SUPREME COURT OF THE UNITED STATES

No. 99–2071

TUAN ANH NGUYEN AND JOSEPH BOULAIS, PETITIONERS *v.* IMMIGRATION AND NATURALIZATION SERVICE

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

[June 11, 2001]

JUSTICE O'CONNOR, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex. The Court today confronts another statute that classifies individuals on the basis of their sex. While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents. Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex-based classification embodied in 8 U. S. C. §1409(a)(4)– *i.e.,* because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives– I would reverse the judgment of the Court of Appeals.

I

Sex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation's "'long and unfortunate history of sex discrimination.'" *J. E. B.* v. *Alabama ex rel. T. B.,* 511 U. S. 127, 136 (1994) (quoting *Frontiero* v.

Richardson, 411 U. S. 677, 684 (1973) (plurality opinion)). Sex-based generalizations both reflect and reinforce "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718, 725 (1982).

For these reasons, a party who seeks to defend a statute that classifies individuals on the basis of sex "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Id.,* at 724 (quoting *Kirchberg* v. *Feenstra,* 450 U. S. 455, 461 (1981)); see also *United States* v. *Virginia,* 518 U. S. 515, 531 (1996). The defender of the classification meets this burden "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi Univ. for Women, supra,* at 724 (quoting *Wengler* v. *Druggists Mut. Ins. Co.,* 446 U. S. 142, 150 (1980)); see also *Virginia, supra,* at 533.

Our cases provide significant guidance concerning the meaning of this standard and how a reviewing court is to apply it. This Court's instruction concerning the application of heightened scrutiny to sex-based classifications stands in stark contrast to our elucidation of the rudiments of rational basis review. To begin with, under heightened scrutiny, "[t]he burden of justification is demanding and it rests entirely on [the party defending the classification]." *Virginia, supra,* at 533. Under rational basis scrutiny, by contrast, the defender of the classification "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller* v. *Doe,* 509 U. S. 312, 320 (1993). Instead, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.,* at 320–321 (internal quotation marks and citation omitted).

Further, a justification that sustains a sex-based classi-

fication "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia, supra,* at 533. "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 648 (1975). Under rational basis review, by contrast, it is "'constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.'" *Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166, 179 (1980) (quoting *Flemming* v. *Nestor,* 363 U. S. 603, 612 (1960)).

Heightened scrutiny does not countenance justifications that "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia, supra,* at 533. Rational basis review, by contrast, is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational. See, *e.g., Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62, 84 (2000); *Fritz, supra,* at 177.

Moreover, overbroad sex-based generalizations are impermissible even when they enjoy empirical support. See, *e.g., J. E. B., supra,* at 139, n. 11; *Craig* v. *Boren,* 429 U. S. 190, 199 (1976); *Wiesenfeld, supra,* at 645. Under rational basis scrutiny, however, empirical support is not even necessary to sustain a classification. See, *e.g., FCC* v. *Beach Communications, Inc.,* 508 U. S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

The different burdens imposed by these equal protection standards correspond to the different duties of a reviewing court in applying each standard. The court's task in applying heightened scrutiny to a sex-based classification is clear: "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court

must determine whether the proffered justification is 'exceedingly persuasive.'" *Virginia,* 518 U. S., at 532–533. In making this determination, the court must inquire into the actual purposes of the discrimination, for "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *Id.,* at 535–536; see also *id.,* at 533; *Wiesenfeld, supra,* at 648; *Califano* v. *Goldfarb,* 430 U. S. 199, 212–217 (1977) (plurality opinion); *id.,* at 219–221 (STEVENS, J., concurring in judgment). The rational basis standard, on the other hand, instructs that "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller, supra,* at 320 (quoting *Beach Communications, supra,* at 313). This standard permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality.

These different standards of equal protection review also set different bars for the magnitude of the governmental interest that justifies the statutory classification. Heightened scrutiny demands that the governmental interest served by the classification be "important," see, *e.g., Virginia, supra,* at 533, whereas rational basis scrutiny requires only that the end be "legitimate," see, *e.g., Nordlinger* v. *Hahn,* 505 U. S. 1, 10 (1992).

The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be "substantially related" to an actual and important governmental interest. See, *e.g., Virginia, supra,* at 533. Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end. See, *e.g., Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 440 (1985).

The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review. See, *e.g., Vance* v. *Bradley,* 440 U. S. 93, 103, n. 20 (1979) ("Even were it not irrelevant to [rational basis review] that other alternatives might achieve approximately the same results . . ."); *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 316 (1976) *(per curiam)* ("[T]he State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect'" (quoting *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970))). But because we require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification. See, *e.g., Wengler,* 446 U. S., at 151 (invalidating a sex-based classification where a sex-neutral approach would completely serve the needs of both classes); *Orr* v. *Orr,* 440 U. S. 268, 281 (1979) (finding "no reason, therefore, to use sex as a proxy for need" where the alimony statute already provided for individualized hearings that took financial circumstances into account); *Wiesenfeld,* 420 U. S., at 653 (finding a gender-based distinction to be "gratuitous" where "without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids").

II

The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, see *ante,* at 5, 15, but departs from the guidance of our precedents concerning such classifications in several ways. In the first sentence of its equal protection analysis, the majority glosses over the crucial matter of the burden of justification. *Ante,* at 5 ("For a gender-based classification

to withstand equal protection scrutiny, it must be established . . ."); see also *ante,* at 15. In other circumstances, the Court's use of an impersonal construction might represent a mere elision of what we have stated expressly in our prior cases. Here, however, the elision presages some of the larger failings of the opinion.

For example, the majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of §1409(a)(4). The Court also does not always explain adequately the importance of the interests that it claims to be served by the provision. The majority also fails carefully to consider whether the sex-based classification is being used impermissibly "as a 'proxy for other, more germane bases of classification,'" *Mississippi Univ. for Women,* 458 U. S., at 726 (quoting *Craig,* 429 U. S., at 198), and instead casually dismisses the relevance of available sex-neutral alternatives. And, contrary to the majority's conclusion, the fit between the means and ends of §1409(a)(4) is far too attenuated for the provision to survive heightened scrutiny. In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.

A

According to the Court, "[t]he first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists." *Ante,* at 7. The majority does not elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship. Nor does the majority demonstrate that this is one of the actual purposes of §1409(a)(4). Assuming that Congress actually had this purpose in mind in enacting parts of §1409(a)(4), cf. *Miller* v. *Albright,* 523 U. S. 420, 435–436 (1998) (opinion of STEVENS, J.), the INS does not appear to rely on this interest in its effort to sustain §1409(a)(4)'s sex-based

classification. Cf. Brief for Respondent 11 (claiming that §1409 serves "at least two important interests: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent– and thus to the United States– to justify the conferral of citizenship upon them; and second, preventing such children from being stateless"). In light of the reviewing court's duty to "determine whether the proffered justification is 'exceedingly persuasive,'" *Virginia,* 518 U. S., at 533, this disparity between the majority's defense of the statute and the INS' proffered justifications is striking, to say the least.

The gravest defect in the Court's reliance on this interest, however, is the insufficiency of the fit between §1409(a)(4)'s discriminatory means and the asserted end. Section 1409(c) imposes no particular burden of proof on mothers wishing to convey citizenship to their children. By contrast, §1409(a)(1), which petitioners do not challenge before this Court, requires that "a blood relationship between the person and the father [be] established by clear and convincing evidence." Atop §1409(a)(1), §1409(a)(4) requires legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of 18. It is difficult to see what §1409(a)(4) accomplishes in furtherance of "assuring that a biological parent-child relationship exists," *ante,* at 7, that §1409(a)(1) does not achieve on its own. The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of §1409(a)(1). See *Miller, supra,* at 484–485 (BREYER, J., dissenting).

It is also difficult to see how §1409(a)(4)'s limitation of the time allowed for obtaining proof of paternity substantially furthers the assurance of a blood relationship. Modern DNA testing, in addition to providing accuracy

unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time. Moreover, the application of §1409(a)(1)'s "clear and convincing evidence" requirement can account for any effect that the passage of time has on the quality of the evidence.

The Court criticizes petitioners' reliance on the availability and sophistication of modern DNA tests, *ante,* at 8, but appears to misconceive the relevance of such tests. No one argues that §1409(a)(1) mandates a DNA test. Legitimation or an adjudication of paternity, see §§1409(a)(4)(A), (C), may well satisfy the "clear and convincing" standard of §1409(a)(1). (Satisfaction of §1409(a)(4) by a written acknowledgment of paternity under oath, see §1409(a)(4)(B), would seem to do little, if anything, to advance the assurance of a blood relationship, further stretching the means-end fit in this context). Likewise, petitioners' argument does not depend on the idea that one particular method of establishing paternity is constitutionally required. Petitioners' argument rests instead on the fact that, if the goal is to obtain proof of paternity, the existence of a statutory provision governing such proof, coupled with the efficacy and availability of modern technology, is highly relevant to the sufficiency of the tailoring between §1409(a)(4)'s sex-based classification and the asserted end. Because §1409(a)(4) adds little to the work that §1409(a)(1) does on its own, it is difficult to say that §1409(a)(4) "substantially furthers" an important governmental interest. *Kirchberg,* 450 U. S., at 461.

The majority concedes that Congress could achieve the goal of assuring a biological parent-child relationship in a sex-neutral fashion, but then, in a surprising turn, dismisses the availability of sex-neutral alternatives as irrelevant. As the Court suggests, "Congress could have required both mothers and fathers to prove parenthood within 30 days or, for that matter, 18 years, of the child's

birth." *Ante,* at 9 (citing *Miller, supra,* at 436 (opinion of STEVENS, J.)). Indeed, whether one conceives the majority's asserted interest as assuring the existence of a biological parent-child relationship, *ante,* at 7, or as ensuring acceptable documentation of that relationship, *ante,* at 8, a number of sex-neutral arrangements– including the one that the majority offers– would better serve that end. As the majority seems implicitly to acknowledge at one point, *ante,* at 7, a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost. Conversely, a father's name may well appear on a birth certificate. While it is doubtless true that a mother's blood relation to a child is uniquely "verifiable from the birth itself" to those present at birth, *ante,* at 7, the majority has not shown that a mother's birth relation is uniquely verifiable *by the INS,* much less that any greater verifiability warrants a sex-based, rather than a sex-neutral, statute.

In our prior cases, the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification. See *supra,* at 5. The majority, however, turns this principle on its head by denigrating as "hollow" the very neutrality that the law requires. *Ante,* at 9. While the majority trumpets the availability of superior sex-neutral alternatives as confirmation of §1409(a)(4)'s validity, our precedents demonstrate that this fact is a decided strike *against* the law. Far from being "hollow," the avoidance of gratuitous sex-based distinctions is the hallmark of equal protection. Cf. *J. E. B.,* 511 U. S., at 152–153 (KENNEDY, J., concurring in judgment) ("'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class'" (quoting *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547, 602 (1990) (O'CONNOR, J., dissenting))).

The majority's acknowledgment of the availability of sex-neutral alternatives scarcely confirms the point that "[t]he differential treatment is inherent in a sensible statutory scheme." *Ante,* at 9. The discussion instead demonstrates that, at most, differential *impact* will result from the fact that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Ante,* at 8. In other words, it will likely be easier for mothers to satisfy a sex-neutral proof of parentage requirement. But facially neutral laws that have a disparate impact are a different animal for purposes of constitutional analysis than laws that specifically provide for disparate treatment. We have long held that the differential impact of a facially neutral law does not trigger heightened scrutiny, see, *e.g., Washington* v. *Davis,* 426 U. S. 229 (1976), whereas we apply heightened scrutiny to laws that facially classify individuals on the basis of their sex. See, *e.g., United States* v. *Virginia,* 518 U. S. 515 (1996); see also *J. E. B., supra,* at 152 (KENNEDY, J., concurring in judgment) ("[O]ur case law does reveal a strong presumption that gender classifications are invalid"); *Parham* v. *Hughes,* 441 U. S. 347, 351 (1979) (plurality opinion) ("Not all legislation, however, is entitled to the same presumption of validity. . . . [T]he presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes" (citing, *inter alia, Reed* v. *Reed,* 404 U. S. 71 (1971))).

If rational basis scrutiny were appropriate in this case, then the claim that "[t]he Constitution . . . does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity," *ante,* at 8, would have much greater force. So too would the claim that "[t]he requirement of §1409(a)(4) represents a reasonable conclusion . . . ." *Ante,* at 8. But fidelity to the Constitution's pledge of equal protection demands

more when a facially sex-based classification is at issue. This is not because we sit in judgment of the wisdom of laws in one instance but not the other, cf. *Beach Communications,* 508 U. S., at 313, but rather because of the potential for "injury . . . to personal dignity" *J. E. B., supra,* at 153 (KENNEDY, J., concurring in judgment), that inheres in or accompanies so many sex-based classifications.

B

The Court states that "[t]he second important governmental interest furthered in a substantial manner by §1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Ante,* at 9–10. The Court again fails to demonstrate that this was Congress' actual purpose in enacting §1409(a)(4). The majority's focus on "some demonstrated opportunity or potential to develop . . . real, everyday ties," in fact appears to be the type of hypothesized rationale that is insufficient under heightened scrutiny. See *supra,* at 2–4.

The INS asserts the governmental interest of "ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent– and thus to the United States– to justify the conferral of citizenship upon them." Brief for Respondent 11. The majority's asserted end, at best, is a simultaneously watered-down and beefed-up version of this interest asserted by the INS. The majority's rendition is weaker than the INS' in that it emphasizes the "opportunity or potential to develop" a relationship rather than the actual relationship

about which the INS claims Congress was concerned. The majority's version is also stronger in that it goes past the formal relationship apparently desired by the INS to "real, everyday ties."

Assuming, as the majority does, that Congress was actually concerned about ensuring a "demonstrated opportunity" for a relationship, it is questionable whether such an opportunity qualifies as an "important" governmental interest apart from the existence of an actual relationship. By focusing on "opportunity" rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how, in this citizenship-conferral context, anyone profits from a "demonstrated opportunity" for a relationship in the absence of the fruition of an actual tie. Children who have an "opportunity" for such a tie with a parent, of course, may never develop an actual relationship with that parent. See *Miller,* 523 U. S., at 440 (opinion of STEVENS, J.). If a child grows up in a foreign country without any postbirth contact with the citizen parent, then the child's never-realized "opportunity" for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child. Likewise, where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship, regardless of when and how the opportunity for that relationship arose.

Accepting for the moment the majority's focus on "opportunity," the attempt to justify §1409(a)(4) in these terms is still deficient. Even if it is important "to require that an opportunity for a parent-child relationship occur during the formative years of the child's minority," *ante,* at 13, it is difficult to see how the requirement that *proof* of such opportunity be obtained before the child turns 18 substantially furthers the asserted interest. As the facts

of this case demonstrate, *ante,* at 2, it is entirely possible that a father and child will have the opportunity to develop a relationship and in fact will develop a relationship without obtaining the proof of the opportunity during the child's minority. After his parents' relationship had ended, petitioner Nguyen lived with the family of his father's new girlfriend. In 1975, before his sixth birthday, Nguyen came to the United States, where he was reared by his father, petitioner Boulais. In 1997, a DNA test showed a 99.98% probability of paternity, and, in 1998, Boulais obtained an order of parentage from a Texas court.

Further underscoring the gap between the discriminatory means and the asserted end is the possibility that "a child might obtain an adjudication of paternity 'absent any affirmative act by the father, and perhaps even over his express objection.'" *Miller,* 523 U. S., at 486 (BREYER, J., dissenting) (quoting *id.,* at 434 (opinion of STEVENS, J.)). The fact that the means-end fit can break down so readily in theory, and not just in practice, is hardly characteristic of a "substantial" means-end relationship.

Moreover, available sex-neutral alternatives would at least replicate, and could easily exceed, whatever fit there is between §1409(a)(4)'s discriminatory means and the majority's asserted end. According to the Court, §1409(a)(4) is designed to ensure that fathers and children have the same "opportunity which the event of birth itself provides for the mother and child." *Ante,* at 12. Even assuming that this is so, Congress could simply substitute for §1409(a)(4) a requirement that the parent be present at birth or have knowledge of birth. Cf. *Miller, supra,* at 487 (BREYER, J., dissenting). Congress could at least allow proof of such presence or knowledge to be one way of demonstrating an opportunity for a relationship. Under the present law, the statute on its face accords different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though

those two individuals are similarly situated with respect to the "opportunity" for a relationship. The mother can transmit her citizenship at birth, but the father cannot do so in the absence of at least one other affirmative act. The different statutory treatment is solely on account of the sex of the similarly situated individuals. This type of treatment is patently inconsistent with the promise of equal protection of the laws. See, *e.g., Reed,* 404 U. S., at 77 ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause").

Indeed, the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. The "[p]hysical differences between men and women," *Virginia,* 518 U. S., at 533, therefore do not justify §1409(a)(4)'s discrimination.

The majority later ratchets up the interest, for the sake of argument, to "the establishment of a real, practical relationship of considerable substance between parent and child in every case, as opposed simply to ensuring the potential for the relationship to begin." *Ante,* at 15. But the majority then dismisses the distinction between opportunity and reality as immaterial to the inquiry in this case. *Ibid.* The majority rests its analysis of the means-end fit largely on the following proposition: "It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a

close and substantial bearing on the governmental interest in the actual formation of that bond." *Ibid.* A bare assertion of what is allegedly "almost axiomatic," however, is no substitute for the "demanding" burden of justification borne by the defender of the classification. *Virginia, supra,* at 533.

Moreover, the Court's reasoning hardly conforms to the tailoring requirement of heightened scrutiny. The fact that a discriminatory policy embodies the good intention of "seek[ing] to foster" the opportunity for something beneficial to happen is of little relevance in itself to whether the policy substantially furthers the desired occurrence. Whether the classification indeed "has a close and substantial bearing" on the actual occurrence of the preferred result depends on facts and circumstances and must be proved by the classification's defender. Far from being a virtual axiom, the relationship between the intent to foster an opportunity and the fruition of the desired effect is merely a contingent proposition. The majority's sweeping claim is no surrogate for the careful application of heightened scrutiny to a particular classification.

The question that then remains is the sufficiency of the fit between §1409(a)(4)'s discriminatory means and the goal of "establish[ing] . . . a real, practical relationship of considerable substance." *Ante,* at 15. If Congress wishes to advance this end, it could easily do so by employing a sex-neutral classification that is a far "more germane bas[i]s of classification" than sex, *Craig,* 429 U. S, at 198. For example, Congress could require some degree of regular contact between the child and the citizen parent over a period of time. See *Miller,* 523 U. S., at 470 (GINSBURG, J., dissenting).

The majority again raises this possibility of the use of sex-neutral means only to dismiss it as irrelevant. The Court admits that "Congress could excuse compliance with the formal requirements when an actual father-child

relationship is proved," but speculates that Congress did not do so "perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie." *Ante,* at 14. We have repeatedly rejected efforts to justify sex-based classifications on the ground of administrative convenience. See, *e.g., Wengler,* 446 U. S., at 152; *Frontiero,* 411 U. S., at 690–691. There is no reason to think that this is a case where administrative convenience concerns are so powerful that they would justify the sex-based discrimination, cf. *Wengler, supra,* at 152, especially where the use of sex as a proxy is so ill fit to the purported ends as it is here. And to the extent Congress might seek simply to ensure an "opportunity" for a relationship, little administrative inconvenience would seem to accompany a sex-neutral requirement of presence at birth, knowledge of birth, or contact between parent and child prior to a certain age.

The claim that §1409(a)(4) substantially relates to the achievement of the goal of a "real, practical relationship" thus finds support not in biological differences but instead in a stereotype– *i.e.,* "the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children." *Miller, supra,* at 482–483 (BREYER, J., dissenting). Such a claim relies on "the very stereotype the law condemns," *J. E. B.,* 511 U. S., at 138 (internal quotation marks omitted), "lends credibility" to the generalization, *Mississippi Univ. for Women,* 458 U. S., at 730, and helps to convert that "assumption" into "a self-fulfilling prophecy," *ibid.* See also *J. E. B., supra,* at 140 ("When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women"). Indeed, contrary to this stereotype, Boulais has reared Nguyen, while Nguyen apparently has lacked a relationship with his mother.

The majority apparently tries to avoid reliance on this

stereotype by characterizing the governmental interest as a "demonstrated opportunity" for a relationship and attempting to close the gap between opportunity and reality with a dubious claim about what is "almost axiomatic." But the fact that one route is wisely forgone does not mean that the other is plausibly taken. The inescapable conclusion instead is that §1409(a)(4) lacks an exceedingly persuasive justification.

In denying petitioner's claim that §1409(a)(4) rests on stereotypes, the majority articulates a misshapen notion of "stereotype" and its significance in our equal protection jurisprudence. The majority asserts that a "stereotype" is "defined as a frame of mind resulting from irrational or uncritical analysis." *Ante,* at 13. This Court has long recognized, however, that an impermissible stereotype may enjoy empirical support and thus be in a sense "rational." See, *e.g., J. E. B., supra,* at 139, n. 11 ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization"); *Craig,* 429 U. S., at 201 (invalidating a sex-based classification even though the evidence supporting the distinction was "not trivial in a statistical sense"); *id.,* at 202 (noting that "prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this"); *Wiesenfeld,* 420 U. S., at 645 (invalidating a sex-based classification even though the underlying generalization was "not entirely without empirical support"). Indeed, the stereotypes that underlie a sex-based classification "may hold true for many, even most, individuals." *Miller,* 523 U. S., at 460 (GINSBURG, J., dissenting). But in numerous cases where a measure of truth has inhered in the generalization, "the Court has rejected official actions that classify unnecessarily and

overbroadly by gender when more accurate and impartial functional lines can be drawn." *Ibid.*

Nor do stereotypes consist only of those overbroad generalizations that the reviewing court considers to "show disrespect" for a class, *ante,* at 18. Compare, *e.g., Craig, supra,* at 198–201. The hallmark of a stereotypical sex-based classification under this Court's precedents is not whether the classification is insulting, but whether it "relie[s] upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'" *Mississippi Univ. for Women, supra,* at 726 (quoting *Craig, supra,* at 198).

It is also important to note that, while our explanations of many decisions invalidating sex-based classifications have pointed to the problems of "stereotypes" and "overbroad generalizations," these explanations certainly do not mean that the burden is on the challenger of the classification to prove legislative reliance on such generalizations. Indeed, an arbitrary distinction between the sexes may rely on no identifiable generalization at all but may simply be a denial of opportunity out of pure caprice. Such a distinction, of course, would nonetheless be a classic equal protection violation. The burden of proving that use of a sex-based classification substantially relates to the achievement of an important governmental interest remains unmistakably and entirely with the classification's defender. See, *e.g., Virginia,* 518 U. S., at 532–533.

C

The Court has also failed even to acknowledge the "volumes of history" to which "[t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds." *Id.,* at 531. The history of sex discrimination in laws governing the transmission of citizenship and with respect to parental responsibilities for children born out of wedlock counsels at least some circumspection in discern-

ing legislative purposes in this context. See generally *Miller, supra,* at 460–468 (GINSBURG, J., dissenting).

Section 1409 was first enacted as §205 of the Nationality Act of 1940, 54 Stat. 1139–1140. The 1940 Act had been proposed by the President, forwarding a report by a specially convened Committee of Advisors, including the Attorney General. The Committee explained to Congress the rationale for §205, whose sex-based classification remains in effect today:

> "[T]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling is based . . . on the ground that the mother in such case stands in the place of the father. . . . [U]nder American law the mother has a right to custody and control of such child as against the putative father, and *is bound* to maintain it as its *natural guardian.* This rule seems to be in accord with the old Roman law and with the laws of Spain and France." To Revise and Codify the Nationality Laws of the United States, Hearings on H. R. 6127 before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 431 (1945) (reprinting Message from the President, Nationality Laws of the United States (1938)) (emphasis added and internal quotation marks and citations omitted).

Section 1409(a)(4) is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Under this law, as one advocate explained to Congress in a 1932 plea for a sex-neutral citizenship law, "when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put

safely in the background." Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, Hearing on H. R. 5489 before the House Committee on Immigration and Naturalization, 72nd Cong., 1st Sess., 3 (testimony of Burnita Shelton Matthews); see also *id.,* at 5 (citizenship law "permit[s] [the father] to escape the burdens incident to illegitimate parenthood"). Unlike §1409(a)(4), our States' child custody and support laws no longer assume that mothers alone are "bound" to serve as "natural guardians" of nonmarital children. See, *e.g.,* Ariz. Rev. Stat. Ann. §25–501 (1999) (equal duties of support); cf. Cal. Civ. Code Ann. §4600 (West 1972) (abolishing "tender years" doctrine). The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the "very stereotype the law condemns," *J. E. B.,* 511 U. S., at 138 (internal quotation marks omitted).

Punctuating the disparity between the majority's and the INS's accounts of the governmental interests at stake is the majority's failure even to address the INS' second asserted rationale: that §1409 prevents certain children from being stateless. Brief for Respondent 11; see also *id.,* at 17–18 (describing statelessness problem). The Court certainly has good reason to reject this asserted rationale. Indeed, the INS hardly even attempts to show how the statelessness concern justifies the discriminatory means of §1409(a)(4) in particular. The INS instead undertakes a demonstration of how the statelessness concern justifies §1409(c)'s relaxed residency requirements for citizen mothers. See Brief for Respondent 17–19, 42–43, 44, n. 23. But petitioners do not challenge here the distinction between §1401(g), which requires that citizen fathers have previously resided in the United States for five years, including at least two years after the age of 14, and §1409(c), which provides that a citizen mother need only

have resided in the United States for one year. The INS' proffered justification of statelessness thus does nothing to buttress the case for §1409(a)(4).

The Court also makes a number of observations that tend, on the whole, to detract and distract from the relevant equal protection inquiry. For example, presumably referring to §1409 in general, the majority suggests that "the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so." *Ante,* at 6. But even apart from the question whether this was one of Congress' actual purposes (and the majority does not affirmatively claim that it was), this equivalence is quite beside the point of petitioners' constitutional challenge, which is directed at the dissimilar treatment accorded to fathers and mothers.

The Court also states that the obligation imposed by §1409(a)(4) is "minimal" and does not present "inordinate and unnecessary hurdles" to the acquisition of citizenship by the nonmarital child of a citizen father. *Ante,* at 16. Even assuming that the burden is minimal (and the question whether the hurdle is "unnecessary" is quite different in kind from the question whether it is burdensome), it is well settled that "the 'absence of an insurmountable barrier' will not redeem an otherwise unconstitutionally discriminatory law." *Kirchberg,* 450 U. S., at 461 (quoting *Trimble* v. *Gordon,* 430 U. S. 762, 774 (1977)).

Finally, while the recitation of statistics concerning military personnel and overseas travel, *ante,* at 10–11, highlights the opportunities for United States citizens to interact with citizens of foreign countries, it bears little on the question whether §1409(a)(4)'s *discriminatory means* are a permissible governmental response to those circumstances. Indeed, the majority's discussion may itself simply reflect the stereotype of male irresponsibility that

is no more a basis for the validity of the classification than are stereotypes about the "traditional" behavior patterns of women.

It is, of course, true that the failure to recognize relevant differences is out of line with the command of equal protection. See *ante,* at 18. But so too do we undermine the promise of equal protection when we try to make our differences carry weight they simply cannot bear. This promise informs the proper application of heightened scrutiny to sex-based classifications and demands our scrupulous adherence to that test.

III

The Court identifies two "additional obstacles" that petitioners would face even were the Court to accept the conclusion that the statute fails heightened scrutiny. *Ante,* at 17–18. The first question concerns "'potential problems with fashioning a remedy.'" *Ante,* at 17 (quoting *Miller,* 523 U. S., at 451 (O'CONNOR, J., concurring in judgment) (citing *id.,* at 452–459 (SCALIA, J., concurring in judgment))). The second question concerns "the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power." *Ante,* at 18. I believe that petitioners are able to surmount both of these hurdles.

As to the matter of remedy, severance of §1409(a)(4) would have been appropriate had petitioners prevailed. Several factors support this conclusion. The Immigration and Nationality Act (INA) contains a general severability clause, which provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." §406, 66 Stat. 281; see note following 8 U. S. C. §1101, p. 38, "Separability."

We have concluded that this severability clause "is unambiguous and gives rise to a presumption that Congress did not intend the validity of the [INA] as a whole, or any part of the [INA], to depend upon whether" any one provision was unconstitutional. *INS* v. *Chadha,* 462 U. S. 919, 932 (1983).

Title 8 U. S. C. §1421(d), which states that "[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," has no effect on the operation of the INA's general severability clause in this case. Section 1421(d) governs only naturalization, which the statute defines as "the conferring of nationality of a state upon a person after birth," §1101(a)(23), whereas §§1401(g) and 1409 deal with the transmission of citizenship at birth, see §1401 ("The following shall be nationals and citizens of the United States at birth . . ."). Further, unlike the INA's general severability clause, §1421(d) does not specifically address the scenario where a particular provision is held invalid. Indeed, the INS does not even rely on §1421(d) in its brief.

Nor does our decision in *INS* v. *Pangilinan,* 486 U. S. 875 (1988), preclude severance here. In *Pangilinan,* this Court held that courts lack equitable authority to order the naturalization of persons who did not satisfy the statutory requirements for naturalization. *Id.,* at 883–885. Petitioners in the instant case, however, seek the exercise of no such equitable power. Petitioners instead seek severance of the offending provisions so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth. Cf. *Miller, supra,* at 488–489 (BREYER, J., dissenting).

In addition to the severance clause, this Court has often concluded that, in the absence of legislative direction *not* to sever the infirm provision, "extension, rather than nullification" of a benefit is more faithful to the legislative

design. *Califano* v. *Westcott,* 443 U. S. 76, 89–90 (1979); see also *Wiesenfeld,* 420 U. S. 636; *Frontiero,* 411 U. S., at 691, n. 25. The choice of extension over nullification also would have the virtue of avoiding injury to parties who are not represented in the instant litigation. And Congress, of course, remains free to redesign the statute in a manner that comports with the Constitution.

As to the question of deference, the pivotal case is *Fiallo* v. *Bell,* 430 U. S. 787 (1977). *Fiallo,* however, is readily distinguished. *Fiallo* involved constitutional challenges to various statutory distinctions, including a classification based on the sex of a United States citizen or lawful permanent resident, that determined the availability of a special immigration preference to certain aliens by virtue of their relationship with the citizen or lawful permanent resident. *Id.,* at 788–792; see also *Miller, supra,* at 429 (opinion of STEVENS, J.). The Court, emphasizing "the limited scope of judicial inquiry into immigration legislation," 430 U. S., at 792, rejected the constitutional challenges. The Court noted its repeated prior emphasis that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Ibid.* (quoting *Oceanic Steam Nav. Co.* v. *Stranahan,* 214 U. S. 320, 339 (1909)).

The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place. A predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens. But whether that predicate obtains is the very matter at issue in this case. Cf. *Miller,* 523 U. S., at 433, n. 10 (opinion of STEVENS, J.) ("[T]he Government now argues . . . that an alien outside the territory of the United States has no substantive rights cognizable under the Fifth Amendment. Even if that is so, the question to be decided is whether petitioner is such an alien or whether, as [petitioner] claims, [peti-

tioner] is a citizen. Thus, we must address the merits to determine whether the predicate for this argument is accurate" (internal quotation marks and citation omitted)). Because §§1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply. See *id.,* at 480–481 (BREYER, J., dissenting).

* * *

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