

NGUYEN v. INS

533 U.S. 53 (2001)

I. INTRODUCTION

Title 8 U.S.C. § 1409, originally dating from 1952, governs the citizenship of children born overseas to unwed parents when only one of the parents is a United States citizen.¹ The statute imposes different requirements for citizenship depending on whether the citizen parent is the mother or the father.² Citizenship for children born to citizen fathers and alien mothers requires taking affirmative steps prior to the child's eighteenth birthday.³ Revisions made to the statute in 1986 allow for a choice between one of three affirmative steps, which must be performed before the child turns eighteen years of age: (1) the child must be legitimated; (2) the father must take an oath of paternity; or (3) a court must issue an order of paternity.⁴ In contrast, children born to citizen mothers receive an automatic grant of citizenship.⁵

1. See Children Born Out of Wedlock, Title III, ch. 1, § 309, 66 Stat. 238 (1952) (codified as amended at 8 U.S.C. § 1409 (1999)).

2. See *id.*

3. See *id.* at § 1409(a).

4. See Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, § 13, 100 Stat. 3657 (1986) (codified as amended at 8 U.S.C. § 1409 (1999)). While 8 U.S.C. § 1409(a) requires satisfaction of all four subcomponents, only the fourth subcomponent is at issue in this case. It reads:

(4) while the person is under the age of 18 years — the person is legitimated under the law of the person's residence or domicile, the father acknowledges paternity of the person in writing under oath, or the paternity of the person is established by adjudication of a competent court.

Id.

5. See *id.* at § 1409(c). This section sets forth the requirement that:

Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Id.

The differential treatment of children born to citizen mothers as opposed to citizen fathers raises a question of equal protection. The issue before the Court in *Nguyen v. Immigration and Naturalization Service* (INS) was whether this distinction based on the sex of the United States citizen parent satisfies the equal protection guarantee in the Due Process Clause of the Fifth Amendment.⁶ The same issue appeared before the Supreme Court in an earlier case, *Miller v. Albright*, but remained unresolved.⁷

In *Miller*, the petitioner argued that the distinction between children born to unwed mothers and fathers was unconstitutional under the Fifth Amendment equal protection guarantee.⁸ However, a majority of the Court did not decide the issue and was divided between rejecting the equal protection challenge, finding the gender-based distinction in violation of the equal protection requirement, and finding a lack of standing to address the issue.⁹ Following the *Miller* decision, a split in the Courts of Appeal emerged with regard to the constitutionality of the statutory provision.¹⁰

II. FACTS

The petitioner in this case, Tuan Ahn Nguyen, was born in Vietnam on September 11, 1969, to United States citizen Joseph Boulais, co-petitioner, and a Vietnamese citizen mother.¹¹ His parents were not married, and after their relationship ended, Nguyen lived with his father in Vietnam.¹² When Nguyen was nearly six years old, he moved to the United States where his father continued to raise him and Nguyen became a lawful permanent resident.¹³

6. See generally *Nguyen v. Immigration and Naturalization Serv.*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 530 U.S. 1305 (2000), *aff'd*, 533 U.S. 53 (2001) (discussing how petitioner, the son of a citizen father and noncitizen mother, became a lawful permanent resident at age six, but never a citizen due to the fact that the citizen parent was his father).

7. See *Miller v. Albright*, 523 U.S. 420, 428 (1998) (explaining that the Court granted certiorari to examine the possible equal protection violation of 8 U.S.C. § 1409's differential treatment of children born to citizen mothers and citizen fathers).

8. See *id.* at 424 (noting petitioner's challenge to the constitutionality of the statutory provision).

9. See *Nguyen*, 533 U.S. at 58 (summarizing the complex division of the *Miller* Court with regard to the constitutionality of the statute's distinction between unwed citizen mothers and fathers).

10. See *id.* (explaining that "[s]ince *Miller*, the Courts of Appeal have divided over the constitutionality of § 1409").

11. See *id.* at 57 (detailing the family origin and personal history of Tuan Ahn Nguyen).

12. See *id.*

13. See *id.*

At age 22, Nguyen pled guilty to two counts of sexual assault against a child.¹⁴ Three years later, in 1995, the Immigration and Naturalization Service (“INS”) initiated deportation proceedings against Nguyen as a result of the convictions.¹⁵ The Immigration Judge found Nguyen deportable after Nguyen testified that he was a Vietnamese citizen.¹⁶ While Nguyen’s appeal of his deportable status to the Board of Immigration Appeals was pending, his father secured a court order of parentage based on DNA evidence.¹⁷ The requirement in 8 U.S.C. § 1409(a)(4) (hereinafter “the statute”) is that the child or father engage in one of the three requisite affirmative steps before the child turns eighteen years of age.¹⁸ Nguyen was twenty-eight years old at the time his appeal to the Board of Immigration Appeals was pending.¹⁹ The Board of Immigration Appeals rejected the claim of United States citizenship for failure to comply with 8 U.S.C. § 1409(a)(4) and dismissed the appeal.²⁰

Nguyen and his father appealed to the Court of Appeals for the Fifth Circuit.²¹ They contended that 8 U.S.C. § 1409 violated their equal protection rights by placing different requirements for United States citizenship on children born abroad to unwed parents depending on the sex of the citizen parent.²² The court rejected the constitutional challenge of the statute,²³ and the Supreme Court of

14. See *Nguyen*, 533 U.S. at 57 (discussing how Nguyen was sentenced to eight years for each count).

15. See *id.* (noting that the INS initiated proceedings against Nguyen as an alien convicted of an aggravated felony and two crimes involving moral turpitude three years after he pled guilty).

16. See *id.* (explaining how Nguyen later argued that he was a United States citizen on appeal).

17. See *id.* (discussing the procedural history of Nguyen’s deportation case).

18. See *supra* notes 1-5 and accompanying text (outlining the statutory requirements of the Child Born Out of Wedlock section of the Immigration and Naturalization Act).

19. See *Nguyen*, 533 U.S. at 57.

20. See *id.* (rejecting Nguyen’s argument that he was a United States citizen because Nguyen was never legitimated nor had his father taken an oath of paternity before Nguyen had turned eighteen years of age).

21. See *generally* *Nguyen v. Immigration and Naturalization Serv.*, 208 F.3d 528 (5th Cir. 2000).

22. See *id.* at 535 (describing the constitutional challenge brought before the Fifth Circuit Court of Appeals by Nguyen who argued that the statute was “unconstitutional because it relies on outdated stereotypes regarding male and female parents”).

23. See *id.* (affirming the statute by relying on the reasoning in *Miller v. Albright*, 523 U.S. 420 (1998), which found that the statute was well tailored to meet the important government objectives of encouraging healthy relationships between a parent and child while the child is a minor and fostering ties between a foreign born child and the United States). Compare *id.* with *Lake v. Reno*, 226 F.3d 131, 148 (2d Cir. 2000) (applying heightened scrutiny to find that the statute “violates the equal

the United States granted certiorari to resolve the divided opinions.²⁴

III. MAJORITY OPINION

Justice Kennedy authored the 5-4 majority opinion affirming the lower courts ruling, which begins its analysis by reiterating the equal protection scrutiny necessary for gender-based classifications: the challenged classification must serve “important governmental objectives” and the “discriminatory means” must be “substantially related to the achievement of those objectives.”²⁵ The opinion addresses two initial issues before beginning its discussion of the governmental interests and means.²⁶ First, the statute provides for equality between expectant citizen mothers who decide to return to the United States to give birth and those who choose not to return.²⁷ Second, the statute places no limitation on when a child born abroad to only one citizen parent, whether father or mother, must apply for citizenship.²⁸ The only statutory distinction is that a child born to a citizen father has eighteen years to complete one of three affirmative steps.²⁹

A. Important Governmental Interests

The Court recognizes two important governmental interests that justify the statute’s unequal requirements.³⁰ The first is the importance of verifying the biological relationship between the parent and child.³¹ While a mother’s biological relationship to the child is evident from the process of giving birth, basic biology prevents a similar verification of the father’s identity.³² A father need

protection rights of citizen fathers as guaranteed by the Fifth Amendment”).

24. See generally *Nguyen v. Immigration and Naturalization Serv.*, 208 F.3d 528 (5th Cir. 2000), cert. granted, 530 U.S. 1305 (2000), *aff’d*, 533 U.S. 53 (2001).

25. *Nguyen*, 533 U.S. at 60.

26. See *id.* at 61 (noting that “two observations concerning the operation of the provision are in order” before the Court considers the governmental interests advanced by the statute).

27. See *id.* (presenting the challenged statute as a mere equalizer for pregnant women abroad who make different decisions on where to give birth).

28. See *id.* at 61 (noting that an individual who qualifies under the statute has an unlimited time period in which to assert citizenship).

29. See *id.* at 2060 (emphasizing the eighteen-year period in which citizen fathers or their children have the opportunity to transmit citizenship).

30. See *Nguyen*, 533 U.S. at 62.

31. See *id.* (emphasizing the importance of “assuring that a biological parent-child relationship exists”).

32. See *id.* (describing the various ways of documenting the mother’s identity including hospital records, birth certificates, or witnesses).

not be present at the birth, and a male present at the birth may not be the biological father.³³ In terms of their identification, mothers and fathers are not similarly situated because of their biological differences. According to the Court, the gender-specific terms in the statute do no more than reflect these differences.³⁴ “Hollow” gender-neutral terms are unnecessary when gender-specific terminology reflects lawful distinctions.³⁵

The second important governmental interest recognized by the Court is the importance of encouraging a substantive parent-child relationship that not only “is recognized, as a formal matter, by the law, but [is] one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”³⁶ The majority declares that this opportunity for a relationship between the mother and child occurs through the birth itself.³⁷ In contrast, the birth does not signal the same opportunity for the father-child relationship, the majority asserts, because of the inherent uncertainty of paternity.³⁸ Men have no simple way to know with certainty that a sexual encounter results in pregnancy, particularly if it occurs when travelling abroad.³⁹ Moreover, there is no guarantee that a father who is aware of the pregnancy will attend the birth or ever meet his child.⁴⁰

The majority views the contested statute as necessarily compensating for the lack of a guaranteed “point of contact” between the citizen father and the child that is inherent in the process of birth for the citizen mother and the child.⁴¹ Furthermore,

33. *See id.* (portraying the difficulty in accurately identifying the father by merely looking to which man attends the birth).

34. *See id.* at 64 (arguing that the gender-specific terms in the statute reflect “a permissible distinction” of biological differences between men and women).

35. *See Nguyen*, 533 U.S. at 64 (declaring that to insist on gender-neutral terms “would be to insist on a hollow neutrality”).

36. *Id.* at 65.

37. *See id.* (stating that the process of birth serves as “an initial point of contact” between the mother and child which provides them with the possibility of developing a close relationship).

38. *See id.* (noting that the nine month disconnect between conception and birth dilutes any certainty of fatherhood).

39. *See id.* (discussing the Court’s concern with the large numbers of male military personnel and travelers who visit foreign countries and may never be aware that they conceived a child).

40. *See Nguyen*, 533 U.S. at 66 (explaining the Court’s concern that even men who are aware of the birth may not be involved in the child’s life).

41. *Id.* (describing the “unremarkable step” taken by § 1409 to provide for the citizen father the same guarantee of a possible relationship that inherently exists for citizen mothers).

the Court defers to Congress the decision of how strictly to limit citizenship, and the benefits that flow from it, to individuals with varying degrees of “ties and allegiances” to the United States.⁴² Lastly, the majority denies the allegation that the statute encapsulates a gender-based stereotype, declaring instead that the statute is based on the non-controversial fact that fatherhood cannot be guaranteed by a single event such as giving birth.⁴³

B. Substantially Related Means

The majority opinion commences this portion of its discussion by noting other statutory provisions for citizenship and naturalization that carry similar requirements for action before a child turns eighteen years old.⁴⁴ Additionally, Congress administered the statutory scheme of § 1409(a) to simplify compliance with its important interest of ensuring the opportunity for substantial parent-child relationships with the citizen father.⁴⁵ A policy promoting the opportunity of meaningful parent-child relationships bears heavily on the government’s interest that a substantial bond actually develops.⁴⁶ Finally, the Court declares that the statute substantially furthers the government interests in light of the undesired prospect of granting citizenship to “vast numbers of persons.”⁴⁷

42. *Id.* at 67 (declaring it “unobjectionable for Congress to require some minimal opportunity for the development of a relationship” so that citizenship is not unwittingly bestowed upon individuals with minimal connection to the United States).

43. *See id.* at 68. The Court announced that:

[t]here is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father.

44. *See Nguyen*, 533 U.S. at 69 (noting 18 U.S.C. §§ 1431 and 1432 as examples of citizenship and naturalization statutes that have similar requirements).

45. *See id.* at 69-70 (arguing that instead of advancing the interest of ensuring actual substantive-child relationships or waiving formal requirements when such a relationship is proven, Congress adopted an interest that is easily met with objective and simple administrative requirements: the opportunity for a close relationship to develop).

46. *See id.* at 70 (reporting that the Court’s previously decided equal protection cases involving sex-based classifications did not require that the challenged statutes achieve their objectives in all instances).

47. *Id.* (noting the “exceedingly persuasive” fit between the ends and means in this case). Since the Court found that § 1409(a)(4) met the standard, it did not address the issue of whether, if it failed to satisfy the standard of review, the Court is able to confer citizenship outside of the manner prescribed by Congress. *See Nguyen*, 533 U.S. at 71. The majority alluded to the obstacles that would confront the success of such an argument, such as the inapplicability of the severability provision. *See id.*

C. The Majority's Conclusions

The majority opinion completes its analysis by describing the “minimal” nature of the obligation imposed on the citizen father and the lack of “inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering [Congress’] important objectives.”⁴⁸ The citizen father has eighteen years to engage in one of the three affirmative steps outlined in the statute.⁴⁹ Further, the child of a citizen father not in compliance with the statute still has the option of seeking citizenship as his or her individual right.⁵⁰ The majority concludes by declaring that the statute does nothing more than recognize basic biological differences between men and women with regard to the process of birth, and uses gender-specific distinctions that the Equal Protection Clause does not forbid.⁵¹ The majority decision affirms the judgement of the Court of Appeals and concluded that § 1409(a)(4) satisfies the necessary standard.⁵²

IV. DISSENTING OPINION

Justice O’Connor authored a vigorous dissent, declaring that while the majority announced it was applying heightened scrutiny, its analysis was “a stranger” to the Court’s thirty-year precedent applying heightened scrutiny to instances of gender-based classifications.⁵³ The dissent argues that the INS failed to establish that the means employed substantially relate to important governmental interests, and states that it would reverse the Court of Appeals’ ruling.⁵⁴

The dissent begins with a lengthy discussion of the differences between heightened scrutiny and rational basis review, and how the distinction between the two standards anchors the dissent’s opinion.⁵⁵ The dissent addresses seven important distinctions, focusing on the

48. *Id.*

49. *See id.* (portraying the burden as minimally onerous).

50. *See id.* at 71 (describing the possibility of a child seeking citizenship independent of ties to his or her citizen parent).

51. *See Nguyen*, 533 U.S. at 72 (asserting that the notion of equal protection does not forbid Congressional treatment of a problem in a gender-specific manner).

52. *See id.* at 72-3 (summarizing the majority’s findings).

53. *Id.* at 74 (O’Connor, J., dissenting) (pronouncing a break from the Court’s “long line” of precedent regarding sex-based legislative classifications).

54. *See id.* (O’Connor, J., dissenting) (declaring that the INS failed to show “an exceedingly persuasive justification for the sex-based classification” contained in § 1409(a)(4)).

55. *See id.* at 75 (O’Connor, J., dissenting) (defining heightened scrutiny and comparing it to the more lenient standard of rational basis review).

last and most important: the contrast in the required fit between the ends and means.⁵⁶ The required tighter fit under heightened scrutiny means that the availability of sex-neutral classifications is a critical indicator of the appropriate classification.⁵⁷

The dissenting opinion then critiques the majority's inadequate application of the heightened scrutiny level of review.⁵⁸ For example, Justice O'Connor notes that the majority failed to inquire into the real purposes of § 1409(a)(4) and the possibility of whether the sex-based classification is being used inappropriately as a proxy for more precise classifications.⁵⁹

A. *First Governmental Interest*

The majority indicates that the first important governmental interest is the assurance of a biological relationship between the citizen parent and child.⁶⁰ However, the dissent points out that the majority failed to examine whether this interest is one of the real purposes of the statute.⁶¹ The respondents did not argue this interest in their justification of the sex-based classification.⁶² Nonetheless, in a "striking" disparity with what the INS argues, the majority relies on the interest in defending its own interpretation of the statute.⁶³

The dissent considers the insufficient fit between the ends and the means to be the most significant aspect of the majority's reliance on

56. See *Nguyen*, 533 U.S. at 77 (O'Connor, J., dissenting) (explaining that heightened scrutiny requires that the discriminatory means are "substantially related" to an important governmental interest, whereas rational basis review requires only that the means be "rationally related to a conceivable and legitimate state end").

57. See *id.* at 78 (describing the probative value of sex-neutral alternatives in ascertaining the validity of a sex-based classification).

58. See *id.* at 78-9 (criticizing the majority for failing to discuss the significance of heightened scrutiny and for superficially applying the standard).

59. See *id.* at 79.

60. See *id.* at 82 (O'Connor, J., dissenting) (referring to the first governmental interest discussed by the majority and stating that while the mother's relationship is "verifiable from the birth itself," the validity of the father's relationship must be gauged by less certain measures).

61. See *Nguyen*, 533 U.S. at 82 (O'Connor, J., dissenting) (noting that even if Congress had this interest in mind, the INS did not rely on it in the materials it submitted to the Court).

62. See *id.* at 84 (O'Connor, J., dissenting) (describing the two justifications in the INS's brief as: (1) offering to ensure a "sufficiently recognized or formal relationship to their . . . citizen parent to justify the conferral of citizenship," and (2) "preventing such child from being stateless").

63. See *id.* at 79 (O'Connor, J., dissenting) (invoking the significance of the Court's role of determining whether the proffered justification for a sex-based classification is "exceedingly persuasive").

this interest.⁶⁴ Section 1409(a) (4) places a burden on citizen fathers that seems unnecessary in light of § 1409(a) (1), which requires that “‘a blood relationship between the person and the father [be] established by clear and convincing evidence.’”⁶⁵ Satisfaction of § 1409(a) (1) sufficiently achieves the first important governmental interest on its own.⁶⁶ Furthermore, the eighteen-year time requirement provides little proof of the relationship than would be achieved through the “clear and convincing” requirement of § 1409(a) (1).⁶⁷ The dissent notes the difficulty in concluding that § 1409(a) (4) furthers an important governmental interest when it adds little to what is already achieved through another existing provision.⁶⁸

The dissent’s second significant concern is the majority’s dismissal of the availability of sex-neutral alternatives for assuring a biological parent-child relationship.⁶⁹ Contrary to established precedent that rejects sex-based classifications where comparable or better sex-neutral alternatives existed, the majority “turns this principle on its head by denigrating as ‘hollow’ the very neutrality that the law requires.”⁷⁰ Precedent requires that the existence of sex-neutral alternatives strike against the validity of sex-based classifications, in stark opposition to the majority’s use of the sex-neutral terms as confirmation of the statute’s legality.⁷¹

B. Second Governmental Interest

The dissent opens its discussion of the second governmental interest offered by the majority, the opportunity to develop a substantial parent-child relationship, by declaring it “at best, is a simultaneously watered-down and beefed-up version of this interest

64. See *id.* at 80 (O’Connor, J., dissenting) (“The gravest defect in the [majority’s] reliance on this interest . . . is the insufficiency of the fit between § 1409(a) (4)’s discriminatory means and asserted ends.”).

65. *Id.* at 80 (O’Connor, J., dissenting).

66. See *Nguyen*, 533 U.S. at 80 (O’Connor, J., dissenting) (arguing that there is little that § 1409(a) (4) accomplishes that is not included in § 1409(a) (1)).

67. See *id.* (O’Connor, J., dissenting) (noting the benefits of modern DNA testing in assuring the biological relationship, especially when compared to “written acknowledgement of paternity under oath,” and the fact that petitioners did not argue for a requirement of DNA testing but rather the flexibility to obtain proof in whatever manner satisfies the goal of establishing paternity).

68. See *id.* at 81 (O’Connor, J., dissenting).

69. See *id.* (O’Connor, J., dissenting) (asserting that numerous sex-neutral alternatives would better serve the government interest of assuring the existence or documentation of a biological parent-child relationship).

70. *Id.* at 82 (O’Connor, J., dissenting).

71. See *Nguyen*, 533 U.S. at 82 (O’Connor, J., dissenting) (declaring that “the avoidance of gratuitous sex-based distinctions is the hallmark of equal protection”).

asserted by the INS.”⁷² The dissent questions the majority’s reliance on the opportunity of a relationship, versus the actual existence of the relationship, and wonders how an eighteen-year time limit substantially satisfies the required ends-means fit.⁷³

The dissent returns again to the availability of sex-neutral alternatives to replace the statute’s facially discriminatory treatment of parents on the basis of their sex.⁷⁴ The statute discriminates against a father who chooses to be present at the birth in favor of a mother who by nature must be present.⁷⁵ When both parents are present at the birth and have an equal opportunity to develop a substantial relationship with the child they are similarly situated yet treated dissimilarly for no reason other than their respective sex.⁷⁶

When the majority modifies the interest to that of a real substantive parent-child relationship, as opposed to the mere opportunity for one, it supports its means-ends analysis by declaring that “it is almost axiomatic” for a policy seeking to foster relationships to bear strongly on the actual development of that bond.⁷⁷ The dissent reprimands the majority for sliding over the necessity of proving “the relationship between the intent to foster an opportunity and the fruition of the desired effect.”⁷⁸ The dissenting opinion calls for the application of heightened scrutiny analysis in order to come to an appropriate and fact-specific determination of the relationship between the desired and the actual outcome.⁷⁹

The dissent then examines the fit between the desired goal of

72. *Id.* at 84 (O’Connor, J., dissenting) (describing the INS’ goal of an actual relationship, as opposed to the mere opportunity for one, and the INS’ desire for a formal relationship, in contrast to the majority’s addition of “real, everyday ties”).

73. *See id.* (O’Connor, J., dissenting) (articulating the limited benefits gained when children have an opportunity for a strong parent-child relationship that never develops or the child obtains the necessary proof of paternity for a father who remains uninvolved in the child’s life, while an involved father who fails to satisfy the eighteen-year time limit sacrifices the possibility of obtaining his child’s citizenship under § 1409(a)).

74. *See id.* at 86 (O’Connor, J., dissenting) (stating that sex-neutral alternatives could easily meet and satisfy the goal of providing an opportunity for a relationship).

75. *See id.* (O’Connor, J., dissenting) (remarking on the preferential treatment for mothers who are present at the birth by necessity as compared to fathers who attend by choice).

76. *See Nguyen*, 533 U.S. at 86-87 (O’Connor, J., dissenting) (referring to well-established precedent to demonstrate the inconsistency of this treatment with the premise of equal protection).

77. *Id.* at 87 (O’Connor, J., dissenting) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

78. *Id.*

79. *See id.* (O’Connor, J., dissenting) (dismissing “the majority’s sweeping claim” as a poor surrogate for the thoughtful application of heightened scrutiny analysis to the classification at issue).

producing real, substantive parent-child relationships with the discriminatory classification used in § 1409(a)(4).⁸⁰ Justice O'Connor notes the availability of sex-neutral classification and invokes precedent to dismiss the use of a sex-based classification for the benefit of administrative convenience, both in this instance and generally.⁸¹ O'Connor then concludes that the majority's claim of a substantial relationship between the challenged statute and the goal of establishing a genuine relationship is based not on biological differences, but, rather, on parenting stereotypes.⁸² In this instance, § 1409(a)(4) represents a historical context where mothers were expected to care for children while fathers had no such obligation.⁸³ The dissent rejects the majority's incorrect definition of stereotype and discusses the Court's past recognition of stereotypes embedded in overbroad generalizations that nonetheless may be supported by empirical evidence.⁸⁴ The dissent further emphasizes the need to recognize when gender is being used as an inappropriate proxy and to instead draw accurate and impartial classifications.⁸⁵ Accordingly, the contested statute's inappropriate reliance on stereotypes leads to the "inescapable conclusion" that it fails to satisfy heightened scrutiny.⁸⁶

C. *The Dissent's Conclusion*

In conclusion, the dissent dismisses several of the majority's points as distracting to its primary discussion.⁸⁷ First, the majority's

80. See *id.* at 88 (O'Connor, J., dissenting) (turning to the remaining question requiring the Court's analysis).

81. See *id.* (O'Connor, J., dissenting) (invoking precedent to dismiss use of sex-based distinctions for administrative ease and indicating that sex-neutral requirements regarding parental presence at the time of birth can also impose little administrative inconvenience).

82. See *Nguyen*, 533 U.S. at 89 (O'Connor, J., dissenting) (portraying the generalization that women are more likely to have caring relationships with their children than men, and using well-established precedent to combat the use of generalizations as self-fulfilling prophecies).

83. See *id.* at 92 (O'Connor, J., dissenting) (noting the contrast between other period laws and current laws that no longer embody the outdated generalization of mother as sole caregiver).

84. See *id.* at 90 (O'Connor, J., dissenting) (recognizing that while generalizations may be supported by statistical evidence and may be applicable to most people, the Court has consistently rejected generalizations in favor of precision).

85. See *id.* (O'Connor, J., dissenting) (noting that the Court's touchstone test for the existence of stereotypes is whether the classification uses outdated generalizations as a proxy for other more accurate bases).

86. *Id.* at 89 (O'Connor, J., dissenting) (indicating that the majority's attempt to avoid relying on stereotypes fails and that the result is a faulty exceedingly persuasive justification).

87. See *Nguyen*, 533 U.S. at 93 (O'Connor, J., dissenting) ("The Court makes a

reference to obtaining equality between expectant citizen mothers abroad⁸⁸ is irrelevant to the question being decided in the case.⁸⁹ Second, the fact that the burden on citizen fathers is minimal⁹⁰ does nothing to redeem its otherwise unconstitutional nature.⁹¹ Third, the majority's concern with the high number of American men abroad⁹² may establish an important government concern but does nothing to address whether the statute's discriminatory means are permissible, or even whether the concern itself is based on an outdated "stereotype of male irresponsibility."⁹³ Lastly, the dissenting opinion concludes by noting that § 1409(a) (4) could appropriately be severed from the rest of the statute.⁹⁴

V. IMPLICATIONS AND CONCLUSION

Nguyen v. Immigration and Naturalization Service delivers potential structural damage to the standard of heightened scrutiny for sex-based classifications by weakening the standard's thirty-year history of strong precedent.⁹⁵ The dissent appropriately rebukes the majority's description of its analysis as heightened scrutiny:

No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration.⁹⁶

number of observations that tend, on the whole, to detract and distract from the relevant equal protection inquiry.").

88. See *supra* note 27 and accompanying text.

89. See *Nguyen*, 533 U.S. at 93 (O'Connor, J., dissenting) (labeling the issue as outside of the constitutional challenge).

90. See *supra* notes 48-50 and accompanying text.

91. See *Nguyen*, 533 U.S. at 93-94 (O'Connor, J., dissenting) (placing aside the question of whether the affirmative requirement is a minimal burden).

92. See *supra* notes 38-39 and accompanying text.

93. *Nguyen*, 533 U.S. at 94 (O'Connor, J., dissenting) (recognizing the possible stereotypes in the majority's portrayal of American men overseas and noting that presentation of statistics does not replace a discussion of whether "discriminatory means are a permissible governmental response to those circumstances").

94. See *id.* at 94-6 (O'Connor, J., dissenting) (presenting the relevant statutory language and precedent that would permit the severance of § 1409(a) (4) had the petitioners been successful).

95. *Id.* at 74 (O'Connor, J., dissenting) (describing the majority's explanation and application of heightened scrutiny as "a stranger to our precedents").

96. *Id.* at 97.

2002]

NGUYEN V. INS

755

The majority purported to apply the requisite standard of review for sex-based distinctions yet failed to conduct the corresponding analysis. This mislabeling introduces a weakened standard for assessing the validity of sex-based classifications.

Moreover, the majority in *Nguyen* perpetuates long-standing assumptions about parenting and family. The decision continues the devaluation of unwed fathers that exists in both immigration and domestic custody contexts.⁹⁷ By setting lowered expectations for the contributions that unmarried fathers may make to the lives of their children and promulgating statutory obstacles in the path of unwed fathers, the Court devalues the relationship between unmarried fathers and their children.⁹⁸ Additionally, the decision legitimizes stereotypical assumptions regarding family arrangements. The contested statutory provision embodies the restrictive stereotypes of the mother as the caregiver and the father as the breadwinner.⁹⁹ In its silence on nontraditional family structure, the majority dismisses the possibility of a heavily involved unwed father and an uninterested mother.¹⁰⁰ The Court perseveres in its adherence to traditionally defined family roles to the exclusion of nontraditional family formation.

BROOKE B. GRANDLE

97. See Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 958 (2001) (describing the extension of prejudice against unwed fathers from domestic custody law to immigration law).

98. See *id.* at 958-59 (presenting the continuing difficulties that confront unwed fathers in immigration matters when dealing with a legal system that encourages parenting in a marital union).

99. See Cornelia T.L. Pillard and T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 21 (1998) (portraying the stereotypes of a “caregiving” mother and “breadwinning” father that remain after *Miller*). The remarks remain fully applicable after the *Nguyen* decision because the *Nguyen* majority accepted the same generalizations as the *Miller* Court did. See *Nguyen*, 533 U.S. at 88.

100. See *id.* at 23 (emphasizing the legal weight that is given to restrictive gender stereotypes after the *Miller* court ruled against atypical family formation and function).