
STATELESS IN THE UNITED STATES:
THE UNITED NATIONS' EFFORTS TO
END STATELESSNESS AND AMERICAN
GENDER DISCRIMINATION IN *LYNCH V.*
MORALES-SANTANA

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ABSTRACT

In 2014, the United Nations initiated a plan to end statelessness, the widely deplored condition in which a person does not have a nationality or the rights conferred by citizenship, which aims to fill gaps in national laws that contribute to statelessness. One such gap exists in the United States' Immigration and Nationality Act—specifically, a gender-based physical-presence requirement that prescribes how American parents can confer citizenship to their children. The Second Circuit, reviewing the physical-presence requirement, held it unconstitutional in Morales-Santana v. Lynch, despite a conflicting ruling from the Ninth Circuit, because the requirement violates the Constitution's Equal Protection Clause. Having granted certiorari to Morales-Santana, the Supreme Court must take this important opportunity to affirm the Second Circuit to ensure that no American citizen is made stateless by a wrongful interpretation of the Immigration and Nationality Act. This Note explores relevant domestic and international laws and conventions and explains why affirming the Second Circuit in Morales-Santana is consistent with both the United Nations'

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efforts to end statelessness and the U.S. Constitution.

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INTRODUCTION

This story is about two boys who grew up on opposite sides of the United States: Luis Morales-Santana and Ruben Flores-Villar. Luis Morales-Santana was born in the Dominican Republic to an American father and a Dominican mother, and he grew up in the Bronx with his parents.¹ Ruben Flores-Villar was born in Mexico to an American father and a Mexican mother, and he grew up in San Diego after his father and grandmother took him there at two years old for medical treatment.² Both boys faced legal proceedings as adults that questioned their U.S. citizenship.³ One major difference distinguished the boys: Ruben lived in California,⁴ and Luis lived in New York.⁵ The difference may seem trivial, but it sent Ruben on an uphill battle to fight for citizenship in the country in which he grew up.

In California, the Ninth Circuit Court of Appeals, in *United States v. Flores-Villar*, held that Ruben was not an American citizen, putting him at risk of deportation.⁶ In New York, on the other hand, the Second Circuit Court of Appeals, in *Morales-Santana v. Lynch*, held that Luis was a citizen and could stay in the country in which he grew up.⁷

As Ruben Flores-Villar faced deportation, he also faced a risk of statelessness, meaning that he would not be a citizen of any country.⁸ Statelessness is devastating because stateless persons are severely limited

1. *Morales-Santana v. Lynch*, 804 F.3d 520, 524 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016); Jon Campbell, *Gender Bias Ruling Saves Imprisoned New York Man from Deportation*, VILLAGE VOICE (July 10, 2015, 9:56 AM), <http://www.villagevoice.com/news/gender-bias-ruling-saves-imprisoned-new-york-man-from-deportation-7352503>.

2. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011).

3. *See id.* (“Flores-Villar was convicted of importation of marijuana . . . and . . . two counts of illegal entry . . .”); *Morales-Santana*, 804 F.3d at 524 (“Morales-Santana was . . . convicted of various felonies.”).

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

5. *Morales-Santana*, 804 F.3d at 524.

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

7. *See Morales-Santana*, 804 F.3d at 528.

8. *See* Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117, 136, <https://treaties.un.org/doc/Publication/UNTS/Volume%20360/v360.pdf> [hereinafter 1954 Statelessness Convention] (explaining that statelessness occurs when “a person . . . is not considered as a national by any State under the operation of its law”). Luckily for Ruben, he likely has Mexican citizenship by virtue of his birth in Tijuana, preventing him from being stateless. *See* INVESTIGATIONS SERV., U.S. OFFICE OF PERS. MGMT., CITIZENSHIP LAWS OF THE WORLD 133 (2001) [hereinafter WORLD CITIZENSHIP LAWS] (describing Mexican citizenship by birth “within the territory of Mexico”). Unfortunately, not everyone in Ruben’s situation is lucky enough to claim citizenship with another country, as described *infra*.

in their freedom to work, travel, or receive medical attention.⁹ Legally, they may not even exist because they have no access to vital documents, such as a birth certificate.¹⁰ A leading cause of statelessness is when different countries' laws are incompatible with each other.¹¹ At birth,¹² people primarily receive citizenship through *jus soli* laws or *jus sanguinis* laws (or both).¹³ *Jus soli* means "the right of soil"; it grants citizenship based on *where* a child is born.¹⁴ *Jus sanguinis* means "the right of blood"; it grants citizenship based on *to whom* a child is born.¹⁵ In a simple example, a child is stateless if he or she is born in a *jus sanguinis* country and cannot derive *jus sanguinis* citizenship from his or her parents.¹⁶

In the United States, preventing statelessness hits a fork in the road with the circuit split between the Second and Ninth Circuits' *Morales-Santana* and *Flores-Villar*.¹⁷ Both cases address provisions of the Immigration and Nationality Act ("INA") that set the bar for fathers to confer their citizenship to foreign-born children higher than the bar for unwed mothers,¹⁸ potentially violating the Equal Protection Clause.¹⁹ The Supreme Court granted certiorari to *Morales-Santana* in June 2016.²⁰ A Supreme Court resolution of this circuit split would ensure that people are not treated differently simply based on where they live or where they were born. Further, it would resolve a legal question in American law with international consequences.

At this point, we must add a third boy to this narrative: Leonardo

9. Morgan G. Miranda, Note, *A (Stateless) Stranger in a Strange Land: Flores-Villar and the Potential for Statelessness Under U.S. Law*, 15 J. GENDER RACE & JUST. 379, 379, 385 (2012).

10. *Id.* at 379.

11. *Id.* at 386.

12. Countries generally grant citizenship at either birth or naturalization. See WORLD CITIZENSHIP LAWS, *supra* note 8, at 4.

13. See *id.* But see *Episode 687: Buy This Passport*, NAT'L PUB. RADIO: PLANET MONEY (Mar. 2, 2016), <http://www.npr.org/sections/money/2016/03/02/468953007/episode-687-buy-this-passport> (exploring citizenship by purchase in St. Kitts and Nevis). *Jus soli* and *jus sanguinis* are the two major legal systems for citizenship at birth.

14. See WORLD CITIZENSHIP LAWS, *supra* note 8, at 4.

15. See *id.*

16. On the other hand, a child born in a *jus soli* country would not be stateless because he or she will, at the least, receive that country's citizenship.

17. *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 879–80 (W.D. Tex. 2015).

18. 8 U.S.C. §§ 1401(g), 1409(c) (2012).

19. See *Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015) ("[T]hese physical presence requirements violate equal protection . . ."), *cert. granted*, 136 S. Ct. 2545 (2016).

20. *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016) (mem.) (granting certiorari). The grant of certiorari renamed the case as "*Lynch v. Morales-Santana*." This Note uses "*Morales-Santana*" to refer to the Ninth Circuit case, and "*Lynch v. Morales-Santana*" to refer to the Supreme Court case.

Villegas-Sarabia. The different rulings for Luis Morales-Santana and Ruben Flores-Villar create problems for lower courts that must decide the fate of similarly positioned individuals, like Leonardo Villegas-Sarabia in Texas.²¹ Echoing Luis Morales-Santana's and Ruben Flores-Villar's experiences, Leonardo Villegas-Sarabia was born in Mexico to an American father and a Mexican mother, moved to the United States as a child, and faced legal proceedings that cast doubt on his citizenship as an adult.²² With a personal stake in the outcome of Luis Morales-Santana's and Ruben Flores-Villar's legal proceedings, Leonardo Villegas-Sarabia's plight demonstrates the importance of definitively resolving the conflict between the Second and Ninth Circuits.

This Note examines the background of statelessness on an international level, then provides an overview of American law and the *Morales-Santana/Flores-Villar* circuit split at a domestic level, and finally offers a resolution of the circuit split that is consistent with the U.S. Constitution and furthers the United Nations' efforts to end statelessness.

I. LEGAL AND HISTORICAL BACKGROUND OF STATELESSNESS AND AMERICAN CITIZENSHIP

A. THE PLIGHT AND HISTORY OF STATELESSNESS

Statelessness can be crippling. One well-documented case is that of Ángel Luis Joseph, a stateless person born to Haitian immigrants in the Dominican Republic.²³ Ángel was a talented baseball player who showed great promise as an athlete—so much so that the San Francisco Giants, a Major League Baseball (“MLB”) team, offered him a \$350,000 contract at age seventeen.²⁴ Unfortunately, the Dominican government's hostile policy toward Haitian migrants crippled Ángel's dream of playing in the major leagues.²⁵ Although the Dominican Republic grants birthright citizenship to people born within its borders, a constitutional loophole allows the government to deny citizenship to children of immigrants, which especially impacts migrants of Haitian descent.²⁶ The Dominican government specifically excluded the children of Haitian migrants from citizenship in

21. See *Villegas-Sarabia*, 123 F. Supp. 3d at 879–80.

22. See *id.* at 875–76.

23. Marc Lacey, *Dominican Crackdown Leaves Children of Haitian Immigrants in Legal Limbo*, N.Y. TIMES (May 25, 2008), <http://nyti.ms/2dtORUP>.

24. *Id.*

25. See *id.*

26. See *id.* The Dominican Constitution excludes birthright citizenship from children of foreign diplomats and people “in transit,” which has been interpreted to include children of immigrants. *Id.*

2004.²⁷ Under this policy, the Dominican government refused to issue Ángel a birth certificate.²⁸ Without this document, the Giants withdrew the offer, and Ángel has never played a game in the MLB.²⁹

Unfortunately, the inability to obtain a birth certificate or gain employment is just the tip of the iceberg for stateless persons. The United Nations identifies stateless persons as “person[s] who [are] not considered as a national by any State under the operation of its law.”³⁰ Stateless persons cannot obtain vital documents like birth certificates, driver licenses, and passports.³¹ In many cases, they are denied vital medical care, such as inoculations.³² They may lack fundamental rights to vote, work, marry, or own property.³³ Further, they are severely limited in their ability to travel freely due to the difficulty of acquiring travel documents and countries’ unwillingness to grant them access.³⁴ Most concerning, stateless persons lack access to adequate remedies to these ills.³⁵

The United Nations High Commissioner for Refugees (“UNHCR”) noted that at least ten million people are stateless;³⁶ over a third are children,³⁷ and all lack fundamental rights conferred by citizenship.³⁸ António Guterres, the High Commissioner, emphasized that “[s]tatelessness is a profound violation of an individual’s human rights,”

27. *Id.*

28. *Id.*

29. *Id.* See also *Players*, MLB.COM, <http://www.mlb.com/mlb/players> (last visited Nov. 7, 2016) (displaying no results for “Ángel Luis Joseph”). While Ángel was waiting for a ruling on his appeal, the Cleveland Indians took advantage of his legal situation and offered him a contract for about a third of the money that the Giants offered. Lacey, *supra* note 23.

30. 1954 Statelessness Convention, *supra* note 8, at 136.

31. Miranda, *supra* note 9, at 379. As we have seen with Ángel Luis Joseph, this inability to obtain vital documents can be detrimental to a stateless person, leading to an inability to secure other human freedoms such as employment. See Lacey, *supra* note 23.

32. Miranda, *supra* note 9, at 379, 385.

33. *Id.*

34. *Id.* at 379, 385–86.

35. See Hélène Lambert, *Statelessness Is an Evil that Has Been Hidden for Too Long*, GUARDIAN (Nov. 5, 2014, 6:31 AM), <http://www.theguardian.com/commentisfree/2014/nov/05/statelessness-evil-hidden-long-un-refugee-agency> (“[Statelessness] marginalises and makes people feel worthless with no prospect of their situation ever improving, no hope for a better future for themselves or their children.”).

36. *Ending Statelessness*, UNHCR, <http://www.unhcr.org/pages/49c3646c155.html> (last visited Nov. 7, 2016).

37. UNITED NATIONS HIGH COMM’R FOR REFUGEES, A SPECIAL REPORT: ENDING STATELESSNESS WITHIN 10 YEARS 4 (2014) [hereinafter UNHCR SPECIAL REPORT]. See also *id.* at 8 (“A stateless child is born every 10 minutes . . .”).

38. See Miranda, *supra* note 9, at 379, 385.

but he noted hopefully that “solutions are so clearly within reach.”³⁹

Ending statelessness is within reach because statelessness is an entirely “man-made problem” that results from a number of “bewildering” causes, such as countries’ dissolution or decolonization, political and legal directives, and incompatibilities between different national laws.⁴⁰ The most illustrative example is the Soviet Union’s collapse,⁴¹ which left approximately 600,000 people stateless for more than two decades.⁴²

However, the biggest cause of statelessness is the incompatibility of national laws, which are generally *jus soli* or *jus sanguinis*.⁴³ At birth, countries issue citizenship in two ways: *jus soli* or *jus sanguinis*.⁴⁴ *Jus soli* laws bestow citizenship based on where a child is born;⁴⁵ *jus sanguinis* laws bestow citizenship based on a child’s parents’ citizenships.⁴⁶ So people may be stateless simply because their country of birth and their parents’ countries’ national laws do not align with each other.

Focusing on the United States, the United States Office of Personnel and Management (“USOPM”) compiled data⁴⁷ that show that at least forty-six countries’ national laws present a risk of statelessness when they interact with American law.⁴⁸ In the American context, statelessness can

39. UNITED NATIONS HIGH COMM’R FOR REFUGEES, GLOBAL ACTION PLAN TO END STATELESSNESS: 2014–2024 (2014) [hereinafter UNHCR GLOBAL ACTION PLAN]. The United Nations aims to end statelessness by 2024, thus shining a spotlight on the issue and hastening its resolution. *Id.* Countries have been adopting the 1961 Convention on the Reduction of Statelessness more rapidly in the 2010s given this movement. UNHCR SPECIAL REPORT, *supra* note 37, at 5.

40. UNHCR SPECIAL REPORT, *supra* note 37, at 2–3.

41. See Lambert, *supra* note 35.

42. UNHCR SPECIAL REPORT, *supra* note 37, at 3. Today, one of the most prominent causes of new statelessness is the Syrian refugee crisis. See Diana Al Rifai, *UN: 36,000 Newborn Syrian Stateless in Lebanon*, AL JAZEERA (May 11, 2015), <http://www.aljazeera.com/news/2015/05/150506060248502.html>. In Lebanon alone, there are more than 36,000 children born stateless due to the Syrian crisis. *Id.*

43. *Ending Statelessness*, *supra* note 36. Note that eye-catching events, such as national conflicts, and incompatibilities in national laws are not mutually exclusive causes of statelessness. For example, if newborn refugees are born in a nation that gives them citizenship via *jus soli* citizenship or a statutory exception, then the statelessness problem would be reduced. However, even “adequate” protections, such as the nation-in-conflict offering *jus sanguinis* citizenship, would not aid in some circumstances, such as when newborn refugees lose their parents or documentation.

44. See WORLD CITIZENSHIP LAWS, *supra* note 8, at 4. Countries may have *jus soli*, *jus sanguinis*, or both methods of bestowing citizenship. See *id.*

45. *Id.*

46. *Id.*

47. *Id.* at 3. These data from 2001 (the most recent year the United States Office of Personnel and Management compiled such data) illustrate the risk of statelessness by compiling the citizenship laws of the world.

48. Those countries are Algeria, Armenia, the Bahamas, Bahrain, Bangladesh, Bhutan, Brunei, Burundi, Cambodia, Cameroon, Cyprus, Djibouti, Egypt, Germany, Greece, Guinea, Indonesia, Iran,

occur when a child is born in a country without *jus soli* citizenship, and his or her parents cannot confer their citizenship through the United States' limited form of *jus sanguinis* law. Yet American vigilance should not be limited to the countries identified by the USOPM because even compatible citizenship laws may lead to statelessness due to prejudice and other issues, as demonstrated by Ángel Luis Joseph's story.⁴⁹

Because citizenship laws may be difficult to grasp in a vacuum, this Note demonstrates these concepts with some hypotheticals using the INA,⁵⁰ which features a hybrid system with both *jus soli* and *jus sanguinis* citizenship.⁵¹ Imagine a hypothetical unwed couple, Han and Leia, and their son, Ben. If Ben were born in the United States, he would be a *jus soli* American citizen by virtue of the Fourteenth Amendment, regardless of the citizenship status of his parents.⁵² If Ben were born anywhere else in the world, then his citizenship under the American *jus sanguinis* system would depend on his parents' citizenship.⁵³ For example, if Ben were born in Canada, he may have *jus sanguinis* American citizenship because the INA allows many citizen-parents to confer citizenship to their children.⁵⁴ However, if Han and Leia cannot confer their citizenship to Ben by blood, then he would be stateless. For instance, if Ben were born in a country with

Japan, Jordan, Kiribati, Kuwait, Lebanon, Lithuania, Madagascar, Maldives, Monaco, Mongolia, Morocco, Myanmar, Namibia, Oman, Qatar, Rwanda, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Sudan, Swaziland, Sweden, Syria, Taiwan, Togo, United Arab Emirates, and Yemen. Miranda, *supra* note 9, at 387–95 (citing WORLD CITIZENSHIP LAWS, *supra* note 8).

49. See Lacey, *supra* note 23.

50. These hypotheticals are based on the Immigration and Nationality Act of 1952 (“1952 Act”), the Act relevant to Morales-Santana’s case. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). The provisions presently in force present many of the same problems, but to a lesser extent. See, e.g., 8 U.S.C. § 1401(g) (2012) (requiring citizen-parents to be “physically present” for “not less than five years, at least two of which were after attaining the age of fourteen years”).

51. See U.S. CONST. amend. XIV, § 1; 8 U.S.C. §§ 1401, 1409.

52. U.S. CONST. amend. XIV, § 1. Note that there are exceptions, such as when a parent is a foreign diplomat or part of an occupying force. See *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).

53. Even if both Han and Leia are American citizens, they may not be able to pass on American citizenship to Ben. For example, under the current provisions, if Han and Leia were *jus sanguinis* American citizens who had lived abroad all their lives, then they would be unable to pass on their American citizenship to Ben. In that scenario, if Ben were born in a *jus sanguinis* country, then he would be stateless. See 8 U.S.C. §§ 1401, 1409.

54. See Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. F. 161, 163–64 (2015) (giving, as an example, the case of politician Ted Cruz, who was born in Canada to an American mother); Nathan Perl-Rosenthal & Sam Erman, *Ted Cruz: Is He or Isn't He Eligible to Be President?*, HIST. NEWS NETWORK (Jan. 31, 2016), <http://historynewsnetwork.org/article/161859> (discussing Ted Cruz's citizenship status in relation to his presidential eligibility).

only *jus sanguinis* citizenship—Germany, for example—he would be unable to receive *jus soli* citizenship, and would be stateless if his parents were unable to confer *jus sanguinis* citizenship to him.⁵⁵

B. THE UNITED NATIONS' RENEWED EFFORTS TO END STATELESSNESS

The United Nations renewed its efforts to end statelessness when UNHCR launched its Global Action Plan to End Statelessness (“Global Action Plan”) in 2014,⁵⁶ also known as the #IBELONG campaign.⁵⁷ In the plan, UNHCR supports United Nations Member States’ efforts to end statelessness in several ways, such as “[s]upport[ing] initiatives by the legal community . . . including through strategic litigation [and b]uild[ing] the capacity of legal professionals and the justice sector on statelessness and nationality issues.”⁵⁸

The Global Action Plan builds on goals that were set out in the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.⁵⁹ The 1954 Convention addressed certain fundamental rights of stateless persons, including the right to obtain vital documents, education, employment, and housing.⁶⁰ The 1961 Convention emphasized establishing international frameworks to prevent statelessness by setting up safeguards in national laws.⁶¹ When UNHCR implemented the Global Action Plan in 2014, eighty-three countries had signed on to the 1954 Convention and sixty-one countries had signed on to the 1961 Convention.⁶² The United States has not signed on to either the 1954 or 1961 Convention,⁶³ despite repeatedly condemning

55. See WORLD CITIZENSHIP LAWS, *supra* note 8, at 82 (describing German citizenship laws, which, until 2000, did not permit citizenship by soil). Appropriately, the Global Action Plan aims to end the gaps in national laws that lead to statelessness. See *infra* Part I.B.

56. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 4 (noting UNHCR’s call in October 2013 for “total commitment of the international community to end statelessness” (internal quotation marks omitted)).

57. #IBELONG, UNHCR, <http://www.unhcr.org/ibelong> (last visited Nov. 7, 2016).

58. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 10.

59. *Id.* at 6; *UN Conventions on Statelessness*, UNHCR, <http://www.unhcr.org/pages/4a2535c3d.html> (last visited Nov. 7, 2016).

60. *Objectives and Key Provisions of the 1954 Convention Relating to the Status of Stateless Persons*, UNHCR (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3394.html>.

61. *Objectives and Key Provisions of the 1961 Convention on the Reduction of Statelessness*, UNHCR (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3914.html>.

62. *UN Conventions on Statelessness*, *supra* note 59.

63. UNHCR, *States Party to the Statelessness Conventions*, REFWORLD (Oct. 1, 2016), <http://www.refworld.org/docid/54576a754.html>. In addition to the 1954 and 1961 Conventions, the United States also has not implemented many other conventions and treaties that lend support to the plan, such as the Convention on the Rights of the Child. See UNHCR GLOBAL ACTION PLAN, *supra*

statelessness as a condition.⁶⁴

The Global Action Plan lays out a ten-action plan to end statelessness by 2024.⁶⁵ The ten actions are: (1) “resolve existing major situations of statelessness”; (2) “ensure that no child is born stateless”; (3) “remove gender discrimination from nationality laws”; (4) “prevent denial, loss or deprivation of nationality on discriminatory grounds”; (5) “prevent statelessness in cases of state succession”; (6) “grant protection status to stateless migrants and facilitate their naturalization”; (7) “ensure birth registration for the prevention of statelessness”; (8) “issue nationality documentation to those with entitlement to it”; (9) “acceding to the UN statelessness conventions”; and (10) “improve quantitative and qualitative data on stateless populations.”⁶⁶ The actions address statelessness with a comprehensive and multi-sector approach; some actions aim to fix legal impediments that contribute to statelessness, while others aim to fix de facto statelessness.⁶⁷ This Note focuses on actions two and three because they are the most relevant to an analysis of *Lynch v. Morales-Santana*.

Action two aims to ensure that no child is born stateless with four goals: (1) “[n]o reported cases of childhood statelessness”; (2) “[a]ll States have a provision in their nationality laws to grant nationality to stateless children born in their territory”; (3) “[a]ll States have a provision in their nationality laws to grant nationality to children of unknown origin found in their territory (foundlings)”; and (4) “[a]ll States have a safeguard in their nationality laws to grant nationality to children born to nationals abroad and who are unable to acquire another nationality.”⁶⁸ Domestically, the United States excels on action two’s second and third goals because it is a *jus soli* country that grants citizenship to foundlings under age five.⁶⁹ However, federal courts’ interpretation of the INA shows that American law does not adequately address action two’s fourth goal.⁷⁰

note 39, at 27; *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. COMM’R, <http://indicators.ohchr.org> (last visited Nov. 7, 2016) (noting the United States’ failure to ratify the Convention on the Rights of the Child).

64. See *infra* Part I.C.

65. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 2, 4.

66. *Id.* at 2–3.

67. For example, Action Seven, “ensure birth registration for the prevention of statelessness,” aims to fix de facto, rather than legal, statelessness. *Id.* at 18–20.

68. *Id.* at 9.

69. 8 U.S.C. § 1401(f) (2012) (granting birthright citizenship to “a person of unknown parentage found in the United States while under the age of five years”).

70. See *infra* Part II.

Action three aims to remove gender discrimination from national laws with the goal of ensuring that “[a]ll States have nationality laws which treat women and men equally with regard to conferral of nationality to their children and with regard to the acquisition, change and retention of nationality.”⁷¹ This action mainly focuses on discrimination in laws that limit women’s rights to confer citizenship to their children.⁷² As this Note discusses *infra*, while the INA facilitates—rather than limits—a woman’s ability to pass on her citizenship, the INA problematically contributes to the plight of women who suffer discrimination, and the policies behind the INA may be born from sexist stereotypes from the early twentieth century.

C. RISKS OF STATELESSNESS UNDER AMERICAN CITIZENSHIP LAWS

Risks of statelessness persist in American citizenship laws, despite the United States loudly and frequently echoing the United Nations’ concerns regarding statelessness. For example, the American Convention on Human Rights declares that “[e]very person has the right to a nationality.”⁷³ Further, the Supreme Court of the United States described statelessness as a “deplored” condition with “disastrous consequences,”⁷⁴ and it repeatedly reaffirmed that preventing statelessness is an important government interest.⁷⁵ For instance, former Supreme Court Chief Justice Earl Warren denounced statelessness on several occasions; in 1958, he denounced statelessness as “a form of punishment more primitive than torture.”⁷⁶

Primarily, the United States’ hybrid legal structure of constitutional *jus soli* citizenship and statutory *jus sanguinis* citizenship leaves gaps that heighten the risk of statelessness. On the one hand, children born in the United States have a low risk of statelessness because the Fourteenth Amendment grants *jus soli* citizenship to all children born in the United

71. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 12.

72. *Id.* (“27 States have nationality laws which do not allow women to confer nationality to their children on an equal basis as men.”).

73. American Convention on Human Rights art. 20, Nov. 22, 1969, 1144 U.N.T.S. 123, 150. While the United States has not ratified this document, it became a signatory to it in 1977. *American Convention on Human Rights “Pact of San José, Costa Rica,”* UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1> (last visited Nov. 7, 2016).

74. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion).

75. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160–61 (1963) (characterizing “[d]eprivation of citizenship” as “an issue of the utmost import”); *Trop*, 356 U.S. at 101–03 (plurality opinion) (refusing to impose denationalization as a punishment).

76. *Trop*, 356 U.S. at 101–03 (plurality opinion) (deeming denationalization barred by the Eighth Amendment). *See also* UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 6 (“At least 10 million people worldwide continue to suffer the privations and indignity of being denied nationality.”).

States.⁷⁷ On the other hand, children born outside of the United States to American parents face a significantly higher risk of statelessness because they must rely on their parents to confer *jus sanguinis* citizenship to them.⁷⁸ For those children to receive citizenship, the INA requires that their parents meet various statutory requirements—notably including a requirement to be physically present in the United States for a number of years.⁷⁹ Further, in this scenario, nonmarital children face a high risk of statelessness because their American parents may face more stringent preconditions.⁸⁰ Finally, some countries will only recognize legitimated children as citizens.⁸¹

A nonmarital child born outside the United States to at least one citizen-parent must derive American citizenship via *jus sanguinis* laws, but in a significant number of situations, the child's ability to do so largely depends on whether the child's American parent is male or female.⁸² This issue is coming to a breaking point with Luis Morales-Santana and Ruben Flores-Villar, who both were born abroad to unwed parents⁸³ and have American fathers who cannot statutorily pass on American citizenship because they are male.⁸⁴ Although they are similarly situated, their cases resulted in drastically different outcomes.⁸⁵

77. U.S. CONST. amend. XIV, § 1. Children born in the United States are largely protected from the risk of statelessness because their American citizenship is guaranteed by the Fourteenth Amendment. *But see* Birthright Citizenship Act, S. 45, 114th Cong. (2015) (pending legislation to reduce *jus soli* citizenship); Birthright Citizenship Act, H.R. 140, 114th Cong. (2015) (same). As a counterexample, the Dominican Republic's reduction in *jus soli* birthright citizenship has led to a drastic increase in statelessness, denationalization, and discrimination. *Denationalization and Statelessness in the Dominican Republic*, IACHR, <http://www.oas.org/en/iachr/multimedia/2016/DominicanRepublic/dominican-republic.html> (last visited Nov. 7, 2016).

78. See 8 U.S.C. § 1401(c)–(e), (g) (2012).

79. See, e.g., *id.* § 1401(g).

80. See *Runnett v. Shultz*, 901 F.2d 782, 787 (9th Cir. 1990) (justifying “a more lenient policy toward illegitimate children of U.S. citizen mothers” due to their increased risk of statelessness).

81. See, e.g., WORLD CITIZENSHIP LAWS, *supra* note 8, at 69 (describing Egyptian citizenship law as “based on the concept of legitimate descent”).

82. The current version of the INA somewhat alleviates this problem. See 8 U.S.C. § 1401(g) (featuring a reduced physical-presence requirement of five years with two years after age fourteen). But, as the Second Circuit has recognized, this issue remains a contested one. *Morales-Santana v. Lynch*, 804 F.3d 520, 523–24 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

83. Luis Morales-Santana was born in the Dominican Republic, Ruben Flores-Villar was born in Mexico, and both had American fathers and foreign-citizen mothers. *Morales-Santana*, 804 F.3d 520, 524; *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011).

84. See *Morales-Santana*, 804 F.3d at 527; *Flores-Villar*, 536 F.3d at 995–96.

85. See *Morales-Santana*, 804 F.3d at 523–24 (recognizing Luis Morales-Santana's citizenship); *Flores-Villar*, 536 F.3d at 993 (refusing to recognize Ruben Flores-Villar's citizenship).

The relevant statute here is the 1952 INA (“1952 Act”)—specifically, its physical-presence requirement.⁸⁶ Under the 1952 Act, if a child is born to a citizen and a foreign national, then the citizen-parent must have resided in the United States or an outlying territory for a total of ten years, five of which must be after the citizen-parent turned fourteen.⁸⁷ Under a section specific to nonmarital children, Congress set the physical-presence requirement for unwed citizen-mothers to one year.⁸⁸ Yet, unwed citizen-fathers needed to meet a more onerous ten-year requirement.⁸⁹ This gender distinction is the crux of the potential gender discrimination in the 1952 Act relevant to this Note.

For clarity, let’s consider Han, Leia, and Ben under the 1952 Act. If Han were a foreign citizen, Leia were an American citizen, and Ben were born abroad and out of wedlock, then Leia would be able to confer her American citizenship to Ben if she had resided in the United States for at least one year before giving birth.⁹⁰ But consider another scenario—if Han were an American citizen and Leia were a foreign citizen, for Han to confer American citizenship to Ben, Han would have had to reside in the United States for at least ten years before Leia gives birth, and five of those ten years must have been after Han turned fourteen.⁹¹ This would put a significant burden on Han because of his gender. More concerning, it would be physically impossible for Han to confer his citizenship if his son was born before Han’s nineteenth birthday.⁹² Thus, under American law, Ben’s risk of statelessness skyrockets because his father, instead of his mother, was an American citizen.

86. Immigration and Nationality Act, Pub. L. No. 82-414, § 301(a)(7), 66 Stat. 163, 236 (1952) (current version at 8 U.S.C. § 1401(g) (2012)). The 1952 version of the Act applies in *Lynch v. Morales-Santana* because that is the version that was in effect at the time of Luis Morales-Santana’s birth. See *Morales-Santana*, 804 F.3d at 523. The Ninth Circuit used the 1974 version of the Immigration and Nationality Act, which has the same language in the relevant statutes. See *Flores-Villar*, 536 F.3d at 994–95.

87. Immigration and Nationality Act § 301(a)(7), 66 Stat. at 236.

88. *Id.* § 309(c), 66 Stat. at 238–39 (current version at 8 U.S.C. § 1409(c) (2012)). Regardless of the parent’s gender, the child’s paternity must be proven by legitimation before the age of twenty-one. *Id.* § 309(a), 66 Stat. at 238 (current version at 8 U.S.C. § 309(a) (2012)). Nonetheless, this does not take away the fact that the child’s other parent is still his or her parent at birth.

89. See *id.* § 301(a)(7).

90. See *id.* § 309(c). She must also legitimize him before he turns twenty-one. *Id.* § 309(a).

91. See *id.* § 301(a)(7).

92. See *id.* This is the scenario in *Flores-Villar*. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff’d by an equally divided court*, 131 S. Ct. 2312 (2011).

D. AMERICAN CITIZENSHIP LAWS ARE INFLUENCED BY HISTORICAL
GENDER AND RACE STEREOTYPES

American citizenship laws have a historical undercurrent of discrimination based on gender stereotypes “shaped by . . . beliefs about men’s and women’s relative capacities and roles that our modern constitutional sex-equality doctrine is intended to repudiate.”⁹³ Historically, men “determined the ‘political and cultural character’ of their families.”⁹⁴ Under this regime, married mothers had no right to confer citizenship to their children until 1934.⁹⁵ But, during the same time, unmarried mothers could confer their citizenship to their children, but only because Congress believed unmarried mothers stood “in the place of the father,”⁹⁶ a reflection of the contemporary stereotype that single mothers are preferable to single fathers.⁹⁷

Prior to 1940, a child could derive citizenship from his or her father only if the father had spent time in the United States.⁹⁸ When fathers were absent, Congress allowed unmarried citizen-mothers to “stand[] in the place of the father” to confer citizenship.⁹⁹ In 1940, Congress enacted “an age-calibrated ten-year physical presence requirement” that required citizen-fathers to be physically present in the United States for ten years before they could confer citizenship to their children.¹⁰⁰ In the same statute, Congress allowed unmarried citizen-mothers to confer citizenship to their children if they had spent any amount of time in the United States.¹⁰¹ In the 1952 Act, Congress kept the basic language from the 1940 Act but increased the physical-presence requirement for unmarried American mothers to one continuous year.¹⁰²

93. Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians’ Amicus Brief in Flores-Villar v. United States*, 91 B.U. L. REV. 1485, 1490 (2011). See also *infra* Part II.A.2.a.

94. *Morales-Santana v. Lynch*, 804 F.3d 520, 532 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

95. *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearing Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 431 (1945), quoted in *Morales-Santana*, 804 F.3d at 532.

96. *Id.*

97. *Morales-Santana*, 804 F.3d at 534 n.13 (noting that contemporary government’s “comments reflect the view that the mother [is a nonmarital child’s] natural guardian and . . . has the right to the custody and control of her bastard child” (quoting 76th Cong. 431) (internal quotation marks omitted)).

98. *Morales-Santana*, 804 F.3d at 532.

99. *Id.*; 76th Cong. 431.

100. *Morales-Santana*, 804 F.3d at 532 (citing Nationality Act of 1940, Pub. L. No. 76-853, § 201(g), 54 Stat. 1137, 1139 (repealed 1952)).

101. *Id.* (citing Nationality Act of 1940 § 205, 54 Stat. 1137, 1139–40 (repealed 1952)).

102. *Id.* (citing Immigration and Nationality Act, Pub. L. No. 82-414, § 309(c), 66 Stat. 163, 238–

Discriminatory race and gender stereotypes permeated early twentieth-century America, and such stereotypes motivated Congress to deny citizenship to foreign-born children that it deemed unworthy of American citizenship. In 1912, Edwin Borchard, “one of the most well-respected citizenship law experts,”¹⁰³ declared that it “seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.”¹⁰⁴

In 2014, Kristin Collins identified numerous legal ramifications that resulted from race and gender stereotypes in the early- to mid-twentieth century, noting that “restriction of father-child citizenship transmission outside the marital family regularly operated to exclude nonwhite children from citizenship.”¹⁰⁵ For example, following World War II, the U.S. government “encouraged soldiers to wed their European sweethearts,” whereas it “thwarted marriages between soldiers and their Asian girlfriends during the Korean and Vietnam Wars.”¹⁰⁶ Further, as Justices Ruth Bader Ginsburg and Sandra Day O’Connor observed, these historical laws and policies saddled women with the responsibility for nonmarital children.¹⁰⁷

Justices Ginsburg and O’Connor’s observations succinctly encapsulate the influence of gender bias in the 1952 Act, in which Congress shifted childrearing responsibilities from single fathers to single mothers by setting a significantly higher physical-presence requirement for men than for unmarried women.¹⁰⁸ Further, the 1952 Act absolves American fathers of even more childrearing responsibilities because unmarried, foreign-citizen mothers are presumed to shoulder the responsibility for nonmarital

39 (1952) (current version at 8 U.S.C. § 1409(c) (2012)). During oral argument in *Lynch v. Morales-Santana*, Justice Stephen Breyer suggested that the one-year, continuous physical-presence requirement is difficult to satisfy as an administrative matter because the citizen-claimant has the burden of proving that he or she has not left the United States for even a second within a continuous year. Transcript of Oral Argument at 28–29, *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016) (No. 15-1191), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1191_6k47.pdf.

103. Collins, *supra* note 93, at 1492.

104. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 612 (1915), *quoted in* Collins, *supra* note 93, at 1492.

105. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2158 (2014).

106. Collins, *supra* note 93, at 1493.

107. *Id.* at 1495 (“Justice Ginsburg noted wryly, ‘[t]here are . . . men out there who are being Johnny Appleseed,’” and “Justice O’Connor articulated a similar concern, observing that our sex-based citizenship laws are ‘paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.’” (alterations in original)).

108. Immigration and Nationality Act, Pub. L. No. 82-414, § 309(c), 66 Stat. 163, 238–39 (1952) (current version at 8 U.S.C. § 1409(c) (2012)) (prescribing a one-year requirement for unmarried mothers to confer *jus sanguinis* citizenship to their children).

children—including the responsibility to confer citizenship.¹⁰⁹

II. THE *MORALES-SANTANA* AND *FLORES-VILLAR* CIRCUIT SPLIT HAS HARMFUL EFFECTS

The Supreme Court's grant of certiorari to *Lynch v. Morales-Santana* indicates that either the Second or the Ninth Circuit may have erred in their ruling regarding the constitutionality of the 1952 Act's physical-presence requirement.¹¹⁰ If the requirement is unconstitutional,¹¹¹ then applying it to deny citizenship to an individual would amount to punishing criminal acts with denationalization (stripping citizens of their citizenship), which the Supreme Court recognizes as a cruel, unusual, and "obnoxious" punishment.¹¹² Thus, with the *Morales-Santana* and *Flores-Villar* circuit split, whether nonmarital children born outside of the United States are American citizens—and whether they have a heightened risk of statelessness—may depend on something as simple as whether they live in New York or California since appellate circuits have construed the physical-presence requirement's gender discrimination differently.¹¹³

Interestingly, the Supreme Court granted certiorari to *Flores-Villar v. United States* in 2011 but did not resolve the issue, affirming the Ninth Circuit ruling in an evenly divided four-to-four vote without an opinion.¹¹⁴ Thus, *Flores-Villar v. United States* does not bind the Court in *Lynch v.*

109. See *id.* Thus, American fathers who cannot confer citizenship to their nonmarital children born outside the United States to foreign-citizen mothers would put their children at a high risk of statelessness.

110. Although the current version of the INA requires fewer years of physical presence than the 1952 Act—reducing the severity of the issues identified *supra*—the current physical-presence requirement remains an equal protection issue because of its unequal treatment of unmarried men and women. See 8 U.S.C. §§ 1401(g), 1409(c) (2012).

111. Under the Second Circuit's interpretation of the 1952 Act, the physical-presence requirement is unconstitutional because it violates equal protection. *Morales-Santana v. Lynch*, 804 F.3d 520, 521 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

112. *Trop v. Dulles*, 356 U.S. 86, 101–03 (1958) (plurality opinion) (deeming denationalization barred by the Eighth Amendment).

113. See generally, *e.g., id.*; *Morales-Santana*, 804 F.3d 520; *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011); *Runnett v. Shultz*, 901 F.2d 782 (9th Cir. 1990). Under the doctrine of stare decisis, district courts must follow precedent from their respective circuit court of appeal; thus, individuals' rights to citizenship may depend on where they live, and consequently, in which court their cases are argued.

114. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011), *aff'g by an equally divided court Flores-Villar*, 536 F.3d 990. Justice Elena Kagan recused herself from the vote because she signed the government's *Flores-Villar* brief in her previous role as Solicitor General. Collins, *supra* note 93, at 1486 n.4.

Morales-Santana.¹¹⁵

By affirming the Second Circuit's decision in *Morales-Santana*, the Supreme Court can reduce the dangers created by the *Morales-Santana* and *Flores-Villar* circuit split and may aid UNHCR's efforts to prevent statelessness. Further, if the Second Circuit correctly held that the 1952 Act's physical-presence requirement is unconstitutional, then the Ninth Circuit's ruling to deny citizenship to Ruben Flores-Villar would have been an unconstitutional, de facto denationalization because he had American citizenship since birth.

A. *MORALES-SANTANA V. LYNCH*

Luis Morales-Santana was born in 1962 in the Dominican Republic to a Puerto Rican father and a Dominican mother.¹¹⁶ His father, born and raised in Puerto Rico, was an American citizen by virtue of the Jones Act;¹¹⁷ he left Puerto Rico for the Dominican Republic “[twenty] days before his nineteenth birthday” to work for a sugar company.¹¹⁸ In the Dominican Republic, he met Luis's mother, and she gave birth to Luis out of wedlock.¹¹⁹ Luis's father and mother later married, legitimating Luis.¹²⁰ One year before his father died, Luis gained admittance to the United States as a lawful permanent resident.¹²¹ As an adult, Luis was “convicted of various felonies” and faced removal proceedings.¹²² He argued that the government could not deport him because the 1952 Act's physical-presence requirement was unconstitutional, and therefore his father conferred *jus sanguinis* American citizenship to him at birth.¹²³

The physical-presence requirement of the 1952 Act, the effective INA at Luis's birth,¹²⁴ required an unmarried father to have been physically

115. ANDREW NOLAN, CONG. RESEARCH SERV., R44400, THE DEATH OF JUSTICE SCALIA: PROCEDURAL ISSUES ARISING ON AN EIGHT-MEMBER SUPREME COURT 4 (2016).

116. *Morales-Santana v. Lynch*, 804 F.3d 520, 524 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

117. *Id.*

118. *Id.*

119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.* His convictions “included robbery, burglary and attempted murder.” Amy Howe, *Argument Preview: Justices to Take On Citizenship Question – Again*, SCOTUSBLOG (Nov. 7, 2016, 7:54 AM), <http://www.scotusblog.com/2016/11/argument-preview-justices-to-take-on-citizenship-question-again>.

123. *See Morales-Santana*, 804 F.3d at 525.

124. *See id.* at 523. Considering whether an individual derived American citizenship from his mother, the Second Circuit in *Ashton v. Gonzales* applied the law that was in effect when the individual

present within the United States for at least ten years—five of which needed to be after age fourteen—prior to his child’s birth to confer *jus sanguinis* citizenship to his child; meanwhile, the requirement does not apply to unmarried mothers.¹²⁵ In *Morales-Santana*, Luis’s father was twenty days short of satisfying the physical-presence requirement because he moved to the Dominican Republic for work twenty days before his nineteenth birthday.¹²⁶ So Luis faced deportation from the country in which he grew up because his father missed the physical-presence requirement by about three weeks. If, instead, Luis’s mother had been an American citizen in the same circumstances as his father, she could have conferred *jus sanguinis* citizenship to Luis easily because she only needed to be physically present in the United States for one year prior to Luis’s birth.¹²⁷ Thus, because the physical-presence requirement explicitly treats unmarried men and women differently, Luis asserted his citizenship and argued that the physical-presence requirement violates the Equal Protection Clause.¹²⁸

1. The Second Circuit Applied Intermediate Scrutiny

Courts review equal protection issues with a three-tiered system: (1) rational basis review, (2) intermediate scrutiny, and (3) strict scrutiny.¹²⁹ Each standard tests how tightly a law is related to a governmental purpose.¹³⁰ If a law satisfies a higher standard, then it also

“fulfilled the last requirement for derivative citizenship.” *Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2015). The 1952 Act applies in *Morales-Santana* because the statute in question confers *jus sanguinis* citizenship at birth, meaning that the relevant law is the one in effect at Luis’s time of birth.

125. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 301(a)(7), 66 Stat. 163, 236 (current version at 8 U.S.C. § 1401(g) (2012)).

126. *Morales-Santana*, 804 F.3d at 524.

127. See Immigration and Nationality Act of 1952 § 309(c), 66 Stat. at 238–39 (current version at 8 U.S.C. § 1409(c) (2012)).

128. *Morales-Santana*, 804 F.3d at 523–25. Luis put forth a total of four arguments in favor of his derivative citizenship: (1) the twenty-day gap between his father’s nineteenth birthday and moving to the Dominican Republic was a de minimis gap; (2) his father’s employer was effectively a part of the U.S. government or a statutory international organization; (3) the Dominican Republic was an outlying possession of the United States at the time of Luis’s birth; and (4) the 1952 Act violates the Equal Protection Clause. *Id.* at 525. In an effort to resolve the issue on factual grounds before setting constitutional precedent, the court quickly considered and dismissed Luis’s first three arguments on statutory grounds. *Id.* at 525–27. Finding no way to avoid the constitutional issue, the court then moved on to the equal protection issue. *Id.* at 527.

129. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3(a)(ii)–(iv) (5th ed. 2014).

130. For example, under intermediate scrutiny, a law must be substantially related to an actual and important government purpose. *Id.* § 18.3(a)(iv).

satisfies any lower standards.¹³¹ This Note focuses on intermediate scrutiny and rational basis review.¹³²

On the one hand, intermediate scrutiny is typically used for equal protection issues that involve discrimination based on gender or legitimacy.¹³³ Under intermediate scrutiny, the government must show that a law is substantially related to an important government purpose.¹³⁴ Further, the justification for the purpose must be something that Congress actually intended when the bill was passed, rather than “hypothesized or invented post hoc in response to litigation.”¹³⁵ For gender issues, the justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹³⁶

On the other hand, rational basis review is the default level of scrutiny that gives immense deference to Congress and is very easy for the government to satisfy.¹³⁷ Under rational basis review, the government must show that a law is rationally related to a legitimate government purpose.¹³⁸ Rational basis review is traditionally applied to “fundamental sovereign attribute[s],” such as “the admission of aliens,”¹³⁹ and the government will almost always prevail under it.¹⁴⁰

Morales-Santana presents a tension between the general rules that gender issues receive intermediate scrutiny,¹⁴¹ and that immigration and

131. See *id.* § 18.3(a)(ii)–(iv).

132. Courts that have reviewed the INA’s physical-presence requirement have focused on these two levels of scrutiny. See, e.g., *Morales-Santana*, 804 F.3d at 528; *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff’d by an equally divided court*, 131 S. Ct. 2312 (2011); *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 883 (W.D. Tex. 2015).

133. ROTUNDA & NOWAK, *supra* note 129, § 18.3(a)(iv). See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (overruling the Virginia Military Institute’s male-only admissions policy).

134. *Virginia*, 518 U.S. at 533; ROTUNDA & NOWAK, *supra* note 129, § 18.3(a)(iv).

135. *Morales-Santana*, 804 F.3d at 520 (quoting *Virginia*, 518 U.S. at 533 (internal quotation marks omitted)).

136. *Virginia*, 518 U.S. at 533. In other words, Congress must have enacted the law at issue because of a genuine concern for an important government purpose, and not because of impermissible stereotyping.

137. See ROTUNDA & NOWAK, *supra* note 129, § 18.3(a)(ii).

138. *Id.*

139. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotation marks omitted).

140. See ROTUNDA & NOWAK, *supra* note 129, § 18.3(a)(ii) (“So long as it is arguable that the other branch of government had . . . a basis for creating the classification a court should not invalidate the law.”).

141. *Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016). *Morales-Santana* argued that intermediate scrutiny should apply because the 1952 Act’s physical-presence requirement constitutes gender discrimination given that its explicit gender-based classification meant that his right to obtain birthright citizenship depended on his citizen-parent’s gender. *Id.* at 527.

naturalization issues receive rational basis review.¹⁴² This tension is also illustrated in *Fiallo v. Bell*, in which the Supreme Court applied rational basis review to a 1952 Act provision that gave special preference to illegitimate noncitizens seeking entry into the United States based on their relationships with their citizen-mothers, but not their citizen-fathers.¹⁴³ As is common with rational basis review, the *Fiallo* Court found the special preference constitutional, noting that “it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision.”¹⁴⁴ Nonetheless, “citizen 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.”¹⁴⁵

The Second Circuit applied intermediate scrutiny in *Morales-Santana* because the issue hinged on gender discrimination and equal protection, noting that “the Supreme Court has never applied the deferential *Fiallo* standard to issues of gender discrimination under [8 U.S.C.] § 1409, despite being asked to do so on at least three occasions.”¹⁴⁶ The court declined to follow *Fiallo* because *Fiallo* concerned aliens who never had citizenship, whereas Luis Morales-Santana had citizenship at birth that is not subject to immigration laws.¹⁴⁷ Thus, the Second Circuit concluded, the 1952 Act’s physical-presence requirement may only be upheld if it is substantially related to an actual and important government purpose under intermediate scrutiny.¹⁴⁸

2. Preventing Statelessness as an Important Government Interest

In *Morales-Santana*, the government asserted two interests to support the gender-based distinction in the 1952 Act’s physical-presence requirement: (1) ensuring a sufficient connection between the child and the

142. *Id.* at 528. The government argues that rational basis review should apply because Congress has “exceptionally broad power” to admit or deny aliens to the United States. *Id.* (quoting *Fiallo*, 430 U.S. at 794).

143. *See Fiallo*, 430 U.S. at 798–99 (construing Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(b)(1)(D), 66 Stat. 163, 171 (current version at 8 U.S.C. § 1101(b)(1)(D) (2012))).

144. *Id.* at 799 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)). *Cf. id.* at 791 (noting the *Fiallo* district court’s holding “that the statutory provisions at issue were neither ‘wholly devoid of any conceivable rational purpose’ nor ‘fundamentally aimed at achieving a goal unrelated to the regulation of immigration’” (quoting *Fiallo v. Levi*, 406 F. Supp. 162, 165, 166 (E.D.N.Y. 1975))).

145. *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001).

146. *Morales-Santana*, 804 F.3d at 528.

147. *Id.*

148. *Id.* at 529.

United States and (2) preventing statelessness.¹⁴⁹ Consistent with the United States' concerns for statelessness, the Second Circuit found that preventing statelessness is "clearly an important governmental interest."¹⁵⁰ From here, the government had to show that (1) Congress enacted the 1952 Act's physical-presence requirement with an actual concern for statelessness, rather than with impermissible stereotyping, and (2) the gender distinction is substantially related to preventing statelessness.¹⁵¹

a. Congress Had No Actual Interest to Prevent Statelessness

The Second Circuit found "no evidence (1) that Congress enacted the 1952 Act's gender-based physical-presence requirements out of a concern for statelessness, (2) that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers, or (3) that Congress believed that the problem of statelessness was greater for children of unwed citizen mothers than for children of unwed citizen fathers."¹⁵²

The Second Circuit came to its conclusion by examining the history of American *jus sanguinis* citizenship.¹⁵³ Before 1940, citizen-fathers could confer *jus sanguinis* citizenship to their children as long as they had spent any time in the United States, which is consistent with the then-prevailing notion that a man determines his family's political and cultural identity.¹⁵⁴ In 1940, Congress first addressed nonmarital children by granting fathers and married mothers the right to confer *jus sanguinis* citizenship to nonmarital children outside of the United States only if they satisfied "an age-calibrated ten-year physical-presence requirement," excepting unmarried mothers.¹⁵⁵ The 1952 Act maintained the physical-presence requirement's disparate treatment of unmarried mothers, even as it required unmarried citizen-mothers to reside in the United States for one continuous year prior to giving birth.¹⁵⁶ Thus, the 1952 Act created a higher risk of statelessness for children of citizen-fathers than children of citizen-mothers.

Documents related to both acts were virtually silent on

149. *Id.* at 530–31. This Note focuses on the purported statelessness interest.

150. *Id.* at 531. This purpose remains important today, demonstrated by the plights of stateless individuals worldwide. *See supra* Part I.A.

151. *See Morales-Santana*, 804 F.3d at 529.

152. *Id.* at 534.

153. *Id.* at 532–34.

154. *Id.* at 532. *See supra* Part I.D.

155. *Morales-Santana*, 804 F.3d at 532.

156. *Id.* (citing 8 U.S.C. § 1409(c) (2012)).

statelessness.¹⁵⁷ Only one congressional report mentioned statelessness, and the report only discussed statelessness in the context of legitimation, and did not address the 1952 Act's physical-presence requirement or the relevant gender-based distinction.¹⁵⁸ Further, only one pre-1940 administrative memorandum addressed statelessness; the lack of documents from such a sizable record showed that Congress had no concern for statelessness, if it was even aware of it at all.¹⁵⁹

Without support from legislative history, the government attempted to refute the Second Circuit's finding that Congress did not have an actual interest in preventing statelessness with the 1952 Act's physical-presence requirement by presenting explanatory comments from the executive branch, which contained a citation to a law review article that mentioned that about thirty countries assigned citizenship to nonmarital children based on their mothers' citizenship.¹⁶⁰ However, the executive comments neither referred to the law review article's discussion of statelessness nor mentioned statelessness in their text.¹⁶¹

Finally, the Second Circuit held that the 1952 Act's physical-presence requirement failed intermediate scrutiny—and was therefore unconstitutional—because Congress had no actual interest in preventing statelessness given the lack of evidence from a sizable record.¹⁶² Instead, the record suggested that Congress's actual interest for enacting the physical-presence requirement was to further the then-existing stereotype that unmarried mothers should be responsible for nonmarital children.¹⁶³

b. No Substantial Relationship Between Means and Ends

Even if Congress's actual interest in enacting the 1952 Act's physical-presence requirement were to prevent statelessness, the Second Circuit ruled that the physical-presence requirement "is not substantially related to the achievement of a permissible, non-stereotype-based objective" and

157. *Id.* at 532–33.

158. *Id.* The report mentioned statelessness as a problem, noting that the 1952 Act eliminated a requirement from the 1940 act that required a father to legitimate his child before an unmarried citizen-mother could confer her citizenship to the child. *Id.* at 533 n.10 (citing S. REP. NO. 82-1137, at 39 (1952)).

159. *Id.* at 532 n.9 (citing Collins, *supra* note 105, at 2205 n.283).

160. *Id.* at 533 (citing Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of a Nationality*, 29 AM. J. INT'L L. 248 (1935)).

161. *Id.* In fact, the executive comments "arguably reflect gender-based generalizations" concerning nonmarital children. *Id.* at 533.

162. *Id.* at 528, 533–34.

163. *See id.* at 534.

therefore does not survive intermediate scrutiny.¹⁶⁴ “A gender-based classification which . . . generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.”¹⁶⁵ Thus, the gender-based physical-presence requirement—which demanded ten years of residence from citizen-fathers and only one year from unmarried citizen-mothers—violates equal protection, especially considering that citizen-fathers under nineteen cannot overcome the burden imposed by the discrimination, no matter the circumstances.¹⁶⁶

Further, the “availability of effective gender-neutral alternatives” reinforced the notion that there is no legitimate reason for the 1952 Act to have a gender-based physical-presence requirement.¹⁶⁷ The court emphasized the availability of, and support for, a gender-neutral alternative by referring to a 1933 letter from then Secretary of State Cordell Hull, who advocated total gender equality for laws that govern conferring *jus sanguinis* citizenship to children born outside of the United States.¹⁶⁸

B. *UNITED STATES V. FLORES-VILLAR*

Ruben Flores-Villar was born in Tijuana, Mexico to an American father and a Mexican mother.¹⁶⁹ At two months old, Ruben had health problems that prompted his father and grandmother to bring him to San Diego, California for medical treatment.¹⁷⁰ Ruben’s father raised Ruben in San Diego—they had little, if any, contact with Ruben’s mother.¹⁷¹ As an

164. *Id.* at 535.

165. *Orr v. Orr*, 440 U.S. 268, 282–83 (1979), *quoted in Morales-Santana*, 804 F.3d at 534.

166. *See Morales-Santana*, 804 F.3d at 527 (“Eighteen-year-old citizen fathers and their children are out of luck.”).

167. *See id.* at 534. In a brief to the Supreme Court on petition for a writ of certiorari, the government argued that the mother is the only “legally recognized parent” at the time of birth. Reply Brief for the Petitioner at 5, *Lynch v. Morales-Santana* (June 7, 2016) (No. 15-1191), 2016 U.S. S. Ct. Briefs LEXIS 2289, at *8. Even putting aside the fact that legitimation is applied retroactively, this argument ignores the fact that the statelessness problem is just as prevalent after birth as at birth, and that biological concerns are erased by the legitimacy requirements. Further, discrimination is deepened if the government argues that illegitimate fathers are not legal parents; the physical-presence requirement may increase the risk of statelessness if the father is not “legally recognized.”

168. *Morales-Santana*, 804 F.3d at 534 (citing Letter from Cordell Hull, Sec’y of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), in *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the H. Comm. on Immigration & Naturalization*, 73d Cong. 8–9 (1933)).

169. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff’d by an equally divided court*, 131 S. Ct. 2312 (2011).

170. *Id.*

171. *Id.* *See* Sandra Park, *Flores-Villar: Supreme Court Allows Law that Discriminates Against Fathers to Stand, for Now*, ACLU (June 13, 2011, 4:44 PM), <https://www.aclu.org/blog/speakeasy/>

adult, Ruben was convicted of marijuana importation and illegal entry,¹⁷² and he faced removal proceedings.¹⁷³

Flores-Villar's factual and legal setup is virtually the same as that of *Morales-Santana*.¹⁷⁴ Ruben's father could not meet the relevant physical-presence requirement—and thus could not confer *jus sanguinis* citizenship—because he was only sixteen years old when Ruben was born and could not possibly be physically present in the United States for five years after age fourteen.¹⁷⁵ If Ruben's mother, who had little to no contact with Ruben, were an American citizen in the same circumstances as Ruben's father, she would easily be able to confer *jus sanguinis* citizenship because she would be subject to a far less restrictive one-year physical-presence requirement.¹⁷⁶

The Ninth Circuit relied heavily on *Nguyen v. INS*, in which the Supreme Court presumed, without deciding, that intermediate scrutiny applied to an INA provision that required fathers but not mothers to take affirmative steps to legitimate a child before the child can acquire American citizenship.¹⁷⁷ The Court held the provision constitutional because the gender distinction was substantially related to an important government purpose, ensuring a biological and familial relationship between father and child, even though the fit was imperfect.¹⁷⁸ The Court

flores-villar-supreme-court-allows-law-discriminates-against-fathers-stand-now (“[Flores-Villar’s] father raised him as a single parent . . .”).

172. The illegal-entry conviction would only hold if Flores-Villar were not a citizen. *See Flores-Villar*, 536 F.3d at 999.

173. *Id.* at 994.

174. The physical-presence requirement relevant to *Flores-Villar* is materially identical to the 1952 Act’s physical-presence requirement. *See id.*

175. *Id.* (“[I]t was physically impossible for his father, who was sixteen when Flores-Villar was born, to have been present in the United States for five years after his fourteenth birthday as required by § 1401(a)(7).”).

176. *See* 8 U.S.C. § 1409(c) (2012) (requiring unmarried mothers to be “physically present in the United States or one of its outlying possessions for a continuous period of one year” to confer citizenship to a nonmarital child). *Flores-Villar* provides a good example of the notion that an unmarried father can bear greater parenting responsibilities for his child than the child’s unmarried mother, contrary to historical stereotypes.

177. *See Nguyen v. INS*, 533 U.S. 53, 59 (2001). An American father must: (1) show a blood relationship with his child by clear and convincing evidence; (2) have American citizenship when his child is born; (3) agree in writing to financially support the child until he or she reaches age eighteen; and (4) while the child is under age eighteen, (a) legitimate the child, (b) acknowledge paternity in writing under oath, or (c) have a competent court establish the child’s paternity. *Id.* at 59 (construing 8 U.S.C. § 1409(a) (2012)).

178. *See id.* at 73 (“To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of

excused the imperfect fit by assigning great deference to Congress's plenary power over "immigration and naturalization."¹⁷⁹

Flores-Villar concerned the INA's physical-presence requirement in effect in 1974, which was materially similar to the 1952 Act's physical-presence requirement.¹⁸⁰ Like in *Morales-Santana*, the government asserted preventing statelessness as an important interest.¹⁸¹ The Ninth Circuit presumed, without deciding, that intermediate scrutiny applied; the court then determined that the physical-presence requirement was constitutional because the gender distinction was substantially related to preventing statelessness, even though "the fit is not perfect" and the requirement would not always prevent statelessness.¹⁸²

Nonetheless, the *Flores-Villar* court's reliance on *Nguyen*¹⁸³ has at least two worrying implications. First, the Ninth Circuit misquoted *Nguyen* in discussing Congress's plenary power over "immigration and citizenship" rather than "immigration and naturalization."¹⁸⁴ Second, the court did not address whether preventing statelessness was Congress's actual purpose in enacting the physical-presence requirement.¹⁸⁵ In response to *Flores-Villar*'s argument that Congress enacted the physical-presence requirement "to perpetuate the stereotypical notion that women should have custody of illegitimate children,"¹⁸⁶ the court reasoned that "the residence differential is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth."¹⁸⁷ But the only support the Ninth Circuit gave was a quote from *Nguyen* about how the gender distinction in the INA's legitimation

equal protection superficial, and so disserving it.").

179. *Id.* at 61, 72–73.

180. *Flores-Villar*, 536 F.3d at 993.

181. Compare *Flores-Villar*, 536 F.3d at 996, with *Morales-Santana v. Lynch*, 804 F.3d 520, 527–28 (2d Cir. 2015), cert. granted, 136 S. Ct. 2545 (2016).

182. See *Flores-Villar*, 536 F.3d at 996. The court sidestepped the government's *Fiallo* challenge for rational basis review because the court, ultimately holding that the physical-presence requirement withstood intermediate scrutiny, negated the need to decide the appropriate level of scrutiny because satisfying intermediate scrutiny also satisfies rational basis review. See *id.* at 996 n.2.

183. See *id.* at 993 ("[T]he answer follows from the Supreme Court's opinion in *Nguyen* . . .").

184. Compare *id.* at 995 (explaining the *Nguyen* Court's deference to "Congress's immigration and naturalization power" (emphasis added)), with *id.* at 996 (noting "the virtually plenary power that Congress has to legislate in the area of immigration and citizenship" (emphasis added)).

185. See *id.* at 996–97. Accord *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 883 (W.D. Tex. 2015) ("[T]he Ninth Circuit's opinion in *Flores-Villar* . . . appears to assume without considering whether preventing statelessness in fact motivated the physical presence requirement enacted by Congress.").

186. *Flores-Villar*, 536 F.3d at 997.

187. *Id.*

provision values administrative efficiency over strict achievement of the statute's goal to ensure a father-child relationship.¹⁸⁸

C. THE CIRCUIT SPLIT CREATED CONFUSION AMONG LOWER COURTS

The *Morales-Santana* and *Flores-Villar* circuit split may lead some jurisdictions to apply the INA's physical-presence requirement in a way that would subject certain would-be citizens to statelessness, deportation, or denationalization. District courts in the Fifth and Seventh Circuit Courts of Appeal have addressed this issue, further splintering the existing circuit split.¹⁸⁹ Demonstrably, a Western District of Texas case, *Villegas-Sarabia v. Johnson*, held that the physical-presence requirement was unconstitutional,¹⁹⁰ while a Western District of Wisconsin case, *United States v. Dominguez*, held the requirement constitutional.¹⁹¹

In *Villegas-Sarabia*, Leonardo Villegas-Sarabia was born in Mexico to an American father and a Mexican mother, moved to the United States a few months after his birth, and was legitimated at age thirteen when his parents married.¹⁹² As an adult, Leonardo applied for a certificate of citizenship, but United States Citizenship and Immigration Services denied his request because his father did not satisfy the physical-presence requirement.¹⁹³ Villegas-Sarabia's father did not satisfy the requirement because, like *Morales-Santana's* and *Flores-Villar's* fathers, it was legally and physically impossible for him to do so given that he was only eighteen years old when Leonardo was born.¹⁹⁴

The Western District of Texas, considering both *Morales-Santana* and *Flores-Villar*, explicitly adopted intermediate scrutiny¹⁹⁵ and concluded

188. See *id.* (quoting *Nguyen v. INS*, 533 U.S. 53, 69 (2001)). On the familial relationship issue, *Flores-Villar* argued that the length of an American father's residence in the United States has nothing to do with his biological or familial relationship with his child. *Id.*

189. See, e.g., *Villegas-Sarabia*, 123 F. Supp. 3d 870; *United States v. Dominguez*, 2010 U.S. Dist. LEXIS 46339 (W.D. Wis. May 11, 2010).

190. *Villegas-Sarabia*, 123 F. Supp. 3d at 875.

191. *Dominguez*, 2010 U.S. Dist. LEXIS 46339, at *16.

192. *Villegas-Sarabia*, 123 F. Supp. 3d at 875. Leonardo Villegas-Sarabia lived in Texas, but he was otherwise situated similarly to Luis Morales-Santana and Ruben Flores-Villar. *Id.* at 875-76.

193. *Id.*

194. See *id.* The physical-presence requirement at the time of Leonardo Villegas-Sarabia's birth included a provision that five of the ten years of physical presence occur after age fourteen. *Id.* at 876.

195. The court also noted that the Fifth Circuit's decision in *Nguyen* applies for determining a level of scrutiny because the issue is citizenship at birth. See *id.* at 881 ("The challenged statute deals not with aliens' claims for immigration preferences, but with how citizen parents may confer citizenship on nonmarital children born abroad. The Court therefore finds that the Fifth Circuit's holding in *Nguyen*

that the Second Circuit was correct in holding the physical-presence requirement unconstitutional under the Equal Protection Clause.¹⁹⁶ The district court went on to say that while preventing statelessness is an important interest, neither Congress nor the executive branch actually considered it in enacting the physical-presence requirement.¹⁹⁷ Finally, the physical-presence requirement was not substantially related to preventing statelessness because “gender-neutral alternatives . . . would [have] advance[d] the goal of preventing statelessness equally well or better than the gender-based physical presence requirements.”¹⁹⁸ Finally, *Villegas-Sarabia* is highly persuasive in the context of the *Morales-Santana* and *Flores-Villar* circuit split because it focuses on the physical-presence requirement issue for an unmarried father, it was published after *Morales-Santana* and *Flores-Villar*, and it specifically addresses both *Morales-Santana* and *Flores-Villar*.¹⁹⁹

In contrast, the Western District of Wisconsin in *United States v. Dominguez* upheld the physical-presence requirement by perpetuating *Flores-Villar*’s reasoning that the important government purpose of preventing statelessness passes intermediate scrutiny.²⁰⁰ The defendant, Jose Guadalupe Dominguez, was born in Mexico to a married couple, an American mother and a Mexican father.²⁰¹ Then, his mother brought him to the United States three weeks after his birth.²⁰² Because she was married, she did not qualify for the exception to the ten-year physical-presence requirement.²⁰³ Although *Dominguez* does not offer as much analytical value as an equal protection challenge because the defendant challenged the statute as discrimination based on age and legitimacy rather than gender (thereby subjecting the case to rational basis review),²⁰⁴ it nonetheless

requires that heightened scrutiny be applied to Petitioner’s claims.” (construing *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000)).

196. *Id.* at 879–80, 895.

197. *Id.* at 887.

198. *Id.*

199. *See generally id.* The case is especially relevant because the government may appeal *Villegas-Sarabia* before the Fifth Circuit Court of Appeals.

200. *United States v. Dominguez*, 2010 U.S. Dist. LEXIS 46339, at *15–16 (W.D. Wis. May 11, 2010).

201. *Id.* at *2.

202. *Id.* (noting that immigration agents may have assumed the newborn was American because he was traveling with his American mother).

203. *Id.* at *2–3. Dominguez’s mother could not satisfy the physical-presence requirement relevant at the time of Dominguez’s birth because it would be impossible for her to have resided in the United States for five years after age fourteen, given that she gave birth at age seventeen. *Id.* at *2.

204. *Id.* at *12. *Dominguez* is further distinguishable because it was decided in 2010, well before the Second Circuit decided *Morales-Santana*.

demonstrates that the confusion created by the *Morales-Santana* and *Flores-Villar* circuit split has spread beyond the Second and Ninth Circuits; a district court within the appellate jurisdiction of the Seventh Circuit, which does not have to follow Ninth Circuit precedent, adopted *Flores-Villar* and upheld the physical-presence requirement's constitutionality.

Notably, *Dominguez* is problematic because it implicitly follows historical gender stereotypes.²⁰⁵ The United Nations explicitly listed “[d]iscriminatory provisions of nationality laws . . . reflect[ing] prevailing social and/or demographic considerations regarding the role of women” as an obstacle to ending statelessness because such considerations are “difficult to change.”²⁰⁶ *Dominguez*'s mother had to satisfy a more difficult requirement to confer her citizenship because she was married. If she were unmarried, then she would be able to confer her citizenship more easily. This demonstrates the historical stereotype that single mothers “stand[] in place of the father” as the guardians of illegitimate children.²⁰⁷ Thus, while the district court may not have intended it as a consequence, the implicit perpetuation of this stereotype demonstrates the lingering effects of historical gender discrimination.

III. THE SUPREME COURT SHOULD RESOLVE THE CIRCUIT SPLIT BY INVALIDATING THE GENDER DISTINCTION IN THE PHYSICAL-PRESENCE REQUIREMENT

In June 2016, the Supreme Court took an important step to resolve this split by granting certiorari to *Morales-Santana*.²⁰⁸ This Note argues that the Court should affirm the Second Circuit's interpretation of the INA's physical-presence requirement because it is most consistent with equal protection jurisprudence and the United Nations' Global Action Plan. Indeed, the Global Action Plan's recommended actions aiming to reduce the risk of statelessness conflict with the INA's physical-presence requirement, demonstrating the requirement's ineffectiveness in preventing

205. The physical-presence requirement is a legacy of the gender-based belief that men should be the political and cultural head and spine of a traditional family. *See supra* Part I.D.

206. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 13.

207. H. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., REP. PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, PART ONE: PROPOSED CODE WITH EXPLANATORY COMMENTS 18 (Comm. Print 1939); Collins, *supra* note 93, at 1511–12 (quoting *id.*). Further, only granting a physical-presence requirement exception to unmarried mothers shows that Congress was concerned about who would take responsibility for a nonmarital child, not protecting women from giving birth to stateless children. *See supra* Part I.D.

208. *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016) (mem.) (granting certiorari).

statelessness. Thus, the Supreme Court should adopt a ruling that will actively aid the United Nations' efforts to end statelessness because the government's stated purpose is to reduce the risk of statelessness, especially when such a ruling would promote the ideals of the U.S. Constitution.

A. RESOLVING THE CIRCUIT SPLIT USING EQUAL PROTECTION
JURISPRUDENCE

1. The Supreme Court Should Explicitly Adopt Intermediate Scrutiny

As *Fiallo* and *Nguyen* demonstrate, there is a tension in the law between gender issues treated under intermediate scrutiny, and immigration and naturalization issues treated under rational basis review.²⁰⁹ Since *Fiallo*, the government has argued for rational basis review in both the Second and Ninth Circuit Courts of Appeal.²¹⁰ The Second Circuit declined to adopt rational basis review because *Fiallo* was binding only in the context of immigration, and not citizenship at birth,²¹¹ while the Ninth Circuit determined that it did not need to decide on the appropriate standard of review because it found that the physical-presence requirement passed intermediate scrutiny.²¹² The Second Circuit declined to follow *Nguyen* using the same reasoning by which it dismissed *Fiallo*.²¹³ The Ninth Circuit, on the other hand, heavily relied on *Nguyen* despite recognizing that *Nguyen* was decided in a different context—citizenship by naturalization.²¹⁴

209. *Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015) (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)), *cert. granted*, 136 S. Ct. 2545 (2016); *United States v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008) (discussing *Nguyen v. INS*, 533 U.S. 53 (2001)), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011).

210. *Morales-Santana*, 804 F.3d at 528; *Flores-Villar*, 536 F.3d at 996 n.2.

211. *Morales-Santana*, 804 F.3d at 528.

212. *Flores-Villar*, 536 F.3d at 996 n.2.

213. *See Morales-Santana*, 804 F.3d at 530–31 (distinguishing the relevance of the government interests at stake in *Nguyen*).

214. *See Flores-Villar*, 536 F.3d at 995–96. It is worth noting that although the Ninth Circuit considered intermediate scrutiny for the sake of argument, it gave serious consideration to rational basis review by dedicating a lengthy part of the opinion to it. *See id.* at 996–98. Further, while the court correctly identified that age discrimination merits rational basis review, it did not address the gender-based distinction of the age discrimination argument. While the court analyzed age discrimination as applied to treating men under nineteen differently from men over nineteen, it did not address the difference between men under nineteen and women under nineteen. Even if this can be explained away because there is no difference in the physical-presence requirement for married men and married women, it still begs the question of discrimination on the basis of legitimacy given that, oddly, the INA statute discriminates against legitimate children in favor of illegitimate children, which is significant because legitimacy distinctions are subject to heightened scrutiny. *See Gomez v. Perez*, 409 U.S. 535,

The Supreme Court should follow the Second Circuit's decision to adopt intermediate scrutiny because the physical-presence requirement contains an express, gender-based distinction and falls outside of Congress's plenary power over immigration and naturalization. Consequently, the Court should distinguish *Lynch v. Morales-Santana*, which arises in the birthright citizenship context, from *Fiallo* and *Nguyen*, which arose in the immigration and naturalization contexts, respectively.²¹⁵ Congress's plenary power, generally warranting rational basis review, cannot destroy an American citizen's fundamental right to equal treatment because "citizen 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."²¹⁶ Therefore, the Supreme Court should adopt intermediate scrutiny because only a heightened level of scrutiny can ensure that gender distinctions do not violate the constitutional guarantee of equal protection.²¹⁷

Morales-Santana's position, though on the periphery of immigration and naturalization, is rooted in unassailable derivative citizenship, and "[u]nlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all."²¹⁸ Unlike in *Nguyen* and *Fiallo*, Luis Morales-Santana asserts he had citizenship at birth, even if it must be confirmed by the Supreme Court.²¹⁹ That is, if he has *jus sanguinis* citizenship, Luis Morales-Santana was not an immigrant when his father brought him to the United States—he was an American citizen returning to his country of citizenship.

2. The Physical-Presence Requirement Fails Intermediate Scrutiny

The gender distinction embedded in the 1952 Act's physical-presence requirement fails intermediate scrutiny because preventing statelessness was not Congress's actual purpose. Further, even if Congress intended to prevent statelessness by enacting the physical-presence requirement, the

537–38 (1973).

215. *Morales-Santana*, 804 F.3d at 528 (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)); *Flores-Villar*, 536 F.3d at 993 (discussing *Nguyen v. INS*, 533 U.S. 53 (2001)).

216. *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001), *quoted in Morales-Santana*, 804 F.3d at 529.

217. *See United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

218. *Morales-Santana*, 804 F.3d at 524.

219. If the Supreme Court confirms that *Morales-Santana* is a citizen by birth, he would be treated as always having possessed American citizenship, and "no ceremonial attestation of national allegiance is required." Collins, *supra* note 93, at 1487.

1952 Act's gender distinction is not substantially related to preventing statelessness because it actually increases the risk of statelessness compared to gender-neutral alternatives.

a. Congress Did Not Intend for the Physical-Presence Requirement to Prevent Statelessness

The Second Circuit found no evidence that Congress considered statelessness when enacting the 1952 Act's physical-presence requirement, or even that it was aware of statelessness as an issue.²²⁰ Out of hundreds of congressional records and memoranda regarding the 1952 Act, none addressed statelessness with respect to the physical-presence requirement.²²¹ Even the Ninth Circuit found no evidence that Congress actually intended to prevent statelessness.²²²

International and domestic events also support the notion that Congress was not aware of statelessness in 1952. UNHCR, the United Nations agency that handles statelessness issues, was not formed until 1950.²²³ UNHCR's campaign to end statelessness by 2024 is based on American lawyer and judge Manley Ottmer Hudson's dream to end statelessness.²²⁴ However, Judge Hudson conceived this dream in 1952,²²⁵ too late for Congress to implement his vision into the 1952 Act, since: (1) there was no mention of Judge Hudson's efforts in the relevant congressional records,²²⁶ (2) the 1952 Act largely adopted the language of its 1940 counterpart,²²⁷ and (3) UNHCR itself did not begin to implement statelessness-prevention measures until the United Nations Convention Relating to the Status of Stateless Persons in 1954.²²⁸ Further, while the first United Nations convention on statelessness in 1954 addressed ways to minimize the plight of stateless persons, the United Nations did not begin to address statelessness with safeguards in national laws until the second United Nations convention on statelessness in 1961.²²⁹ Finally, although former Supreme Court Chief Justice Earl Warren addressed the plight of

220. See *Morales-Santana*, 804 F.3d at 532–34.

221. See *id.* at 532 n.9 (citing Collins, *supra* note 105, at 2205 n.283).

222. See *supra* note 185 and accompanying text.

223. *History of UNHCR*, UNHCR, <http://www.unhcr.org/en-us/history-of-unhcr.html> (last visited Nov. 7, 2016).

224. Lambert, *supra* note 35.

225. *Id.*

226. See Collins, *supra* note 105, at 2205 n.283.

227. See *supra* note 102 and accompanying text.

228. See generally 1954 Statelessness Convention, *supra* note 8.

229. *UN Conventions on Statelessness*, *supra* note 59.

statelessness, he did not do so until 1958.²³⁰ Each of these efforts to highlight statelessness could not have influenced Congress with regard to the 1952 Act because they all occurred after Congress drafted the Act.

More likely, Congress's intent was to continue historical gender discrimination by perpetuating the stereotype that women should be responsible for nonmarital children, in line with Justices Ginsburg and O'Connor's concerns.²³¹ The lesser physical-presence requirement helped to ensure that nonmarital children's unmarried mothers, instead of their fathers, would determine their citizenship and consequently assume responsibility for them.²³²

Another likely congressional motivation for the physical-presence requirement was racial discrimination. Historically, gender distinctions and restrictions on father-child relationships were also used to exclude nonwhite children from citizenship.²³³ Such would be a concern in 1952, just as the United States exited World War II and entered the Korean War. This concern may be demonstrated by discriminatory policies like the War Brides Act, which encouraged soldiers to marry their European sweethearts, just as the military discouraged soldiers from marrying their Asian sweethearts.²³⁴ The historically racially discriminatory policy is especially concerning as a statelessness problem because the people of the predominantly non-European and nonwhite countries that faced historical discrimination are the same *jus sanguinis* countries that have the highest

230. See *United States v. Flores-Villar*, 536 F.3d 990, 995–96 (discussing Chief Justice Warren's opinion in the 1958 Supreme Court case *Trop v. Dulles*, in which he called statelessness a "deplorable" condition (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion))), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011). Accord Brief Amici Curiae of Professors of History, Political Science, and Law in Support of Respondent at 29–32, *Lynch v. Morales-Santana* (No. 15-1191) (U.S. Oct. 3, 2016) (reviewing historical sources to conclude that "Congress codified and maintained anachronistic gender-based norms concerning the father-child relationship in the laws governing citizenship transmission to nonmarital foreign-born children").

231. Collins, *supra* note 93, at 1495.

232. The historical laws emphasize men's ability to determine their families' political and cultural identity. *Morales-Santana v. Lynch*, 804 F.3d 520, 532 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016). Not long before the 1952 Act, married women could not confer citizenship, and even lost their citizenship, if they married a foreign man. Collins, *supra* note 93, at 1502. The mother-child relationship in the non-marital context was given precedence over the father-child relationship because the mother in such cases was presumed to be the "natural caregiver." *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 884 (W.D. Tex. 2015).

233. Collins, *supra* note 93, at 1492–93. Perhaps the 1952 Act merits strict scrutiny due to its discriminatory racial impact, but that argument is outside the scope of this Note.

234. *Id.*

risk of statelessness.²³⁵ The notable exception to the non-European, nonwhite *jus sanguinis* countries is Germany,²³⁶ which Congress also would have been predisposed to discriminate against because Germany had fought two major wars with the United States in the early twentieth century. Thus, the historical context of postwar America suggests that statelessness was far from Congress's concern when it passed the 1952 Act.

Given the government's lack of proof and the more persuasive alternative explanations why Congress enacted the 1952 Act, the government cannot prove that Congress actually intended the 1952 Act's physical-presence requirement to prevent statelessness.

b. The Physical-Presence Requirement Does Not Prevent Statelessness

The physical-presence requirement increases the risk of statelessness because it sets a high—and sometimes impossible—standard for fathers, may be incompatible with discriminatory foreign national laws, and shuts off simple and effective gender-neutral alternatives. Even if Congress's actual purpose in enacting the 1952 Act's physical-presence requirement was to prevent statelessness, the requirement cannot be substantially related to preventing statelessness because it actually *increases* the risk of statelessness. The burdensome physical-presence requirement means that many children are unable to derive *jus sanguinis* citizenship from their fathers. The Ninth Circuit's analysis and conclusion in *Flores-Villar* are concerning because, as the *Villegas-Sarabia* court pointed out, the "Ninth Circuit . . . appears to assume without considering whether preventing statelessness in fact motivated the physical presence requirement enacted by Congress."²³⁷

First, the physical-presence requirement sets a high standard for citizen-fathers to confer *jus sanguinis* citizenship, and, under the 1952 Act, the requirement makes conferring *jus sanguinis* citizenship impossible for fathers under age nineteen.²³⁸ Illustratively, an eighteen-year-old American soldier who fathered a nonmarital child abroad—in Japan, for example²³⁹—could not satisfy this high standard. Considering that forty-six

235. Cf. *supra* note 48.

236. See WORLD CITIZENSHIP LAWS, *supra* note 8, at 82 (describing the historical lack of *jus soli* citizenship in Germany).

237. *Villegas-Sarabia*, 123 F. Supp. 3d at 883.

238. See Immigration and Nationality Act, Pub. L. No. 82-414, § 301(a)(7), 66 Stat. 163, 236 (1952) (current version at 8 U.S.C. § 1401(g) (2012)).

239. Japan, an antagonist of the United States during World War II, is a *jus sanguinis* country. WORLD CITIZENSHIP LAWS, *supra* note 8, at 103.

countries are *jus sanguinis* countries,²⁴⁰ the physical-presence requirement increases the risk of statelessness by exacting a high standard for men and unwed mothers to confer citizenship.

Second, the physical-presence requirement is incompatible with foreign national laws that discriminate against women. At least twenty-seven countries do not allow women to confer nationality to their children on an equal basis as men.²⁴¹ If a child is born in a *jus sanguinis* country to a woman from a country with discriminatory citizenship-conferral laws, then that child must entirely rely on his or her father for citizenship. Then, if the father's citizenship conferral standards were high, like they were under the 1952 Act's physical-presence requirement,²⁴² the child faces a heightened risk of statelessness.

Further, more than sixty countries do not allow women to "acquire, change or retain their nationality on an equal basis,"²⁴³ which creates more situations in which women may not be able to confer their citizenship. For example, if a country were to revoke a woman's citizenship for marrying a foreign man, like the United States historically required,²⁴⁴ then she would not be able to confer *jus sanguinis* citizenship of that country because she herself would have lost her citizenship. In this situation, the child would have to rely on his or her father for citizenship. Thus, the prohibitively high physical-presence requirement for American fathers increases, rather than decreases, the risk of statelessness.

Finally, gender-neutral alternatives are better at preventing statelessness. Notably, while the Second and Ninth Circuits correctly identified the risk of statelessness for nonmarital children,²⁴⁵ small variations in national laws, such as the Dominican Republic's statute that excludes Haitian migrants,²⁴⁶ mean that broad declarations about *jus sanguinis* and *jus soli* citizenship mechanisms do not sufficiently guard against the risk of children being born stateless. Recall Ángel Luis Joseph's status as a stateless Dominico-Haitian due to the Dominican government's

240. See *supra* note 48.

241. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 12.

242. Immigration and Nationality Act § 301(a)(7), 66 Stat. at 236.

243. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 12.

244. Collins, *supra* note 93, at 1502.

245. Morales-Santana v. Lynch, 804 F.3d 520, 531 (2d Cir. 2015), cert. granted, 136 S. Ct. 2545 (2016); United States v. Flores-Villar, 536 F.3d 990, 996, *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011).

246. Lacey, *supra* note 23.

discriminatory practices toward persons of Haitian descent.²⁴⁷ His story exemplifies the fact that a child may be born stateless in *any* country if its laws are inadequate. For example, under the INA, a child born in the Dominican Republic to a teenage Haitian-American father is at a further-heightened risk of statelessness. Thus, effective efforts to prevent statelessness should go beyond merely addressing *jus sanguinis* countries²⁴⁸ and should consider statelessness to a greater extent than Congress considered it, if at all, when passing the 1952 Act's physical-presence requirement.

3. Applying the Equal Protection Clause

The remedy for an equal protection violation is a mandate of equal treatment, which can be accomplished by either withdrawing the impermissible benefits to the favored class or increasing the benefits to the excluded class.²⁴⁹ The Second Circuit Court of Appeals offered three possibilities: (1) invalidate the entire act, (2) apply the ten-year requirement to everyone, or (3) apply the one-year requirement to everyone.²⁵⁰ The court discarded the first option because the 1952 Act contained a severance clause that mandated severing unconstitutional provisions, if possible,²⁵¹ and it rejected the second option because precedent suggests that a court should extend, rather than contract, rights when applying an equal protection remedy given an ambiguous congressional intent.²⁵² Thus, if the 1952 Act's physical-presence requirement fails constitutional muster, then the third option remains the option most consistent with equal protection jurisprudence, and the one-year requirement should apply to all American parents.²⁵³

Equalizing the physical-presence requirement at one year, regardless of gender, makes sense as a matter of policy to prevent statelessness. Responsible American fathers could more easily confer *jus sanguinis* citizenship to children who otherwise would be stateless, especially

247. *Id.*

248. It would have to address all countries without *jus soli* citizenship.

249. See *Heckler v. Mathews*, 465 U.S. 728, 740 (1983).

250. *Morales-Santana v. Lynch*, 804 F.3d 520, 535–36 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

251. *Id.* at 536.

252. *Id.* at 536–37.

253. See *id.* at 537. During the *Lynch v. Morales-Santana* oral argument, Justice Ruth Bader Ginsburg commented that leveling up would have a significant negative impact on a large group of people, including married couples. Transcript of Oral Argument at 33–34, *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016) (No. 15-1191), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1191_6k47.pdf.

considering that the child could be born in one of the forty-six *jus sanguinis* countries or one of the sixty countries that discriminates based on gender in the context of citizenship conferral.²⁵⁴

B. AFFIRMING *MORALES-SANTANA* WOULD CONTRIBUTE TO UNHCR'S GLOBAL ACTION PLAN

In addition to remedying an equal protection violation, affirming *Morales-Santana* would be consistent with the United Nations Global Action Plan to End Statelessness by 2024. Primarily, making the INA's physical-presence requirement gender neutral would promote actions two and three of the Global Action Plan. Further, if the executive and legislative branches also commit to reducing statelessness, there are many avenues for all branches of government to reduce statelessness risks in the INA.

First, affirming *Morales-Santana* promotes action two of the Global Action Plan—which aims to “ensure no child is born stateless”²⁵⁵—because it would address a gender-based distinction that persists in the current INA's physical-presence requirement.²⁵⁶ Given that nonmarital children have a higher risk of statelessness in the United States, the Supreme Court's decision can have an immediate impact on the international stage, just as UNHCR's first set of milestones are set to be achieved in 2017.²⁵⁷

Second, affirming *Morales-Santana* would explicitly further action three of the Global Action Plan—which aims to have “[a]ll States have nationality laws which treat women and men equally with regard to conferral of nationality to their children”²⁵⁸—by eliminating gender discrimination in the INA by equalizing the physical-presence requirement for men and women.²⁵⁹ Given that at least twenty-seven countries do not

254. See UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 12. See also *supra* note 48.

255. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 9.

256. 8 U.S.C. § 1401(g) (2012) (requiring physical presence in the United States for five years, two of which must be after age fourteen); *id.* § 1409(c) (requiring unmarried mothers to be physically present for one continuous year).

257. Reducing risks of statelessness in the INA for children born outside the United States with one American parent would immediately address risks associated with forty-four percent of countries with inadequate safeguards against statelessness. UNHCR GLOBAL ACTION PLAN, *supra* note 39, at 9. UNHCR hopes to reduce the rate of countries with inadequacies to thirty-three percent of countries by 2017. See *id.*

258. *Id.* at 12.

259. Removing gender discrimination from national laws by granting women and men equal

allow women to confer citizenship to their children on an equal basis as men,²⁶⁰ giving children a wider avenue to derive citizenship through their American fathers would greatly reduce the risk of statelessness. On the other hand, maintaining a burdensome ten-year physical-presence requirement would contribute to the burden of women who face discrimination outside the United States and hamper their children's ability to derive a nationality.

Moreover, after the Supreme Court rules on *Lynch v. Morales-Santana*, the executive and legislative branches should take affirmative steps to prevent statelessness. The executive branch can refuse to enforce INA requirements if enforcement would result in creating a stateless person. The legislature, meanwhile, can amend the INA to include gender-neutral safeguard provisions. An effective safeguard consistent with the Global Action Plan might be something as simple as adding an additional subpart to 8 U.S.C. § 1401 to grant citizenship to "a person born to a citizen-parent outside of the United States, provided that the person is unable to otherwise acquire a nationality." Such a safeguard, "the cornerstone of efforts to prevent statelessness . . . set out in the 1961 Convention on the Reduction of Statelessness," would fill gaps in national laws and create a solution to this man-made problem.²⁶¹ A safeguard would also preserve important national interests because the United States would not be required to grant nationality to all children, yet would ensure that no child with a connection to the United States is born stateless.

CONCLUSION

The INA's physical-presence requirement is both unconstitutional and detrimental to the global statelessness problem highlighted by UNHCR. Thus, the Supreme Court should affirm *Morales-Santana* because the Second Circuit's conclusion is consistent with the U.S. Constitution, and has the added benefit of aiding the United Nations' goal to end statelessness by 2024. Urgency is key because there are many similarly situated individuals, such as Leonardo Villegas-Sarabia, who are looking to the Supreme Court for guidance in the United States and around the world.

rights with respect to the nationality of their children, in line with the Convention on the Elimination of All Forms of Discrimination Against Women. *See id.*

260. *Id.*

261. *Id.*

