ILLEGITIMATE CITIZENSHIP RULES

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ABSTRACT

In 2017, the Supreme Court decided Sessions v. Morales-Santana*, a challenge to 8 U.S.C. § 1409, the law governing the conferral of U.S. citizenship to children born abroad to parents who are U.S. citizens. As the Court noted in a forceful opinion, § 1409 imposed different and more onerous physical presence requirements on unwed fathers than unwed mothers, making it difficult for nonmarital fathers to transmit their U.S. citizenship to their foreign-born children. Such distinctions, the Court concluded, were rooted in archaic gender stereotypes and thus incompatible with equal protection principles.*

Although Morales-Santana *corrected the gender discrimination inherent in § 1409, it said nothing of the statute's other constitutionally infirm provisions. Although it has drawn little attention, § 1409 also discriminates on the basis of illegitimacy, which like gender, is a quasi-suspect classification for purposes of equal protection law. Specifically, § 1409 requires nonmarital children to prove that they have been legitimated by their unwed U.S. citizen fathers to establish their derivative citizenship claim. By contrast, foreign-born children in wedlock need not show that they have been legitimated; by virtue of their parents' marriage, they are legally recognized as "legitimate" children. These legitimation requirements have made it more difficult for foreign-born nonmarital children of U.S. citizen parents to prove what should be regarded as their pre-existing citizenship. Crucially, in general, laws such as these that distinguish on the basis of a parents' marital status constitute illegitimacy discrimination. Yet, the Court in* Morales-Santana *neglected to acknowledge this unequal treatment of nonmarital children, focusing*

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instead on how § 1409 discriminated on the basis of gender and effectively allowing this unconstitutional practice to continue.

This Article calls attention to the prevalence of illegitimacy classifications in immigration law by identifying what we term "illegitimate citizenship rules." In highlighting the pervasiveness of this form of discrimination, this Article makes three contributions. As a descriptive matter, these rules demonstrate the unfinished project within equal protection law of eviscerating discrimination against nonmarital children, which includes the treatment of such children in immigration law. As a doctrinal matter, the Article argues that the Supreme Court's narrow focus on the sex equality dimension of § 1409 rendered invisible the discrimination against nonmarital children. Finally, as the Article makes clear, by discriminating against nonmarital children, illegitimate citizenship rules promote and perpetuate the "traditional" family and thus discriminate against those families that do not comport with the heterosexual marital family model. The Article concludes by recommending that Congress seize the opportunity created by Morales-Santana *to address and eventually eradicate the ongoing discrimination against nonmarital children who are born abroad.*

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INTRODUCTION

"[S]tunningly anachronistic."[1] This is how the Supreme Court in *Sessions v. Morales-Santana* described a derivative citizenship law that, for more than half a century, explicitly discriminated on the basis of gender.[2] Derivative citizenship law, codified as 8 U.S.C. § 1409(c), imposes certain physical presence requirements that parents must satisfy in order to transmit U.S. citizenship to their children who are born abroad.[3] Married couples and unwed U.S. citizen fathers need to establish that they had ten years' physical presence in the United States prior to their child's birth.[4] Unmarried U.S. citizen mothers, however, merely had to establish one year of continuous physical presence.[5] Writing for the majority, Justice Ruth Bader Ginsburg explained that such preferential treatment violated the right of "all persons [to] 'the equal protection of the laws.'"[6] Noting that the different physical presence requirements for unwed fathers and mothers were grounded in stereotypes,[7] Justice Ginsburg wrote that the distinction "date[s] from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are."[8] Applying intermediate scrutiny, the Court ruled that the "gender line" that Congress drew is incompatible with the Constitution.[9] Unsurprisingly, commentators described *Morales-Santana* as a "landmark case"[10] and a "groundbreaking victory for gender equality."[11]

At the same time, many have expressed disappointment with the Court for its refusal to provide a remedy that would have conferred citizenship on the Petitioner, Luis Ramón Morales-Santana.[12] Indeed, others commented

1. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017).
2. *Id.* at 1690–92.
3. 8 U.S.C. § 1401(a)(7) (1958 ed.). As the Court pointed out, the current version of this law is now 8 U.S.C. § 1401(g) (2018). *Morales-Santana*, 137 S. Ct. at 1686.
4. *See* 8 U.S.C. § 1401(a)(7) (establishing physical presence requirements for married couples); 8 U.S.C. § 1409(a) (providing physical presence requirements for unmarried U.S. citizen fathers).
5. 8 U.S.C. § 1409(c).
6. *Morales-Santana*, 137 S. Ct. at 1686.
7. *Id.* at 1695 (such generalizations included the view that "unwed fathers care little about . . . their children").
8. *Id.* at 1689.
9. *Id.* at 1687.
10. Wesley Walker, Case Comment, *Ginsburg Makes Strides Towards Gender Equality in* Sessions v. Morales-Santana, CUMB. L. REV. (July 4, 2017), https://cumberlandlawreview.com/2017/07/04/ginsburg-makes-strides-towards-gender-equality-in-sessions-v-morales-santana/ [https://perma.cc/8AFN-ZGQJ].
11. Mark Joseph Stern, *Ruth Bader Ginsburg Affirms the "Equal Dignity" of Mothers and Fathers*, SLATE (June 13, 2017, 12:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/sessions_v_morales_santana_ruth_bader_ginsburg_defends_gender_equality.html [https://perma.cc/8VNM-P6CQ].
12. It should be noted that although many commentators agreed with the Court's invalidation of the discriminatory treatment of unwed U.S. citizen fathers, many decried the Court's decision refusing

on the potential of the *Morales-Santana* case to have an adverse impact on unwed mothers and their children.[13]

Morales-Santana should be criticized for another reason. In examining the gender discrimination claim, the Court ignored a second distinct form of discrimination that also has lain within 8 U.S.C. § 1409 for more than half a century—discrimination on the basis of "illegitimacy."[14] Specifically, § 1409(a)(4)(A) requires foreign-born nonmarital children to prove that they have been "legitimated" by their unwed fathers before they turn eighteen years old in order for them to prevail on their citizenship claims.[15] By contrast, foreign-born children in wedlock need not show these requirements, including that they have been legitimated. By virtue of their parents' marriage, they are automatically and legally recognized as

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to grant the remedy that the Petitioner sought: to extend the benefit of the one-year physical presence requirement to his father, which by extension would mean that Petitioner acquired citizenship at birth. *See, e.g.*, Linda Greenhouse, Opinion, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supreme-court.html [https://perma.cc/W9SP-F8JU]; Tracy Thomas, *SCOTUS Denial of Equal Protection Remedy Jeopardizes Equality Law: What Was Justice Ginsburg Thinking?*, GENDER & L. PROF BLOG (June 13, 2017), http://lawprofessors.typepad.com/gender_law/2017/06/sctous-denial-of-equal-protection-remedy-jeopardizes-equality-law-what-was-justice-ginsburg-thinking.html [https://perma.cc/79SC-6V24]. Instead, the Court explained that it "is not equipped to grant the relief Morales-Santana seeks . . . ." *Morales-Santana*, 137 S. Ct. at 1698. The Court noted that, in previous cases, it would extend the general rule to a disfavored class; however, in this case, the general rule—a longer physical presence requirement—would cause a disadvantage to a *favored* class (unwed mothers) and would significantly disrupt a statutory scheme in which Congress expressed its preference for a longer physical presence requirement. *Id.* The Court's remedy left in place a preference in favor of married U.S. citizen families, and one that disfavors nonmarital children. *Id.*

13. *Morales-Santana*, 137 S. Ct. at 1697. Nevertheless, many have applauded the Court's decision, calling it a "victory for gender equity." Martha Davis, *High Court Ruling on Birthright Citizenship Is a Victory for Gender Equity*, BOS. GLOBE (June 13, 2017, 12:00 AM), https://www.bostonglobe.com/opinion/2017/06/12/high-court-ruling-birthright-citizenship-victory-for-gender-equity/NPZ1zGM1eU1d85TZmWWHCP/story.html [https://perma.cc/27KP-YBK4]. As one commentator quipped, "one of the most sexist federal laws currently on the books can no longer be enforced." Stern, *supra* note 11.

14. By discrimination on the basis of "illegitimacy," we refer to government discrimination against a person on the basis of that person being born outside of marriage. Although we prefer to use the term "nonmarital" to refer to children whose parents are unmarried, we sometimes use the terms "illegitimate" and "illegitimacy" to explain statutory or judicial description or legal historical discussion of nonmarital children. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 766 n.11 (1977) (noting that between 1968 and 1977, the Supreme Court considered twelve cases examining the constitutionality of "alleged discrimination on the basis of illegitimacy").

15. *See* 8 U.S.C. § 1409(a)(4)(A) (2018) (requiring a foreign-born non-citizen born out of wedlock to show that while she was under the age of eighteen years old she was "legitimated under the law of the person's residence or domicile"). For a discussion of the process of "legitimation" in immigration law, see Laura Murray-Tjan, *The Tragicomedy of Legitimation Jurisprudence After* Watson v. Holder, 14-12 IMMIGR. BRIEFINGS 1 (2014).

Section 1409 does allow parental acknowledgment of a child through paternity. *See* 8 U.S.C. § 1409(a)(4)(B) (enabling a father to establish a filial relationship with the child through a number of methods, including the submission of results of a blood or DNA test). Moreover, § 1409(a) also requires the child to establish, by clear and convincing evidence, a blood relationship between the child and father, *see* 8 U.S.C. § 1409(a)(1), *and* that the father agreed in writing to provide financial support for the child until the age of eighteen years old. *See* 8 U.S.C. § 1409(a)(3).

"legitimate" children.[16] These legitimation requirements have made it more difficult for foreign-born nonmarital children of U.S. citizen parents, specifically unwed fathers, to prove what should be regarded as their pre-existing citizenship.[17] In other words, just as § 1409 unfavorably treated unwed fathers, it also disfavored nonmarital children. Crucially, such disparate treatment of nonmarital children—illegitimacy discrimination—is generally considered an equal protection violation.[18] Despite this differential treatment, the Supreme Court in *Morales-Santana* failed to acknowledge this constitutionally infirm provision.[19]

This Article calls attention to the prevalence of illegitimacy classification in immigration law by identifying what we term "illegitimate citizenship rules." In highlighting the pervasiveness of this form of discrimination, this Article makes three contributions. First, as a descriptive matter, these rules demonstrate the unfinished project within equal protection law of eviscerating discrimination against nonmarital children. Since the 1960s, the Supreme Court has generally held that laws that distinguished between nonmarital and marital children violated the Equal Protection Clause.[20] Although not all forms of marital preferences that essentially discriminate against children of unwed parents are struck down, such illegitimacy discrimination, like gender, is considered a quasi-suspect classification for purposes of equal protection analysis and is thus reviewed under heightened scrutiny.[21] Immigration law's ongoing deployment of these illegitimate citizenship rules, and the Court's uncritical examination of such laws, show that much work remains in ensuring equal treatment of children regardless of their parents' marital status.

Second, as a doctrinal matter, we analyze why the Supreme Court has elided this illegitimacy discrimination problem and argue that, ironically, the Court's focus on the sex equality dimension of § 1409 is to blame. Revisiting the Court's derivative citizenship cases—*Miller v. Albright*,[22] *Nguyen v. INS*,[23] and *Morales-Santana*[24]—we contend that the Court's emphasis on how § 1409 discriminated on the basis of gender rendered

16. *Compare* 8 U.S.C. § 1409(a) (imposing certain requirements that children born out of wedlock must meet, including getting legitimated by their U.S. citizen fathers), *with* 8 U.S.C. § 1401 (does not require legitimation), *and* 8 U.S.C. § 1408 (same).

17. *See infra* Part II (examining the difficulties faced by foreign-born nonmarital children in proving their citizenship claims).

18. *See infra* Part I.

19. *See infra* notes 262–267 and accompanying text.

20. Levy v. Louisiana, 391 U.S. 68, 72 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968); *see also infra* Part I.

21. *See infra* Part I.A–C (explaining the development of the rights of nonmarital children under equal protection jurisprudence).

22. 523 U.S. 420 (1998).

23. 533 U.S. 53 (2001).

24. 137 S. Ct. 1678 (2017).

invisible the discrimination against nonmarital children. Finally, as this Article makes clear, by discriminating against nonmarital children, illegitimate citizenship rules promote and perpetuate the "traditional" family and thus discriminate against those families that do not comport with the heterosexual marital family model.[25]

The significant impact of these "illegitimate citizenship rules" should not go unnoticed. Millions of U.S. citizens who live abroad—to serve in the military, teach English, or work for the government and companies, among other reasons—must live by these rules.[26] Although the government does not have accurate numbers of how many U.S. citizens live outside the United States, reports indicate that between 2.2 to 6.8 million U.S. citizens live abroad.[27] Among these are U.S. military personnel. As of 2016, approximately 193,442 U.S. citizens are serving outside the United States.[28] These military personnel have historically engaged in sexual relations with non-citizens and many men have fathered children.[29] Further, the Trump administration recently issued policy changes concerning the children of U.S. military personnel that created confusion regarding the conferral of citizenship to these children.[30] Moreover, there have been a number of children born abroad through assisted reproductive technology (ART) and courts and the federal government have issued conflicting opinions on whether those children are U.S. citizens at birth.[31] Doubtlessly, as more U.S. citizens have children born abroad, clarity regarding these citizenship rules is necessary.

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25. *See infra* Part IV.

26. Joe Costanzo & Amanda Klekowski von Koppenfels, *Counting the Uncountable: Overseas Americans*, MIGRATION POL'Y INST. (May 17, 2013), https://www.migrationpolicy.org/article/counting-uncountable-overseas-americans [https://perma.cc/PAW7-ALW4] (explaining the various reasons why U.S. citizens live abroad).

27. *Id.* (noting the absence of accurate records of U.S. citizens living abroad but estimating that between 2.2 to 6.8 million U.S. citizens are residing outside of the United States).

28. Kristen Bialik, *U.S. Active-Duty Military Presence Overseas Is at Its Smallest in Decades*, PEW RES. CTR. (Aug. 22, 2017), http://www.pewresearch.org/fact-tank/2017/08/22/u-s-active-duty-military-presence-overseas-is-at-its-smallest-in-decades [https://perma.cc/PN5F-5VCF].

29. *See* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629 (2014); Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); 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 (2014).

30. *See* Maria Sacchetti & Carol Morello, *Trump Administration Clarifies Policy on Citizenship of Children Born Abroad to American Servicemembers*, WASH. POST (Aug. 30, 2019, 7:33 AM), https://www.washingtonpost.com/immigration/trump-administration-clarifies-policy-on-citizenship-of-children-born-abroad-to-american-servicemembers/2019/08/30/1b5d4e22-ca6b-11e9-a4f3-c081a126de70_story.html [https://perma.cc/WU8B-ZRKL].

31. *Compare* Sarah Mervosh, *Both Parents Are American. The U.S. Says Their Baby Isn't.*, N.Y. TIMES, May 21, 2019, at A1, *with* Sarah Mervosh, *Twins Were Born to a Gay Couple. Only One Child Was Recognized as a U.S. Citizen, Until Now.*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/us/gay-couple-twin-sons-citizenship.html [https://perma.cc/42WN-XHPA].

The Article proceeds in four parts. Part I situates illegitimate citizenship rules within the broader development of equal protection rights for nonmarital children. As this Part explains, nonmarital children faced significant legal disadvantages under the common law. Beginning in the late 1960s, however, courts began to invalidate discriminatory laws against them to recognize that they should not be punished for the sexual "misconduct" of their parents.[32] In response to these developments, the federal and state governments revised statutes to eliminate discriminatory treatment of nonmarital children. Eventually, the Supreme Court's equal protection jurisprudence developed in ways that accorded greater protection for the rights of nonmarital children. Specifically, the Court provided that illegitimacy discrimination would be subjected to intermediate scrutiny.[33] Treated as a quasi-suspect class, a law that discriminates on the basis of "illegitimacy" must further important government interests and be substantially related to such interests.[34] Yet, as this Part explains, not all classifications based on a parent's nonmarital status are unconstitutional, leaving in place some statutes that arguably discriminate against nonmarital children.

With the proper legal framework regarding the rights of nonmarital children established, Part II analyzes the Immigration and Nationality Act (INA) and its differential treatment of foreign-born nonmarital and marital children in the acquisition of citizenship from U.S. citizen parents. Although Congress in 1986 sought to treat children born out of wedlock the same as those born within marriage, it reinstated laws a few years later that revived the discriminatory treatment of nonmarital children.[35] Specifically, the INA today, as embodied in § 1409, requires nonmarital children to prove that their fathers have "legitimated" them in order for these children to acquire U.S. citizenship from their fathers.[36] Children born in wedlock, by contrast, are not subjected to these rules. The differential treatment of these nonmarital children in immigration and citizenship law, this Part maintains, should be subject to intermediate scrutiny under conventional constitutional analysis. Instead, these illegitimate citizenship rules largely remain unaddressed.[37]

32. *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 350–57 (2012) (explaining that the legal construct of illegitimacy "operated as a means of regulating sex" and that beginning in 1968, the Supreme Court began to view such laws as "illogical and unjust" because they penalize children for the "sexual transgressions of their parents").

33. Clark v. Jeter, 486 U.S. 456, 461 (1988).

34. *See id.*

35. *See infra* Part II.D.

36. 8 U.S.C. § 1409 (2018).

37. *See, e.g.*, *infra* Part III.

Next, Part III examines why the federal government has continued to use illegitimate citizenship rules despite the development of equal protection laws that protect nonmarital children. Indeed, this Part points out that such rules have even come before the Supreme Court several times.[38] The problem, as this Part contends, is that the Supreme Court has a narrow view of the discriminatory nature of derivative citizenship law. Specifically, the Supreme Court, for years, has framed the problem along a sex equality framework.[39] Revisiting the key derivative citizenship cases—*Miller v. Albright*, *Nguyen v. INS*, and *Morales-Santana*—we demonstrate how the Court's focus on gender discrimination rendered and continues to render illegitimacy discrimination invisible.

Lastly, Part IV argues that these illegitimate citizenship rules not only impose harms on nonmarital children, but they also result in promoting and perpetuating the "traditional" family. Thus, the rules discriminate against those families that do not comport with the heterosexual marital family model. As such, this Part prescribes that Congress should seize the opportunity created in *Morales-Santana* to address and eventually eradicate the ongoing discrimination against foreign nonmarital children who are claiming citizenship from their unwed fathers.

I. THE RIGHTS OF NONMARITAL CHILDREN UNDER THE U.S. CONSTITUTION

Historically, nonmarital children faced legal and social discrimination, although over time, as this Part explains, their legal status improved as a result of caselaw.[40] Moreover, the legal and social status of nonmarital children advanced further with states' adoption of the Uniform Parentage Act,[41] which mandated that all children have the same rights regardless of their parents' marital status.[42] Still, as legal scholars and commentators have noted, differential and discriminatory treatment against nonmarital children in the United States endures.[43] The illegitimate citizenship rules that § 1409

38. *See infra* Part III.

39. *See infra* notes 262–267 and accompanying text.

40. *See* Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

41. UNIF. PARENTAGE ACT § 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973).

42. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 540 (1990) (stating that the Uniform Parentage Act was intended to "equalize the legal and social status of children born out of wedlock"). Related to the goal of equalizing the rights of marital and nonmarital children, the Uniform Parentage Act also sought to establish the legal relationship between children and their nonmarital fathers. *See* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2308 (2016).

43. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 389 (2012) (challenging the "progress narrative" that the law abandoned the common

imposes on nonmarital children born abroad whose parents are U.S. citizens underscore the ongoing prevalence of illegitimacy discrimination today.

Part A first discusses that, for centuries, children that were born out of wedlock encountered significant legal and social maltreatment. Reflecting law and society's preference for marriage and the traditional family, the common law legally disadvantaged nonmarital children in various ways. The tide changed, however, beginning in the 1960s when the Supreme Court stepped in and held that the Equal Protection Clause proscribes invidious discrimination against nonmarital children. Part B explains that courts began to further protect the rights of nonmarital children by eliminating many of the legal distinctions between children born out of wedlock and those born within marriage. Lastly, Part C notes that, today, classifications on the basis of parents' marital status are subjected to intermediate scrutiny. This scrutiny illuminates law's recognition that illegitimacy discrimination is disfavored but that some distinctions grounded on parents' marital status remain. Overall, this history of the development of equal protection for nonmarital children demonstrates the trajectory towards equality for all children regardless of whether they were born in or outside of marriage. Importantly, it provides valuable background for analyzing the scope of the constitutional question at issue of illegitimate citizenship rules discussed in the ensuing Parts.

A. Equal Protection Rights of Nonmarital Children

Under the common law, children who were born outside of marriage were stigmatized and faced significant legal disadvantages in comparison to children born within marriage.[44] Unlike their counterparts, nonmarital children could not inherit property,[45] recover loss from the wrongful death

law's treatment of illegitimacy and arguing that cases associated with this narrative were less about disfavoring illegitimacy and more about favoring marriage and marriage-like types of families); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 348 (2011) (contending that despite legal and social changes to the status of nonmarital children, a number of laws continue to discriminate against nonmarital children). Other scholars highlight new forms of illegitimacy discrimination. *See, e.g.*, Appleton, *supra* note 32, at 365–67 (exploring the possibility of a "new illegitimacy" emerging from differences between children conceived through heterosexual intercourse and those conceived through assisted reproductive treatments); Katherine A. West, *Denying a Class of Adopted Children Equal Protection*, 53 SANTA CLARA L. REV. 963 (2013) (arguing that children of unmarried and same-sex couples adopted through interstate adoption agencies face discrimination because they do not enjoy the same rights and benefits that stem from birth certificates of adopted children by married couples).

44. Murray, *supra* note 43, at 390 (stating that "children born out of wedlock were legally disfavored"). Under the common law, nonmarital children were called *filius nullius*, which meant "son of no one and the heir of no one." Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 337 (1962).

45. Trimble v. Gordon, 430 U.S. 762, 766 n.11 (1977); Lalli v. Lalli, 439 U.S. 259, 275 (1978); Eleanor Mixon, Note, *Deadbeat Dads: Undeserving of the Right to Inherit from Their Illegitimate*

of a parent,[46] obtain state benefits,[47] acquire child support,[48] or receive Social Security benefits,[49] among other things. Courts justified the legal discrimination of nonmarital children based on morality and general welfare policies that were intended to promote marriage and discourage nonmarital births.[50]

To address the discriminatory treatment of nonmarital children, states adopted different approaches. Some states passed statutes that enabled fathers to legitimate their nonmarital children by recognizing and acknowledging them as their children.[51] Some states allowed for legitimation if the parents subsequently married.[52] Some of these states required fathers to sign formal written recognition and acknowledgment of their children, which required the signature of a witness, whereas other states accepted written letters by fathers to their children as valid form of legitimation.[53] Other states recognized nonmarital children as legitimated if their fathers, through their words or conduct, publicly acknowledged or recognized them as their own children.[54] Once legitimated, these nonmarital children effectively obtained rights that they would have automatically enjoyed if they were born in wedlock.[55] Put differently, unless legitimated, children who were born out of wedlock were legally inferior to marital children.[56] This form of second-class citizenship continued well after the mid-twentieth century.[57]

Change began in 1968. That year, the Supreme Court decided two cases, *Levy v. Louisiana*[58] and a companion case, *Glona v. American Guarantee &*

Children and Undeserving of Equal Protection, 34 GA. L. REV. 1773, 1775 (2000); Susan E. Satava, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 938 (1996); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 73 n.3 (2003).

46. Levy v. Louisiana, 391 U.S. 68, 72 (1968); Parham v. Hughes, 441 U.S. 347, 357 (1979); Davis, *supra* note 45, at 76; Satava, *supra* note 45, at 940–44; Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 8 (1999).

47. Labine v. Vincent, 401 U.S. 532, 540 (1971).

48. Mills v. Habluetzel, 456 U.S. 91, 97 (1982).

49. Mathews v. Lucas, 427 U.S. 495, 516 (1976).

50. Robert L. Stenger, *The Supreme Court and Illegitimacy: 1968–1977*, 11 FAM. L.Q. 365, 370–71 (1978) (stating that the exclusion of nonmarital children from the state's wrongful death recovery law was based on morals and general welfare policies that discourage "bringing children into the world out of wedlock" (quoting *Levy*, 391 U.S. at 70)).

51. *See* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 19 (1971) (cataloguing the treatment of illegitimacy by the states); Mayeri, *supra* note 42, at 2307–08 (discussing the legal treatment of children and their nonmarital fathers).

52. KRAUSE, *supra* note 51, at 14.

53. *Id.* at 20.

54. *Id.*

55. *Id.* at 9 n.1.

56. *Id.*

57. Stenger, *supra* note 50, at 370–71.

58. Levy v. Louisiana, 391 U.S. 68 (1968).

Liability Insurance Co.[59] These cases led to a paradigm shift in the jurisprudence regarding the rights of nonmarital children seeking to remove legal distinctions based on whether their parents were married at the time of their birth.[60] The Court, for the first time, addressed whether state discrimination against nonmarital children violated the Equal Protection Clause of the Fourteenth Amendment.[61]

In *Levy*, the Supreme Court examined whether the state's denial of nonmarital children's damages recovery for the death of their mother under the state's wrongful death statute was constitutional.[62] Although the Court acknowledged that legislatures have discretion to create classifications in order to further their "social and economic" policies, it held that such distinctions must not constitute "invidious discrimination against a particular class."[63] In this case, what was at stake, according to the Court, was the right involving the "intimate, familial relationship between a child and his own mother."[64] The child's status bore no rational relation to the "wrong allegedly inflicted on the mother"[65] and the child's exclusion from the law based on nonmarital status constituted invidious discrimination.[66]

In the companion case, *Glona v. American Guarantee & Liability Insurance Co.*, the Supreme Court addressed a similar exclusion from the state's wrongful death act, except this time, the claim was made by the mother for the wrongful death of her child born out of wedlock.[67] Here, too, the Court held that the law engaged in unlawful discrimination.[68] Noting that the state had previously applied the law inconsistently against nonmarital children and their parents, the Court concluded that the law did not have a rational basis.[69] Although the Court recognized that the state sought to regulate a "sin,"[70] which according to the state allowed it to apply the wrongful death recovery law inconsistently, the Court nevertheless found that denying the mother the right to recover damages would not further the "cause of illegitimacy."[71] By holding that the discrimination against nonmarital children violated the Equal Protection Clause, the Court

59. Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

60. *See generally* Harry D. Krause, *Legitimate and Illegitimate Offspring of* Levy v. Louisiana—*First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969).

61. *Levy*, 391 U.S. at 70; *Glona*, 391 U.S. at 74.

62. *See Levy*, 391 U.S. at 70 (explaining that the state's wrongful death statute defined "child" to mean "legitimate child" and thus excluded those children who were "illegitimate").

63. *Id.* at 71.

64. *Id.*

65. *Id.* at 72.

66. *Id.*

67. *See* Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 73 (1968).

68. *Id.* at 75.

69. *Id.*

70. *Id.*

71. *Id.*

in both *Levy* and *Glona* inaugurated a fundamental shift in the treatment of children born out of wedlock.[72]

B. Removing Legal Distinctions Between Nonmarital and Legitimated Children

As noted above, *Levy* and *Glona* underscored the historical actions against nonmarital children as an "illogical and unjust" method of punishing parents through their children.[73] Despite the strong declarations that law must not punish children born out of wedlock, the cases that followed *Levy* and *Glona* did not necessarily lead to equal treatment between nonmarital and marital children. In some cases, the children born out of wedlock prevailed against the government[74] and, in some cases, they lost.[75] For example, in *Labine v. Vincent*, the Court held that "acknowledged, but not legitimated, illegitimate children" may be excluded from inheriting property from their parents under the state's intestacy laws.[76] Distinguishing the right to inherit property, the issue in *Labine*, from the right to recover damages under tort law, the issue in *Levy*, the Court held that the state has the authority and discretion to pass intestacy statutes in order to "further strengthen and preserve family ties."[77] Notably, the Court stated that *Levy* did not issue a blanket ruling that "a State can never treat an illegitimate child differently from legitimate offspring."[78]

Yet, in *Weber v. Aetna Casualty & Surety Co.*, the Court held that the Equal Protection Clause prohibited the state from excluding unacknowledged nonmarital children from the definition of children under the state's workers' compensation law.[79] The Court did not question the state's right to enact laws that are designed to protect "legitimate family relationships" or the importance of protecting this interest.[80] However, the Court noted that the issue centered on how the state law promoted such interests.[81] In this case, the Court found that "the classification is justified

72. *But see* Murray, *supra* note 43 (challenging the conventional view that *Levy* and *Glona* instantiated a fundamental shift in the treatment of nonmarital children by contending that both cases featured marriage-like situations, illustrating an ongoing marital preference in family law).

73. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

74. *See id.* at 165 (holding that Louisiana's denial of benefits under the state's workman's compensation laws to nonmarital children violates the Equal Protection Clause).

75. *See* Labine v. Vincent, 401 U.S. 532, 535 (1971) (upholding the denial to unacknowledged nonmarital children of the right to inherit under the state's intestate succession act).

76. *See id.* at 534–35.

77. *Id.* at 536.

78. *Id.*

79. *Weber*, 406 U.S. at 165.

80. *Id.* at 173 (quoting Stokes v. Aetna Cas. & Sur. Co., 242 So. 2d 567, 570 (La. 1970)).

81. *Id.*

by no legitimate state interest, compelling or otherwise."[82] As the Court explained, "[n]or can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."[83]

As *Labine* and *Weber* make evident, the Supreme Court's jurisprudence on the rights of nonmarital children is far from consistent. Nevertheless, in the 1970s and 1980s, the federal government and states relaxed their legitimation statutes to comport with the principle unrebutted in these cases—that nonmarital children should not be punished for the actions of their parents. Statutes that prevented nonmarital children from gaining rights given to marital and legitimated children were struck down.[84]

Significantly, in 1973, several states adopted the Uniform Parentage Act (UPA) which eliminated legitimation as the standard for recognizing the rights of nonmarital children.[85] Instead, the UPA adopted the more relaxed process of paternity to establish the parent-child relationship. The UPA noted that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[86] Nineteen states adopted this definition in 1973, and other states adopted it soon after, abrogating the legal distinctions between children who were born in marriage and outside of marriage.[87] The requirement of fathers having to legitimate their children disappeared, replaced by the more flexible process of paternity in the majority of states today.[88]

C. Illegitimacy as a Quasi-Suspect Classification

Today, classifications relating to illegitimacy are not *per se* unconstitutional. Rather, courts have subjected classifications to a higher level of scrutiny and inquire whether there is a substantial relationship between the classification and a legitimate state interest.[89] Thus, the Court in *Lalli v. Lalli* upheld the exclusion of a nonmarital child from receiving an intestate share of the father's estate because the child did not obtain an

82. *Id.* at 176.
83. *Id.* at 173.
84. Lalli v. Lalli, 439 U.S. 259, 261–62 (1978).
85. *See* UNIF. PARENTAGE ACT § 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973); *see also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J.C.R. & C.L. 201, 211–12 (2009) (discussing the drafting of the Uniform Parentage Act); *see also* KRAUSE, *supra* note 51, at 7.
86. UNIF. PARENTAGE ACT § 2.
87. *See* Polikoff, *supra* note 85, at 211 n.35.
88. *See* Kimberly G. Montanari, *Does the Presumption of Legitimacy Actually Protect the Best Interests of the Child?*, 24 STETSON L. REV. 809, 817 (1995) (describing the legal trend away from viewing children as "illegitimate").
89. *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977) (applying a standard more rigorous than rational basis scrutiny but less than strict scrutiny).

order of paternity during the father's lifetime.[90] Notably, it explained that the state had a substantial interest in ensuring a "just and orderly disposition of property at death" and that the means adopted here—requiring the establishment of paternity while the father is still alive—is substantially related to the interest.[91] Of particular importance is the Court's emphasis on New York's liberalization of its intestacy statute, recognizing that it has "soften[ed] the rigors of previous law which permitted illegitimate children to inherit only from their mothers"[92] and granted nonmarital children "in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children."[93] Thus, despite holding against a nonmarital child, the Court's decision was based on an inquiry into the state's legitimate interests and whether it substantially related to the state's interest while also recognizing that nonmarital children should enjoy rights that marital children enjoy.

In sum, gone are the days where nonmarital children, referred to as *filius nullius* or child of no one,[94] may be absolutely barred from rights traditionally conferred to children born in wedlock. Courts have held that laws that distinguish the rights of children on the basis of their parents' marital status for the purposes of promoting marriage may constitute invidious discrimination.[95] As such, "illegitimacy" is treated as a quasi-suspect classification that is distinct from whether the law also discriminates on the basis of gender.[96] In other words, discrimination against nonmarital children receives special scrutiny. As the Court explained in *Weber*, "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."[97]

At the same time, states may continue to impose classifications that relate to illegitimacy as long as they are not overly burdensome or insurmountable, and they can show that there is a substantial relationship

90. Lalli v. Lalli, 439 U.S. 259, 275–76 (1978).

91. *Id.* at 266–71.

92. *See id.* at 266.

93. *Id.* at 274 (emphasis omitted) (quoting Fourth Report of the Temporary State Comission on the Modernizatiton, Revision and Simplification of the Law of Estates, Legis. Doc. No. 19, at 265 (1965)); *see also* Mathews v. Lucas, 427 U.S. 495, 504 (1976) (stating that statutory classifications "are not *per se* unconstitutional . . . '[t]he essential inquiry is . . . [w]hat legitimate [governmental] interest does the classification promote?'" (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972))).

94. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447 (1765).

95. *Weber*, 406 U.S. at 175–76.

96. Levy v. Louisiana, 391 U.S. 68, 70–72 (1968) (law that discriminates against nonmarital children is subject to review more rigorous than ordinary rational basis review); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (illegitimacy classifications are subject to more scrutiny than a "toothless" rational basis review).

97. *Weber*, 406 U.S. at 175.

between a given law that treats nonmarital children differently from marital children and the state's legitimate interest.[98]

As the next Part explains, however, the constitutional protections accorded to nonmarital children from the foregoing cases have had little impact in the context of citizenship and immigration law.

II. NONMARITAL CHILDREN AND LEGITIMATION RULES IN CITIZENSHIP LAW

In this Part, this Article explores derivative citizenship laws and analyzes the extent to which they depart from the constitutional mandate of equal treatment of all children regardless of their parents' marital status. To begin to do so, consider the following scenario. Both Anna and Barbara were born in the Philippines on February 4, 1972. Anna's parents, Adam and Abby, are married and both are U.S. citizens. Under citizenship rules in effect in 1972, Anna acquired citizenship at birth if she can show that one of her parents resided (for any period of time) in the United States before she was born.[99] Barbara's parents, Bob and Beth, by contrast, are not married and only one (Bob) is a U.S. citizen. For this unmarried couple, citizenship law imposes stricter requirements. At the outset, their child Barbara must show that Bob resided in the United States for at least five years.[100] Barbara must also demonstrate with clear and convincing evidence her blood relationship to her unwed father, Bob, and that he agreed in writing to provide her financial support until she reaches the age of eighteen years old.[101] Critically, she must show that her father legitimated her by acknowledging paternity in writing under oath or established paternity in a court of law.[102] By contrast, Anna does not have to establish the ongoing parental bond—her parents' marriage presumes her validity as the child of a U.S. citizen and paves an easier path to obtaining citizenship.

The foregoing examples demonstrate the critical role that marriage plays in a child's ability to prove her entitlement to citizenship. As explained in this Part, derivative citizenship law underwent various legislative changes to determine how children born out of wedlock could acquire citizenship. Part A first explains the two provisions within the Immigration and

98. *Id.* at 176.

99. Immigration and Nationality Act § 301(g), 8 U.S.C. § 1401(g) (2018).

100. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657. The 1986 Amendments shortened the previously required time period for U.S. residence, from ten years to five years.

101. Immigration and Nationality Act § 309(a)(3), 8 U.S.C. § 1409(a)(3) (2018). These requirements are not imposed on unwed mothers, however, demonstrating the gendered dimension of derivative citizenship law. 8 U.S.C. § 1409(c).

102. 8 U.S.C. § 1409(a).

Nationality Act (INA) that govern the conferral of citizenship from a parent to a child. Next, Part B examines the trajectory of legitimation and the treatment of nonmarital children in the INA,[103] and demonstrates a set of rules that clearly favor marital over nonmarital children when it comes to derivative citizenship.[104] Although Congress at one point sought to rid the statute of unequal treatment of nonmarital children, the INA continues to impose requirements that go beyond the paternity acknowledgment that suffices to establish a family bond under the UPA.

A. Proving Citizenship for Nonmarital Children in the Immigration and Nationality Act

Nonmarital children born in the United States are treated the same as marital children because of the principle of *jus soli* in the Act. Anyone born in or outside of marriage in the United States is automatically a U.S. citizen.[105] Marriage, in other words, is irrelevant to a claim of citizenship under the principles of *jus soli*. Marriage, however, becomes relevant when a child is born outside the United States. Today, two sections of the INA are implicated in the determination of citizenship for children born abroad. First, a general provision requires a citizen parent to show five years of physical presence in the United States before a child is born abroad to the citizen and a noncitizen parent.[106] A second provision applies if the child born abroad is born outside of marriage, requiring nonmarital children to demonstrate either proof of paternity or legitimation, plus a commitment from the nonmarital father of financial support until the child turns eighteen.[107] Before Congressional amendment in 1986, the provision was even more restrictive. It allowed nonmarital children to acquire citizenship only if their U.S. citizen fathers legitimated them.[108] The provision focused on legitimation rather than simply the establishment of the parent-child relationship because of long-held family law doctrine denying equal status

103. *Id.* §§ 1401(a), 1409(a).
104. *See id.* §§ 1401(a), 1409(a).
105. U.S. CONST. amend. XIV, § 1.
106. 8 U.S.C. § 1401(g).
107. *Id.* § 1409(a).
108. No such requirement existed for unmarried mothers. Kristin Collins describes how the legitimation requirement itself was a creation of administrative authorities and their interpretation of the statute before it became an explicit statutory requirement. Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727, 1737–38 (2017); *see also* Citizenship–Children Born Abroad Out of Wedlock of Am. Fathers and Alien Mothers, 32 Op. Att'y Gen. 162, 164 (1920). The administrative agencies eventually pushed for legislative ratification of this policy by drafting the legitimation requirement that was implemented in the Nationality Act of 1940. Nationality Act of 1940, Pub. L. No. 76-853, ch. 876, §§ 201(g), 205, 54 Stat. 1137, 1139–40; *see also* Collins, *supra*, at 1744.

to nonmarital children.[109] The immigration statute reflected the general attitudes found in other laws governing the rights of nonmarital children until the 1970s, when state laws began to adopt the UPA. Congress has failed to catch up with the evolution of the rights of nonmarital children since the 1970s, however. The following sections trace how the Bureau of Immigration Naturalization, tasked with making decisions about derivative citizenship, and the statute have historically treated nonmarital children.

B. Pre-1952: Enforcing Legitimation Rules in the Face of Congressional Silence

The first derivative citizenship law, which was passed in 1790, provided that the "children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens."[110] As these words evidence, the statute did not expressly require that a child born out of wedlock satisfy additional prerequisites in order to obtain citizenship. Indeed, the 1940 Immigration Act, which provides the foundation for modern derivative citizenship, similarly said nothing about the relationship between marriage and derivative citizenship. Yet, although the immigration statute itself was silent on the treatment of nonmarital children before 1940, agency interpretation of the derivative citizenship provisions was institutionalized during the period through opinion letters and guidance on the treatment of nonmarital children of citizen fathers.[111] The law at the time stated:

> All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States.[112]

Although the language of the statute said nothing about fathers being married, the agency interpreted the law to require fathers to legitimate children born outside of marriage. Specifically, adjudicators sought evidence of legitimation in cases where nonmarital children sought citizenship through their U.S. citizen fathers. Take the case of Mr. and Mrs. Frank Wagner, who sought an opinion on their citizenship status in 1933.[113] Mrs. Wagner was a U.S. citizen at the time she married Frank Wagner, who was born in Europe.[114] Under the law at the time, Mrs. Wagner's citizenship

109. *See supra* Part I.
110. 1790 Naturalization Act, ch. 3, § 1, 1 Stat. 103, 104.
111. Collins, *supra* note 108, at 1747.
112. 8 U.S.C. § 6, 34 Stat. 1229 (1907).
113. Letter from O.K. Alger to P.J. Greeley, Dist. Dir. Naturalization (Mar. 27, 1933) (NARA, Box X, 23/17750).
114. *Id.*

followed that of her husband's when she married.[115] Mrs. Wagner's attorney sought an opinion on whether Mr. Wagner had derived U.S. citizenship from his U.S.-born father.[116] Frank was the child of a foreign-born mother and a U.S. citizen father who were not married. The Wagners' attorney argued that Congress was silent on the issue of illegitimacy.[117]

The Wagners' attorney argued that because the statute was silent as to legitimacy, establishment of paternity should suffice to establish citizenship.[118] The agency responded with a two-pronged interpretation of the statute. First, it argued that the citizenship of a nonmarital child follows the citizenship of the mother.[119] Second, if a child were legitimated under the laws of the father's domicile the agency could award benefits to the child, including citizenship.[120]

The agency cited two cases to support its position that Congress did not intend to extend citizenship rights to nonmarital children of citizen fathers.[121] In *Ng Suey Hi v. Weedin*,[122] a child of a U.S. citizen father and a second wife in a polygamous marriage claimed her father's citizenship. The circuit court refused to recognize the second marriage, thereby classifying the child as nonmarital.[123] Despite the silence of Congress on the issue, the court noted that "we are far from convinced that Congress intended to confer the right of citizenship on illegitimate children born abroad, or upon the offspring of polygamous marriages."[124] The court opined that the child bore the consequences of "intercourse between persons of opposite sex [that] was illicit in its inception, because of their failure to enter into a marriage by ceremony or by agreement."[125] It then placed the burden on the child to show a subsequent legitimation.

In *Mason ex rel. Chin Suey v. Tillinghast*,[126] Suey claimed derivative citizenship as a child of a U.S. citizen born abroad. Suey's U.S. citizen father, Chin Ming, was married to two wives, one of whom died.[127] Suey

115. Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (discussing citizenship rules that applied a husband's citizenship to a non-citizen immediately upon marriage).

116. Letter from O.K. Alger to P.J. Greeley, *supra* note 113.

117. *Id.*

118. *See id.*

119. Letter from Raymond Orist, Comm'r of Naturalization, to O.K. Alger (Apr. 6, 1933) (NARA, Box X, 23/17750).

120. *Id.*

121. *Id.*

122. 21 F.2d 801 (9th Cir. 1927).

123. *Id.*

124. *Id.* at 802.

125. *Id.* (quoting 38 C.J. 1328).

126. Mason *ex rel.* Chin Suey v. Tillinghast, 26 F.2d 588 (1st Cir. 1928).

127. *Id.* at 588.

was the offspring of the second marriage.[128] Suey argued that he was legitimated when the first wife died, and his mother became the first wife.[129] The court disagreed, noting that the offspring of a secondary wife of a polygamous marriage is not recognized as legitimated simply because the first wife dies.[130] The court noted that the statute applies to legitimate children only and is silent about the process of legitimation, so even if the child were legitimated, he would still not have been a citizen at birth.[131] In both of these cases, the agency used the publicly sanctioned aversion to polygamy to refuse citizenship to nonmarital children in general.

The addition of a legitimation requirement at the administrative level may have been an attempt to reflect public attitudes surrounding the status of nonmarital children at the time. The agency had a choice, however. At the time, several states had paternity acknowledgment laws that would have served the same purpose, and some states essentially treated children born out of wedlock as "legitimate."[132] The agency chose the most restrictive option in the face of congressional silence: without legitimation, nonmarital children could not obtain derivative citizenship.

As Congress considered passage of the 1952 Immigration and Nationality Act, the agency sought to institutionalize the legitimation requirement it had read into the statute.[133] A committee consisting of the heads of the departments of Labor, Justice, and State proposed the statutory language requiring legitimation (or an adjudicative process) before a citizen father could transfer citizenship to a nonmarital child.[134] The 1952 Immigration and Nationality Act added the legitimation requirement. It specified that only a legitimation occurring under the laws of the citizen father's domicile would suffice for immigration purposes.[135] By this time, the immigration agency had developed another rationale not just for a legitimation requirement, but also for its narrow construction: fraud.[136] No longer was the legitimation requirement a substitute for paternity acknowledgment. It became the only method by which the federal government could avoid fraud in the case of fathers and their nonmarital children. This rationale became the predominant reason for a formal legitimation requirement, and its power remains today. Ultimately, the

128. *Id.*
129. *Id.* at 589.
130. *See id.*
131. *Id.*
132. *See* Collins, *supra* note 108, at 1749 n.92; *see also supra* Part I.B (discussing the adoption of paternity rules and elimination of legitimation processes in several states).
133. Collins, *supra* note 108, at 1746–47.
134. *Id.*
135. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 171–72.
136. Collins, *supra* note 108, at 1750.

immigration agency succeeded in interpreting the legitimation provision narrowly. It required that to be a valid legitimation for immigration purposes, a state paternity acknowledgment or legitimation law had to bring a nonmarital child into parity with a marital child.[137] This meant that even though the child may have been legitimated under a valid state legal process, the legitimation was not sufficient for immigration law purposes if it did not bring the nonmarital child into parity with the marital child. This was problematic in the many instances in which, for example, only marriage would allow the nonmarital child to achieve parity with the marital child. Parents who could not marry for whatever reason were left without a remedy under the immigration statute.[138] Importantly, neither the legitimation requirement, nor an equivalent, existed for the children of unmarried mothers or for marital children.[139]

C. Equal Protection Challenges to Legitimation Rules and Congressional Advocacy: 1952–1986

Soon after Congress incorporated the legitimation requirement into the immigration statute, advocates began to challenge the general state laws that punished nonmarital children based on their status. As discussed *supra*, several cases challenged the differential treatment of children born out of wedlock on equal protection grounds.[140] In these cases, the Supreme Court repeatedly struck down the distinctions between children born within marriage and those children born outside of marriage. The Court held in these cases that nonmarital children should not suffer the consequences of their parents' sins and, importantly, their status was not deserving of unequal treatment.[141]

On the other hand, the Supreme Court has been more equivocal in its treatment of nonmarital children in the immigration context. In immigration law, the Supreme Court allowed the legitimation requirement to stand in several cases, demonstrating its preference for plenary power principles

137. *See id.* at 1751–52; *see also* Matter of F, 7 I. & N. Dec. 448, 449–50 (B.I.A. 1957) (formal declaration of paternity under Portuguese law found not to establish legitimation because the rights accorded the child were less than those available to legitimate children).

138. *See* Fiallo v. Bell, 430 U.S. 787 (1977).

139. *See supra* note 16.

140. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (discrimination in workers' compensation recovery based on illegitimacy); Trimble v. Gordon, 430 U.S. 762 (1977) (discrimination in inheritance laws based on illegitimacy and sex); Caban v. Mohammed, 441 U.S. 380 (1979) (discrimination in adoption laws based on illegitimacy and sex); Stanley v. Illinois, 405 U.S. 645 (1972) (discrimination in custody law based on illegitimacy and sex); Jimenez v. Weinberger, 417 U.S. 628 (1974) (discrimination in social security law based on illegitimacy).

141. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1280 (2015) (noting the Court's rationales in striking down distinctions based on illegitimacy, including those based on not blaming the children for the sins of their parents).

over anti-discrimination principles in the immigration arena. In *Fiallo v. Bell*,[142] for example, the Supreme Court upheld an immigration provision that conferred family preference immigration status to marital children and to the nonmarital children of mothers but not fathers.[143] The plaintiffs challenged the definition of child in the statute, which, at the time, included the children of unmarried mothers, but not the children of unmarried fathers. The litigants claimed the statute discriminated "on the basis of the father's marital status, the illegitimacy of the child and the sex of the parent without either compelling or rational justification."[144] They also claimed that the statute's assumption that no relationship existed between a father and his nonmarital child denied them due process because it was "an unwarranted conclusive presumption of the absence of strong psychological and economic ties between natural fathers and their children born out of wedlock and not legitimated."[145] Finally, they claimed the statute's failure to recognize the relationship between fathers and their nonmarital children "seriously burden[ed] and infringe[d] upon the rights of natural fathers and their children, born out of wedlock and not legitimated, to mutual association, to privacy, to establish a home, to raise natural children and to be raised by the natural father."[146] Rather than confronting the discrimination head-on, the Court held that Congress's plenary power over immigration gave it the authority to impose gender and legitimacy-based distinctions when it conferred immigration benefits.[147]

Nonetheless, judicial concern over the treatment of nonmarital children in general spilled over into legislative discussions surrounding immigration law in the 1970s and 1980s. Several amendments were proposed as part of comprehensive immigration reform proposals during that period.[148] Proposed changes to the child definition would put nonmarital children on the same footing as children born within a marriage for immigration benefits and citizenship. It was not until 1986, however, that the concerns over equal treatment of nonmarital children resulted in amendments to both the child definition in the statute, and the derivation of citizenship for nonmarital children.[149]

142. 430 U.S. 787 (1977).
143. *Id.* at 791.
144. *Id.* (quoting Brief for Appellant at 11–12).
145. *Id.* (quoting Brief for Appellant at 11–12).
146. *Id.* (alterations in original) (quoting Brief for Appellant at 11–12).
147. *Id.* at 799.
148. *See, e.g.*, *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 97th Cong. 893–94 (1981) [hereinafter *Immigration Reform*] (statement of Rep. Frank, Member, H. Comm. on the Judiciary); H.R. 3405, 97th Cong. (1981).
149. The provision that Congress ultimately enacted was drafted by the Department of State. *See Administration of the Immigration and Nationality Laws: Hearing on H.R. 4823, H.R. 4444, and H.R. 2184 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*,

D. The 1986 Amendments to the Legitimation Rules in Immigration Law and the 1988 Technical Corrections

In 1986, Congress loosened the legitimation requirement by allowing for the establishment of paternity by alternative means.[150] Mirroring state litigation over differential treatment of nonmarital children, the debates leading up to the 1986 amendments centered on whether the gender disparities in the statute were sufficiently related to a legitimate purpose.[151] They resulted from several years of advocacy by those who sought to eliminate illegitimacy-based discrimination.[152] Legislators seeking to remove the disparities between nonmarital and marital children in the law, in general, were at the forefront of immigration reform legislation.[153] Progressive legislators, including Elizabeth Holtzman, chair of the House Immigration Subcommittee, targeted the gender-based differences in immigration law, including the legitimation requirements in citizenship law, as sexist. In the 1970s, Representative Holtzman introduced a bill that would "bring section 101(b) of the Immigration and Nationality Act into accord with our constitutional prohibitions against discrimination based on sex."[154] She also noted the discrimination based on nonmarital child status, observing that "[a]s the courts have held in many circumstances, it is no less important for a 'child' to be cared for by its parent when that parent is male rather than female."[155] The advocacy of Representative Holtzman and like-minded representatives no doubt brought about the 1986 changes expanding the paternity acknowledgment options for nonmarital fathers in the citizenship acquisition provisions. Still, the proposed changes centered on differences between unmarried mothers and fathers, rather than on differences made in the statute between marital and nonmarital children.

Ultimately, Congress did not completely eliminate the legitimation requirement. It remains in the statute as one of the options available for proving the parent-child relationship.[156] The legitimation option comports with the State Department's anti-fraud position because it requires a state

99th Cong. 150 (1986) (written testimony of Hon. Joan M. Clark, Assistant Secretary of State for Consular Affairs, Department of State).

150. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657 (codified as amended at 8 U.S.C. § 1409 (1986)).

151. *Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 133 (1976) [hereinafter *Review of Immigration Reform*] (statement of Rep. Holtzman, Member, H. Comm. on the Judiciary).

152. *See, e.g.*, *Immigration Reform*, *supra* note 148.

153. *See, e.g.*, *Review of Immigration Reform*, *supra* note 151.

154. *Id.* at 133.

155. *Id.*

156. *See* 8 U.S.C. § 1409 (2018).

court action to adjudicate paternity.[157] Moreover, Congress imposed a requirement of financial support for the nonmarital child, thereby incorporating the agency rule that paternity acknowledgment must bring the nonmarital child into parity with the marital child, at least with respect to child support.[158]

Congress did, it seems, address the potential unconstitutionality of distinctions between marital and nonmarital children by making the 1986 amendment retroactive. In contrast to other citizenship provisions, including the previous version of the legitimation provision that became effective prospectively, the 1986 amendment eliminated the words, "on or after the effective date of this act."[159] Instead, the amended provision applied "at the time of the child's birth" to a person born out of wedlock.[160] Thus, a nonmarital child born before the alternative means of proving the parent-child relationship were implemented in 1986 could now use those alternative means to establish the relationship. In so doing, the 1986 amendment reflected the purpose of the drafters to remove the stigma of illegitimacy from the statutory provision for all nonmarital children.[161] It also comported with the trend in the states to eliminate distinctions between nonmarital and marital children.[162] Congress had essentially given a father several options in addition to legitimation for establishing paternity no matter when the child was born.

The 1986 amendment, as originally written, however, was short-lived. It was amended again through technical amendments in 1988.[163] The amendment added an effective date to the provision—"persons born on or after November 14, 1986."[164] The old § 1409(a) provision still applies to anyone who was already eighteen years old as of the date of the Act.[165] The technical amendment had the effect of making the statute prospective, thus preventing those individuals who turned eighteen before 1986 from establishing paternity by alternative means.[166] For these nonmarital

157. *See* Collins, *supra* note 108, at 1761; Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 194–95 (2004).

158. *See* 8 U.S.C. § 1409(a)(3).

159. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657 (codified as amended at 8 U.S.C. § 1409 (1986)).

160. *Id.*

161. *See supra* notes 152–155 and accompanying text.

162. *See supra* Part I.B. (discussing the adoption of the Uniform Parentage Act, which sought to eliminate the distinction between marital and nonmarital children as far as parent and child relationships are concerned).

163. Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8, 102 Stat. 2609, 2617 (codified as amended in scattered sections of 8 U.S.C. (1988)).

164. *See id.* § 8(r).

165. *See id.*

166. *See id.*

children, the only means of establishing their filial tie is through legitimation.

By contrast, to this day, the children of married parents obtain citizenship without any further proof of a filial bond. The history of the legitimation provision demonstrates unease with nonmarital children and their undeserving status in citizenship decisions. Throughout this period, marriage did the work of ensuring that only the proper, or deserving, children born outside the United States became citizens. As a result, both the legitimation and the physical presence requirements served as the government's proxies for citizenship. Marriage bestowed a presumption of both familial ties and loyalty to the United States.[167]

III. DERIVATIVE CITIZENSHIP CASES: SEX EQUALITY OVER ILLEGITIMACY DISCRIMINATION

The previous Parts highlighted an apparent disconnect between the protections accorded to nonmarital children under conventional equal protection jurisprudence and the current treatment of foreign-born nonmarital children of U.S. citizen fathers. Part I explained that today, equal protection principles have sought to do away with the differential treatment of nonmarital children, particularly where the law seeks to punish a child in order to promote marital preference. Under this approach, courts analyze whether the legal distinction being imposed on the nonmarital child is substantially related to an important government interest.[168] This searching scrutiny would allow courts to strike down the disparate treatment of children born out of wedlock if it finds that the law punishes children on the basis of their parents' unwed status.[169] Yet, as Part II discussed, derivative citizenship law continues to make distinctions between nonmarital and marital children in their ability to acquire citizenship from their parents. While children of married U.S. citizens easily acquire citizenship, children of unmarried fathers where at least one person is a U.S. citizen have a significantly more difficult time proving citizenship.

In this Part, we critically analyze why the federal government has continued to use illegitimate citizenship rules. In particular, we contend that the recurring differential treatment of nonmarital children born abroad can best be understood as the issue of "illegitimacy discrimination" taking a back seat to gender discrimination. That is, it is not that the Supreme Court has not been aware of these illegitimacy citizenship rules. Specifically, the

167. Immigration and Nationality Act § 301(c), 8 U.S.C. § 1401(c) (1994); § 309(a), 8 U.S.C. § 1409(a) (1988).

168. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

169. *See supra* Part I.

Supreme Court in three cases—*Miller v. Albright*,[170] *Nguyen v. INS*,[171] and *Sessions v. Morales-Santana*[172]—addressed the constitutionality of the disparate rules imposed on nonmarital children's abilities to derive citizenship from their unwed fathers. However, the Court analyzed derivative citizenship rules mainly from the perspective of the effect of the laws on the unwed U.S. citizen father. The rights of the nonmarital child, by contrast, were left unaddressed. We argue that although addressing the discriminatory treatment based on gender was important, the Court should have also taken into account how the rules perpetuated illegitimacy discrimination.

To demonstrate the Court's neglect of the impact of illegitimate citizenship rules on nonmarital children, this Part revisits the forgoing Supreme Court cases. In retelling the cases from the nonmarital child's perspective, this Part illuminates how the Court's framing of derivative citizenship law on sex equality grounds rendered illegitimacy discrimination invisible. As our narrative of the cases argues, the Court's rejection of the constitutional harm to unwed fathers in *Miller* and *Nguyen* ignores the ways in which derivative citizenship law imposed more burdensome requirements for nonmarital children to prove their citizenship. By focusing on the impact of derivative citizenship law on nonmarital children, we reveal two key animating principles embedded in the Court's analyses—the extent to which derivative citizenship laws not only penalize nonmarital children but also privilege marriage and heteronormative, dual U.S. citizen families. Notably, although the Court in *Morales-Santana* ensured that at least one provision of the derivative citizenship law—the different physical presence requirements for unwed fathers and unwed mothers—could no longer stand because it discriminated against unwed fathers,[173] it left in place the disparate treatment of nonmarital children. Again, this harm to children born out of wedlock could have been addressed had the Court taken into account both the gender and illegitimacy discrimination animating the illegitimate citizenship rules.

A. Miller v. Albright

Miller v. Albright[174] is generally known as the first time the Supreme Court addressed the issue of gender discrimination in the context of derivative citizenship.[175] It therefore established the legal landscape for the

170. 523 U.S. 420 (1998).
171. 533 U.S. 53 (2001).
172. 137 S. Ct. 1678 (2017).
173. *Id.* at 1696.
174. 523 U.S. 420 (1998).
175. *See* Maldonado, *supra* note 43, at 361 (noting that scholars have examined *Miller v. Albright*

ensuing cases and, accordingly, this Part spends considerable time examining the case. *Miller* actually began as a case brought by Lorelyn Miller (Lorelyn), the child of an unwed U.S. citizen man, Charlie Miller (Charlie), who argued that she was being discriminated against on the basis of her status as an "illegitimate" child.[176] The facts depict a story of a parent-child relationship that developed later in the child's life but nonetheless shows significant familial bonds. Lorelyn was born out of wedlock on June 20, 1970, in the Philippines to Luz Peñero, a Philippine national, and Charlie, a U.S. citizen who was a serving in the United States Air Force and stationed in the Philippines when Lorelyn was conceived.[177] As her parents were not married, Lorelyn's mother registered her birth as "illegitimate," leaving the space for her father blank.[178]

Lorelyn's parents never married and Lorelyn, growing up in the Philippines while her father was in the United States, did not have a "parental relationship" with Charlie.[179] However, the two eventually began exchanging letters and communicating with each other.[180] Lorelyn also communicated regularly with her paternal grandmother.[181] When Lorelyn's grandmother died, Charlie and Lorelyn had more frequent direct communication with each other.[182] In other words, although the two might not have had a parental relationship in the beginning of Lorelyn's life, they eventually developed a parent-child bond. Charlie thought of Lorelyn as his daughter (albeit located thousands of miles away) and she looked to him as her father.

As a father, Charlie ultimately wanted to bring his daughter, Lorelyn, to the United States. Because Charlie is a U.S. citizen, he contended that Lorelyn acquired citizenship at birth, which meant that she had the right to enter the United States.[183] He therefore sought to obtain paperwork to establish their parent-child relationship. Shortly after Lorelyn turned

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as a gender discrimination case); Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405 (2013). *But see* Nikki Ahrenholz, Comment, Miller v. Albright*: Continuing to Discriminate on the Basis of Gender and Illegitimacy*, 76 DENV. U. L. REV. 281, 281 (1998).

176. *Miller*, 523 U.S. at 424–25.

177. *Id.*

178. *Id.*

179. *See* Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996) (noting that counsel conceded during oral arguments that Lorelyn and Charlie did not have an "ongoing parental relationship" until she reached adulthood).

180. Miller v. Christopher, C.A. No. 6: 93 CV 39 (E.D. Tex. June 2, 1993); *see also* Cornelia T. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v Albright, 1998 SUP. CT. REV. 1, 6.

181. Pillard & Aleinikoff, *supra* note 180, at 6.

182. *Id.*

183. For a discussion of the rights of citizenship, including the right to enter the United States, see Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1676 (2017).

twenty-one, Charlie sought and was granted a voluntary paternity decree from a Texas court recognizing him as Lorelyn's legal father.[184] With the decree in hand, Lorelyn subsequently applied for a passport.[185] The state's legal recognition of Charlie as Lorelyn's father, however, was insufficient to confer citizenship on Lorelyn.[186] As discussed in Part II, under illegitimate citizenship rules, Charlie, as her unwed father, needed to either legitimate Lorelyn before she turned twenty-one, or acknowledge his paternity before Lorelyn turned eighteen years old, as well as agree in writing to provide financial support until she turned eighteen years old.[187]

Neither Charlie nor Lorelyn, however, knew about these requirements. Unfortunately, Charlie acknowledged his paternity for purposes of conferring his citizenship too late—after she had already turned twenty-one.[188] Thus, when Lorelyn went to the State Department to apply for a U.S. passport, her application was denied.[189] Believing that the statute discriminated against nonmarital children in violation of the Fourteenth Amendment, Lorelyn sued.[190] In particular, Lorelyn contended that the statute's distinction between "legitimate" and "illegitimate" children violated equal protection principles as applied to the federal government.[191]

The procedural history of the case reveals the complexity of discrimination in derivative citizenship. The district court dismissed the case, holding that the court lacked power to grant her the remedy she sought—citizenship.[192] The U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court, however, at least with respect to its conclusion that it lacked the power to convey a remedy.[193] In particular, the D.C. Circuit held that the lower court was mistaken in that the plaintiff

184. Miller v. Albright, 523 U.S. 420, 425 (1998).

185. *Id.*

186. *Id.*

187. *Id.*; *see also* 8 U.S.C. § 1409(a) (2018). Lorelyn was born in a period of transition for the immigration statute, which allowed children to choose between the "old" and "new" provisions for nonmarital children born abroad. Under the "old" provision, Lorelyn had to demonstrate her father legitimated her before she turned twenty-one. Under the "new" provision, Lorelyn could show either that her father acknowledged paternity or legitimated her before her eighteenth birthday, and in addition, agreed in writing to provide financial support until she turned eighteen. *See Acquisition of U.S. Citizenship by a Child Born Abroad*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html [https://perma.cc/NU9T-2TMH].

188. *Miller*, 523 U.S. at 425–26; *see also* Linda Greenhouse, *Facet of Immigration Law Is Argued*, N.Y. TIMES, Nov. 5, 1997, at A22 (reporting that Charlie Miller acknowledged paternity after Lorelyn's twenty-first birthday).

189. *Miller*, 523 U.S. at 426.

190. Miller v. Christopher, 870 F. Supp. 1, 2 (D.D.C. 1994).

191. *See id.*

192. *See id.* at 3 (dismissing the case for lack of standing because of the court's inability to redress plaintiff's injury). The court explained that only Congress has the power to confer citizenship to those who lacked the right to acquire citizenship under the Constitution. *Id.*

193. Miller v. Christopher, 96 F.3d 1467, 1470 (D.C. Cir. 1996).

did not ask the court to *grant* her citizenship; instead, Lorelyn asked the court to declare a statute unconstitutional.[194]

However, the D.C. Circuit disagreed with Lorelyn's equal protection claim. At the outset, the D.C. Circuit recognized that the "burdens imposed upon illegitimate children are greater than those imposed upon legitimate children."[195] In particular, the D.C. Circuit noted that under 8 U.S.C. § 1401(g), every *legitimate* child who is born outside the United States acquires citizenship if their marital parents are U.S. citizens or one of the marital parents is a U.S. citizen who satisfies certain residency requirements.[196] By contrast, that statute does not apply to a child with bi-national parents (one U.S. citizen and one non-citizen parent) who are unmarried.[197] In other words, the statute by design privileges those children whose parents are married.

Despite the court's recognition of the differential treatment of nonmarital children, the D.C. Circuit shifted its analysis on gender lines. Specifically, it concluded that requiring unwed fathers, but *not* unwed mothers, to legitimate their children was justified in fostering the child's ties to both the United States and her U.S. citizen father.[198] Thus, instead of analyzing whether § 1409 discriminated against nonmarital children in the first instance, the court examined it instead as a form of gender discrimination.

Notably, illustrating the court's deferential approach to the federal government where immigration and citizenship laws are concerned,[199] the D.C. Circuit applied rational basis review and held that "'a desire to promote early ties to this country and to those relatives who are citizens of this country is not a[n ir]rational basis for the requirements made by' sections 1409(a)(3) and (4)."[200] The court further commented that it was "entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father" since a "mother is far less likely to ignore the child she has carried in her womb" than the "natural father, who may not even be aware of its existence."[201] Here, the language illuminates the sex equality framing of the court's analysis. Emphasizing the court's approach along gender lines, it noted that "mothers and fathers of illegitimate children are not similarly situated."[202] The father may be

194. *See id.*
195. *Id.* at 1471.
196. *See id.*
197. *See id.*
198. *Id.*
199. *See* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 593–614 (2017).
200. *Miller*, 96 F.3d at 1472 (alteration in original) (quoting Ablang v. Reno, 52 F.3d 801, 806 (9th Cir. 1995)).
201. *Id.*
202. *Id.* (quoting Parham v. Hughes, 441 U.S. 347, 355 (1979)).

"unconscious of the birth of the child" and even if conscious, he would be unconcerned "because of the absence of any ties to the mother."[203]

Today, under *Morales-Santana*, such language would constitute unlawful gender stereotyping that would reasonably lead to both § 1409(a)(3) and (4) getting struck down.[204] At the time, however, this language was reflective of the rationale that upheld differential treatment of unwed fathers and unwed mothers. The opinion is also worth noting for another reason—it illustrates how the D.C. Circuit missed the opportunity to see how § 1409(a)(3) and (4) also discriminated on the basis of Lorelyn's status as a nonmarital child who, unlike children of U.S. citizens born in marriage, must show that her father legitimated her. The court could have examined why nonmarital children *ex ante* must overcome barriers that are not imposed on marital children, who are automatically considered "legitimate" because their parents are married.

Lorelyn's illegitimacy discrimination continued to take a back seat when her case was heard by the Supreme Court. The Court granted certiorari to determine whether the distinction in § 1409 between "'illegitimate' children" of U.S. citizen mothers and "'illegitimate' children" of U.S. citizen fathers violated the Fifth Amendment of the Constitution.[205] Thus, like the court below, the Supreme Court ultimately focused on whether the differences in § 1409(a)(4)'s treatment of nonmarital mothers and fathers in its derivative citizenship rules amounted to gender discrimination and marginalized the illegitimacy discrimination issue that was also at the heart of Lorelyn's claim.

Producing five opinions, the Supreme Court's plurality opinion honed in on gender discrimination in coming to its conclusion that § 1409(a)(4) was constitutional, holding that "[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."[206] As this conclusion evidences, the Court's analysis centered on presumed gender differences in parental responsibilities. Specifically, the Court noted that far more severe burdens are imposed on unwed mothers (including carrying the pregnancy to term and giving birth to the child) than unwed fathers, who do not even need to be present at birth.[207] Finding unpersuasive the claim that such differential burdens are the product of "overbroad

203. *Id.* (quoting *Parham*, 441 U.S. at 355 n.7).

204. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017) (discussing derivative citizenship law's reliance on overbroad gender stereotypes and describing them as anachronistic).

205. Miller v. Albright, 520 U.S. 1195 (1997) (granting certification in *Miller v. Albright*, 96 F.3d 1467 (D.C. Cir. 1996)); *see also* Miller v. Albright, 523 U.S. 420, 428 (1998) (discussing question before the Supreme Court).

206. *See Miller*, 523 U.S. at 445 (plurality opinion).

207. *Id.* at 434.

stereotypes," the Court emphasized that § 1409(a)(4) ensures that the nonmarital child shares a blood relationship with a U.S. citizen and that requiring reliable proof of this biological relationship is an important government interest.[208] While the blood relationship between a mother and child is patently obvious at birth, the relationship between a father and child, according to the Court, may be undisclosed and unrecorded.[209] It is thus rational to require a father to produce evidence within eighteen years of the child's life that substantiates his biological relationship to the child.[210] Further, the Court explained that Congress could have concluded that either a written acknowledgment (legitimation) or a court adjudication of paternity along a clear and convincing evidence standard was necessary to deter fraud.[211]

Crucially, the Court noted that § 1409(a)(4) also promotes interests that are unrelated to paternity: fostering the relationship between a parent and a minor and the "ties between the foreign-born child and the United States."[212] Highlighting that the case involved a U.S. serviceman who did not establish his legal relationship to his child before her twenty-first birthday, the Court explained that, given the size of the military, Congress had legitimate concerns "about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children."[213] Thus, the Court continued, it was reasonable to condition the awarding of citizenship to such children on legitimation or paternity actions that establish the possibility that those who would become citizens will develop ties to the United States.[214] Such actions perform a "meaningful purpose for citizen fathers" but would be "superfluous for citizen mothers."[215] These strong governmental interests not only justify the additional requirements on fathers but they are also "well tailored to serve those interests." [216] The formal acts imposed on unwed fathers but not unwed mothers—legitimation, written acknowledgment of the father, or court adjudication—lessen fraudulent claims.[217] Moreover, Congress has an interest in fostering parental ties and ties to the United States during the child's formative years.[218] For these reasons, the Court

208. *Id.* at 434–35.
209. *Id.* at 436.
210. *See id.* at 437.
211. *Id.* at 437–38.
212. *Id.* at 438.
213. *Id.* at 438–39.
214. *Id.* at 439.
215. *Id.*
216. *Id.* at 440.
217. *Id.*
218. *Id.*

concluded that § 1409(a)(4)'s differential treatment of unwed fathers and unwed mothers in their ability to confer citizenship was constitutional.[219]

Many have criticized the Court's gender analysis in *Miller* and we do not revisit those concerns here.[220] Our point here is to illustrate how the Court in *Miller* failed to see how § 1409(a)(4) also discriminated on the basis of illegitimacy. When examined from the perspective of Lorelyn, the nonmarital child, the Court's opinion illuminates the privileging of the traditional, marital family. In reaching its conclusion, the Court emphasized Charlie's absence in Lorelyn's life in the Philippines.[221] The plurality opinion characterized Charlie's relationship with Lorelyn's mother as a brief one in which Lorelyn was conceived while Charlie was on leave from his military duties.[222] The opinion noted that Charlie left the country and never returned.[223] The Court inferred that Lorelyn and Charlie had no relationship, and it was unclear from the facts in the opinion whether Charlie even knew that he had a child.[224] Here, the Court essentially casts the relationship between Charlie and Lorelyn's mother as equivalent to a one-night stand. In so doing, the Court more easily credited the government's rationale for requiring some form of paternal acknowledgement before the nonmarital child turns eighteen. The requirement met Congress's purpose in ensuring proof of paternity, encouraging ties to the father and the country, and encouraging healthy relationships between fathers and their nonmarital children.[225] Framing the issue on sex-equality grounds, the Court agreed that sex-based classifications were substantially related to those purposes, and characterized them as based on biological differences between the sexes.[226] But they failed to address nonmarital birth status as a salient legal concept.

Legal scholar Melissa Murray claims that the Court's characterization of the facts in the illegitimacy cases influences outcomes that skew in favor of relationships that mimic marriage for the most part. She notes,

> [T]he traditional account of illegitimacy imagines a life where non-marital children have little contact with their fathers, who, absent marriage, have few ties to the household and do little to contribute to its financial support. Instead, mothers are assumed to have primary

219. *Id.* at 444.

220. *See, e.g.*, Collin O'Connor Udell, Miller v. Albright*: Plenary Power, Equal Protection, and the Rights of an Alien Love Child*, 12 GEO. IMMIGR. L.J. 621 (1998); Katharine B. Silbaugh, Comment, Miller v. Albright*: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999); Richard G. Wood, *When a Majority Loses on the Merits:* Miller v. Albright *and the Problem of Splintered Judgments*, 29 SETON HALL L. REV. 816 (1998).

221. *Miller*, 523 U.S. at 438–39.

222. *See id.* at 425.

223. *Id.* at 420.

224. *Id.* at 438–39.

225. *Id.* at 440.

226. *Id.* at 443–45.

> responsibility for non-marital children, and, it is expected, will lack the resources to provide for the care and upkeep of these children. . . . [I]llegitimacy often is imagined as engendering an unhealthy, but inevitable, dependence on the public fisc—a dependence that is wholly at odds with the norms of financial independence that the marital family is believed to cultivate.[227]

This characterization of illegitimacy certainly holds true in the *Miller v. Albright* plurality opinion. More importantly, the characterization allows the Court to circumvent the question of whether these rules create disfavored classes of children based on their parents' marital status. As a result, a nonmarital child of a U.S. citizen father could not simply show evidence of a biological, or even a bona fide relationship. Instead more stringent requirements of parentage apply than those imposed on either the marital child or the nonmarital child of a U.S. citizen mother.

The dissenting opinions similarly examined the issue on gender discrimination grounds and, importantly, elided the discriminatory treatment of nonmarital children. Justices Ginsburg and Breyer, in separate dissents, rejected the assumptions behind the sex-based differences in the paternity acknowledgement provision. Justice Ginsburg described the history of citizenship acquisition for nonmarital children, noting that for much of that history, Congress had little regard for the sex of the U.S. parent.[228] Instead, Congress focused on the child, requiring nonmarital children to reside in the United States for five years before their eighteenth birthday before they could acquire citizenship.[229] She criticized the sex-based assumptions in the plurality opinion that were "based on generalizations (stereotypes) about the way women (or men) are."[230] Justice Breyer's dissent was even more pointed. By switching the facts of the case to make Lorelyn's mother the U.S. citizen, he illustrated the extent to which the plurality and concurring opinions depended on stereotypes to come to their conclusions.[231] Both justices objected to the rule for violating equal protection principles based on gender, noting that while Congress is free to require close family ties during early and formative years, it could not require such a relationship only of fathers and their nonmarital children.[232] As important as their dissents were in promoting gender equality, they failed to point out how the rules also negatively impacted nonmarital children. The marital presumption built into § 1409(a)(4) privileges marital children who

227. Murray, *supra* note 43, at 393–94 (footnotes omitted).
228. *Miller*, 523 U.S. at 461–62 (Ginsburg, J., dissenting).
229. *Id.* at 469.
230. *Id.*
231. *See id.* at 484 (Breyer, J., dissenting).
232. *See id.* at 469–70 (Ginsburg, J., dissenting); *id.* at 474 (Breyer, J., dissenting).

are recognized as "legitimate" and discriminates against nonmarital children, who must go through more onerous processes of legitimation, paternity acknowledgment, and paternal financial support that remain to this day.

The foregoing analysis demonstrates that *Miller v. Albright* was important in the arc of illegitimacy discrimination cases because it signaled the turn to gender discrimination theory in subsequent challenges to the derivative citizenship rule. As explained *supra*, in the lower courts, Lorelyn and her father claimed both illegitimacy and gender discrimination, making a distinction between the two.[233] The Supreme Court and the appellate court in the case both chose to focus on the gender discrimination claim, leaving aside for another day the classifications of children based on their parents' marital status. The *Miller v. Albright* opinion essentially set the tone for the other derivative citizenship cases that followed it. As we show in the next case narratives, after *Miller v. Albright*, and by the time the Court decided *Sessions v. Morales-Santana*, the illegitimacy discrimination arguments had fallen by the wayside in the courts.

B. Nguyen v. INS

The second derivative case that went before the Supreme Court is *Nguyen v. INS*.[234] Unlike *Miller*, the facts reveal a father who had raised his child. Tuan Anh Nguyen was born in Vietnam.[235] His father, Joseph Boulais, was a U.S. citizen working for a corporate employer in Vietnam.[236] His mother was a Vietnamese citizen who abandoned him at birth.[237] Boulais took Nguyen to live with the family of his new Vietnamese girlfriend.[238] Nguyen lived in Vietnam until he was almost six years old, when his father took him to live in Texas with him.[239] Nguyen could have sought to enter the United States as a derivative citizen or as an immigrant child of a U.S. citizen.[240] Instead, he entered the United States as a refugee under the Indochina Migration and Refugee Act and eventually became a lawful permanent resident.[241] He never applied for naturalization.

233. *See* Miller v. Christopher, 96 F.3d 1467, 1469 (D.C. Cir. 1996) (explaining that Lorelyn Miller's complaint argued that the statute was unconstitutional because it distinguished "between legitimate and illegitimate children *and* between men and women" (emphasis added)).
234. 533 U.S. 53 (2001).
235. *Id.* at 57.
236. *Id.*
237. Nguyen v. INS, 208 F.3d 528, 530 (5th Cir. 2000).
238. *See Nguyen*, 533 U.S. at 57.
239. *Id.*
240. *Id.*
241. *Nguyen*, 208 F.3d at 530.

Nguyen was still a lawful permanent resident when he was convicted in a Texas state court of sexual assault on a child.[242] After he served his sentence, the federal government initiated deportation proceedings against him.[243] It was here that Nguyen claimed U.S. citizenship, and challenged the differential rules for mothers and fathers in § 1409. Nguyen's father also produced an order of parentage showing through DNA evidence that he was indeed Nguyen's biological father.[244] By the time Nguyen's father had obtained the order of parentage, Nguyen was already twenty-eight years old.[245]

Similar to the nonmarital child in *Miller*, Nguyen challenged the effect of the rules on nonmarital children on equal protection grounds.[246] And, as in *Miller*, the Supreme Court analyzed the case as a gender discrimination case rather than an equal protection case based on illegitimacy discrimination. Significantly, the Court found that rules requiring affirmative steps of a nonmarital father, but not a mother, to prove a filial relationship with a nonmarital child did not violate the Equal Protection Clause.[247] Its rationale was based on the same stereotypes about how the relationship between a mother and her child is different from that of a father and a child. First, echoing its reasoning in *Miller*, the Court noted that the biological relationship between a mother and a child is unquestioned because the mother is necessarily present at birth.[248] While proof of motherhood is inherent at birth, proof of fatherhood is not[249] and the government interest in ensuring a biological relationship justifies the gendered differential.

Second, the Court gave weight to the government's interest in ensuring that the parent-child relationship "consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[250] Despite Nguyen's deep relationship with his father, the Court raised the specter of the father who unknowingly conceives a child outside of marriage to justify the statutory distinction between the nonmarital children of unwed mothers and fathers.[251] The Court required nonmarital fathers to demonstrate a real relationship through formal

242. *Nguyen*, 533 U.S. at 57.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 58.
247. *Id.* at 72–73.
248. *Id.* at 62–63.
249. *See id.* at 63.
250. *Id.* at 65.
251. *Id.*

channels. A real, everyday tie is presumed, however, if the parent is the mother or if the child is born within a marriage.[252]

When viewed through the lens of the nonmarital child, the Court's opinion reveals not only § 1409's privileging of marriage but also its treatment of marriage as fostering ties to the United States. Reflecting its view of citizenship as a valuable asset to be protected, the Court noted,

> Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.[253]

Here, the absence of marriage presumes the need to establish and support the connection between the child and the parent as well as the child and the United States. Children of married U.S. citizens, by contrast, are already presumed to not only have such ties to the parents but also to the country.

Lastly, the Court in *Nyugen* shows the historical judicial deference to congressional decision-making about immigration benefits even if it means discriminating on the basis of illegitimacy, which would be deemed unlawful, or at the very least, quasi-suspect, under conventional equal protection analysis. The Court abdicates its own authority to review Congress's decision on constitutional grounds, and provides that, "[i]f citizenship is to be conferred by the unwitting means petitioners urge, so that its acquisition abroad bears little relation to the realities of the child's own ties and allegiances, it is for Congress, not this Court, to make that determination."[254] In other words, Congress's categorical rules entrenching stereotypes about how families form and exist are entitled to deference even when, as here, the facts counter the stereotype.

In sum, the Court ignored how the rule treats nonmarital parents and marital parents differently, giving the most favorable treatment to married U.S. citizen parents and their children. Even a nonmarital child of a U.S. citizen mother is at a disadvantage, however, compared to a marital child of a U.S. citizen mother. A child's loyalty to the United States is not questioned when the child is born inside a marriage. On the other hand, a child born outside a marriage must meet physical presence requirements, at the very least, to prove worthy of citizenship. The Court ignored the discriminatory effects of this preference for marriage in *Nguyen v. INS*.

252. *See id.*
253. *Id.* at 67.
254. *Id.*

C. Sessions v. Morales-Santana

The last and most recent Supreme Court case to address the constitutionality of derivative citizenship laws was *Sessions v. Morales-Santana*.[255] And, like the preceding cases, the facts of *Morales-Santana* demonstrate both gender and illegitimacy discrimination. Crucially, the Court's analysis centered on gender only. This time, however, while the Court gestured towards illegitimacy discrimination, it nevertheless failed to find it problematic. Luis Ramón Morales-Santana was born in the Dominican Republic in 1962 to Yrma Santana Montilla, a Dominican, and José Morales, a U.S. citizen.[256] Although José Morales was living with Yrma Santana at the time, they were not married.[257] Jose and Yrma married in 1970, at which point José added his name to Luis's birth certificate as his father.[258] Contemporaneous records show that José and Yrma lived together before, during, and after Luis's birth, and that José supported his family.[259] The family moved to Puerto Rico, where José was born, and lived with family there and in New York until José died in 1976.[260] Before Luis was born, José had moved to the Dominican Republic to work for a U.S. construction company. He was just twenty days short of his nineteenth birthday when he left.[261] The timing made him ineligible to transfer his citizenship to Luis because he had failed to maintain physical presence in the United States for five years after the age of fourteen before his son was born, as § 1401(a)(7) requires. Justice Ginsburg, writing for the Court, based the Court's decision on gender discrimination against fathers of nonmarital children.[262] Morales-Santana had, in effect, a derivative claim based on the gender differential embedded in the residency requirement of the citizenship acquisition provision. The residency provision required fathers, but not mothers, of nonmarital children to reside in the United States for five years after the age of fourteen to be eligible to transmit their citizenship to their nonmarital children.[263] Justice Ginsburg focused on facts that demonstrated both a vertical parent-child relationship between José and Luis, and a horizontal spousal relationship between José and Yrma. There was no doubt from these facts that José Morales was a family man who supported his child and who, therefore, had a true family relationship with his wife and his

255. 137 S. Ct. 1678 (2017).
256. *Id.* at 1687–88.
257. *Id.* at 1688.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 1687.
262. *Id.* at 1689.
263. *See* 8 U.S.C. §§ 1401, 1409(c) (2018).

child, who happened to be born out of wedlock. The Court's characterization of José Morales as a family man allowed Justice Ginsburg to more readily focus on the outdated and overbroad generalizations not just about the nonmarital father, but "about the way men and women are."[264] The majority held that the sex-based differences in the residency requirements were subject to intermediate scrutiny, requiring the government to show that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[265]

While Justice Ginsburg distinguished this residency requirement from the paternal acknowledgment requirement at issue in *Miller* and *Nguyen*, she drew from her dissent in *Miller* to criticize the assumption in the statute underlying both provisions that men were less inclined to form relationships with their children.[266] "Lump characterization of that kind," she noted, "no longer passes equal protection inspection."[267] Nonetheless, Justice Ginsburg failed to address the illegitimacy discrimination now evidenced in the statute.

IV. HOW ILLEGITIMATE CITIZENSHIP RULES DISCRIMINATE AGAINST NONMARITAL CHILDREN AND PERPETUATE TRADITIONAL FAMILY NORMS

The Court's *Morales-Santana* decision reveals more starkly the ways in which nonmarital children still face differential treatment in citizenship law. While the physical presence requirements have been equalized for nonmarital mothers and fathers, they have not been equalized for married and unmarried parents. The statute continues to require more stringent physical presence requirements for unmarried parents who want to pass their U.S. citizenship to nonmarital children. In addition, as we have demonstrated in Part III, the requirements for establishing the parent-child relationship reflect differential treatment between marital and nonmarital children. Nonmarital children must demonstrate the filial bond, not just with a birth certificate, but with proof of open acknowledgment or legitimation, and proof of financial support through childhood.[268]

Legitimacy status is the unrecognized mark of inequality that must be addressed in the immigration statute. The quasi-suspect category of illegitimacy requires scrutiny of both the importance of the government's

264. *Morales-Santana*, 137 S. Ct. at 1689.
265. *Id.* at 1690 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
266. *Id.* at 1694.
267. *Id.* at 1695.
268. *See supra* Part III.

interest and the substantial relationship between the legitimation rules and the government's interest. The government might argue, as was done in Congressional debates in the 1980s,[269] that its interest in detecting fraud is served by more stringent standards for proving the filial bond between fathers and nonmarital children. Presumably, marriage cures the need to prevent fraud, so only nonmarital children must demonstrate a bona fide filial bond. The fact of marriage today, however, fails to establish the strong filial bond that the rules seek to enforce. Nothing in the statute differentiates the marital child whose father abandons her the day after her birth from the marital child whose father supports her through her childhood. Both are U.S. citizens as long as their parents were married the day they were born. On the other hand, the nonmarital child gets no such benefit even if the nonmarital father raised her but failed to legitimate her. Here, the child's nonmarital status illuminates the type of sex stereotyping undergirding the statute.

Even if the government had an important interest in detecting fraud back when it enacted them, the legitimation rules fail toady because they do not reflect contemporary relationships between parents and their children. As we discuss below, the cases involving nonmarital children demonstrate that the stereotypical assumptions about the rules—that fathers have weak filial bonds with their nonmarital children—break down. If the rules are based on stereotypes about weak filial bonds, the government cannot show a substantial relationship between the rule and the government's interest in preventing fraud.

The category of the nonmarital child has been expanded, moreover, to categories of children that are not—and should not be—considered "nonmarital." This expanded category includes children born within a marriage, but conceived through ART. The State Department asserts that a child "born in wedlock" is a child whose *biological* parents are married at the time of the child's birth.[270] This position has the effect of limiting birthright citizenship to biological, heterosexual parents. It demonstrates just how far-reaching and dangerous the discrimination against nonmarital children can be. It also demonstrates the incompleteness of the equality project at the intersection of immigration and family law, and as contemporary views of the family evolve. This section explains the effect of illegitimate citizenship rules as they apply not just to the nonmarital children of U.S. citizen fathers, but to the broader universe of children that the agency has deemed nonmarital. The use of the marital/nonmarital binary in the treatment of children leads to several forms of unnecessarily harsh

269. *See Administration of the Immigration and Nationality Laws*, *supra* note 149.
270. 8 FOREIGN AFFAIRS MANUAL § 1140, app. E(c) (U.S. DEP'T OF STATE 2018).

consequences for all relationships that are not the traditional, heterosexual marriage between U.S. citizens.

Importantly, the Court's admonition in *Morales-Santana* regarding the assumptions embedded in the residency requirement about how "men and women are"[271] applies just as much to the legitimation provision. If we scrutinize the legitimation requirement with "new insights and societal understandings [that] can reveal unjustified inequality . . . that once passed unnoticed and unchallenged,"[272] as the Court did in *Morales-Santana*, we can conclude that no important government interest justifies differences in treatment of nonmarital children. The legitimation requirement continues to be embedded with moral judgments about marriage, sex outside of marriage, and who is ultimately responsible for children born outside of marriage.[273] The Court's holding in *Morales-Santana* exposes the now outdated marriage preference still embedded in the provision.

A. The Historical Stereotypes Embedded in the Marriage Preference

This section discusses the historical context for the marriage preference, juxtaposing the trends in state family law to dismantle it with forces in immigration law to further entrench it. It then provides a framework for breaking down the preference in immigration law by revealing the stereotypes that continue to keep the marriage preference alive in immigration law.

Initially, the immigration statute was silent about the rights of nonmarital children born abroad to derive citizenship from their fathers.[274] The agency interpreted congressional silence on the issue by taking cues from state law and following the common law rules requiring fathers to claim children inside a marriage, and mothers to claim them outside a marriage.[275] States codified these rules in their family laws.[276] The marriage preference in state law was clear: state recognition of nonmarital children required clear proof of the parent-child bond.[277] By contrast, the state required no evidence beyond a marriage certificate to recognize marital children.[278] Most states presumed that a child born within a marriage was presumptively the child

271. *Morales-Santana*, 137 S. Ct. at 1689.
272. *Id.* at 1690 (alteration in original) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).
273. Mayeri, *supra* note 141, at 1289.
274. Collins, *supra* note 29, at 2165.
275. *Id.* at 2186.
276. *Id.*
277. ERNST FREUND, ILLEGITIMACY LAWS OF THE UNITED STATES AND CERTAIN FOREIGN COUNTRIES 10 (1919).
278. *Id.* at 10–11.

of the husband,[279] in part because marriage did the work of maintaining order, in contra-distinction to the loose morals and disorder characterized by sex outside of marriage.[280] Most states did not recognize a nonmarital child as having a father until the child's parents married.[281] The nonmarital child derived no rights from the father until a marriage occurred.[282] The immigration system adopted this restrictive view of the nonmarital child's rights, first through agency decisions,[283] then through the derivative citizenship provisions codified within the statute.[284]

In the latter half of the twentieth century, states began to remove legal impediments to nonmarital status for children.[285] Even after states began to loosen standards for recognizing nonmarital children, however, the immigration agency continued to impose illegitimate citizenship rules. For example, the agency interpreted the term legitimation in the statute to require that state laws recognize nonmarital children as having the full rights of marital children in order to be considered legitimated under immigration law. The initial rationale for the marriage preference—the right of the state to express a preference—gave way in this interpretation to an institutionalized preference for marriage in immigration law, even when states no longer opted to maintain a marriage preference in family law.[286] The stereotype that marriage conveyed and sustained a sense of order as against a danger of disorder remained embedded in the immigration statute.

The gap between the marriage preference in immigration law and state dismantling of the preference only grew as the constitutional challenges to state laws based on illegitimacy discrimination gained ground.[287] At the

279. *Id.* at 10.

280. A recent episode of the podcast This American Life, describing the story of Bobby Dunbar, who disappeared from his home in 1912 and was allegedly found eight months later, illustrates societal biases against nonmarital parents. *This American Life: The Ghost of Bobby Dunbar*, CHICAGO PUBLIC RADIO (Mar. 14, 2008), https://www.thisamericanlife.org/352/the-ghost-of-bobby-dunbar [https://perma.cc/JQR4-VQHZ]. When Bobby Dunbar disappeared, a search turned up a boy whom the Dunbars claimed was Bobby. *Id.* An unwed mother, Julia Anderson, claimed the boy was her son. *Id.* The child was placed in the Dunbar home. *Id.* When Julia sought help from the courts to get her child back, she was vilified as a prostitute and a loose woman. *Id.* Decades later, the descendants of the family discovered through DNA testing that the child did belong to Julia Anderson. *Id.* For a discussion of the ways in which family law delineated nonmarital relationships as deviant, see Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1656 (2003).

281. FREUND, *supra* note 277, at 10.

282. *Id.*

283. Citizenship—Children Born Abroad Out of Wedlock of Am. Fathers and Alien Mothers, 32 Op. Att'y Gen. 162, 164 (1920).

284. Nationality Act of 1940, Pub. L. No. 76-853, §§ 201(g), 205, 54 Stat. 1137, 1139–40.

285. *See supra* Part II.B.

286. This was especially the case in states that began to adopt Model Family Code parental acknowledgement provisions recognizing children whether born in or outside of marriage. *See* INGEBORG SCHWENZER, MODEL FAMILY CODE (2006).

287. Collins, *supra* note 108, at 1755–59.

same time that lawsuits forced states to reconsider laws favoring marriage, the immigration statute's marriage preference remained frozen in place.[288]

Congressional attempts to dismantle the marriage preference in citizenship law had only limited success in the 1980s, in part because of a new rationale for illegitimate citizenship rules: fraud.[289] Congressional members as well as the immigration agency were concerned that a simple parental acknowledgement requirement would introduce unmitigated fraud, in part because, they argued, many of these children were the products of one-night stands that should not sustain a citizenship claim.[290] The racialized implications of the fraud rationale remained in the background of debates surrounding alternatives to legitimation to prove the family relationship. Again, stereotypical notions of loose morals and threats to marital order lay at the foundation of these concerns. In response, Congress introduced a requirement that nonmarital fathers demonstrate a willingness to financially support a child in addition to physical presence requirements showing loyalty to the United States.[291] The rationale behind the extra requirements was that they operated to establish a true bond with a child, something that was assumed within a marriage, and that was necessary to fulfill the purpose of the statute to unify families.[292] The anti-fraud rationales were powerful motivators during this period, as the debate centered on American G.I.s having consorted with women during their activity in foreign wars.[293] Thus, even as the immigration statute incorporated parental acknowledgment as a way to loosen the strict legitimation rules, Congress required proof of parental financial support as an additional condition for establishing the nonmarital parent-child

288. *Id.*

289. *See Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 96th Cong. 35 (1979) [Hereinafter *Hearing*] (statement of Elizabeth Harper, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, Department of State); *Hearing*, *supra*, at 2–3 (statement of David Crosland, Acting Comm'r, INS); *see also* Collins, *supra* note 108, at 1761.

290. *Hearing*, *supra* note 289, at 35.

291. *See* Immigration and Nationality Act, 8 U.S.C. § 1409 (2018) (as amended by the Immigration and Nationalty Act Amendments, Pub. L. No. 99-653, 100 Stat. 3655, 3657 (1986)).

292. *See Review of Immigration Problems: Hearing on H.R. 10993 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 133 (1975 & 1976) (statement of Rep. Elizabeth Holtzman, Member, H. Comm. on the Judiciary); Collins, *supra* note 108, at 1760–61; Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, *in* THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL 73 (Kim Rubenstein & Katharine G. Young eds., 2016).

293. *See, e.g.*, *Amerasian Immigration Proposals: Hearing on S. 1698 Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 38–39 (1982) (statement of Hon. Alan C. Nelson) (considering whether to extend "preferential treatment" to "children of United States Armed Forces personnel"); 15 OSCAR M. TRELLES, II & JAMES F. BAILEY, III, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 1950–1978, at 383 (1979); *Review of Immigration Problems*, *supra* note 292, at 131–40 (addressing, among other matters, "Immigration Benefits to Illegitimate Children").

relationship.[294] These new rules adopted in the 1980s maintained, if not entrenched, the marriage preference.

Supreme Court jurisprudence, especially the Court's latest pronouncement in *Morales-Santana*, has produced an even more entrenched bias in favor of marriage. The decision challenges the stereotypical assumptions that nonmarital mothers automatically have a bond with their children while fathers do not.[295] While the decision puts nonmarital mothers and fathers on equal footing, it creates an inequality between marital and nonmarital children. This, in turn, reveals a heavy preference for marriage on the *assumption* that parents who were married upon a child's birth have *both* a greater bond with the child and deeper loyalties to the United States.[296] Children born inside a two-U.S.-citizen-parent marriage can derive citizenship from parents whose bond, as well as whose loyalty to the United States, is automatically assumed. Because loyalty to the United States is not in question, there is no need for a residency requirement. Nor is further proof needed of an established parent-child bond if the child was born within a marriage. In sum, the anti-fraud rationales heavily motivate the implementation of illegitimate citizenship rules.

B. The Consequences of the Marriage Preference: How Derivative Citizenship Rules Perpetuate the Heterosexual Marriage Norm

The marriage preference in immigration law that produced illegitimate citizenship rules has even broader effects. It reveals an institutionalized preference for the U.S.-citizen, married, heterosexual couple. This preference manifests itself both in the statute, and in ways that the agency scrutinizes relationships that lie outside of this paradigmatic structure.[297]

294. *See* § 1409(a)(3).

295. *See* Miller v. Albright, 523 U.S. 420, 439 (1998).

296. Some might argue that there is no marriage preference in the derivative citizenship provisions because U.S. citizen parents who marry foreign-born spouses must also meet physical presence requirements. The requirement for this marriage configuration does not negate the marriage preference, however. These requirements are based on a different set of stereotypes based on alienage and national origin, and they operate in much the same way as the residency requirements for nonmarital parents. In each of these configurations, the loyalty of the parents is called into question simply because it does not fit the ideal paradigm of the two-U.S.-citizen-parent marriage. Because the two-U.S.-citizen-parent marriage is the ideal, unwarranted stereotypes about the fitness of the parents are allowed to come into play. The current anti-fraud rationale is a particularly powerful driver of these stereotypes. In both cases, the specter of a parent of questionable status—either no spouse or a foreign-born spouse—drives the decision to require more of non-U.S. citizen married parents. The result is that the most preferred status in the statute is the child of a married couple born in the United States. The children of a foreign-born parent are treated, like the children of nonmarital parents, differently because of their inability to show marriage to a U.S. citizen.

297. *See* 8 FOREIGN AFFAIRS MANUAL § 304.3-4 (U.S. DEP'T OF STATE 2018) (describing procedures for establishing biological relationships with parents for children born through non-traditional means such as artificial insemination or surrogacy).

The norm is both a preference for *heterosexual* marriage *and* a preference for heterosexual *marriage*.

The marriage preference reflects an immigration benefits hierarchy, with the two-citizen married couple at its zenith. This hierarchy produces anomalies as the nature of families evolves, and the immigration system tries to grapple with outdated rules. This section describes three scenarios, including the stories embedded in *Nguyen*, *Miller*, *and Morales-Santana*, depicting the evolving definitions of family that find no place within the immigration system. These scenarios demonstrate the failure of immigration law's marriage preference to capture the reality of today's families in the United States.

1. The Marriage Preference and the Primary Caretaker Nonmarital Father

The category of nonmarital child of an unmarried father represents the quintessential stereotype embedded in illegitimate citizenship rules. The stereotype, as exemplified in congressional and court discussions, is reflected in the G.I. who serves overseas, engages in a sexual relationship in which a child is conceived, and subsequently leaves the child behind.[298] The stereotypical view is that the child is claiming a benefit—citizenship—that she does not deserve because, presumably, she has no relationship with her father. The stereotypical view of the father is that he carelessly wastes a valuable asset: citizenship.

The facts in cases such as *Miller*, *Nguyen*, and *Morales-Santana* represent the first wave of cases challenging the traditional marriage norm. They demonstrate the counter-narrative: fathers who are involved in the raising of their nonmarital children, but who, for various reasons, failed to meet the formal requirements of the statute to prove they were really "fathers." The circumstances surrounding the family relationship are at issue in each case, as the fathers attempted to demonstrate they really were parents in the traditional sense even if they were not husbands. These cases involve a set of counter-narratives that challenge the government's narrative of possible fraudulent—and illegitimate—family relationships. The facts in these cases demonstrated that the nonmarital fathers could still parent in meaningful and substantive, if non-traditional, ways despite not having fulfilled the marriage function.[299]

298. *See, e.g.*, *Miller*, 523 U.S. at 439 ("Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children.").

299. *See supra* Part III.

Charlie Miller, of *Miller v. Albright*, had a long-distance relationship with his daughter Lorelyn throughout her youth and had frequent direct communication with her, even though they did not live with each other.[300] Neither knew that the immigration statute required paternity acknowledgement before Lorelyn turned eighteen.[301] So, even though he tried to legally establish his relationship with his daughter under state law, he could not perfect it under immigration law.[302] He could not perfect it because his family did not mirror the ideal married, heterosexual citizen couple.

The same occurred when Luis Morales-Santana, the respondent in *Morales-Santana*, sought to have his parents' family relationship recognized under immigration law. Morales-Santana's parents married several years after he was born, thus legitimizing him under Puerto Rican law, where his father resided before he left the country.[303] Luis Morales-Santana came as close to a traditional family as one could get without being born into a marriage. Nonetheless, instead of focusing on the vast difference in treatment between marital and nonmarital children, the Court focused on the gender differential between unmarried mothers and fathers, to the detriment of Luis, a nonmarital son under immigration law rules. Again, Luis's family failed to reflect the traditional married U.S. citizen family unit.

The case against nonmarital children is even more striking in *Nguyen v. INS*, because Nguyen was actually raised by his U.S. citizen father in the United States from age six.[304] Nguyen, a lawful permanent resident raised and supported by his father, failed to fulfill the technical requirement of legitimation by court order before the age of eighteen.[305] In this case, the requirement was truly a technicality because Nguyen's father was physically and fiscally responsible for his son for the vast majority of his life.[306]

In each of these cases, the nonmarital father was, in practice, if not legally, fathering his nonmarital child. This "nontraditional" role was not only elided but it was also the basis for granting fewer benefits to the nonmarital child than the marital child.[307] Crucially, the Court failed to

300. *See* Pillard & Aleinikoff, *supra* note 180, at 6.

301. *Id.*

302. *Id.*

303. *See* P.R. LAWS ANN. tit. 31, § 442 (2020); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687–88 (2017).

304. Nguyen v. INS, 533 U.S. 53, 53 (2001).

305. *Id.* at 60.

306. *Id.* at 57.

307. It should be noted that the treatment of nonmarital fathers and ensuing negative impact on their foreign-born children is remiscent of the type of presumptions of unfitness to parent a child that the Supreme Court has deemed unconstitutional. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972)

explain why marriage was a necessary component for passing down citizenship in the first instance. The presumptive role of the nonmarried father was scrutinized, with the presumptive role of the unmarried mother in the background. Although that presumption was finally struck down in *Morales-Santana*, the presumption that only marital children are the issue of their parents was never in question in these cases. Thus, the Department of State's Foreign Affairs Manual (FAM) continues to direct its officers to scrutinize the parental relationship of nonmarital children.[308] The marriage preference is clear in these cases, requiring that nonmarital parents do much more than married parents to justify citizenship for their children.

2. I Have Two Moms: The Heterosexual Marriage Preference, the LGBTQIA Partnership, and Artificial Insemination

The rules regarding nonmarital children seep into the interpretation of the INA as it applies to same-sex married couples. The assumption that children born within a marriage are more deserving than nonmarital children gives the agency leeway to define the category of the nonmarital child. The agency has determined in several ART cases that, in effect, even some marital children can be considered "nonmarital." The agency's interpretation reveals a bias in favor of heterosexual marriage.

The preference for *heterosexual* marriage reveals itself when we consider the children of same-sex partners conceived through artificial insemination. The INA continues to be silent on gay marriage, although the immigration agency under the Obama administration announced that it would recognize gay marriage as valid under immigration law after the Supreme Court's decision in *United States v. Windsor*.[309] There, the Court struck down the Defense of Marriage Act, holding that its prohibition of same-sex marriage violated the Equal Protection Clause.[310] Shortly thereafter, the Department of Homeland Security issued a guideline instructing the agency to recognize same-sex marriage as a valid marriage for immigration law purposes.[311] At the same time, in the face of

(holding that presumptions that "distinguish[ ] and burden[ ] all unwed fathers" are repugnant and violate the Equal Protection Clause").

308. 8 FOREIGN AFFAIRS MANUAL § 301.4-1(D)(1)(b)(1) (U.S. DEP'T OF STATE 2018) ("Section 309(a) INA (8 U.S.C. 1409(a)), as amended on November 14, 1986, specifies that the blood relationship of a child born out of wedlock to a U.S. citizen father must be established by clear and convincing evidence. This standard generally means that the evidence must produce a firm belief in the truth of the facts asserted that is beyond a preponderance but does not reach the certainty required for proof beyond a reasonable doubt. There are no specific items of evidence that must be presented. DNA tests are not required, but may be submitted and can help resolve cases in which other available evidence is insufficient to establish the relationship.").

309. 133 S. Ct. 2675, 2682 (2013).

310. *Id.*

311. Press Release, Janet Napolitano, Sec'y of Dep't of Homeland Sec., Statement by Secretary

congressional silence, the agency has opted to treat children born through ART like nonmarital children.

Take the case of Allison Blixt and Stefania Zaccari and their children. Blixt is a U.S. citizen married to Zaccari, an Italian citizen.[312] Both parents are listed on the birth certificate of their son, Lucas, who was born in London.[313] Stefania was artificially inseminated.[314] Because Blixt could not prove that her son was a blood relative, the state department refused to register the child as a U.S. citizen.[315] The state department's rules require a showing of a biological or genetic link between the parent and child for transmission of citizenship.[316]

The Foreign Affairs Manual for the agency, used by field officers to guide their decisions, describes what should happen in the case of a child born abroad to same-sex couples. The FAM requires officers to seek biological proof of a relationship in certain instances, including birth through ART.[317]

Although not completely determinative, children born in wedlock to heterosexual parents start with a *presumption* that they are the issue of the marriage.[318] No such presumption exists for same-sex couples because the question of artificial insemination always lingers. Thus, while the rule affects heterosexual parents who undergo artificial insemination, it unduly targets same-sex couples for whom ART always raises questions about the blood relationship between parent and child.

There may be other avenues in the statute to recognize the relationship between Allison and her child. Allison may qualify as the child's stepmother, for example. The agency's interpretation of the statute,

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of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), https://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court [https://perma.cc/5P3R-MKU3].

312. Maria Sacchetti, *In Lawsuits, Same-Sex Couples Say U.S. Wrongly Denied Their Children Citizenship*, WASH. POST (Jan. 22, 2018, 9:29 AM), https://www.washingtonpost.com/local/immigration/in-lawsuits-same-sex-couples-say-us-wrongly-denied-their-children-citizenship/2018/01/22/1c83c98a-fd34-11e7-8f66-2df0b94bb98a_story.html?utm_term=.761f33e26adb [https://perma.cc/HHL5-NFSZ].

313. *Id.*

314. *See id.*

315. *See id.*

316. *Id.*

317. 8 FOREIGN AFFAIRS MANUAL § 301.4-1(D)(1)(a) (U.S. DEP'T OF STATE 2018) ("The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.").

318. *Id.* § 301.4-1(D)(1)(d).

however, has been facilitated by the creation and maintenance of the nonmarital child category. The anachronistic view of children is now deployed in new and evolving ways even as the family moves away from the traditional heterosexual marriage. Consequently, in the ART cases, officers require proof of a blood relationship even if the parents are married,[319] a framework descending from the nonmarital child category.

3. I Have Two Dads: The Marriage Preference and Surrogacy Arrangements

As with artificial insemination, children experience the discriminatory preference for the two-U.S.-citizen, heterosexual married couple in immigration law when the child is conceived through a surrogacy agreement.[320] Take the seemingly simple case of Derek Mize and Jonathan Gregg.[321] Both are U.S. citizens.[322] Jonathan lived in England most of his life, and moved to the United States to live with Derek.[323] They married in New York and settled in Decatur, Georgia.[324] When they decided to have a child, they entered into a surrogacy agreement with a surrogate in England, and they used Jonathan's sperm.[325] Their daughter Simone was born in England, where the surrogate lived.[326] Here is where immigration law's preference for the heterosexual married family unit kicks in. First, the agency refused to treat Derek and Jonathan as a U.S. citizen married couple. Instead, it invoked a rule that all children born through ART would be DNA-tested and evaluated according to the citizenship of the biological parents.[327] While the rule, on its face, affects all ART families, it has a much greater effect on same-sex parents, because all same-sex marriages are subject to it. Thus, the statute applies presumptively only to children born within a traditional heterosexual marriage. The same-sex marriage is treated according to the rules for a nonmarital relationship.

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319. *Id.* §§ 304.3, 304.1-2. Blixt recently filed a lawsuit challenging the State Department's rule. *See* Blixt v. U.S. Dep't of State, No. 1:18-cv-00124-EGS-RMM (D.D.C. filed Jan. 22, 2018).

320. *See* 8 FOREIGN AFFAIRS MANUAL § 304.3-4 (DEP'T OF STATE 2018). Surrogacy and other forms of ART give rise to doubt in the biological relationship (and, therefore, parentage) between a U.S. citizen and a child, even if the child is born in wedlock. In these cases, an officer can seek more evidence to establish the parent-child relationship.

321. Complaint for Declaratory and Injunctive Relief, Mize v. Pompeo, No. 1:19-cv-3331-MLB (N.D. Ga. July 29, 2019).

322. *Id.* at 2.

323. *Id.* at 5, 15.

324. *Id.* at 2, 15, 18.

325. *Id.* at 2.

326. *Id.*

327. *See id.* at 3.

In the case of Jonathan Gregg, the consequences are compounded. The surrogate is a British citizen.[328] The immigration agency treats Simone as the nonmarital child of a U.S. citizen and foreign-born spouse.[329] So, not only must Jonathan "legitimate" Simone—a requirement that is typically not required when a child is born within a marriage—but he must also meet the five-year physical presence requirement left intact after *Morales-Santana*.[330] Jonathan did not live in the United States the required five years before moving to England, so he cannot pass his citizenship to Simone as a result. In July 2019, Mize and Gregg sued the federal government to enforce the Equal Protection Clause, and this case is sure to reveal the issues we address in this Article.[331]

A similar case produced results that are just as illogical as those in the Mize-Gregg scenario. Andrew Dvash-Banks (a U.S. citizen) and Elad Dvash-Banks (an Israeli citizen), a married gay couple, fathered twins through artificial insemination with a surrogate in Canada.[332] The couple inseminated a Canadian surrogate with sperm from each spouse, resulting in the birth of twins, A.J. and E.J., in Canada.[333] When the couple sought passports for the twins, the immigration agency interpreted the immigration statute to require DNA testing for the twins.[334] In other words, instead of treating the children as the marital children of a U.S. citizen parent, the agency treated the children as the nonmarital children of a U.S. citizen father and the Canadian surrogate mother.[335] The result was that DNA testing became the key to establishing the blood relationship with the U.S. citizen parent. E.J., who did not have Andrew's DNA, could not derive citizenship, according to the agency, even though the child was born within the

328. *Id.* at 2.

329. *Id.* at 3.

330. This case illustrates the problem with leaving the five-year requirement intact. We acknowledge that to place nonmarital children in the same status as marital children, the statute would need to eliminate both the "legitimation" requirement and the five-year physical presence requirement. The Gregg-Mize case illustrates the consequences of not doing so, and the real differences that the requirement creates between the traditional heterosexual married couple and everyone else. We also recognize that if we put the nonmarital child and the marital child on the same level, there would still be a difference between the marital child of a marriage between two U.S. citizens and that of a U.S. citizen and a foreign-born spouse. The latter would still have a five-year physical presence requirement. Some might argue that the real problem in the statute is not a marriage preference, but a preference for the two-U.S.-citizen marriage. This case makes clear that, as we have argued, the real preference is a historical one for the traditional, heterosexual marriage above all else. This case reveals, also, that the five-year requirement may also be anachronistic as our notions of family and the filial bond evolve. As ART technologies progress, there may be as many as five parents of a child (the sperm donor, the egg donor, the surrogate, and the two parents), and the immigration citizenship rules are simply inadequate to accommodate such arrangements.

331. Complaint for Declaratory and Injunctive Relief, *supra* note 321.

332. Sacchetti, *supra* note 312.

333. *Id.*

334. *Id.*

335. *Id.*

marriage.[336] On the other hand, his twin brother, A.J., who shared Andrew's DNA, could derive citizenship. The marriage preference did not work, in other words, to protect the marital child of a gay marriage because the family did not fit the paradigmatic profile of the preferred heterosexual married couple. Ultimately, the difference between nonmarital and marital children surfaced in this case to create different treatment for twins born from a surrogate relationship.

When the couple sued, the district court judge granted citizenship to E.J., noting that the statute was silent about the need to prove a biological relationship between the marital child and his parents.[337] The court interpreted the statute as not creating such a requirement. It focused on the fact of the couple's marriage, thereby reinforcing that there is a difference between the citizenship requirements for marital and nonmarital children.[338] The court refused, however, to grant a declaratory judgment requiring the agency to treat all children within a same-sex marriage as marital children.[339] These cases demonstrate that the marriage preference does not work in immigration law to protect the marital child in same-sex marriages. These families do not fit the paradigmatic profile of the preferred heterosexual married couple. These are the anomalies created from treating nonmarital and marital children differently, but also from having a paradigmatic marriage preference for the two-U.S.-citizen heterosexual married family. If there were no difference between nonmarital and marital parents, the U.S. citizen father would pass on his citizenship simply by showing ties (in this case a nuclear family) to the child.

That the agency required DNA testing at all for this case demonstrates that the agency still thinks about children born within a U.S.-citizen heterosexual marriage as the norm. Its anti-fraud rationales continue to motivate stereotypes about the "normal" way to have kids: all but the two-U.S.-citizen paradigm must continue to jump through hoops to establish citizenship.

C. Dismantling the Marriage Preference

Some might ask why the preference for U.S. citizen married parents should not be enforced. It seems rational to bestow a most-preferred status on the children of a U.S. citizen marriage. This conceptualization distorts the issue because it focuses on U.S. citizenship rather than on marriage. It

336. *Id.*
337. *See* Judgment at 5, Dvash-Banks v. Pompeo, No. 2:18 cv-00523-JFW-JC (C.D. Cal. Mar. 6, 2019).
338. *Id.*
339. *Id.*

is the heterosexual marriage preference that is both outdated and ahistorical. It is ahistorical because it fails to account for early derivation rules and the stereotypes on which they were based. It is outdated because it is entrenched at a time when states are ridding their family laws of marriage-preference-based rules, and it fails to recognize how families are evolving.

The marriage preference rooted itself in citizenship law at the same time that citizenship became the racialized marker of inclusion in the polity. The preferred status of the two-citizen married couple reflects the federal government's long-time race-based efforts to exclude from citizenship those who did not fit within the conception of American. That conception included nonmarital families, and often these were also families excluded based on race. The "othering" of nonmarital families was, in other words, part of the race-based "othering" of nonwhite residents seeking citizenship.

Ironically, early congressional pronouncements about the relationship between fathers and their nonmarital children, as well as mothers and their nonmarital children, might actually point to a sounder set of principles on which to base derivative citizenship. Under the original principles of *filius nullius*, the child of a nonmarital father was not recognized, and, therefore, derived no rights from the father.[340] Immigration law incorporated this principle, then prevalent in state family law.[341] Children of nonmarital mothers, on the other hand, derived rights from their mothers, including citizenship status.[342] When the principle of *filius nullius* began to break down, and nonmarital fathers were allowed to recognize their children through processes such as legitimation, the immigration agency, and later the statute, followed suit, allowing for citizenship derivation as long as fathers legitimated their children under state law. The child was then able to derive citizenship from the nonmarital father from the date of its birth.[343] Importantly, because the relationship was re-recognized as legitimate from birth, the nonmarital child was treated just like a marital child, with the same residency requirements and without a need to establish financial support.[344] In other words, the main driver of citizenship derivation was not marriage but the establishment of the parent-child relationship. This set of principles divorced the determination of derivation from whether the parents were married.

340. *See* Citizenship—Children Born Abroad Out of Wedlock of Am. Fathers and Alien Mothers, 32 Op. Att'y Gen. 162, 164 (1920).

341. FREUND, *supra* note 277, at 10.

342. *See* Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties*, 109 YALE L.J. 1669, 1672 (2000).

343. *See* Citizenship—Children Born Abroad Out of Wedlock of Am. Fathers and Alien Mothers, 32 Op. Att'y Gen. 162, 164 (1920).

344. *Id.*

The introduction of anti-fraud rationales has allowed for what is today a more restrictive derivation scheme for the children of unmarried parents. The stereotype that sustains this scheme is that of the American foreign traveler (usually a military enlistee) trapped into recognizing a child after a one-night stand. The more restrictive provisions in the statute raise the specter of the American needing protection from possible fraudulent claims arising out of such short liaisons. While *Morales-Santana* fixed the gender differential among nonmarital parents by breaking down gender stereotypes, it kept the structural restrictions against the nonmarital parent in place. Now, the old stereotypes protecting the American foreign traveler are still in place, and they apply to both mothers and fathers. The stereotype upholding the restrictions, including the physical presence requirement, makes no sense for nonmarital fathers in an age of easy DNA testing, and it makes less sense for nonmarital mothers. The value in *Morales-Santana* lies in the Court's systematic breakdown of old stereotypes. The same can be done for the stereotypes still undergirding the more restrictive requirements for nonmarital parents.

CONCLUSION

This Article drew attention to the unnoticed ongoing discriminatory treatment of nonmarital children in derivative citizenship law. The conventional narrative about parentage law is that although historically, the law unjustly punished children who were born out of wedlock, equal protection principles today provide that all children have the same rights, regardless of their parents' marital status. This narrative, however, is incomplete. As we argued in this Article, it overlooks the harsh treatment that nonmarital children who are born abroad experience in seeking to derive citizenship from their unwed U.S. citizen parents. In particular, this Article contended that derivative citizenship rules impose onerous rules on nonmarital children based on their status. By drawing attention to this ongoing unconstitutional treatment of nonmarital children, this Article revealed the extent to which derivative citizenship rules have escaped the progressive turn in parentage law that began in the 1960s. Additionally, this Article demonstrated how citizenship rules affect not only parentage law but marriage law as well by punishing those who are unmarried and in effect promoting the traditional family. Our analysis revealed the extent to which marriage does the work of ensuring a family relationship in immigration law.

In drawing attention to this ongoing discriminatory treatment of nonmarital children, we call on Congress to invalidate these illegitimate citizenship rules. Nonmarital children should be treated the same as marital

children, in recognition of evolved family law constructs for acknowledging parentage. Once a child is recognized by a parent, the child should have all the rights inherent in being a child, including citizenship. To that end, Congress should eliminate 8 U.S.C. § 1409, which creates extra requirements for establishing the filial relationship for nonmarital children. This change should resolve the issues that occur with same-sex marriages, civil unions, or other forms of partnership other than marriage, which are currently analyzed under § 1409.[345]

345. In suggesting our prescription, we recognize that there may be concerns regarding the privileging of children who are the biological children of U.S. citizen unmarried fathers. The debate between biological parentage and other forms of parentage is beyond the scope of this Article.