CASE NOTE
THE US SUPREME COURT IN SESSIONS v MORALES-SANTANA: PREVENTING STATELESSNESS FOR CHILDREN BORN ABROAD

HEATHER ALEXANDER*

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INTRODUCTION

This case note examines the 2017 United States Supreme Court case Sessions v Morales-Santana (‘Morales-Santana’).1 In the interests of gender equality and equal protection under the Fifth Amendment to the United States Constitution,2 the Court made it more difficult for some US citizen women to pass on their nationality to their children born abroad. This case is noteworthy to the global fight against statelessness because it restricts the right to a nationality for children born abroad under US law, specifically through changes to §§ 1401 and 1409 of the US Immigration and Nationality Act.3 In restricting US nationality law, the case implicated the International Covenant on Civil and Political Rights (‘ICCPR’)4 and the 1961 Convention on the Reduction of Statelessness.5 It also involved issues of US constitutional interpretation not directly related to statelessness; specifically the ‘Due Process Clause’ of the Fifth Amendment to the United States Constitution.6

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* Heather Alexander is a PhD Candidate in Law at Tilburg University. Her work focuses on nationality, statelessness, migration and refugees, with a particular focus on statelessness among nomadic and mobile peoples. She has previously worked for United Nations High Commissioner for Refugees in Chad, Sri Lanka, Kosovo and Côte d’Ivoire.

1 (15-1191, 12 June 2017) (‘Morales-Santana’).
2 United States Constitution amend V (‘Fifth Amendment’).
3 Immigration and Nationality Act, 8 USC §§ 1401, 1409 (1952) (‘Immigration and Nationality Act’).
6 Fifth Amendment (n 2); Weinberger v Wiesenfeld, 420 US 636, 638 n 2 (1975).
II  FACTS

The applicant, Luis Ramon Morales-Santana was born in the Dominican Republic to a US citizen father and a Dominican Republic citizen mother. At the time of his birth, Mr Morales-Santana’s parents were not married. At the time of the case, §§ 1401 and 1409 of the US Immigration and Nationality Act stated that US citizens living abroad and married to non-citizens could only pass on their US nationality if they had lived for ten years in the US, a common requirement in US immigration law often called a ‘physical presence’ test. The law also imposed a ten year physical presence requirement on unwed, US citizen fathers, five of which had to be after the father’s 14th birthday. For unwed US citizen mothers, however, the required period of physical presence in the US was only one year.

Mr Morales-Santana’s father had not lived in the US for five years after his 14th birthday, so he did not qualify under the law. He had been in the US for longer than one year after his 14th birthday. Had he been a woman, therefore, he would have met the one-year exception for unwed mothers. As a result, Mr Morales-Santana did not qualify as a US citizen under the law. Facing removal from the US, he argued that he was the victim of unconstitutional gender discrimination and filed a motion with the Board of Immigration Appeals to re-open his case based on an Equal Protection claim under the US Constitution. The motion was denied, but the US Court of Appeals for the 2nd Circuit (‘2nd Circuit’) reversed the decision, holding that the gender discrimination in the law was unconstitutional and that, therefore, Mr Morales-Santana derived US citizenship from his father. The 2nd Circuit crafted a remedy that extended the one-year physical presence exception to unwed fathers. The government appealed to the US Supreme Court to decide whether (1) §§1401 and 1409 of the United States Code violated the Fifth Amendment’s guarantee of equal protection and (2) if so, ‘[w]hether the court of appeals properly remedied the equal protection violation by extending to unwed citizen fathers of foreign-born children the same rights available to similarly situated unwed citizen mothers’. To settle this area of law, which had previously been raised, but not addressed, by the US Supreme Court decision in Flores-Villar

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7 Morales-Santana (n 1) slip op 1, 4.
8 ibid slip op 5.
9 Immigration and Nationality Act (n 3) §§ 1401, 1409. These sections have since been amended and the physical presence requirement is now five years instead of ten years.
10 Many US immigration and nationality laws require periods during which the applicant must be continuously physically present within the territory of the US or one of its outlying possessions, such as American Samoa. For more information, see US Citizenship and Immigration Services, USCIS Policy Manual (Manual, vol 12, 28 August 2019) pt H ch 3 <https://www.uscis.gov/policy-manual>.
11 Morales-Santana (n 1) slip op 4.
12 ibid slip op 1–3.
14 Morales-Santana (n 1) slip op 1–3. Under the Due Process Clause of the Fifth Amendment to the US Constitution, the US government is required to apply the laws equally to everyone and to not draw arbitrary distinctions that are not based on a legitimate state interest. For more information on equal protection under the Fifth Amendment to the US Constitution, see Kenneth L. Karst, ‘The Fifth Amendment’s Guarantee of Equal Protection’ (1977) 55(3) North Carolina Law Review 541.
15 Lynch v Morales-Santana, Petition for a Writ of Certiorari (23 May 2016) i.
v United States,\(^{16}\) the US Supreme Court agreed to review the case, granting writ of certiorari.

### III ISSUES

This case examined gender discrimination under the *US Constitution’s Fifth Amendment* Due Process Clause and discussed appropriate remedies for removing gender discrimination. It also examined the US Government's obligations to prevent statelessness, particularly insofar as it results from gender discrimination.

### IV HOLDING

The US Supreme Court agreed with the 2nd Circuit that §§ 1401 and 1409 of the US *Immigration and Nationality Act* contain elements of unconstitutional gender discrimination. It differed in its ruling, however, as to the correct remedy.\(^{17}\) The majority decision, written by Justice Ginsburg, struck down the exception for unwed mothers, applying the ten-year rule to all US citizens living abroad.\(^{18}\)

### V REASONING

This case involved a complex interpretation of the *Fifth Amendment* to the *US Constitution*. This note will mainly focus on the aspects of the US Supreme Court's reasoning that touched on the problem of statelessness. As several of the constitutional questions ended up being highly relevant to the problem of statelessness, however, this note will also summarise the relevant constitutional questions. This case concerned the risk of statelessness stemming from gender discrimination. It also concerned the risk of statelessness caused by restricting access to nationality, although this issue was not mentioned in the decision.

The problem of statelessness was first raised by the US Government. It argued that gender discrimination in the law served an important government interest, that of preventing statelessness.\(^{19}\) The 2nd Circuit acknowledged that the ‘avoidance of statelessness’ served ‘an important government interest’, but rejected the argument that gender discrimination was necessary to reach that aim.\(^{20}\) The US Supreme Court discussed the risk of statelessness arising from gender discrimination, though it did not expressly say that preventing statelessness serves an important US Government interest. The Court merely noted the importance of the United Nations High Commissioner for Refugees’ #IBELONG campaign to end statelessness and discussed the role of gender discrimination in causing

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\(^{16}\) *Flores-Villar v United States*, 564 US 610 (2011) ('Flores'). *Flores* raised similar issues to the present case, but the Supreme Court affirmed the holding of the lower court, in this case the 9th Circuit decision, without taking up the merits. The 9th Circuit had held that the law was not unconstitutional, upholding an earlier US Supreme Court case, *Nguyen v Immigration and Naturalization Service*, 533 US 53 (2001). See *United States v Flores-Villar*, 536 F 3d 990 (9th Cir, 2008).

\(^{17}\) *Morales-Santana v Lynch*, 792 F 3d 256 (2nd Cir, 2015); *Morales-Santana v Lynch*, 804 F 3d 520 (2nd Cir, 2015); *Morales-Santana* (n 1) slip op 1–5. As stated above (see n 10), under current law, the physical presence requirement is five years.

\(^{18}\) *Morales-Santana* (n 1) 1–5.


statelessness.\textsuperscript{21} The Court also agreed with the 2\textsuperscript{nd} Circuit that preventing statelessness was a goal of some sections of the original \textit{Nationality Act of 1940}, but not of the specific sections at issue in this case.\textsuperscript{22} Like the 2\textsuperscript{nd} Circuit, the Supreme Court rejected the argument that gender discrimination in the law was necessary to prevent statelessness.\textsuperscript{23} As Justice Ginsburg, writing for the majority, put it: ‘the Government [has not] shown that the risk of statelessness disproportionately endangered the children of unwed US-citizen mothers’ as opposed to those of unwed fathers.\textsuperscript{24}

Gender discrimination, however, was not the only potential cause of statelessness at issue in this case. Statelessness may also arise from changes in the law that make it harder for children to gain a nationality at birth. Yet neither court addressed this fact. Instead, when crafting a remedy, both courts focused only on their constitutional powers and those of Congress, rather than on the goal of preventing statelessness or the human right to a nationality.

In applying the one-year physical presence rule to both unwed US citizen fathers and mothers, the 2\textsuperscript{nd} Circuit held that it had no power to strip citizenship from an individual as such powers lay only with Congress.\textsuperscript{25} But while the Supreme Court acknowledged that the 2\textsuperscript{nd} Circuit was correct in stating this general rule,\textsuperscript{26} the majority decision held that the US Congress clearly intended the clause on unwed mothers to be an \textit{exception} to an otherwise general rule for both married and unmarried persons.\textsuperscript{27} In such cases, the Court determined it was required to remove the exception for unwed mothers, the one-year requirement, and apply the ten-year requirement to everyone. This method of crafting a remedy to an unconstitutional law, often called ‘levelling down’,\textsuperscript{28} resulted in stripping citizenship from Mr Morales-Santana and, potentially, many others.\textsuperscript{29}

\textit{Morales-Santana} provides an excellent example of how restricting nationality at birth can exacerbate the problem of statelessness, violating the right to a nationality.\textsuperscript{30} Yet, the creation of statelessness as the result of restricting the right to a nationality at birth was not discussed by either court in crafting a remedy,

\begin{itemize}
\item \textsuperscript{21} Morales-Santana (n 1) slip op 22.
\item \textsuperscript{22} ibid slip op 20. To determine legislative intent, an important part of US Supreme Court legal interpretation, the Court looked to the drafting of the original \textit{Nationality Act of 1940}, which forms the basis of much of the modern law.
\item \textsuperscript{23} Morales-Santana (n 1) slip op 4, 19–23.
\item \textsuperscript{24} ibid slip op 23.
\item \textsuperscript{25} Morales-Santana v Lynch, 804 F 3d 520 (2\textsuperscript{nd} Cir, 2015) 41.
\item \textsuperscript{27} Morales-Santana (n 1) slip op 28.
\item \textsuperscript{28} As the 2\textsuperscript{nd} Circuit explained:
\begin{quote}
‘equal treatment’ might be achieved in any one of three ways: (1) striking both § 1409(c) and (a) entirely; (2) severing the one-year continuous presence provision in § 1409(c) and requiring every unwed citizen parent to satisfy the more onerous ten-year requirement if the other parent lacks citizenship; or (3) severing the ten-year requirement in § 1409(a) and § 1401(a)(7) and requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship.
\end{quote}
\end{itemize}
meaning that the interest of the US Government in preventing statelessness was only partially addressed. This gap was mirrored in briefs filed by amici curiae organisations. Briefs by experts on statelessness focused on the role gender discrimination plays in creating statelessness, but did not adequately focus on the danger of statelessness due to restricting nationality at birth. Meanwhile, possible remedies were extensively discussed by scholars of constitutional law in a separate brief, but the risk of statelessness as a result of ‘levelling down’ was only mentioned in passing. It is not clear to what extent these omissions influenced the Supreme Court’s failure to discuss statelessness as a result of ‘levelling down’, but the omissions mark an unfortunate missed opportunity to address the problem of statelessness as a result of restricting access to US nationality. These omissions are particularly glaring in light of the fact that the Dominican Republic, the country at issue in this case, has a large population of stateless persons who cannot pass on their nationality to their children. Children born in the Dominican Republic to stateless persons and US citizens therefore must rely on the US citizen parent in order to gain a nationality.

In choosing to ‘level down’, the majority erred, this case note argues, in failing to mention the right to a nationality at birth that finds support in US treaty law and norms, as well as US Constitutional law. The right to a nationality for children at birth is guaranteed by the ICCPR in art 24, which has been ratified by the US Government. The US is not a signatory to the 1961 Convention on the Reduction of Statelessness, but this treaty could have served as guidance to the Court in applying the ICCPR. The 1961 Convention on the Reduction of Statelessness supports the duty of states to prevent statelessness not only for children born in their territory, but also for children born abroad. Article 4 states that:

32 Morales-Santana (n 1) slip op 25. ‘Brief of Amici Curiae Scholars on Statelessness’ (n 31) 9–10, cited in Morales-Santana (n 1) slip op 22.
33 ‘Brief of Equality Now et al’ (n 31) 30. ‘Brief of Amici Curiae Scholars on Statelessness’ (n 31, 20–8.
37 Consulting foreign and international laws as guidance in Supreme Court decisions is controversial, but for an example, see Justice Breyer’s arguments in Knight v Florida 528 US 990 (1999) (Breyer J), where his Honour cites, among other foreign and international sources, the European Convention on Human Rights: Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘European Convention on Human Rights’).
A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person’s birth was that of that State.39

The right to a nationality further finds support under US constitutional law. For example, in *Trop v Dulles*, the Supreme Court held that Congress does not have the power to de-nationalise and, even if it had such power, de-nationalisation would be a violation of the Eighth Amendment to the US Constitution.40 Even if the Court had declined to discuss the treaty obligations of the US Government, it should have discussed its own precedent on de-nationalisation.

**VI CONCLUSION**

By making it harder for some unwed, US citizen mothers to pass on their nationality to their children, the US Supreme Court has raised the risk of statelessness for some children born abroad. Some children who would have had the right to a nationality via their US citizen mother before *Morales-Santana* have now lost that right. In *Morales-Santana*, the Court gave more weight to abstract concepts of gender equality than to the human right to a nationality, creating a troubling precedent.

39 ibid art 4(1).
40 *Trop v Dulles* (n 20). The Eighth Amendment to the US Constitution prohibits cruel and unusual punishment.