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MILLER v. ALBRIGHT
SUPREME COURT OF THE UNITED STATES
523 US 420
April 22, 1998

OPINION: Justice STEVENS/CHIEF JUSTICE REHNQUIST…There are "two sources of citizenship, and two only: birth and naturalization." *United States v. Wong Kim Ark* (1898). Within the former category, the Fourteenth Amendment of the Constitution guarantees that every person "born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." **Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress.**

The petitioner in this case challenges the constitutionality of the statutory provisions governing the acquisition of citizenship at birth by children born out of wedlock and outside of the United States. The specific challenge is to the distinction drawn by §309 of the Immigration and Nationality Act (INA) between the **child of an alien father and a citizen mother**, on the one hand, and the **child of an alien mother and a citizen father**, on the other. Subject to residence requirements for the citizen parent, the citizenship of the former is established at birth; the citizenship of the latter is not established unless and until either the father or his child takes certain affirmative steps to create or confirm their relationship. Petitioner contends that the statutory requirement that those steps be taken while the child is a minor violates the Fifth Amendment because the statute contains no limitation on the time within which the child of a citizen mother may prove that she became a citizen at birth.

We find no merit in the challenge because the statute does not impose any limitation on the time within which the members of either class of children may prove that they qualify for citizenship. It does establish different qualifications for citizenship for the two classes of children, but we are

persuaded that the qualifications for the members of each of those classes, so far as they are implicated by the facts of this case, are well supported by valid governmental interests. We therefore conclude that the statutory distinction is neither arbitrary nor invidious.

Petitioner was born on June 20, 1970, in Angeles City, Republic of the **Philippines**. The records of the Local Civil Registrar disclose that her birth was registered 10 days later, that she was named Lorena Penero, that her **mother** was Luz Penero, **a Filipino national**, and that her birth was "**illegitimate**." Spaces on the form referring to the name and the nationality of the father are blank.

Petitioner grew up and received her high school and college education in the **Philippines**. At least until after her 21st birthday, she never lived in the United States. There is no evidence that either she or her mother ever resided outside of the Philippines.

Petitioner's father, Charlie Miller, is an American citizen residing in Texas. He apparently served in the **United States Air Force** and was stationed in the Philippines at the time of petitioner's conception. **He never married petitioner's mother**, and there is no evidence that he was in the Philippines at the time of petitioner's birth or that he ever returned there after completing his tour of duty. In 1992, Miller filed a petition in a Texas court to establish his relationship with petitioner. The petition was unopposed and the court entered a "Voluntary Paternity Decree" finding him "to be the biological and legal father of Lorelyn Penero Miller." The decree provided that "the parent-child relationship is created between the father and the child as if the child were born to the father and mother during marriage."

In November 1991, petitioner filed an application for registration as a United States citizen with the State Department. The application was denied in March 1992, and petitioner reapplied after her father obtained the paternity decree in Texas in July 1992. The reapplication was also denied on the ground that the Texas decree did not satisfy "the requirements of Section 309(a)(4) INA, which requires that a child born out of wedlock be legitimated before age eighteen in order to acquire U.S. citizenship under Section 301(g) INA." In further explanation of its reliance on §309(a)(4), the denial letter added: "Without such legitimation before age eighteen, there is no legally recognized relationship under the INA and the child acquires no rights of citizenship through an American citizen parent."

In 1993, petitioner and her father filed an amended complaint against the Secretary of State in the United States District Court for the Eastern District of Texas, seeking a judgment declaring that petitioner is a citizen of the United States and that she therefore has the right to possess an American passport. They alleged that the INA's different treatment of citizen mothers and citizen fathers violated Mr. Miller's "right to equal protection under the laws by utilizing the suspect classification of gender without justification." In response to a motion to dismiss filed by the Government, the District Court…[sided with the Government] because federal courts do not have the power to "grant citizenship."

The Court of Appeals…concluded that the requirements imposed on the "illegitimate" child of an American citizen father, but not on the child of a citizen mother, were justified by the interest in fostering the child's ties with this country. It explained:

> "We conclude…that a desire to promote early ties to this country and to those relatives who are citizens of this country is not an irrational basis for the requirements…Furthermore, we find it entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father. A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence. As the Court has recognized, 'mothers and fathers of illegitimate children are not similarly situated.' The putative father often goes his way unconscious of the birth of the child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother.' This sex-based distinction seems especially warranted where, as here, the applicant for citizenship was fathered by a U.S. serviceman while serving a tour of duty overseas."

Judge Wald concurred in the judgment despite her opinion that there is "no rational basis for a law that requires a U.S. citizen father, but not a U.S. citizen mother, to formally legitimate a child before she reaches majority as well as agree in writing to provide financial support until that date or forever forfeit the right to transmit citizenship." While she agreed that "requiring some sort of minimal 'family ties' between parent and child, as well as fostering an early connection between child and country, is rational government policy," she did not agree that those goals justify "a set of procedural hurdles for men-and only men-who wish to confer citizenship on their children." She nevertheless regretfully concurred in the judgment because she believed that our decision in *Fiallo v. Bell* (1977) required the court to uphold the constitutionality of §1409.

We granted certiorari to address the following question:

> "Is the distinction in 8 U.S.C. §1409 between illegitimate children of United States citizen mothers and illegitimate children of United States citizen fathers a violation of the Fifth Amendment to the United States Constitution?"

Before explaining our answer to the single question that we agreed to address, it is useful to put to one side certain issues that need not be resolved. First, we need not decide whether *Fiallo v. Bell* dictates the outcome of this case, because that case involved the claims of several aliens to a special immigration preference, whereas here the petitioner claims that she is, and for years has been, an American citizen. Additionally, *Fiallo* involved challenges to the statutory distinctions between "illegitimate" and "legitimate" children, which are not encompassed in the question presented in this case and which we therefore do not consider.

The statutory provision at issue in this case draws two types of distinctions between citizen fathers and citizen mothers of children born out of wedlock. The first relates to the class of unmarried persons who may transmit citizenship at birth to their offspring, and the second defines the affirmative steps that are required to transmit such citizenship.

With respect to the eligible class of parents, an unmarried father may not transmit his citizenship to a child born abroad to an alien mother unless he satisfies the residency requirement in §1401(g) that applies to a citizen parent who is married to an alien. Under that provision, the citizen parent must have resided in the United States for a total of at least five years, at least two

of which were after attaining the age of 14 years. If the citizen parent is an unmarried mother, however,…she need only have had one year of continuous residence in the United States in order to confer citizenship on her offspring. Since petitioner's father satisfied the residency requirement in §1401(g), the validity of the distinction between that requirement and the unusually generous provision in §1409(c) is not at issue.

As for affirmative steps, §1409(a), as amended in 1986, imposes four requirements concerning unmarried citizen fathers that must be satisfied to confer citizenship "as of the date of birth" on a person born out of wedlock to an alien mother in another country. Citizenship for such persons is established if:

> "(1) a **blood relationship** between the person and the father is established by clear and convincing evidence,
>
> "(2) the father had the **nationality of the United States** at the time of the person's birth,
>
> "(3) the father (unless deceased) has agreed in writing to provide **financial support** for the person **until the person reaches the age of 18 years**, and
>
> "(4) **while the person is under the age of 18 years**-
>
> "(A) the person is **legitimated** under the law of the person's residence or domicile,
>
> "(B) the father **acknowledges paternity** of the person in writing under oath, or
>
> "(C) the **paternity of the person is established** by adjudication of a competent court."

Only the second of these four requirements is expressly included in §1409(c), the provision applicable to unwed citizen mothers. Petitioner, relying heavily on Judge Wald's separate opinion below, argues that there is no rational basis for imposing the other three requirements on children of citizen fathers but not citizen mothers. The first requirement is not at issue here, however, because the Government does not question Mr. Miller's blood relationship with petitioner.

Moreover, even though the parties have disputed the validity of the third condition-and even though that condition is repeatedly targeted in Justice BREYER's dissent-we need not resolve that debate because it is unclear whether the requirement even applies in petitioner's case; it was added in 1986, after her birth, and she falls within a special interim provision that allows her to elect application of the pre-amendment §1409(a), which required only legitimation before age 21. And even if the condition did apply to her claim of citizenship, the State Department's refusal to register petitioner as a citizen was expressly based on §1409(a)(4). Indeed, since that subsection is written in the disjunctive, it is only necessary to uphold the least onerous of the three alternative methods of compliance to sustain the Government's position. Thus, the only issue presented by the facts of this case is whether the requirement in §1409(a)(4)-that children born out of wedlock to citizen fathers, but not citizen mothers, obtain formal proof of paternity

by age 18, either through legitimation, written acknowledgment by the father under oath, or adjudication by a competent court-violates the Fifth Amendment…

Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen, regardless of whether the citizen parent is the male or the female partner. If the two parties engage in a second joint act-if they agree to marry one another-citizenship will follow. The provision at issue in this case, however, deals only with cases in which no relevant joint conduct occurs after conception; it determines the ability of each of those parties, acting separately, to confer citizenship on a child born outside of the United States.

If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion-an alternative that is available by law to many, and in reality to most, women around the world. She must then actually give birth to the child. Section 1409(c) rewards that choice and that labor by conferring citizenship on her child.

If the citizen is the unmarried male, he need not participate in the decision to give birth rather than to choose an abortion; he need not be present at the birth; and for at least 17 years thereafter he need not provide any parental support, either moral or financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child pursuant to §1409(a). In order **retroactively** to transmit his citizenship to the child as of the date of the child's birth, all that §1409(a)(4) requires is that he be willing and able to acknowledge his paternity in writing under oath while the child is still a minor. In fact, §1409(a)(4) requires even less of the unmarried father-that provision is alternatively satisfied if, before the child turns 18, its paternity "is established by adjudication of a competent court." It would appear that the child could obtain such an adjudication absent any affirmative act by the father, and perhaps even over his express objection.

There is thus a vast difference between the burdens imposed on the respective parents of potential citizens born out of wedlock in a foreign land. It seems obvious that the burdens imposed on the female citizen are more severe than those imposed on the male citizen by §1409(a)(4), the only provision at issue in this case. It is nevertheless argued that the male citizen and his offspring are the victims of irrational discrimination because §1409(a)(4) is the product of "overbroad stereotypes about the relative abilities of men and women." We find the argument singularly unpersuasive.

Insofar as the argument rests on the fact that the male citizen parent will "forever forfeit the right to transmit citizenship" if he does not come forward while the child is a minor, whereas there is no limit on the time within which the citizen mother may prove her blood relationship, the argument overlooks the difference between a substantive condition and a procedural limitation. The substantive conduct of the unmarried citizen mother that qualifies her child for citizenship is completed at the moment of birth; the relevant conduct of the unmarried citizen father or his child may occur at any time within 18 years thereafter. There is, however, no procedural hurdle that limits the time or the method by which either parent (or the child) may provide the State Department with evidence that the necessary steps were taken to transmit citizenship to the child.

The substantive requirement embodied in §1409(a)(4) serves, at least in part, to ensure that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen. As originally enacted in 1952, §1409(a) required simply that "the paternity of such child [born out of wedlock] is established while such child is under the age of twenty-one years by legitimation." The section offered no other means of proving a biological relationship. In 1986, at the same time that it modified the INA provisions at issue in *Fiallo* in favor of unmarried fathers and their out-of-wedlock children, Congress expanded §1409(a) to allow the two other alternatives now found in subsections (4)(B) and (4)(C). The purpose of the amendment was to "simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock to an American citizen father, by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction." The 1986 amendment also added §1409(a)(1), which requires paternity to be established by clear and convincing evidence, in order to deter fraudulent claims; but that standard of proof was viewed as an ancillary measure, not a replacement for proof of paternity by legitimation or a formal alternative.

There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective. Nor can it be denied that the male and female parents are differently situated in this respect. The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record. Thus, the requirement that the father make a timely written acknowledgment under oath, or that the child obtain a court adjudication of paternity, produces the rough equivalent of the documentation that is already available to evidence the blood relationship between the mother and the child. If the statute had required the citizen parent, whether male or female, to obtain appropriate formal documentation within 30 days after birth, it would have been "gender-neutral" on its face, even though in practical operation it would disfavor unmarried males because in virtually every case such a requirement would be superfluous for the mother. Surely the fact that the statute allows 18 years in which to provide evidence that is comparable to what the mother provides immediately after birth cannot be viewed as discriminating against the father or his child.

Nevertheless, petitioner reiterates the suggestion that it is irrational to require a formal act such as a written acknowledgment or a court adjudication because the advent of reliable genetic testing fully addresses the problem of proving paternity, and subsection (a)(1) already requires proof of paternity by clear and convincing evidence. We respectfully disagree. Nothing in subsection (a)(1) requires the citizen father or his child to obtain a genetic paternity test. It is difficult, moreover, to understand why signing a paternity acknowledgment under oath prior to the child's 18th birthday is more burdensome than obtaining a genetic test, which is relatively expensive, normally requires physical intrusion for both the putative father and child, and often is not available in foreign countries. Congress could fairly conclude that despite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity, coupled with a clear-and-convincing evidence standard to deter fraud. The time limitation, in turn, provides assurance that the formal act is based upon reliable evidence, and also deters fraud. Congress is of course free to revise its collective judgment and permit genetic proof of paternity rather than requiring some formal legal act by the father or a court, but the Constitution does not now require any such change.

Section 1409 also serves two other important purposes that are unrelated to the determination of paternity: the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States. When a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child immediately after the birth. Such a child thus has the opportunity to develop ties with its citizen mother at an early age, and may even grow up in the United States if the mother returns. By contrast, due to the normal interval of nine months between conception and birth, the unmarried father may not even know that his child exists, and the child may not know the father's identity. Section 1409(a)(4) requires a relatively easy, formal step by either the citizen father or his child that shows beyond doubt that at least one of the two knows of their blood relationship, thus assuring at least the opportunity for them to develop a personal relationship.

The facts of this very case provide a ready example of the concern. Mr. Miller and petitioner both failed to take any steps to establish a legal relationship with each other before petitioner's 21st birthday, and there is no indication in the record that they had any contact whatsoever before she applied for a United States passport. Given the size of the American military establishment that has been stationed in various parts of the world for the past half century, it is reasonable to assume that this case is not unusual. In 1970, when petitioner was born, about 683,000 service personnel were stationed in the Far East, 24,000 of whom were in the Philippines. Of all Americans in the military at that time, only one percent were female. These figures, coupled with the interval between conception and birth and the fact that military personnel regularly return to the United States when a tour of duty ends, suggest that Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children. It was surely reasonable when the INA was enacted in 1952, and remains equally reasonable today, for Congress to condition the award of citizenship to such children on an act that demonstrates, at a minimum, the possibility that those who become citizens will develop ties with this country-a requirement that performs a meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers.

It is of course possible that any child born in a foreign country may ultimately fail to establish ties with its citizen parent and with this country, even though the child's citizen parent has engaged in the conduct that qualifies the child for citizenship. A citizen mother may abandon her child before returning to the States, and a citizen father, even after acknowledging paternity, may die or abscond before his child has an opportunity to bond with him or visit this country. The fact that the interest in fostering ties with this country may not be fully achieved for either class of children does not qualify the legitimacy or the importance of that interest. If, as Congress reasonably may have assumed, the formal requirements in §1409(a)(4) tend to make it just as likely that fathers will have the opportunity to develop a meaningful relationship with their children as does the fact that the mother knows of her baby's existence and often has custody at birth, the statute's effect will reduce, rather than aggravate, the disparity between the two classes of children.

We are convinced not only that strong governmental interests justify the additional requirement imposed on children of citizen fathers, but also that the particular means used

in §1409(a)(4) are well tailored to serve those interests. It is perfectly appropriate to require some formal act, not just any evidence that the father or his child know of the other's existence. Such a formal act, whether legitimation, written acknowledgment by the father, or a court adjudication, lessens the risk of fraudulent claims made years after the relevant conduct was required. As for the requirement that the formal act take place while the child is a minor, Congress obviously has a powerful interest in fostering ties with the child's citizen parent and the United States **during his or her formative years**. If there is no reliable, contemporaneous proof that the child and the citizen father had the opportunity to form familial bonds before the child turned 18, Congress reasonably may demand that the child show sufficient ties to this country on its own rather than through its citizen parent in order to be a citizen…

Even though the rule applicable to each class of children born abroad is eminently reasonable and justified by important Government policies, petitioner and her amici argue that §1409 is unconstitutional because it is a "gender-based classification." We shall comment briefly on that argument.

The words "stereotype," "stereotyping," and "stereotypical" are used repeatedly in petitioner's and her amici's briefs. They note that we have condemned statutory classifications that rest on the assumption that gender may serve as a proxy for relevant qualifications to serve as the administrator of an estate, *Reed v. Reed*, to engage in professional nursing, *Mississippi Univ. for Women v. Hogan*, or to train for military service, *United States v. Virginia*, to name a few examples. Moreover, we have expressly repudiated cases that rested on the assumption that only the members of one sex could suitably practice law or tend bar. Discrimination that "is merely the accidental byproduct of a traditional way of thinking about females" is unacceptable. *Califano v. Goldfarb*.

The gender equality principle that was implicated in those cases is only indirectly involved in this case for two reasons. First, the conclusion that petitioner is not a citizen rests on several coinciding factors, not just the gender of her citizen parent. On the facts of this case, even if petitioner's mother had been a citizen and her father had been the alien, petitioner would not qualify for citizenship because her mother has never been to the United States. Alternatively, if her citizen parent had been a female member of the Air Force and, like Mr. Miller, had returned to the States at the end of her tour of duty, §1409 quite probably would have been irrelevant and petitioner would have become a citizen at birth by force of the Constitution itself. Second, it is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a legal relationship between parent and child-the birth itself for citizen mothers, but post-birth conduct for citizen fathers and their offspring. Nevertheless, we may assume that if the classification in §1409 were merely the product of an outmoded stereotype, it would be invalid.

The "gender stereotypes" on which §1409 is supposedly premised are (1) "that the American father is never anything more than the proverbial breadwinner who remains aloof from day-to-day child rearing duties," and (2) "that a mother will be closer to her child born out of wedlock than a father will be to his." Even disregarding the statute's separate, non-stereotypical purpose of ensuring reliable proof of a blood relationship, neither of those propositions fairly reflects the justifications for the classification actually at issue.

Section 1409(a)(4) is not concerned with either the average father or even the average father of a child born out of wedlock. It is concerned with a father (a) whose child was born in a foreign country, and (b) who is unwilling or unable to acknowledge his paternity, and whose child is unable or unwilling to obtain a court paternity adjudication. A congressional assumption that such a father and his child are especially unlikely to develop a relationship, and thus to foster the child's ties with this country, has a solid basis even if we assume that all fathers who have made some effort to become acquainted with their children are as good, if not better, parents than members of the opposite sex.

Nor does the statute assume that all mothers of illegitimate children will necessarily have a closer relationship with their children than will fathers. It does assume that all of them will be present at the event that transmits their citizenship to the child, that hospital records and birth certificates will normally make a further acknowledgment and formal proof of parentage unnecessary, and that their initial custody will at least give them the opportunity to develop a caring relationship with the child. Section 1409(a)(4)-the only provision that we need consider-is therefore supported by the undisputed assumption that fathers are less likely than mothers to have the opportunity to develop relationships, not simply, as Justice BREYER contends, that they are less likely to take advantage of that opportunity when it exists. These assumptions are firmly grounded and adequately explain why Congress found it unnecessary to impose requirements on the mother that were entirely appropriate for the father.

None of the premises on which the statutory classification is grounded can be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex. The biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands. Indeed, it is the suggestion that simply because Congress has authorized citizenship at birth for children born abroad to unmarried mothers, it cannot impose any post-birth conditions upon the granting of citizenship to the foreign-born children of citizen fathers, that might be characterized as merely a byproduct of the strong presumption that gender-based legal distinctions are suspect. An impartial analysis of the relevant differences between citizen mothers and citizen fathers plainly rebuts that presumption.

The judgment of the Court of Appeals is affirmed. It is so ordered.

CONCURRENCE: Justice O'CONNOR/KENNEDY…[Not Provided.]

CONCURRENCE: Justice SCALIA/THOMAS…I agree with the outcome in this case, but for a reason more fundamental than the one relied upon by Justice STEVENS. In my view it makes no difference whether or not §1409(a) passes "heightened scrutiny" or any other test members of the Court might choose to apply. **The complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.**

The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States v. Wong Kim Ark*. Under the Fourteenth Amendment, "every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." **Petitioner, having been born outside the**

territory of the United States, is an alien as far as the Constitution is concerned, and "can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress.'' Here it is the "authority of Congress" that is appealed to-its power under Art. I, §8, cl. 4, to "establish an uniform Rule of Naturalization." **If there is no congressional enactment granting petitioner citizenship, she remains an alien…**

By its plain language, §1409(a) sets forth a precondition to the acquisition of citizenship under §1401(g) by the illegitimate child of a citizen-father. Petitioner does not come into federal court claiming that she met that precondition, and that the State Department's conclusion to the contrary was factually in error. Rather, she acknowledges that she did not meet the last two requirements of that precondition, §§1409(a)(3) and (4). She nonetheless asks for a "declaratory judgment that [she] is a citizen of the United States" and an order to the Secretary of State requiring the State Department to grant her application for citizenship, because the requirements she did not meet are not also imposed upon illegitimate children of citizen-mothers, and therefore violate the Equal Protection Clause. Even if we were to agree that the difference in treatment between illegitimate children of citizen-fathers and citizen-mothers is unconstitutional, we could not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship. "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." *INS v. Pangilinan.*

…In sum, this is not a case in which we have the power to remedy the alleged equal protection violation by either expanding or limiting the benefits conferred so as to deny or grant them equally to all. **"We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests.'' Federal judges may not decide what those national interests are, and what requirements for citizenship best serve them.**

Because petitioner is not a citizen under any Act of Congress, we cannot give her the declaratory judgment or affirmative relief she requests. I therefore concur in the judgment.

DISSENT: Justice GINSBURG/SOUTER/BREYER…As Justice BREYER convincingly demonstrates, 8 U.S.C. §1409 classifies unconstitutionally on the basis of gender in determining the capacity of a parent to qualify a child for citizenship. The section rests on familiar generalizations: mothers, as a rule, are responsible for a child born out of wedlock; fathers unmarried to the child's mother, ordinarily, are not. The law at issue might have made custody or support the relevant criterion. Instead, it treats mothers one way, fathers another, shaping government policy to fit and reinforce the stereotype or historic pattern…

On the surface, §1409 treats females favorably. Indeed, it might be seen as a benign preference, an affirmative action of sorts. Two Justices today apparently take this view. Justice STEVENS' opinion, in which THE CHIEF JUSTICE joins, portrays §1409 as helpfully recognizing the different situations of unmarried mothers and fathers during the pre-natal period and at birth, and fairly equalizing the "burdens" that each parent bears. But pages of history place the provision in real-world perspective. Section 1409 is one of the few provisions remaining in the United States

Code that uses sex as a criterion in delineating citizens' rights. It is an innovation in this respect: During most of our Nation's past, laws on the transmission of citizenship from parent to child discriminated adversely against citizen mothers, not against citizen fathers.

Justice Ginsburg provides a most interesting history lesson!

The first statute on the citizenship of children born abroad, enacted in 1790, stated: "The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Statutes passed in 1795 and 1802 similarly conditioned the citizenship of the child born abroad on the father's at least one-time residence in the United States. This father's residence requirement suggests that Congress intended a child born abroad to gain citizenship only when the father was a citizen. That, indeed, was the law of England at the time. The statutory language Congress adopted, however, was ambiguous. One could read the words "children of citizens" to mean that the child of a United States citizen mother and a foreign father would qualify for citizenship if the father had at some point resided in the country. Or, as Chancellor Kent observed, the words might mean that both parents had to be United States citizens for citizenship to pass.

Under the 1802 legislation, children born abroad could not become citizens unless their parents were citizens in 1802, which meant that as the years passed few foreign-born persons could qualify. Daniel Webster, among others, proposed remedial legislation. His bill would have granted citizenship to children born abroad to United States-born citizen mothers as well as fathers. His effort was unsuccessful. Instead, in 1855, Congress clarified that citizenship would pass to children born abroad only when the father was a United States citizen. Codified as §1993 of the Revised Statutes, the provision originating in 1855 read: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

In these early statutes, Congress did not differentiate between children born abroad to married parents and those born out of wedlock. Section 1993, as applied, allowed transmission of citizenship to children born out of wedlock if the father legitimated the child. See also *Guyer v. Smith* (1864) (foreign born children who remain illegitimate do not qualify for citizenship). In several reported instances, children legitimated by their fathers gained citizenship even though the legitimation occurred, as it did in Lorelyn Miller's case, after the child reached majority. But see 3 G. Hackworth, Digest of International Law 29 (1942) (noting a case in which legitimation post-majority was deemed sufficient, but maintaining that "normally the legitimation must take place during the minority of the child").

In the early part of this century, the State Department permitted the transmission of citizenship from unwed mother to child reasoning that, for the child born out of wedlock, the mother "stands

in the place of the father." Ultimately, however, the Attorney General rejected the Department's reasoning, finding it incompatible with §1993's exclusive reference to fathers.

Women's inability to transmit their United States citizenship to children born abroad was one among many gender-based distinctions drawn in our immigration and nationality laws. The woman who married a foreign citizen risked losing her United States nationality. **In early days, "marriage with an alien, whether a friend or an enemy, produced no dissolution of the native allegiance of the wife." *Shanks v. Dupont.* By the end of the nineteenth century, however, a few courts adopted the view that a woman's nationality followed her husband's, particularly when the woman resided abroad in her husband's country. State Department officials inclined towards this view as well. In 1907, Congress settled the matter: It provided by statute that a female United States citizen automatically lost her citizenship upon marriage to an alien. This Court upheld the statute, noting that "the identity of husband and wife is an ancient principle of our jurisprudence." *Mackenzie v. Hare* (1915).**

The statutory rule that women relinquished their United States citizenship upon marriage to an alien encountered increasing opposition, fueled in large part by the women's suffrage movement and the enhanced importance of citizenship to women as they obtained the right to vote. In response, Congress provided a measure of relief. Under the 1922 Cable Act, marriage to an alien no longer stripped a woman of her citizenship automatically. But equal respect for a woman's nationality remained only partially realized. A woman still lost her United States citizenship if she married an alien ineligible for citizenship; she could not become a citizen by naturalization if her husband did not qualify for citizenship; she was presumed to have renounced her citizenship if she lived abroad in her husband's country for two years, or if she lived abroad elsewhere for five years. A woman who became a naturalized citizen was unable to transmit her citizenship to her children if her noncitizen husband remained alive and they were not separated. See *In re Citizenship Status of Minor Children* ("the status of the wife was dependent upon that of her husband, and therefore the children acquired their citizenship from the same source as had been theretofore existent under the common law"). No restrictions of like kind applied to male United States citizens.

Instead, Congress treated wives and children of male United States citizens or immigrants benevolently. The 1855 legislation automatically granted citizenship to women who married United States citizens. Under an 1804 statute, if a male alien died after completing the United States residence requirement but before actual naturalization, his widow and children would be "considered as citizens." That 1804 measure granted no corresponding dispensation to the husband and children of an alien woman…

In 1934, Congress moved in a new direction. It terminated the discrimination against United States citizen mothers in regard to children born abroad. Specifically, Congress amended §1993 to read:

> "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen

mother, as the case may be, has resided in the United States previous to the birth of such child."

Senate and House Reports on the Act stated that the change was made "to establish complete equality between American men and women in the matter of citizenship for themselves and for their children." Congress again did not speak of children born out of wedlock, but the 1934 Act "was construed as authorizing transmission of American citizenship by descent by an American citizen mother to a child born abroad…out of wedlock under the same conditions as a child born in wedlock."

…Six years later, Congress passed the Nationality Act of 1940, which replaced the Revised Statutes' single provision on citizenship of children born abroad with an array of provisions that turned on whether the child was born in an outlying possession of the United States, whether one or both of the child's parents were United States citizens, and whether the child was born in or out of wedlock. The 1940 Act preserved Congress' earlier recognition of parental equality in regard to children born in wedlock, but established a different regime for children born out of wedlock, one that disadvantaged United States citizen fathers and their children.

Under the 1940 Act, if the mother of the child born abroad out of wedlock held United States citizenship and previously had resided in the country or in a United States possession, the child gained the mother's nationality from birth, provided the child's paternity was not established by legitimation or a court order. But if the father and not the mother held United States citizenship, then the child would qualify for United States citizenship only upon legitimation or adjudication of paternity during the child's minority. Furthermore, the child generally had to live in the United States for five years before the age of 21. The same residency requirement applied to children born abroad to married couples with only one United States citizen parent, whether that parent was the mother or the father.

Subsequent legislation retained the gender lines drawn in the 1940 Act. The Immigration and Nationality Act of 1952 made only one significant change regarding the citizenship of children born abroad out of wedlock. It removed the provision that a mother could pass on her nationality to her child only if the paternity of the child had not been established. In 1986, however, Congress added further gender-based differentials. The Legislature that year permitted substitution of a written acknowledgment under oath or adjudication of paternity prior to age 18 in place of formal legitimation. To that extent, Congress eased access to citizenship by a child born abroad out of wedlock to a United States citizen father. At the same time, however, Congress imposed on such a child two further requirements: production of clear and convincing evidence of paternity, also a written statement from the father promising support until the child turned 18. The requirements for a child of a United States citizen mother remained the same; such a child obtained the mother's nationality if the mother had resided in the United States or its territorial possessions for at least a year before the child's birth. No substantive change has been made since 1986 in the law governing citizenship of children born abroad out of wedlock.

The history of the treatment of children born abroad to United States citizen parents counsels skeptical examination of the Government's prime explanation for the gender line drawn by §1409-the close connection of mother to child, in contrast to the distant or fleeting father-child link. Or, as Justice STEVENS puts it, a mother's presence at birth, identification on the birth

certificate, and likely "initial custody" of the child give her an "opportunity to develop a caring relationship with the child," which Congress legitimately could assume a father lacks. For most of our Nation's past, Congress demonstrated no high regard or respect for the mother-child affiliation. It bears emphasis, too, that in 1934, when Congress allowed United States citizen mothers to transmit their citizenship to their foreign-born children, Congress simultaneously and for the first time required that such children (unless both parents were citizens) fulfill a residence requirement: "The right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday."…Congress largely relied on a residence requirement, not the sex of the child's citizen parent, to assure an abiding affiliation with the United States.

Even if one accepts at face value the Government's current rationale, it is surely based on generalizations (stereotypes) about the way women (or men) are. These generalizations pervade the opinion of Justice STEVENS, which constantly relates and relies on what "typically," or "normally," or "probably" happens "often."

We have repeatedly cautioned, however, that when the Government controls "gates to opportunity," it "may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." Only an "exceedingly persuasive justification," *Kirchberg v. Feenstra* (1981), one that does "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," *United States v. Virginia*, will support differential treatment of men and women.

One can demur to the 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 of such children. As Justice BREYER has elucidated, this observation does not justify distinctions between male and female United States citizens who take responsibility, or avoid responsibility, for raising their children. Nor does it justify reliance on gender distinctions when the alleged purpose-assuring close ties to the United States-can be achieved without reference to gender. As Judge Wald commented in discussing an analogous claim when this case was before the Court of Appeals:

> "Congress is free to promote close family ties by ensuring that citizenship is conferred only on children who have at least minimal contact with citizen parents during their early and formative years…But this putative interest provides absolutely no basis for requiring fathers, and only fathers, to formally declare parentage and agree to provide financial support before a child reaches age 18."

In 1934, it was no doubt true that many female United States citizens who gave birth abroad had married foreigners and moved to their husbands' country, and that the children of such marriages were brought up as natives of a foreign land. And if a female United States citizen were married to a United States citizen, her children born abroad could obtain United States citizenship through their father. Thus, the historic restriction of citizenship to children born abroad of United States citizen fathers may not have affected many women. But, in the words of one woman who testified in favor of the 1934 Act (and later became the first woman to sit as a federal district court judge), "whether there are a lot of people who suffer or whether there are a few who suffer, it seems to us that the principle of equal application of the law to men and women ought to

receive recognition." Congress recognized this equality principle in 1934, and is positioned to restore that impartiality before the century is out.

DISSENT: Justice BREYER/SOUTER/GINSBURG…Since the founding of our Nation, American statutory law, reflecting a long-established legal tradition, has provided for the transmission of American citizenship from parent to child-even when the child is born abroad. Today's case focuses upon statutes that make those children, when born out of wedlock, "citizens of the United States at birth." The statutes, as applied where only one parent is American, require the American parent-whether father or mother-to prove the child is his or hers and to meet a residency requirement. The statutes go on to require (1) that the American parent promise to provide financial support for the child until the child is 18, and (2) that the American parent (or a court) legitimate or formally acknowledge the child before the child turns 18-if and only if the American parent is the father, but not if the parent is the mother.

What sense does it make to apply these latter two conditions only to fathers and not to mothers in today's world-where paternity can readily be proved and where women and men both are likely to earn a living in the workplace? As Justice O'CONNOR has observed, and as a majority of the Court agrees, "it is unlikely…that any gender classifications based on stereotypes can survive heightened scrutiny." These two gender-based distinctions lack the "exceedingly persuasive" support that the Constitution requires. *United States v. Virginia*. Consequently, the statute that imposes them violates the Fifth Amendment's "equal protection" guarantee. See *Bolling v. Sharpe* (1954).

It concerns me when Supreme Court Justices disregard their obligation to "interpret" the Constitution and, instead, create it to their liking. Justice Breyer, what do you mean "what sense does it make"? Determining the "sense of it all" is a legislative function.

The family whose rights are at issue here consists of Charlie Miller, an American citizen, Luz Penero, a citizen of the Philippines, and their daughter, Lorelyn. Lorelyn was born out of wedlock in 1970 in the Philippines. The relevant citizenship statutes state that a child born out of wedlock shall be a "citizen of the United States at birth" if the child is born to a father who "had the nationality of the United States at the time of the person's birth," if the "blood relationship between the person and the father is established by clear and convincing evidence," if the father had been physically present in the United States for five years, and:

> "(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> "(4) while the person is under the age of 18 years-
>
> "(a) the person is legitimated under the law of the person's residence or domicile,
>
> "(b) the father acknowledges paternity of the person in writing under oath, or
>
> "(c) the paternity of the person is established by adjudication of a competent court."

Charlie Miller did not meet the requirements set forth in (3) and (4) above on time. And the question before us is whether the Constitution forbids the application of those requirements for the reason that the statute imposed them only where the child's American parent is the child's father, not the mother. In my view the Constitution does forbid their application…

[T]he Government argues that Lorelyn cannot succeed because a federal court lacks the power to grant her the relief she seeks, namely, a grant of citizenship. As I shall later explain in more detail, however, this argument is beside the point, for, once the two unconstitutional clauses are excised from the statute, that statute operates automatically to confer citizenship upon Lorelyn "at birth."

…This case is about American citizenship and its transmission from an American parent to his child. The right of citizenship, as this Court has said, is "a most precious right."

…Further, the tie of parent to child is a special one, which in other circumstances by itself has warranted special constitutional protection. See, e.g., *Wisconsin v. Yoder*.

Moreover, American statutory law has consistently recognized the rights of American parents to transmit their citizenship to their children.

Finally, the classification at issue is gender-based, and we have held that, under the equal protection principle, such classifications may not rest on generalizations about the different capacities of males and females when neutral categories would serve the legislature's end. *United States v. Virginia.*

These circumstances mean that courts should not diminish the quality of review-that they should not apply specially lenient standards-when they review these statutes. The statutes focus upon two of the most serious of human relationships, that of parent to child and that of individual to the State. They tie each to the other, transforming both while strengthening the bonds of loyalty that connect family with Nation. Yet because they confer the status of citizenship "at birth," they do not involve the transfer of loyalties that underlies the naturalization of aliens, where precedent sets a more lenient standard of review. See *Fiallo v. Bell*.

To the contrary, the same standard of review must apply when a married American couple travel abroad or temporarily work abroad and have a child as when a single American parent has a child born abroad out of wedlock. If the standard that the law applies is specially lenient, then statutes conferring citizenship upon these children could discriminate virtually free of independent judicial review. And as a result, many such children, lacking citizenship, would be placed outside the domain of basic constitutional protections. Nothing in the Constitution requires so anomalous a result.

I recognize that, ever since the Civil War, the transmission of American citizenship from parent to child, jus sanguinis, has played a role secondary to that of the transmission of citizenship by birthplace, jus soli. That lesser role reflects the fact that the Fourteenth Amendment's Citizenship Clause does not mention statutes that might confer citizenship "at birth" to children of Americans born abroad. U.S. Const., Amdt. 14, §1 (stating that "all persons born or naturalized in the United States…are citizens"). But that omission, though it may give Congress the power to decide whether or not to extend citizenship to children born outside the United States, see *Rogers v.*

Bellei, does not justify more lenient "equal protection" review of statutes that embody a congressional decision to do so.

Nothing in the language of the Citizenship Clause argues for less close scrutiny of those laws conferring citizenship at birth that Congress decides to enact. Nor have I found any support for a lesser standard in either the history of the Clause or its purpose. To the contrary, those who wrote the Citizenship Clause hoped thereby to assure that courts would not exclude newly freed slaves-born within the United States-from the protections the Fourteenth Amendment provided, including "equal protection of the laws." They took special care, lest deprivation of citizenship undermine the Amendment's guarantee of "equal protection of the laws." Care is no less necessary when statutes, transferring citizenship between American parent and child, make the child a citizen "at birth." How then could the Fourteenth Amendment itself provide support for a diminished standard of review?

Nor have I found any such support in the history of the jus sanguinis statutes. That history shows a virtually unbroken tradition of transmitting American citizenship from parent to child "at birth," under statutes that imposed certain residence requirements. A single gap occurred when, for a brief period of time, the relevant statutes (perhaps inadvertently) failed to confer citizenship upon what must have been a small group of children born abroad between 1802 and 1855 whose citizen-fathers were also born between 1802 and 1855. See *Montana v. Kennedy*; *Weedin*; *Wong Kim Ark*. But even then, some courts, recognizing the importance of the right, found common-law authority for the transmission to those children of their parent's American citizenship.

The history of these statutes does reveal considerable discrimination against women, particularly from 1855 to 1934. But that discrimination then cannot justify this discrimination now, when much discrimination that the law once tolerated, including "de jure segregation and the total exclusion of women from juries," is "now unconstitutional even though [it] once coexisted with the Equal Protection Clause."

Neither have I found case law that could justify use here of a more lenient standard of review. Justice STEVENS points out that this Court has said it will apply a more lenient standard in matters of "immigration and naturalization." But that language arises in a case involving aliens. The Court did not say it intended that phrase to include statutes that confer citizenship "at birth." And Congress does not believe that this kind of citizenship involves "naturalization." ("The term "naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever"). The Court to my knowledge has never said, or held, or reasoned that statutes automatically conferring citizenship "at birth" upon the American child of American parents receive a more lenient standard of review…

In sum, the statutes that automatically transfer American citizenship from parent to child "at birth" differ significantly from those that confer citizenship on those who originally owed loyalty to a different nation. To fail to recognize this difference, and consequently to apply an unusually lenient constitutional standard of review here, could deprive the children of millions of Americans, married and unmarried, working abroad, traveling, say, even temporarily to Canada or Mexico, of the most basic kind of constitutional protection. Thus, generally prevailing, not specially lenient, standards of review must apply.

If we apply undiluted equal protection standards, we must hold the two statutory provisions at issue unconstitutional. The statutes discriminate on the basis of gender, making it significantly more difficult for American fathers than for American mothers to transmit American citizenship to their children born out of wedlock. If the citizen-parent is a man, the statute requires (1) a promise by the father to support the child until the child is 18, and (2) before the child turns 18, legitimation, written acknowledgment by the father under oath, or an adjudication of paternity. If the citizen-parent is a woman, she need not do either.

Distinctions of this kind-based upon gender-are subject to a "strong presumption" of constitutional **invalidity**. The Equal Protection Clause permits them only if the Government meets the "demanding" burden of showing an "exceedingly persuasive" justification for the distinction. That distinction must further important governmental objectives, and the discriminatory means employed must be "substantially related" to the achievement of those objectives. This justification "must be genuine, not hypothesized or invented post hoc in response to litigation." Further, "it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." The fact that the statutes "discriminate against males rather than against females" is beside the point. *Mississippi Univ. for Women*.

The statutory distinctions here violate these standards. They depend for their validity upon the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children. But consider how the statutes work once one abandons that generalization as the illegitimate basis for legislative line-drawing we have held it to be. First, assume that the American citizen is also the Caretaker Parent. The statute would then require a Male Caretaker Parent to acknowledge his child prior to the child's 18th birthday (or for the parent or child to obtain a court equivalent) and to provide financial support. It would not require a Female Caretaker Parent to do either. The gender-based distinction that would impose added burdens only upon the Male Caretaker Parent would serve no purpose at all. Second, assume that the American citizen is the Non-Caretaker Parent. In that circumstance, the statute would forgive a Female Non-Caretaker Parent from complying with the requirements (for formal acknowledgment and written promises to provide financial support) that it would impose upon a Male Non-Caretaker Parent. Again, the gender based distinction that would impose lesser burdens only upon the Female Non-Caretaker Parent would serve no purpose.

To illustrate the point, compare the family before us-Charlie, Lorelyn, and Luz-with an imagined family-Carlos, a Philippine citizen, Lucy, his daughter, and Lenora, Lucy's mother and an American citizen. Suppose that Lenora, Lucy's unmarried mother, returned to the United States soon after Lucy's birth, leaving Carlos to raise his daughter. Why, under those circumstances, should Lenora not be required to fulfill the same statutory requirements that here apply to Charlie? Alternatively, imagine that Charlie had taken his daughter Lorelyn back to the United States to raise. The statute would not make Lorelyn an American from birth unless Charlie satisfied its two conditions. But had our imaginary family mother, Lenora, taken her child Lucy back to the United States, the statute would have automatically made her an American from birth without anyone having satisfied the two conditions. The example suggests how arbitrary the statute's gender-based distinction is once one abandons the generalization that mothers, not fathers, will act as caretaker parents.

Let me now deal more specifically with the justifications that Justice STEVENS finds adequate. Justice STEVENS asserts that subsection (a)(4) serves two interests: first, "ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent" and second, "encouraging" certain relationships or ties, namely "the development of a healthy relationship between the citizen parent and the child while the child is a minor" as well as "the related interest in fostering ties between the foreign-born child and the United States." I have no doubt that these interests are important. But the relationship between the statutory requirements and those particular objectives is one of total misfit.

Subsection (a)(4) requires, for example, the American citizen father to "acknowledge" paternity before the child reaches 18 years of age, or for the child or parent to obtain a court equivalent (legitimation or adjudication of paternity). Justice STEVENS suggests that this requirement "produces the rough equivalent of the documentation," such as a birth certificate memorialized in hospital records, "already available to evidence the blood relationship between the mother and the child." But, even if I assume the "equivalency" (only for argument's sake, since birth certificates do not invariably carry a mother's true name or omit the father's), I still do not understand the need for the prior-to-18 legitimation-or-acknowledgment requirement. When the statute was written, one might have seen the requirement as offering some protection against false paternity claims. But that added protection is unnecessary in light of inexpensive DNA testing that will prove paternity with certainty.

Moreover, a different provision of the statute, subsection (a)(1), already requires proof of paternity by "clear and convincing evidence." No one contests the validity of that provision, and I believe that biological differences between men and women would justify its imposition where paternity is at issue. In light of that provision, subsection (a)(4)'s protection against false claims is not needed. Indeed, the Government concedes that, in light of the "clear and convincing evidence" requirement, the "time limit for meeting the legitimation-or-acknowledgement requirement of Section 309(a)(4) must…reflect, at least in part, some other congressional concern."

Justice STEVENS says that this "other concern" is a concern for the establishment of relationships and ties, to the father and to the United States, all before the child is 18. According to Justice STEVENS, the way in which the requirement serves this purpose is by making certain the father knows of the child's existence-in the same way, it says, that a mother, by giving birth, automatically knows that the child exists.

The distance between this knowledge and the claimed objectives, however, is far too great to satisfy any legal requirement of tailoring or proportionality. And the assumption that this knowledge-of-birth could make a significant gender-related difference rests upon a host of unproved gender-related hypotheses. Simple knowledge of a child's existence may, or may not, be followed by the kinds of relationships for which Justice STEVENS hopes. A mother or a father, knowing of a child's birth, may nonetheless fail to care for the child or even to acknowledge the child. A father with strong ties to the child may, simply by lack of knowledge, fail to comply with the statute's formal requirements. A father with weak ties might readily comply. Moreover, the statute does little to assure any tie for, as Justice STEVENS acknowledges, a child might obtain an adjudication of paternity "absent any affirmative act by the father, and perhaps even over his express objection."

To make plausible the connection between the statute's requirement and the asserted "relationship" goals, Justice STEVENS must find a factual scenario where a father's knowledge-equivalent to the mother's knowledge that she has given birth-could lead to the establishment of a more meaningful parenting relationship or tie to America. It therefore points to what one might term the "war baby" problem-the problem created by American servicemen fathering children overseas and returning to America unaware of the related pregnancy or birth. The statutory remedy before us, however, is disproportionately broad even when considered in relation to that problem. Justice STEVENS refers to 683,000 service personnel stationed in the Far East in 1970 when Lorelyn was born. The statute applies, however, to all Americans who live or travel abroad, including the 3.2 million private citizens, and the 925,000 Federal Government employees, who live, or who are stationed, abroad-of whom today only 240,000 are active duty military employees, many of whom are women. Nor does the statute seem to have been aimed at the "war baby" problem, for the precursor to the provisions at issue was first proposed in a 1938 report and was first adopted in the Nationality Act of 1940, which was enacted before the United States entered World War II.

Nor is there need for the gender-based discrimination at issue here, for, were Congress truly interested in achieving the goals Justice STEVENS posits in the way Justice STEVENS suggests, it could simply substitute a requirement of knowledge-of-birth for the present subsection (a)(4); or it could distinguish between caretaker and non-caretaker parents, rather than between men and women. A statute that does not do so, but instead relies upon gender-based distinctions, appears rational only, as I have said, if one accepts the legitimacy of gender-based generalizations that, for example, would equate gender and caretaking-generalizations of a kind that this Court has previously found constitutionally impermissible. See, e.g., *Virginia*, (striking down men-only admissions policy at Virginia Military Institute even assuming that "most women would not choose VMI's adversative method"); *J.E.B.* (invalidating gender-based peremptory challenges even if a measure of truth can be found in some of the gender stereotypes used to justify them); *Craig* (invalidating Oklahoma law that established different drinking ages for men and women, although the evidence supporting the age differential was "not trivial in a statistical sense"); *Wiesenfeld* (holding unconstitutional statutory classification giving to widowed mothers benefits not available to widowed fathers even though "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support")…

For similar reasons, subsection (3) denies Charlie Miller "equal protection" of the laws. That subsection requires an American father to "agree…to provide financial support" for the child until the child "reaches the age of 18," but does not require the same of an American mother. I agree with the Government that this provision has as one objective helping to assure ties between father and child. But I do not see why the same need does not exist with respect to a mother. And, where the American parent is the Non-Caretaker Parent, the need for such assurances would seem the same in respect to either sex. Where the American parent is the Caretaker Parent, there would seem no need for the assurance regardless of gender. Since either men or women may be caretakers, and since either men or women may be "breadwinners," one could justify the gender distinction only on the ground that more women are caretakers than men, and more men are "breadwinners" than women. This, again, is the kind of generalization that we have rejected as justifying a gender-based distinction in other cases.

For these reasons, I can find no "exceedingly persuasive" justification for the gender-based distinctions that the statute draws.

Justice SCALIA argues that, if the provisions at issue violate the Constitution, we nonetheless are powerless to find a remedy. But that is not so. The remedy is simply that of striking from the statute the two subsections that offend the Constitution's equal protection requirement, namely (a)(3) and (a)(4). With those subsections omitted, the statute says that the daughter, Lorelyn, of one who, like Charlie, has proved paternity by "clear and convincing evidence," is an American citizen, and has lived in the United States for five years, is a "citizen of the United States at birth." Whatever limitations there may be upon a Court's powers to grant citizenship, those limitations are not applicable here, for the Court need not grant citizenship. The statute itself grants citizenship automatically, and "at birth." And this Court need only declare that that is so. *INS v. Pangilinan*, which Justice SCALIA cites in support, is beside the point, for the plaintiffs in that case, conceding that the statute at issue did not make them citizens, asked the courts to confer citizenship as a remedy in equity.

Of course, we can excise the two provisions only if Congress likely would prefer their excision, rather than imposing similar requirements upon mothers. *Califano v. Westcott* (1979); *Welsh v. United States.* But, since the provisions at issue seem designed in significant part to address difficulties in proving paternity (along with providing encouragement for fathers to legitimate the child) and, since DNA advances have overcome the paternity-proof difficulties, I believe that Congress would have preferred severance.

Justice SCALIA is also wrong, I believe, when he says that "the INA itself contains a clear statement of congressional intent" not to sever, for the Act in fact contains the following explicit severability provision:

> "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."

The provision cited by Justice SCALIA says:

> "A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this title and not otherwise."

As "naturalization" under this statute does not include the conferral of citizenship at birth, the provision does not apply here. ("The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth").

Justice SCALIA also says that the law, as excised, would favor fathers over mothers. The law, however, would require both fathers and mothers to prove their parentage; it would require that one or the other be an American, it would impose residency requirements that, if anything, would disfavor fathers. I cannot find the reverse favoritism that Justice SCALIA fears.

For these reasons, I would reverse the judgment of the Court of Appeals.