SUPREME COURT OF THE UNITED STATES

No. 96–1060

LORELYN PENERO MILLER, PETITIONER
v. MADELEINE K. ALBRIGHT,
SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 22, 1998]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

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*, 169 U. S. 649, 702 (1898). Under the Fourteenth Amendment, "[e]very 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." *Ibid.* 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." *Id.*, at 702–703; see also *Rogers* v. *Bellei*, 401 U. S. 815, 827 (1971). 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.

The enactment on which petitioner relies is §309 of the Immigration and Nationality Act (INA), 66 Stat. 238, as amended, 8 U. S. C. §1409, which establishes the requirements for the acquisition of citizenship by a child born out of wedlock when the child's father is a United States citizen. Section 1409(a) provides, in relevant part, that §1401(g), which confers citizenship on foreign-born children when one parent is an alien and the other a citizen of the United States, shall apply:

> "(a) . . . as of the date of birth to a person born out of wedlock if–
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> "(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."

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, App. 11–12, because the requirements she did not meet are not also imposed upon illegitimate children of citizen-mothers, and therefore violate the Equal Protection Clause.[1] 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

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[1] Petitioner makes the equal-protection claim on behalf of her father, not on her own behalf. JUSTICE BREYER finds that she has third-party standing to make the claim because "[s]he has a 'close' and relevant relationship" with her father, and "there was 'some hindrance' to her father's asserting his own rights." *Post*, at 3 (quoting from *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991)). As an original matter, I would agree with JUSTICE O'CONNOR that this ground is inadequate, but I do not read our cases as demanding so significant an impairment of the rightholder's ability to sue as she does. For example, in *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), although the rightholder who was one of the named plaintiffs had indeed lost his ability to sue because he had turned 21, there was "no barrier whatever" to assertion of the constitutional claim by other Oklahoma males between 18 and 20. *Id.*, at 216 (Burger, C. J., dissenting). Certainly here, as in *Craig*, petitioner is the "least awkward challenger," *id.*, at 197, since it is her right to citizenship that is at stake. Our law on this subject is in need of what may charitably be called clarification, but I would leave it for another day. Since I accept petitioner's third-party standing, there is no need for me to reach the Government's claim (which it asserts for the first time in its brief on the merits in this Court) that petitioner cannot invoke the Equal Protection Clause on her own behalf because she is not within the jurisdiction of the United States. Brief for Respondent 11–12.

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,* 486 U. S. 875, 884 (1988) (internal quotation marks and citation omitted).

Judicial power over immigration and naturalization is extremely limited. "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo* v. *Bell,* 430 U. S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, 210 (1953)). See also *Landon* v. *Plasencia,* 459 U. S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative"); *Mathews* v. *Diaz,* 426 U. S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"); *Kleindienst* v. *Mandel,* 408 U. S. 753, 769–770 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established"); *Galvan* v. *Press,* 347 U. S. 522, 531 (1954) ("That the formulation of [policies pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"). Because only Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States, federal courts cannot exercise that power under the guise of their remedial authority. "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Pangilinan, supra,* at 885. "An alien who seeks political rights as a member of this Nation can rightfully obtain them *only upon terms and conditions*

specified by Congress. Courts are without authority to sanction changes or modifications." United States v. *Ginsberg*, 243 U. S. 472, 474 (1917) (emphasis added).

Petitioner argues, and JUSTICE BREYER's dissent seems to agree, see *post*, at 19–20 (BREYER, J., dissenting), that because she meets the requirements of §1401(g), the Court may declare her a citizen "at birth" under that provision and ignore §1409(a) entirely, which allegedly unconstitutionally takes away that citizenship. Brief for Petitioner 14–15. This argument adopts a fanciful view of the statute, whereby §1409(a) takes away what §1401(g) has unconditionally conferred– as though §1409(a) were some sort of a condition subsequent to the conveyance of real estate in a will. If anything, of course, it would be a condition *precedent*, since it says that §1401(g) "shall apply as of the date of birth to a person born out of wedlock *if*" the person meets the requirements there set forth. 8 U. S. C. §1409(a) (emphasis added). But a unitary statute is not to be picked apart in this fashion. To be sure, §1401(g), read in isolation, might refer to both married and unmarried parents. We do not, however, read statutory provisions in isolation, as if other provisions in the same Act do not exist, see *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991). Section 1401(g) does *not* confer citizenship upon children born out of wedlock unless the requirements in §1409 are satisfied.

It can be argued that in exempting an applicant from an unconstitutional requirement (either part or all of §1409(a)) a court is not rewriting the law, but simply ignoring that portion of the law which is a nullity. See *post*, at 19–20 (BREYER, J., dissenting). That assumes, however, a judicial power to sever the unconstitutional portion from the remainder, and to apply the remainder unencumbered. Such a power exists in other cases– and is exercised on the basis of the Court's assessment as to whether Congress would have enacted the remainder of

the law without the invalidated provision. See *New York* v. *United States*, 505 U. S. 144, 186 (1992). I know of no instance, however, in which this Court has severed an unconstitutional restriction upon the grant of immigration or citizenship. It is in my view incompatible with the plenary power of Congress over those fields for judges to speculate as to what Congress would have enacted if it had not enacted what it did– whether it would, for example, have preferred to extend the requirements of §§1409(a)(3) and (4) to mothers instead of eliminating them for fathers, or even to deny citizenship to illegitimate children entirely. ("[T]he Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Rogers*, 401 U. S., at 830.) Moreover, if the mere character of the naturalization power were not enough to render the severing of a limitation upon citizenship improper, the INA itself contains a clear statement of congressional intent: "A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise*." 8 U. S. C. §1421(d) (emphasis added). JUSTICE BREYER's reliance upon the INA's general severability clause, 66 Stat. 281, §406, is misplaced because the specific governs the general, see *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384–385 (1992). The question of severance ultimately turns on "whether the provisions are inseparable by virtue of inherent character," *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 322 (1936), which must be gleaned from the structure and nature of the Act.

Another obstacle to judicial deletion of the challenged requirements is the fact that when a statutory violation of equal protection has occurred, it is not foreordained which particular statutory provision is invalid. The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provi-

sion (here, supposedly, the provision governing citizenship of illegitimate children of citizen mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen fathers). "[W]e have noted that a court sustaining [an equal protection] claim faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Heckler* v. *Mathews*, 465 U. S. 728, 738 (1984), quoting *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result). Given the nature of the law at issue here, and given the clear command of 8 U. S. C. §1421(d) ("under the conditions prescribed in this subchapter and not otherwise") there is no doubt which of those alternatives the court must employ. It cannot confer citizenship where Congress has not done so.

In any event, this is not like the ordinary equal protection case, in which one class is subjected to a restriction from which the other class is exempt. See, *e.g.*, *Craig* v. *Boren*, 429 U. S. 190, 191–192 (1976) (men can be served alcoholic beverages only if over 21 years of age, whereas women need be only 18). Here *each* class is subjected to restrictions from which the other is exempt. While illegitimate children of citizen fathers must meet the requirements of §1409(a) from which illegitimate children of citizen mothers are exempt, illegitimate children of citizen mothers must meet the quite different requirements of §1409(c), from which illegitimate children of citizen fathers are exempt.[2] In this situation, eliminating the re-

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[2] Title 8 U. S. C. §1409(c) provides that an illegitimate child born to a citizen mother shall be a citizen "if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

strictions on fathers does not produce a law that complies with the Equal Protection Clause (assuming it is initially in violation), but rather produces a law that treats fathers *more* favorably than mothers. There is no way a court can "fix" the law by merely disregarding one provision or the other as unconstitutional. It would have to disregard them *both*, either leaving no restrictions whatever upon citizenship of illegitimate children or (what I think the more proper course) denying naturalization of illegitimate children entirely (since §1401(g) was not meant to apply by its unqualified terms to illegitimate children). Even outside the particularly sensitive area of immigration and naturalization, I am aware of no case that has engaged in such radical statutory surgery, and it certainly cannot be engaged in here.

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." *Fiallo*, 430 U. S., at 795, n. 6. 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.