Sessions v. *Morales-Santana*: Beyond the Mean Remedy

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INTRODUCTION

The Supreme Court's recent decision in *Sessions v. Morales-Santana*[1] found that a derivative citizenship statute violated an unwed father's Fifth Amendment due process and equal protection rights by not according him the same rights as an unwed mother to transmit citizenship to his foreign-born child.[2] The decision appears to be a straightforward application of equal protection doctrine invalidating a gender-based statutory distinction, notable only for choosing a "mean remedy": withdrawing rights from mothers rather than extending them to fathers.[3]

This article argues that the decision applies to immigration as well as naturalization laws and could significantly alter the constitutional rights of both citizens and aliens. By redirecting judicial scrutiny from the rights of the foreign-born child to those of the citizen parent, the decision should implicitly (1) overrule *Fiallo v. Bell,*[4] which allowed similar discrimination in the context of immigration, (2) reverse *Gil v. Sessions*,[5] which upheld similar discrimination in conferring derivative citizenship on children of naturalized parents, and (3) overrule *Rogers v. Bellei*,[6] which permitted the involuntary expatriation of the foreign-born child of an American citizen.

The decision might also overrule or undermine those cases and others like *Mathews v. Diaz*[7] regarding aliens' first party rights and perhaps establish their personal right to heightened judicial scrutiny of constitutional challenges to actions of Congress and the President involving their admission and their treatment while abroad. The *Bellei* Court found that Bellei was an alien to the Constitution and therefore had no right to equal treatment with constitutional citizens or to any greater than nominal judicial

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[1] No. 15–1191, *cert. granted*, 137 S. Ct. 1678 (June 12, 2017).

[2] *See id.*, at 1686 n.1 (equal protection right inherent in due process clause), and at 1689 (relevant party is the citizen father, not the foreign-born child, and statute does not accord father the right of an unwed citizen mother to transmit citizenship).

[3] *See*, *e.g.*, Ian Samuel, *Morales-Santana and the Mean Remedy*, PRAWFSBLAWG (June 12, 2017, 5:04 PM), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/scotus-symposium-morales-santana-and-the-mean-remedy.html.

[4] 430 U.S. 787 (1977).

[5] No. 15–3134–ag (2d Cir. Mar. 17, 2017).

[6] 401 U.S. 815 (1971).

[7] 426 U.S. 67 (1976).

review of his Fifth Amendment challenge.[8] Morales-Santana's father was also an alien to the Constitution under the reasoning of that case, yet the Court found that he had a right to equal treatment and to heightened judicial scrutiny of his Fifth Amendment claim.[9]

A critical reading of *Morales-Santana* might also show that the Court's chosen remedy cannot stand, inviting new equal protection challenges and recognizing the citizenship of Morales-Santana and others similarly situated, because the naturalization provision that the remedy adopts dilutes citizenship rights and discriminates on impermissible grounds. The decision's scope depends on its subsequent development.

I. CONSTITUTIONAL CONTEXT

Morales-Santana was born in the Dominican Republic. He claims U.S. citizenship under a federal statute granting citizenship to foreign-born children of citizen parents.[10] Under the Constitution this is a claim to naturalized citizenship, and the applicable statute is a naturalization statute. Under longstanding principles of constitutional law explained in *United States v. Wong Kim Ark*, "[a] person born out of the jurisdiction of the United States can only become a citizen by being naturalized . . . as in the enactments conferring citizenship upon foreign-born children of citizens . . . ."[11] This is true even though common usage of "naturalization" differs.[12] As Justice Black explains,

> [N]aturalization, when used in its constitutional sense, is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization. This inclusive definition has been adopted in several opinions of this Court besides *United States v. Wong Kim Ark*, *supra*.[13]

The principle that a foreign-born child of citizen parents "is an alien as far as the Constitution is concerned"[14] follows from inherited common law incorporated in the original Constitution under which foreign-born children were "born aliens" even if a derivative nationality statute naturalized them

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[8] *See infra* notes 131–39 and accompanying text.

[9] *See infra* notes 23–25, 127–30, and 141 and accompanying text.

[10] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687–88 (2017).

[11] United States v. Wong Kim Ark, 169 U.S. 649, 702–03 (1898).

[12] *See* Rogers v. Bellei, 401 U.S. 815, 840 (1971) (Black, J., dissenting on other grounds).

[13] *Id*. at 841 (Black, J., dissenting on other grounds).

[14] Miller v. Albright, 523 U.S. 420, 453 (1998) (Scalia, J., concurring).

at birth.[15] It also follows from the fact that foreign-born children of citizen parents receive citizenship only by naturalization, because "naturalization" applies only to aliens.[16] Consequently, those who receive derivative citizenship at birth to an American parent abroad are naturalized outside of the United States.[17] Under cases that pre-date *Morales-Santana* the judiciary has limited authority in this context because "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[18]

II. DECISION, REMEDY AND PARENTAL RIGHT

A. Decision and Chosen Remedy

Federal law generally grants derivative citizenship to the foreign-born child of a citizen parent who had been physically present in the United States for a specified period prior to the child's birth.[19] The *Morales-Santana* Court examined the rules that applied to children of one citizen and one alien parent ("mixed nationality parents"). The Court construed the relevant law as providing a main rule imposing a lengthy presence requirement and an

[15] *See, e.g.*, Dundas v. Dundas (1839) 12 Scot. Jur. 165, 167 (Lord Cuninghame referring the case to the whole court) ("born aliens"), https://hdl.handle.net/2027/coo.31924065520599; Shedden v. Patrick [1854] 149 Rev. Rep. 55, 90 (Lord St. Leonards) ("in order to entitle an alien to be treated as a natural-born subject" under the derivative nationality statute "he must at the time of his birth, although a foreigner born, be the son of a father who was a natural-born subject"); 1 WILLIAM BLACKSTONE, COMMENTARIES 373 (7th ed. 1775) (the derivative nationality statutes merely "deemed" the children to be natural born subjects); FRANCIS PLOWDEN, A SUPPLEMENT TO THE INVESTIGATION OF THE NATIVE RIGHTS OF BRITISH SUBJECTS 134 (1785) ("there must exist a strange relict of alienage in them"); Minor v. Happersett, 88 U.S. 162, 167–68 (1875) (incorporation of common law rule); and Weedin v. Chin Bow, 274 U.S. 657, 660 (1927) (common law rule in England and the United States is *jus soli* [right of soil]). For an extended analysis of the British authorities, including alternative interpretations of the effects of statutory law, *see* John Vlahoplus, *Toward Natural Born Derivative Citizenship*, 7 BRIT. J. AM. LEGAL STUD. 71, 104–12 (2018).

[16] *See, e.g.*, Naturalization, GILES'S LAW DICTIONARY (1729) ("where a Person who is an *Alien*, is made the King's *natural* Subject by Act of Parliament, whereby one is a Subject to all Intents and Purposes, as much as if he were born so") (emphasis in original). Jacob's was the most widely used law dictionary in the early American republic. *See* Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 260–61 n.25 (2000).

[17] *See Bellei*, 401 U.S. at 827.

[18] Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) (footnote omitted).

[19] *See, e.g.*, 8 U.S.C. §§ 1401(d), 1401(g), 1409(c) (2012). In the case of two married citizen parents the requirement is based on residency. *See id*. § 1401(c). One provision allows grandparental presence to substitute for parental presence. *See id*. § 1433(a)(2)(B). Others count periods spent abroad during honorable service in the armed forces or employment by the federal government or specified international organizations as domestic presence for both the citizen and his or her unmarried dependents. *See*, *e.g.*, *id*. §§ 1401(g) and 1409(a) (incorporating by reference § 1401(g)). Some provisions impose additional conditions beyond parental presence, including post-natal conditions precedent. *See, e.g.*, *id*. § 1409(a) (natural child of citizen father), 1431 (lawful admission to the United States and other conditions), and §1433 (lawful admission to the United States and other conditions).

exception imposing a shorter presence requirement where the citizen parent is an unwed mother.[20] The main rule required ten years of physical presence in the United States (or its outlying possessions) prior to the child's birth, five of which were after attaining age fourteen.[21] The exception required one year of continuous presence prior to the child's birth.[22]

Morales-Santana's unwed citizen father satisfied the shorter exception but not the longer main rule. The Court construed the exception as benefitting one gender, while the main rule excluded the other. The Court recognized that the exception did not discriminate against Morales-Santana on account of his own gender; however, it found that he had third party standing to argue that the requirements discriminated against his citizen father on the ground of gender by not according him the same right as an unwed mother to transmit citizenship to his foreign-born child.[23]

The Court examined the history of American citizenship law and practice and found that the exception was based on overbroad historical stereotypes incorporated, for example, in the common law rule that "the mother, and only the mother, was 'bound to maintain [a nonmarital child] as its natural guardian.'"[24] The Court then found that the government's purported justifications for the exception did not survive the heightened scrutiny that applies to gender-based equal protection claims.[25] Finally, the Court determined that Congress would not have intended the exception to swallow the main rule, so it eliminated the gender differential by severing the exception and prospectively requiring the government to apply the main rule's longer presence requirement to natural (i.e., nonmarital)[26] children of citizen mothers.[27] It remanded the case for further proceedings consistent with its opinion.[28]

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[20] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678,1688–89 (2017).

[21] *See id.*, 137 S. Ct. at 1687 (also treating honorable service in the armed forces abroad as constructive domestic presence).

[22] *See id.* The two provisions are not strictly comparable because one aggregates non-continuous actual and constructive presence while the other requires continuous actual presence.

[23] *Id*. at 1689, 1696 n.20. Morales-Santana was a proper party to assert this claim derivatively because his father was deceased. *Id*. at 1689.

[24] *Id*. at 1691(generalizations), also quoting 2 J. KENT, COMMENTARIES ON AMERICAN LAW *215–*216 (8th ed. 1854).

[25] *Morales-Santana*, 137 S. Ct. at 1694–95.

[26] This article uses "natural" to describe the child of an unmarried parent because it reflects the relationship between the parent and the child and because it was in use at the adoption of the Constitution. *See, e.g.*, JOHN ADAMS, FOUNDERS ONLINE: NATIONAL ARCHIVES, JUNE 23. WEDNESDAY., (1779) ("Mr. M. asked, are natural Children admitted in America to all Priviledges like Children born in Wedlock."), http://founders.archives.gov/documents/Adams/01-02-02-0009-0005-0012.

[27] *Morales-Santana*, 137 S. Ct. at 1700 n.25 (extending the exception to children of unmarried fathers might require extension to children of married mixed nationality parents because marital status distinctions are also subject to heightened scrutiny).

[28] *Id.* at 1701.

B. Parental Right

The majority opinion refers to the parent's right to "transmit" citizenship to the foreign-born child. Some might interpret that usage to mean that the decision reflects and is limited to bloodline transmission under a fundamental principle similar to the Roman law of *jus sanguinis* (right of blood). That interpretation would be incorrect. The parental right is statutory.[29] Consequently the Court uses "transmit" colloquially, and the decision cannot be limited to naturalization or to the one-way interest of the parent in the child.

The United States inherited the common law rule of *jus soli* (right of soil).[30] Those born within and under the jurisdiction of the United States are citizens under the Constitution regardless of parentage.[31] Regardless of parentage, a child born abroad is "an alien as far as the Constitution is concerned, and 'can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress.'"[32] As the Court explained in *United States v. Wong Kim Ark*, American citizenship does not descend from parent to child "'either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute.'"[33]

Britain interprets the common law consistently. The King's Bench expressly considered and rejected the theory that parents can transmit nationality to their children, finding that "nationality is a status which must be acquired by or conferred upon the individual himself. It is not a status which can be transmitted to him by his parent."[34]

Parents do not legally transmit American citizenship to their foreign-born children. Only Congress confers citizenship upon them. The Court's statement must be interpreted colloquially to mean that Congress granted to the parent the statutory right that the child receive citizenship. This article uses the term in that sense hereafter. Because *Morales-Santana* applies to a

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[29] *See supra* notes 20–22.

[30] *See, e.g.*, Weedin v. Chin Bow, 274 U.S. 657, 660 (1927).

[31] *See, e.g.,* United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898).

[32] Miller v. Albright, 523 U.S. 420, 453 (1998) (Scalia, J., concurring) (*quoting Wong Kim Ark*, 169 U.S. at 702–03).

[33] *See Wong Kim Ark*, 169 U.S. at 665 (quoting, with approval, Horace Binney); *see also Miller*, 523 U.S. at 434 n.11. As a former law officer of the Bureau of Immigration advised Congress:

> [C]itizenship acquired through birth abroad to American parents is a citizenship which is acquired simply because Congress has said, under the authority of the provision of the Constitution allowing [it] to make a uniform rule of naturalization, that birth under those circumstances would be regarded as conferring citizenship, and not because of anything that attached to the idea of the blood that ran in a man's veins which he had gotten from his parents.

Naturalization of Individuals by Special Acts of Congress: Hearings on H.J. Res. 79 Before the H. Comm., 67th Cong. 189–90 (1921) (statement of A.W. Parker).

[34] The King v. The Superintendent of Albany Street Police Station, or *Ex parte* Carlebach [1915] 3 KB 716, 729 (Lush, J.), http://hdl.handle.net/2027/inu.30000022559334. *See also id*. at 723 (Reading, C.J.) (the child "does not really acquire his status by reason of his descent.").

right that exists solely because of a congressional grant, there is no justification for limiting its reach to the particular statutory right in the case.

III. REMEDY LIKELY CANNOT STAND

If the Court's statutory and equal protection interpretations are correct, then its remedy likely cannot stand. It is inconsistent with Supreme Court precedent that strikes down involuntary expatriation laws. It also discriminates on grounds of race, ethnicity, gender, marital status and marital choice.

A. Involuntary Expatriation and Dilution of Citizenship

The lengthy presence requirement reflects extreme suspicion of citizens who spend significant time abroad and center their family and other connections there.[35] The executive branch, which drafted the requirement for the Nationality Act of 1940 (the "1940 Act"),[36] did not consider them to be "bona fide citizens;"[37] "really citizens;"[38] or in any "true sense American."[39] It considered their foreign residency to evidence evasion of the duties and responsibilities of citizenship.[40] It also believed that children born and raised abroad of mixed nationality parents would evade the duties and responsibilities of their derivative citizenship.[41]

The 1940 Act's drafters considered the absent parents' continuing citizenship and the transmission of citizenship to their foreign-born children to be essentially the same problem. As Richard Flournoy, a leading State Department advisor who participated in negotiating and drafting the legislation, explained:

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[35] *See To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 and H.R. 9980 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 36–37 (1945) [hereinafter *Hearings*], https://hdl.handle.net/2027/mdp.39015019148942 (statement of Richard Flournoy, State Department). The 1945 print includes the 1940 hearings and a 1938 three-part message from the President with the proposed code and significant explanatory comments and comparisons.

[36] Nationality Act of 1940, 54 Stat. 1137. *See* Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2189 n.221 (2014) (executive branch drafting).

[37] *Hearings*, *supra* note 35, at 151 (statement of Col. Crawford, War Department). *Cf. id*. at 371 (they are not "bona fide and permanent citizens") (statement of American Bar Association).

[38] *Id*. at 135 (statement of Richard Flournoy).

[39] *Id*. at 37 (statement of Richard Flournoy). *See also id*. at 49–50 (exchange between Rep. William Poage and Thomas Shoemaker, Deputy Commissioner of Immigration and Naturalization) (citizens who spend insufficient time in the United States lack a "real American background[.]").

[40] *See id*. at 496; Schneider v. Rusk, 218 F.Supp. 302, 306 (D.D.C. 1963), *rev'd*, Schneider v. Rusk, 377 U.S. 163 (1964).

[41] *See* Brief in Support of Petition for Certiorari, Weedin v. Chin Bow, 274 U.S. 657 (1927) (No. 237), *reproduced in* GALE, WEEDIN V. CHIN BOW U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS 13 (2011).

> There are hundreds of thousands of those persons living around different parts of the world who happen to have been born here and acquire citizenship under the fourteenth amendment, but they are brought up in the countries of their parents and they are in no true sense American, and yet they may not only enter this country themselves as citizens, but may marry aliens in those countries and have children and those children are born citizens.[42]

Rep. William Poage expressed similar skepticism about citizens retaining their citizenship if they grew up abroad[43] and about a child receiving derivative citizenship from American parents regardless of where they had lived.[44] When Poage asked what control the government has over the problem, Flournoy responded "[w]e have control over citizens born abroad, and we also have control over . . . expatriation."[45] The drafters of the 1940 Act exercised that control by including both involuntary expatriation provisions and the lengthy presence requirement for marital children of mixed nationality parents and natural children of citizen fathers.[46] Congress enacted the expatriation provisions with a specific intent of preventing the parent from transmitting citizenship to foreign-born children.[47] Moreover, it allowed two married citizen parents to transmit citizenship to their foreign-born children as long as one of them had resided in the United States (or its outlying possessions) for any period before the children's birth.[48]

The expatriation and physical presence rules denied the reality of some Americans' citizenship and impugned their allegiance, leading to constitutional challenges. In *Schneider v. Rusk,* an appellant challenged on Fifth Amendment grounds a statute that involuntarily expatriated naturalized citizens, but not those born in the United States, on account of extended residency abroad. The Court found the provision to be unconstitutional because "[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance, and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by

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[42] *Hearings*, *supra* note 35, at 37.

[43] *See id.* at 52.

> I don't think anybody is an asset simply because their name is on some court record or some birth-registration record in the United States, who has gone out of the United States and grown up with the customs and conditions of a foreign nation. I don't think they are any asset to our Nation and I don't see any reason for keeping them any longer than we have to . . . .

[44] *See id.* at 45 ("I should like to know . . . why . . . any child born of anybody who ever acquired any American citizenship, no matter where they have lived, ought to be an American citizen . . . .").

[45] *Id.* at 37.

[46] *See* the Nationality Act of 1940 §§ 201(g), 205 and 338, Ch. IV, 54 Stat. 1137.

[47] *See, e.g.*, *Hearings*, *supra* note 35, at 238 (letter of submittal from Secretary of State Cordell Hull, Attorney General Homer Cummings, and Secretary of Labor Frances Perkins); Schneider v. Rusk, 218 F. Supp. 302, 310, 314 (D.D.C. 1963), *rev'd*, Schneider v. Rusk, 377 U.S. 163 (1964).

[48] *See* the Nationality Act of 1940 § 201(c), 54 Stat. 1137.

family, business, or other legitimate reasons."[49] Ultimately the Court held involuntary expatriation to be unconstitutional generally, finding in *Afroyim v. Rusk* that the Fourteenth Amendment removes all doubt about who is a citizen and puts the question of the rights of citizens beyond congressional power:[50] Congress has no authority to cancel or dilute a citizen's citizenship.[51]

Congress considered the parent's continuing citizenship and the child's derivative citizenship to be essentially the same problem and imposed expatriation in the 1940 Act in part to prevent parents from transmitting citizenship to their foreign-born children. If the child's citizenship is a right of the parent then the expatriation precedents should also invalidate the lengthy parental presence requirement.[52] Congress cannot grant rights to one group of citizen parents but not another based on its determination of who is "really" a citizen and who is not; it cannot dilute the transmission rights of some citizen parents on the theory that their insufficient U.S. presence makes them not "bona fide citizens."[53] As the *Schneider* Court recognized, living abroad may be compelled by business reasons (as it was for Morales-Santana's father, who went abroad for employment)[54] or family reasons (as it is for foreign- or domestic-born children who reside abroad to be with their parents).

B. Racial, Ethnic and Gender Discrimination

It is impossible to understand the lengthy presence requirement without recognizing the pervasive racial and ethnic discrimination in America at the time of its enactment, which included immigration quotas and exclusions based on race and ethnicity.[55] Immigration was considered tolerable if it only involved reasonable numbers of "Stuyvesant's Hollanders and Penn's German Quakers, but when it came to Austrians, Italians, Poles and Portuguese; Russian Jews and Irish agitators in unlimited hordes it ceased to be beneficial."[56] Japanese were said to "breed like minks, their progeny

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[49] Schneider v. Rusk, 377 U.S. 163, 169 (1964). *Cf.* Kent v. Dulles, 357 U.S. 116, 125–26 (1958) (Fifth Amendment due process protects the right to travel abroad because "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood . . . . Freedom of movement is basic in our scheme of values.").

[50] *See* Afroyim v. Rusk, 387 U.S. 253, 263 (1967) (citing statement of Sen. Howard).

[51] *See id.* at 262. For citizenship not described in the Fourteenth Amendment, *see infra*, Part V.B.2.

[52] At least for citizen parents described in the Fourteenth Amendment. For other citizen parents, *see infra*, Part V.B.2.

[53] At least for citizen parents described in the Fourteenth Amendment. For other citizen parents, *see infra*, Part V.B.2.

[54] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017).

[55] *See generally* Collins, *supra* note 36, at 2137–38.

[56] HUBERT HOWE BANCROFT, IN THESE LATTER DAYS 10 (1917), https://hdl.handle.net/2027/nyp.33433074790472.

being about as suitable as minks for American citizenship."[57] Derivative citizenship was criticized as a device to circumvent the restrictions and admit otherwise disfavored groups.[58] Chinese Americans who moved to China to marry and start families were considered as setting up "stock-farms" with Chinese women as "breeders" intensively propagating American citizens whom the nation could not exclude.[59]

In this context the 1940 Act's drafters imposed the lengthy presence requirement to discriminate on grounds of race and ethnic origin, in particular to suppress derivative citizenship for children of Asian, Mexican, and Southern and Eastern European American heritage.[60] The presence requirement targeted children born in the United States to Chinese or Mexican parents who were taken to their parents' native countries as children; Flournoy explained that if one of them later "marries a woman of that country he breeds citizens of the United States" whom the nation cannot exclude.[61] The presence requirement also targeted Hungarian Americans and Italian Americans who moved abroad, married aliens and had children there. Flournoy explained further:

> And then I think another very important element of this thing is the children. It is utterly absurd that these Italians should live in Italy or Hungarians who live in Hungary, who are breeding citizens of the United States, who have a right, whenever they see fit, to come over to this country.[62]

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[57] *Id.* at 69. *See also Relating to Naturalization and Citizenship Status of Children Whose Mothers are Citizens of the United States, and Relating to the Removal of Certain Inequalities: Hearings Before the Comm. on Immigration and Naturalization on H.R. 3673 and H.R. 77*, 73rd Cong. 25 (March 28, 1933) [hereinafter *Naturalization and Citizenship Hearings*], (statement of Andrew Furuseth, President International Seamen's Union of America) (Japanese Americans "can go back to Japan and breed more Japanese who may become citizens of the United States.").

[58] *See Naturalization and Citizenship Hearings*, *supra* note 57, at 23 (statement of Andrew Furuseth, President International Seamen's Union of America).

[59] *See* Collins, *supra* note 36, at 2177.

[60] *See, e.g.*, *Hearings*, *supra* note 35, at 40–41 (Chinese Americans and Mexican Americans); *id.* at 58 (presence requirements in cases of mixed nationality parents); *id.* at 137 (Italian Americans and Hungarian Americans) (statements of Richard Flournoy). *See also* Collins, *supra* note 36, at 2195 (presence requirement deliberately targeted Chinese Americans and Mexican Americans).

[61] *Hearings*, *supra* note 35, at 37 (breeding citizens); *id* at 40–41 (children of Mexican American and Chinese American parents).

[62] *Id*. at 137. Flournoy explained the need for the expatriation provisions by reference to those same parents: "We, in the State Department, are particularly anxious to have something of this sort adopted so that we can definitely be rid of these people and not have to be worried with appeals for protection, and so on." *Id*. Britain began to allow voluntary renunciation of nationality in 1870 for similar discriminatory and economic reasons:

> [A]s the dominions of the Crown increased and as they were widely scattered over the world, there came a period when it seemed the interest of the State not to claim more subjects, but rather to indicate to many of its subjects how they might get rid of their nationality and so free this country

The State Department provided many examples of such undesirable citizens to justify the 1940 Act's restrictions, and unsurprisingly almost all were of Italian, Hungarian, Irish, Polish, Cuban, Greek, and Russian heritage.[63] None implicated any of the nondiscriminatory justifications that the federal government cited in litigation over the constitutionality of involuntary expatriation.[64]

The peculiar requirement of five years presence after attaining age fourteen is particularly telling. When women's rights groups demanded equality in derivative citizenship law many in Congress, the State Department, and the private sector resisted because they believed that alien fathers would dominate citizen mothers in raising children abroad, producing derivative citizens who were not really American, and that allowing children to receive derivative citizenship through citizen mothers and alien fathers would increase the number of otherwise racially and ethnically excludable children who could enter the country.[65] Yet there was overwhelming pressure to make the derivative citizenship law gender neutral. The State Department insisted that some limitation was required.[66] Some proposed limiting derivative citizenship to children of two citizen parents,[67] but Congress did not agree. Some proposed to ban derivative citizenship for children of a citizen parent and an inadmissible alien, but Congress rejected the proposal "as an insult to the Japanese and Chinese."[68]

Instead, when Congress enacted legislation in 1934 that allowed children to receive derivative citizenship through citizen mothers as well as fathers it imposed a facially neutral requirement to exclude in practice children of citizen mothers and alien fathers. It required children of mixed nationality parents to reside in the United States continuously for five years from age fourteen through eighteen in order to keep their derivative

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from the burden of protecting them. Many of those people, moreover, were not of English type at all, and by 1870 I think the State thought it was convenient to be rid of them . . . .

The King v. The Superintendent of Albany Street Police Station, or *Ex parte* Carlebach [1915] 3 K.B. 716, 727 (Darling, J.).

[63] *Hearings*, *supra* note 35, at 135, 497–500.

[64] *See, e.g.*, Brief for Appellant at 37, Schneider v. Rusk, 377 U.S. 163 (1964) (No. 368), reproduced in GALE, SCHNEIDER V. RUSK U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS (2011).

[65] *See, e.g.*, *Naturalization and Citizenship Hearings*, *supra* note 57, at 9–10 (statement of Wilbur J. Carr, Assistant Secretary, for the Secretary of State); *id.* at 47 (statement of William C. Hushing, American Federation of Labor).

[66] *See id.* at 10 (statement of Wilbur J. Carr, Assistant Secretary, for the Secretary of State).

[67] *See, e.g.*, *To Amend the Law Relative to Citizenship and Naturalization and for Other Purposes: Hearings Before the Comm. on Rules on H.R. 3673*, 73rd Cong. 6–7 (March 24, 1934) (reprinted with corrections, March 27, 1934) (memorandum of Henry B. Hazard, prepared for D. W. MacCormack, Commissioner, Immigration and Naturalization Service) (agreeing with proposal of National Advisory Committee to restrict to children of two U.S. citizens or nationals), and *Naturalization and Citizenship Hearings*, *supra* note 57, at 6 (statement of Andrew Furuseth, President International Seamen's Union of America).

[68] *See, e.g.,* Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 105 (1934).

citizenship.[69] It was widely recognized that the requirement did "much to deflate the principle" of citizenship for those children and would cause hardship because it might "be extremely difficult to send the child to the United States at so young an age and for so long a period."[70]

This personal residency requirement, while facially gender neutral, implemented the desire to prevent children of citizen mothers and alien fathers from receiving derivative citizenship. Some also supported it because it prevented children of citizen fathers and Asian mothers from receiving derivative citizenship. As Kristin A. Collins explains:

> When Senator William King of Utah expressed concern that the foreign-born children of "a Japanese or a Chinese [woman] or a woman from India . . . [married to] a man who is a citizen of the United States" would be considered citizens, his colleague Senator Royal Copeland assured him, "[T]hat is all fixed by necessity of the term of residence."[71]

The 1940 Act extended similar discrimination to citizen parents by imposing the five-year prong of the lengthy presence requirement. The requirement continues to have its intended effect even though Congress has reduced its duration. An international group representing Americans abroad protested its effect in 1993:

> The effect of this requirement in all too many cases is that it renders American children who are raised outside of the U.S. (because they lived with their parents abroad) ineligible to transmit U.S. citizenship to their children born abroad later in life. **This provision penalizes Americans for living abroad and for choosing spouses who are not U.S. citizens.** Basically, it requires those of us who live abroad to find the emotional and financial resources to send our children to the U.S. . . . so that they will have spent a total of five years in the U.S. (with two of those five years after age 14) during their own growing up period. In that way, we could ensure that they fulfill the requirement . . . for transmitting U.S. citizenship to their children (our grandchildren) in the event that they . . . decide to marry non-Americans and have their children born abroad. Surely Congress did not intend to force parents and children apart

[69] *See* Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797.
[70] *See* Orfield, *supra* note 68, at 103.
[71] Collins, *supra* note 36, at 2194 (footnote omitted).

in this way.[72]

Of course, history shows that Congress intentionally enacted the presence requirement in order to suppress derivative citizenship for disfavored groups despite its effects on families. The presence requirement continues to disadvantage children of disfavored racial and ethnic groups, in particular children of Mexican American parents.[73] Most current litigation over parental physical presence "arise[s] in the context of U.S.-Mexico border families who tend to 'straddle' the border, engage in relationships and marriage with individuals across the border, and take advantage of the fluidity of that border for the better part of the 20th Century."[74]

C. Marital Status

The physical presence requirements also apply to natural children of two citizen parents.[75] They are more restrictive than the rule applicable to marital children of two citizen parents, which requires only that one of the parents had resided in the United States (or its outlying possessions) for any period of time prior to the child's birth.[76] There is no justification for restricting two citizen parents' right to transmit citizenship because they are not married.

Moreover, the statute allows the father (but not the mother) to cause the nominal prior residency rule to apply rather than the longer physical presence requirements. If the father recognizes and agrees to support the natural child through age eighteen then the statute treats the child as if born to two married citizen parents.[77] Any residency by either parent prior to the

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[72] *Hearing before the Subcomm. on Int'l Law, Immigration, and Refugees of the Comm. on the Judiciary, House of Representatives, on H.R. 783 Naturalization and Nationality Amendments and H.R. 97 Parole for Funerals*, 103rd Cong. 56 (1993) (statement of Michael Adler, World Federation of Americans Abroad) (emphasis in original), https://hdl.handle.net/2027/pst.000021875649. In hearings on the 1940 Act Representative John Lesinski expressed doubt that even one in one hundred foreign-born children of citizen parents would move to the United States. *See Hearings*, *supra* note 35, at 301. Congress provided some facially gender-neutral exemptions to the personal residency and parental presence requirements after their enactment to mitigate their effects on the economic head of the family; in practice these covered citizen fathers and further demonstrated the intent to discriminate on the ground of parental gender. *See* Collins, *supra* note 36, at 2158 n.85.

[73] *See, e.g.*, M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to do With It?*, 28 GEO. IMMIGR. L.J. 391, 393–94, n.9 (2014) (actual racial effects, including effects on natural children). Disparate impact itself is insufficient to prove discrimination on the grounds of race or national origin. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976). However, the legislative history shows an actual purpose to discriminate, which is sufficient to prove an equal protection violation. *See, e.g.*, *Davis*, 426 U.S. at 239–40; McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

[74] Medina, *supra* note 73, at 433.

[75] *See* 8 U.S.C. § 1409(a) (2012), incorporating 8 U.S.C. § 1401(c).

[76] *See* 8 U.S.C. § 1401(c).

[77] *See* 8 U.S.C. § 1409(a) ("Children born out of wedlock"), incorporating 8 U.S.C. § 1401(c) (marital rule for two citizen parents), and § 1409(a)(3) (paternal support requirement unless father is deceased) and (4)(B) (acknowledging paternity under oath), assuming that a blood relationship is

child's birth suffices to transmit citizenship. This statutory structure reflects outdated gender stereotypes such as that a father is free to deny his natural children unless he chooses to recognize and support them,[78] in which case they become "legitimate" and the same as marital children. The non-marital rule is likely unconstitutional because it discriminates on the ground of marital status.[79]

D. Marital Choice

Finally, requiring longer physical presence for a parent to transmit citizenship to a foreign-born child if married to an alien rather than to another citizen impermissibly discriminates against citizen parents on the ground of marital choice.[80] This is especially so because the lengthy presence requirement intentionally combines discrimination on the ground of marital choice with discrimination on the grounds of race and ethnicity.[81]

The 1940 Act's legislative history provides a stark example of the intent to discriminate on those grounds. Rep. William Poage objected to prior federal law because under it a man who could not marry a Chinese woman under Texas law could go abroad, marry a Chinese woman, have children with her, and then bring them back to the United States notwithstanding the immigration laws because, as Richard Flournoy confirmed, the children would be born citizens.[82] Adding the lengthy presence requirement in response to such circumstances likely violates due process. As Justice Kennedy explains, "[a] first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due

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separately proved under § 1409(a)(1). Even if paternity is proved under other provisions of § 1409(a)(4), the marital prior residency rule cannot apply unless the father agrees to support the child. The mother might be able to cause the nominal prior residency rule to apply if the father dies before the child turns 18 by satisfying the other conditions (proof of paternity and blood relationship).

[78] *See, e.g.*, Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. REV. 1485, 1495 (2011). The Court declined to consider the support provision's constitutionality in Nguyen v. INS, 533 U. S. 53, 60 (2001).

[79] *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700 n.25 (2017) ("Distinctions based on parents' marital status, we have said, are subject to the same heightened scrutiny as distinctions based on gender.").

[80] *See, e.g.,* Medina, *supra* note 73, at 393. The statutory effects on same sex couples, married or unmarried, can create additional discrimination. *See id*. at 393 and 405 (analysis prior to recognition of constitutional right to same sex marriage) and Scott Titshaw, *Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47 (2010).

[81] *See supra* notes 60–64 and accompanying text.

[82] *Hearings*, *supra* note 35, at 42. The lengthy presence requirement could not prevent derivative citizenship in all such cases. The executive branch settled on it as a compromise between those who wanted to restrict derivative citizenship only to children of two citizen parents and those who thought that such a restriction would depart too far from prior law for a bill whose primary purpose was codification. *See id*. at 45, 58–59.

Process Clause."[83]

E. Conclusion and Need for Alternative Remedy

The *Morales-Santana* Court chose to remedy gender discrimination by extending a rule that dilutes some parents' citizenship and discriminates on grounds of race, ethnicity, gender, marital status and marital choice. If the Court's statutory and constitutional interpretations are correct then its remedy likely cannot stand. If the child's citizenship is a right of the citizen parent then both presence requirements in all of their applications should be unconstitutional. An alternative remedy must exist in Morales-Santana's case and in every other case in which either of the parental presence requirements applies.

IV. APPROPRIATE REMEDY

A. Excision

Two remedies are available on remand in *Morales-Santana* and in any other successful challenge to the presence requirements. They are severance by excision[84] and severance by substitution of the nominal prior residency requirement.[85]

The first alternative remedy is to excise the unconstitutional provision and determine the claimant's citizenship under the remaining valid statutory requirements. The Supreme Court approved this approach in *Schneider v. Rusk*. Schneider was married to an alien and had four sons abroad, two before her purported expatriation and two after. She challenged her expatriation in part because she and the executive branch recognized that the after-born children's citizenship followed her own.[86] The Supreme Court agreed, finding that "[t]wo of her four sons, born in Germany, are dual nationals, having acquired American citizenship under § 301(a)(7) of the 1952 Act. The American citizenship of the other two turns on this case."[87]

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[83] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[84] For general discussions of severance by excision *see* Miller v. Albright, 523 U.S. 420, 453, 457 (1998) (Scalia, J., concurring in judgment), and Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 41 (1995).

[85] For a general discussion of severance by substituting one provision in the relevant statute for another, see Sessions v. Morales-Santana, 137 S. Ct. 1678, 1694–95 (2017).

[86] *See* Transcript of Oral Argument statement 21, Schneider v. Rusk, 377 U.S. 163 (1964) (No. 368) ("If this case is successful they are like their brothers dual nationals carrying American citizenship . . . and if we are unsuccessful they are only German nationals and they do not have the same rights as their brothers."), http://www.scotussearch.com/casefiles/5598#statement21. The executive branch acknowledged that "their American citizenship . . . depends on the outcome of this case since their American citizenship derives from their mother and they were born after the Department of State had determined that appellant had lost her citizenship." *See* Brief for the Respondent at 8, Schneider v. Rusk, 377 U.S. 163 (1964) (No. 368), reproduced in GALE, *supra* note 64.

[87] *See Schneider*, 377 U.S. at 164.

The Court found that the two younger sons would be American citizens if it severed the rule that purported to expatriate their mother even though it was well aware that Congress enacted that rule with a specific intent of preventing such foreign-born children from receiving American citizenship.[88]

The Court then struck down the expatriation provision as unconstitutional,[89] and the federal government recognized the younger sons' American citizenship and issued passports to them.[90] After *Afroyim* clarified that involuntary expatriation was generally unconstitutional, the Immigration and Naturalization Service (the "INS") used mass media to notify foreign-born children of unconstitutionally expatriated parents that they could claim derivative citizenship through their parents. As the INS explained officially:

> Initiation of reconsideration of previous determinations of loss of nationality may be made by the person against whom the previous determination was made or any person claiming United States citizenship through him . . . In view of the enormous number of cases that are involved, the only practical means of informing the potential citizenship claimants is through extensive public notice. . . Each post is requested to give the most extensive publicity to this instruction appropriate for its consular district . . . by newspapers or other mass media unless such publication is not possible or politically feasible for a particular country or consular district.[91]

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[88] *See, e.g.*, Schneider v. Rusk, 218 F. Supp. 302, 310, 314 (D.D.C. 1963), *rev'd*, Schneider v. Rusk, 377 U.S. 163 (1964), and Brief for Appellant at 55, Schneider v. Rusk, 377 U.S. 163 (1964) (No. 368), reproduced in GALE, *supra* note 64. Subsequent case law requires the courts to assess whether Congress would have excised the provision or declined to enact the entire statute if it knew that the provision were unenforceable. *See, e.g.*, New York v. United States, 505 U. S. 144, 186 (1992). The *Schneider* Court did not make this assessment. However, it is highly likely that Congress would have chosen to excise the presence requirements rather than drop the entire statutes that adopted them. The most recent comprehensive act that adopted them, the Immigration and Nationality Act of 1952, was a massive undertaking that revised and codified broad areas of the law including immigration laws that were not included in any earlier codification. *See, e.g.*, United States, U.S. Citizenship and Immigration Services, *Immigration and Nationality Act* (Sept. 10, 2013), https://www.uscis.gov/laws/immigration-and-nationality-act.

[89] *See Schneider*, 377 U.S. at 168–69.

[90] Private correspondence with one of the younger sons. The author gratefully acknowledges the assistance of Ellen Hayes and the cooperation of the Schneider family.

[91] U.S. DEP'T OF JUSTICE IMMIGRATION AND NATURALIZATION SERV., CODES, OPERATIONS INSTRUCTION, REGULATIONS AND INTERPRETATIONS App. B 6980.164-6980.165 (1991), https://hdl.handle.net/2027/nyp.33433067542153. *See also* Sabina Mariella, *Leveling Up Over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. REV. 219, 250 (2016) (same general INS position in Supreme Court briefing). For mass media

Justice Scalia considered this remedy to be an unconstitutional "conferral of citizenship on a basis other than that prescribed by Congress."[92] He acknowledged that the remedy applies in other circumstances but did not believe that it applied to immigration or citizenship statutes in part because he did not know of any instance in which the Court had applied it to them.[93] Justice Scalia may have been unaware of the Court's finding in *Schneider* and of the federal government's mass implementation of it.

B. Substitution of Nominal Prior Residency Requirement

The second alternative is either to substitute a valid parental requirement from the statute or to strike down the entire statute that includes the presence requirement, based on the court's assessment of which Congress would have chosen. In this alternative a court might properly substitute the rule that applies to marital children of two citizen parents, which requires only that one of the citizen parents had resided in the United States (or its outlying possessions) for any period prior to the child's birth.

It is likely that Congress would have chosen to apply the nominal prior residency requirement rather than strike down the entire statute that includes it. Congress first enacted the nonmarital gender differential in the 1940 Act. Its legislative history acknowledges that "[i]t has evidently been the will of the people of the United States that, with certain limitations, children born abroad of American parents should acquire American nationality at birth, and there is nothing to indicate a change of opinion on this subject."[94] Nominal residency was the only parental presence required from the first naturalization statute in 1790 until 1940,[95] and it has continued to apply to marital children of two citizen parents since 1940.[96]

V. FIALLO, BELLEI, GIL AND DIAZ

By recognizing the statutory rights of citizen parents the *Morales-Santana* decision should implicitly overrule *Rogers v. Bellei* and *Fiallo v.*

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inviting the children to apply for citizenship through the unlawfully expatriated parent, *see, e.g.*, *Loss of U.S. Citizenship May Be Restored Soon*, COURIER-EXPRESS, July 1, 1969, at 2; and *You May Still Be a Citizen of the U.S.*, GREAT FALLS TRIBUNE, June 7, 1969, at 7. For a more specific INS interpretation recognizing foreign-born children's citizenship through unlawfully expatriated parents *see* U.S. DEP'T OF JUSTICE IMMIGRATION AND NATURALIZATION SERV., CODES, OPERATIONS INSTRUCTION, REGULATIONS AND INTERPRETATIONS 301.1(b)(1)(ii) (1991), https://hdl.handle.net/2027/nyp.33433067542146 (recognizing citizenship at birth of children born abroad after a mother's purported expatriation for marriage to an alien).

[92] *See* Miller v. Albright, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in judgment).

[93] *See id.*

[94] *Hearings*, *supra* note 35, at 422.

[95] *See* Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797; Act of Feb. 10, 1855, ch. 71, 10 Stat. 604; Act of Apr. 14, 1802, ch. 28, 2 Stat. 153; Act of Jan. 29, 1795, ch. 20, 1 Stat. 414; and Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

[96] *See* 8 U.S.C. § 1401(c) (2012).

Bell, and implicitly reverse *Gil v. Sessions*. In addition, the decision might establish first party rights of aliens to heightened or strict judicial review of their constitutional claims and thereby overrule or undermine precedents like *Mathews v. Diaz* that limit judicial authority to review decisions of Congress and the President involving aliens' admission and treatment while abroad.

A. Statutory Rights of Citizens

1. Rogers *v.* Bellei

Rogers v. Bellei principally involved a Fifth Amendment due process challenge to a statute granting derivative citizenship at birth abroad, subject to a condition subsequent for children of mixed nationality parents requiring five years of continuous personal presence in the United States between the ages of fourteen and twenty-eight.[97] Bellei received citizenship under the statute at birth in Italy, failed to satisfy the condition subsequent, and challenged the revocation of his citizenship on his own behalf.[98] The lower court relied on *Schneider* and *Afroyim* and found the condition subsequent to be unconstitutional.[99]

The Supreme Court reversed. It noted that Schneider and Afroyim had been naturalized in the United States and found that their rights derived from "Fourteenth Amendment citizenship and that Amendment's direct reference to 'persons born or naturalized in the United States.'"[100] Bellei was naturalized outside of the United States, so he had to comply fully with the statute like any other alien even though he was a citizen at birth.[101] He did not have the broad right to retain his citizenship like Afroyim or the narrower right to be treated equally with those born in the United States like Schneider.[102] The majority applied only nominal judicial scrutiny to his Fifth Amendment challenge. The dissent protested bitterly that "[t]he majority applies the 'shock the conscience' test to uphold, rather than strike, a federal statute. It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is 'irrational or arbitrary or unfair,' the statute must be constitutional."[103]

The Court based its decision on the alien-born Bellei's first party rights. *Morales-Santana* redirects judicial scrutiny to the statutory rights of his mother, who was a Fourteenth Amendment citizen married to an alien.[104]

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[97] *See* Rogers v. Bellei, 401 U.S. 815, 816 (1971).

[98] *See id.* at 816–17.

[99] *See* Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969), *rev'd*, 401 U.S. 815 (1971).

[100] *Bellei*, 401 U.S. at 835.

[101] *See id.* at 830 ("'No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . .'") (citation omitted).

[102] *See id.* at 834–35.

[103] *Id.* at 844 (Black, J., dissenting).

[104] *See id*. at 817.

The condition subsequent diluted her right to transmit citizenship to her foreign-born son. It discriminated against her transmission right on the ground of marital choice because the condition did not apply to marital children of two citizen parents. It also discriminated on the ground of gender. Although the condition was facially gender-neutral, Congress only imposed it when it extended derivative citizenship to children of citizen mothers and alien fathers because Congress feared that alien fathers would dominate citizen mothers in raising their foreign-born children abroad. It is likely that these limitations on her right to transmit citizenship were unconstitutional.

2. Fiallo *v.* Bell

Fiallo considered an equal protection challenge to an immigration statute allowing citizen parents other than unmarried fathers to bring their alien children into the country without regard to otherwise applicable restrictions. The majority upheld the statute under an extremely deferential standard of review on the ground that Congress' power over the admission of aliens is nearly complete and "'largely immune from judicial control.'"[105] The dissent acknowledged that "aliens have no constitutional right to immigrate and that Americans have no constitutional right to compel the admission of their families."[106] Nevertheless it carefully documented legislative history and statutory structure to show that the purpose and operation of the law was to create a statutory right for the citizen parent, not the alien child.[107] It identified legislative history expressing Congress' concern for the U.S. citizen's family unity, and it noted that "[i]f the citizen [parent] does not petition the Attorney General for the special 'immediate relative' status for his . . . child, the alien, despite his relationship, can receive no preference."[108] Because Congress granted the statutory right to some citizen parents it could not withhold the right from others because of their gender without showing that the classification was substantially related to achieving important governmental objectives, which the government failed to do.[109]

Morales-Santana involves the same gender discrimination as *Fiallo*, and the Court's reasoning tracks the dissent's in *Fiallo*. Yet the *Morales-Santana* Court declined to overrule *Fiallo*, purporting instead to distinguish it on two grounds. The first is that *Fiallo* involved the entry of aliens and therefore Congress' broad power over immigration.[110] This distinction fails because Congress has equally broad power over naturalization—the Court considers

[105] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)).

[106] *Fiallo*, 430 U.S. at 807 (Marshall, J., dissenting).

[107] *See id.* at 806–08 (Marshall, J., dissenting).

[108] *Id.* at 806–07 (Marshall, J., dissenting).

[109] *Id.* at 808–09, 816 (Marshall, J., dissenting).

[110] Session v. Morales-Santana, 137 S. Ct. 1678, 1684 (2017).

immigration and naturalization to occupy the same area of congressional and presidential power.[111]

The second purported distinction is that unlike the alien children in *Fiallo*, Morales-Santana claims citizenship "since birth," and in that circumstance "the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review."[112] This distinction fails because the *Bellei* Court found that only reverse shock the conscience review applies to statutes that grant citizenship at birth abroad. The relevant constitutional distinction is between citizenship acquired by birth within and under the jurisdiction of the United States or by naturalization, not automatically at birth or by a legal process afterward.[113] Even if there were a distinction for citizenship acquired at birth abroad it would not apply to Morales-Santana because he could not have received citizenship until his parents satisfied all statutory conditions precedent, which did not occur until eight years after his birth when they married.[114] Until then he was an alien under any definition of the word. The statute does grant citizenship "as of" birth, but that could not have altered the fact that Morales-Santana was an alien for the first eight years of his life. It is also doubtful that the provision makes anyone a citizen retroactively to birth for all purposes, such as liability for taxes on previously earned income[115] or charges of treason for prior acts in aid of the nation's enemies.[116]

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[111] *See* Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); *see also Fiallo*, 430 U.S. at 792 (quoting *Diaz*, 426 U.S. at 80) (noting that "we observed recently that, in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'").

[112] *Morales-Santana*, 137 S. Ct. at 1694.

[113] *See, e.g.*, *supra* text accompanying notes 11–16; *see* Vlahoplus, *supra* note 15, at 76–82. For dissenting views that statutory citizenship is constitutionally privileged if conferred automatically at birth, particularly at birth to citizen parents, *see e.g.*, Mariella, *supra* note 91 at 222, n.11 (citing among others dissenting opinions by Justices O'Connor and Breyer). The claim that the Constitution privileges foreign-born children of citizen parents over those of alien parents is especially pernicious. It risks supporting claims that the Constitution privileges domestic-born children of citizen parents over those of alien parents. *Cf.* Publius-Huldah, *Natural Born Citizen and Naturalized Citizen Explained* (Feb. 11, 2016) https://publiushuldah.wordpress.com/category/vattel/ (arguing that only children of citizen parents are natural born and eligible to the presidency, citing de Vattel).

[114] *See Morales-Santana*, 137 S. Ct. at 1694.

[115] *Cf.* Rev. Rul. 70–506, 1970–2 C.B. 1 (waiving liability for citizenship-based federal income taxes for the period of a citizen's unconstitutional purported expatriation), and Rev. Rul. 75–357, 1975–2 C.B. 5 (same for income, estate and gift taxes).

[116] *Cf.* Shedden v. Patrick (1854) 149 Rev. Rep. 55, 73 (Lord Chancellor Cranworth) and 81 (Lord Brougham) (denying that "legitimation" that was retroactive to birth for other legal purposes gave foreign-born offspring a British father and therefore British derivative nationality at birth because "strange consequences would follow" such as liability for treason for prior acts). *Shedden* was widely reported, digested and cited in the United States and may have been part of the background law that informed American rulings that early U.S. derivative citizenship statutes did not apply to natural children of citizen fathers. *See*, *e.g.*, 28 CHAUNCEY SMITH & EDMUND H. BENNETT, ENGLISH REPORTS

Fiallo is constitutionally indistinguishable from *Morales-Santana*. Congress has equally broad power over aliens' physical entry (immigration) as political entry (admission to citizenship by naturalization), whether at birth or afterward. *Morales-Santana* adopts the *Fiallo* dissent, redirects the equal protection analysis from the rights of the alien-born child to those of the citizen parent, and requires heightened scrutiny of the immigration statute's gender differential, likely overruling the result in *Fiallo*.

3. Broader significance and Gil

Morales-Santana's claim is to post-natal naturalized citizenship. The Court equates Congress' power over immigration with its power over naturalization. Consequently the decision in *Morales-Santana* should apply to all immigration and naturalization claims, whether natal or post-natal. Courts should consider it and derivative citizenship law and practice generally when adjudicating claims by citizens involving significant relationships with aliens.

One example involves another gender differential in derivative citizenship law. Federal statutes have historically granted derivative citizenship to alien minors upon the naturalization of their parents.[117] One such statute contains an exception that excludes natural children of naturalized fathers.[118] *Morales-Santana* should invalidate this exception and

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IN LAW AND EQUITY ETC. 56 (1855) (case report), https://hdl.handle.net/2027/osu.32437121385245; 9 JOHN PHELPS PUTNAM, UNITED STATES DIGEST; BEING A DIGEST OF DECISIONS OF THE COURTS OF COMMON LAW, EQUITY, AND ADMIRALTY, IN THE UNITED STATES AND ENGLAND 32 (1858) (substantive holding in *Shedden*), https://hdl.handle.net/2027/nyp.33433007996006; and Commercial Bank of Manchester v. Buckner, 61 U.S. 108, 109 (1857) (argument of counsel citing procedural holding in *Shedden*). *Cf.* Collins, *supra* note 36, at 2145–49 (importance of *nullius filius* doctrine to first American decision on point). U.S. authorities interpreted early federal derivative nationality statutes more liberally, however, to confer citizenship on the natural child of a citizen father upon subsequent "legitimation," apparently retroactive to birth. *See, e.g.*, Citizenship—Children Born Abroad Out of Wedlock of American Fathers and Alien Mothers, 32 Op. Atty Gen. 162, 164 (1920) (the "relationship should be recognized as existing from the date of the child's birth."), https://hdl.handle.net/2027/hvd.32044103154068. A citizen grandfather's "legitimation" of a father may even have been retroactive to the father's birth for purposes of further retroactively conferring derivative citizenship on the father's own previously foreign-born child (i.e., the citizen grandfather's grandchild). *Cf.* Matter of Varian, 15 I&N Dec. 341 (BIA 1975) (entertaining the argument but finding that it did not apply to the facts of the case), https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2395.pdf. American citizenship acquired "as of" birth likely confers rights retroactively but obligations only prospectively.

[117] *See, e.g.,* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795) (for children dwelling in the United States).

[118] The general rule, 8 U.S.C. § 1432 (1995) (repealed prospectively 2000), applies to marital children through its ordinary operation and to natural children of citizen mothers through § 1432(a)(3) (repealed prospectively 2000). It excludes natural children of citizen fathers through a separate statutory definition of "child." *See* Gil v. Sessions, 851 F.3d 184 (2d Cir. 2017) (denying derivative citizenship to the natural child of a naturalized father, citing the statutory definition of "child" in 8 U.S.C. § 1101(c)(1) (2012)); *Cf.* Ayton v. Holder, 686 F.3d 331 (5th Cir. 2012) (dismissing an equal protection challenge to the gender differential as moot under the facts of the case).

recognize the citizenship of those children. This would implicitly reverse *Gil v. Sessions*, which denied derivative citizenship to the natural child of a naturalized father.[119]

Another example is derivative citizenship provisions that grant automatic or of-right citizenship to foreign-born children of citizen parents after the children's lawful entry into the United States.[120] The United States has applied immigration rules aggressively to prevent children of disfavored heritage from entering the country and thereby gaining citizenship under similar statutes.[121] In fact, the reason that Congress imposed the five year requirement at issue in *Bellei* as a condition subsequent was the fear that immigration officials would prevent Chinese American children from entering the country and fulfilling a condition precedent.[122] *Morales-Santana* should establish the right of citizen parents to their children's entry to gain citizenship under these provisions despite formal travel bans or informal exclusionary practices based on race, religion, national origin or other impermissible grounds.

A third example is immigration preferences for parents of citizen minors. *Fiallo* also upheld a statutory provision that allowed citizen minors to bring their alien parents into the country without regard to otherwise applicable limitations, excluding fathers of natural children. The dissent recognized that the statute protected the citizen child's interest in her alien parent like the citizen father's interest in his alien child, and it concluded

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[119] *See Gil,* 851 F.3d at 184. Under this statute the paternal rule is the exception, so *Morales-Santana* requires severing it and recognizing the citizenship of natural children of fathers who were naturalized while the statute was in force. In any event, the only way to ensure equal protection in this case is to recognize those children's citizenship. Congress has already repealed the statutory provisions prospectively, so only a retroactive remedy can apply. Congress could hardly have intended to retroactively expatriate children of the favored parental classes in order to equalize their treatment with natural children of naturalized fathers (even if that were constitutional). The *Morales-Santana* Court did not explain why the foreign-born child's citizenship is a statutory right of the citizen parent. There is no reason to interpret the statute at issue in *Gil* differently because it relates to a parent naturalized in the United States. Federal law automatically naturalized both minor children of naturalized parents and foreign-born children of citizen parents beginning with the first federal naturalization act in 1790. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

[120] *See* 8 U.S.C. § 1431 (2012) (automatic citizenship after entry for permanent residency in the custody of the citizen parent) and 8 U.S.C. § 1433 (2012) (of-right citizenship upon application, proof of specified conditions, and temporary entry to take the oath of allegiance). The child's citizenship is of-right under the latter because the statute provides that "[t]he Attorney General shall issue a certificate of citizenship to such applicant upon proof" of the statutory conditions. *See* 8 U.S.C. § 1433(a) (2012).

[121] *See, e.g.*, United States *ex rel*. Goldman v. Tod, 3 F.2d 836 (N.D.N.Y. 1924) (Jewish American); Kaplan v. Tod, 267 U.S. 228 (1925) (Jewish American); United States *ex rel*. Gaudelli v. Maxwell 60 F.2d 655 (D.N.J. 1932) (Italian American), and additional cases cited in Ernest J. Hover, *Derivative Citizenship in the United States*, 28 AM. J. INT'L L. 255, 258–60 (1934). Restrictions on Eastern European immigration were in part designed to exclude Jewish immigrants. *See*, *e.g.*, 1 RICHARD S. LEVY, ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION 343 (Richard S. Levy ed., 2005).

[122] *See, e.g.*, Collins, *supra* note 36, at 2194 n.242.

that the exclusion violated the rights of natural children of alien fathers.[123] *Morales-Santana* should overrule *Fiallo* on this point.

A final example is the definition of a close familial relationship, which a lower court interpreted to include the grandparent/grandchild relationship in the context of one of President Trump's initial travel bans.[124] Derivative citizenship law does not only permit a citizen grandparent to apply for the grandchild's citizenship as the lower court notes in its decision.[125] It also allows the grandparent's physical presence in the United States to qualify the grandchild for of-right post-natal citizenship even if the citizen parent has never been physically present in the United States.[126] Congress considers the relationship to a grandparent who has a physical connection to the United States to be more important for citizenship purposes than the parent's lack of any such connection.

B. First Party Rights of Aliens

The *Morales-Santana* Court found that the applicable statute violated the right of the respondent's father, José Morales, to equal treatment with unwed citizen mothers. Under *Bellei* he had no such right, because he was also naturalized outside of the United States. Therefore *Morales-Santana* should implicitly overrule *Bellei* as to first party rights of the alien-born and might establish their right to heightened judicial review of actions of Congress and the President involving their admission and their treatment abroad.

1. Citizenship of José Morales

Morales was born in Puerto Rico in 1900.[127] Under prevailing interpretations Puerto Rico is not part of the United States for purposes of

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[123] Fiallo v. Bell, 430 U.S. 787, 809 (1977) (Marshall, J., dissenting). In this context, the Constitution protects the natural child. *Id*. This is true even though the source of the discrimination is the marital status of the parents, not the marital status of the child.

[124] *See* Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce, or, in the Alternative, to Modify Preliminary Injunction, State of Hawai'i v. Trump, CV. No. 17–00050 DKW–KSC (D. Hawaii July 13, 2017) [hereinafter *Order*]. The travel ban subject to this stay expired, and the Supreme Court vacated the stay as moot. *See* Trump v. Hawaii, 583 U.S. __ (2017). This article was written before the Supreme Court upheld a later version of the travel ban. *See* Trump v. Hawaii, No. 17–965, 585 U.S. __ (2018).

[125] *See Order*, supra note 124 at 13 n.8; *see* 8 U.S.C. § 1433(a)(2012) (if the citizen parent is deceased).

[126] *See* 8 U.S.C. § 1433(a)(2)(B) (2012). The grandparent's physical presence qualifies the child even if the parent applies for the child's citizenship and even if the grandparent is deceased at the time the parent applies. *See* 7 *Foreign Affairs Manual 1150*, U.S. DEPARTMENT OF STATE § 1158.3(b)(2) (2009), https://fam.state.gov/fam/07fam/07fam1150.html.

[127] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017).

the Fourteenth Amendment,[128] so Morales was born an alien. He received naturalized U.S. citizenship in 1917 under the Jones-Shafroth Act[129] while physically present in Puerto Rico.[130] Consequently he was naturalized outside of the United States for purposes of the Fourteenth Amendment under prevailing interpretations of that amendment.

2. Bellei *and* Diaz*: First party rights*

Bellei challenged his expatriation on his own behalf. The lower court found that Fifth Amendment due process required applying the same protections to him as to Schneider and Afroyim, specifically interpreting *Schneider* and *Afroyim* to hold that Congress may not grant citizenship and then either qualify or terminate the grant.[131] The Supreme Court rejected both Bellei's right to equal treatment and the purported prohibition on Congress granting and subsequently qualifying or terminating his citizenship. The Court explained that Bellei's claim could only "rest, if it has any basis at all," on those cases' reliance on Fourteenth Amendment citizenship, and it refused to extend their holdings "to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute."[132]

The Court found that the Fourteenth Amendment declares the only two types of constitutional citizenship: that from birth within and under the jurisdiction of the United States and that from naturalization within and under the jurisdiction of the United States.[133] Bellei held neither, and the Court insisted that the rights of Fourteenth Amendment citizenship do not apply to "a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory."[134]

Consequently Bellei had to identify limitations on Congress' power in "any pertinent constitutional provisions other than the Fourteenth

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[128] *See, e.g.*, Tuaua v. United States, 788 F. 3d 300 (D.C. Cir. 2015) (no birthright constitutional citizenship from birth in unincorporated territories), *cert. denied* (June 13, 2016). Strong arguments exist against the prevailing view. *See, e.g.*, John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. (forthcoming 2018). The *Morales-Santana* Court noted that Puerto Rico was a part of the United States in 1900 and remains so, citing precedent involving double jeopardy and a twentieth century statutory definition that applies for limited purposes of nationality and naturalization. *See Morales-Santana*, 137 S. Ct. at 1687. The Court did not suggest that Puerto Rico is part of the United States for purposes of the Fourteenth Amendment.

[129] Act of Mar. 2, 1917, Pub. L. 64–368, 39 Stat. 951, and *supra* text accompanying notes 11–14 (citizenship conferred by statute is naturalization for constitutional purposes).

[130] *See* Morales-Santana v. Lynch, 804 F.3d 520, 524 (2nd Cir. 2015) (birth, receipt of citizenship, and physical presence), *rev'd in part, aff'd in part, and remanded*, Morales-Santana, 137 S. Ct. 1678 (2017).

[131] Bellei v. Rusk, 296 F. Supp. 1247, 1252 (D.D.C. 1969), *rev'd*, Rogers v. Bellei, 401 U.S. 815 (1971).

[132] *Bellei*, 401 U.S. at 834–35.

[133] *See id.* at 830.

[134] *Id.* at 833.

Amendment's first sentence" in order to prevail.[135] The Court found Congress' power to be broad and identified no applicable limitations.[136] Its analysis suggests that Congress may qualify even First Amendment rights of such naturalized citizens.[137] It found that Bellei had to satisfy the statute fully like any other alien even though he was a citizen at birth,[138] and it applied only a reverse shock the conscience standard of review to his claim.[139] Under the Court's reasoning Bellei remained an alien as far as the Constitution is concerned even though he was a citizen at birth. The Court also recognized that Congress specifically has the power not to grant any "United States citizen the right to transmit citizenship by descent."[140]

In summary, the *Bellei* Court found that those naturalized abroad are not constitutional citizens; they have no right to equal treatment with those born or naturalized in the United States; their Fifth Amendment claims merit only nominal judicial review; Congress may grant them citizenship and then qualify or terminate the grant; and Congress has the power to deny them the right to transmit citizenship by descent.

Morales was also naturalized outside of the United States. His citizenship was also wholly and only statutory. Under *Bellei* he was an alien as far as the Constitution is concerned; he had no right to equal treatment or to transmit citizenship by descent contrary to statutory law; and his Fifth Amendment claim merited only nominal judicial review.[141] Yet the *Morales-Santana* Court found that he had the right to equal treatment with unwed citizen mothers and that his Fifth Amendment claim merited heightened scrutiny. Read broadly, *Morales-Santana* might establish that all those who are aliens as far as the Constitution is concerned have first party rights to equal treatment when challenging statutes that apply to them, including the right to heightened or strict judicial scrutiny of claims involving discrimination on grounds of gender, religion, race, or national origin. This would overrule or undermine *Diaz* and other authorities that grant Congress wide powers over actions affecting aliens abroad and limit judicial review of first party challenges to those actions. It might also recognize similar

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[135] *Id.* at 828.

[136] *See, e.g.*, Case Comment*: Involuntary Expatriation:* Rogers v. Bellei—*A Chink in the Armor of* Affroyim [sic], 21 AM. U. L. REV. 184, 199–200 (1971).

[137] *See id*. at 202–03 (citing Perez v. Brownell, 356 U.S. 44, 81–82 (1958) (Douglas, J., dissenting)).

[138] *See Bellei*, 401 U.S. at 830.

[139] *See id.* at 844 (Black, J., dissenting).

[140] *Id.* at 828–30.

[141] Morales was abroad during all periods relevant to the claimed transmission of citizenship. *See* Jon Campbell, *Gender Bias Ruling Saves Imprisoned New York Man From Deportation*, VILLAGE VOICE (July 10, 2015), https://www.villagevoice.com/2015/07/10/gender-bias-ruling-saves-imprisoned-new-york-man-from-deportation/. He could not therefore claim the higher judicial protection that a closer connection to the United States would have conferred. For a discussion of due process and relative connection to the United States, *see, e.g.*, Jennifer K. Elsea, *Substantive Due Process and U.S. Jurisdiction over Foreign Nationals*, 82 FORDHAM L. REV. 2077 (2014).

rights against actions of the President, because prior authorities apply to immigration and naturalization decisions made by either Congress or the President.[142]

Is it possible to justify Morales' first party equal protection right in some way other than overruling *Bellei*? *Bellei* forecloses any argument based on a general constitutional right to equal treatment exclusive of the Fourteenth Amendment. Chief Justice Marshall had claimed in 1824 that all American citizenship was equal except for presidential eligibility and that Congress could not qualify naturalized citizenship.[143] The *Bellei* Court dismissed his statement as dicta.[144] Even the *Afroyim* Court acknowledged that Chief Justice Marshall's statement and similar judicial and legislative pronouncements under pre-Fourteenth Amendment law "may be regarded as inconclusive . . . ."[145]

It would be hard to reconcile the cases by reading *Bellei* to hold only that Congress may not qualify naturalized citizenship once it vests. In explaining Congress' historical power over derivative citizenship the *Bellei* Court cited approvingly a 1907 statute that withdrew federal protection from minors who received derivative citizenship abroad unless they recorded their intent to reside in the United States and met other conditions.[146] The law applied only to such minors, not to anyone born or naturalized in the United States, and it applied even though their derivative citizenship was vested. In addition, the Court asserted Morales' right to equal treatment even though the physical presence requirement likely increased his transmission right compared to the law in effect at his naturalization. There is no statutory authority for the proposition that Morales had any right to transmit citizenship to his son under the law in effect in 1917. That law required prior residency in the United States,[147] and Morales did not reside in the United States prior to his son's birth.[148] Derivative citizenship statutes did not include Puerto Rico in the definition of the United States for this purpose until the 1940 Act.[149]

Finally, the *Bellei* decision asserts congressional power over

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[142] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 81–82 (1976). Read narrowly, the decision might only apply to naturalization statutes and adopt the *Bellei* dissent's assertion that persons naturalized abroad are Fourteenth Amendment citizens; *see Bellei*, 401 U.S. at 843 (Black, J., dissenting), 845 (Brennan, J., dissenting).

[143] *See* Osborn v. Bank of the United States, 22 U.S. 738, 827–28 (1824).

[144] *See Bellei*, 401 U.S. at 822.

[145] *See* Afroyim v. Rusk, 387 U.S. 253, 261 (1967).

[146] *See* Act of Mar. 2, 1907, Pub. L. No. 193, § 6, 34 Stat. 1228, *cited in Bellei*, 401 U.S. at 824.

[147] *See* Title 25 §1993, 43 Rev. Stat. 350 (2d ed. 1878).

[148] *See* Campbell, *supra* note 141.

[149] *See* Nationality Act of 1940, ch. 876, § 101(d), 54 Stat. 1137. Consequently, the State Department has generally held that residency in Puerto Rico does not satisfy the prior law, although in certain cases the Board of Immigration Appeals has held to the contrary; *see 7 Foreign Affairs Manual 1130*, U.S. DEPARTMENT OF STATE, § 1135.2–3(d), https://fam.state.gov/fam/07fam/07fam1130.html (last visited on Jan 27, 2018), and discussion in Friend v. Reno, 172 F.3d 638 (9th Cir. 1999).

naturalization that exceeds even that of Parliament before the adoption of the Constitution. Parliament could not naturalize on a condition because naturalization made one "as a naturall borne subject," and naturalization on a condition is inconsistent with "the absolutenesse, puritie, and indelibilitie of naturall Allegeance."[150] The United States early rejected the indelibility of natural allegiance, recognizing the individual's natural right of voluntary expatriation.[151] *Bellei* found that the Constitution also rejects the absoluteness and purity of allegiance conferred by naturalization abroad. *Bellei* and its constitutional analysis should not survive *Morales-Santana*.

CONCLUSION

Many scholars have criticized the Court's choice of remedy in *Morales-Santana*.[152] One has condemned Justice Ginsburg's opinion in the case as a thorough disappointment and perhaps her worst writing for the Court, characterizing the decision as merely a symbolic victory and only perhaps a principled one.[153] This article argues on the contrary that the decision represents the triumph of Justice Marshall's *Fiallo* dissent. It recognizes citizens' rights to meaningful judicial scrutiny of some actions by Congress and the President that affect aliens with whom they have significant relationships. It may also establish aliens' personal rights to meaningful judicial scrutiny of congressional and presidential actions that affect their admission and their treatment while abroad. The mean remedy may well be incorrect and open to challenge. However, Justice Ginsburg's opinion is at heart principled. It should force courts to confront the discrimination that pervades American immigration and naturalization law, and it may ultimately extend due process and equal protection farther than critics and even the Court expect.

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[150] 1 EDW. COKE, INSTITUTES OF THE LAWES OF ENGLAND 129 (1628).

[151] *See, e.g.*, JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 267–69 (1978).

[152] *See, e.g.*, Richard M. Re, *Morales-Santana's Many Judgments*, PRAWFSBLAWG (June 13, 2017), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/morales-santanas-ambiguous-judgments-scotus-symposium.html.

[153] *See* Samuel, *supra* note 3.