AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Equality/Equality under Law

Morales-Santana v. Sessions, __ U.S. __ (2017)

Luis Ramón Morales-Santana was born in 1962 to unwed parents in the Dominican Republic. His mother, Yrma Sanatana Montilla, was a citizen of the Dominican Republic. His father, Jose Morales, was a U.S. citizen but had not been physically present in the United States for the five-year time period needed to transmit his U.S. citizenship to his children under 8 U.S.C. § 1409(c). Had Jose Morales been the birth mother rather than the birth father, his son would have been a U.S. citizen under 8 U.S.C. § 1409(c), which mandates that an unwed mother who is a citizen of the United States transmits citizenship to her children if she has "previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." Remarkably, under 8 U.S.C. § 1401(a)(7), either Morales or Montilla would have had to have been physically present in the United States for five years had they been married. In 2000, an immigration judge ordered Morales deported to the Dominican Republican because he was a noncitizen who had committed various crimes in New York. A decade later, Morales sought to reopen those proceedings on the ground that the citizenship law that distinguished between children of unwed female citizens and children of unwed male citizens violated the equal protection clause of the Fourteenth Amendment. The Board of Immigration Appeals denied his petition, but that decision was reversed by the Court of Appeals for the Second Circuit. The United States, eventually represented by Attorney General Jefferson Sessions, appealed to the Supreme Court of the United States.

The Supreme Court by a 6–2 vote held that Luis Morales-Santana had standing to bring the lawsuit and that the federal citizenship scheme was unconstitutional but by a unanimous vote declared that federal courts could not offer him the requested relief. Justice Ruth Bader Ginsburg's majority opinion declared that Luis Morales-Santana was sufficiently interested in the outcome of the proceedings to assert the rights of his deceased father. She then held that the different treatment of unwed citizen mothers and fathers was based on outdated stereotypes that did not provide the constitutionally required "exceedingly persuasive justification" for gender distinctions. Ginsburg nevertheless ruled that, given the overall statutory scheme, Congress would have preferred to have the children of unwed citizen mothers be citizens only if the mother had been in the United States for the same five-year period required of all citizen parents who marry aliens and have children while living abroad than have the required period of physical presence in the United States less for unwed parents than for wed parents. Justice Clarence Thomas concurred in this final judgment, insisting that no reason existing for deciding the merits of the case. Why did Ginsburg think the federal citizenship scheme was based on gender stereotypes rather than sound policy reasons? Is her conclusion correct? Might good reasons exist for requiring less physical presence in the United States for an unwed parent than a married parent? Had the courts chosen to go Thomas's route, would there be a way for a court to declare the statutory scheme unconstitutional?

Justice GINSBURG delivered the opinion of the Court.

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Ordinarily, a party "must assert his own legal rights" and "cannot rest his claim to relief on the legal rights . . . of third parties." But we recognize an exception where, as here, "the party asserting the

right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests." José Morales' ability to pass citizenship to his son, respondent Morale-Santana, easily satisfies the "close relationship" requirement. So, too, is the "hindrance" requirement well met. José Morales' failure to assert a claim in his own right "stems from disability," not "disinterest," for José died in 1976, many years before the current controversy arose. Morales-Santana is thus the "obvious claimant," the "best available proponent," of his father's right to equal protection.

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Laws granting or denying benefits "on the basis of the sex of the qualifying parent," our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee. . . . Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification."

The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Moreover, the classification must substantially serve an important governmental interest *today,* for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." Here, the Government has supplied no "exceedingly persuasive justification."

History reveals what lurks behind § 1409. Enacted in the Nationality Act of 1940 § 1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents. During this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. . . . Through the early 20th century, a male citizen automatically conferred U.S. citizenship on his alien wife. A female citizen, however, was incapable of conferring citizenship on her husband; indeed, she was subject to expatriation if she married an alien. . . . And from 1790 until 1934, the foreign-born child of a married couple gained U.S. citizenship only through the father.

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian. In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice.

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration, which proposed § 1409, explained: "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian."

This unwed-mother-as-natural-guardian notion renders § 1409's gender-based residency rules understandable. Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture.

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. . . [T]he Court has held that no "important [governmental] interest" is served by laws grounded, as § 1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives. Laws according or denying benefits in reliance on "[s]tereotypes about women's domestic roles," the Court has observed, may "creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." Correspondingly, such laws may disserve men who exercise responsibility for raising their children. In light of the equal protection jurisprudence this Court has developed since 1971. § 1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.

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. . . [In *Nguyen v. INS* (2001)], the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth. Morales-Santana's challenge does not renew the contest over § 1409's paternal-acknowledgment requirement (whether the current version or that in effect in 1970), and the Government does not dispute that Morales-Santana's father, by marrying Morales-Santana's mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in *Nguyen* and *Miller*, the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman "in order to have assimilated citizenship-related values to transmit to [his] child." And unlike *Nguyen*'s parental-acknowledgment requirement, § 1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as "minimal."

Notwithstanding § 1409(a) and (c)'s provenance in traditional notions of the way women and men are, the Government maintains that the statute serves two important objectives: (1) ensuring a connection between the child to become a citizen and the United States and (2) preventing "statelessness," *i.e.*, a child's possession of no citizenship at all. Even indulging the assumption that Congress intended § 1409 to serve these interests, neither rationale survives heightened scrutiny.

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An unwed mother, the Government urges, is the child's only "legally recognized" parent at the time of childbirth. An unwed citizen father enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the alien mother. . . .

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U.S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the "competing national influence" that, according to the Government, justifies imposing on unwed U.S.-citizen fathers, but not unwed U.S.-citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. Lump characterization of that kind, however, no longer passes equal protection inspection.

Accepting, *arguendo,* that Congress intended the diverse physical-presence prescriptions to serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely serve the posited end. The scheme permits the transmission of citizenship to children who have no tie to the United States so long as their mother was a U.S. citizen continuously present in the United States for one year at any point in her life *prior* to the child's birth. The transmission holds even if the mother marries the child's alien father immediately after the child's birth and never returns with the child to the United States. At the same time, the legislation precludes citizenship

transmission by a U.S.-citizen father who falls a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if the father acknowledges paternity on the day of the child's birth and raises the child in the United States. One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny.

The Government maintains that Congress established the gender-based residency differential in § 1409(a) and (c) to reduce the risk that a foreign-born child of a U.S. citizen would be born stateless. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U.S.-citizen mother than it was for the foreign-born child of an unwed U.S.-citizen father. But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception, nothing in the congressional hearings and reports on the 1940 and 1952 Acts "refer[s] to the problem of statelessness for children born abroad." . . . The justification for § 1409's gender-based dichotomy . . . was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. It will not do to "hypothesiz[e] or inven[t]" governmental purposes for gender classifications "*post hoc* in response to litigation."

Infecting the Government's risk-of-statelessness argument is an assumption without foundation. "[F]oreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother's citizenship." The Government, however, neglected to expose this supposed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child

Experts who have studied the issue report that, at the time relevant here, in "at least thirty countries," citizen mothers generally could not transmit their citizenship to nonmarital children born within the mother's country. "[A]s many as forty-five countries," they further report, "did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father." In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. Taking account of the foreign laws actually in force, these experts concluded, "the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U.S. fathers, a risk perhaps greater than that for unmarried U.S. mothers." One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U.S.-citizen mothers while ignoring the same risk for children of unwed U.S.-citizen fathers.

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There are "two remedial alternatives," our decisions instruct, when a statute benefits one class (in this case, unwed mothers and their children), as § 1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). "[A] court 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 exclusion." . . . Ordinarily, we have reiterated, "extension, rather than nullification, is the proper course." Here, however, the discriminatory exception consists of *favorable* treatment for a discrete group (a shorter physical-presence requirement for unwed U.S.-citizen mothers giving birth abroad). Following the same approach as in those benefits cases—striking the discriminatory exception—leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group.

The residual policy here, the longer physical-presence requirement stated in §§ 1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment." And the potential for "disruption of the statutory scheme" is large. For if

§ 1409(c)'s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S.-citizen parent is married? Disadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress.

Although extension of benefits is customary in federal benefit cases, all indicators in this case point in the opposite direction Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule.

The gender-based distinction infecting §§ 1401(a)(7)and 1409(a) and (c), we hold, violates the equal protection principle. For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." Although the preferred rule in the typical case is to extend favorable treatment, this is hardly the typical case. Extension here would render the special treatment Congress prescribed in §1409(c), the one-year physical-presence requirement for U.S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U.S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. 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(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers.

Justice GORSUCH took no part in the consideration or decision of this case.

Justice THOMAS, with whom Justice ALITO joins, concurring in the judgment in part.

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The Court's remedial holding resolves this case. Because respondent cannot obtain relief in any event, it is unnecessary for us to decide whether the 1952 version of the INA was constitutional, whether respondent has third-party standing to raise an equal protection claim on behalf of his father, or whether other immigration laws (such as the current versions of §§ 1401(g) and 1409) are constitutional. . . .