

GINSBURG, J., dissenting

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 GINSBURG, with whom JUSTICE SOUTER and
JUSTICE BREYER join, dissenting.

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.

Characteristic of sex-based classifications, the stereotypes underlying this legislation may hold true for many, even most, individuals. But in prior decisions the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn. While the Court is divided on Lorelyn Miller’s standing to sue, a solid majority adheres to that vital understanding. As JUSTICE O’CONNOR’s opinion makes plain, distinctions based on gender trigger heightened scrutiny and “[i]t is unlikely . . .

GINSBURG, J., dissenting

that any gender classifications based on stereotypes can survive heightened scrutiny.” *Ante*, at 7 (opinion concurring in judgment); *post*, at 12–19 (BREYER, J., dissenting).

On the surface, §1409 treats females favorably. Indeed, it might be seen as a benign preference, an affirmative action of sorts. Compare *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 731, and n. 17 (1982) with *id.*, at 740–744 (Powell, J., dissenting). 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. See *ante*, at 11–12, 16–17. 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.

I

The first statute on the citizenship of children born abroad, enacted in 1790, stated: “[T]he 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.” Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. 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. Act of Jan. 29, 1795, §3, 1 Stat. 415; Act of Apr. 14, 1802, §4, 2 Stat. 155. This father’s residence requirement suggests that Congress intended a child born

GINSBURG, J., dissenting

abroad to gain citizenship only when the father was a citizen. That, indeed, was the law of England at the time. See 2 J. Kent, *Commentaries on American Law* *50–*51 (hereinafter Kent’s *Commentaries*); 4 Geo. 2, ch. 21 (1731). 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. See Binney, *The Alienigenae of the United States*, 2 Am. L. Reg. 193, 203–205 (1854). Or, as Chancellor Kent observed, the words might mean that both parents had to be United States citizens for citizenship to pass. 2 Kent’s *Commentaries* *53.

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. See Cong. Globe, 30th Cong., 1st Sess., 827 (1848); F. Franklin, *The Legislative History of Naturalization in the United States* 271–276 (reprint ed. 1971). Instead, in 1855, Congress clarified that citizenship would pass to children born abroad only when the father was a United States citizen. Act of Feb. 10, 1855, §2, 10 Stat. 604. 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.” Rev. Stat. §1993.

In these early statutes, Congress did not differentiate

GINSBURG, J., dissenting

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, *e.g.*, 32 Op. Atty. Gen. 162, 164–165 (1920); see also *Guyer v. Smith*, 22 Md. 239 (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. See *In re P*, 4 I. & N. Dec. 354 (C. O. 1951); 7 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* §93.04[2][d], pp. 93–43 to 93–44 (1992) (hereinafter Gordon). 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 “[n]ormally 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.” House Committee on Immigration and Naturalization, *A Report Proposing A Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments*, 76th Cong., 1st Sess., 18 (Comm. Print 1939) (hereinafter *Proposed Code*). Ultimately, however, the Attorney General rejected the Department’s reasoning, finding it incompatible with §1993’s exclusive reference to fathers. See 39 Op. Atty. Gen. 397, 398 (1939).

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

GINSBURG, J., dissenting

days, “marriage with an alien, whether a friend or an enemy, produce[d] no dissolution of the native allegiance of the wife.” *Shanks v. Dupont*, 3 Pet. 242, 246 (1830) (Story, J.). By the end of the nineteenth century, however, a few courts adopted the view that a woman’s nationality followed her husband’s, see, e.g., *Pequignot v. Detroit*, 16 F. 211, 216 (CC ED Mich. 1883), particularly when the woman resided abroad in her husband’s country, see, e.g., *Ruckgaber v. Moore*, 104 F. 947, 948–949 (CC ED NY 1900). See generally C. Bredbenner, *Toward Independent Citizenship: Married Women’s Nationality Rights in the United States: 1855–1937*, 54–59 (Ph. D. dissertation, University of Virginia, 1990) (hereinafter Bredbenner); Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 *Politics & Soc.* 1, 4–10 (1984). State Department officials inclined towards this view as well. See L. Gettys, *The Law of Citizenship in the United States* 118 (1934). 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. Act of Mar. 2, 1907, §3, 34 Stat. 1228. This Court upheld the statute, noting that “[t]he identity of husband and wife is an ancient principle of our jurisprudence.” *Mackenzie v. Hare*, 239 U. S. 299, 311 (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. See Bredbenner 81, 95–105; Sapiro, *supra*, at 12–13. 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. Act of Sept. 22, 1922 (Cable Act), ch. 411, §3, 42 Stat. 1022. But equal respect for a woman’s nationality remained only

GINSBURG, J., dissenting

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. *Id.*, §§3, 5; see also Sapiro, *supra*, at 11–12. 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*, 25 F. 2d 210, 210 (NJ 1928) (“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”); see also Gettys, *supra*, at 56–57. 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. Act of Feb. 10, 1855, ch. 71, §2, 10 Stat. 604; see also *Kelly v. Owen*, 7 Wall. 496, 498 (1869) (the 1855 Act “confers the privileges of citizenship upon women married to citizens of the United States” without further action). 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.” Act of Mar. 26, 1804, §2, 2 Stat. 292, 293. That 1804 measure granted no corresponding dispensation to the husband and children of an alien woman. In addition, Congress provided statutory exemptions to entry requirements for the wives and children of men but not for the husbands and children of women. See, e.g., Act of Mar. 3, 1903, §37, 32 Stat. 1213, 1221 (wives and children enter-

GINSBURG, J., dissenting

ing the country to join permanent resident aliens and found to have contracted contagious diseases during transit shall not be deported if the diseases were easily curable or did not present a danger to others); S. Rep. No. 1515, 81st Cong., 2d Sess., 415–417 (1950) (wives exempt from literacy and quota requirements).

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.”
Act of May 24, 1934, §1, 48 Stat. 797.¹

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.” S. Rep. No. 865, 73d Cong., 2d Sess., 1 (1934); accord, H. R. Rep. No. 131, 73d Cong., 2d Sess., 2 (1933); see generally Orfield, *The Citi-*

¹A 1921 bill contained a similar provision allowing United States citizen women to transmit citizenship to their children born abroad. The bill provided: “A child born at any time without the United States, either parent being at the time of such birth a citizen of the United States, may, if not a citizen under section 1993 of the Revised Statutes, derive United States citizenship under this section.” H. R. Rep. No. 15603, 66th Cong., 3d Sess., §33(2), p. 26 (1921). This 1921 bill, a precursor to the Cable Act, passed the House Committee on Immigration and Naturalization but proceeded no further. See H. R. Rep. No. 1185, 66th Cong., 3d Sess., 1 (1921); Bredbenner 137.

GINSBURG, J., dissenting

zenship Act of 1934, 2 U. Chi. L. Rev. 99, 100–106 (1935). 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.” 7 Gordon §93.04[2][b], p. 93–42; see also *id.*, §93.04[2][d][iii], p. 93–46.

The 1934 Act’s equal respect for the citizenship stature of mothers and fathers of children born abroad did not remain unmodified. 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.² But if the father and not

²Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. 8 U. S. C. §1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island. See T. Aleinikoff, D. Martin, & H. Motomura, *Immigration: Process and Policy* 974–975, n. 2 (3d ed. 1995). The provision that a child born abroad out of wedlock to a United States citizen mother gains her nationality has been interpreted

GINSBURG, J., dissenting

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. Nationality Act of 1940, §§201, 205, 54 Stat. 1138–1140.³

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.⁴ Immigration and Nationality Act, §309, 66 Stat. 238–239. In 1986, however, Congress added further gender-based differentials. The Legislature that year permitted substitution of a written acknowledgment

to mean that the child gains her citizenship as well; thus if the mother is not just a United States national but also a United States citizen, the child is a United States citizen. See 7 Gordon §93.04[2][b], p. 93–42; *id.*, §93.04[2][d][viii], p. 93–49.

³The provision granting citizenship to children born abroad out of wedlock applied retroactively; the provision granting citizenship to children born in wedlock did not. The 1934 Act, too, was nonretroactive. The net result was that a child born abroad out of wedlock to a United States citizen mother in 1933 or earlier had United States citizenship after the 1940 Act, but a child born in wedlock did not until 1994 when Congress enacted legislation making the 1934 Act retroactive. Pub. L. 103–416, Tit. I, §101(a)(2), 108 Stat. 4306, codified at 8 U. S. C. §1401(h).

⁴The 1952 Act also provided that periods of service in the Armed Forces abroad could count towards satisfying the parental residency requirement in regard to a child born after January 13, 1941. Immigration and Nationality Act of 1952, §§301(a)(7), 309(b), 66 Stat. 236, 238, codified as amended at 8 U. S. C. §§1401(g), 1409(b).

GINSBURG, J., dissenting

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. Act of Nov. 14, 1986, §13, 100 Stat. 3657, codified as amended at 8 U. S. C. §1409. No substantive change has been made since 1986 in the law governing citizenship of children born abroad out of wedlock.

II

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,” *ante*, at 22, 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: “[T]he right of citizenship shall not descend unless the

GINSBURG, J., dissenting

child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday.” Act of May 24, 1934, §1, 48 Stat. 797. Commentary underscores what the text conveys. 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. See Proposed Code 10–11, 14.

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.” *E.g., ante*, at 14, 15, 16, 18, 21, 22.

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.” *United States v. Virginia*, 518 U. S. ____ (1996) (slip op., at 24) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 725 (1982)); see also *Orr v. Orr*, 440 U. S. 268, 283 (1979) (“Where, as here, the State’s . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.”). Only an “exceedingly persuasive justification,” *Kirchberg v. Feenstra*, 450 U. S. 455, 461 (1981) (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256, 273 (1979)), one that does “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,” *United States v. Virginia*, 518 U. S., at ____ (slip op., at 15), will support differential treatment of men and women. See *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 152 (1994) (Kennedy, J., concurring in judgment) (noting that prevail-

GINSBURG, J., dissenting

ing case law “reveal[s] a strong presumption that gender classifications are invalid”).

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.” *Miller v. Christopher*, 96 F. 3d 1467, 1476 (CA DC 1996) (Wald, J., concurring in judgment).

* * *

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

GINSBURG, J., dissenting

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), “[w]hether 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.” Hearings on H. R. 3673 and H. R. 77 before the House Committee on Immigration and Naturalization, 73d Cong., 1st Sess., 36 (1933) (testimony of Burnita Shelton Matthews). Congress recognized this equality principle in 1934, and is positioned to restore that impartiality before the century is out.