AN ANALYSIS OF *SESSIONS V. MORALES-SANTANA*'S IMPLICATIONS ON THE PLENARY POWER DOCTRINE AND THE SUPREME COURT'S APPROACH TO EQUAL PROTECTION CHALLENGES

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I. INTRODUCTION

Jane Doe[1] was born in San Juan, Puerto Rico on February 3, 1955. In 1957, several days short of her second birthday, Jane's family left Puerto Rico for the Dominican Republic, where Jane resided until the age of twenty-five. While living in the Dominican Republic, Jane met a Dominican man with whom she had an out-of-wedlock child, John Doe. By 1998, John had moved to the United States to take up residence in New York. But John's residency came to a halt in 2003, when he was placed in removal proceedings due to several criminal convictions. In opposing removal, John claimed he acquired U.S. citizenship at birth based on the U.S. citizenship of his biological mother. An immigration judge accepted John's citizenship claim and terminated John's removal proceedings.

Notably, if one particular detail of John Doe's story were altered—if, instead, John were born abroad to an unwed U.S.-citizen *father* rather than an unwed U.S.-citizen *mother*—his claim to birthright citizenship would have been denied, leaving him vulnerable to removal. More specifically, John's mother, Jane Doe, satisfied § 1409(c) of the Immigration and Nationality Act's ("INA") requirement of one-year physical presence in the United States because she spent the first year of her life in the United States.[2]

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[1] The name of this individual and the facts of her story are fabricated for purposes of this Comment.

[2] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2018)) provides the framework for acquisition of U.S. citizenship at birth by a child born abroad to a U.S. citizen parent and a parent who is a citizen of another nation.

> Under the terms of the INA, the joint conduct of a citizen and an alien that results in conception is not sufficient to produce an American citizen,

In contrast, if John's U.S.-citizen parent were his father, a one-year presence in the United States would not suffice to confer citizenship because an unwed father must demonstrate a five-year physical presence in the United States prior to the child's birth.[3]

The United States Supreme Court recently addressed this gender demarcation in *Sessions v. Morales-Santana*.[4] In an effort to halt his removal proceedings, Luis Ramon Morales-Santana asserted U.S. citizenship at birth as derived from his U.S.-citizen father.[5] The Supreme Court rejected his citizenship claim, however, affirming that Morales-Santana's father was twenty days short of meeting the then-applicable ten-year physical presence requirement of § 1401(g).[6] Even further, the Supreme Court held that the

> regardless of whether the citizen parent is the male or the female partner. If the two parties engage in a second joint act—if they agree to marry one another—citizenship will follow.

Miller v. Albright, 523 U.S. 420, 433 (1998). Accordingly, certain provisions of the INA determine the ability of unwed U.S.-citizen mothers and fathers, "acting separately, to confer citizenship on a child born outside of the United States." *Id.* The general rule for determining who "shall be nationals . . . at birth" is found in § 1401, which provides for the U.S. citizenship of

> a person born outside the geographical limits of the United States and its outlying possessions [to married] 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, at least two of which were after attaining the age of fourteen years*.

8 U.S.C. § 1401(g) (2018) (emphasis added). Further, § 1409 incorporates and extends "by reference the physical-presence requirements of § 1401" to children of unmarried parents, thereby allowing an "unwed citizen parent to transmit U.S. citizenship to a foreign-born child under the same terms as a married citizen parent." Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017); *see also* 8 U.S.C. § 1409(a) (2018). Section 1409(c), however, provides an exception to the physical presence requirement of §§ 1401 and 1409(a) for U.S.-citizen mothers. *See* 8 U.S.C. § 1409(c) (2018). Under this exception, "only *one year* of continuous physical presence is required before unwed mothers may pass [U.S.] citizenship to their children born abroad." *Morales-Santana*, 137 S. Ct. at 1687 (emphasis added); *see also* § 1409(c).

[3] *See* § 1401(g); *cf.* § 1409(c).

[4] 137 S. Ct. at 1686.

[5] *Id.*

[6] *Id.* "The law in effect at the time of birth governs whether a child obtained derivative citizenship as of his or her birth. Accordingly, the 1952 Act provide[d] the statutory framework applicable to Morales-Santana's nationality claim." Morales-Santana v. Lynch, 804 F.3d 520, 524 (2d Cir. 2015), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017) (citation omitted). The 1952 Act included a physical-presence requirement of ten years for unwed U.S.-citizen fathers, five of which must have been met after the age of fourteen, and a one-year physical-presence requirement for unwed U.S.-citizen mothers. *Id.*; *see also* 8 U.S.C. §§ 1401(g) (1952) (amended 1986) (substituting "five years, at least two" for "ten years, at least five"), 1409(c). The current version of the statute reduces the physical-presence requirement for unwed fathers to five years; however, "[t]he reduction affects only children born on or after November 14, 1986" and "[b]ecause Morales-Santana was born in 1962, his challenge [wa]s to the ten-years, five-after-age-14

gender-based differential in §§ 1401(g) and 1409(c) violated the Fifth Amendment's Equal Protection Clause.[7] To remedy the equal protection violation, the Court chose to remove the benefit that the statute conferred on mothers, rather than follow its customary approach of extending the benefit to the aggrieved class (the fathers).[8] In other words, the Court eliminated the one-year exception for unwed mothers, thereby applying the current five-year residency requirement to unwed fathers and mothers.[9] *Morales-Santana* is, thus, an anomalous ruling in the Court's equal protection jurisprudence, particularly in light of Congress's nearly complete power over immigration laws.[10]

In the wake of *Morales-Santana*, commentators have critiqued the decision from two related perspectives. Some contend that *Morales-Santana* adds to a line of Supreme Court decisions[11] that signals an erosion of the Court's longstanding deference to the political branches in immigration matters.[12] Congress has traditionally exercised broad and nearly exclusive authority over immigration policy-making—a principle that is often referred to as the "plenary power doctrine."[13] Yet, there has been a recent "chipping

requirement applicable at the time of his birth." 137 S. Ct. at 1687 n.3 (internal citation omitted). Nevertheless, the disparity in treatment of unwed U.S.-citizen fathers and unwed U.S.-citizen mothers persists in the current statute. *See* §§ 1401(g), 1409(a), (c).

[7] *Morales-Santana*, 137 S. Ct. at 1686 n.1 ("As this case involve[d] federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amendment's Due Process Clause.") (internal citation omitted).

[8] *Id.* at 1698–1701.

[9] *Id.* at 1701 ("Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, § 1401[(g)]'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers.").

[10] *See* Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 174 (2017) (arguing that the *Morales-Santana* "opinion marks the first time that modern equality principles of any sort have served as grounds for the Court to invalidate a statute governing the acquisition of citizenship").

[11] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001).

[12] *See* David Rubenstein, *Immigration Symposium: The Future of Immigration Exceptionalism*, SCOTUSBLOG (June 29, 2017), http://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/; Allissa Wickham, *Citizenship Ruling May Spell Trouble for Plenary Power*, LAW360 (June 13, 2017), https://www.law360.com/articles/933945/citizenship-ruling-may-spell-trouble-for-plenary-power ("One of the most notable developments [in *Session v. Morales-Santana*] may be that the Supreme Court decided to apply constitutional analysis to immigration law at all, bucking what's known as the plenary power doctrine . . . .").

[13] *See* Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, CTR. FOR IMMIGR. STUD. (Feb. 25, 2009), https://cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy ("Historically, the U.S. Supreme Court has taken a hands-off approach when asked to review the political branches' immigration decisions and policymaking. The ability of Congress and the executive branch to regulate immigration largely without judicial intervention is what has come to be known as the political branches'

away" at this doctrine, and some have posited that *Morales-Santana* supports "a greater willingness by the [C]ourt to apply . . . constitutional rules and heightened scrutiny to immigration laws enacted by Congress."[14] Others have criticized the Supreme Court's decision to abrogate § 1409(c)'s one-year exception for unwed mothers, and apply the harsher five-year physical-presence requirement equally to unwed fathers and mothers.[15] These commentators contend that *Morales-Santana*'s result does not comport with the Court's established practice of remedying an equal protection violation by extending the particular benefit rather than nullifying it.[16]

This Comment will examine the intersection of Congress's plenary power and the Supreme Court's equal protection jurisprudence in light of *Morales-Santana*. Part II of this Comment will discuss the history of the plenary power doctrine and briefly summarize Supreme Court rulings relevant to the doctrine. Part III will analyze the Supreme Court's gender-based equal protection jurisprudence, with a particular focus on the Court's longstanding practice of remedying equal protection violations by extending the benefit. Part IV will provide a detailed discussion of the *Morales-Santana* decision. Part V will argue that the Court's remedy in *Morales-Santana* was improper, and that the Court should have extended, rather than eliminated, the benefit to remedy the constitutional infirmity. Further, while Congress's plenary power has recently yielded to constitutional principles, *Morales-Santana*'s choice of remedy signals an indisputable "chipping away" at Congress's plenary power over immigration policies. Part VI will

'plenary power' over immigration.").

[14] Kimberly Strawbridge Robinson, *Immigration Discrimination? SCOTUS Says No*, BNA (June 12, 2017), https://www.bna.com/immigration-discrimination-scotus-n73014453468/; *see also* Collins, *supra* note 10, at 175 ("By quietly rejecting the contention that federal judges should defer to Congress when it regulates parent-child citizenship transmission along constitutionally suspect lines, *Morales-Santana* constrains an operative understanding of the plenary power doctrine and calls into question a core principle that purportedly undergirds it: that sovereignty necessarily implies a limitation of judicial authority. *Morales-Santana* does not repudiate the plenary power doctrine, but it contains it and raises important questions concerning the doctrine's future reach.").

[15] *See* Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supreme-court.html; David Issacson, Sessions v. Morales Santana*: The Problems of Leveling Down*, INSIGHTFUL IMMIGR. BLOG (June 21, 2017), http://blog.cyrusmehta.com/2017/06/sessions-v-morales-santana-the-problems-of-leveling-down.html; Ian Samuel, Morales-Santana *and the "Mean Remedy"*, TAKE CARE BLOG (June 12, 2017), https://takecareblog.com/blog/morales-santana-and-the-mean-remedy.

[16] *See* Greenhouse, *supra* note 15; Issacson, *supra* note 15; Samuel, *supra* note 15. *But see* Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 1, 2 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157987&download=yes (explaining that the Court's "'leveling down' of the remedy—responding to inequality by reducing benefits to all rather than leveling up and extending benefits to the disadvantaged group—is unusual, but not unheard of").

conclude.

II. THE PLENARY POWER DOCTRINE

After *Morales-Santana*, the boundaries and vigor of the plenary power doctrine remain uncertain; however, the doctrine's origins and early Supreme Court precedent demonstrate historical support for broad congressional power over immigration matters. For more than a century, the Supreme Court has recognized Congress's "absolute and unqualified" power—plenary power—over immigration, and has accordingly limited its judicial review of immigration policies.[17] This practice, in turn, has resulted in diluted constitutional analysis in matters involving immigration law,[18] with the Court "declar[ing] itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy."[19] This Part begins with an analysis of the origins of Congress's plenary power over immigration, followed by a discussion of the development of the doctrine, particularly in the context of gender-based equal protection challenges, through a case-by-case analysis.

A. *The Doctrine's Origins*

The United States Constitution does not explicitly grant the power to regulate immigration to a specific branch of government. Article I, Section 8 of the Constitution invests the power "[t]o establish a uniform Rule of Naturalization" in Congress.[20] On its face, this provision does not grant Congress absolute power over immigration. Still, Congress's plenary power is firmly rooted in Supreme Court precedent as evidenced by recurrent affirmations that immigration matters[21] "are so exclusively entrusted to the political branches of government as to be largely immune from judicial

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[17] *See* Feere, *supra* note 13; *see also* Jessica Portmess, Comment, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After* Flores-Villar, 61 AM. U. L. REV. 1825, 1829 (2012); *Developments in the Law—Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1584 (2013) ("The plenary power acts as a 'shield' against what could otherwise be meritorious individual rights claims sounding in the equal protection and substantive due process components of the Fifth Amendment.").

[18] Generally, "the term 'immigration law' [is] used to describe the body of law governing the admission and the expulsion of aliens." Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984) [hereinafter Legomsky, *Principle of Plenary Congressional Power*]. This term is used accordingly in this Comment's discussion of the plenary power doctrine.

[19] *Id.* at 255.

[20] U.S. CONST. art. I, § 8, cl. 4.

[21] Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 381 (2004) (explaining that the plenary power doctrine is not all-encompassing and instead "most clearly protects the political branches of the federal government in their exercise of power to *exclude and expel* aliens") (emphasis added).

inquiry or interference."[22] The plenary power doctrine may be characterized as a "doctrine of judicial deference" or, relatedly, a doctrine of "unlimited congressional power."[23] But regardless of its characterization, the Court has invoked the doctrine to rebuff constitutional challenges to immigration laws, choosing instead to engage in only a minimal review of such laws when their constitutionality is at issue.[24] This judicial hesitancy to engage in constitutional analysis has provided a "virtual blank check" to Congress to formulate immigration laws as it sees fit and an ensuing judicial deference to such judgment.[25]

The Court first gave life to Congress's plenary power in its 1889 *Chinese Exclusion Case*.[26] An Act of Congress prohibited Chinese laborers from reentering the United States if they had departed before the passage of the Act.[27] A Chinese laborer who had received a certificate of return, but who was then denied the right to reenter, challenged the validity of the Act.[28] Rejecting his contentions, the Court held that determinations by Congress regarding the admission of aliens were "conclusive upon the judiciary"—thereby crafting Congress's plenary power over immigration matters.[29] After the *Chinese Exclusion Case*, the Court continued to elaborate on and develop Congress's plenary power. In *Fong Yue Ting v. United States,*[30] the Court extended the ruling in the *Chinese Exclusion Case,* declaring that Congress also had exclusive and plenary power over the expulsion of aliens from the United States.[31] Notably, the Court in *Fong Yue Ting*

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[22] Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).

[23] Cox, *supra* note 21, at 381–86 (discussing the overlapping characterizations of the plenary power doctrine, including a characterization of the doctrine as one of "alien standing"). Interpreting the doctrine as one of judicial deference means that courts "are generally not the appropriate institution to evaluate [constitutional] constraints" on Congress's power to regulate immigration. *Id.* at 382. Separate but analogous, interpreting the doctrine as one of unlimited congressional power means that "Congress's power over immigration is simply unlimited by any constitutional constraints." *Id.* at 384.

[24] *Id.* at 382.

[25] *See* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1617 (2000) [hereinafter Legomsky, *Immigration and Judicial Review*].

[26] Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889).

[27] *Id.* at 582.

[28] *Id.*

[29] *Id.* at 606. The Court justified its decision and found support for the plenary power doctrine in a principle of inherent national sovereignty, reasoning that the federal government's ability, through Congress, to "exclude aliens from its territory is a proposition [not] open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation." *Id.* at 603.

[30] 149 U.S. 698, 707 (1893) (justifying the "right of a nation to expel or deport foreigners" as inherent to national sovereignty, similar to the justification provided in the *Chinese Exclusion Case*).

[31] *See id.*

acknowledged a procedural due process exception to the plenary power doctrine solely for foreign nationals within the United States;[32] however, the Court later emphasized that the doctrine continued to prevent judicial review of substantive due process challenges.[33]

The Court strengthened and reaffirmed Congress's absolute power over immigration in a series of cases in the 1950s, endorsing its nearly nonexistent review of the constitutionality of immigration policies.[34] In *Knauff v. Shaughnessy*,[35] the Court upheld the exclusion of the alien wife of a U.S. citizen with broad deference to Congress's decision and method of exclusion.[36] The Court reasoned that, "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[37] Similarly, in *Shaughnessy v. United States ex rel. Mezei*,[38] the Court sustained an alien's exclusion on Ellis Island, reasoning that the "right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."[39]

Thereafter, the Court invoked the plenary power doctrine to uphold the removal of members of the Communist Party,[40] and to reject a Marxist scholar's First Amendment challenge to his exclusion from the United States.[41] But intricate and novel challenges to immigration policies required the Court to acknowledge, and to attempt to reconcile, the tension between

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[32] *See id.* at 701, 728 (explaining that foreign nationals within the United States were afforded some procedural due process protections, but that such protections did not extend to foreign nationals seeking entry); *see also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (explaining that such protections did not extend to aliens "on the threshold of initial entry").

[33] *See* Yamataya v. Fisher, 189 U.S. 86, 102 (1903); *see also* Portmess, *supra* note 17, at 1833–34 (discussing the Court's acknowledgment of a procedural due process exception to the plenary power).

[34] *See generally Mezei*, 345 U.S. at 206; Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[35] 338 U.S. 537 (1950).

[36] *Id.* at 542, 547 (relying on the justification raised in the *Chinese Exclusion Case* and *Fong Yue Ting* that "[t]he exclusion of aliens is a fundamental act of sovereignty," and extending the plenary power and, accordingly, judicial deference to executive officer determinations enforcing Congress's rules of admissibility).

[37] *Id.* at 543.

[38] 345 U.S. 206 (1953).

[39] *Id.* at 216.

[40] *See* Galvan v. Press, 347 U.S. 522, 531 (1954) (affirming that entrusting the formulation of immigration policies 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"); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[41] Kleindienst v. Mandel, 408 U.S. 753 (1972).

substantive constitutional safeguards and the plenary power doctrine, which historically justified the Court's decision to "decline[] to review federal immigration statutes for compliance with substantive constitutional restraints."[42] Accordingly, the Court gradually established "unusual standards" for reviewing substantive constitutional challenges to immigration policies.[43]

B. *The Supreme Court's Modern Approach to the Plenary Power Doctrine*

Notwithstanding the fortitude of Congress's plenary power, the Supreme Court gradually moved away from its traditional, absolute "hands-off" approach to immigration matters.[44] In so doing, the Court developed a judicial role in assessing the constitutionality of immigration laws, particularly in areas that did not directly involve deportation or exclusion.[45] The evolution of this judicial role, however, has produced uncertainties surrounding the status of the plenary power doctrine.[46] While the Court has invoked Congress's plenary power in a range of recent immigration cases,[47] the Court has applied varying levels of scrutiny in analyzing the alleged constitutional infirmities, and has avoided defining the contours of the doctrine, leaving future courts without a clear rule to follow.[48]

1. *Fiallo v. Bell*

In *Fiallo v. Bell*,[49] the Supreme Court addressed an equal protection challenge to § 101(b)(1)(D) and 101(b)(2)[50] of the INA. The provisions gave special preference immigration status to aliens who were the children of U.S.-citizen (or lawful-permanent resident) mothers, and to aliens who were

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[42] *See* Legomsky, *Principle of Plenary Congressional Power*, *supra* note 18, at 255.

[43] Portmess, *supra* note 17, at 1838–39.

[44] *See Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1585 (2013) [hereinafter *Developments in the Law*] ("[C]ourts have reviewed immigration laws, but have subjected them to only the most deferential standard—rational basis review."); Portmess, *supra* note 17, at 1838–39.

[45] Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 n.7 (1994) [hereinafter Legomsky, *Ten More Years of Plenary Power*].

[46] *Compare* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (arguing that the Court's recent immigration decisions indicate the end of the plenary power doctrine), *with* Nina Pillard, *Plenary Power Underground in* Nguyen v. INS: *A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002) (arguing that the plenary power doctrine still influences the Court's decisions, albeit not explicitly).

[47] *See infra* pp. 9–17.

[48] *See Developments in the Law*, *supra* note 44, at 1588–89.

[49] 430 U.S. 787 (1977).

[50] 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2) (1952); *see also Fiallo*, 430 U.S. at 788.

unwed mothers of U.S.-citizen (or lawful-permanent resident) children.[51] Unwed fathers and their nonmarital children challenged the constitutionality of the provisions after being denied special immigration preference.[52] The fathers and children contended that the provisions violated the Fifth Amendment's equal protection guarantee by discriminating against unwed fathers and their nonmarital children "on the basis of the father's marital status, the illegitimacy of the child[,] and the sex of the parent without . . . compelling or rational justification."[53] In other words, the gender demarcation in the provisions made it unjustifiably more difficult for nonmarital children and their natural fathers to attain special preference immigration, as compared with nonmarital children and their natural mothers.

At the outset of its analysis, the Supreme Court underscored the "limited scope of judicial inquiry into immigration legislation" and, thus, rejected a more searching standard of review.[54] In holding the statutory provisions constitutional under a rational basis review, the Court explained that, although Congress's distinction between nonmarital children of unwed fathers and those of unwed mothers potentially "den[ied] preferential status to parents and children who share[d] strong family ties," it was beyond the scope of the judicial role to examine the justifications for Congress's legislative decision.[55] Invoking Congress's broad plenary power over

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[51] *Fiallo*, 430 U.S. at 788. The INA requires, among other conditions, that an alien seeking admission into the United States as a legal permanent resident satisfy a numerical quota and certain labor certification requirements. *Id.* at 789–90. Congress, however, allowed American citizens to petition for waiver of the requirements for their immediate families. *Id* at 800–01. The respective provisions of the Act

> grant[ed] special preference immigration status to aliens who qualif[ied] as the "children" or "parents" of United States citizens or lawful permanent residents. Under § 101(b)(1), a "child" [wa]s defined as an unmarried person under 21 years of age who [wa]s a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his *natural mother*. The definition d[id] not extend to an illegitimate child seeking preference by virtue of his relationship with his *natural father*. Moreover, under § 101(b)(2), a person qualifie[d] as a "parent" . . . solely on the basis of the person's relationship with a "child." As a result, the natural father of an illegitimate child who is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a "parent."

Id. at 788–89 (emphasis added) (citation omitted).

[52] *Id.* at 790.

[53] *Id.* at 791.

[54] *Id.* at 792 (explaining that Supreme Court precedent "ha[s] 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" and rejecting plaintiff-appellant's argument that such broad power did not apply in this case (citations omitted)).

[55] *Id.* at 798–99 (citations omitted).

immigration matters, the Court added that it did not have authority to overrule Congress's political judgment.[56]

Justice Marshall, in a dissenting opinion joined by Justice Brennan, agreed with the majority's willingness to review the immigration statute at issue; however, he disagreed with its "toothless" review.[57] The dissenters reasoned that the provisions at issue involved the rights of citizens rather than aliens, and "discrimination among citizens cannot escape traditional constitutional scrutiny simply because it occurs in the context of immigration legislation."[58] Accordingly, the dissenters found the majority's undue deference to Congress inappropriate and would have applied a heightened standard of review.[59]

2. *Miller v. Albright*

The Court's strong deference to Congress's plenary power over immigration matters was further substantiated in *Miller v. Albright*,[60] in which a U.S.-citizen father and his foreign-born daughter challenged the constitutionality of the gender distinction present in § 1409(a) of the INA.[61] The provision delineates the requirements for transmission of U.S. citizenship to a child born out of wedlock in a foreign country, and it draws a distinction between the child of a U.S.-citizen mother and the child of a U.S.-citizen father.[62] More specifically, the provision provides that, subject to residence requirements for the citizen parent,[63] a child born abroad to an unwed citizen *mother* acquires U.S. citizenship at birth, whereas a child born abroad to an unwed citizen *father* acquires citizenship only once certain legitimation requirements are satisfied.[64]

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[56] *Id.* at 799. Congress's decision to withhold preferential statute from nonmarital children and their fathers "nonetheless remains one solely for the responsibility of the Congress and wholly outside the power of this Court to control." *Id.*

[57] *Fiallo*, 430 U.S. at 805.

[58] *Id.* at 806, 809.

[59] *Id.* at 810.

[60] 523 U.S. 420 (1998).

[61] Codified as amended at 8 U.S.C. § 1409 (2018). Petitioner did not challenge the gender distinction prevalent in §§ 1409(c) and 1409(g)'s residency requirement as Petitioner's father satisfied the residency requirement. *Miller*, 523 U.S. at 430.

[62] *See* § 1409(a).

[63] These residency requirements are delineated in §§ 1409(c) and 1409(g), and are challenged in *Morales-Santana*.

[64] *Miller*, 523 U.S. at 430–31. Section 1409(a) imposes four requirements that unmarried U.S.-citizen fathers must satisfy to confer citizenship on a child born out of wedlock to an alien mother in another country. Citizenship is established if:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence;
>
> (2) the father had the nationality of the United States at the time of the person's birth;

Luz Penero was born out of wedlock in the Philippines to a U.S.-citizen father and a Filipino mother.[65] She sought U.S. citizenship after turning eighteen, but the Government denied her application because her father failed to legitimate her before her eighteenth birthday.[66] Upon denial of her application, Penero and her father filed suit alleging that the legitimation requirements imposed on unwed fathers, but not on unwed mothers, were the "product[s] of overbroad stereotypes about the relative abilities of men and women," and thus, violated the Equal Protection Clause.[67]

In rejecting the equal protection challenge,[68] the Court determined that the legitimation requirement imposed solely on unwed fathers served three important purposes: (1) "ensuring reliable proof of a biological relationship between the potential citizen and [the] citizen parent"; (2) "encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor"; and (3) "fostering ties between the foreign-born child and the United States."[69] The Court reasoned that the biological differences between unwed fathers and unwed mothers "provide a relevant basis for differing rules governing their ability to confer citizenship on

> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years; and
> (4) while the person is under the age of 18 years—
> (A) the person is legitimated under the law of the person's residence or domicile,
> (B) the father acknowledges paternity of the person in writing under oath, or
> (C) the paternity of the person is established by adjudication of a competent court.
>
> Only the second of these four requirements is expressly included in § 1409(c), the provision applicable to unwed citizen mothers.

8 U.S.C. § 1409(a).

[65] *Miller*, 523 U.S. at 425.

[66] *Id.* at 424–25. In addition to the disparate duration of residency requirement imposed on mothers and fathers, § 1409 also requires that a U.S.-citizen father, but not a U.S.-citizen mother, take "one of three affirmative steps" before the child attains the age of eighteen to confer U.S. citizenship on his nonmarital child: "legitimation; a declaration of paternity under oath by the father; or a court order of paternity." Nguyen v. I.N.S., 533 U.S. 53, 62 (2001). It is this affirmative requirement that the daughter and her father challenged as the "father satisfied the residency requirement" and thus, "the validity of the [gender] distinction in that requirement . . . [wa]s not at issue." *Miller*, 523 U.S. at 430.

[67] *Id.* at 435 (internal quotations omitted).

[68] *Id.* at 434 (internal citations omitted). "Deference to the political branches dictates 'a narrow standard of review of decisions made by the Congress . . . in the area of immigration and naturalization.'" *Id.* at 434 n.11. The Court added that "[e]ven if . . . the heightened scrutiny that normally governs gender discrimination claims applied in this context, [it was] persuaded that the [legitimation] requirement imposed . . . on children of unmarried male, but not female, citizens is substantially related to important governmental objectives." *Id.* at 431, 434 n.11 (citations omitted).

[69] *Id.* at 436, 438.

children born in foreign lands."[70] In turn, these differences underpinned § 1409(a)'s gender demarcation,[71] which the Court concluded was well tailored to serve the Government's interests.[72] The Court, however, did not produce a majority opinion and the constitutionality of § 1409(a) remained an open question.[73]

Justice Scalia, joined by Justice Thomas, agreed that § 1409(a) should be upheld, but on different grounds. The Justices maintained that the Court did not have the authority to review the constitutionality of the statute and to provide the relief requested because only Congress has the power to prescribe the requirements for conferral of citizenship on persons not born within the United States.[74] The plain language of § 1409 sets forth a precondition that Congress deemed appropriate to the acquisition of citizenship, no matter that it encompasses a gender distinction. Accordingly, the Justices added that "even if the Court were to agree that the difference in treatment between the illegitimate children of citizen-fathers and citizen-mothers is unconstitutional, it could not, consistent with the extremely limited judicial power in this area, remedy that constitutional infirmity."[75] More specifically, the Justices posited that the Court could not extend or

[70] *Id.* at 422.

[71] *Miller*, 523 U.S. at 445. The Court reasoned that whereas there is no time-sensitive legitimation requirement for unwed mothers, "the argument overlooks the difference between a substantive condition and a procedural limitation." *Id.* at 435. More specifically, "the blood relationship to the birth mother" is established at the time of birth—the substantive conduct that qualifies her child for citizenship. *Id.* at 436. In contrast, such a relationship to the father is not so immediate and, thus Congress imposed an eighteen-year requirement within which an unwed father must demonstrate such a relationship in order to transmit citizenship. *Id.* The Court emphasized that there was "no procedural hurdle that limit[ed] the time or the method by which either parent (or the child) [could] provide . . . evidence that the necessary steps were taken to transmit citizenship to the child." *Id.* at 435. Accordingly, the requirement did not impose a burden on unwed fathers. *Id.* at 436.

[72] *Id.*

[73] Four Justices, in two different opinions, rejected the challenge to the gender-based distinction. Justice Stevens, joined by Justice Rehnquist, found the statute consistent with the Fifth Amendment, while Justice Scalia, joined by Justice Thomas, concluded that the Court could not provide a remedy even if the statute violated equal protection. *Id.* at 423, 452. Conversely, Justice Ginsburg, joined by Justice Souter and Justice Breyer, would have found the statute unconstitutional as violating the Equal Protection Clause. *Id.* at 460. Finally, Justice O'Conner and Justice Kennedy would have dismissed on standing grounds, reasoning that the child lacked standing to raise an equal protection challenge on behalf of his father. *Id.* at 445.

[74] *Id.* at 453, 456 (Scalia, J., concurring) ("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.*") (emphasis in original).

[75] *Id.* at 423, 456 (internal citations omitted) ("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.").

eliminate the benefits conferred by § 1409(a) because doing so would require the Court "to speculate as to what Congress would have enacted if it had not enacted what it did," and that is incompatible with Congress's plenary power over immigration.[76]

3. *Nguyen v. I.N.S.*

After *Fiallo* and *Miller*, the Court appeared to signal a shift in its broad deference to Congress's plenary power, subjecting certain statutes to a more stringent constitutional analysis. In *Nguyen v. I.N.S.*,[77] the Court accepted a second opportunity to assess the constitutionality of § 1409(a) of the INA.[78] Tuan Anh Nguyen and his father challenged the constitutionality of § 1409(a) after the government denied Nguyen's claim for derivative U.S. citizenship.[79] Nguyen was born in Vietnam to a U.S.-citizen father and a Vietnamese mother, but moved to the U.S. at the age of six where he remained as a lawful permanent resident.[80] In 1995, the government initiated deportation proceedings against Nguyen and ultimately ordered his deportation, as his father had failed to take the affirmative steps necessary for Nguyen to obtain citizenship under § 1409(a).[81] Nguyen and his father contended that the provision violated the Fifth Amendment's equal protection guarantee by unjustifiably imposing different requirements for acquisition of U.S. citizenship by children born abroad to a U.S.-citizen father.[82]

Applying "equal protection scrutiny,"[83] the Court rejected the challenge and held that the disparate treatment of mothers and fathers under § 1409(a) did not violate the equal protection guarantee.[84] The Court relied largely on the governmental objectives and biological differences emphasized in *Miller*

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[76] *Id.* at 457, 459 ("We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests. Federal judges may not decide what those national interests are, and what requirements for citizenship best serve them.").

[77] 533 U.S. 53 (2001).

[78] *See supra* note 2.

[79] *Nguyen*, 533 U.S. at 57.

[80] *Id.*

[81] *Id.* at 57–58. In addition to the disparate duration of residency requirement imposed on mother and fathers, § 1409 also requires that a U.S.-citizen father, but not a U.S.-citizen mother, take "one of three affirmative steps" before the child attains the age of eighteen to confer U.S. citizenship on his nonmarital child: "legitimation; a declaration of paternity under oath by the father; or a court order of paternity." *Id.* at 62. It is this affirmative requirement that Nguyen and his father challenged. *Id.* at 57–58.

[82] *Id.* at 58.

[83] *Id*. at 60–61. The Court assumed, without deciding, that intermediate scrutiny applied given the gender-based classifications at issue, refusing to consider whether a lesser degree of scrutiny could apply in light of Congress's plenary power. *Id.*

[84] *Id.* at 58–59.

in support of the constitutionality of § 1409(a),[85] and similarly concluded that "Congress ha[d] not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives."[86] Notably, however, the Court refused to identify the standard of review applicable in immigration cases involving constitutional questions, particularly in light of Congress's plenary power. The Court reasoned that, because the statute satisfied heightened scrutiny, the Court did not need to "decide whether some lesser degree of scrutiny pertains."[87]

In dicta, the Court noted that, if the provision had not survived heightened scrutiny, Nguyen and his father would not necessarily prevail, as the Court would likely face difficulties in fashioning a remedy.[88] More specifically, remedying the constitutional violation would require the Court to sever the provision, which would problematically confer "citizenship on terms other than those specified by Congress."[89] Still, the Court avoided resolving this issue given the constitutionality of the provision. Justice O'Connor, in a dissenting opinion, critiqued the Court's application of the heightened scrutiny standard, concluding that the gender classification did not substantially relate to the alleged governmental interests.[90]

4. *United States v. Flores-Villar*

After *Nguyen*, it was unclear just how deferential the Court remained to Congress's policy decisions regarding immigration matters. In its most recent treatment of Congress's plenary power prior to its decision in *Morales-Santana*, the Court tangentially addressed the constitutionality of §§ 1401 and 1409[91] in *United States v. Flores-Villar*.[92] Ruben Flores-Villar,

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85 *Nguyen*, 533 U.S. at 62–68.

86 *Id.* at 70–71. The Court explained that "[i]n the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth." *Id.* at 65. Accordingly, the gender demarcation considered "a biological difference" between fathers and mothers and thus, it was a lawful and "sensible statutory scheme, given the unique relationship of the mother to the event of birth." *Id.* at 64.

87 *Id.* at 61.

88 *Id.* at 72.

89 *Id.* at 71–72. The Court highlighted the required deference to Congress's intent by noting that

> Congress expressly provided with respect to the very subchapter of the United States Code at issue and in a provision entitled "Sole procedure" 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."

Id. at 72; *see also infra* Part IV for a discussion of *Morales-Santana*, where the Court ultimately considers and decides this issue.

90 *Nguyen*, 533 U.S. at 74–97 (O'Connor, J., dissenting).

91 *See supra* note 2 and accompanying text.

92 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court per curiam* 564 U.S.

a Mexican-native born to a U.S.-citizen father and a Mexican mother, claimed U.S. citizenship as derived from his father as a defense to deportation proceedings.[93] Upon denial of his claim, Flores-Villar challenged the constitutionality of §§ 1401 and 1409, arguing that the provisions classified and discriminated on the basis of gender and age.[94]

The Court of Appeals for the Ninth Circuit, ostensibly applying intermediate scrutiny, upheld the constitutionality of §§ 1401 and 1409. The Ninth Circuit concluded that the provisions could survive an equal protection challenge "under intermediate scrutiny, a rational basis standard, or some other level of review in between," but like the Supreme Court in *Nguyen*, the court assumed that intermediate scrutiny applied.[95] The court reasoned that, while the means at issue in *Nguyen*—legitimation requirement for fathers—were different from the means at issue in *Flores-Villar*—longer residency requirement for fathers—the "government's interests [we]re no less important, and the particular means no less substantially related to those objectives," particularly "in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship."[96]

Still, the Ninth Circuit refused to decide which level of constitutional scrutiny is most appropriate in immigration cases, leaving it an open question.[97] The Supreme Court affirmed *Flores-Villar* "by an equally divided Court" without issuing an opinion.[98] Because "an affirmance by an equally divided Court [is not] entitled to precedential weight,"[99] *Flores-Villar* did not elucidate the Court's position on the plenary power doctrine or the standard of review that should be applied in such cases.[100]

After *Flores-Villar*, commentators highlighted the Court's hesitancy to issue a clear opinion on the plenary power doctrine's modern boundaries. Some interpreted the Court's affirmance in *Flores-Villar*, among its other decisions, as a "refus[al] to clarify the standard of scrutiny that applies in challenges to immigration statutes," which leaves the viability of the plenary

210 (2011), *abrogated by* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

93 *Flores-Villar*, 536 F.3d at 994.

94 *Id.* at 994–95.

95 *Id.* at 996 n.2.

96 *Id.* at 996–97 (internal citation omitted). As in *Nguyen*, the Government in *Flores-Villar* asserted that the gender demarcation substantially furthered certain governmental interests; namely (1) the assurance "that a biological parent-child relationship exists" and (2) avoiding statelessness of children by ensuring a connection to the United States. *Id.* at 995–96. In both instances, the Government argued that mothers and fathers are situated differently as the parent-child relationship is easily established at birth for the mother but not for the father. *Id.*

97 *Id.* at 996 n.2.

98 Flores-Villar v. United States, 564 U.S. 210, 210 (2011) (per curiam).

99 Neil v. Biggers, 409 U.S. 188, 192 (1972).

100 *See Developments in the Law*, *supra* note 44, at 1591.

power doctrine uncertain.[101] Others argued that the Court's failure to explicitly invoke the doctrine in its recent decisions, thereby engaging in a form of constitutional analysis, signals that "the grave has been dug" for Congress's plenary power.[102] In light of the diluted scrutiny applied by the Court in its recent immigration cases, however, it is evident that the plenary power continues to influence the Court's decisions, even if the Court does not invoke it explicitly.[103] The Court ultimately tackled this issue in *Morales-Santana*, albeit in a manner that arguably departed from its traditional approach to the plenary power doctrine.[104]

III. GENDER-BASED EQUAL PROTECTION

The Fourteenth Amendment's Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[105] This prohibition extends to the federal government through the Fifth Amendment's Due Process Clause.[106] While the Equal Protection Clause does not prevent the states and the federal government from treating different classes of persons differently,[107] it prohibits, among other things, gender classifications that rest on stereotypical notions about the relative roles and abilities of each gender.[108] This Part examines the history of the Equal Protection Clause as it applies to gender classifications in federal legislation, with a particular focus on the Supreme Court's practice of extending, rather than nullifying, a benefit to redress an equal protection

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101 *See* Portmess, *supra* note 17, at 1829.

102 *See* Spiro, *supra* note 46, at 340.

103 *See* Pillard, *supra* note 46, at 836, 846–47 (arguing that the Court has merely driven the doctrine "underground").

104 *See infra* Part IV; *see also* Miller v. Albright, 523 U.S. 420, 452–59 (1998) (Scalia, J., concurring).

105 U.S. CONST. amend. XIV, § 1.

106 *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment[,] which applies only to the states," but "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

107 *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" "[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.") (emphasis added) (internal citations and quotations omitted); Reed v. Reed, 404 U.S. 71, 75 (1971) ("[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.").

108 *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1696–97 (2017); Califano v. Westcott, 443 U.S. 76, 89 (1979) (explaining that the gender demarcations in a provision of the Social Security Act were "part of the 'baggage of sexual stereotypes'" that the father's primary responsibility is breadwinning, while the mother's is hearthtending, and that "[l]egislation that rests on such presumptions, without more," could not survive equal protection scrutiny).

violation.[109]

A. *A Brief History of Equal Protection and Gender-Based Classifications*

Courts have generally regarded federal legislation that differentiates on the basis of gender as presumptively invalid "because gender generally provides no sensible ground for differential treatment."[110] Accordingly, courts addressing an equal protection challenge to a gender-based classification typically apply intermediate scrutiny.[111] Notably, however, the level of scrutiny applied to such classifications has changed considerably over the past several years.[112] Until the early 1970s, gender-based classifications were subjected only to rational basis review—the lowest level of judicial scrutiny.[113] But the Court changed course in *Reed v. Reed*.[114] In its first decision invalidating a gender-based classification as unconstitutional, the Court recognized that gender-based discrimination should be subjected to a more stringent scrutiny than rational basis.[115] Still, the Court stopped short of explicitly adopting a heightened standard of

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[109] Extending the benefit is often colloquially referred to as "leveling up," and nullifying the benefit is colloquially referred to as "leveling down." *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004) ("[I]nequality may be remedied either by leveling up and improving the treatment of the disadvantaged class, or by leveling down and bringing the group that is better off down to the level of those worse off." (footnote omitted))

[110] Rachel L. Jensen et al., *Equal Protection*, 1 GEO. J. GENDER & L. 213, 230 (2000).

[111] *Id.* Intermediate (or heightened) scrutiny is a standard of constitutional review used by courts in equal protection cases. *See* Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU L. REV. 2277, 2280–81 (2010). Specifically, intermediate scrutiny is used to determine whether gender classifications in legislation are constitutional. "[S]tatutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause[]'" and "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Further, if a statute does not implicate a fundamental right or does not affect certain protected classes, a court may apply a more deferential standard of review known as rational basis review. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 (1938); *see also infra* note 112 and accompanying text. Immigration provisions that involve gender classifications have been reviewed under rational basis rather than intermediate scrutiny. *See generally* Fiallo v. Bell, 430 U.S. 787 (1977).

[112] *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961); Bradwell v. Illinois, 83 U.S. 130 (1873); *see also* Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953, 953 (1996).

[113] Brake, *supra* note 112. Under rational basis review, a classification survives constitutional scrutiny if it is "rationally related to a legitimate government purpose." *Id.* "Courts have only rarely struck down government classifications under rational basis review." *Id.*

[114] 404 U.S. 71 (1971) (invalidating an Idaho statute that preferred males over females as administrators of estates).

[115] *Id.* at 75–76.

review.[116]

In *Frontiero v. Richardson*,[117] a plurality of the Court expanded *Reed* to conclude that gender-based classifications should be subjected to strict scrutiny.[118] The Court nevertheless retreated from this exacting standard of scrutiny in *Craig v. Boren*[119] and gave life to intermediate scrutiny.[120] In invalidating an Oklahoma statute that prohibited the sale of beer to males under twenty-one and to females under eighteen, a majority of the Court found *Reed* controlling, and held that gender-based classifications should be subjected to intermediate scrutiny.[121] The Court identified the standard for this level of scrutiny that courts still use with precision today: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[122] Finally, the Court refined (and arguably intensified) this standard of scrutiny in subsequent gender-discrimination cases.[123] The Court provided that, apart from the standard articulated in *Craig*, a challenged gender-based classification will be upheld only if there is an "exceedingly persuasive justification" for the classification.[124]

As previously discussed, this heightened standard of scrutiny has not held constant in cases involving immigration statutes that discriminate on the basis of gender.[125] In such cases, the Court has indisputably considered Congress's plenary power over immigration, and has modified its intermediate scrutiny to one that is more deferential—arguably akin to rational basis review.[126] In the words of one commentator, "[a]t the

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[116] *Id.* Although the Court did not formally adopt heightened scrutiny, it applied something more stringent than rational basis review. *Id.* The Court provided that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Id.* at 76.

[117] 411 U.S. 677 (1973) (invalidating a fringe benefits statute that automatically considered spouses of servicemen dependents for purposes of obtaining benefits, but required servicewomen to prove actual dependency by their spouses in order to obtain identical benefits).

[118] *Id.* at 688 ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

[119] 429 U.S. 190 (1976).

[120] *Id.* at 197.

[121] *Id.* at 197–98.

[122] *Id.* at 197; *see also* Jensen et al., *supra* note 110, at 232–33.

[123] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979); *see also* Brake, *supra* note 112, at 956.

[124] *Id.*; *see also* Jensen et al., *supra* note 110, at 238; Brake, *supra* note 112, at 956.

[125] *See supra* Part II.B.

[126] *See supra* Part II.B.

intersection of immigration and equal protection lies a judicial vortex. This area of law is a twilight zone of sorts, where established constitutional principles do not follow their regular paths."[127]

B. *Supreme Court's Practice of Extending the Benefit to Remedy Gender Discrimination*

Once the Supreme Court ascertains that a federal statute[128] violates the Equal Protection Clause, it must determine how to redress the constitutional infirmity. The appropriate remedy is generally a mandate of equal treatment,[129] but "[h]ow equality is accomplished . . . is a matter on which the Constitution is silent."[130] The Supreme Court must provide a constitutionally sufficient remedy and thereby "serve as a short-term surrogate for the legislature."[131] The Court generally fulfills this role by assessing whether the unconstitutionally discriminatory benefit should be extended or nullified.[132] Traditionally, the Court has chosen "extension, rather than nullification" as the proper course,[133] and until *Sessions v. Morales-Santana*, the Court had never ordered nullification of a benefit to redress an equal protection violation.[134] In view of this, nowhere is the

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127 Hess, *supra* note 111, at 2277.

128 *See* Sabina Mariella, Note, *Leveling up Over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. REV. 219, 232 (2016) (explaining that the Supreme Court seeks redress when a *federal* statute violates the Equal Protection Clause; however, when the Court considers "*state* action or legislation . . . [it] has often avoided the question by remanding the remedial decision to state courts" due to federalism concerns).

129 *See* Heckler v. Mathews, 465 U.S. 728, 740 (1984).

130 Levin v. Commerce Energy, Inc., 560 U.S. 413, 426–27 (2010) (citing *Mathews*, 465 U.S. at 740).

131 *See* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 317 (1979); *see also* Bruce K. Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Approach of* Heckler v. Mathews, 20 HARV. C.R.-C.L. L. REV. 79, 131 (1985).

132 *See Mathews*, 465 U.S. at 738 ("[A] court . . . 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.'" (internal citations omitted)); *see also* Brake, *supra* note 109, at 515 ("In the canon of equal protection, it is seemingly well-settled that inequality may be remedied either by leveling up and improving the treatment of the disadvantaged class, or by leveling down and bringing the group that is better off down to the level of those worse off.").

133 *See, e.g.*, *Mathews*, 465 U.S. at 739 n.5. While the Supreme Court has never directly addressed its preference for leveling up, some scholars contend that a potential reason for the avoidance of leveling down is that it could "confront[] persons disadvantaged by inequality with a double bind: challenge the inequality and risk worsening the situation for others instead of improving one's own situation, or continue to endure unlawful discrimination." Brake, *supra* note 109, at 516.

134 *See* Miller, *supra* note 131, at 142.

Court's practice of extending the benefit more evident than in its equal protection jurisprudence involving gender classifications.

1. *Frontiero v. Richardson*

In *Frontiero v. Richardson*,[135] the Court considered a constitutional challenge to a statutory scheme[136] that provided increased fringe benefits to members of the uniformed services who had dependents. The statutes entitled the servicemembers "to an increased 'basic allowence [sic] for quarters' and . . . [the] member's dependents [to] comprehensive medical and dental care."[137] The statute provided that a service*man* could claim his wife as a dependent irrespective of whether she depended on him for support; however, a service*woman* could not claim her husband as a dependent unless he was "*in fact* dependent upon her for over one-half of his support."[138] Sharron Frontiero, a female lieutenant of the United States Air Force, sought increased benefits for her and her husband. Her application was ultimately denied as a result of her failure to show that her husband *in fact* depended on her for more than one-half of his support.[139]

Frontiero challenged the gender distinction, alleging that the statutory scheme violated the Due Process Clause of the Fifth Amendment because it unreasonably placed a proof-of-dependency burden on women that it did not place on men.[140] The Supreme Court, expanding on its decision in *Reed v. Reed*,[141] applied intermediate scrutiny in holding the statutes unconstitutional.[142] Because the challenged statutes "command[ed] dissimilar treatment for men and women who [were] similarly situated," the Court sought evidence to support the differential treatment.[143] The government contended that the statutes' gender distinction served administrative efficiency; however, the Court found this justification, without concrete evidence, insufficient to withstand heightened judicial scrutiny.[144] To redress the constitutional infirmity, the Court eliminated the

135 411 U.S. 677 (1973).

136 37 U.S.C. §§ 401, 403 (1962); 10 U.S.C §§ 1072, 1076 (1958).

137 *Frontiero*, 411 U.S. at 679–80.

138 *Id.* at 678–79 (emphasis added).

139 *Id.* at 680 (emphasis added).

140 *Id.* at 680 & n.5, 690–91 ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" (alteration in original)).

141 404 U.S. 71 (1971).

142 *Frontiero*, 411 U.S. at 688 ("[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

143 *Id.* at 688.

144 *Id.* at 688–90 ("[A]lthough efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and

proof-of-dependency requirement imposed on women, thereby extending the benefit accorded to men—namely, the lack of such a requirement—to women.[145]

2. *Califano v. Westcott*

The Supreme Court's practice of extending the particular benefit was further institutionalized in *Califano v. Westcott*.[146] The Court addressed a constitutional challenge to § 407 of the Social Security Act,[147] which granted benefits to families whose dependent children were deprived of parental support because of the *father*'s unemployment, but did not grant such benefits to families who lacked support because of the *mother*'s unemployment.[148] Two couples applied for public assistance because the wives—the former breadwinners in each respective family—and their husbands were unemployed.[149] The families were denied benefits on the ground that the husbands' prior work histories were insufficient to render them "unemployed" under the Act, notwithstanding the fact that the wives satisfied the unemployment criteria.[150] The couples challenged the provision's gender distinction as repugnant to the Due Process Clause of the Fifth Amendment.[151]

The district court declared § 407 unconstitutional, finding that the gender differentiation was not "substantially related to the achievement of any important governmental interests."[152] More specifically, the district court found that the differentiation failed intermediate scrutiny because it rested on an "archaic and overbroad generalization" that the loss of mothers' earnings in two-parent families did not significantly affect families because

efficiency . . . . [A]ny statutory scheme [that] draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience . . . involves the very kind of arbitrary legislative choice forbidden by the Constitution.") (internal citations and quotations omitted).

145 *Id.* at 690–91 n.25. The Court explained that its conclusion invalidated only the portion of the statutory scheme that "require[s] a female member to prove the dependency of her spouse." *Id.*

146 443 U.S. 76 (1979).

147 Codified as amended at 42 U.S.C. § 607 (1935).

148 *Westcott*, 443 U.S. at 78.

149 *Id.* at 80–81.

150 *Id.* at 80–81 n.1. To be eligible for benefits under § 407 of the Act, a family had to meet both financial and categorical requirements. *Id.* The States determined the financial requirements, while the Federal Government determined the categorical requirements. *Id.* The Act itself delineated the requirements for satisfying the "unemployment" definition under the Act that "w[ould] render a family eligible for . . . benefits." *Id.* Most importantly, the regulations spoke "in terms of the unemployment of the 'father.'" *Id.*

151 *Id.* at 81. The families also challenged § 407 as violating the Fourteenth Amendment. *Id.*

152 *Id.* at 81–82 (applying intermediate scrutiny standard for gender classifications).

women were not traditional breadwinners.[153] To remedy the constitutional infirmity, the lower court ordered that benefits paid to families that are deprived of parental support because of the father's unemployment must also be paid to families deprived of such support because of the mother's unemployment.[154] Thus, the district court *extended* the benefit.

The Supreme Court agreed that the gender classification did not survive constitutional scrutiny because it was "not substantially related to the attainment of any important and valid statutory goals."[155] Rather, the Court added, it rested on stereotypes that a "father has the primary responsibility to provide . . . while the mother is the center of home and family life" and legislation that finds its support in such presumptions without concrete evidence cannot survive heightened judicial scrutiny.[156] The Court, therefore, affirmed the lower court's decision to extend the benefit to families of unemployed mothers, concluding that such a remedy was not only consistent with its longstanding practice of extension, but was also supported by "equitable considerations."[157]

These cases demonstrate the Court's longstanding practice of extending the benefit—or "leveling up"—to remedy equal protection violations, particularly when grappling with gender-based discrimination. Notwithstanding this practice, the *Morales-Santana* Court took the unprecedented step of remedying the relevant equal protection violation by "leveling down," namely by nullifying the one-year exception for unmarried U.S.-citizen mothers—the benefit—and applying the longer, ten-year residency requirement to all non-marital children irrespective of the U.S.-citizen parent's gender.[158] This unique choice of remedy suggests that the Court is not yielding to Congress's plenary power over all immigration matters. Instead, it intimates that the plenary power's reach is limited, particularly when equal protection principles are involved.

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153 *Id.* (internal quotations omitted).

154 *Westcott*, 443 U.S. at 82 ("The court saw two remedial alternatives: a simple injunction against further operation of the . . . program, or extension of the program to all families with needy children where *either* parent is unemployed. The court decided that extension, rather than nullification, was the proper remedial course . . . .").

155 *Id.* at 89.

156 *Id.* at 90.

157 *Id.* at 89–90 ("In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." In weighing the proper choice here, the Court reasoned that "[a]pproximately 300,000 needy children currently receive . . . benefits [under § 407], and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect.") (internal citations omitted).

158 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1701 (2017).

IV. *SESSIONS V. MORALES-SANTANA*[159]

Luis Ramón Morales-Santana was convicted of several offenses under the New York Penal Law, which triggered removal proceedings by the United States Government. To resist removal, Morales-Santana asserted U.S. citizenship as derived from his father. When his application was unsuccessful, Morales-Santana alleged an equal protection violation resulting from a gender differentiation in applicable INA provisions. This Part briefly addresses Morales-Santana's background, followed by a discussion of the Second Circuit's resolution of the asserted equal protection violation and the Supreme Court's decision in *Morales-Santana*, focusing on its approach to the equal protection violation.

A. *Background*

Morales-Santana was born in the Dominican Republic in 1962 to a U.S.-citizen father and a Dominican mother.[160] His father, José Morales, left his childhood home in Puerto Rico in 1919, twenty days before his nineteenth birthday, to work in the Dominican Republic.[161] Once there, he met a Dominican woman named Yrma Santana Montilla.[162] In 1962, Yrma gave birth to their child, Morales-Santana, and the pair married in 1970.[163] Morales-Santana subsequently moved to Puerto Rico in 1975 and then to New York in 1976 as a lawful permanent resident.[164]

In 2000, Morales-Santana faced removal proceedings after receiving various felony convictions.[165] Morales-Santana applied for a stay of removal, claiming he derived U.S. citizenship from his father's U.S. citizenship under § 1409.[166] The Government, however, classified Morales-Santana as an alien because at the time of Morales-Santana's birth, his father did not satisfy the physical-presence requirement applicable to unwed fathers.[167] Consequently, an immigration judge rejected Morales-Santana's citizenship claim and "ordered [his] removal to the Dominican Republic."[168]

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159 *See generally id*.

160 *Id.* at 1687–88.

161 *Id.* at 1687. Morales-Santana's father acquired U.S. citizenship in 1917 pursuant to the Jones Act. *See* Jones Act of Puerto Rico, Pub. L. No. 64-368, ch. 145, 39 Stat. 951 (1917).

162 *See Morales-Santana*, 137 S. Ct. at 1688.

163 *Id.* "Morales–Santana was . . . 'legitimat[ed]' by his father upon his parents' marriage in 1970 and admitted to the United States as a lawful permanent resident in 1975." *See* Morales-Santana v. Lynch, 804 F.3d 520, 524 (2d Cir. 2015), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (internal citations omitted).

164 *Morales-Santana*, 137 S. Ct. at 1688.

165 *Id.*

166 *See id.*; *see also Lynch*, 804 F.3d at 524–25.

167 *Morales-Santana*, 137 S. Ct. at 1688.

168 *Id.*

In 2010, Morales-Santana sought to reopen his removal proceedings on the basis of an equal protection violation.[169] Morales-Santana challenged §§ 1401 and 1409's gender-based distinction in the treatment of derivative citizenship conferral rights, alleging that the then-applicable ten-year[170] residency requirement for unwed U.S.-citizen fathers, juxtaposed with the one-year physical presence requirement for unwed U.S.-citizen mothers, violated the Fifth Amendment's equal protection guarantee.[171] The Board of Immigration Appeals (BIA) denied Morales-Santana relief.[172]

B. *The Second Circuit's Remedy*

The Court of Appeals for the Second Circuit reversed the BIA's decision, holding the gender-based differential in §§ 1401 and 1409 unconstitutional as violating the equal protection guarantee.[173] The Second Circuit applied intermediate scrutiny in reviewing the INA provisions because the law "discriminate[d] on the basis of gender."[174] In rejecting the government's request to apply rational basis review, the court distinguished Morales-Santana's claim of pre-existing *citizenship* at birth with *Fiallo*'s[175] claim of special preference for *admission* of non-citizens.[176] The Court reasoned that, while "over no conceivable subject is the legislative power of Congress more complete than it is over the admission [or removal] of aliens," a claim of pre-existing citizenship is not an "issue of alienage that would trigger special deference" to Congress.[177] Accordingly, the court found that *Fiallo*'s deferential standard did not govern and thus, the gender-based scheme in §§ 1401 and 1409 must be "substantially related to an actual and

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169 *Id.* Morales-Santana made three additional arguments in support of derivative citizenship; however, those arguments are not addressed in this Comment because they are not relevant to the alleged equal protection violation or Congress's plenary power over immigration matters. *See Lynch*, 804 F.3d at 525.

170 Morales-Santana necessarily challenged the ten-year requirement present in the 1952 Act applicable at the time of his birth and not the five-year requirement present in the current version of the Act; however, both versions reflect a gender differentiation. *Compare* 8 U.S.C. § 1401(a)(7) (1958), *with* 8 U.S.C. § 1401(g) (2018). For purposes of clarity, this Comment will refer to the duration of residency requirement as the "five-year requirement."

171 *Morales-Santana*, 137 S. Ct. at 1688–89 ("Because § 1409 treats sons and daughters alike," Morales-Santana alleged the gender-discrimination claim on behalf of his father "who was unwed at the time of Morales-Santana's birth and was not accorded the right an unwed U.S.-citizen mother would have to transmit U.S. citizenship to her child.").

172 *Id.* at 1688.

173 *Lynch*, 804 F.3d at 528, 538.

174 *Id.* at 528.

175 Fiallo v. Bell, 430 U.S. 787 (1977).

176 *Lynch*, 804 F.3d at 528 (emphasis added).

177 *Id.* (internal citations omitted). Congress exercises plenary power over immigration matters; however, the Second Circuit emphasized that such power traditionally extends to issues of admission and exclusion of non-citizens, but not to issues of pre-existing citizenship. *Id.*; *see also supra* Part II.

important governmental objective" in order to be upheld.[178]

The government articulated two objectives that would be furthered by the provision's gender-based physical-presence requirements: (1) ensuring a sufficient connection between the child and the United States to warrant citizenship, and (2) preventing newborn statelessness.[179] The Second Circuit did not find either interest persuasive, concluding that the gender-based scheme was not substantially related to the purported interests and that §§ 1401 and 1409 therefore violated equal protection.[180] To cure the constitutional infirmity, the Second Circuit mandated equal treatment by severing the five-year[181] requirement for unwed U.S.-citizen fathers and "requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement."[182] This remedy, in turn, confirmed Morales-Santana's U.S. citizenship at birth as derived from his father, who readily satisfied the one-year residency requirement.[183] The Supreme Court granted certiorari in 2016.[184]

C. *The Supreme Court's Equal Protection Victory Without a Remedy*

The Supreme Court, in a decision delivered by Justice Ginsburg, affirmed the Second Circuit's judgment that the gender discrepancy in §§ 1401 and 1409 violated the Fifth Amendment's equal protection guarantee. The Court, however, explicitly disagreed with the Second Circuit's remedial course, finding the extension of the one-year physical presence requirement

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178 *Lynch*, 804 F.3d at 529 ("[C]itizen claimants with an equal protection claim deserving of heightened scrutiny do not lose that favorable form of review simply because the case arises in the context of immigration.").

179 *Id.* at 530–35.

180 *Id.* at 531–35. The court found that both interests were important governmental interests; however, they were insufficient to withstand intermediate scrutiny. *Id.* As for the first interest, the court added that the government "offers no reason, and [the court] s[aw] no reason, that unwed fathers need more time than unwed mothers in the United States prior to the child's birth in order to assimilate values that the statute seeks to ensure are passed on to citizen children born abroad." *Id.* at 530. As to the second interest, the court found that "avoidance of statelessness [was not] Congress's actual purpose in establishing the physical presence requirements" and even if it were, the interest could not survive intermediate scrutiny because gender-neutral means were available to accomplish the objective. *Id.* at 531.

181 Recall that Morales-Santana necessarily challenged the ten-year requirement as it existed in the 1952 Act at the time of his birth. *See supra* notes 6 and 170.

182 *Lynch*, 804 F.3d at 535–36 (internal citations omitted). To make this determination, the Second Circuit looked to Congress's intent in enacting the statutory scheme. *Id.* at 535–37. Notwithstanding the government's argument to sever the one-year exception for mothers and extend the more onerous requirement to every unwed U.S.-citizen parent, the court found that "the historical background against which Congress enacted the relevant provisions" and "the binding precedent that cautions . . . to extend rather than contract benefits in the face of ambiguous congressional intent" supported the chosen remedy. *Id.* at 536–37.

183 *Id.* at 538.

184 Lynch v. Morales-Santana, 136 S. Ct. 2545 (2016).

inappropriate.[185] Justices Thomas and Alito, in a joint concurring opinion, found that the majority decided too much. The Justices reasoned that, because the Court did not have the power to provide relief—"namely, conferral of citizenship on a basis other than that prescribed by Congress"—it did not need to address the constitutionality of the INA provisions.[186]

The majority nevertheless engaged in a unique constitutional analysis. Justice Ginsburg began by positing that §§ 1401 and 1409 "date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are," with "[l]aws [that] grant[ed] or den[ied] benefits on the basis of the sex of the qualifying parent."[187] The Court, therefore, applied intermediate scrutiny to assess the constitutionality of the gender-based classification inherent in the INA provisions.[188] Justice Ginsburg rejected the government's contention that the Court should instead apply a rational basis review in light of "Congress'[s] exceptionally broad power to admit or exclude aliens."[189] Similar to the Second Circuit, Justice Ginsburg found *Fiallo*[190] distinguishable and its deferential standard inapplicable, as it involved the admission of *aliens*, which implicates Congress's plenary power, whereas *Morales-Santana* involved a claim of pre-existing citizenship, which arguably does not trigger such broad power.[191]

The Court found the "discrete duration-of-residence requirements for unwed mothers and fathers . . . stunningly anachronistic" as resting on the obsolete notion that the unwed mother is "the child's natural and sole guardian" and that the father is "less qualified and entitled . . . to take responsibility for nonmarital children."[192] Because "no important

185 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).

186 *Id.* at 1701–02 (internal citations omitted).

187 *Id.* at 1683 (internal quotations omitted).

188 *Id.* at 1683–84, 1690 ("[H]eightened scrutiny is in order" and thus, "[s]uccessful defense of legislation that differentiates on the basis of gender . . . requires an 'exceedingly persuasive justification.'" Such justification must demonstrate that the classification "serve[s] an important governmental interest *today*.").

189 *Id.* at 1693 (internal quotations omitted).

190 Fiallo v. Bell, 430 U.S. 787 (1977). The Court also distinguished *Miller v. Albright*, 523 U.S. 420 (1998) and *Nguyen v. INS*, 533 U.S. 53 (2001), in which the Supreme Court applied a rational basis standard in reviewing a parental-acknowledgement provision of the INA, because *Morales-Santana* involved a physical-presence requirement instead. *Id.* at 1694; *see also* Brief Amicus Curiae of The American Civil Liberties Union, The New York Civil Liberties Union, The National Immigration Law Center, & The National Women's Law Center, in Support of Respondents at 7–8, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191) ("[S]ince *Fiallo* was decided, this Court has made unequivocally clear, in numerous cases, that heightened scrutiny should be applied whenever laws explicitly discriminate on the basis of gender.").

191 *Morales-Santana*, 137 S. Ct. at 1693–94.

192 *Id.* at 1691–93 (internal quotations omitted).

governmental interest is served by laws grounded" in this notion, the Court concluded that the government's purported interests[193] did not provide an "exceedingly persuasive justification" for the gender-specific residency and age criteria, and that the provisions therefore violated the Constitution's Equal Protection Clause.[194]

The Court's remedy for the constitutional infirmity, however, differed drastically from the Second Circuit's remedial course and the Court's equal protection remedial history. Rather than extending the one-year physical-presence requirement to all unwed U.S.-citizen parents, the Court severed the one-year exception and preserved the current five-year physical presence requirement, making it prospectively applicable to unwed U.S. citizen *fathers and mothers*.[195] While acknowledging its long-standing practice of "extension, rather than nullification" of a federal benefit to remedy an equal protection violation,[196] the Court noted that the legislature's intent governs the remedial course chosen.[197] Even more, when the discriminatory scheme involves an exception that encompasses the favorable treatment—i.e., the benefit—the Court must further "consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation" of the exception.[198]

In finding that Congress would nullify the one-year exception and preserve the general rule if Congress were aware of the constitutional infirmity, the Court focused primarily on two factors.[199] First, Congress's inclusion of a more arduous physical presence requirement as the general rule suggests that it deemed actual residence in the United States to be of great importance.[200] Second, the extension of the one-year exception to unwed U.S.-citizen fathers would significantly disrupt the statutory scheme, creating an anomaly whereby marital children receive "[d]isadvantageous

193 *See supra* notes 179–180 and accompanying text.

194 *Morales-Santana*, 137 S. Ct. at 1695–96, 1698 ("One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny.").

195 *Id.* at 1700–01, 1698 ("[T]his Court is not equipped to grant the relief Morales-Santana seeks, *i.e.*, extending to [Morales-Santana's] father (and, derivatively, to him) the benefit of the one-year physical presence term § 1409(c) reserves for unwed mothers.") (emphasis added).

196 *Id.* at 1698–99; *see also* Oral Argument at 22:55, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191), https://www.oyez.org/cases/2016/15-1191 (affirming the Supreme Court's practice of leveling up rather than leveling down in response to an equal protection violation and finding "one compelling reason to do it [in this case]," namely that "in this case, unlike in some cases, there really isn't a choice between leveling up and leveling down . . . because if you level down, [Morales-Santana] gets no relief.").

197 *Morales-Santana*, 137 S. Ct. at 1699.

198 *Id.* at 1700 ("In making this assessment, a court should 'measure the intensity of commitment to the' . . . main rule . . . .") (internal citations omitted).

199 *Id.*

200 *Id.*

treatment . . . in comparison to nonmarital children."[201] Accordingly, the Court abrogated § 1409(c)'s more beneficial requirement and extended the current "five-year requirement . . . prospectively, to children born to unwed U.S.-citizen mothers," leaving Morales-Santana without a remedy.[202] Still, the Court deferred to Congress to "settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender."[203]

At least two things are certain after *Morales-Santana*. First, the Court's decision provided Morales-Santana a victory without a remedy.[204] While the Court considered the equal protection challenge to §§ 1401 and 1409 meritorious, the Court's method of remedying the constitutional infirmity—namely, nullifying the one-year exception for unwed mothers and extending the five-year residency requirement to both unwed mothers and unwed fathers—left Morales-Santana without relief.[205] Because the Court did not modify the five-year residency requirement for unwed fathers and because Morales-Santana's father did not originally satisfy such requirement,[206] the Court's remedial course left Morales-Santana unqualified for U.S. citizenship and, thus, still subject to deportation; the very circumstance he wished to avoid in raising this equal protection challenge. Second, post-*Morales-Santana*, children born abroad to unwed U.S.-citizen mothers will face a more onerous process when seeking to acquire derivative U.S. citizenship insofar as they are now also subject to the five-year physical presence requirement. This difficulty will endure unless and until Congress intervenes to affirm its intent and settle on a different prescription.[207]

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[201] *Id.* The Court added that this "is scarcely a purpose one can sensibly attribute to Congress." *Id.*

[202] *Id.* at 1701.

[203] *Morales-Santana*, 137 S. Ct. at 1701. The Court's chosen remedial course is to be upheld "in the interim" until Congress addresses the issue. *Id.*

[204] *See* Amy Howe, *Opinion Analysis: Court Rejects Gender-Based Distinctions in Citizenship Laws*, SCOTUSBLOG (June 12, 2017), http://www.scotusblog.com/2017/06/opinion-analysis-court-rejects-gender-based-distinctions-citizenship-laws/ (arguing that the Court's decision "was a hollow victory for Luis Ramon Morales-Santana" and that the "ruling may not help Morales-Santana . . . ward off deportation").

[205] *Morales-Santana*, 137 S. Ct. at 1698 ("[T]his Court is not equipped to grant the relief Morales-Santana seeks, *i.e.,* extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term § 1409(c) reserves for unwed mothers.); *see also* Thomas, *supra* note 16, at 8 ("What was shocking was the Court's decision in *Morales-Santana* to deny any meaningful remedy to the [P]laintiff who had proven such anachronistic discrimination. The [P]laintiff effectively lost because the Court refused to grant the requested remedy of applying the one year rule for unwed women to unwed men.").

[206] Recall that Morales-Santana necessarily challenged the ten-year requirement as it existed in the 1952 Act at the time of his birth. *See supra* notes 6 and 170.

[207] *Morales-Santana*, 137 S. Ct. at 1701 (leaving open the possibility that "Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender."); *see also* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 226 (2015) ("If Congress disagrees with a

V. TOWARDS EXTENDING, RATHER THAN LIMITING, THE BENEFIT

In the months since *Morales-Santana*, commentators have roused different assessments of the Court's decision. Some commentators argue that the Court's outright refusal to submit to Congress's plenary power signals an erosion of the Court's longstanding deference to the political branches in immigration matters.[208] Other commentators focus on the Court's decision to apply the harsher five-year physical-presence requirement equally to unwed fathers and mothers, contending that it does not comport with the Court's established practice of remedying an equal protection violation by extending the particular benefit rather than nullifying it.[209]

This Comment argues that the Court should have remedied the constitutional violation in *Morales-Santana* by extending, rather than abrogating, the statutory benefit, thereby treating *all* non-marital children equally in accordance with Congress's seeming intent to provide preferential treatment to this group of children.[210] Notably, if Congress thought it justifiable to treat the foreign-born children of unwed U.S.-citizen mothers preferably by way of the one-year exception (in the same way that it provides preferential treatment to a variety of groups in other forms of legislation), it is not implausible that Congress would admit similar treatment for children of unwed U.S.-citizen fathers.[211] Still, the Court's refusal to extend the one-year exception to the nonmarital children of U.S.-citizen fathers does not indicate a decreased deference to Congress in immigration matters. Instead, the plenary power continues to influence the Court's decisions, albeit in a limited way when equal protection principles are involved.[212]

judicial decision or wants to change the law for other reasons, it is the legislature's responsibility to amend the statute pursuant to the constitutionally mandated procedures.").

208 *See supra* note 12.

209 *See* Bridget Crawford, *Is Ginsburg's Decision in* Sessions v. Morales-Santana *Good for Women?*, FEMINIST L. PROFESSORS (June 12, 2017), http://www.feministlaw professors.com/2017/06/is-ginsburgs-decision-in-sessions-v-morales-santana-good-for-women/; Ian Millhiser, *The Supreme Court Just Made Our Ugly, Messed-Up Immigration Law Even Uglier*, THINK PROGRESS (June 12, 2017), https://thinkprogress.org/scotus-immigration-gender-bf65cebccf9d/; *supra* note 15; Thomas, *supra* note 16.

210 In other words, the Court should have affirmed the United States Court of Appeals for the Second Circuit's decision insofar as the Circuit Court found an equal protection violation, but remedied it by extending the one-year exception to unwed U.S.-citizen fathers. *See* Lynch v. Morales-Santana, 136 S. Ct. 2545 (2016).

211 *See id.* The Second Circuit concluded that leveling up was the right course. *Id.*; *see also* Thomas, *supra* note 16, at 9 ("[A] court could just as easily have discerned a different intent for Congress, as the Second Circuit did in the same case below. The appellate court severed the longer general rule for unwed fathers, leaving in place a gender-neutral one-year rule that then applied to all unwed parents.").

212 *See* Robinson, *supra* note 14; *see also* Collins, *supra* note 10, at 175.

A. *The INA—An Exception to the General Rule and an Argument for Leveling Up*

The Immigration and Nationality Act (INA) sets forth provisions for admission, deportation, and nationality.[213] While the INA's existing provisions address a host of concerns, the provisions at issue in *Morales-Santana*—and thus relevant to this Comment—are those that provide a framework for acquisition of U.S. citizenship at birth by a child born abroad to a U.S.-citizen parent.[214] The INA 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."[215] Specifically, §§ 1401 and 1409 of the INA provide the primary rules for determining who "shall be nationals and citizens of the United States at birth" by instituting residency and physical-presence requirements contingent on the parents' nationality and marital status, among other things.[216]

In particular, § 1401 provides for the U.S. citizenship of a child born abroad to married parents "one of whom is an alien, and the other a citizen of the United States who . . . was physically present in the United States" for at least ten years prior to the child's birth.[217] Furthermore, § 1409 adopts the physical-presence requirements of § 1401 and makes them applicable to unwed U.S.-citizen fathers, "thereby allowing an acknowledged unwed citizen parent to transmit U.S. citizenship to a foreign-born child under the same terms as a married citizen parent."[218] Section 1409(c), however, makes an exception to this residency requirement for unwed U.S.-citizen mothers.[219] Under § 1409(c)'s exception, unwed mothers may transfer citizenship to their foreign-born children so long as they were continuously present in the United States for one year.[220]

As noted by Justice Ginsburg in *Morales-Santana*, § 1409(c) is unique in that it is the exception to the general rule for acquisition of citizenship at

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213 *See* The Immigration and Nationality Act, Pub. L. No. 82–414, 66 Stat. 163–64 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2018)) (providing that the purpose of the INA was "[t]o revise the laws relating to immigration, naturalization, and nationality"); *see also Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/laws/immigration-and-nationality-act (last visited Mar. 13, 2019) (explaining that the INA "collected many provisions and reorganized the structure of immigration law. [It] has been amended many times over the years, but is still the basic body of immigration law.").

214 8 U.S.C. §§ 1401, 1409 (2018).

215 8 U.S.C. § 1421(d) (emphasis added).

216 *See* § 1401(a)(7) (now codified at 8 U.S.C. § 1401(g) (2018)); *see also* §1409(a).

217 *Id.* The residency requirement has since been reduced to five years.

218 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017); *see also* 8 U.S.C. §1409.

219 8 U.S.C. §1409(c).

220 *Id.*

birth.[221] In other words, the five-year residency requirement is applicable to married U.S.-citizen parents and unwed U.S.-citizen fathers; however, unwed U.S.-citizen mothers are excepted from this general rule and are instead subject to a one-year residency requirement. Furthermore, the general framework for acquisition of U.S.-citizenship at birth by a child born abroad is likewise unique insofar as there are three groups involved rather than two—namely, children of (1) married U.S.-citizen parents; (2) unwed U.S.-citizen fathers; and (3) unwed U.S.-citizen mothers. These factors, according to the *Morales-Santana* Court, made leveling up to remedy the equal protection violation problematic.[222]

Seemingly, the Court's difficulty in choosing nullification—rather than extension—as the appropriate remedy arose in reaction to two issues. First, when the Court has previously considered an equal protection challenge to a discriminatory exception, the exception generally "den[ied] benefits to discrete groups" that were available to others under the general rule.[223] Thus, when the Court struck down such an exception as unconstitutional, the result was an extension of benefits that were previously denied. In contrast, the *Morales-Santana* Court dealt with a discriminatory exception that extended—rather than denied—a benefit to a discrete group; namely, U.S.-citizen mothers enjoyed a one-year exception to the more arduous five-year requirement.[224] Faced with this perplexity, the Court, "serv[ing] as a short-term surrogate for the legislature,"[225] considered whether Congress "would have struck [the] exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation."[226] Quoting Justice Harlan's concurring opinion in *Welsh v. United States*, the *Morales-Santana* Court added that in making this assessment, it must "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation."[227] The Court then concluded that the longer physical-presence requirement—the residual policy—"evidences Congress' recognition of 'the importance of residence in this country as the talisman of dedicated attachment,'" and that the

221 *Morales-Santana*, 137 S. Ct. at 1687.

222 *Id.* at 1699–1700.

223 *Id.* at 1699 (citing Califano v. *Goldfarb,* 430 U.S. 199, 202–04, 213–17 (1976); *Jimenez v. Weinberger,* 417 U.S. 628, 630–631, 637–38, (1974); *Dep't of Agriculture v. Moreno,* 413 U.S. 528, 529–30, 538 (1973); Frontiero v. Richardson, 411 U.S. 677, 678–79 (1973).

224 *Id.*

225 *See* Ginsburg, *supra* note 131, at 317.

226 *Morales-Santana*, 137 S. Ct. at 1700.

227 *Id.* (quoting Welsh v. United States, 398 U.S. 333, 365 (1970) (Harlan, J., concurring)).

disruption of such a statutory scheme by extending the one-year exception could be "large."[228]

Second, tied to a potential disruption of the statutory scheme was the Court's concern that if it remedied the constitutional violation by leveling up and extending § 1409(c)'s one-year exception to unwed U.S.-citizen fathers, the longer residency requirement would remain applicable to married U.S.-citizen parents.[229] Because the statutory scheme at issue in *Morales-Santana* involves three groups, the Court did not face the simpler task of treating two classes equally. Instead, by providing equally favorable treatment to U.S.-citizen fathers and mothers, married parents—the third group—would be subject to the more stringent residency requirement and thereby treated less favorably. This result, according to the Court, would be anomalous.[230] The "[d]isadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress."[231] Even more, this remedy could give rise to a separate constitutional violation—the unequal treatment of married parents in juxtaposition to that of unmarried parents.

Nevertheless, the potentially jarring result from extending the one-year exception to unwed U.S.-citizen fathers should not have prevented the *Morales-Santana* Court from leveling up to remedy the constitutional violation. The Court could have adopted a relatively straightforward solution: extend the one-year exception to all parents, married or unmarried, unless and until the statute were changed by Congress. Going forward, Congress would still be free to choose a different requirement applicable to all genders and all marital statuses.[232] The Supreme Court's choice of judicial alteration to the statute in the interim creates more problems than it solves.

B. *Preferential Treatment in Immigration Laws*

A law's preferential treatment of one group in comparison to another is not entirely anomalous, particularly in the context of immigration. United States' immigration laws have historically given preferential treatment to different groups of people. The laws treat certain groups more favorably for a variety of reasons, ranging from protectionist purposes to longstanding

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228 *Id.* ("Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule." (quoting Rogers v. Bellei, 401 U.S. 815, 834 (1971))).

229 *Id.*

230 *Id.*

231 *Id.*

232 The United States Court of Appeals for the Second Circuit, examining the same record that was before the Supreme Court, concluded that leveling up was the right course, so it is not as though a case cannot be made for that approach.

political agreements. A significant example of such differential treatment is that of Cuban immigrants, who received special status under U.S. immigration laws as a result of the Cuban Adjustment Act of 1966 ("Act").[233] Originally instituted to provide a safe harbor to those fleeing persecution under Fidel Castro's regime, the Act made it significantly easier for a Cuban to enter the country lawfully in comparison to immigrants from other countries.[234] A separate example of such preferential treatment is evidenced in the differential treatment of spouses, children, and parents under the Violence Against Women's Act ("VAWA") provisions in the INA who face removal proceedings and who are victims of domestic abuse.[235] These provisions afford benefits to abused foreign nationals, such as permitting them to self-petition for lawful permanent resident status, that are not otherwise available to foreign nationals who do not face such abuse.[236] Accordingly, Congress has provided for preferential treatment of different groups and, thus, providing for such in *Morales-Santana* so as to create a situation in which marital children have more stringent requirements would not produce an entirely anomalous result.

VI. CONCLUSION

After the Supreme Court's decision in *Morales-Santana*, some commentators critiqued the Court's constitutional analysis and remedy as signaling a continued erosion of Congress's plenary power over immigration matters, while others critiqued the Court's contravention of its long-standing practice of extending, rather than nullifying, a benefit to remedy an equal protection violation. This Comment contends that the Court's remedy in *Morales-Santana* was improper, and that the Court should have extended, rather than limited, the benefit to remedy the constitutional infirmity. Further, while recent Supreme Court decisions have seemed to signal a "chipping away" at Congress's plenary power over immigration policies, it is more probable that Congress's plenary power is instead yielding to certain constitutional principles.

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233 *See* Henry Cuellar, *Stop Preferential Treatment for Cuban Immigrants*, WASH. EXAMINER (Mar. 28, 2016), http://www.washingtonexaminer.com/stop-preferential-treatment-for-cuban-immigrants/article/2586889.

234 *Id.*

235 *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime: Fact Sheet*, AM. IMMIGR. COUNCIL (May 7, 2012), https://www.americanimmigrationcouncil.org/research/violence-against-women-act-vawa-provides-protections-immigrant-women-and-victims-crime.

236 *Id.*