Miller v. Albright: Continuing to Discriminate on the Basis of Gender and Illegitimacy

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COMMENT

MILLER V. ALBRIGHT: CONTINUING TO DISCRIMINATE ON THE BASIS OF GENDER AND ILLEGITIMACY

INTRODUCTION

Today, with over three million U.S. citizens living and travelling abroad,¹ many children are born in foreign countries to unwed parents.² Should it be more difficult for a child born out of wedlock to receive U.S. citizenship than it is for a child born to married parents? Should it matter that the child’s mother, rather than the child’s father, is an American citizen? Contrary to the general antidiscrimination attitude prevalent in today’s society,³ the answer to both of these questions is “yes, it does matter.”⁴ The Immigration and Nationality Act (INA) allows either a legitimate or an illegitimate child whose mother is a U.S. citizen to automatically gain citizenship at birth.⁵ Another section of the Act, however, provides that an illegitimate child born to a U.S. citizen father cannot become a citizen unless the father establishes paternity and supports the child while the child is a minor.⁶

In Miller v. Albright,⁷ a plurality of the Supreme Court held that the provision of the INA limiting the citizenship of an illegitimate child born to a U.S. citizen father does not violate equal protection.⁸ This Comment reviews the history of the law surrounding Miller, describes the case, and argues that the plurality incorrectly upheld the Act by applying too narrow a level of scrutiny and by failing to sufficiently justify the INA’s gender classification. Moreover, the Court ignored recent cases forbidding discrimination based on gender or against illegitimate children.⁹ By focusing on the distinction that the INA draws between mothers and fathers, the plurality overlooked the discriminatory effects of the Act on illegitimate children.

⁵. Immigration and Nationality Act (INA) § 301(g), 8 U.S.C. § 1401(g) (1994).
⁶. Id. § 309, 8 U.S.C. § 1409; see also infra text accompanying note 83.
⁸. Miller, 118 S. Ct. at 1428. Justice Stevens, joined by Chief Justice Rehnquist, delivered the opinion; Justices O’Connor, Kennedy, Scalia, and Thomas concurred in the judgment; and Justices Breyer, Ginsburg and Souter dissented. For a discussion of these positions, see infra Part II.B.
⁹. See id. at 1434–35 (distinguishing Fiallo v. Bell, 430 U.S. 787 (1977), and refusing to consider that opinion’s treatment of gender-based distinctions).
Part I of this Comment explains the level of scrutiny applied in equal protection cases and the relevant cases in which courts have addressed statutes that discriminate according to illegitimacy and gender. It also reviews the history and current status of U.S. immigration and nationality law. Part II summarizes the plurality opinion, and each of the concurring and dissenting opinions in Miller. Part III critiques the plurality decision and describes how the Act discriminates against illegitimate children.

I. BACKGROUND

A. Equal Protection

Although no explicit constitutional provision requires the federal government to provide equal protection of the law, the Supreme Court has extended the equal protection component of the Fourteenth Amendment to the Due Process Clause of the Fifth Amendment. Thus, in Fifth Amendment claims dealing with federal statutes based on gender or illegitimacy, courts must assess whether the governmental purpose justifies the gender distinction at issue.

1. Level of Scrutiny

Depending on the circumstances of the case, a court applies one of three types of equal protection review. At a minimum, the statute must be rationally related to a legitimate government purpose. When classifications affect fundamental rights or disadvantage a class of people who have historically been the victims of discrimination, courts apply strict scrutiny, the highest level of review, requiring the government to demon-
strate a regulation is necessary to achieve a compelling state interest.\textsuperscript{14} Intermediate scrutiny is a heightened standard, requiring that the classification be "substantially related to important governmental objectives," and thus provides more protection than rational basis review but less protection than strict scrutiny.\textsuperscript{15}

During the past thirty years, the U.S. Supreme Court has struggled to formulate an appropriate standard of review for statutes that classify on the basis of gender or on the basis of illegitimacy.\textsuperscript{16}

2. Supreme Court Cases Concerning Gender-Based Discrimination

In \textit{Reed v. Reed},\textsuperscript{17} decided in 1971, the Court recognized that equal protection prohibits mandatory preference to members of either sex and held (applying heightened scrutiny) that a statute giving preference to male estate administrators over female estate administrators was unconstitutional.\textsuperscript{18} Two years later, in \textit{Frontiero v. Richardson},\textsuperscript{19} the Court was presented with a challenge to a statute giving dependents of male members of the armed forces greater access to benefits than dependents of female members.\textsuperscript{20} The Court determined that sex is a suspect classification, warranting strict scrutiny, and held that the statute was unconstitutional based on equal protection principles.\textsuperscript{21}

The Supreme Court, however, has not consistently followed \textit{Frontiero}\textsuperscript{22} in cases that involve gender discrimination—applying the intermediate standard rather than strict scrutiny.\textsuperscript{23} In 1976, the Court in \textit{Craig v. Boren},\textsuperscript{24} formally adopted intermediate scrutiny as the standard of re-

\textsuperscript{14} See, \textit{e.g.}, \textit{Frontiero v. Richardson}, 411 U.S. 677, 682–88 (1973) (using a strict scrutiny standard for gender-based classifications); \textit{Harper v. Virginia Bd. of Elections}, 383 U.S. 663, 672 (1966) (applying strict scrutiny in a case involving a statute that classified persons according to race). See generally Galotto, supra note 12, at 537–38 (noting that "strict scrutiny is necessary to 'smoke out' racial classifications that are based on 'illegitimate notions of racial inferiority' or illegitimate racial prejudice or stereotype" (quoting \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 492 (1989))).


\textsuperscript{17} 404 U.S. 71 (1971).

\textsuperscript{18} \textit{Reed}, 404 U.S. at 76–77.

\textsuperscript{19} 411 U.S. 677 (1973).

\textsuperscript{20} \textit{Frontiero}, 411 U.S. at 678.

\textsuperscript{21} \textit{Id. at 688. Frontiero} is the only case to date in which the Supreme Court has applied strict scrutiny to a gender-based statute. See Udell, supra note 16, at 527.

\textsuperscript{22} See Galotto, supra note 12, at 522.

\textsuperscript{23} See, \textit{e.g.}, \textit{Craig v. Boren}, 429 U.S. 190, 197–98 (1976).

\textsuperscript{24} 429 U.S. 190 (1976).
view for gender discrimination. In this case, male plaintiffs between the ages of eighteen and twenty-one sought injunctive relief against the enforcement of a statute that prohibited the sale of 3.2% beer to males under the age of twenty-one and women under the age of eighteen. Recognizing that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," the Court determined that stereotypes and generalizations characterizing men and women were an insufficient justification for statutes distinguishing based on gender.

In Mississippi University for Women v. Hogan, a 1982 case, the Court was faced with a challenge by a male who wanted to pursue an education at an exclusively female nursing school. In order to ensure that the validity of a classification was not improperly determined according to "traditional, often inaccurate, assumptions about the proper roles of men and women," the Court further heightened the intermediate standard in gender-based cases by requiring the government to prove an "exceedingly persuasive justification" for the classification. Accordingly, the Court determined that prohibiting males from enrolling in a professional school violated equal protection.

In 1996, the Supreme Court, again requiring an exceedingly persuasive justification for the classification, determined that the benefits associated with single sex schools did not justify Virginia's exclusion of women from the Virginia Military Institute. By applying the heightened standard of review, the Court has consistently refused to uphold statutes containing gender-based classifications.

3. Supreme Court Cases Concerning Discrimination Against Illegitimate Children

The Supreme Court has considered the validity of various justifications for classifications based on illegitimacy in over twenty cases during
the past thirty years. While the Court did not expressly hold—until 1988 Clark v. Jeter—that a heightened level of scrutiny should apply to a law that classified people according to illegitimacy. Several—but not all—cases addressing illegitimacy beginning in the 1970s implicitly applied heightened scrutiny. 3

In 1968, the Supreme Court first addressed the question of whether illegitimacy may be used as the basis for a legislative classification in Levy v. Louisiana. In addressing the standard for reviewing a legislative act, the court recognized that while “we give great latitude to the legislature in making classifications, . . . we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side.” Finding that “[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother,” the Court held that a wrongful death statute denying recovery to illegitimate children after their mother’s death, but allowing legitimate children the right to recover, violated the Equal Protection Clause.

Arguably, the Court did not consistently follow Levy’s precedent. In 1977, the Supreme Court in Trimble v. Gordon, addressed whether an intestate succession law that allowed illegitimate children to inherit only from their mothers violated the Equal Protection Clause. Articulating a standard of review similar to intermediate level scrutiny, the court held

36. See ZINGO & EARLY, supra note 10, at 92–93 (discussing several cases in which the Court has considered classifications based on birth status); Howlett, supra note 16, at 14 (describing the Court’s analytical method in cases involving illegitimacy classifications).
38. See Trimble v. Gordon, 430 U.S. 762, 772 (1977) (applying a standard that asks whether the statute is “carefully tuned to alternative considerations” to examine the constitutionality of statutes that distinguish between illegitimate and legitimate children); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972) (indicating that the level of scrutiny applied to legitimacy classifications should be stricter because “fundamental personal rights” are involved).
41. Id. at 72.
42. Id.
45. Trimble, 430 U.S. at 776.
46. Id. at 766–67. As stated by the Court:
“[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.” In this context, the standard just stated is a minimum; the Court sometimes requires more. “Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . ."
that the law unjustifiably discriminated against illegitimate children. In *Fiallo v. Bell*, also decided in 1977, the Court upheld a section of the Immigration and Naturalization Act which gave preferential immigration status to a child born out of wedlock to an American mother but not to a child born to an American father. The Court refused to apply the intermediate level of review and used the minimal review standard because of Congress's broad power over immigration and naturalization issues. Moreover, the Court reasoned that illegitimate children should not receive preferential status because of a "perceived absence in most cases of close family ties" and the difficulties involved in proving paternity.

In contrast, in 1979, the Court found that an adoption law requiring only the permission of a mother for the adoption of her illegitimate child denied equal protection to fathers. The Court determined that the law failed to meet the heightened standard of scrutiny because the well being of illegitimate children did not "serve important governmental objectives" and therefore did not justify the distinction between unwed mothers and fathers. To further confuse the issue, the Court applied rational basis scrutiny in *Parham v. Hughes*, also decided in 1979, and upheld a wrongful death statute that discriminated against illegitimate children.

Five years later, in *Lehr v. Robertson*, the Court upheld a statute that required an unwed father of an illegitimate child to take certain steps

... Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that the scrutiny "is not a toothless one."


47. *Id.* at 773-74.
49. *Fiallo*, 430 U.S. at 791-92. The Court stated that Congress, not the courts, should make decisions regarding immigration issues. *Id.* at 798.
50. *Id.* at 792-95. Specifically, the Court required the government to prove a "facially legitimate and bona fide reason" for the distinction. *Id.* at 794.
51. *Id.* at 799.
52. *Id.*
56. *Parham*, 441 U.S. at 348-49. The statute at issue allowed the mother of an illegitimate child, or the father of a motherless legitimate child, to sue for the wrongful death of that child but precluded the father of an illegitimate child from bringing such an action. *Id.* In the concurring and dissenting opinions, five Justices advocated for the application of the heightened standard of review because the statute included a gender-based distinction. *Id.* at 359, 362.
in order to receive notice of adoption. The father claimed that his equal protection rights were violated, not the rights of his child. Applying the intermediate standard to the potential violation of the father’s rights, the Court recognized that laws “may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose.” The Court upheld the law to encourage adoption and promote the state’s “preference for the formal family.”

In the late 1980s, the Court heard Clark v. Jeter, a case in which the petitioner claimed that a Pennsylvania law requiring an illegitimate child to prove paternity within six years of her birth in order to seek support from her father was unconstitutional. Because a legitimate child does not face these time limitations to obtain support from her parents, the statute contained an unjustified classification based on illegitimacy which violated the Equal Protection Clause. In its decision, the Court formally adopted the intermediate level of scrutiny for classifications based on illegitimacy to ensure that illegitimate children are not punished for their parents’ conduct.

Viewed together, these decisions represent the confusion of the rights the Supreme Court allotted to unwed fathers and their children born out of wedlock.

B. History Surrounding the U.S. Immigration and Nationality Laws

Under common law, children born abroad could only gain American citizenship if their father had resided in the United States. Congress’s amendment of section 1993 of the Revised Statutes by the Act of May 24, 1934 ended the discrimination against mothers of children born abroad.

58. Lehr, 463 U.S. at 267–68.
59. Id. at 258.
61. Clark, 486 U.S. at 457.
62. Id. at 462–65.
63. Id. at 461 (stating that discriminatory classifications based on illegitimacy deserve the intermediate level of scrutiny, which requires that the statute “be substantially related to an important governmental objective”).
64. See Howlett, supra note 16, at 14.
67. Id. § 1, 48 Stat. at 797. Section 1993 was amended to read: Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both as the time of the birth of such child is 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 ... has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, 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, and unless, within six months after the child’s twenty-first birthday, he or she shall take an oath of allegiance to the United States of America ...
The Nationality Act of 1940 established different citizenship criteria for children born out of wedlock. While a child could gain nationality from an American mother at birth, an illegitimate child with an American father would qualify for U.S. citizenship only if the father legitimized or received the adjudication of paternity during the child's minority years.

Although the Constitution and its amendments provide no mention of immigration and do not define citizenship, immigration law principles are largely based upon the Equal Protection Clause. In 1886, the Supreme Court determined that the phrase "any person" in the Fourteenth Amendment's Equal Protection Clause included aliens as well as citizens. Congress, however, has the authority to classify aliens and may opt to treat them less favorably than citizens. Consequently, even though the Constitution protects individual rights of persons in the United States, Congress may subject aliens living abroad to arbitrary classifications.

Moreover, the plenary power doctrine provides "broad and often exclusive authority" to Congress and the Executive Branch in deciding immigration and naturalization issues. Because of judicial deference to this power, courts have limited review or applied rational basis scrutiny to cases involving immigration and nationality. In Plyler v. Doe, the Court indicated that cases in the immigration context may warrant an intermediate level of scrutiny. The protections in Plyler, however, have
been limited to cases where the people claiming citizenship have come to
the United States and developed ties with the country.\textsuperscript{81}

Currently, 8 U.S.C. § 1401(g) allows an illegitimate child with a U.S.
citizen parent to become a citizen at birth if that parent lived in the
United States for at least five years.\textsuperscript{82} Section 1401(g), however, does not
confer citizenship upon children born out of wedlock unless the require-
ments in 8 U.S.C. § 1409 are satisfied.\textsuperscript{83} As amended in 1986, section
1409 requires a child born out of wedlock to a U.S. citizen father to pro-
vide clear and convincing evidence of paternity and a statement con-
firming that the father will provide financial support until the child
reaches the age of eighteen.\textsuperscript{84}

\textbf{II. MILLER V. ALBRIGHT}\textsuperscript{85}

A. \textit{Facts and Procedural History}

While serving in the U.S. Air Force and stationed in the Philippines,
Charlie Miller, an American citizen, met Luz Penero, a Filipino national,
and conceived Lorelyn Penero Miller.\textsuperscript{86} Because Ms. Penero Miller was
born and raised by her mother in the Philippines, her father was unaware
of her existence until after her twenty-first birthday.\textsuperscript{87} In 1992, Mr. Miller
received a decree from a Texas court to establish his paternity.\textsuperscript{88} Assured
that Mr. Miller was her biological father, Ms. Penero Miller applied for
U.S. citizenship.\textsuperscript{89} The State Department denied her application because
the paternity decree did not fulfill the requirements of section 1409.\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{81} See United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).
\item \textsuperscript{82} INA § 301(g), 8 U.S.C. § 1401(g) (1994). Section 1401(g) provides that an individual born
outside of the United States with "parents one of whom is an alien, and the other a citizen of the
United States who, prior to the birth of such person, was physically present in the United States or its
outlying possessions for a period or periods totaling not less than five years" is a citizen at birth. \textit{Id.}
\item \textsuperscript{83} \textit{Id.} § 309(a), 8 U.S.C. § 1409(a). Children born abroad are U.S. citizens when one parent is
a U.S. citizen and the other is an alien if:
\begin{enumerate}
\item (1) [A] blood relationship between the person and the father is established by clear and
convincing evidence,
\item (2) the father had the nationality of the United States at the time of the person's birth,
\item (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
\item (4) while the person is under the age of 18 years—
\begin{enumerate}
\item (A) the person is legitimated under the law of the person's residence or domicile,
\item (B) the father acknowledges paternity of the person in writing under oath, or
\item (C) the paternity of the person is established by adjudication of a competent court.
\end{enumerate}
\end{enumerate}
\textit{Id.}
\item \textsuperscript{84} \textit{Id.} It is interesting to note that a U.S. district court determined that the distinction made in
section 1409 on the basis of both sex and illegitimacy failed to meet even the minimum rationality
\item \textsuperscript{85} 118 S. Ct. 1428 (1998).
\item \textsuperscript{86} \textit{Miller}, 118 S. Ct. at 1432–33.
\item \textsuperscript{87} \textit{Id.} Ms. Penero Miller was born in June 1970. \textit{Id.} at 1432.
\item \textsuperscript{88} \textit{Id.} at 1433.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
Specifically, Mr. Miller failed to legitimate and support Ms. Penero Miller while she was a minor.51

In 1993, Ms. Penero Miller and her father filed a complaint in the U.S. District Court for the Eastern District of Texas to obtain a judgment establishing that Ms. Penero Miller was a citizen of the United States.52 In an amended complaint, Ms. Penero Miller alleged that the distinction in section 1409 based on illegitimacy did not meet equal protection standards.53 The Texas district court transferred the case to the United States District Court for the District of Columbia, where venue was proper.54 The district court found that Ms. Penero Miller suffered an injury in fact and established a causal connection between her injury and the statute she claimed was unconstitutional.55 The court held, however, that because federal courts do not have the power to grant citizenship, she failed to show redressability and therefore lacked standing to sue.56

On appeal, the court of appeals held that the district court improperly dismissed for lack of standing, but rejected her constitutional challenges to section 1409.57 Finding the Supreme Court’s decision in Fiallo v. Bell dispositive,58 section 1409 did not violate the Equal Protection Clause because the government’s interests in protecting the child’s ties to the United States and to her citizen relatives presented a “legitimate and bona fide reason” for the classification.59 Judge Wald concurred in the judgement because she believed the holding in Fiallo was binding, but she also expressed concern that Fiallo was “out of step” with the Supreme Court’s current antipathy to classifications based on broad generalizations regarding men and women.60 The Supreme Court of the United States granted certiorari61 and affirmed the decision of the court of appeals.62

91. Id.
92. Id.
94. Miller, 118 S. Ct. at 1433.
95. Miller, 870 F. Supp. at 3.
96. Id.
97. Miller v. Christopher, 96 F.3d 1467, 1471–73 (D.C. Cir. 1996) (upholding the statutory distinction between illegitimate and legitimate children regarding the claims of several aliens seeking special immigration preference).
98. Miller, 96 F.3d at 1471 (noting that Fiallo v. Bell must be followed because that case involved an equal protection challenge to an immigration statute that discriminated according to the status of the child and the sex of the parent); see also Fiallo v. Bell, 430 U.S. 787 (1977).
99. Miller, 96 F.3d at 1470, 1472.
100. Id. at 1473, 1475–77 (Wald, J., concurring).
102. Miller v. Albright, 118 S. Ct. 1428, 1442 (1998). Justice Stevens announced the judgment of the Court and delivered an opinion in which Chief Justice Rehnquist joined. Miller, 118 S. Ct. at 1432. Justice O’Connor delivered a concurring opinion in which Justice Kennedy joined. Id. at 1442
B. *Supreme Court Opinion*

1. *Plurality Opinion*

The U.S. Supreme Court explained that the issue in *Miller v. Albright* turned on whether the distinction in section 1409 between illegitimate children of U.S. citizen mothers and illegitimate children of U.S. citizen fathers violated the Fifth Amendment to the U.S. Constitution. Ms. Penero Miller alleged that the INA's discriminatory treatment of citizen fathers violated the equal protection component of the Fifth Amendment. The government argued that the law was designed to ensure that the child develops ties to the United States and that the father acknowledges and financially supports the child. Before discussing this issue on its merits, Justice Stevens, the author of the plurality opinion, disposed of a few initial points. First, the plurality decided that *Fiallo v. Bell* was not controlling in *Miller*. *Fiallo* involved a claim for immigration status of aliens, not citizenship, and there the Court considered the distinction between legitimate children and illegitimate children. *Miller*, on the other hand, addressed the disparate treatment of mothers and fathers of illegitimate children. The Court also determined that Ms. Penero Miller had standing to bring this claim because she was contesting the government's refusal to treat her as a citizen and because her claim was based on discrimination against both herself and her father.

The plurality held that section 1409 did not violate the equal protection component of the Fifth Amendment, accepting the justification for the classification made by Congress. Justice Stevens applauded section 1409(c), which automatically confers citizenship on the child of an American mother, because it "rewards" a mother's decision to carry the child to term. In contrast, Justice Stevens noted that because an American father is not necessarily aware of the child and is not burdened with the obligation to care for the child, he should not be similarly rewarded. Justice Stevens explained that for this reason the father should be re-
quired to comply with section 1409(a) by acknowledging his paternity under oath while the child is still a minor.\textsuperscript{13}

The plurality believed that sufficient government's interests validated section 1409.\textsuperscript{14} First, the Court noted that the government desire to ensure that the child has a blood relationship with an American citizen and to deter fraudulent claims of citizenship justified the additional requirements imposed on unwed fathers.\textsuperscript{15} Second, Justice Stevens argued that if the statute established gender-neutral criteria, such as requiring the citizen parent to obtain proof within thirty days, it would have the practical effect of discriminating against the unwed father.\textsuperscript{16} Pursuant to this theory, a statute allowing a father a period of eighteen years to establish paternity should be not be viewed as discriminatory.\textsuperscript{17} Third, the court held that despite the reliability of genetic testing and the requirement of proof of paternity by clear and convincing evidence set forth in section 1409(a)(1),\textsuperscript{18} Congress was justified in requiring additional proof of paternity.\textsuperscript{19} Fourth, Justice Stevens suggested that the statute was upheld because it promotes the government's interest in establishing relationships between citizen parents and their children and between the children and the United States.\textsuperscript{20} Finally, the plurality advocated that because Congress was concerned that a large number of American military servicemen who were stationed abroad may have fathered children, section 1409 guarantees that children who may not know or are not known by their fathers do not automatically receive citizenship.\textsuperscript{21}

The plurality rejected the plaintiff's argument that the statute is the product of "overbroad stereotypes about the relative abilities of men and women."\textsuperscript{22} Instead, Justice Stevens argued that the assumption that fathers are less likely than mothers to develop a relationship with their children, an assumption on which section 1409 relies, is based on bio-

\begin{itemize}
\item \textsuperscript{113.} Id.
\item \textsuperscript{114.} Miller, 118 S. Ct. at 1437–40.
\item \textsuperscript{115.} Id. at 1437.
\item \textsuperscript{116.} Id. at 1438.
\item \textsuperscript{117.} Id. at 1438–39.
\item \textsuperscript{118.} See supra note 83 and accompanying text.
\item \textsuperscript{119.} Miller, 118 S. Ct. at 1438–39. Specifically, section 1409(a) requires that while under the age of eighteen, the person must be legitimated by law, the father must acknowledge paternity in writing under oath, or the person must establish paternity by adjudication. INA § 309(a), 8 U.S.C. § 1409(a) (1994).
\item \textsuperscript{120.} Miller, 118 S. Ct. at 1439. Because an unmarried father may not know that his child exists, it seems reasonable that he take the steps required to acknowledge his child. Id. at 1439 n.11. Moreover, because a mother usually has custody at the child's birth, it is more likely that a child will establish ties to the United States. Id.
\item \textsuperscript{121.} Id. at 1439.
\item \textsuperscript{122.} Id. (quoting Petitioners' Brief at 8, Miller v. Albright, 118 S. Ct. 1428 (1998) (No. 96–1060)). The plurality noted that a narrow standard of review should apply because the case deals with the area of immigration and naturalization. Id. Even under heightened scrutiny, section 1409(a)(4) "is substantially related to important governmental objectives." Id.
\end{itemize}
logical differences between the sexes and is thus a justified basis for classification.\(^{123}\) Furthermore, requiring fathers, and not mothers, to make an "affirmative act" in order to gain rights associated with their children followed the precedent established by the Supreme Court in *Lehr v. Robinson.*\(^ {124}\) Finally, the plurality distinguished *Miller* from recent gender-equality cases,\(^ {125}\) noting that Ms. Penero Miller's citizenship request rested on several factors, including her parents' conduct, and not merely on her gender.\(^ {126}\)

2. Justice O'Connor's Concurrence

Justice O'Connor based her concurring opinion on the premise that federal courts should not determine the rights of third parties who are not parties to the litigation.\(^ {127}\) The Justice believed that Mr. Miller had not been substantially hindered in his ability to assert his own rights.\(^ {128}\) Mr. Miller had the opportunity to take advantage of the appeals process but did not assert his rights.\(^ {129}\) Therefore, Ms. Penero Miller could not assert her father's rights and instead must raise her own rights, which would likely be unsuccessful because section 1409 does not classify people according to the gender of the child.\(^ {130}\) Although Justice O'Connor supported the dismissal of the claim, she advocated the application of rational basis scrutiny because the statute involves the area of immigration and nationalization.\(^ {131}\) She also explained that even though the classification would be upheld under a rational basis standard of review, it would not withstand heightened scrutiny.\(^ {132}\)

3. Justice Scalia's Concurrence

According to Justice Scalia, Ms. Penero Miller's claim was correctly dismissed because the Court had no power to confer citizenship on a basis other than that established by Congress.\(^ {133}\) Because Ms. Penero Miller did not qualify for citizenship based on section 1409, the Court had no discretion to decide the case on its merits.\(^ {134}\) Moreover, he ex-

\(^{123}\) *Id.* at 1442.

\(^{124}\) *Id.* at 1440. In *Lehr v. Robinson,* the U.S. Supreme Court held that a statute requiring an unwed father, and not a mother, to prove his paternity by some formal act in order to receive notice prior to the adoption of his children did not violate the Equal Protection Clause. *Lehr v. Robinson,* 463 U.S. 248, 248–50 (1983).


\(^{126}\) *Id.*

\(^{127}\) *Id.* at 1442 (O'Connor, J., concurring).

\(^{128}\) *Id.* at 1443–44.

\(^{129}\) *Id.* at 1444.

\(^{130}\) *Id.* at 1445.

\(^{131}\) *Id.* at 1446.

\(^{132}\) *Id.* at 1445–46.

\(^{133}\) *Id.* at 1446 (Scalia, J., concurring).

\(^{134}\) *Id.* at 1447.
plained that Congress has significant authority in the area of immigration and nationalization and courts have limited discretion. Justice Scalia also emphasized that a court cannot “fix” the law by holding certain provisions unconstitutional.

4. Justice Ginsburg’s Dissent

Justice Ginsburg believed that the Court should have followed earlier cases which rejected statutes that classified based on gender stereotypes where more accurate and impartial distinctions could have been made. The Justice recognized that American women have been discriminated against throughout history in the areas of immigration and nationalization. When the legislature amended section 1409 in 1986, it continued to discriminate on the basis of gender. According to Justice Ginsburg, the government’s rationale was based on generalizations concerning the abilities of men and women. She concluded that because the government could promote the interest of assuring close ties to the United States without classifying based on gender, section 1409 violated the Equal Protection Clause.

5. Justice Breyer’s Dissent

Justice Breyer believed that the Court should have applied heightened scrutiny to determine the constitutionality of the provisions in section 1409. Although the area of immigration and nationalization is traditionally subject to a more lenient standard of review, Justice Breyer felt that Ms. Penero Miller belonged to a class whose rights had been determined based on the gender of their parents. When the Act is reviewed under heightened scrutiny, the standard typically applied in gender discrimination cases, Justice Breyer felt that it could not survive constitutional analysis.

135. Id. (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977)).
136. Id. at 1449. According to Justice Scalia, “fixing” the law would require the Court to perform “radical statutory surgery,” and disregard “one provision or the other as unconstitutional.” Id.
137. Id. at 1449–50 (Ginsburg, J., dissenting).
138. Id. at 1450–53. Until 1934, a woman could not confer her U.S. citizenship on her children born abroad. Id. at 1451–52; see supra notes 65–67.
139. Id. at 1453.
140. Id. at 1454.
141. Id.
142. Id. at 1449–50.
143. Id. at 1457 (Breyer, J., dissenting). Initially, Justice Breyer mentioned that Ms. Penero Miller may assert her father’s rights because she has suffered an injury in fact, she had a close relationship with her father, and her father faced some hindrance in asserting his rights. Id. at 1456.
144. Id. at 1457.
145. Id. at 1460.
Justice Breyer argued that the plurality inadequately justified the gender classifications and that the government failed to prove an "exceedingly persuasive justification," for the distinction in section 1409 between men and women. Moreover, Justice Breyer contended that the statutory distinction depends on the generalization that mothers are more likely to care for their children and are better caretakers than fathers. The Justice also observed that the additional legitimation or acknowledgement requirement is unnecessary to protect against false claims because advanced DNA tests prove paternity with certainty. In addition, although Justice Stevens assumed in the plurality opinion that once a father knows of his child he will establish a relationship with his child and his child will therefore have ties to the United States, Justice Breyer argued that these bonds will not necessarily be formed. Justice Breyer further indicated that section 1409 refers to all the American citizens who live or travel abroad, not merely the 683,000 service personnel stationed in the Far East mentioned in Justice Stevens' opinion. Finally, Justice Breyer's dissent suggested that Congress could substitute a gender-neutral requirement for the current provision.

III. ANALYSIS

In Miller v. Albright, the Supreme Court held that 8 U.S.C. § 1409 did not violate the equal protection component of the Fifth Amendment even though the statute classifies on the basis of gender and illegitimacy. Five justices, however, agreed that the purported governmental interests did not justify the distinction. This analysis argues that the plurality applied an inappropriate level of scrutiny and overlooked several controlling precedents. Moreover, the analysis further discusses the plurality's failure to consider the discriminatory effects that the Miller decision will have on illegitimate children.

146. Id. at 1455.
147. This language indicates the heightened scrutiny standard. See id.
148. Id. at 1460 (citing United States v. Virginia, 518 U.S. 515, 532–33 (1996)).
149. Id. at 1461.
150. Id. at 1461–62.
151. Id. at 1462.
152. Id.
153. Id. Justice Breyer noted that requiring knowledge of the child's birth or distinguishing between caretaker and noncaretaker parents could substitute for the gender-based classification. Id. Justice Breyer also disagreed with Justice Scalia's opinion that the Court does not have the power to grant citizenship. Id. at 1463. He explained that limitations on the Court's power to grant citizenship are irrelevant because section 1401 confers citizenship at birth. Id.
154. Id. at 1432.
155. See id. at 1445 (Scalia, J., concurring); id. at 1455 (Breyer, J., dissenting).
A. The Plurality Applies the Incorrect Level of Scrutiny

Although the level of scrutiny applied in equal protection cases is critical and often determines the outcome of a case, the plurality did not initially specify the standard of review it was applying in Miller. Rather, the Court briefly mentioned in a footnote that because deference should be given to Congress in the area of immigration and nationality, Miller warranted a narrower, rational basis standard of review. The plurality's reasoning became further blurred when it indicated that even if the intermediate level of scrutiny was applied, section 1409 sufficiently relates to important governmental interests and would survive such scrutiny. Justice Stevens, however, failed to elaborate on the heightened scrutiny standard's imposition on the government to establish an exceedingly persuasive justification for the gender-based classification. According to this reasoning, it is unlikely that he adequately applied an appropriate level of scrutiny given recent Supreme Court precedent. Because of the ambiguity of the plurality opinion, it is difficult to determine which level of scrutiny was actually applied in Miller. Moreover, the plurality's failure to hold that section 1409 violates equal protection indicates that the plurality applied the minimum level of scrutiny.

Recent Supreme Court cases clearly state that the heightened scrutiny standard applies without exception to all “gender based government actions.” Because the Court has expressly determined that the distinction between unmarried mothers and unmarried fathers constitutes a gender-based classification, heightened scrutiny was required in Miller. In addition, statutes classifying on the basis of illegitimacy have also war-

156. Cf., e.g., Parham v. Hughes, 441 U.S. 347, 351–52 (1979) (applying rational basis scrutiny and upholding a statute that classified individuals by sex). See generally Howlett, supra note 16, at 17 (describing the importance of the level of scrutiny used in cases involving discrimination against illegitimate children); Galotto, supra note 12, at 509 (indicating that the level of scrutiny applied to gender-based discrimination cases often serves as an explanation for the outcome).

157. Miller, 118 S. Ct. at 1437 n.11.

158. Id.


160. See, e.g., United States v. Virginia, 518 U.S. 515, 532–33 (1996) (reiterating that the government must demonstrate an exceedingly persuasive justification for gender-based classifications); Hogan, 458 U.S. at 724 (indicating that the burden of proof is demanding and rests entirely on the state).

161. On the other hand, both Justice Ginsburg and Justice Breyer, in their dissenting opinions, observed that the provisions of section 1409 must be subject to heightened scrutiny. Miller, 118 S. Ct. at 1450, 1454, 1457–60.

162. See discussion supra Part I.A.2; see also Galotto, supra note 12, at 508. See generally Amicus Brief at 17, Miller v. Albright, 118 S. Ct. 1428 (1998) (No. 96–1060) (stating that Congress’s specialized judgments concerning the security matters at issue must be accompanied by evidence and meet the heightened scrutiny standard if they discriminate on the basis of gender). Moreover, the standard of review remains high when the statutory policy discriminates against males rather than against females. Hogan, 458 U.S. at 723.
ranted the intermediate level of review. Therefore, because section 1409 distinguishes between illegitimate children and legitimate children, the Court should have considered *Miller* under a heightened level of review.

Although courts have tended to limit the scope of review in the area of immigration and naturalization, adherence to rational basis scrutiny is outdated. Critics have advocated that the Constitution does not require courts to recognize Congress's plenary power and that immigration law must adhere to modern constitutional boundaries. Consequently, the Supreme Court has held that deference to Congress does not trump the heightened scrutiny standards of the Equal Protection Clause.

In addition, courts have expressly differentiated between the rights afforded to citizens versus those granted to aliens. Similarly, the plurality in *Miller* initially distinguished *Miller* from *Fiallo v. Bell* because *Miller* addressed the rights of an American citizen, while *Fiallo* involved the immigration of aliens. The Supreme Court has held that the test for citizenship should hinge on the individual's ties to the United States.

Ms. Penero Miller's close connections to the country included the fact that she was a child of an American citizen and she maintained a con-

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163. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that courts should apply the heightened level of scrutiny to all illegitimacy cases); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (noting that the heightened level of scrutiny should be applied because fundamental rights are concerned). *See generally Rotunda & Nowak, supra* note 53, § 18.14 (discussing legitimacy classifications and the Supreme Court's use of such classifications).


165. Justice O'Connor argued that the Court should apply rational basis scrutiny because the distinction is not based on the child's gender. *Id.* at 1445 (O'Connor, J., concurring). Her argument, however, seems unpersuasive because the main issue in *Miller* focused on the gender classification of mothers versus fathers. *Cf.* *id.* at 1434.


167. *Miller v. Christopher*, 96 F.3d 1467, 1474 n.2 (Wald, J., concurring). Current Supreme Court doctrine indicates that a standard must account for Congress's power over immigration as well as the constitutional rights of citizens. *Id.*


tinuing relationship with her American father. Because Ms. Penero Miller had a legitimate claim for citizenship, the Court was not obligated to extend the same amount of deference usually given to Congress in the area of immigration.

Moreover, courts must apply a stricter standard of review to cases involving fundamental rights or suspect classes. Because the Supreme Court has described U.S. citizenship as "a most precious right" and described noncitizens as a discrete minority, the Court may be required to apply a stricter standard of review. If the plurality reviewed section 1409 under the stricter equal protection standard, the Court would have likely held the provisions requiring an unwed father, and not a mother, to take affirmative steps to transfer citizenship unconstitutional because it violates the Equal Protection Clause.

B. Section 1409 Relies on Suspect and Untrue Stereotypes

Even under rational basis scrutiny, the interests that the government seeks to protect do not serve as sufficient justification for section 1409. The plurality sought to justify the gender classification in section 1409 with the government's interest in ensuring proof of paternity and deterring fraud. While requiring legitimization may have been reasonable before the advances in genetic testing, it is no longer necessary because Congress itself has acknowledged the reliability of current paternity tests.

The justification for statutory distinctions based on gender must be genuine and cannot rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." Section


176. Id.


180. See Gunlicks, supra note 10, at 560–61, 575; see also Frontiero, 411 U.S. at 682 (stating that close judicial scrutiny is warranted where fundamental rights are concerned).

181. See Miller, 118 S. Ct. at 1455 (Breyer, J., dissenting); id. at 1445–46 (O'Connor, J., concurring); Miller v. Christopher, 96 F.3d 1467, 1473–74 (Wald, J., concurring); see also Howlett, supra note 16, at 17 (noting that the level of scrutiny applied by a court often determines the outcome).

182. "It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny . . . ." Miller, 118 S. Ct. at 1445–46 (O'Connor, J., concurring).

183. See id. at 1437–38.


185. United States v. Virginia, 518 U.S. 515, 533 (1996); see also Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (noting that states "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").
1409 relies upon the generalization that mothers are significantly more likely than fathers to assume child care obligations or develop relationships with their children.186 Even if unwed mothers were closer to their children than unwed fathers, this generalization is an unacceptable basis for legislative distinctions.187

Justice Stevens’s reasoning in Miller further supports his critics’ views that he will neglect historical sex role stereotyping underlying a challenged statute and uphold gender-based discrimination if based on reasoned distinctions.188 Justice Stevens argued that section 1409 rewards mothers for “reject[ing] the alternative of abortion” and caring for the child after birth.189 Not only does he inappropriately apply his pro-life views and preference toward marriage and the traditional nuclear family, but his argument fails to acknowledge the constitutional rights of the father.190 Illegitimate children should not be burdened in order to encourage legitimate family relationships.191 The plurality’s alternative rationales are wholly unrelated to the interests of promoting an illegitimate child’s ties to the United States and that child’s citizen parent.

Moreover, because the governmental interests of promoting ties to the United States and the citizen parent could be protected with a gender-neutral classification, the additional requirements for unwed fathers are unnecessary.192 The plurality rejected this idea after considering only one such criterion. According to Justice Stevens, a requirement that the citizen parent obtain proof within thirty days after the child’s birth would not eliminate the discriminatory effect because the unwed father is usually not present during childbirth.193 Again, the plurality’s reasoning is based on stereotypes and generalizations regarding the roles of unwed fathers.

The gender-based stereotypes underlying section 1409 are also untrue.194 The Act assumes that fathers are less likely than mothers to develop meaningful relationships with their children.195 However, not all

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186. See Miller, 118 S. Ct. at 1461 (Breyer, J., dissenting).
189. Miller, 118 S. Ct. at 1437.
190. See ZINGO & EARLY, supra note 10, at 58 (discussing the Court’s decision in Lehr v. Robertson, 463 U.S. 248 (1983)); Crane, supra note 187, at 443 (criticizing Justice Stevens’ dissenting opinion in Caban v. Mohammed, in which he applied reasoning similar to his decision in Miller).
192. Miller, 118 S. Ct. at 1454 (Ginsburg, J., dissenting).
193. Id. at 1438.
195. Miller, 118 S. Ct. at 1441. Interestingly, the plurality admitted this assumption. See id. at 1492.
illegitimate child/father relationships lack the strength the government attempts to instill and "there are undoubtedly many illegitimate child/mother relationships that lack the closeness the Act attempts to promote." In addition, denial of parental rights to unwed fathers solely on the basis of sex is unsupported by social science research indicating that fathers' child rearing abilities do not differ significantly from mothers' abilities. Because the plurality insufficiently justified that the classifications and the stereotypes underlying the Act are no longer true, the plurality should not have upheld section 1409 even under the rational basis level of review.

C. Miller Ignores Precedent Indicating That Section 1409 Is Unconstitutional

The plurality also improperly ignored several cases and other important indications that section 1409 violates the Fifth Amendment. First, in the early 1980s, the Attorney General listed the Act under the category of "uncorrected sex biases in federal statutes" in its Report to the President on Women's Equality and warned that it might violate the Equal Protection Clause. Interestingly, when Congress amended the Act in 1986, although it allowed illegitimate children to acquire rights of citizenship through an American father, Congress did not give those children the same rights as children with American mothers. Instead, in an effort to ease the determination of citizenship and paternity, Congress amended the Act to require the father to take affirmative actions during an illegitimate child's minority. Therefore, section 1409 continued to classify based on the parent's gender, and it now remains the only United States law conferring nationality to children that distinguishes American citizen parents on the basis of their gender. In 1998, the Supreme Court, once again, failed to eliminate the discrimination.

The plurality also overlooked several cases that have held that a statute "may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Moreover, the Court failed to consider cases that held statutes unconstitutional that required only fathers to take actions to benefit their illegitimate children. Rather, Justice Stevens believed that *Lehr v. Robertson*, an adoption case, directly supported his decision in *Miller*. *Miller* and *Lehr* each required an unwed father, and not an unwed mother, to take affirmative steps to receive rights associated with their children. In *Lehr*, however, the strong governmental interest in the adoption of illegitimate children provided sufficient justification for the classification—this government interest was not present in *Miller*. Additionally, in *Lehr*, the father was asserting his rights, not the rights of his child, and courts have been more reluctant to strike down statutes that deny rights to the father rather than those which deny rights to the child.

The Court was not persuaded by *Wauchope v. United States Department of State*, which held that a statute conferring U.S. citizenship on foreign-born children of citizen fathers, not mothers, violated the Equal Protection Clause. The U.S. government chose not to appeal *Wauchope* because it "is consistent with modern developments in the Supreme Court's jurisprudence concerning statutory distinctions based on gender." Because *Wauchope* parallels the structural setting of *Miller*

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206. See supra Part I.A.2.


208. See *Miller*, 118 S. Ct. at 1440. Justice Stevens also wrote the majority opinion in *Lehr v. Robertson*, 463 U.S. at 249–68.


210. *Lehr*, 463 U.S. at 266; see also *Caban v. Mohammed*, 441 U.S. 380, 395 (1979) (Stewart, J., dissenting) (indicating that states encourage adoption and that courts use the strong state interest as a justification for the classification).

211. *Miller*, 118 S. Ct. at 1432.

212. *Lehr*, 463 U.S. at 257.

213. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (dismissing an unwed father's claim that an adoption law violated the Equal Protection Clause); see also *Crane*, supra note 187, at 427 (describing cases in which fathers sought to assert their rights and stating that they "face a greater than average risk of denial").

214. 985 F.2d 1407 (9th Cir. 1993).


(except that Wauchope involved discrimination against females) the Court should have at least considered the case.\textsuperscript{217}

In \textit{LeBrun v. Thronburgh},\textsuperscript{218} a federal district court specifically determined that the distinction made in section 1409 between legitimate and illegitimate children was "unreasonable and arbitrary" and failed to meet even the minimum rationality standard.\textsuperscript{219} It appears that the opinion of the district court in \textit{LeBrun} was so well reasoned that the government did not attempt an appeal to the circuit court.\textsuperscript{220} Not only did \textit{LeBrun} involve the constitutionality of the same provision as was at issue in \textit{Miller},\textsuperscript{221} but the facts were also remarkably similar, as each involved daughters of American soldiers who did not discover their fathers before reaching the age of majority.\textsuperscript{222} Despite the fact that Ms. Penero Miller cited and explained that \textit{LeBrun} presented an issue directly on point with \textit{Miller},\textsuperscript{223} the plurality failed to mention the case in its discussion.

\textbf{D. Miller Ignored Section 1409's Unconstitutional Discrimination of Illegitimate Children}

In addition to classifying on the basis of gender, section 1409 also distinguishes between legitimate and illegitimate children.\textsuperscript{224} While children born abroad and out of wedlock to an American father must prove paternity and obtain the support of their father during the age of minority,\textsuperscript{225} children born to married parents do not face these hurdles in order to receive citizenship.\textsuperscript{226} Consequently, if section 1409 did not distinguish based on illegitimacy, the distinction between mothers and fathers of illegitimate children would not be present. By failing to consider the INA's discriminatory treatment of illegitimate children,\textsuperscript{227} the Supreme Court incorrectly upheld the Act.


\textsuperscript{219} \textit{Lebrun}, 777 F. Supp. at 1211.

\textsuperscript{220} See Petitioners' Brief at 12, Miller v. Albright, 118 S. Ct. 1428 (1998) (No. 96-1060); see also Wauchope v. United States Dept of State, 985 F.2d 1407, 1418 (9th Cir. 1993) (holding that a statute conferring U.S. citizenship on foreign-born children of citizen fathers, not mothers, violated the Equal Protection Clause).

\textsuperscript{221} \textit{LeBrun}, 777 F. Supp. at 1207.

\textsuperscript{222} Miller v. Albright, 118 S. Ct. 1428, 1432-33 (1998); \textit{LeBrun}, 777 F. Supp. at 1205. The plaintiff in \textit{LeBrun} was born in France to unmarried parents—an American World War II soldier father and a French mother. \textit{id}.


\textsuperscript{224} See \textit{LeBrun}, 777 F. Supp. at 1211.

\textsuperscript{225} INA § 309, 8 U.S.C. § 1409 (1994).

\textsuperscript{226} \textit{id}., § 301, 8 U.S.C. § 1401.

\textsuperscript{227} The Court narrowed the issue by limiting certiorari to the question, "Is the distinction in 8 U.S.C. § 1409 between 'illegitimate' children of U.S. citizen mothers and 'illegitimate' children of
The outcome of an equal protection case in the foregoing context often depends on whether the Court chooses to analyze the interests of the illegitimate child or the interests of the parents. In LeBrun, the court found that section 1409 discriminated on the basis of both sex and illegitimacy. By contrast, in Miller, the plurality narrowed the issue to whether section 1409 unconstitutionally distinguished between mothers and fathers and failed to consider whether the statute also discriminated on the basis of illegitimacy. The plurality neglected to acknowledge that the Supreme Court has recognized for several decades that classifications treating illegitimate children more harshly than legitimate children violate equal protection. The plurality also failed to recognize that other countries have completely eliminated the unnecessary distinction between illegitimate and legitimate children.

Moreover, although the Act seeks to reunite families, it reflects only the traditional view of the family, a view which is impracticable in today's society as illegitimacy rates continue to increase and single parenthood is not uncommon.

Although the Supreme Court has consistently held that children should not be punished for the conduct of their parents or as a method of deterring the parents' conduct, the decision in Miller to uphold section


231. See LeBrun, 777 F. Supp. at 1213 (holding that section 1409 unconstitutionally discriminates on the basis of both sex and illegitimacy); see also HARRY D. KRAUSE, FAMILY LAW 927-28 (3d ed. 1990) (stating that distinguishing between mothers and fathers has unnecessarily introduced the subject of sex discrimination into the issue of illegitimacy).

232. See, e.g., Caban v. Mohammed, 441 U.S. 380, 388-89 (1979) (finding a requirement that only the permission of an unwed mother, not an unwed father, to adopt a child violated the Equal Protection Clause); Levy v. Louisiana, 391 U.S. 68 (1968) (holding for the first time that classification based on illegitimacy violates equal protection); see also supra Part I.A.2.


234. Id. at 429-30.

235. LeBrun, 777 F. Supp. at 1213; see also O'Brien, supra note 2, at 110 (recognizing the increasing number of illegitimate children born each year).


1409 will likely have a punitive effect on illegitimate children. According to the INA, an illegitimate child cannot receive citizenship unless her American father agrees to take the steps required by section 1409. Consequently, illegitimate children are disadvantaged because few can locate or gain the support of their fathers. For example, only fifteen percent of Filipino-Amerasian children with fathers who were American service personnel have been able to receive citizenship based on section 1409. In Miller, Justice Stevens reiterated the position that a father may not receive equal protection rights associated with his child if he fails to participate in raising the child. As a result, the Court deprived Ms. Penero Miller of her U.S. citizenship because her father failed to take the appropriate steps to legitimize her while she was a minor.

IV. CONCLUSION

The plurality decision in Miller held that section 1409 does not violate the equal protection component of the Fifth Amendment. Section 1409 of the INA imposes a burden on the children of unwed citizen fathers, but not children of unwed citizen mothers, and is therefore the type of gender discrimination banned by the Supreme Court in previous decisions. As Part II details, the plurality opinion applied an incorrect level of scrutiny and failed to adequately justify the classification made by section 1409. Moreover, the Court ignored important precedent and the discriminatory effects of section 1409 on illegitimate children.

In several immigration cases, the Supreme Court has failed to use its authority to strike down a statute that violates the Equal Protection Clause because it believes that Congress should make these changes. The Court’s refusal to adequately review the constitutionality of federal statutes makes immigration law a “constitutional oddity.” Similarly, in Miller, the plurality acknowledged that the additional requirements imposed on unwed citizen fathers are unnecessary in light of reliable genetic testing, but believed that it was Congress’s decision whether to change the Act. The Court appears to use the deference given to Con-

237. Miller, supra note 236, at 193.
238. See LeBrun, 777 F. Supp. at 1206, 1212.
240. Id.
242. Miller, 118 S. Ct. at 1432–33, 1437–42.
243. Id. at 1440.
245. See, e.g., Fiallo v. Bell, 430 U.S. 787, 799 n.9 (1977) (stating that the issue "should be addressed to the Congress rather than the courts").
gress as an excuse for not taking appropriate action.\textsuperscript{248} Because Congress has failed to eliminate the discriminatory classifications in section 1409, the Court should have taken responsibility for ensuring that the statute conformed to the requirements of the Equal Protection Clause in \textit{Miller}. One would hope, as critics’ reactions to \textit{Miller} have initially indicated, that the decision will only "stand for the moment."\textsuperscript{249}

\textit{Nikki Ahrenholz}

\textsuperscript{248} See Scaperlanda, \textit{supra} note 179, at 716.
