec’y of Health, Educ. & Welfare*, 367 F. Supp. 981, 991 (D.N.J. 1973).

⁷⁸ *Goldfarb*, 430 U.S. at 202.

⁷⁹ *Goldfarb v. Sec’y of Health, Ed. & Welfare*, 396 F. Supp. 308, 309 (E.D.N.Y. 1975).

⁸⁰ Respondent’s Brief in *Miller*, *supra* note 19, at 82. See Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROBS. 115, 123 (1975) [hereinafter *Extension Versus Invalidation*] (“Implicit recognition [of extension] occurs most frequently today in cases involving the extension of publicly funded statutory benefits, such as a welfare benefit.”); see also *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (extending benefits of legislation by eliminating dependency requirement for women of uniformed services seeking to obtain benefits for their husbands).

⁸¹ An exception from the pension offset was the contested benefit in *Mathews*. *Heckler v. Mathews*, 465 U.S. 728, 730-33 (1984).

⁸² Respondent’s Brief in *Miller*, *supra* note 19, at 49 (citing *Afroyim v. Rusk*, 387 U.S. 253 (1967)) (discussing the “irreversibility” of leveling up and granting citizenship to the petitioner); see also *infra* note 95 and accompanying text (stating that Congress cannot rescind citizenship once granted).

⁸³ Ginsburg, *supra* note 69, at 318.

a party to argue that the benefit should be withdrawn from the large class, rather than extended to the class that seems slight in comparison.⁸⁴ Extension in such a situation would be less disruptive of the statutory scheme than where doing so “would yield a large percentage increase in persons covered by the statute.”⁸⁵ For example, in *Wiesenfeld*, extension formally would have doubled the number of persons eligible for social security benefits. The Court likely recognized, however, that in practice, “[g]iven the present structure of the family, the number of widowed fathers who will choose to stay at home with their children may turn out to be small.”⁸⁶ The same was true in *Mississippi University for Women v. Hogan*,⁸⁷ where extending the benefit seemed to be the natural course of action even though it in form doubled the number of persons eligible for admission to the previously female-only nursing school; practically, leveling up only extended the benefit to the small number of males who actually sought to attend nursing school.

In cases where the remedial choice *has* elicited substantial discussion in Supreme Court opinions, the Court has treated it as a policy judgment, attempting to choose the remedy that aligns most with the “residual policy” of the underlying statutory scheme.⁸⁸ Here, the “residual policy” that the Court would consider is the INA’s special exception for unmarried citizen mothers that makes the transmission of citizenship to their foreign-born children less burdensome. In choosing a remedy, the Court must effectively decide whether, in order to render the statute constitutional, Congress would have eliminated that policy altogether, or extended it to unmarried men. While the INA contains a general severability clause demonstrating Congress’s intent to allow the Court to strike down unconstitutional pieces of the legislative scheme without striking down the entire statute,⁸⁹ it does not provide any indication

⁸⁴ *Id.*

⁸⁵ *Id.*; accord *Extension Versus Invalidation*, *supra* note 80, at 128-29.

⁸⁶ *Extension Versus Invalidation*, *supra* note 80 at 130 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652-53 (1975)). That note goes so far as to propose that when extension would “result in a large percentage increase in the number of persons covered, [a court] may prefer to avoid the necessity of considering the question of extension altogether by upholding the validity of the statute as written.” *Id.* at 129.

⁸⁷ 458 U.S. 718 (1982) (holding that state-supported universities that denied men admission to nursing programs violated the Equal Protection Clause).

⁸⁸ *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (“[T]he court should not, of course, ‘use its remedial powers to circumvent the intent of the legislature,’ and should therefore ‘measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.’” (citations omitted)); see also Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1185 (1985) (“Courts currently approach this remedial enterprise . . . [by] implement[ing] whichever remedy best furthers the legislative purposes animating the underlying statutory scheme.”).

⁸⁹ *Nguyen v. INS*, 533 U.S. 53, 95 (2001) (O’Connor, J., dissenting) (citing *INS v. Chadha*, 462 U.S. 919, 932 (1983)).

about *which* of the two problematic provisions at issue here the Court should sever.⁹⁰

The government has argued, however, that either remedial option would in some way contravene legislative intent.⁹¹ Leveling up—and thus severing § 1409(a)—would entail extending the benefit of the more lenient residency requirement of § 1409(c) and of freedom from the requirements of § 1409(a) to unmarried citizen fathers of foreign-born children.⁹² This solution, as the government has argued, would place children born abroad out of wedlock in a better position than children born abroad in wedlock, since the latter would still be subject to the longer residency requirement of § 1401(g).⁹³ The exception created for unmarried mothers would “swallow the rule,” which Congress could not have intended.⁹⁴

Leveling down—and thus severing § 1409(c)—would entail withdrawing the benefit of the shorter residency requirement and the absence of special support and acknowledgement requirements that unmarried citizen mothers of foreign-born children currently enjoy. Mothers would then be subject to the acknowledgment requirements of § 1409(a) and the residency requirement of § 1401(g). Further, in order to truly level down, the Court would in effect strip citizenship from children who have already reaped the benefits of having a citizen mother, rather than a citizen father. Neither the Court nor the

⁹⁰ The severability clause states: “If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.” Immigration and Naturalization Act of 1952, Pub. L. No. 414, § 406, 66 Stat. 281. Such a severability clause essentially renders a statute divisible so that an “invalid part may be dropped if what is left is fully operative as law . . . and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained.” *Champlin Ref. Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 235 (1932); *see also, e.g., Welsh v. United States*, 398 U.S. 333, 364-66 (1970); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 639 (2008).

⁹¹ *See* Pillard & Aleinikoff, *supra* note 8, at 68 (“Any plausible rule that the Department might craft to overcome the constitutional problem would appear either to deny citizenship to persons who would be eligible for it under the current statute or to entitle persons to citizenship in a manner inconsistent with congressional intent.”).

⁹² Severing § 1409 in its entirety has not been suggested. Doing so would change the dynamic of the statutory scheme as a whole, and would be contrary to the congressional policy of creating a statutory distinction between children born in wedlock and children born out of wedlock for purposes of *jus sanguinis* citizenship. *See id.* at 66-68. While that distinction arguably unconstitutionally discriminates on the basis of legitimacy, as well, such an argument is beyond the scope of this Note. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 465 (1988); *Pickett v. Brown*, 462 U.S. 1, 18 (1983); *Gomez v. Perez*, 409 U.S. 535, 537-38 (1973); *Davis, supra* note 39.

⁹³ Respondent’s Brief in *Nguyen*, *supra* note 19, at 48-49; Respondent’s Brief in *Miller*, *supra* note 19, at 47.

⁹⁴ United States’ Brief in *Flores-Villar*, *supra* note 19, at 49. For a counterargument to this point, *see infra* Section III.A.2.

legislature, however, has the power to rescind citizenship—once granted, citizenship is an absolute right of which someone may not be deprived.⁹⁵ Irrespective of the deficiencies of *both* leveling up and leveling down, the government has urged the Court to choose the latter.⁹⁶ As the Second Circuit has recognized, however, “the binding precedent . . . cautions us to *extend rather than contract benefits* in the face of ambiguous congressional intent,” and “[n]either the text nor the legislative history of the [INA] is especially helpful or clear on this point.”⁹⁷ The following section demonstrates the Supreme Court’s preference for leveling up.

B. *The Court’s Preference for Leveling Up*

The Supreme Court has not presented a comprehensive discussion of the choice between leveling up and leveling down. While the Supreme Court has recognized that leveling down would theoretically produce formal equality in that the “remedy for an equal protection violation is to treat everybody the same,”⁹⁸ it has never ordered such a remedy.⁹⁹ Nor has the Court ever found that leveling up would be more disruptive to the statutory scheme in question than leveling down. When lower courts have upheld federal legislation, and the Supreme Court has subsequently reversed on equal protection grounds, the Court, pressed to select a remedy itself, has demonstrated a preference for leveling up unless Congress has expressly demonstrated a different preference.¹⁰⁰

⁹⁵ See, e.g., *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that a citizen has “a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship” because “[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship”); *Berenyi v. Dist. Dir., INS*, 385 U.S. 630, 637 (1967) (stating that citizenship status “once granted, cannot lightly be taken away”); Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, 123 YALE L.J. FORUM 565, 570-73 (2014) (discussing a citizen’s “absolute right not to be deprived of his legal identity as an American citizen” and cases that have confirmed that right).

⁹⁶ See, e.g., Respondent’s Brief in *Nguyen*, *supra* note 19, at 49 (“The potential inability of Congress to effectuate its intent in the face of inconsistent remedial action by this Court . . . is an additional reason to prefer narrowing Section 1409 to expanding it.”).

⁹⁷ *Morales-Santana v. Lynch*, 792 F.3d 256, 272 (2d Cir. 2015) (emphasis added).

⁹⁸ *Flores-Villar* Oral Argument, *supra* note 17, at 19; see also *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984); *Welsh v. United States*, 398 U.S. 333, 361 (1970).

⁹⁹ Bruce K. Miller, *Constitutional Remedies of Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews*, 20 HARV. C.R.-C.L. L. REV. 79, 98-99, 142 (1985) [hereinafter Miller, *Constitutional Remedies*].

¹⁰⁰ See, e.g., *Mathews*, 465 U.S. at 739 n.5; *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (citing *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 691 & n.25 (1973) (plurality opinion)); Miller, *Constitutional Remedies*, *supra* note 99, at 80-81, 142 (“In the absence of an identifiable legislative preference, the Court

In *Califano v. Westcott*, the Court noted that it should avoid ordering remedies that “would involve a restructuring of the Act,”¹⁰¹ but that, generally, “extension, rather than nullification, is the proper course.”¹⁰² Aside from viewing the question of remedies as one of legislative intent, and thus affirming leveling up in order to avoid “circumvent[ing] the intent of the legislature,”¹⁰³ the Court has never directly addressed the rationale behind the more general preference for leveling up delineated in *Westcott*.¹⁰⁴ The remainder of this section attempts to offer an explanation of the Court’s preference in order to illustrate why leveling up is the more equitable remedial choice.

As a check on the legislature, allowing private citizens to challenge laws that they believe violate their right to equal protection is an important function of the judicial system. If courts choose to level down after those who have suffered some injury challenge the inequality that caused that injury, constitutional challenges may not serve the interests of those who can demonstrate standing to bring them.¹⁰⁵ The first potential reason that the Court has been hesitant to level down is that the potential consequences of leveling down confront those who are disadvantaged with a decision to either “challenge the inequality and risk worsening the situation for others instead of improving one’s own situation, or continue to endure unlawful discrimination.”¹⁰⁶ Second, leveling down would deny plaintiffs challenging a constitutional defect the constitutional right to a remedy, since they would find themselves in the same position as before they had initiated litigation.

has either provided relief tacitly by way of extension or has permitted lower courts to fashion a remedy following an adjudication of unconstitutionality . . .”).

¹⁰¹ *Westcott*, 443 U.S. at 92.

¹⁰² *Id.* at 89.

¹⁰³ *Id.* at 94 (Powell, J., concurring in part and dissenting in part).

¹⁰⁴ Caminker, *supra* note 88, at 1189 n.15.

¹⁰⁵ See Ginsburg, *supra* note 69, at 316 (“A judgment withdrawing rights or benefits from others would be a pyrrhic victory for the challengers, it would not conform to the contours of the controversy shaped by the parties.”). Some, including Justice Scalia, argue that litigants challenging § 1409 do not, in fact, have standing to do so because the Court cannot grant citizenship, and thus their injury is not redressable. See *infra* Section III.B. However, “the redressability prong of the standing test is not an inquiry into the scope of the court’s power to grant relief. . . . Rather, the test *assumes* that a decision on the merits would be favorable and that the requested relief would be granted” *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989); see also *Orr v. Orr*, 440 U.S. 268, 272 (1979). Further, the logical conclusion of such an argument is that citizenship legislation such as § 1409 would be immune from challenge by noncitizens seeking citizenship as a remedy in court.

¹⁰⁶ Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 516 (2004).

1. The “Double Bind”¹⁰⁷

When a subordinated group succeeds in challenging the unequal distribution of a benefit, and a court orders that the benefit is withdrawn from the group currently enjoying that benefit rather than extending it to the group deprived of it, that court has formally complied with the demands of equal protection. The law now treats both groups equally as to the contested benefit. The prevailing litigant, however, is unlikely to consider this outcome a success. Rather, such an outcome is a penalty—the lawsuit that the litigant initiated has now disturbed the status quo and made others worse off. This demonstrates an evident reason why the Supreme Court has never ordered a leveling down remedy: “[M]ost federal judges would be reluctant to strip away the benefit entitlements of large numbers of innocent recipients because of the success of another claimant’s constitutional argument.”¹⁰⁸ Further, litigants faced with the possibility of such an outcome must either risk injuring others by challenging the inequality, or forego litigation and endure what they believe is an unconstitutional deprivation of rights.¹⁰⁹

Desegregation-era jurisprudence provides a startling illustration of the double bind with which leveling down confronts potential civil rights litigants. For example, it is difficult to imagine that any federal court, after finding the segregation of public facilities to violate the Equal Protection Clause of the Fourteenth Amendment, would order a state to either integrate those facilities or close them down to both white and black citizens. The Supreme Court found that this was an acceptable result, however, in *Palmer v. Thompson*.¹¹⁰ In 1962, a federal court entered a judgment finding that the segregation of swimming pools in Jackson, Mississippi violated equal protection,¹¹¹ and the Fifth Circuit affirmed.¹¹² Rather than integrating the swimming pools, however, the city closed them.¹¹³ A number of African-American citizens subsequently brought a class action, compelling the city to reopen and integrate the swimming pools.¹¹⁴ The Supreme Court held that regardless of

¹⁰⁷ Professor Brake used the term “double bind” to describe this dilemma. *See id.*

¹⁰⁸ Miller, *Constitutional Remedies*, *supra* note 99, at 98-99; *see also* *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O’Connor, J., dissenting) (“The choice of extension over nullification also would have the virtue of avoiding injury to parties who are not represented in the instant litigation.”); *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (“But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid.”).

¹⁰⁹ Brake, *supra* note 106, at 516.

¹¹⁰ 403 U.S. 217, 219 (1971).

¹¹¹ *Clark v. Thompson*, 206 F. Supp. 539, 542 (S.D. Miss. 1962).

¹¹² *Clark v. Thompson*, 313 F.2d 637, 638 (5th Cir. 1963).

¹¹³ *Palmer*, 403 U.S. at 219.

¹¹⁴ *Id.*

any illicit motivation, leveling down by closing the pools removed the unequal benefit provided to white citizens, and therefore did not deny African Americans equal protection of the laws.¹¹⁵

The Fifth Circuit dissent, which Justice Douglas quoted in his dissent in *Palmer*, describes the dilemma that litigants face, regardless of whether the level down is the result of a federal court ordering a state to equalize, or a federal court affirmatively choosing to do so in order to remedy a federal statute:

The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.¹¹⁶

In a separate dissent, Justice White added that while the closing of the pools achieved formal equality, that action could not have *operated* equally on both classes of citizens: “[T]he closed pools stand as mute reminders to the community of the official view of Negro inferiority.”¹¹⁷

The injury suffered by the litigants in *Palmer*—denial of access to certain public utilities—is undoubtedly different than that of being denied citizenship. This comparison, however, is a concrete and vivid illustration of why achieving formal equality by withdrawing benefits from those who already enjoy them may leave everyone worse off, and thus confront civil rights litigants with a difficult and unfair decision.¹¹⁸

¹¹⁵ *Id.* at 225-26.

¹¹⁶ *Id.* at 235 (Douglas, J., dissenting) (quoting *Palmer v. Thompson*, 419 F.2d 1222, 1236 (5th Cir. 1969) (Wisdom, J., dissenting)).

¹¹⁷ *Id.* at 268 (White, J., dissenting).

¹¹⁸ For more examples of leveling down and the double bind in which it places litigants, see Brake, *supra* note 106, at 517-22. Professor Brake cites *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992) as a particularly compelling example. *Id.* at 517-18. In that case, a high school student was unconstitutionally denied admission to an honors society because she was “pregnant, unmarried, and not living with the father of her future child.” *Id.* After a district court found that the school had violated Title IX and the Fifth Amendment, the school denied all students induction into the honors society rather than including the pregnant student. *Id.*

2. The Right to a Remedy

In addition to the double bind, the hesitancy to level down may also stem from the more fundamental idea that when civil rights litigants prevail, they possess a right to a remedy that will provide them with what they sought when initiating the litigation.¹¹⁹ When individuals challenge allegedly unconstitutional laws, the result they seek is typically access to some benefit or right of which they have been allegedly deprived. In *Miller, Nguyen, and Flores-Villar*, the plaintiffs sought the citizenship they were denied because their citizen parent was their unmarried father, rather than their unmarried mother. If the Court levels down, and thus requires litigants to meet certain procedural hurdles regardless of the gender of the citizen-parent, those litigants challenging the INA will go without a remedy for their injuries. If the Court levels up, however, it would provide relief to those litigants by both deeming them citizens and protecting them from deportation.¹²⁰

It is important to carefully characterize the injury that the litigants in *Miller, Nguyen, and Flores-Villar* alleged they had suffered. If the injury were merely the perpetuation of stereotypes, then nullifying the benefit would suffice to remedy that injury in that it would create equality between the sexes.¹²¹ Lorelyn Miller, Tuan Anh Nguyen, and Ruben Flores-Villar, however, were not merely objecting to the unequal treatment of their mothers and their fathers.¹²² Rather, as the *Miller* Court articulated, the litigants challenging § 1409 complained of the government's "refusal to register and treat [them] as [citizens]."¹²³ The stereotypes about the respective roles of men and women in society and the law's subsequent unequal treatment of mothers and fathers may have caused the injury at hand, but were not in and of themselves the injury of which the litigants complained.

Federal courts have the authority to tailor remedies not only in order to correct unconstitutionality, but also to remedy the injuries of which the

¹¹⁹ See *Miller, Constitutional Remedies*, *supra* note 99, at 110-30.

¹²⁰ This assertion assumes that the litigants' fathers can satisfy § 1409(c).

¹²¹ See Jean Marie Doherty, *Law in an Elevator: When Leveling Down Remedies Let Equality Off in the Basement*, 81 S. CAL. L. REV. 1017, 1052 (2008) ("[In *Heckler v. Mathews*], the Court emphasized that the nature of the injury was actually the stigma from the treatment, not the deprivation of the material benefit itself. By denying benefits to women, instead of extending them to men, the injury could easily be remedied." (footnotes omitted)).

¹²² Chief Justice Roberts suggested at oral argument for the *Flores-Villar* litigation that Flores-Villar's "objection is . . . my father and my mother are not being treated the same. That's all of the relief he is entitled to." *Flores-Villar* Oral Argument, *supra* note 19, at 19. This is misguided first because the injury of which the litigants complained was not unequal treatment, but rather denial of citizenship and consequent danger of deportation. Second, the inequality at hand is not between a litigant's father and mother, but rather between a litigant's citizen father and another person's citizen mother.

¹²³ *Miller v. Albright*, 523 U.S. 420, 432 (1998).

litigants before them have complained.¹²⁴ Such judicial power was first delineated in *Bell v. Hood*,¹²⁵ in which the question before the Supreme Court was whether litigants asserting injuries arising from Fourth and Fifth Amendment violations could recover money damages, even though the traditional remedy for such violations was equitable relief.¹²⁶ The Supreme Court reserved the question, but stated that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. . . . [And] courts may use any available remedy to make good the wrong done.”¹²⁷ The Supreme Court addressed the question twenty-five years later in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹²⁸ Citing *Hood*, the Court held that a litigant injured by a warrantless search was entitled to recover money damages.¹²⁹ For *Bivens*, an injunction would not have remedied his injury, since the unconstitutional behavior and the injury it caused had already occurred. Thus, an award of damages was the only form of relief that would fit the circumstances and provide proper redress.¹³⁰

When a statute is underinclusive, leveling down and thus withdrawing the benefit altogether will *never* fit the circumstances or remedy a litigant’s injury. In *Wiesenfeld* and *Goldfarb*, for example, withdrawing the benefit conferred to widows but not to widowers by the Social Security Act would have rendered the plaintiffs in those cases meritorious because it would have remedied the alleged unequal treatment. It would not have, however, remedied the litigants’ injuries. The same would be true of the litigants in *Miller*, *Nguyen*, and *Flores-Villar* if they had been successful in their equal protection claims *and* if their injury had properly been characterized as a denial of citizenship that they had acquired at birth, rather than mere unequal treatment. The reluctance to choose nullification of a benefit rather than extension thus seems to stem partly from the federal judiciary’s authority, and arguably responsibility, to craft remedies that fit the circumstances of a particular prevailing litigant and properly redress his or her injuries.

¹²⁴ Miller, *Constitutional Remedies*, *supra* note 99, at 131. Professor Miller provides an important explanation of the difference between “judicial correction of an unconstitutional classification and judicial relief for an unconstitutional injury.” *Id.* at 113-17.

¹²⁵ 327 U.S. 678 (1946).

¹²⁶ *Id.* at 684.

¹²⁷ *Id.*

¹²⁸ 403 U.S. 388 (1971).

¹²⁹ *Id.* at 396-97.

¹³⁰ *Id.* at 410 (Harlan, J., concurring) (“For people in *Bivens*’ shoes, it is damages or nothing.”); *see also* *Davis v. Passman*, 442 U.S. 228, 245 (1979) (affirming a damages remedy where “equitable relief . . . would be unavailing . . . [a]nd there are available no other alternative forms of judicial relief”).

III. HOW PLENARY POWER COLORS THE PICTURE

As the previous section illustrated, successful equal protection claims almost always result in an order for the defendant to level up and extend the benefit to the class from whom it had been previously withheld. Litigation attacking § 1409 faces the difficulty of Congress's plenary power over prescribing rules regarding the admission, exclusion, and naturalization of aliens to and from the United States.¹³¹ The plenary power doctrine was first articulated in *Chae Chan Ping v. United States*,¹³² also known as the Chinese Exclusion Case of 1889, in which the Supreme Court held that decisions by Congress to exclude aliens are binding on the judiciary.¹³³ As the government has articulated in its briefings to the Court regarding the § 1409 litigation, the rationale behind the doctrine is that the judiciary is not well-positioned to second-guess Congress "about what classes of persons should be eligible for statutory citizenship" because: (1) that decision requires a "complex weighing of competing considerations;" (2) the power to exclude aliens from the Nation is a "fundamental sovereign attribute exercised by the Government's political departments;" and (3) "policy toward aliens is vitally and intricately interwoven with the conduct of foreign relations," and a constitutional ruling on that policy could inhibit flexibility to respond to a changing world.¹³⁴

Whether the plenary power doctrine even applies to § 1409 as a derivative citizenship statute, rather than an immigration or naturalization statute, is an open question.¹³⁵ Even if the doctrine does not strictly apply to *jus sanguinis* citizenship statutes, however, the doctrine still substantively shapes this area of the law. Pillard and Aleinikoff have recognized that the plenary power doctrine has resulted in the substantive underenforcement of constitutional principles of gender equality in the context of immigration, naturalization, and citizenship.¹³⁶ This section of this Note explains the ways in which plenary power operates in the remedial context, and offers counterarguments suggesting why the doctrine should not have such an effect.

¹³¹ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972) (citing *Boutilier v. INS*, 387 U.S. 118, 123 (1967)); *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

¹³² 130 U.S. 581 (1889).

¹³³ *Id.*

¹³⁴ United States' Brief in *Flores-Villar*, *supra* note 19, at 17-18 (citations omitted). For a compelling argument suggesting that the plenary power doctrine's force has been declining since the Supreme Court's 2000 term, see Spiro, *supra* note 9.

¹³⁵ See *supra* notes 10-12 and accompanying text.

¹³⁶ Pillard & Aleinikoff, *supra* note 8, at 40 (explaining that the plenary power doctrine could result in underenforcement of equal protection principles); see also Weinrib, *supra* note 13, at 233 n.50 ("The doctrine may nevertheless have influenced the majority's willingness to sanction facial discrimination.").

A. *Statutory Scheme*

While Congress has plenary power over immigration and naturalization, it may not ignore constitutional principles and is “buffered against judicially enforceable constitutional constraints” when exercising its plenary power.¹³⁷ As articulated by the Court in *Kleindienst v. Mandel*, legislation relating to the exclusion of aliens is afforded a special level of deference: when there is a “facially legitimate and bona fide reason” for the rule, “the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional] interests of those [challenging the law].”¹³⁸ The result of that special deference is that rules regarding naturalization and immigration may be unconstitutional when applied to citizens, but not when applied to noncitizens.¹³⁹ Litigants may bring constitutional challenges to those rules, but they are thus subject to less exacting judicial review for constitutional infirmities.¹⁴⁰ Therefore, the plenary power doctrine does not prevent litigants such as those in *Miller, Nguyen*, and *Flores-Villar* from challenging § 1409, but presents a hurdle that makes it more difficult for litigants to succeed in their constitutional challenges.

The deference element of the plenary power doctrine has certainly contributed to the Court’s hesitancy to declare § 1409 unconstitutional. The doctrine has also, however, colored the debate over the proper remedial option. Since the Court generally defers to Congress as to what classes of people may be deemed citizens of the United States, leveling up would seem especially “intrusive”¹⁴¹ and the Court is hesitant to “pull one strand [of the statutory scheme] if it [would] not be able to reweave the tapestry.”¹⁴² The government’s briefs pose several objections to leveling up based on its practical

¹³⁷ Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 HARV. C.R.-C.L. L. REV. 743, 746 (2013).

¹³⁸ *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). The Court applied this level of deference in *Fiallo v. Bell*, 430 U.S. 787, 794 (1977).

¹³⁹ *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

¹⁴⁰ *Fiallo*, 430 U.S. at 793 n.5 (“Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with the respect to the power of Congress to regulate the admission and exclusion of aliens . . .”). While the Court accords Congress special deference, it still has the power to consider the constitutionality of immigration legislation. *See, e.g.*, *Zadydas v. Davis*, 533 U.S. 678, 701 (2001) (casting constitutional doubt on a post-removal-period detention provision in the INA); *INS v. Pangilinan*, 486 U.S. 875, 885-86 (1988) (conducting due process and equal protection analysis of a naturalization decision); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (striking down a Texas immigration statute as unconstitutional); *Diaz*, 426 U.S. at 77-78 (considering a due process challenge to immigration legislation); *Rogers v. Bellei*, 401 U.S. 815, 831-36 (1971) (considering the constitutionality of conditions on dual citizenship).

¹⁴¹ *See supra* note 65 and accompanying text.

¹⁴² Respondent’s Brief in *Miller*, *supra* note 19, at 47.

consequences, two of which are addressed here, and urge that the Court is not equipped to consider whether those consequences are genuine.¹⁴³

1. Expansion of Citizenship to Children with No Ties to the United States

The government has argued that the expansion of citizenship “would bestow U.S. citizenship upon untold numbers of persons who . . . may never have developed meaningful ties to the United States. . . .”¹⁴⁴ Citizenship conferred on such persons cannot be withdrawn once conferred, rendering the remedy “irreversible.”¹⁴⁵

While the government’s concern regarding this consequence may be logical, its arguments make no mention of what class of noncitizens leveling up would actually affect. After the Child Citizenship Act of 2000 (“CCA”), children born abroad, but residing permanently in the United States, may automatically acquire citizenship if (1) at least one parent is a citizen, irrespective of that parent’s gender; (2) the child is under the age of eighteen; and (3) the child is residing in the United States in the legal and physical custody of the child’s citizen parent.¹⁴⁶ The gender disparity of § 1409 no longer affects children who may acquire citizenship under that Act, and those children would not benefit from leveling up and an automatic conferral of citizenship because they have already been afforded that right.¹⁴⁷

The class of children who cannot benefit from the CCA, including children who still live abroad and those who turned eighteen before the Act’s effective date, may be large, but it may be shrunk in practicality. Children still living abroad would benefit from an extension of the statute only if they desired to become American citizens *and* if they were in contact with their fathers. In light of Justice Ginsburg’s suggestion to consider the size of the class to whom

¹⁴³ *E.g.*, *id.* at 48 (“[T]he courts do not have the institutional competence to craft a nuanced remedy that might properly take into account all the interests that Congress had in view when it crafted section [1409].”).

¹⁴⁴ United States’ Brief in *Flores-Villar*, *supra* note 19, at 48; *see also* Respondent’s Brief in *Nguyen*, *supra* note 19, at 41 n.22 (arguing that rewriting § 1409 to expand Congress’s grant of citizenship would “open the door to claims of United States citizenship by untold numbers of persons.”); Respondent’s Brief in *Miller*, *supra* note 19, at 48 (arguing that the Court should “avoid expanding the class of persons to whom citizenship is accorded beyond the limits that Congress has specifically approved, and should leave to Congress the task of deciding how to rework the statutory scheme to achieve its legislative goals in a constitutional manner”).

¹⁴⁵ United States’ Brief in *Flores-Villar*, *supra* note 19, at 48.

¹⁴⁶ Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631.

¹⁴⁷ The CCA does not affect children of an unmarried citizen father who (1) are still living abroad; (2) are living in the United States but not residing with their unmarried citizen father; or (3) turned eighteen before February 27, 2001—the CCA’s effective date. The children unaffected by the CCA would benefit from a ruling that § 1409 is unconstitutional, and an order to level up. *See* Petition for Writ of Certiorari at 32, *Pierre v. Holder*, 135 S. Ct. 58 (2014) (No. 13-1301).

a benefit would extend when deciding whether leveling up or leveling down is the proper remedy, the classes of children affected seem small.¹⁴⁸ Equally troubling is the government's assumption that all children who would be affected by leveling up and extending § 1409's benefit "never have developed meaningful ties to the United States" or their citizen fathers.¹⁴⁹ Tuan Anh Nguyen and Ruben Flores-Villar provide stark examples of children who would have benefited from a gender-neutral statute, and were also well-connected to the United States and their fathers.¹⁵⁰ Both were raised in the United States by their fathers, yet were denied citizenship because their fathers did not comply with the technical nuances of § 1409 with which similarly situated women did not have to comply. Why should children who are not covered by the CCA and have similar ties to the United States as Nguyen and Flores-Villar be denied a right as precious and fundamental as citizenship?

This argument is not meant to completely discredit the government's concern, which should certainly be one of many considerations in deciding how to remedy a complicated statutory scheme. The claim that leveling up would confer citizenship on an "untold" number of children with no ties to the United States, however, is a troubling way to characterize the potential consequences of leveling up, and has likely contributed to the Court's diluted application of heightened scrutiny.¹⁵¹

2. Placing Foreign Children Born Out of Wedlock in a Better Position than Those Born in Wedlock

The government's more compelling argument against leveling up is that doing so would place foreign-born children of unmarried parents in a better position than those of married parents.¹⁵² As the INA currently stands, a *legitimate* child—that is, a child born to married parents—born abroad to one citizen parent and one noncitizen parent is deemed a citizen at birth if that

¹⁴⁸ See *supra* notes 83-87 and accompanying text.

¹⁴⁹ United States' Brief in *Flores-Villar*, *supra* note 19, at 48; see also Respondent's Brief in *Nguyen*, *supra* note 19, at 41 n.22.

¹⁵⁰ See *Flores-Villar v. United States*, 131 S.Ct. 2312, 2312 (2011); *Nguyen v. INS*, 533 U.S. 53, 71 (2001); *Villegas-Sarabia v. Johnson*, No. 5:15-CV-122-DAE, 2015 WL 4887462, at *18 (W.D. Tex. Aug. 17, 2015) (collecting cases in which "citizen parents involved in court challenges to various aspects of the requirements for transmission of citizenship to foreign-born children have exhibited similarly strong ties to this country").

¹⁵¹ For a more complete version of this argument, see Pillard, *supra* note 60, at 847.

¹⁵² *Nguyen* Oral Argument, *supra* note 19, at 42; Respondent's Brief in *Nguyen*, *supra* note 19, at 47 ("Allowing children of unwed citizen fathers to obtain statutory citizenship on substantively the same terms as legitimate children . . . would obliterate Congress's clearly articulated distinction between the two classes."); Respondent's Brief in *Miller*, *supra* note 19, at 47 (arguing that equal application of Section 309(c) would accord "an illegitimate foreign-born child with only one citizen parent the benefit of a parental residency requirement substantially more favorable than that applicable to the child of a mixed-citizenship *married* couple . . .").

child's citizen parent can meet the five-year residency requirement of § 1401(g).¹⁵³ This residency requirement also applies to an illegitimate child—that is, born to unmarried parents out of wedlock—born abroad to a citizen father and a noncitizen mother.¹⁵⁴ Thus, the one-year physical presence requirement of section § 1409(c) for unmarried mothers can be fairly characterized as a statutory exception. The thrust of the government's argument is that if the Court were to level up, unmarried fathers would be subject to the shorter residency requirement, while married mothers and fathers would still be subject to the longer residency requirement.¹⁵⁵ Thus, the exception would “swallow the rule” if the Court were to level up.¹⁵⁶

This argument only has merit if Congress had a specific, nondiscriminatory purpose for making it easier for unmarried women to transmit citizenship to their foreign-born children than for married men and women, and significantly more difficult for unmarried men. The government's asserted justification for the exception is preventing statelessness.¹⁵⁷ A person is considered “stateless” when, due to the particular citizenship laws of his or her birthplace and parents' countries of citizenship, both *jus soli* and *jus sanguinis* citizenship are unattainable.¹⁵⁸ The government contends that in thirty countries at the time the statute was drafted, citizenship descended through a maternal blood relationship (*jus sanguinis* citizenship countries) rather than place of birth (*jus soli* citizenship countries, including the United States).¹⁵⁹ Therefore, if the requirements for children born to unmarried women were not relaxed, and a child was born in a country where citizenship may descend only through a mother's bloodline, then that child would run the risk of being born with no citizenship at all.¹⁶⁰ The foreign-born child would neither be a *jus soli* citizen of the United States under the Constitution nor a *jus sanguinis* citizen if the mother had not complied with the stringent requirements of the statute governing *jus sanguinis* citizenship. Further, unless the child's mother was a dual citizen of the United States and the foreign country with the maternal bloodline citizenship laws, the child would not be a citizen of the foreign country in which he or she was born.

¹⁵³ 8 U.S.C. § 1401(g) (2012). At least two of those years must have been after the age of fourteen. *Id.*

¹⁵⁴ *Id.* § 1409(a).

¹⁵⁵ *Nguyen* Oral Argument, *supra* note 19, at 42; Respondent's Brief in *Nguyen*, *supra* note 19, at 47; Respondent's Brief in *Miller*, *supra* note 19, at 47.

¹⁵⁶ United States' Brief in *Flores-Villar*, *supra* note 19, at 49.

¹⁵⁷ *Id.* at 23-30; Respondent's Brief in *Nguyen*, *supra* note 19, at 11-16; Respondent's Brief in *Miller*, *supra* note 19, at 9, 33-34.

¹⁵⁸ *See generally* Brief of Scholars on Statelessness as Amici Curiae in Support of Petitioner, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (No. 09-5801).

¹⁵⁹ Respondent's Brief in *Miller*, *supra* note 19, at 33.

¹⁶⁰ *Id.*

The statelessness argument is misplaced for two reasons. First, even if preventing statelessness was the “legislative intent” behind the shorter residency requirement for unmarried mothers than for married citizens, an argument can be made that leveling up is more consistent with this intent.¹⁶¹ While some *jus sanguinis* countries assign a mother’s citizenship to her child, many countries currently assign a father’s citizenship to the child.¹⁶² The risk that a child of an unmarried father will be born stateless if the father has not complied with United States *jus sanguinis* requirements is thus no less of a concern than that for a child of an unmarried mother.

Second, the work of Professor Kristin Collins outlines historical evidence, which to date at least two courts have accepted and incorporated into their opinions,¹⁶³ that demonstrates that statelessness was not, in fact, a concern of legislators or administrators at the time the exception was originally delineated in the Nationality Act of 1940.¹⁶⁴ During the drafting process, the Secretary of Labor and the Attorney General agreed that the nationality bill should codify the Bureau of Immigration’s practice of recognizing the foreign-born children of unmarried citizen mothers as citizens when those mothers attempted to return to the U.S. with their children.¹⁶⁵ This practice stemmed from “concern about the costs and public relations embarrassment that could result if border officials separated children from their mothers,”¹⁶⁶ since “mothers were the presumed caretakers of such children.”¹⁶⁷

The reason that separating illegitimate children from their citizen mothers at the United States border was more concerning than separating *legitimate* children from their mothers is presumably that unmarried citizen mothers were

¹⁶¹ See Brief for the National Immigrant Justice Center, *supra* note 19, at 13-14; see generally Brief of Scholars on Statelessness as Amici Curiae in Support of Petitioner, Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (No. 09-5801) (describing the modern risk of statelessness for children born abroad of unmarried American fathers); 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, 384-90 (2012) (arguing that in the modern world, citizenship laws create a greater risk of statelessness for the children of unmarried fathers than for those of unmarried mothers).

¹⁶² For a list of those *jus sanguinis* countries that assign a child’s father’s citizenship to the child, see Miranda, *supra* note 161, at 387-95.

¹⁶³ Morales-Santana v. Lynch, 792 F.3d 256, 268-70 (2d Cir. 2015); Villegas-Sarabia v. Johnson, No. 5:15-CV-122-DAE, 2015 WL 4887462, at *7-13 (W.D. Tex. Aug. 17, 2015).

¹⁶⁴ Collins, *Illegitimate Borders*, *supra* note 8, at 2199-2205; see also Morales-Santana, 792 F.3d at 267-69; Villegas-Sarabia, No. 5:15-CV-122-DAE, 2015 WL 4887462 at *7-11.

¹⁶⁵ Collins, *Illegitimate Borders*, *supra* note 8, at 2205. This practice occurred at the U.S.-Canadian border especially often. *Id.* at 2202.

¹⁶⁶ *Id.* at 2202.

¹⁶⁷ *Id.* at 2203. Professor Collins based this finding on letters and memoranda between officials at the Bureau of Immigration.

assumed to be the sole caretaker of those illegitimate children.¹⁶⁸ Married citizen mothers had husbands who had legitimated the child and could likely assist in caring for the child. From a public relations standpoint, separating a child from his or her sole caretaker would appear crueler than separating a child from one of two caretakers. It is unclear, however, why this concern would not arise equally in the case of an unmarried citizen father attempting to re-enter the country with a foreign-born child. If the gendered presumption that mothers will form the predominant caregiving relationship with their foreign-born child—and, conversely, that fathers will not—were eliminated, then there is no logical rationale for the exception to apply only to unmarried mothers and not to unmarried fathers who are the primary caretakers of their foreign-born child.

If the government's claim is that allowing the exception to encompass unmarried men—in effect, leveling up—must align with the exception's purpose so as not to swallow the rule, then there seems to be no real problem with a shorter residency requirement for unmarried men and women than for married men and women. In fact, a child born to a single parent with whom they do not share a common citizenship is much more vulnerable than a child born to two married parents. In such situations, the child has only one caretaker, and placing hurdles in front of the transfer of citizenship from that parent to that child would be denying the child a shared citizenship with the only parent who has assumed any responsibility to care for that child. For example, Ruben Flores-Villar was born in Mexico, but was raised by his United States citizen father in San Diego.¹⁶⁹ Not sharing his father's citizenship made him more prone to be separated from the only parent he had ever known than a child born abroad to a married couple, with one citizen and one noncitizen parent.

B. *The Court's Ability to Level Up*

The government has argued that the plenary power doctrine operates in a second way that denies even those litigants who can prevail on an equal protection claim relief from the inequality of § 1409.¹⁷⁰ Since only Congress has the power to specify the rules and conditions by which an alien can enter the United States or become naturalized, “[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will.”¹⁷¹ Therefore, as the argument proceeds, a federal court cannot

¹⁶⁸ See *id.* at 2202 (citing concern over “the practical problem of who would take responsibility for those children”).

¹⁶⁹ *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008).

¹⁷⁰ See, e.g., *United States' Brief in Flores-Villar*, *supra* note 19, at 47-48.

¹⁷¹ *United States v. Ginsberg*, 243 U.S. 472, 474 (1917).

confer citizenship upon someone who has not complied with Congress's specified immigration and naturalization rules.¹⁷²

As Justice Scalia illustrates in his *Miller* concurrence, one reading of this limit is that a federal court is without any power whatsoever to grant citizenship "where Congress has not done so."¹⁷³ If the Court were to level up, and thus place unmarried fathers in the category that unmarried mothers currently occupy, it would indirectly confer citizenship on the foreign-born children of those unmarried fathers who can meet the lenient residency requirement of § 1409(c).¹⁷⁴ Thus, according to Justice Scalia's construction of Congress's plenary power over granting citizenship, the Court's only remedial option would be to level down, and withdraw the benefit that § 1409 currently confers on unmarried mothers of foreign-born children.

Justice Scalia first articulated his construction of the limit on federal courts to confer citizenship in *INS v. Pangilinan*,¹⁷⁵ holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts . . . as one of their generally applicable equitable powers."¹⁷⁶ Justice Scalia rejected the constitutional challenge in that case, and held that because the litigants had not applied for naturalization before the statute in question's cutoff date, a federal court could not confer citizenship as an equitable remedy "in violation of the limitations imposed by Congress in the exercise of its exclusive constitutional authority over naturalization."¹⁷⁷

The United States and the INS have cited *Pangilinan* repeatedly in briefs, claiming that its holding demonstrates that federal courts can by no means grant citizenship as a remedy.¹⁷⁸ There is another reading of *Pangilinan*, however, that makes its holding inapplicable to cases where the Supreme Court finds that a naturalization statute protected under Congress's plenary power violates the Constitution.¹⁷⁹ The Ninth Circuit articulated this reading in *Wauchope v. U.S. Department of State*.¹⁸⁰ Judge Fletcher wrote:

¹⁷² *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) ("Once it has been determined that a person does not qualify for citizenship . . . the district court has no discretion to ignore the defect and grant citizenship.").

¹⁷³ *Miller v. Albright*, 523 U.S. 420, 458 (1998) (Scalia, J., concurring).

¹⁷⁴ Derek Ludwin, *Can Courts Confer Citizenship? Plenary Power and Equal Protection*, 74 N.Y.U. L. REV. 1376, 1393 (1999).

¹⁷⁵ 486 U.S. 875 (1988).

¹⁷⁶ *Id.* at 883-84. The Court cited 8 U.S.C. § 1421(d) for this proposition, which states that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." (emphasis added).

¹⁷⁷ *Pangilinan*, 486 U.S. at 875-76, 884-85.

¹⁷⁸ See, e.g., United States' Brief in *Flores-Villar*, *supra* note 19, at 47; Respondent's Brief in *Nguyen*, *supra* note 19, at 48.

¹⁷⁹ Recall that in *Pangilinan*, the Court held that there was no equal protection violation. *Pangilinan*, 486 U.S. at 886 ("We also reject the possibility of a violation of the equal protection component of the Fifth Amendment's Due Process Clause.").

¹⁸⁰ 985 F.2d 1407 (9th Cir. 1993).

The Court's holding precludes the judiciary from exercising its statutory powers of naturalization to redress *statutory* violations except in strict conformity with Congress' authorizing legislation. It does not speak to the courts' capacity to utilize traditional constitutional remedies to rectify *constitutional* violations. The United States reads *Pangilinan* to bar the courts from redressing constitutionally underinclusive statutes by extending their benefits to a disfavored class where the benefits in question are those of citizenship. *Pangilinan* does not support such a sweeping proposition.¹⁸¹

First, the reading presented in *Wauchope* seems to be more consistent with history. In the INS's brief for *Pangilinan*, the very case that the government has cited repeatedly for the proposition that a court cannot confer citizenship, the government conceded that a court lacks the equitable power to grant citizenship "where the legislature has spoken, *unless, of course, the legislation itself is unconstitutional . . .*"¹⁸² Thus, Congress may be entitled to deference when drafting legislation concerning immigration, but such legislation is still subject to the judiciary's equitable powers if it is constitutionally inadequate. Second, it is clear that a majority of the Justices do not agree with Justice Scalia's reading of *Pangilinan*. Only Justice Thomas joined Justice Scalia's concurrence in *Miller*, and Justice Scalia explicitly recognized this in his *Nguyen* concurrence.¹⁸³

Further, characterizing the relief that the plaintiffs in *Miller*, *Nguyen*, and *Flores-Villar* were seeking as a "grant of citizenship" is misguided. As several Supreme Court justices have noted, the plaintiffs in those cases asked courts to interpret § 1409 in a way that did not violate equal protection, and to then decide whether the statute granted them citizenship at birth.¹⁸⁴ A judgment in

¹⁸¹ *Id.* at 1418.

¹⁸² Brief for the Petitioner at 43, *INS v. Pangilinan*, 486 U.S. 875 (1988) (No. 86-1992) (emphasis added). Further, federal courts granting citizenship despite unconstitutional legislation is not unheard of. *See, e.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) (restoring citizenship upon finding that § 401(e) of the 1940 Act violated the Fifth and Fourteenth Amendments); *Lake v. Reno*, 226 F.3d 141, 148-49 (2d Cir. 2000) (recognizing petitioner's citizenship after finding the gender distinction in § 1409(a) to be unconstitutional); *Wauchope*, 985 F.2d at 1407, 1418 (finding that district courts have the authority to remedy gender-based discrimination by extending citizenship rights to a previously disfavored class); *Aguayo v. Christopher*, 865 F. Supp. 479, 490-92 (N.D. Ill. 1994) (finding § 1993 of the Revised Statutes of 1874 unconstitutional and issuing a declaratory judgment that plaintiff a citizen).

¹⁸³ *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (Scalia, J., concurring) ("I remain of the view that the Court lacks power to provide . . . conferral of citizenship A majority of the Justices in *Miller* having concluded otherwise . . . and a majority of the Court today proceeding on the same assumption; I think it appropriate for me to reach the merits of petitioners' equal protection claims." (internal citations omitted)).

¹⁸⁴ *See id.* at 96-97 (O'Connor, J., dissenting) ("The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is

favor of the plaintiffs would have “confirm[ed] . . . pre-existing citizenship” rather than granting them citizenship that they did not already possess.¹⁸⁵

Plenary power is an old and enduring doctrine that has colored the Court’s analysis of § 1409 in various ways, and the government’s arguments regarding the implications of leveling up have contributed to the Court’s hesitancy to strike down the provision. As this section has demonstrated, however, such “anxiety about an influx of citizen-strangers”¹⁸⁶ is misplaced, as is the worry that plenary power prevents the Court from granting citizenship as an equitable remedy.

IV. INTERMEDIATE ALTERNATIVES

While discussion of the remedial options of leveling up versus leveling down is sparse, discussion of any intermediate option is even more absent from both court opinions and scholarship. In light of the tension between equity and plenary power, this section suggests two intermediate solutions.

A. *Extending and Reducing the Benefit*

Califano v. Westcott represents one of the rare instances where an intermediate remedy has, in fact, been considered: extending the benefit, but reducing its size.¹⁸⁷ There, the Court held that a section of a public assistance program providing benefits to families with an unemployed father, but not to those with an unemployed mother, was unconstitutional.¹⁸⁸ The Massachusetts Public Welfare Department Commissioner urged that in order to equalize the statute, the Court should require the unemployed parent to show that he or she was a “principal wage earner,” rather than classifying on the basis of gender.¹⁸⁹ This way, the benefit would be extended in that it would be available to families, but would be reduced in that unemployed mothers and unemployed

a citizen in the first place.”); *Miller v. Albright*, 523 U.S. 420, 488-89 (1998) (Breyer, J., dissenting) (asserting that the Court need only decide whether citizenship was conferred at birth); *Morales-Santana v. Lynch*, 792 F.3d 256, 272-73 (2d Cir. 2015) (finding for the petitioner in a constitutional challenge to § 1409, and thus concluding that the petitioner “is a citizen as of his birth”); *Villegas-Sarabia v. Johnson*, No. 5:15-CV-122-DAE, 2015 WL 4887462, at *8 (W.D. Tex. Aug. 17, 2015) (dismissing petitioner’s request for a declaration of his citizenship on jurisdictional grounds, but deciding his constitutional claim); Brief for the National Immigrant Justice Center, *supra* note 10, at 16 (differentiating between the conferral of citizenship through naturalization and the acquisition of citizenship at birth).

¹⁸⁵ *Miller*, 523 U.S. at 432.

¹⁸⁶ Pillard, *supra* note 60, at 847.

¹⁸⁷ 443 U.S. 76 (1979). I have borrowed the phrase “extending the benefit, but reducing its size” from Caminker, *supra* note 88, at 1187 n.5.

¹⁸⁸ *Westcott*, 443 U.S. at 89.

¹⁸⁹ *Id.* at 91.

fathers alike would have to show that they were principal wage earners to obtain the benefit.¹⁹⁰

The Supreme Court rejected this intermediate option in lieu of leveling up because it “would introduce a term novel in the [statutory] scheme and would pose definitional and policy questions best suited to legislative or administrative elaboration.”¹⁹¹ In *Westcott*, completely leveling up entailed merely expending a monetary benefit that Congress could later withdraw. Therefore, the choice was appropriate compared to the option of introducing a novel term into the statutory scheme—extending the benefit to all families with needy children was “the simplest and most equitable extension” until Congress had the chance to devise a new program.¹⁹²

An intermediate option may be the best course in remedying the INA, however, given the added complication of the plenary power doctrine.¹⁹³ A complete level up would not have the virtue of being simple like the remedy in *Westcott*, due to the irreversibility of granting citizenship to children whom Congress may not have intended to have access to the benefits of § 1409(c). Rather than absolute extension, the Court could, for example, extend the benefit of § 1409(c) to males who serve as caregivers to their foreign-born children, while at the same time removing it from females who are not caregivers to such children. In effect, the Court would strike § 1409(a), and replace the term “mother” in § 1409(c) with a gender-neutral term, such as “caretaker.”¹⁹⁴

This option would alleviate the government’s concern that children with no ties to the United States would obtain automatic citizenship. The caretaker parent would still have to meet the continuous presence requirements of § 1409(c), meaning that he or she must have been residing in the United States for a continuous period of at least one year.¹⁹⁵ Additionally, this option furthers one of the alleged “governmental interests” in the statute’s current gender classification—assuring that a parent-child relationship exists.¹⁹⁶ Inevitably, if a caretaker standard were adopted—at least temporarily—only those children

¹⁹⁰ Ginsburg, *supra* note 69, at 315.

¹⁹¹ *Westcott*, 433 U.S. at 92. For example, if the Court had adopted this remedy, it would also have had to determine what percentage of the family’s income a parent must earn in order to be deemed a principal wage earner. See Ginsburg, *supra* note 69, at 315 (“For example, is the principal breadwinner one who earns fifty-one, fifty-five, or seventy-five percent of the family’s income?”).

¹⁹² *Westcott*, 433 U.S. at 93.

¹⁹³ See *supra* Part III.

¹⁹⁴ Justice Breyer has proposed this gender-neutral term. *Miller v. Albright*, 523 U.S. 420, 487 (1998) (Breyer, J., dissenting) (claiming that Congress could distinguish between “Caretaker and Noncaretaker Parents”).

¹⁹⁵ 8 U.S.C. § 1409(c) (2012).

¹⁹⁶ See *Nguyen v. INS*, 533 U.S. 53, 62 (2000); *Miller*, 523 U.S. at 436.

with real ties to their U.S. citizen parent would acquire automatic citizenship.¹⁹⁷

This option would also be equitable, especially for any future litigant in a situation similar to the plaintiffs in *Nguyen* and *Flores-Villar*. In *Nguyen*, the plaintiff, Tuan Anh Nguyen, was born in Vietnam. After his unmarried parents ended their relationship when he was about six years old, he came to the United States and was raised by his father.¹⁹⁸ In *Flores-Villar*, the plaintiff, Ruben Flores-Villar, was born in Mexico, but his father brought him to the United States when he was two months old and raised him with the help of his paternal grandmother.¹⁹⁹ Neither plaintiff could enjoy the benefits of the CCA because it only applies to children born after February 27, 2001, and neither father had the option to legitimate them in accordance with the requirements of § 1409(a)(3) and (4) because the plaintiffs were over the age of eighteen by the time they faced deportation proceedings.²⁰⁰ If the proposed remedial option were put into place upon a finding that § 1409 were unconstitutional, the litigant, if in a similar situation, would thus be declared a citizen, rather than being deported after being raised in the United States, as long as the litigant could show that the litigant's father served as a caregiver. The consequence, however, would not be that children with no ties to their citizen father or the United States would become citizens, as the government has suggested.²⁰¹

This option, however, has one significant drawback—there will still be children affected by § 1409 who will not be able to demonstrate that their citizen parent is their primary caregiver. On the administrative level, it may be much easier for mothers to demonstrate that they are a caregiver parent than for similarly situated fathers because of the assumptions about the roles of mothers and fathers that fueled the disparity of § 1409 in the first place. The remedy would therefore only be partial, and while courts are best equipped to provide equitable relief to those individuals who affirmatively challenge the statute and are facing deportation, the legislature is better equipped to devise a statutory scheme that will provide relief to the entire affected class. The next section explores a way in which the courts may provide relief to individuals, while pushing the legislature to create a law that complies with the Constitution—staying the judgment and allowing the legislature to redraft the provision.

B. *Stay*

Courts often allow unconstitutional statutes to remain in effect temporarily, and “delay for a reasonable time, in consideration of practical problems incident to an implementation of [new constitutional rights], the actual exercise

¹⁹⁷ *Miller*, 523 U.S. at 487 (Breyer, J., dissenting).

¹⁹⁸ *Nguyen*, 533 U.S. at 57.

¹⁹⁹ *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008).

²⁰⁰ See *supra* notes 146-47 and accompanying text.

²⁰¹ See *supra* Section III.A.1.

of the newly declared rights.”²⁰² Such judicial discretion to delay or withhold coercive relief is grounded in judge-made common law and, like abstention, aligns with the flexible nature of equitable relief.²⁰³ Upon finding that § 1409’s gender classification violates the Constitution, the Supreme Court could issue a declaratory judgment holding that the provision is unconstitutional, but stay an injunction—which would likely be an order extending the benefit to the petitioner—to give the legislature time to respond.²⁰⁴ In *Buckley v. Valeo*,²⁰⁵ for instance, the Court held that much of the power conferred by the Federal Election Campaign Act on the Federal Elections Commission violated the Appointments Clause of the Constitution.²⁰⁶ The Court stayed its judgment “for a period not to exceed 30 days” in order to “afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms . . . allowing the present Commission in the interim to function . . .”²⁰⁷ Similarly, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²⁰⁸ the Supreme Court found that in granting overbroad jurisdiction to Bankruptcy Courts, the Bankruptcy Reform Act violated Article III of the Constitution.²⁰⁹ Citing *Buckley*, the Court stayed its judgment for approximately three months to “afford Congress an opportunity

²⁰² See *White v. Crook*, 251 F. Supp. 401, 410 & n.16 (M.D. Ala. 1966) (declaring statute unconstitutional but postponing relief in order to give Alabama “a reasonable time to comply with that part of this Court’s decree”); see also Candace S. Kovacic, *Remedying Underinclusive Statutes*, 33 WAYNE L. REV. 39, 89 n.382 (1986) (citing *Heckler v. Mathews*, 465 U.S. 728, 746 (1984)).

²⁰³ See HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* 391 (2d ed. 1948) (“In balancing the equities, the court is not limited to a determination of whether it will grant or refuse the relief in its entirety . . . it may provide for time to adjust to the situation [and] may permit experiments to determine the effect of changes made”); William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 44-46 (1999) (“In the Anglo-American legal tradition, courts enjoy broad discretion to grant, withhold, or delay the issuance of coercive relief.”).

²⁰⁴ Kovacic, *supra* note 202, at 90. Canadian courts have employed a “delayed enforcement” approach similar to what is suggested in this section. See David M. Bizar, *Remedying Underinclusive Entitlement Statutes: Lessons From a Contrast of the Canadian and U.S. Doctrines*, 24 U. MIAMI INTER-AM. L. REV. 121, 129 (1992) (“[A] court would declare the legislation or provision unconstitutional, but suspend the effect of the declaration until Parliament could repair the legislation. This remedy . . . is appropriate where striking down the provision . . . threatens the rule of law” (footnote omitted)).

²⁰⁵ 424 U.S. 1 (1976).

²⁰⁶ *Id.* at 140.

²⁰⁷ *Id.* at 143.

²⁰⁸ 458 U.S. 50 (1982).

²⁰⁹ *Id.* at 87.

to reconstitute the bankruptcy courts or to adopt other valid means of adjudication”²¹⁰

A stay acts as a delay between a declaratory judgment and a coercive injunction.²¹¹ In both *Buckley* and *Northern Pipeline*, such a delay was equitable because issuing an immediate injunction would have disrupted government administration of the laws at hand.²¹² Such a delay may also be useful “when formulating creative relief would test the limits of judicial competence.”²¹³ In light of these considerations, disputes over the constitutionality of § 1409 are candidates for stayed judgments. Courts are concerned that an immediate injunction would result in many children becoming United States citizens, thus disrupting the INS’s ability to issue certificates of citizenship and comply with the order.²¹⁴ Further, the government contends that courts do not possess the institutional competence to craft citizenship legislation—one reason why Congress has plenary power over the issue in the first instance.²¹⁵

If the Supreme Court were to hold § 1409 of the INA unconstitutional and order an extension of the benefits, but stay its judgment for a limited period of time, it would allow Congress to decide exactly *how* to level up. The Court would not have to require Congress, before the end of the stay period, to enact new legislation consistent with its order. Rather, it would allow Congress to adopt some temporary scheme for the INA to administer in the interim while it devises and votes on a new, gender-neutral provision. Further, a federal district court could retain jurisdiction over the dispute in order to follow up and monitor the legislature’s progress.²¹⁶ The court may also set a date, effectively a deadline, on which it will revisit the dispute if no political action has been taken.²¹⁷

²¹⁰ *Id.* at 88.

²¹¹ *Stay*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²¹² *See Northern Pipeline*, 458 U.S. at 88 (deciding to stay the judgment so as not to “impair[] the interim administration of the bankruptcy laws”); *Buckley*, 424 U.S. at 143 (deciding to stay the judgment so as to allow the then-present Commission to function in the interim).

²¹³ Nardini, *supra* note 203, at 49.

²¹⁴ *See supra* notes 144, 151 and accompanying text.

²¹⁵ *See, e.g.*, United States’ Brief in *Flores-Villar*, *supra* note 19, at 17 (“Nor are the courts well-positioned to second-guess Congress’s judgments about what classes of persons should be eligible for statutory citizenship.”); Respondent’s Brief in *Miller*, *supra* note 19, at 48 (“In short, the courts do not have the institutional competence to craft a nuanced remedy that might properly take into account all the interests that Congress had in view when it crafted [§ 1409].”).

²¹⁶ Nardini, *supra* note 203, at 47 (“As a practical matter . . . an American court can take steps to ensure compliance with its judgment simply by retaining jurisdiction over a case.” (footnote omitted)).

²¹⁷ *Id.* at 48.

Such a remedy is just for several reasons. First, while it would not provide the petitioner an immediate remedy because the Court would not immediately confer citizenship, it would ensure that the petitioner would not be subject to deportation under the unconstitutional law—in many cases, the petitioner brings the litigation because he or she is facing deportation, thus challenging the law in order to remain in the United States. Second, a stay would be consistent both with Congress’s plenary power over naturalization and with the Court’s general preference for leveling up—the Court would not usurp Congress’s role in any way by writing a new statute, but could ensure that Congress extend the benefit. Finally, staying its judgment and retaining jurisdiction over the dispute may help break the apparent cycle of “circular buck-passing.”²¹⁸ Because of Congress’s plenary power over legislation like the INA, constitutional principles may be underenforced: if courts must defer to Congress on an issue, they will be hesitant to strike down the legislation, and if courts do not strike down the legislation, Congress will not effect change.²¹⁹ If a court does not strike down the legislation but also stays its judgment and sets a deadline for legislative action, the stay will push Congress to amend the statute in order to comply with the Constitution.

In sum, if the Court is hesitant to extend the benefits of § 1409 because of the weight and persistence of the plenary power doctrine, it has other options before it. The Court need not order an absolute level up, which would extend the benefits currently afforded to unmarried women under § 1409 to all unmarried men, or an absolute level down, which would remove those benefits from all unmarried citizens. The government’s characterization of the options as two polar extremes is misleading, and that characterization, with the help of plenary power, has made any remedy the Court could choose seem extreme, intrusive, and vexing. The remedy, however, need not be so intrusive, and may be tailored to the delicate nature of the immigration scheme at hand by extending and reducing the benefit, or by staying a judgment ordering extension of the benefit.

V. CONGRESS’S ROLE

Upon declaring § 1409 unconstitutional, the Supreme Court’s decision of whether to order a level up, a level down, or something in between would only

²¹⁸ David Strauss, *Presidential Interpretation of the Constitution*, 15 *CARDOZO L. REV.* 113, 129 (1993) (defining the phrase as what happens when the courts defer to political branches, but political branches in turn wait for the court to tell them what they can and cannot do, thus never determining the answer to a constitutional question). Professor Collins has discussed Professor Strauss’s theory of “buck-passing” in the plenary power context. Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, in KIM RUBENSTEIN & KATHARINE YOUNG, *PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL* (forthcoming 2016) (manuscript at 23) (on file with author).

²¹⁹ Strauss, *supra* note 218, at 129.

provide a temporary solution to cure the constitutional defect. Congress “remains free to redesign the statute in a manner that comports with the Constitution.”²²⁰ While the Child Citizenship Act has fixed some of the infirmities, § 1409 has not been repealed. Further, the CCA only applies to children born after its effective date, and excludes children still living abroad or living in the United States but not with their citizen parent.²²¹ This final section urges Congress to apply any amendment retroactively to all children, so as not to prevent those born before the CCA’s effective date from benefiting from the changes. In doing so, this section considers not only achieving gender equality, but also the interests of those foreign-born children whom the statute most directly affects.

The INA unconstitutionally discriminates against both men and women,²²² and Congress’s plenary power over immigration and naturalization does not render the distinction constitutional.²²³ On the one hand, unmarried citizen mothers have the benefit of nearly automatic transmission of citizenship to their foreign-born children, while similarly situated unmarried citizen fathers must meet more stringent requirements to do so.²²⁴ On the other hand, “giving right also gives responsibility,” and unmarried men can more easily escape the responsibilities that come with parenthood.²²⁵ Leveling down would not properly address this often-overlooked problem with § 1409, and would thus not benefit the real and intended beneficiaries of the exception for unmarried mothers: foreign-born children.

First, requiring proof of paternity, an acknowledgement of support, and legitimization from men, but not women, presumes that women will assume primary caretaker responsibilities over those children. As scholars of family law have explained, laws that require steps to be taken to establish paternity, but not to establish maternity, discourage fathering: even though the process is not difficult, “paternity establishment is time-consuming and the rate of establishment remains stubbornly low.”²²⁶ Further, “these legal structures also reflect the view that fatherhood is a chosen, voluntary status, rather than one automatically or involuntarily conferred [F]athers are volunteers; mothers are draftees.”²²⁷ Leveling down, and thus placing such structures before both fathers *and* mothers, would thus suggest that neither an unmarried citizen mother nor an unmarried citizen father has presumed parental responsibilities. Essentially, in Professor Dowd’s words, both mothers and fathers with foreign-

²²⁰ *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O’Connor, J., dissenting).

²²¹ See *supra* notes 146-47 and accompanying text.

²²² See *supra* Section I.A.

²²³ See *supra* notes 137-40 and accompanying text.

²²⁴ See *supra* Section I.A.

²²⁵ Silbaugh, *supra* note 8, at 1158.

²²⁶ Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 528 (1996).

²²⁷ *Id.* at 529 (citing Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415, 1415-16, 1449 (1991)).

born children would be “volunteers,” and neither would be “draftees.” Escaping parental responsibilities would be as easy for unmarried female citizens who choose to have no relationship with their foreign-born children as it currently is for unmarried male citizens.

Although this solution would formally eliminate stereotyping, it is nonetheless problematic. The goal of Congress should not be to eliminate the presumption that a mother will care for her child, but to establish the same presumption for fathers—especially considering that foreign-born children have no way to compel their fathers or mothers to care for them. Both an unmarried citizen mother and an unmarried citizen father should have the right to easily transmit citizenship to their foreign-born children, and both should automatically undertake the responsibilities and presumptions that accompany parenthood. Leveling up, and thus allowing all unmarried citizen parents to benefit from more lenient residency requirements and the absence of acknowledgement requirements, would counteract both the presumption that women predominantly care for illegitimate children born abroad *and* the presumption that men can abandon those children. The caring citizen mother *or* the caring citizen father would have the privilege of transmitting citizenship with ease. At the same time, neither would be able to easily escape parental responsibilities.

Second, leveling down would increase the number of foreign-born children denied citizenship “on technical grounds despite close ties with their citizen-parents as well as to the United States.”²²⁸ Tuan Anh Nguyen and Ruben Flores-Villar were both raised in the United States by their fathers, yet were denied citizenship on technical grounds—Nguyen’s father did not petition a court to legitimate him in time,²²⁹ and Flores-Villar’s father was only sixteen at the time of his birth and could not have possibly satisfied the residency requirements in place.²³⁰ Clearly, the technicalities currently required by § 1409 are overinclusive and do not accurately reflect whether or not a real relationship exists between father and child. Requiring that unmarried fathers *and* mothers comply with such technicalities would increase the number of children denied citizenship simply because their mother or father is unaware of the intricacies of § 1409. Such a result is inequitable, especially in light of the relatively small number of children that would reap the benefits of an extension of the statute.²³¹

CONCLUSION

The Supreme Court’s decisions dealing with § 1409’s clearly outdated and stereotypical gender categorization are peculiar: a plurality opinion of only two justices, an unexplained dilution of heightened scrutiny, and a mysterious

²²⁸ Weinrib, *supra* note 13, at 249.

²²⁹ Nguyen v. INS, 533 U.S. 53, 57-58 (2001).

²³⁰ United States v. Flores-Villar, 536 F.3d 990, 994 (9th Cir. 2008).

²³¹ See *supra* Section II.A.1.

single-line holding. The plenary power doctrine generally may be behind the atypical decisions. The issue troubling the Court, however, seems to be more precise: what can the Court do to fix this inequality without usurping Congress's control over immigration and naturalization? The question, while difficult and not clearly answered by precedent, is not a dead end. The Court has almost always leveled up when faced with statutes that violate equal protection, and doing so when faced with § 1409 would not fly in the face of Congress's plenary power. Leveling up would not be contrary to Congress's original purpose in creating an exception for the foreign-born children of unmarried women. Further, the choice need not be absolute—options exist for the Court aside from completely leveling up or completely leveling down. While the question of how to remedy the INA is delicate and laden with policy concerns, it should not serve as the deciding factor in answering the question of whether to uphold or to equalize a gender classification that clearly relies on impermissible stereotypes regarding the respective roles of men and women in raising children born out of wedlock.