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Journal

Supreme Court Review

Author

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Publication Date

2018-03-01

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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

Public Law and Legal Theory Research Paper Series Number 693



BIOLOGICAL WARFARE: CONSTITUTIONAL CONFLICT OVER “INHERENT DIFFERENCES” BETWEEN THE SEXES

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CARY FRANKLIN

BIOLOGICAL WARFARE:
CONSTITUTIONAL CONFLICT
OVER “INHERENT DIFFERENCES”
BETWEEN THE SEXES

Constitutional sex discrimination law grew out of constitutional race discrimination law and in many ways takes after it. But there are some critical distinctions between the two areas of law, and the most significant involves the Supreme Court’s attitude toward biological difference. The Court has explained that once upon a time—indeed not so very long ago—Americans believed there were significant biological differences among the races.¹ The law now recognizes those allegedly biological differences as social constructs: pseudo-scientific assertions about the implications of skin color that masked and legitimated cultural biases and sustained racial hierarchy. As a result, “[s]upposed ‘inherent differences’ between the races are no longer accepted as a ground for discrimination.”² The Court tells a different story about

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AUTHOR’S NOTE: For helpful comments on drafts of this piece, I am thankful to Justin Driver, Joey Fishkin, Serena Mayeri, and Doug NeJaime.

¹ See *United States v Virginia*, 518 US 515, 533 (1996) (citing *Loving v Virginia*, 388 US 1 (1967), in which the trial court upheld a ban on interracial marriage in part because it viewed the different races as akin to different species).

² *Id.*

sex. Where sex is concerned, the Court asserts, it is not pseudo-science all the way down. Unlike the supposed differences between, say, black and white people, “[p]hysical differences between men and women . . . are enduring.”³ Thus, the Court has explained, the law may be more receptive to sex-based state action predicated on “inherent differences” than it is toward race-based state action predicated on those grounds.⁴ Of course, that does not mean the state has carte blanche to discriminate on the basis of sex. Inherent differences between the sexes may sometimes justify the use of sex classifications, but such classifications may not be used today, as they once were, to constrain opportunity, to reinforce traditional sex and family roles, or “to create or perpetuate the legal, social, and economic inferiority of women.”⁵

Like many constitutional tests of its sort, this test does not automatically resolve the question of what qualifies as permissible state action. It is not always clear when sex classifications help to dismantle sex-based hierarchies and erode conventional sex-role stereotypes and when they do the opposite. Even people committed to gender equality can and do disagree, for instance, about whether it is constitutional for the state to maintain sex-segregated bathrooms or for the military to make sex-based distinctions in its strength and physical fitness requirements. Even more fundamentally, the test raises questions about what counts as an “inherent difference” between the sexes.⁶ Many differences between men and women we now understand to be socially constructed were once viewed as biologically based. In the nineteenth century, for instance, opponents of higher education for women argued that the sustained contemplation of difficult texts diverted energy from the reproductive organs to the

³ Id.

⁴ See id. (explaining that “[t]he two sexes are not fungible” and that “[i]nherent differences” between men and women . . . remain cause for celebration”).

⁵ *Virginia*, 518 US at 534.

⁶ Indeed, the Court in *United States v. Virginia*, the most important sex discrimination decision since the 1970s, put the phrase “inherent differences” in quotation marks even as it acknowledged the existence of such differences. It is not entirely clear what the Court intended to convey through the use of those quotation marks. I am inclined to believe they reflect the Court’s awareness of the long and sorry history of the government’s reliance on specious biological distinctions to justify the differential treatment of the sexes and its increasing skepticism toward attempts to justify discrimination on those grounds. For more on this point, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 NYU L Rev 83, 145–46 & n 133 (2010).

brain and thus threatened to render women sterile.⁷ In the *Lochner* era, the Court itself cited women's lack of stamina and unique physical vulnerability as a reason to uphold sex-based restrictions on their working hours.⁸

Over time—as a result of social movement advocacy and advances in scientific understanding—the list of attributes viewed as “inherent differences” between the sexes has dwindled. Constitutional law today is skeptical of sex-based generalizations and (in theory, at least) will not accept them as a ground for discrimination even if they are true, or believed to be true, of most men and women. In its canonical holding in *United States v Virginia*,⁹ the Court rejected the state's claim that women are inherently ill-suited for the Virginia Military Institute's “adversative method” of education, which subjects students to a rigorous series of physical and psychological challenges in order to mold them into “citizen soldiers.”¹⁰ Even if it were true that fewer women than men would sign up for, or benefit from, such an ordeal, the Court explained, generalizations “‘about the different talents, capacities, or preferences of males and females’” are no longer permissible grounds for discrimination.¹¹ Under current law, even physical characteristics like height, weight, and upper-body strength

⁷ See, for example, Edward H. Clarke, *Sex in Education; Or, a Fair Chance for Girls* 62 (J. R. Osgood, 1873) (describing the “numberless pale, weak, neuralgic, dyspeptic, hysterical, menorrhagic, dysmenorrhoeic girls and women” among the “classes of our private, common, and normal schools” and “among the female graduates of our colleges”). Clarke, a physician and professor at Harvard Medical School, believed that intensive study diverted blood away from men's reproductive organs as well, but that women were more likely to be rendered sterile through “excessive brain activity” because “the female reproductive apparatus” was larger and more complicated. *Id.* at 137.

⁸ See *Muller v Oregon*, 208 US 412 (1908) (upholding a maximum-hour law that applied only to women in part because “[t]he two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence”); see also *Bradwell v Illinois*, 83 US 130 (1872) (Bradley, J., concurring) (voting to uphold a law prohibiting women from joining the Illinois bar on the ground that “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman”).

⁹ 518 US 515 (1996).

¹⁰ *Id.* at 545 (holding that the goal of creating “citizen-soldiers” is “great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men”).

¹¹ *Id.* at 533 (quoting *Weinberger v Wiesenfeld*, 420 US 636, 643 (1975)); *Virginia*, 518 US at 542 (assuming “for purposes of this decision, that most women would not choose VMI's adversative method,” but holding that generalizations about women's interests and preferences cannot justify limiting their opportunities).

cannot justify sex-based limitations on opportunity, for although men and women differ on average with respect to these characteristics, the distinction is hardly absolute: some women are taller and stronger than some men.¹² In fact, the only contexts in which constitutional law today seems to countenance sex-based limitations on individuals' rights and opportunities are those involving reproductive biology—perhaps the sole remaining site of legally cognizable “inherent differences” between the sexes.¹³

Thus, it not surprising that on the two occasions last Term in which the Court called upon the government to justify its use of a sex classification, the government turned to reproductive biology in both instances. In *Pavan v Smith*, Arkansas sought to defend a law that required a birth mother's male spouse to be listed on her child's birth certificate but did not permit a birth mother's female spouse to be listed.¹⁴ The state argued that the differential treatment was justified because men and women are not similarly situated with respect to reproduction: a male spouse almost always has a biological connection to his wife's child, whereas a female spouse never does.¹⁵ In *Sessions v*

¹² See Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L Rev 1447, 1449–50 (2000) (“For a sex-respecting rule to withstand constitutional scrutiny . . . it seems to be at least necessary . . . that it embody some perfect proxy. . . . [T]he assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men. . . .”); see also *Virginia*, 518 US at 573 (Scalia, J, dissenting) (asserting that under the test the Court developed in *Virginia*, the school's all-male admissions policy would be unconstitutional if even “a single woman [was] willing and able to undertake VMI's program”).

¹³ The Court has never specified exactly what counts as an “inherent difference” between the sexes. But the only “inherent differences” it has recognized, since it began to accord heightened scrutiny to sex-based state action, have involved reproductive biology. See, for example, *Michael M. v Superior Court of Sonoma County*, 450 US 464, 467 (1981) (upholding a statutory rape law that criminalized sex only with minor females on the ground that “the classification was supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant”); *Nguyen v Immigration and Naturalization Service*, 533 US 53 (2001) (upholding a law requiring unmarried citizen fathers, but not unmarried citizen mothers, to take certain steps before becoming eligible to transmit their citizenship to children born overseas on the ground that pregnancy establishes a biological link between mother and child but not between father and child).

¹⁴ 137 S Ct 2075 (2017).

¹⁵ Brief for the Respondent in Opposition, *Pavan v Smith*, Civil Action No 16-992, *19 (US filed Apr 14, 2017) (available on Westlaw at 2017 WL 1397395) (arguing that the lesbian couples challenging the law “ignore the basic fact that—unlike a husband—a mother's female spouse will *never* be a marital child's biological parent”). In fact, this is not true: there are quite a few women today who have given birth to their female spouse's biological child through the use of in vitro fertilization (a process that allows an embryo made with one woman's egg to be transferred to another woman's uterus). In this scenario, the female spouse of a birth mother is a biological parent of the child in the same way that a male spouse might be. Perhaps the state

Morales-Santana, the federal government sought to defend a portion of the Immigration and Nationality Act (INA) pertaining to the acquisition of U.S. citizenship by children born abroad to one parent who is a U.S. citizen and one who is not.¹⁶ The law placed more onerous restrictions on citizen fathers who wished to transmit their citizenship to such children than it did on citizen mothers.¹⁷ Here too the government turned to reproduction: it argued that giving birth creates a special legal and physical bond between an unmarried mother and her child that an unmarried father—who “enters the scene later, as a second parent”¹⁸—lacks.¹⁹

The Court rejected these arguments and ruled in favor of the litigants challenging the laws in both cases. But neither case received much attention. What little press *Pavan* received treated it as an inconsequential derivative of *Obergefell v Hodges*, the landmark 2015 decision in which the Court held that the Constitution affords same-sex couples the right to marry.²⁰ On this view, *Pavan* simply reiterated what the Court said in *Obergefell*: same-sex couples who marry are entitled to the full complement of obligations and privileges entailed in marriage. *Morales-Santana* attracted a bit more attention than *Pavan*. But when it came down, the nation was embroiled in a vigorous, wide-ranging debate over immigration and citizenship that made the Court’s decision look like small potatoes.²¹

What the Court did in *Pavan* and *Morales-Santana* was no small thing, however. In these decisions, the Court genuinely scrutinized the government’s ostensibly biological justifications for treating the sexes differently in contexts where it has traditionally declined to do

was genuinely unaware of this possibility; or perhaps it elided this possibility in an effort to identify an “inherent difference” between men and women sufficiently universal and absolute to satisfy the high bar the Court has set.

¹⁶ 137 S Ct 1678 (2017).

¹⁷ For a more detailed description of the law, see text accompanying notes 98–99.

¹⁸ *Morales-Santana*, 137 S Ct at 1695 (paraphrasing the government’s argument).

¹⁹ More specifically, the government argued that because unmarried mothers are invariably present at a child’s birth, and because their parentage is thereby assured, they are recognized at that moment as the child’s only legal parent. Because an unmarried father does not prove his paternity through giving birth and has no legal ties to the child’s mother, he is not similarly situated—either legally or physically—to an unmarried mother with respect to his child. For more on this argument, see notes 141–43 and accompanying text.

²⁰ 135 S Ct 2584 (2015).

²¹ See, for example, Michael D. Shear and Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, NY Times (Sept 5, 2017); Peter Baker, *Trump Supports Plan to Cut Legal Immigration in Half*, NY Times (Aug 2, 2017).

so. For decades, equal protection law has required the state to adduce “an exceedingly persuasive justification” for classifying individuals on the basis of sex²² and to show that the differential treatment does not reflect or reinforce traditional sex stereotypes.²³ But there are a few contexts in which courts have pretty consistently declined to apply this kind of heightened scrutiny to laws that classify on the basis of sex, and contexts involving gay people and unmarried fathers are two of the most significant. Historically, courts in these contexts have not asked the kinds of questions that sex classifications are supposed to trigger: they have not asked whether the government’s ostensibly biological justifications were devised post-hoc to defend laws actually founded on stereotypes; nor have they required the government to show that it could not achieve its aims using sex-neutral rules.²⁴ As a result, these areas have become repositories of specious biological justifications for discrimination—not as archaic as the notion that reading renders women sterile, but not completely removed from that species of argument either.

In *Pavan* and *Morales-Santana*, the Court broke with this tradition. It did not give the government a free pass, as it might have in the past, because the litigants challenging the laws were gay, in the case of *Pavan*, and unmarried, in the case of *Morales-Santana*. It carefully examined the government’s ostensibly biological justifications for treating the sexes differently and, in so doing, recognized that such justifications can mask traditional stereotypes and limit opportunity where gay people and unwed fathers are concerned, just as they do in cases involving, say, women who wish to attend military institutes. That is a significant development for a number of reasons. *Pavan* and *Morales-Santana* extended sex-based equal protection law beyond the boundaries of the traditional marital family—something the Court has often been loath to do. That is welcome news for gay people, unmarried parents, and others whose families depart from the conventional heterosexual nuclear model. It is also welcome news for pregnant women and mothers, who have not benefited from the Court’s ongoing refusal, in

²² *Virginia*, 518 US at 531.

²³ *Id.* at 541–42.

²⁴ See, for example, *Nguyen*, 533 US at 78 (O’Connor, J., dissenting) (asserting that, in this case, which involved an unmarried father, “[t]he Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, but departs from the guidance of our precedents concerning such classifications in several ways”).

some contexts, to scrutinize pregnancy-related justifications for discrimination.

Part I of this article provides some historical context for these developments. It briefly examines the Court's growing skepticism over the past half-century toward justifications for discrimination that rest on "inherent differences" between the sexes. But its central focus is on areas in the law where this skepticism has faltered—most notably, in cases involving pregnancy itself, as well as in cases involving gay people and unwed fathers. It is not a coincidence that the Court has given the government more leeway to discriminate in these areas: they lie at the core of the "separate spheres" ideology the Court has mostly, but never fully, dismantled. The uneven application of heightened scrutiny has resulted in a disjunction between the kinds of biological justifications the Court has continued to accept in these areas and the more narrow set of biological justifications operative elsewhere in the law.

Part II examines *Pavan*. Some scholars may be tempted to dismiss *Pavan* as a mere footnote to *Obergefell*. It is true: Arkansas's refusal to include female spouses of birth mothers on their children's birth certificates while automatically including male spouses was a form of resistance to the Court's landmark ruling.²⁵ But the Court's rejection of the state's biological justifications for discriminating on the basis of sex in the context of birth certificates—where such justifications were arguably more plausible than in the context of marriage—pressed the point further than the Court had in *Obergefell*. The Court in *Pavan* took a hard look at the state's biological justifications for treating parents of different genders and sexual orientations differently in matters concerning their children. In so doing, it provided an example of what it might look like for courts to scrutinize the sorts of sex classifications that continue to ensnare people who engage in nontraditional means of family formation.

Part III turns to *Morales-Santana*. The Court issued an unusual remedy in this case, which drew a lot of attention.²⁶ As a result, most

²⁵ See *Smith v Pavan*, 505 SW3d 169 (Ark 2016) (Chief Justice Brill concurring in part and dissenting in part) (quoting Bob Dylan's *The Times They Are A-Changin'* and reminding his colleagues in the majority, who approved the state's discriminatory birth certificate regime, that "[r]egardless of personal values and regardless of a belief that the United States Supreme Court may have wrongfully decided a legal issue, all are bound by the law of the land").

²⁶ For further discussion of the remedy in *Morales-Santana* and the response to that remedy in the days after the decision came down, see text accompanying notes 150–61.

of the commentary on *Morales-Santana*, at least in the immediate aftermath of the decision, skipped over the momentous move the Court made in this case: it found a sex-based equal protection violation in a case involving an unmarried father. The Court has resisted doing this since the advent of sex-based equal protection law nearly half a century ago. In the first wave of unmarried father cases, the Court almost uniformly declined to engage in any sort of equal protection analysis.²⁷ It almost always disposed of those cases on due process grounds—and only very rarely in the unmarried fathers' favor. More recently, in cases involving citizenship, the Court has applied equal protection law, but only in a diluted form; it has explicitly and implicitly deferred to the government and upheld laws that discriminate against unmarried fathers.²⁸ The Court's decision to apply a robust form of equal protection analysis in *Morales-Santana* and to reject the government's ostensibly biological justification for treating unmarried mothers and fathers differently is therefore a significant development. Particularly when coupled with *Pavan*, it opens up possibilities for the extension of genuinely heightened equal protection scrutiny outside the conventional marital family.

Pavan and *Morales-Santana* have attracted much less attention than some other recent developments involving the same areas of law. But, this article argues, the Court did more in these decisions than meets the eye. It extended equal protection into areas it had previously walled off from meaningful constitutional scrutiny. It took a close look at ostensibly biological justifications for discrimination that had previously gone unexamined in cases involving gay people and unmarried fathers. In doing so, it discovered that those justifications were acting as smokescreens, obscuring a set of social judgments inconsistent with contemporary equal protection principles. If the Court abides by this approach, it could have significant ramifications for the rights of gay

²⁷ See Serena Mayeri, *Foundling Fathers: (Non)-Marriage and Parental Rights in the Age of Equality*, 125 Yale L J 2292 (2016) (providing an extensive historical account of the Court's refusal in the 1970s and early 1980s to subject sex classifications to heightened scrutiny in cases involving unmarried fathers).

²⁸ See Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L J 2260, 2282–85 (2017) (discussing the Court's treatment of unwed fathers in *Nguyen v Immigration and Naturalization Service* and other cases involving citizenship); Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 Yale L J 1669 (2000) (criticizing the Court's failure to apply long-standing equal protection principles in a case involving a citizenship law that discriminated against unwed fathers on the basis of sex).

people and unwed fathers in particular, and more generally for the kind of differential treatment courts consider constitutionally justifiable based on “inherent differences” between the sexes, including in cases involving pregnancy. Whether that will occur, it is too early to say. What is clear is that returning to a regime in which the state may simply cite “inherent differences” between the sexes to justify discrimination against gay people and unmarried fathers would require unseeing much of what *Pavan* and *Morales-Santana* exposed.

I. Constitutional Sex Discrimination Law—and Exceptions to It

For many years, the Eagle Forum, a leader in the conservative “pro-family movement,” has maintained on its website a list of the “top ten cases that prove the Equal Rights Amendment (ERA) would have been a disaster.”²⁹ The ERA, which fell three states short of ratification in 1982, would have guaranteed that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”³⁰ The Eagle Forum’s list, which is designed to illustrate the disastrous consequences a constitutional bar on sex discrimination would have inflicted on American society, is notable for two reasons. The first is the sheer number of cases on the list (an absolute majority) that have to do with the subjects of this article: pregnancy, gay people, and unmarried fathers. The second is that the list underscores the amount of discrimination that still exists with respect to these subjects—despite the fact that the Court over the past half-century has developed a constitutional bar on sex discrimination that functions as a “de facto ERA.”³¹ It is difficult today “to identify any respect in which constitutional law is different from

²⁹ Top Ten Cases That Prove the Equal Rights Amendment (ERA) Would Have Been a Disaster, Eagle Forum (2002), at <http://www.eagleforum.org/era/2002/top-ten.shtml>.

³⁰ HRJ Res 208, 92d Cong, 1st Sess (1971); SJ Res 8, 92d Cong, 1st Sess (1971). Some classic accounts of the ERA’s failure include Mary Frances Berry, *Why ERA Failed* (Indiana, 1986); Jane J. Mansbridge, *Why We Lost the ERA* (Chicago, 1986); and Donald G. Mathews and Jane Sherron De Hart, *Sex, Gender, and the Politics of ERA* (Oxford, 1990).

³¹ Michael C. Dorf, *Equal Protection Incorporation*, 88 Va L Rev 951, 985 (2002) (“The social changes that did not quite produce the Equal Rights Amendment produced a de facto ERA in the Court’s equal protection jurisprudence.”); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 Cal L Rev 1323, 1324 (2006) (observing that “[w]ith energetic countermobilization, the ERA was defeated,” but that “[i]n this same period, the Court began to interpret the Fourteenth Amendment in ways that were responsive to the amendment’s proponents—so much so that scholars have begun to refer to the resulting body of equal protection case law as a ‘de facto ERA’”).

what it would have been if the ERA had been adopted.”³² Yet a striking number of the regulations the Eagle Forum references—regulations it assumes would automatically be invalidated by a constitutional bar on sex discrimination—either remain good law or were only very recently deemed unconstitutional.

What accounts for the lag? This part shows that the Court has been slower to apply sex-based equal doctrine in certain contexts that strike especially close to the core of “separate spheres” ideology. That ideology, which prevailed for the first two centuries of our nation’s history, mandates that women play domestic roles, taking care of hearth and home—and of course children—and that men take charge in the public sphere. As late as 1961, the Court approved a Florida law exempting women from jury service on the ground that the law merely acknowledged the “special responsibilities” that flow from women’s natural role as the “center of home and family life.”³³ But the 1960s also witnessed the rise of the women’s movement, which took aim at stereotyped assumptions about men’s and women’s roles. Advocates of sex equality argued that much of what looked natural when it came to the sexes was actually socially constructed: it was not biology that required women to serve as the center of home and family life, but rather a vast apparatus of laws and customs that constrained them from straying too far outside those domains.³⁴ In the 1970s, the Court began to see that this was so. It began to apply heightened scrutiny to laws that discriminated on the basis of sex and, in a very short period of time, invalidated thousands of such laws.

The Court applied its new sex-based equal protection doctrine unevenly, however. Although the Court purported to subject all laws that classify on the basis of sex to heightened scrutiny, in practice, it

³² David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv L Rev 1457, 1476–77 (2001); see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U Pa L Rev 419, 502 (2001) (asserting that “[b]ecause the women’s movement did shift public norms to a relatively anti-discrimination baseline, it was able to do through the Equal Protection Clause virtually everything the ERA would have accomplished had it been ratified and added to the Constitution”); Jeffrey Rosen, *The New Look of Liberalism on the Court*, NY Times § 6 (magazine) at 60 (Oct 5, 1997) (quoting Justice Ruth Bader Ginsburg, who observed: “There is no practical difference between what has evolved and the ERA.”).

³³ *Hoyt v Florida*, 368 US 57, 62 (1961). For more on *Hoyt*, see Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 Cal L Rev 1101, 1114–24 (2012).

³⁴ For more on the history and development of these denaturalizing arguments, see Franklin, 85 NYU L Rev at 92–106 (cited in note 6).

carved out an array of exceptions—most notably in cases involving pregnancy, gay people, and single fathers. Sometimes, the Court explicitly exempted discrimination in these areas from heightened scrutiny;³⁵ other times, it simply applied a rational basis standard without acknowledging the downward departure.³⁶ The Court's reasons for departing from its general rule regarding sex classifications varied, but the departures themselves reveal a consistent theme. Unmarried fathers and gay people—especially gay people who form couples and/or become parents—present a particularly deep challenge to the separate-spheres ideology, as do pregnant women who do not wish to become mothers and mothers who do not wish to remain at home. As a result, people who fall into these categories have often had to wait longer to benefit from the full protection of constitutional equality law. Some are still waiting.

Around pregnancy, for instance, the Court in the 1970s created a kind of bubble that has insulated various forms of regulation from constitutional review. In 1971, in *Reed v Reed*, the Court—for the first time in American history—invalidated a law on the ground that it discriminated on the basis of sex.³⁷ Cases involving abortion and pregnancy discrimination soon followed. But the Court did not apply its new, more skeptical equality jurisprudence in either context. Where abortion was concerned, the Court chose to analyze regulations under substantive due process and almost entirely skirted questions about women's equality.³⁸ Then in 1974, in *Geduldig v Aiello*, it held that pregnancy discrimination is not sex discrimination because it does not differentiate between men and women, but simply subjects pregnant

³⁵ See, for example, *Fiallo v Bell*, 430 US 787 (1977) (explicitly applying rational basis review in a case involving discrimination against unwed fathers in the context of citizenship).

³⁶ See, for example, *Michael M. v Superior Court of Sonoma County*, 450 US 464, 470 (1981) (purporting to apply heightened scrutiny but actually granting “great deference” to the legislature); id at 488–96 (Brennan, J, dissenting) (arguing that the plurality opinion failed to apply heightened scrutiny to the sex classification at issue).

³⁷ 401 US 934 (1971).

³⁸ See, for example, *Roe v Wade*, 410 US 113 (1973) (deciding that women have a constitutional right to abortion as a matter of substantive due process); see also Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan L Rev 261, 273 (1992) (observing that “[i]n *Roe*, the Court repeatedly suggests that states should defer to private decisions respecting abortion because they reflect the expertise of a medical professional, not because the community owes any particular deference to women's decisions about whether to assume the obligations of motherhood”).

people to less favorable treatment than nonpregnant people.³⁹ However, when the government turned around and defended *sex classifications* by reference to pregnancy, the Court changed course and concluded that pregnancy was an “inherent difference” between men and women that could justify their differential treatment.⁴⁰ This gave rise to something of a paradox: under the law the Burger Court created, pregnancy discrimination does not count as sex discrimination, yet pregnancy is, in some instances, deemed to be a fundamental difference between the sexes that gives the state a legitimate reason to treat men and women differently. Despite the apparent tension between these approaches, they are consistent in one respect: in both circumstances, the Court steps back and allows the state greater leeway to regulate because pregnancy is involved.

In recent decades, the Court has made several gestures toward limiting this leeway. In 1992, it invalidated an abortion law, which regulated pregnant women, on the ground that it reflected and reinforced a “common-law understanding of woman’s role within the family.”⁴¹ In 2003, in a case involving the Family and Medical Leave Act, the Court suggested that discrimination against women “when they are mothers or mothers-to-be,” that is, pregnant, ought to be treated as a serious constitutional problem.⁴² But the Court has never explicitly overruled *Geduldig*; nor has it overruled the decisions in which it effectively applied a lower level of scrutiny when confronted by sex classifications justified by reference to pregnancy. Thus, even if the regulation of pregnancy no longer falls entirely outside the ambit of sex-based equal protection law, there remain substantial questions about how

³⁹ 417 US 484 (1974).

⁴⁰ *Michael M. v Superior Court of Sonoma County*, which was decided not too long after *Geduldig*, provides a particularly vivid illustration of this phenomenon. The Court in *Michael M.* upheld a law criminalizing sex with minor females, but not minor males, on the ground that girls, by virtue of their ability to become pregnant, “suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity.” *Michael M.*, 450 US at 471.

⁴¹ *Planned Parenthood of Southeastern Pa. v Casey*, 505 US 833, 897 (1992). The law *Casey* invalidated required married women to notify their husbands before terminating a pregnancy. *Id.* at 887.

⁴² *Nevada Department of Human Resources v Hibbs*, 538 US 721, 736 (2003) (quotation marks omitted). For more on *Hibbs*’s groundbreaking commentary on the status of pregnancy discrimination under the Equal Protection Clause, see Franklin, 85 NYU L Rev at 149–54 (cited in note 6); Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 Stan L Rev 1871 (2006).

closely the Court will scrutinize state action in this area to ensure that it does not perpetuate conventional sex-role stereotypes.

A similar dynamic exists in the domain of sexual orientation. Courts have long shied away from applying heightened scrutiny to laws that facially classify on the basis of sex in cases in which the perceived targets of those laws are sexual minorities.⁴³ So-called traditional marriage laws are a good example. Such laws explicitly restricted one's choice of partner on the basis of sex. They barred women, but not men, from marrying women (and vice versa). Yet when the first challenge to such a law reached the Court in the early 1970s—after the Court's landmark decision in *Reed*, invalidating a sex classification under equal protection and suggesting that such classifications raise significant constitutional issues—the Court issued a one-sentence order dismissing the lawsuit “for want of a substantial federal question.”⁴⁴ That 1972 ruling set a powerful precedent: where gay rights are concerned, courts have typically declined to subject facial sex classifications to the same level of scrutiny they apply to such classifications outside that context.

Often, courts in gay rights cases have simply applied rational basis review to laws that classify on the basis of sex without even acknowledging the discrepancy. When courts have supplied a reason for downgrading the level of scrutiny, they generally explain that, although the law at issue facially discriminates on the basis of sex, its real purpose is to regulate homosexuality: the law targets gays and lesbians, not men and women.⁴⁵ At this point, there is a substantial academic literature arguing that discrimination against gays and lesbians *is* sex discrimination, not simply because it involves facial sex classifications, but also, more substantively, because it reflects and reinforces traditional

⁴³ See, for example, Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 Colum L Rev 2087 (2014) (discussing courts' hesitancy to apply sex-based equal protection law to the sex classification in marriage).

⁴⁴ *Baker v Nelson*, 409 US 810, 810 (1972).

⁴⁵ See, for example, *In re Marriage Cases*, 183 P3d 384, 437 (Cal 2008) (declining to apply sex-based equal protection law to the sex classification in marriage because, “in realistic terms, a statute or policy that treats same-sex couples differently from opposite sex couples . . . does not treat an individual man or an individual woman differently *because of* his or her *gender* but rather accords differential treatment *because of* the individual's *sexual orientation*”); *Hernandez v Robles*, 855 NE2d 1, 11 (NY 2006) (declining to apply sex-based equal protection law because there was no indication that the sex classification in marriage was “designed to subordinate either men to women or women to men as a class”).

understandings of men's and women's sex and family roles.⁴⁶ There is also a (smaller) literature pushing back against this argument. Martha Nussbaum, for instance, has argued that discrimination against gays and lesbians has less to do with the enforcement of sex stereotypes and more to do with "profound anxieties about bodily penetration and vulnerability" (this argument assumes that "prejudice against gay men . . . is really what drives antigay efforts in America").⁴⁷

But even if courts believed that antigay discrimination was driven solely by disgust, and that that disgust had nothing to do with gays' and lesbians' transgression of traditional gender norms, that still does not explain their failure to extend heightened scrutiny to *sex classifications* in this context. The Court has repeatedly and vehemently insisted over the past forty years that equal protection law is anti-classificationist—that it is concerned with regulations that formally classify on forbidden grounds and that the level of constitutional scrutiny does not vary according to subjective judgments about the nature of those classifications. For instance, if a state that assigned white employees to one set of jobs and black employees to another set of jobs were to convince the Court that it did this, not out of racial prejudice, but merely because it wanted wealthier employees in one set of jobs and poorer employees in the other, and race worked as a proxy for this, that would get the state nowhere. All racial classifications, regardless of their purpose, are subject to strict scrutiny.⁴⁸ The fact that the government *does* get somewhere when it argues that the real purpose of a sex classification is to prefer heterosexuals to homosexuals suggests that, in fact, the Court exercises considerable judgment in determining

⁴⁶ See, for example, Suzanne Pharr, *Homophobia: A Weapon of Sexism* (Chardon, 1988); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 Stan L & Pol Rev 97, 125–34 (2005); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L Rev 1199 (2010); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv L Rev 1307 (2012); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L Rev 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis L Rev 187; Deborah A. Widiss, Elizabeth L. Rosenblatt, and Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv J L & Gender 461 (2007).

⁴⁷ Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* 116 (Oxford, 2010); see also Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L Rev 471 (2001).

⁴⁸ *Johnson v California*, 543 US 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications. . ."); *Adarand Constructors, Inc. v Peña*, 515 US 200, 222 (1995) ("[T]he Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.").

what counts as a classification for purposes of equal protection law.⁴⁹ In the context of gay rights, as in the context of pregnancy, the Court's hesitancy to subject the state's justifications to heightened scrutiny reflects (at least in part) a hesitancy about completely dismantling the sex-role-based structures that have undergirded American society since the time of the founding. The result has been that, in this context too, biological justifications for discrimination have generally gone unchecked.

These same features appear in equal protection cases involving unmarried fathers. Right around the time the Court was beginning to subject laws that discriminate on the basis of sex to heightened scrutiny, unmarried fathers began to bring constitutional challenges to regulations that made it more difficult for them, as opposed to unmarried mothers, to establish legal rights with regard to their children. Many of these cases involved fathers who were contesting the adoption of their children by men married to their children's mothers;⁵⁰ others involved child custody⁵¹ or the right to sue for the wrongful death of a child.⁵² In all of these instances, the contested laws classified on the basis of sex in ways that saddled unmarried fathers with particular burdens. Unmarried mothers were given the right to consent (or not consent) to the adoption of their children, unmarried fathers were not; unmarried mothers were permitted to bring wrongful death lawsuits when their children were killed, unmarried fathers were not; unmarried mothers automatically retained custody of their children when the fathers of those children died, unmarried fathers did not necessarily retain custody when their children's mothers died.

⁴⁹ Scholars have written about this phenomenon in the context of race as well. See, for example, Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U Miami L Rev 9, 16–17 (2003) (contrasting cases finding racial classifications where race is considered as one of many factors in the context of affirmative action and cases finding no classification when race is considered as one of many factors in adoption placements and suspect identification); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv L Rev 493, 509 (2003) (suggesting that the term “racial classification” may “function[] as a term of art that encompasses a mix of descriptive and normative elements”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv L Rev 1470, 1542–44 (2004) (discussing the indeterminacy of what counts as a racial classification and courts' hesitancy to find racial classifications, and thus apply strict scrutiny, in cases involving, among other things, the collection of racial census data and racial profiling by law enforcement officials).

⁵⁰ See, for example, *Lehr v Robertson*, 463 US 248 (1983); *Caban v Mohammed*, 441 US 380 (1979); *Quilloin v Walcott*, 434 US 246 (1978).

⁵¹ See, for example, *Stanley v Illinois*, 405 US 645 (1972).

⁵² See, for example, *Parham v Hughes*, 441 US 347 (1979).

Occasionally, unmarried fathers won these cases; more often, they lost. But in almost all of these cases the Court simply sidestepped the equal protection question and resolved the issue on due process grounds.⁵³ That approach resulted in highly fact-intensive decisions, generally holding that the father in question had not done enough to establish a relationship with his child and had consequently forfeited whatever legal right he was seeking. It also meant that the Court did not engage with the broader constitutional questions about whether laws that discriminate against unmarried fathers reflect or reinforce conventional sex-role stereotypes. When the state sought to justify the differential treatment of unmarried men and women by citing biological differences between the sexes, the Court generally left those justifications unexamined. When the Court did examine such biological justifications, far from drilling down on them in the way that constitutional doctrine by then required, it tended to embrace them. In *Parham v Hughes*, for example, the Court upheld a law that allowed the mother but not the father of a nonmarital child to sue for the child's wrongful death on the ground that "mothers and fathers of illegitimate children are not similarly situated. . . . Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."⁵⁴ The implications of the Court's decision to give the state a free pass in these cases and to leave unexamined, or even to endorse, biological justifications for discrimination would reverberate through constitutional sex discrimination law for decades to come.

II. Scrutinizing Biological Justifications for Discrimination Against Gay Parents

The ongoing power of biological justifications for sex discrimination was evident in 2016 in the Arkansas Supreme Court's decision to uphold a law that treated men and women differently with respect

⁵³ Mayeri, 125 Yale L.J. at 2372 (cited in note 27) (showing that although, in the 1970s and 1980s, "nonmarital fathers achieved some due process protections, they never won a constitutional guarantee of equal treatment based on sex and marital status").

⁵⁴ *Parham v Hughes*, 441 US 347, 355 (1979); see also *Caban*, 441 US at 405–06 (Stevens, J., dissenting) (condoning "the differential treatment of the mother and the father in the adoption process" because when a child is born, "the mother and child are together; the mother's identity is known with certainty," whereas the father "may or may not be present; his identity may be unknown," and "[t]hese natural differences between unmarried fathers and mothers make it probable that the mother, and not the father or both parents, will have custody of the newborn infant").

to their children's birth certificates.⁵⁵ The law required that a man's name be placed on the birth certificate of his wife's newborn child in almost all circumstances, while prohibiting a woman's name from being placed on the birth certificate of her wife's newborn child.⁵⁶ A set of married lesbians who had recently become parents challenged the law in the wake of *Obergefell*—which had declared that the Constitution guarantees same-sex couples the right to marry “on the same terms and conditions as opposite-sex couples.”⁵⁷ The lesbian couples challenging the law argued that it violated this precept and discriminated on the basis of sex and sexual orientation in violation of the Fourteenth Amendment.⁵⁸

The Arkansas Supreme Court disagreed. It endorsed the state's argument that the overarching purpose of its birth certificate system was not to sanctify anyone's marriage but to identify biological ties between parents and children for public health and other purposes.⁵⁹ That was an important state interest, the Court held, and it was not discriminatory to treat male and female spouses of birth mothers differently in this context in recognition of the fact that the female spouse “does not have the same biological nexus to the child that the biological mother or the biological father has.”⁶⁰ In sum, the Court concluded: “It does not violate equal protection to acknowledge basic biological truths.”⁶¹

The Arkansas Court's decision was not an outlier. Indeed, it was indicative of a long-term trend in gay rights law. In 1972, in *Baker v Nelson*, the U.S. Supreme Court did not even ask the government to

⁵⁵ *Smith v Pavan*, 505 SW3d 169 (Ark 2016).

⁵⁶ *Pavan v Smith*, 137 US 2075, 2077 (2017).

⁵⁷ 135 S Ct 2584, 2605 (2015). Indeed, the Court in *Obergefell* explicitly cited the placement of one's name on a marital child's birth certificate as one of the “governmental rights, benefits, and responsibilities” traditionally entailed in marriage. *Id.* at 2601.

⁵⁸ Appellees' Responsive Brief, *Smith v Pavan*, Civil Action No 15-988, *11–22 (Ark filed May 23, 2016) (available on Westlaw at 2016 WL 7987958).

⁵⁹ *Smith*, 505 SW3d at 179–80; see also *id.* at 178 (“[T]he statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife.”).

⁶⁰ *Id.* at 181. The Court accepted the state's assertion that the female spouse of a birth mother will never have a biological relationship to a child of the marriage. Although it did not become central to the United States Supreme Court's holding in *Pavan*, this is, in fact, not true. See note 15, which describes a situation in which a birth mother's female partner is biologically related to her child.

⁶¹ *Id.*

justify its discrimination against same-sex couples.⁶² Over the next few decades, as constitutional challenges to laws that discriminated against gays and lesbians proliferated, courts began to require that the government provide some sort of justification for the discrimination. At first, the bar for such justifications was exceedingly low. The state could simply argue that homosexuality was immoral and that “[m]any Americans d[id] not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”⁶³ Courts in the 1980s and 1990s often sympathized with Americans who viewed antigay laws as a means of “protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.”⁶⁴ Justice Scalia, who penned the preceding quotations, would have accepted such justifications for sexual-orientation-based discrimination well into the twenty-first century.⁶⁵

But over time, the Court rejected such views. It began to subject laws that discriminate against gays and lesbians to something more than rational basis review and to reject arguments grounded purely in traditional morality.⁶⁶ At that point, biological arguments became the coin of the realm in terms of justifying orientation-based state action, particularly in matters relating to family law. Where marriage was

⁶² See note 44 and accompanying text.

⁶³ *Lawrence v Texas*, 539 US 558, 602 (2003) (Scalia, J, dissenting).

⁶⁴ *Id.*

⁶⁵ Cf. Jeffrey Toobin, *Justice Scalia’s Shameful Joke*, New Yorker (Apr 28 2015), available at <https://www.newyorker.com/news/daily-comment/on-gay-marriage-its-not-scalias-court> (reporting on the oral argument in *Obergefell*, during which Justice Scalia (sort of) joked that a protester’s shouted assertion that supporters of gay marriage would “burn in Hell” was “refreshing”).

⁶⁶ See, for example, *Lawrence*, 539 US at 582 (“This case raises a different issue . . . : whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not.”). The Court purported to apply rational basis review in *Lawrence* and *Romer v Evans*, 517 US 620 (1996) (striking down a state constitutional amendment barring all government action designed to protect people on the basis of sexual orientation). Indeed, the Court never explicitly stated, even in *United States v Windsor*, 133 S Ct 2675 (2013) (holding the Defense of Marriage Act unconstitutional), and *Obergefell* that it had heightened the standard of review. But as the dissenting Justices in these cases correctly noted, the Court has clearly departed from traditional rational basis review and now holds laws that discriminate against gays and lesbians to a higher constitutional standard. See, for example, *Windsor*, 133 S Ct at 2706 (Scalia, J, dissenting) (observing that, although the Court does not explicitly state that it has departed from rational basis, it “certainly does not *apply* anything that resembles that deferential framework”).

concerned, states began to argue that preserving the sex distinction was essential because only different-sex couples could produce children, and society needed an institution that could bind fathers to their children and to the women who gave birth to those children.⁶⁷ When the sex-role stereotypes embedded in that ostensibly biological argument became too apparent to ignore, states stripped it down further, dropping the explicit references to fathers' lack of commitment to their children and arguing simply that marriage was an institution designed to manage the care of children and that only heterosexuals—who often procreated without intending to—were thus in need of it.⁶⁸ Proponents of “traditional marriage” argued that allowing same-sex couples to marry would delink the institution from procreation and therefore reduce its efficacy in keeping heterosexuals in check.⁶⁹

It is not surprising that the constitutional argument for excluding gays and lesbians from marriage arrived at this destination. Under the Court's doctrine, biology remains the most promising justification for laws that discriminate on the basis of sex and sexual orientation. In fact, procreation-based justifications for limiting marriage rights to different-sex couples prevailed in lower courts for some years.⁷⁰

Those arguments met their end, however, in *Obergefell*. The Court observed in *Obergefell* that much of what had once seemed “natural” about marriage was subsequently revealed to reflect stereotyped con-

⁶⁷ See Widiss, Rosenblatt, and NeJaime, 30 Harv J L & Gender 461 (cited in note 46) (describing states' increasing reliance on arguments of this sort).

⁶⁸ The best example of this form of the argument appears in Chief Justice Roberts's dissenting opinion in *Obergefell v Hodges*, 135 S Ct 2584 (2013) (Roberts, CJ, dissenting) (“The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond. Society has recognized that bond as marriage.”); see also id at 2641 (Alito, J, dissenting) (asserting that states “formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children”).

⁶⁹ For more on this argument, see Kenji Yoshino, *The Best Argument Against Gay Marriage, and Why It Fails*, Slate (Dec 13, 2010), at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/12/the_best_argument_against_gay_marriage.html.

⁷⁰ See Kerry Abrams and Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 Yale J L & Humanities 1, 3–4 (2009) (describing the emergence and rapid adoption of this argument by courts throughout the country after 2003).

ceptions of men's and women's roles.⁷¹ In the nineteenth century and even into the twentieth, the Court explained, marriage was synonymous with coverture, the system through which a married woman's legal identity was subsumed into that of her husband.⁷² Even when coverture receded, "invidious sex-based classifications in marriage remained common."⁷³ For a long time, those classifications were understood to be justified by men's and women's different talents and capacities—including differences in their reproductive functions. But, in the 1970s and 1980s, it became apparent that lurking underneath the veneer of the government's biological justifications for treating husbands and wives differently was a plethora of social judgments and generalizations incompatible with constitutional liberty and equality guarantees.⁷⁴

Now, the Court held in *Obergefell*, it was time for a similar unmasking in the context of sexual orientation. Upon examination, the biological justifications for limiting marriage to different-sex couples were revealed to be just as socially constructed and constitutionally troublesome as the old arguments in favor of coverture. The Court observed that "[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State."⁷⁵ Older people and infertile people have never been barred from marrying, because, in fact, "[t]he constitutional marriage right has many aspects, of which childbearing is only one."⁷⁶ Moreover, the Court concluded, it makes no sense to suggest that allowing gay people to marry would "sever the connection between natural procreation and marriage" and thereby cause fewer heterosexuals to marry: "Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-

⁷¹ *Obergefell*, 135 S Ct at 2595.

⁷² *Id.*

⁷³ *Id.* at 2603.

⁷⁴ *Id.* at 2603–04 ("These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that 'the husband is the head of the family and the wife is subject to him. . . .' Ga. Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage.").

⁷⁵ *Obergefell*, 135 S Ct at 2601.

⁷⁶ *Id.*

sex couples may do so.”⁷⁷ The dissenting Justices pushed back hard on the biological front, insisting that “[f]or millennia, marriage [has been] inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”⁷⁸ But the Court in *Obergefell* made clear that, although that kind of ostensibly biological justification may have escaped constitutional scrutiny in the past, the law now demanded more.⁷⁹

Just how much more was on display in *Pavan*. If the biological justification for maintaining the sex classification in marriage was always a little shaky, the argument for treating male and female spouses of birth mothers differently with respect to birth certificates seemed, at first glance, more plausible. But once again, the Court declined to defer to the government’s proffered biological justifications: it genuinely scrutinized the challenged law to ensure it did not reflect or reinforce illicit social judgments.

Arkansas’s birth certificate regime could not withstand such scrutiny. Upon examination, it became clear that there was more at work in the way the state allocated spots on birth certificates than simply biology. For one thing, the automatic inclusion of the birth mother’s husband ran directly counter to biology in a range of cases—and intentionally so. The Court observed, for instance, that if the mother used a sperm donor, her husband’s name still appeared on the birth certificate as the child’s father.⁸⁰ Also, the Court noted, if the mother slept with another man and became pregnant that way, the state still mandated that her husband’s name be listed on the child’s birth certificate, even if he objected to being labeled the father of a child to whom he had no biological ties.⁸¹ The Court pointed to the challeng-

⁷⁷ *Id.*

⁷⁸ *Id.* at 2641 (Alito, J, dissenting); see also *id.* at 2584 (Roberts, CJ, dissenting).

⁷⁹ *Obergefell*, 135 S Ct at 2602 (“The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”).

⁸⁰ *Pavan*, 137 S Ct at 2077.

⁸¹ *Id.* (noting that one of the very few ways a husband can avoid the inclusion of his name on the birth certificate in these circumstances is if he and “the ‘mother’ and . . . ‘putative father’ all file affidavits vouching for the putative father’s paternity”). The only other way a husband can avoid being listed on the birth certificate of his wife’s newborn child is if a court of competent jurisdiction has determined that he is not the father of the child. See *Smith v Pavan*, 505 SW3d 169, 175 (Ark 2016).

ers' brief for more arguments along these lines⁸²—the most striking of which was simply that Arkansas made no effort to ensure that a birth mother's husband actually had biological ties to the child on whose birth certificate he was listed as the father.⁸³ In fact, biological fathers have traditionally had enormous difficulty obtaining parental rights when their children are born to married women who are not their wives: the marital relationship between husband and wife has generally trumped the genetic relationship between a biological father and his child.⁸⁴ Because Arkansas "has . . . chosen to make its birth certificates more than a mere marker of biological relationships," *Pavan* held, it could not rely on biological justifications to defend its differential treatment of same-sex and different-sex couples.⁸⁵

Pavan was obviously an application of *Obergefell*'s holding that same-sex couples are entitled to civil marriage rights "on the same terms and conditions as opposite-sex couples."⁸⁶ But it was not merely a matter of judicial housekeeping—a case in which the Court simply swept away a law that obviously contravened a prior ruling. *Pavan* extended the principles articulated in *Obergefell* even deeper into the family, revealing how normative judgments about gender and sexual orientation can underwrite even the most elementary-seeming "facts" about reproductive biology. The Court's refusal to defer to ostensibly biological reasoning even in *Pavan*, where the state's justifications seemed to be at their most "biological," could have implications for a broad range of cases,⁸⁷ particularly in the realm of assisted reproduc-

⁸² *Pavan*, 137 S Ct at 2078 ("As the petitioners point out, other factual scenarios (beyond those present in this case) similarly show that the State's birth certificates are about more than genetic parentage.").

⁸³ Reply Brief of Petitioners, *Pavan v Smith*, Civil Action No 16-992, *4–6 (US filed May 1, 2017) (available on Westlaw at 2017 WL 1629334) (pointing out "that a biological relationship with the child is not required for Arkansas to list the male spouse of the birth mother as the child's parent," and that "[n]ot only do [the state's] laws often require the *exclusion* of a child's biological parent from a birth certificate, they permit and sometimes require the *inclusion* of non-biological parents").

⁸⁴ See, for example, *Michael H. v Gerald D.*, 491 US 110 (1989) (holding that a biological father's liberty interest in maintaining a relationship with his child did not overcome a statutory presumption that the husband of the child's mother was the child's other parent).

⁸⁵ *Pavan*, 137 S Ct at 2078.

⁸⁶ *Id* (quoting that language in *Obergefell*). The Court determined in *Pavan* that inclusion on birth certificates was one of "the constellation of benefits that the States have linked to marriage," and that married same-sex couples could not therefore be treated differently in this regard from married different-sex couples. *Id* at 2077.

⁸⁷ Indeed, a few months after *Pavan* came down, the Arizona Supreme Court relied on it to invalidate that state's differential treatment of male and female spouses of birth mothers in the

tive technology (ART)—a method of family formation to which more Americans are turning every year.

Doug NeJaime has extensively chronicled instances in which biological justifications are still being offered—and accepted by courts—for regulations that, in actuality, perpetuate conventional stereotypes about men's and women's sex and family roles and disadvantage gay people.⁸⁸ For instance, courts often allow husbands (with no biological relation) to derive parental rights through marriage to a newborn's biological mother, but they do not allow wives (with no biological relation) to derive parental rights through marriage to a newborn's biological father.⁸⁹ A woman who relies on a gestational surrogate to carry a child produced with a donor egg and her husband's sperm generally cannot derive parentage by being married to the biological father, whereas if donor sperm is used, a man can derive parental rights by being married to the child's biological mother.⁹⁰ This distinction penalizes nonbiological mothers, and it also penalizes gay men. Lesbians can obtain parental rights by being married to a biological mother; gay men cannot obtain parental rights by being married to a biological father. When these distinctions are challenged, judges have cited "actual physiological differences between men and women" as justification for upholding them.⁹¹ But, in fact, from a biological standpoint, nongestational, nongenetic mothers are not situated any differently from nonbiological fathers; lesbians whose wives produce biological children are not situated any differently from gay men whose husbands do.⁹² The distinction is not a biological one, it is a social one: "[E]ven in an age of sex and sex-orientation equality, courts and legislatures continue

assignment of legal parentage. See *McLaughlin v McLaughlin*, 401 P3d 492 (Ariz 2017). Prior to this ruling, Arizona presumed that a man was the legal parent of any child to whom his wife gave birth in the course of their marriage, but did not extend the same presumption to female spouses whose wives gave birth. The litigant defending the law argued that the state's sex-differentiated system of parental presumptions simply tracked biology. *Id.* at 498. But the Arizona Supreme Court rejected that argument for reasons similar to those the Court relied on in *Pavan*. See *id.* ("Because the marital paternity presumption does more than just identify biological fathers, Arizona cannot deny same-sex spouses the benefit the presumption affords. See *Pavan*....").

⁸⁸ See NeJaime, 126 Yale L J 2260 (cited in note 28).

⁸⁹ *Id.* at 2290–2316.

⁹⁰ *Id.*

⁹¹ *In re Parentage of a Child by T.J.S. & A.L.S.*, 54 A3d 263, 264 (NJ 2012) (Hoens concurring) (citation omitted).

⁹² The one instance in which there is a difference is when one mother provides the egg and the other gestates the fetus, but courts do not cabin the differential treatment of lesbian mothers

to treat *biological mothers* as the parents from whom the *legal family* necessarily springs.”⁹³ If you are a biological mother, or are married to one, your parental rights are likely secure; if not, you are likely to face some problems.

Regulations of this sort, which have the effect of reinforcing traditional sex stereotypes and disadvantaging sexual minorities, are ripe for reconsideration in light of the Court’s holding in *Pavan*. Change will not come easily in this area, however. The Court’s opinions in *Obergefell* and *Pavan* both triggered vigorous dissents. The dissenting Justices in those cases disavowed the Court’s deployment of heightened scrutiny in the context of gay rights; in fact, it is not even clear they entirely accept the use of heightened scrutiny in the context of sex.⁹⁴ In both *Obergefell* and *Pavan*, the dissenters would have deferred to the state, allowing it to rely on biological justifications for the challenged discrimination without subjecting those justifications to any real scrutiny.

Indeed, in his dissenting opinion in *Pavan*, Justice Gorsuch—the Court’s newest Justice—relied heavily on a case involving an unmarried father in which the Court did just that.⁹⁵ In that case, which also involved a sex classification, the Court purported to apply heightened scrutiny, but in fact applied a standard of review akin to rational basis: it accepted a biological justification for discrimination over a strenuous dissenting opinion that exposed the thick layer of stereotypes underlying the state’s claims.⁹⁶ Justice Gorsuch’s dissent likely raised alarm bells for scholars concerned that in the future—especially if more right-leaning Justices are appointed—the Court will cabin its pronouncements about liberty and equality in *Obergefell* to the context of mar-

and gay fathers to those instances. See NeJaime, 126 Yale L J at 1206–07, 2314–16 (cited in note 28).

⁹³ Id at 2314.

⁹⁴ See Mary Anne Case, *Missing Sex Talk in the Supreme Court’s Same-Sex Marriage Cases*, 84 UMKC L Rev 675 (2016) (“[N]one of the dissenters in *Obergefell* has ever, as far as I can tell, voted in favor of a constitutional sex discrimination claim.”). Case observes that when questioned by Senator Joseph Biden during his confirmation hearings, Chief Justice Roberts “did express a commitment to heightened scrutiny for sex distinctions, but in a way that . . . does not quite commit him to upholding, let alone extending, the current settled law of constitutional sex discrimination.”). Id at n 64.

⁹⁵ *Pavan*, 137 S Ct at 2079 (Gorsuch, J, dissenting) (citing *Nguyen v Immigration and Naturalization Service*, 533 US 53 (2001)).

⁹⁶ For further discussion of the Court’s holding in *Nguyen* and the dissenting Justices’ objections to that holding, see text accompanying notes 122–37.

riage.⁹⁷ As the unmarried-father case Justice Gorsuch cited in *Pavan* demonstrates, the Court has long hesitated to apply constitutional principles derived from its decisions striking down sex classifications in cases involving the nonmarital family. What Justice Gorsuch failed to acknowledge in his dissent, however, is that just two weeks prior to *Pavan*, the Court issued a new decision involving unmarried fathers in which it ratcheted up the level of scrutiny and rejected an ostensibly biological justification for treating the sexes differently. It is to that case this article now turns.

III. Extending Sex-Based Equal Protection Outside Marriage

Sessions v Morales-Santana was a case about citizenship—more specifically, the citizenship of children born abroad to unmarried parents, one of whom is a U.S. citizen and the other of whom is not. In these circumstances, the portion of the INA at issue in the case conferred citizenship automatically on the child of a citizen mother, as long as the mother had resided in the United States for at least one year at some point prior to the child's birth.⁹⁸ The residency requirements were considerably stiffer for citizen fathers: they could transmit citizenship to their children only if, prior to their children's birth, they had lived in the United States for a total of ten years, five of which occurred after their fourteenth birthday.⁹⁹ The child—now a grown man—challenging this law was Luis Morales-Santana. He was born in the Dominican Republic to a Dominican mother and an American father, José Morales.¹⁰⁰ His parents were not married when he was born, although they did marry a few years later.¹⁰¹ When Morales-Santana was thirteen, the family moved to the Bronx.¹⁰² Years later, he was

⁹⁷ See, for example, Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 Cal L Rev 1207 (2016).

⁹⁸ Immigration and Nationality Act of 1952, ch 477, § 309(c), 66 Stat 163, 238–39.

⁹⁹ Id at §§ 301(a)(7), 309(a). In 1986, the requirement for unmarried citizen fathers was reduced to five years in the United States, two of them after the age of fourteen. Immigration and Nationality Act Amendments of 1986, Pub L No 99-653, § 12, 100 Stat 3655, 3657. This amendment did not help Morales-Santana, however, because he was born prior to the change and it did not apply retrospectively.

¹⁰⁰ *Morales-Santana*, 137 S Ct at 1688.

¹⁰¹ Id.

¹⁰² Id.

convicted of burglary and attempted murder, and the government sought to deport him after determining he was not a U.S. citizen.¹⁰³

Because Morales-Santana's parents were not married at the time of his birth, he was subject to the portion of the INA governing non-marital children born abroad to mixed-nationality couples. Unfortunately for him, his father had left Puerto Rico for the Dominican Republic at the age of nineteen—twenty days shy of satisfying the residency requirements that would have enabled him to transmit U.S. citizenship to his son.¹⁰⁴ If José Morales had been a woman, he would easily have satisfied the one-year residency requirement and his son would have been a U.S. citizen. But because José was a man, his son was a foreigner. An immigration judge ordered Morales-Santana's removal to the Dominican Republic—and a Supreme Court case was born.¹⁰⁵

If one knew nothing about the Court's constitutional sex discrimination jurisprudence over the past forty years, it seems unlikely that one would attempt to justify the INA's imposition of different residency requirements on male and female parents by reference to biology. These differential residency requirements are not tied in any obvious way to biological differences between the sexes. It is indicative of how much work "inherent differences" between the sexes continue to perform in justifying discrimination under the Fourteenth Amendment that the government did in fact frame its defense of the differential residency requirements in those terms.

Indeed, constitutional precedents in this area made the government's reliance on biology in *Morales-Santana* a foregone conclusion. About twenty years ago, several different sets of unmarried citizen fathers and their children challenged a closely related provision of the INA having to do with the establishment of parentage.¹⁰⁶ In order to establish parentage, a citizen father of a nonmarital child born abroad to a noncitizen mother was required to "legitimate" or otherwise formally acknowledge paternity of his child before the child turned eigh-

¹⁰³ Brief for the Petitioner, *Sessions v Morales-Santana*, Civil Action No 15-1191, at *7 (US filed Aug 19, 2016) (available on Westlaw at 2016 WL 4436132).

¹⁰⁴ *Morales-Santana*, 137 S Ct at 1687.

¹⁰⁵ *Id* at 1688.

¹⁰⁶ See *Nguyen v Immigration and Naturalization Service*, 533 US 53, 78 (2001); *Miller v Albright*, 523 US 420 (1998).

teen.¹⁰⁷ If the father failed to do so, his ability to transmit citizenship to his child evaporated. Citizen mothers were not required to take any equivalent steps. Assuming they satisfied the one-year residency requirement at issue in *Morales-Santana*, their children automatically acquired U.S. citizenship at birth.

The government defended its differential treatment of men and women with respect to the establishment of parentage in two successive constitutional challenges by arguing that the lopsided requirements merely reflected the fact that the sexes are not similarly situated to one another at the moment of a child's birth.¹⁰⁸ Mothers are invariably present at the birth of their children, and, the government asserted, their participation in the birth automatically establishes their parentage and provides them an opportunity to bond with their children. Fathers are not necessarily present at the birth of their children and—especially when they are not married to their children's mother—may not even know those children exist. Thus, the government argued, the law requires fathers to take a series of affirmative steps to establish what the birthing process has already established where mothers are concerned.

There were various problems with this argument, starting with the fact that, in practice, giving birth does not necessarily provide mothers an opportunity to bond with their children.¹⁰⁹ Some children are taken from their mothers at birth and never get to know them. In such cases, children still automatically derive U.S. citizenship from their mothers. Yet fathers who take custody of their children at birth and raise those children in the United States remain powerless to transmit their citizenship unless they formally acknowledge paternity within the legally specified window. Even a DNA test that demonstrates beyond a shadow of a doubt that a man is his child's father is of no avail under the law if he misses that window.¹¹⁰ But this kind of proof is never required of mothers, even those who long ago lost touch with, or indeed never even met, their children.

¹⁰⁷ For a more detailed account of this law, see *Nguyen*, 533 US at 59–60.

¹⁰⁸ For a more fulsome look at the government's arguments, see Brief for the Respondent, *Nguyen v Immigration and Naturalization Service*, Civil Action No 99-2071 (US filed Dec 13, 2000) (available on Westlaw at 2000 WL 1868100).

¹⁰⁹ See *Nguyen*, 533 US at 86–87 (O'Connor, J, dissenting) (discussing situations in which a birth mother may not have an opportunity to develop a relationship with her child).

¹¹⁰ *Id* at 80.

Despite these seeming infirmities, and others,¹¹¹ the fathers and children in these cases faced an uphill battle: the law they were challenging sat at the intersection of two areas where the Court has traditionally given the government a break under equal protection. As Part I showed, the Court has generally refrained from applying heightened scrutiny to sex-based state action in cases involving unmarried fathers. On top of this, the INA cases involved citizenship—an area where the Court has often deferred to the government under the plenary power doctrine.¹¹² In 1977, for instance, in *Fiallo v Bell*, the Court heard a challenge to a provision of the INA that granted special immigration preferences to noncitizens who qualify as the “children” or “parents” of U.S. citizens.¹¹³ Unmarried mothers and their children qualified for these preferences; unmarried fathers and their children did not.¹¹⁴ The Court did not hold in *Fiallo* that the statute was unreviewable,¹¹⁵ but it applied rational basis review rather than heightened scrutiny in recognition of “the limited scope of judicial inquiry into immigration legislation.”¹¹⁶

With the plenary power doctrine and judicial precedents involving unmarried fathers in the background, the Court in *Miller v Albright*—the first of the challenges to the INA’s sex-differentiated rules regarding the establishment of parentage—left the statute intact.¹¹⁷ The Court in *Miller* was deeply fractured and did not ultimately resolve the constitutional questions presented.¹¹⁸ But at least some of the Justices were

¹¹¹ For more extensive discussion of the imprecise fit between the statute’s provisions and the government’s stated ends, see *id.* at 78–94.

¹¹² For more on the Court’s deployment of the plenary power doctrine in this context, see Cornelia T. L. Pillard and T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v Albright*, 1998 Supreme Court Review 1.

¹¹³ 430 US 787 (1977).

¹¹⁴ *Id.* at 788–89.

¹¹⁵ *Id.* at 792 (concluding that the question at issue was subject “to narrow judicial review” (quotation marks omitted)).

¹¹⁶ *Id.* at 791, 795–96 (holding that, because “[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control” (quotation marks omitted), the government had to provide only “a facially legitimate and bona fide reason” for discriminating on the basis of sex in this context).

¹¹⁷ *Miller v Albright*, 523 US 420 (1998).

¹¹⁸ Six Justices were in favor of upholding the law in *Miller*. Two of these Justices rejected the sex-based equal protection claim; two others believed there were standing problems; and the final two argued that the Court could not confer citizenship as a remedy in this case even if there were an equal protection violation. The three dissenting Justices would have held that

prepared to accept the government's ostensibly biological justifications for treating men and women differently. In an opinion announcing the judgment of the Court, but joined only by Chief Justice Rehnquist, Justice Stevens concluded that "biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."¹¹⁹ Only women are necessarily present at their children's births, Justice Stevens explained; men are not, and unmarried men are especially prone to absence. Thus, he reasoned, "the gender equality principle" that generally applies when the state discriminates on the basis of sex "is only indirectly involved" in this case.¹²⁰ when it comes to establishing parentage, the differential treatment of the sexes reflects not "'gender stereotypes,'" but real physiological differences.¹²¹

Three years later, when the Court took up the question again in *Nguyen v Immigration and Naturalization Service*, this proposition gained the assent of a majority of the Court.¹²² The petitioner in *Nguyen* was born in Vietnam to an unmarried American citizen father and a non-citizen mother.¹²³ His father moved him to the United States at an early age and raised him there, his mother having long since left the family. Like Morales-Santana, Nguyen ran into trouble with immigration authorities after being convicted of a crime. Because his father had not taken the steps the INA required of unmarried men who wish to transmit citizenship to nonmarital children, the government initiated deportation proceedings against him.

Nguyen argued that he was a victim of sex discrimination. If his citizen parent had been female, he would not now be facing deportation to a country he barely remembered. Following in the vein of

the differential treatment of male and female parents constituted a sex-based equal protection violation. *Id.*

¹¹⁹ *Id.* at 445.

¹²⁰ *Id.* at 442.

¹²¹ *Id.* at 443. It is interesting—and revealing—to watch how the Court's placement of quotation marks shifts across different opinions. In the *VMI* case, the Court placed quotation marks around—and thereby raised ontological doubts about—the phrase "inherent differences." *Virginia*, 518 US at 533. In his lead opinion in *Miller*, Justice Stevens placed quotation marks around the phrase "gender stereotypes" instead. *Miller*, 523 US at 443. In this same vein, it is interesting to consider Justice Alito's placement of quotation marks around the phrase "gender equality" in *Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751, 2779 (2014).

¹²² See *Nguyen*, 533 US at 78.

¹²³ For more on the facts in the case, see *id.* at 57–58.

Justice Stevens's opinion in *Miller*, however, the Court held there was no equal protection violation.¹²⁴ The Court explained that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood,”¹²⁵ and that, “[g]iven the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers” that it required of fathers.¹²⁶ Because the mother gives birth, she “knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.”¹²⁷ In other words, the Court concluded, birth provides women an opportunity to bond with their children “as a matter of biological inevitability.”¹²⁸ Fathers do not inevitably have that opportunity. Thus, the Court held, the distinction between unmarried mothers and fathers in these circumstances is not grounded in sex stereotypes, but merely reflects the fact that “[t]he difference between men and women in relation to the birth process is a real one.”¹²⁹

The Court in *Nguyen* purported to apply heightened scrutiny,¹³⁰ but as the dissenting Justices observed, many of the indicia of that standard of review are missing from its opinion.¹³¹ Sex-based equal protection law, properly applied, requires the government to show that it has “an exceedingly persuasive justification” for discriminating on the basis of sex; cannot reasonably satisfy its important constitutional interests through nondiscriminatory means; and did not develop its justification for the discrimination post-hoc, but actually

¹²⁴ Id at 73.

¹²⁵ Id at 63.

¹²⁶ Id at 64.

¹²⁷ Id at 65.

¹²⁸ Id at 73.

¹²⁹ Id. See also id (“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 equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.”).

¹³⁰ *Nguyen*, 533 US at 60–61 (concluding that because the statute at issue in *Nguyen* did not satisfy heightened scrutiny, it was unnecessary to “decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’ immigration and naturalization power”).

¹³¹ Id at 74 (O’Connor, J, dissenting) (“While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents.”).

relied on that justification at the time it decided to discriminate.¹³² The Court in *Nguyen* did not place much of a burden on the government when it came to making these showings. For a start, it was not clear what the discriminatory rule accomplished that a nondiscriminatory rule could not. If the government was interested in ensuring that a child had a biological connection to its American citizen parent before acquiring that parent's citizenship, why wouldn't genetic testing—which the challengers in *Nguyen* had in fact undergone—suffice?¹³³ Likewise, if the government was interested in ensuring that the child had an actual relationship with its citizen parent, it was unclear why a sex-neutral rule would be inferior to the extant rule.¹³⁴ Indeed, a sex-neutral rule would seem to satisfy the government's objectives better because there are certainly cases, like *Nguyen*, in which mothers lack any actual relationship to their children and fathers enjoy a robust one.¹³⁵

Unsurprisingly—given the mismatch between the government's twenty-first-century justifications and the lines the INA draws—history reveals that, in 1940, when Congress enacted the rules governing unmarried citizen parents, it was motivated not by perceived biological differences between men and women, but by stereotyped assumptions about their sex and family roles.¹³⁶ Lawmakers in 1940 viewed unmarried mothers as the sole and natural guardians of their children and assumed unmarried fathers would have little to do with their children—especially when those children were born abroad to noncitizen mothers. If the Court had actually scrutinized the law in *Nguyen*, the dissenting Justices argued, the government's biological justifications would have been exposed as post-hoc rationalizations for a

¹³² Id at 74–78.

¹³³ Id at 80–81.

¹³⁴ Id at 81–83.

¹³⁵ As Justice O'Connor's dissenting opinion notes, it is only by reframing the government's proffered interest as an interest in ensuring that a parent has an "opportunity" to bond with his or her child (as opposed to actually bonding with that child) that the biological argument even gets off the ground. Id at 84 ("By focusing on 'opportunity' rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how... anyone profits from a 'demonstrated opportunity' for a relationship in the absence of the fruition of an actual tie.").

¹³⁶ Id at 91–92.

law that, in practice, perpetuated long-standing and deeply-rooted sex-role stereotypes.¹³⁷

Professor, now Judge, Nina Pillard has argued that although the Court did not explicitly advert to plenary power doctrine in *Nguyen* the way it did in *Fiallo*, that doctrine nonetheless informed its decision.¹³⁸ Pillard argues that *Nguyen* “took the plenary power doctrine underground”—purporting to apply heightened scrutiny, but actually giving the government a pass in deference to its constitutionally-delegated powers over immigration.¹³⁹ That is a plausible contention; it is also true that the Court has historically deferred to the government in Fourteenth Amendment cases involving unmarried fathers.

Whatever combination of factors motivated the Court to slacken the standard of review it actually applied in *Nguyen*, the government was hoping for a reprise of this approach in *Morales-Santana*.¹⁴⁰ Thus, the government focused again on the moment of birth, noting that because unmarried mothers are invariably present at a child’s birth, and because their parentage is thereby assured, they are recognized at that moment as the child’s only legal parent.¹⁴¹ Because an unmarried father does not give birth to his child and has no legal relationship to its mother, he “enters the scene later, as a second parent.”¹⁴² Accordingly, the government argued, a longer physical connection to the United States is warranted for the unmarried father because he alone will have to contend with the “competing national influence” of the

¹³⁷ Id at 91–93.

¹³⁸ See Nina Pillard, *Plenary Power Underground in Nguyen v. INS: A Response to Professor Spiro*, 16 Georgetown Immig L J 835 (2002).

¹³⁹ Id at 836.

¹⁴⁰ Between *Nguyen* and *Morales-Santana*, the Court considered one other sex-based challenge to the rules governing the citizenship of nonmarital children born abroad: *Flores-Villar v United States*, 564 US 210 (2011) (per curiam), affirming by an equally divided Court, 536 F3d 990 (9th Cir 2008). *Flores-Villar* involved the same provision that was at issue in *Morales-Santana*, but Justice Kagan recused herself in the earlier case, which left the Court evenly split on the question of the law’s constitutionality. See *Flores-Villar*, 564 US at 210. The Justices did not write in *Flores-Villar*, but simply affirmed by an equally divided Court the Ninth Circuit’s decision to uphold the provision. Id. The Ninth Circuit’s decision reads much like *Nguyen*. It assumed, without deciding, that heightened scrutiny applies in this context, *Flores-Villar*, 536 F3d at 996 n 2, but did not apply that standard with much rigor.

¹⁴¹ Brief for the Petitioner, *Sessions v Morales-Santana*, Civil Action No 15-1191, at *28–29, 34 (US filed Aug 19 2016) (available on Westlaw at 2016 WL 4436132) (“*Morales-Santana* Petitioner’s Brief”).

¹⁴² *Morales-Santana*, 137 S Ct at 1695 (paraphrasing the government’s argument).

child's noncitizen mother when trying to impart American values to his child.¹⁴³

Previously, that kind of argument might have prevailed in this context. But the Court in *Morales-Santana* rejected it. The different residency requirements imposed by the INA were not driven by biological differences, the Court held, but rather by the conventional assumption that an unmarried mother will be the guardian of a nonmarital child and the corresponding assumption that an unmarried father will be a secondary parent at best.¹⁴⁴ The Court observed that, until 1934, married women could not transmit their citizenship to children born abroad—only married men could do so.¹⁴⁵ But, the Court observed, “the father-controls tradition never held sway” where unmarried men and women were concerned: “At common law, the mother, and only the mother, was ‘bound to maintain [a nonmarital child] as its natural guardian,’” while the father was excused of any responsibility.¹⁴⁶ Echoing the dissenters in *Nguyen*, the Court noted that the officials originally responsible for the sex distinctions in the INA explicitly referenced and endorsed those common-law principles.¹⁴⁷ Indeed, the Court asserted, the only way to make sense of the differential residency requirements for unmarried mothers and fathers was in light of those principles.¹⁴⁸ The government imposed longer residency requirements on unmarried citizen fathers because it assumed they would be absent or negligible presences at best and that their children would be strongly subject to the competing national influence of their noncit-

¹⁴³ *Morales-Santana* Petitioner's Brief at *9 (cited in note 141). The government also argued that the shortened residency requirement for unmarried citizen mothers was an effort on the part of Congress to reduce the problem of statelessness, as many other countries permit nonmarital children to acquire citizenship only through their mothers. *Id.* at *11. The Court rejected this argument too. See *Morales-Santana*, 137 S Ct at 1696 (“[There is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.”). For more on the statelessness argument, see Brief of Professors of History, Political Science, and Law as Amici Curiae in Support of Respondent, *Sessions v Morales-Santana*, Civil Action No 15-1191, *33–37 (US filed Oct 3, 2016) (available on Westlaw at 2016 WL 5800340).

¹⁴⁴ *Morales-Santana*, 137 S Ct at 1690–93.

¹⁴⁵ *Id.* at 1691; see also *id.* (noting that, through the early twentieth century, the same assumptions motivated a rule that allowed male citizens to confer citizenship on noncitizen wives but barred female citizens from conferring citizenship on their husbands—indeed, subjected women who married noncitizens to expatriation).

¹⁴⁶ *Id.* at 1691.

¹⁴⁷ *Id.* at 1692.

¹⁴⁸ *Morales-Santana*, 137 S Ct at 1692.

izen mothers. Of citizen mothers, it assumed the opposite: that they would serve as their children's primary caregivers and thus overwhelm any foreign influence from the paternal side.

The Court was not required to—and did not—overrule *Nguyen* to reach this holding. It distinguished the earlier case on the ground that *Nguyen* involved the establishment of parentage, whereas *Morales-Santana* involved rules regarding the duration of parents' residency in the United States.¹⁴⁹ The nexus between biological differences and the sex distinction in *Nguyen* was arguably closer than the nexus between biological differences and the sex distinction in *Morales-Santana*—but in the same way, I think, that the nexus between biological differences and legal distinctions between the sexes was arguably closer in *Pavan* than it was in *Obergefell*. The sex classification in *Nguyen* passed constitutional muster only because the Court did not actually scrutinize it with much rigor. If the Court had actually applied the same level of scrutiny in *Nguyen* that it applied in *Morales-Santana* (or in *Pavan* and *Obergefell*), it would have detected the fairly substantial gaps between the government's stated ends and its use of a sex discriminatory rule. Thus, although *Morales-Santana* did not overrule *Nguyen*, the Court's decision to scrutinize a citizenship law that discriminated against an unmarried father, rather than to defer to the government in a de facto kind of way, steered the law in a new direction. After *Morales-Santana*, courts and litigants cannot as easily assert or assume that the reach of heightened scrutiny for sex-based state action runs out early, either at the water's edge of citizenship law or when it comes to the rights of unmarried parents.

This is a significant jurisprudential development. But it was obscured in the immediate aftermath of *Morales-Santana* by the controversy that erupted over the Court's choice of remedy. In general, a court has two options when it finds that a law violates equal protection by treating similarly situated groups dissimilarly: while waiting for the legislature to cure the problem, it can either "level up" by extending the benefit to the excluded group or "level down" by removing the benefit from the favored group.¹⁵⁰ Historically, the Court

¹⁴⁹ Id at 1694.

¹⁵⁰ For more on the difficult conceptual problems involved in the choice of whether to "level up" or "level down," see Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law*, 46 Wm & Mary L Rev 513 (2004); Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 Yale L J 1185,

has almost always concluded that “extension, rather than nullification, is the proper course.”¹⁵¹ In this case, however, the Court took the opposite course: it held that while we wait for Congress to “address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender,” the “now-five-year requirement” that applies to children born to unwed U.S.-citizen fathers “should apply, prospectively, to children born to unwed U.S.-citizen mothers.”¹⁵² The Court explained that withdrawing, rather than extending, the benefit was appropriate in these circumstances because that is almost certainly what Congress would have wanted.¹⁵³ Under the statute at issue in *Morales-Santana*, married men and women and unmarried fathers are all subject to the same residency requirement.¹⁵⁴ The substantially reduced one-year requirement was a special exception to the general rule for unmarried mothers only.¹⁵⁵ Thus, the Court reasoned, it would be strange, as well as constitutionally problematic, to “level up”: to extend the special one-year rule to unmarried fathers as well as unmarried mothers would create a new form of discrimination based on marriage—one that would have the odd and almost certainly not-congressionally-approved effect of disadvantaging marital children.¹⁵⁶

Everyone who has written about *Morales-Santana* has had something to say about this remedy. Some commentators have criticized the Court for a lack of clarity—particularly with regard to children of unmarried citizen mothers who were born prior to the Court’s decision but who have not yet had their citizenship adjudicated.¹⁵⁷

1199–201 (1986); Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 *Cleve St L Rev* 301, 316–19 (1979); Sabina Mariella, Note, *Leveling Up over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 *BU L Rev* 219, 238–41 (2016).

¹⁵¹ *Morales-Santana*, 137 S Ct at 1699 (quotation marks omitted).

¹⁵² *Id* at 1701.

¹⁵³ *Id* at 1699–1701.

¹⁵⁴ *Id* at 1686–87.

¹⁵⁵ *Id* at 1699.

¹⁵⁶ See *id* at 1700 (“Disadvantageous treatment of marital children in comparison to non-marital children is scarcely a purpose one can sensibly attribute to Congress.”); *id* at 1700 n 25 (noting that “[d]istinctions based on parents’ marital status . . . are subject to the same heightened scrutiny as distinctions based on gender”).

¹⁵⁷ See, for example, Kristin Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 *Harv L Rev* 170, 208–13 (2017); Ian Samuel, *Morales-Santana and the “Mean Remedy,”* Take Care (June 12, 2017), available at <https://takecareblog.com/blog/morales-santana-and-the-mean-remedy>. It is true that the Court does not explicitly address the citizenship status of these

Two things seem clear, however: (1) *Morales-Santana* is unlikely to benefit Morales-Santana himself when it comes to deportation, as the Court's chosen remedy seems to promise only that, going forward, all non-marital children born abroad to mixed-nationality couples will be subject to the longer residency requirement; and (2) in the future, nonmarital children born abroad to U.S.-citizen mothers will have a harder time acquiring U.S. citizenship than they would have in the absence of the Court's decision (unless, of course, Congress steps in to change that).

These results have triggered significant criticism. Some commentators have argued that equality came unhinged from justice in *Morales-Santana*.¹⁵⁸ The Second Circuit, examining the same record that was before the Supreme Court, concluded that leveling up was the right course, so it is not as though a case cannot be made for that approach.¹⁵⁹ Some commentators have criticized the opinion's author, Justice Ginsburg, for betraying her feminist principles: standing up for formal equality but issuing a decision that in practice may hurt countless numbers of unwed American women and their children.¹⁶⁰ Some have speculated that the more liberal Justices needed to acquiesce to the stingier remedy in order to garner a majority of votes on the substantive equality question.¹⁶¹

children. But the suggestion that *Morales-Santana* strips them of their citizenship seems implausible. Prior to the Court's decision, nonmarital children born abroad to citizen mothers and noncitizen fathers became U.S. citizens at birth as long as their mothers satisfied the INA's one-year residency requirement. The Court gave no indication in *Morales-Santana* that it intended to strip these children of their citizenship; indeed, the Court almost certainly applied its remedy "prospectively" precisely in order to avoid stripping people of their citizenship. *Morales-Santana*, 137 S Ct at 1701.

¹⁵⁸ See, for example, Bridget Crawford, *Is Ginsburg's Decision in Sessions v. Morales-Santana Good for Women?*, Feminist Law Professors (June 12, 2017), available at <http://www.feministlawprofessors.com/2017/06/is-ginsburgs-decision-in-sessions-v-morales-santana-good-for-women/>; Ian Millhiser, *The Supreme Court Just Made Our Ugly, Messed-Up Immigration Law Even Uglier*, Think Progress (June 12, 2017), available at <https://thinkprogress.org/scotus-immigration-gender-bf65cebc9d/>.

¹⁵⁹ *Morales-Santana v. Lynch*, 804 F3d 520, 535–37 (2d Cir 2013) (holding that “the ten-year requirement for fathers and married mothers imposed by Congress in 1940 appears to have represented a significant departure from long-established historical practice,” that is it therefore ambiguous what remedy Congress would have preferred, and that “binding precedent . . . cautions us to extend rather than contract benefits in the face of ambiguous congressional intent”).

¹⁶⁰ See, for example, Noah Feldman, *Ginsburg's Surprisingly Retro Feminism*, Bloomberg View (June 14, 2017), available at <https://www.bloomberg.com/view/articles/2017-06-14/ginsburg-s-surprisingly-retro-feminism>.

¹⁶¹ See, for example, Mark Joseph Stern, *Ruth Bader Ginsburg Affirms the “Equal Dignity” of Mothers and Fathers*, Slate (June 13, 2017), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/sessions_v_morales_santana_ruth_bader_ginsburg_defends

But the remedy in *Morales-Santana* may also be a product of the subject matter of the case and the times in which we live. Few issues were more hotly contested in the 2016 presidential election than immigration and citizenship. At the time the Court decided *Morales-Santana*, the Republican administration and Republican lawmakers routinely declared themselves committed to the restriction of legal and illegal immigration and the tightening up of lax controls in those areas. Some of the measures the democratic branches of government were taking in pursuit of those ends were already making their way to the Court. Against this backdrop, it is perhaps even less surprising than it might normally be that the Court chose to defer to what it perceived as the will of Congress when devising a remedy—especially in light of the fact that it had already taken the significant step of not deferring on the merits. Given everything else transpiring at the time of *Morales-Santana*, the Court may have been particularly sensitive about the perils of essentially rewriting the INA in a way that it saw no indication Congress—either in 1940 or in 2017—would have preferred. The one thing the Court could be certain about in 2017 was that legal challenges to the government’s new policies with respect to immigration and citizenship were heading its way. That knowledge might have influenced, and at least provides some context for, the Court’s decision to craft a remedy designed to insulate from criticism—and thereby preserve—the power of judicial review over substantive questions of equal protection in this context.

IV. CONCLUSION

The exact parameters of the remedy in *Morales-Santana*—and the real reasons the Court adopted it—will likely become clearer in the future. But it is important not to allow the controversy over the Court’s decision to “level down” to overshadow its substantive equal protection holding. In the immediate aftermath of *Morales-Santana*, some commentators suggested that there was not much to say about the Court’s decision on the merits—that “on the merits,” the Court produced “an opinion that is perfectly consonant with what you might predict.”¹⁶² Indeed, many commentators skipped right over the Court’s

_gender_equality.html (“I suspect this compromise was the price of Chief Justice John Roberts’ vote, and probably Justice Anthony Kennedy’s as well.”).

¹⁶² Samuel, *Morales-Santana and the “Mean Remedy”* (cited in note 157).

substantive equal protection holding to address what they perceived as the more interesting and consequential questions of remedy.

In fact, the Court's opinion was not necessarily consonant with what one might predict in a sex-based equal protection case involving unmarried fathers and questions of citizenship. In the past, the Court has not always, or even regularly, scrutinized laws that discriminate on the basis of sex in determining which children of American citizens are citizens themselves. The same analysis holds in the context of gay rights: *Pavan* might have seemed a foregone conclusion in the wake of *Obergefell*, but in light of the Court's past judgments about such matters, its extension of heightened scrutiny to a situation involving the birth certificates of children born to gay parents constitutes a meaningful step. Courts have not historically made a habit of scrutinizing sex classifications for potential injustices when the perceived victims of those classifications are sexual minorities—indeed, the opposite is true. Thus, *Morales-Santana* and *Pavan* both moved the ball forward in substantial ways where equal protection law is concerned. Both of these decisions raise significant constitutional questions about sex classifications that continue to govern gays and lesbians and unmarried fathers. They both raise questions about the pregnancy-related and other ostensibly biologically based reasons the government continues to offer in these contexts for classifying individuals on the basis of sex. They could both be read to suggest that the days of exempting sex classifications that harm gays and lesbians and unwed fathers from heightened scrutiny are over—and also, more broadly, that constitutional doctrine now takes a harder line toward ostensibly biological justifications for discrimination that in fact provide cover for sex stereotypes. Depending on how energetically the Court chooses to apply the lessons of these cases, they could have particularly significant implications for how the law treats justifications for discrimination rooted in pregnancy.

The new doctrine generated by these cases will not, however, apply itself. The Court could cabin *Pavan* and *Morales-Santana* to their facts. It could unsee what these decisions exposed: that apparently biologically based justifications for discrimination can hide stereotype-reinforcing social judgments even—perhaps especially—where gays and lesbians and unwed fathers are concerned. A generation ago, in *United States v Virginia*, the Court declared that “[i]nherent differences’ between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an indi-

vidual's opportunity."¹⁶³ *Pavan* and *Morales-Santana* extended this principle into new territory. In so doing, they struck a blow on behalf of the constitutional equality project that began nearly half a century ago in *Reed v Reed*. It is hard to predict how that project will fare in the future. But these two cases undercut its most persistent and resilient opponent: arguments that build outward from biological foundations to encircle and constrain the scope of men's and women's lives.

¹⁶³ *Virginia*, 518 US at 533.