

LEGITIMATING THE TRANSNATIONAL FAMILY

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ABSTRACT

Legitimation represents a widening chasm at the intersection of immigration and family law. Agencies' and courts' persistent misguided reliance on biology as a paramount dispositive factor in determining who qualifies as a family for the purposes of immigration and nationality is increasingly at odds with family law's growing aspiration of a nuanced, inclusive, and complex vision of the legal family. Immigration and nationality law has been interpreted to significantly privilege parent-child relationships linked by biological connection, despite the Immigration and Nationality Act's (INA) express reliance on state family law frameworks that have evolved beyond that narrow idea. Agencies tasked with enforcement of immigration and nationality laws have gone so far as to add a biological component to family recognition, even when the INA does not require one. This Article argues that the outdated fixation on biology in the enforcement of immigration law is a manifestation of the racially exclusionary and patriarchal ideals that animate the concept of jus sanguinis citizenship, rooted in a xenophobic infatuation with purity of bloodlines. Upholding that regime of biological supremacy has caused legal actors to cling to the otherwise obsolete notion of legitimation, which is derived from archaic social and religious norms. As a result of these perverse policy choices, queer and non-biological transnational families face the harms of non-recognition under immigration and nationality law and of deprivation of the right to automatically confer citizenship from parent to child. This Article argues that biological supremacy based in jus sanguinis is fundamentally flawed as a construct of national belonging. Accordingly, the time has come for jus sanguinis citizenship to be reconceptualized as jus parentis, or parentage right citizenship—a nationality regime based upon parenthood rather than reproduction—in order to give way to a more equitable and rational approach to the conferral of citizenship between parent and child.

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INTRODUCTION

The widely publicized¹ case of the Dvash-Banks twins draws into focus the pernicious absurdity of a singular focus on biology as the determinative

¹ See, e.g., Associated Press & Brooke Sopelsa, *Gay couple sues U.S. after twin son's citizenship is denied*, NBC NEWS (Jan. 24, 2018), www.nbcnews.com/feature/nbc-out/gay-couple-sues-state-dept-after-one-twin-s-u-n840661 [https://perma.cc/G25Z-AJZ7] (news coverage of the Dvash-Banks case); Tom Embury-Dennis, *Gay couple sue US government after only one of their twins receives citizenship*, INDEPENDENT (Jan. 25, 2018), www.independent.co.uk/news/world/americas/gay-couple-twins-citizenship-us-

factor in defining the parent-child relationship for the purpose of nationality law.² When twins Ethan and Aiden Dvash-Banks were born in September of 2016, Aiden was deemed an American citizen at birth, while Ethan was deemed an alien.³ Although Aiden and Ethan were gestated and born together, and shared one set of legal parents, this case of Schrodinger's babies⁴ turned on a single factor: the portion of DNA that was not shared between these fraternal twins. That biological detail, above all other facts of these twins' lives, was what the U.S. Department of State used to determine that Aiden should be welcomed as an American citizen at birth, while Ethan should be a non-citizen. Thus, the twins did not share the same citizenship at birth, even though they shared the same legal parents and were conceived, gestated, and born together.

Ethan and Aiden Dvash-Banks were born to Andrew and Elad Dvash-Banks, a married same-sex couple who obtained anonymous donor eggs and contracted a surrogate to carry and deliver their twins.⁵ Andrew and Elad chose to use sperm from both fathers to conceive the twins.⁶ Andrew, a U.S. citizen, contributed a gamete to Aiden's conception; and Elad, a non-citizen, contributed a gamete to Ethan's conception. The twins were conceived, gestated, and born in Canada, which recognized only Andrew and Elad as their parents.⁷ Since well before the twins were conceived, their fathers wanted to

government-sues-dvash-banks-a8177121.html [https://perma.cc/4U8T-EF6H] (same); Leila Fadel, *Same-Sex Couples Sue U.S. Government For Kids' Citizenship*, NPR (Jan. 26, 2018), www.npr.org/2018/01/26/580918004/same-sex-couples-sue-u-s-government-for-kids-citizenship [https://perma.cc/9G96-NVPR] (same); Alene Tchekmedyan, *These Twins Were Born 4 Minutes Apart. But Only One Is a U.S. Citizen*, L.A. TIMES, Jan. 27, 2018, www.latimes.com/local/lanow/la-me-ln-twins-citizenship-20180127-story.html [https://perma.cc/T4BP-LYK2] (same); Fox News, *Gay couple sues after 1 twin's US citizenship denied*, FOX NEWS (Jan. 24, 2018), www.foxnews.com/us/2018/01/24/gay-couple-sues-after-1-twins-us-citizenship-denied.html [https://perma.cc/3CJK-6CDU] (same); Maria Sacchetti, *In lawsuits, same-sex couples say U.S. wrongly denied their children citizenship*, WASH. POST, Jan. 22, 2018, 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 [https://perma.cc/3LUZ-3W6Q] (same).

² The United States is not alone in its struggle to reconcile the new realities of assisted reproductive technology. Similar cases have arisen in other countries around the world, including in Ukraine and Japan. See Costica Dumbrava, *Bloodlines and Belonging: Time to Abandon Jus Sanguinis?*, in *BLOODLINES AND BELONGING: TIME TO ABANDON JUS SANGUINIS?* 2 (Costica Dumbrava & Rainer Bauböck eds. 2015) (EUI Working Paper RSCAS 2015/80) (noting similar situations in Belgian and Japan).

³ See Associated Press & Brooke Sopelsa, *supra* note 1.

⁴ The Dvash-Banks twins, born with the same legal parents, consist of one U.S. citizen and one non-citizen. They cannot be reliably distinguished without DNA testing. Their parents planned not to tell them which child was biologically related to which parent. Compl. at 12, *Dvash-Banks v. U.S. Dep't of State*, No. 2:18-cv-00523, 2018 WL 550224 (C.D. Cal. 2018) (hereinafter "Dvash-Banks Compl."). In the absence of such testing, they each, like Schrodinger's cat, simultaneously exist in two opposing states: citizen and non-citizen.

⁵ Associated Press & Brooke Sopelsa, *supra* note 1.

⁶ See *id.*

⁷ Dvash-Banks Compl., *supra* note 4, at 1.

have children together.⁸ Andrew and Elad believed that both twins qualified at birth as U.S. citizens.⁹ The couple alleged that the twins qualified as citizens under section 301(g) of the Immigration and Nationality Act (INA),¹⁰ which states that a child born abroad is a U.S. citizen at birth if one of that child's married parents is a U.S. citizen who satisfies a residency requirement.¹¹ Although Andrew was Ethan's legal father, was a U.S. citizen, and satisfied the residency requirement, the Department of State found that Ethan did not qualify as a child born in wedlock under section 301(g), because a child born in wedlock "means that the child's *biological* parents were married to each other at the time of the birth of the child."¹²

The Dvash-Banks case was recently resolved in the Central District of California, which ruled that Ethan was, in fact, a U.S. citizen at birth, under INA section 301(g).¹³ This ruling represents an important step, but that case alone does not end the pervasive obsession with biological parentage in immigration and nationality law matters as adjudicated in both courts and federal agencies. The fact that the Department of State even contested the Dvash-Banks case in federal court is troubling. Similar cases remain pending. For example, Part II.C. will discuss a Kansas district court case that recently upheld the supremacy of biological parenthood.¹⁴ That case is now pending in the Tenth Circuit Court of Appeals.¹⁵ Further, around the same time the Dvash-Banks case surfaced, early in 2018, a strikingly similar story emerged in a case that remains pending in federal court in the District of Columbia.¹⁶

The Zaccari-Blixts, a mixed-nationality married lesbian couple, also had two children whose nationality was recognized differently by the U.S. government. American Allison Blixt and her Italian wife, Stefania Zaccari, had two children while married and living abroad.¹⁷ One of the Zaccari-Blixt children was deemed a citizen because he was conceived using Allison's gamete and gestated by Allison; the other was deemed a non-citizen because

⁸ See *id.* at 11 ("In the summer of 2015, Andrew and Elad selected an anonymous egg donor to enable them to have and raise children as a couple.").

⁹ See *id.* at 12.

¹⁰ 8 U.S.C. 1401(g).

¹¹ Dvash-Banks Compl., *supra* note 4, at 12–13.

¹² *Id.* at 5 (citing U.S. DEP'T. OF STATE, FOREIGN AFFAIRS MANUAL 8 FAM 304.1-1(d)(1) (2018), <https://fam.state.gov/fam/08fam/08fam030401.html> [<https://perma.cc/L5W8-PWKC>]) (emphasis added).

¹³ Order Granting in Part and Denying in Part Pls.' Mot. for Partial Summ. J. & Order Granting in Part and Denying in Part Def.'s Mot. for Partial Summ. J., at 7–10, *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCX), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019).

¹⁴ Mem. & Order at 28, *Schreiber v. McCament*, 349 F. Supp. 3d 1063 (D. Kan 2018) (No. 2:17-2371).

¹⁵ *Schreiber v. Cissna*, No. 18-3215 (10th Cir. filed Oct. 9, 2018).

¹⁶ *Blixt v. U.S. Dep't of State*, No. 18-124, 2018 WL 5001371 (D.D.C. filed Jan. 22, 2018).

¹⁷ See Compl. at 1, *Blixt v. U.S. Dep't of State*, No. 18-124, 2018 WL 5001371 (D.C. Jan. 22, 2018) (hereinafter "Blixt Compl."); Sacchetti, *supra* note 1.

he was conceived using Stefania's gamete and gestated by Stefania.¹⁸ Although the Zaccari-Blixt case garnered less media attention, potentially because the children are not twins, the stories are quite similar and both families are represented by Immigration Equality.¹⁹ Both the Zaccari-Blixts and the Dvash-Bankses were denied full recognition by the United States because they did not share the right kind of connection—a biological one. Both families also lacked a heteronormative family structure representative of a biological connection, in which a female partner is presumed to be the mother and a male partner is presumed to be the father of the couple's child.

The persistence of this kind of biological supremacy²⁰ in the interpretation of family-based immigration and nationality law, despite evolving legal and social concepts of family and parentage in other areas of law, particularly family law, has troubled scholars.²¹ However, this persistence is unsurprising given the conceptual mandate of *jus sanguinis* that undergirds heritable citizenship. *Jus sanguinis* is a framework fundamentally animated by the sanctity of a pure ethno-national bloodline.²² This theoretical imperative, like the results it sometimes produces in the adjudication of nationality, is antithetical to the aspirational American values of justice: ethnic diversity, free association, gender equity, and bodily autonomy. While statutory and judicial approaches to ameliorate the problem of biological supremacy have

¹⁸ See Blixt Compl., *supra* note 17, at 1–2.

¹⁹ See *id.* at 14 (listing one of the attorneys for the plaintiffs as being from Immigration Equality); Dvash-Banks Compl., *supra* note 4, at 1 (C.D. Cal. 2018) (same).

²⁰ In this Article, I will use the term “biological supremacy” to mean the exaltation of biological ties over all other connections that form or distinguish the parent-child relationship. In selecting this phrase, I build upon Serena Mayeri and other scholars' work on marital supremacy. See Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1280, 1284, 1284–85 n.24, 1288–89, 1297 (2015) (using “marital supremacy” to refer broadly to the legal privileging of marriage over non-marriage, and marital over nonmarital families”) (noting other uses of “marital supremacy” in Elizabeth Freeman, *The Wedding Complex: Forms of Belonging in Modern American Culture* xiv, 6, 86 (2002); Elizabeth H. Pleck, *Not Just Roommates: Cohabitation After the Sexual Revolution* 25, 44 (2012).

²¹ See, e.g., Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2260, 2265–66 (2017) (critiquing the perpetuation of gendered stereotypes in courts' and legislatures' treatment of families formed by ART); see Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 277–78, 298–99, 303, 306 (2014) [hereinafter *Removing Citizens*] (criticizing the government's overreliance on DNA tests in immigration court); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2134 (2014) [hereinafter *Illegitimate Borders*] (arguing “an important yet overlooked reason for the development of gender- and marriage-based derivative citizenship law—*jus sanguinis* citizenship—was officials' felt need to enforce the racially nativist policies that were a core component of American nationality law for over 150 years”); but see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 652–55, 673–75, 682–84 (2014) (arguing that the divergence between how family law and immigration law recognize families is a natural consequence of differing priorities in each system).

²² See Dumbrava, *supra* note 2; Kerry Abrams, *No More Blood* (EUI Working Paper RSCAS 2015/80 27, 2015) [hereinafter *No More Blood*] (“It is this obsession with genetic purity that has linked *jus sanguinis* to tribalism, xenophobia, and even genocide”).

been proposed,²³ this Article takes the position that those remedies will be insufficient without revisiting the theoretical framework upon which *jus sanguinis* citizenship is built. In the absence of such a fundamental realignment, the mandate of *jus sanguinis* will continue to drive law and policy in this area, leading to problematic results. This Article, therefore, argues that the time has come for blood right citizenship to be reconceptualized as parentage right citizenship (or *jus parentis*), a nationality regime based upon parenthood, rather than biological lineage.

Part I begins with a discussion of the doctrinal foundation of American birthright citizenship and its conceptual relationship to the family-based immigration system. An exploration of the theoretical underpinnings of *jus sanguinis* reveals ethno-nationalist, patriarchal, and sexual conformist ideologies deeply intertwined with a vision of national belonging premised on ethnic purity as achieved through patriarchal heteronormative control. Part II traces the evolution of legitimacy and family outside of immigration law. That journey begins with the troubling history of illegitimacy as a social and legal status, proceeds through the rapid decline of illegitimacy under equal protection doctrine, and concludes with a discussion of the rise of a construction of family that is defined by the best interest of the child, intent to parent, and the functional performance of parenthood. Though family courts, lawmakers, and scholars in the family law realm have no easy answer to the question of what makes a parent, there is little remaining doubt the answer is more than simple biology. Part III explores the divergent path of immigration and nationality law's definition of the parent-child relationship, starting with the immigration and nationality exception to equal protection for nonmarital children (or so-called "illegitimates"). Recent Supreme Court caselaw, particularly *Morales-Santana*, partially unsettle the immigration and nationality exception to equal protection, but do not topple the reign of biological supremacy in immigration and nationality law. Finally, Part IV returns to the origin of biological supremacy in immigration and nationality law—*jus sanguinis*—and argues that the time has come to relinquish the problematic ideological construct of blood as belonging. Instead, *jus sanguinis* ought to be reconceptualized as *jus parentis* (right of the parent), a belonging premised on parentage as determined by state (and foreign) family laws.²⁴ That shift would disempower the regressive biological supremacy that currently infects immigration and nationality law and insists upon the relevancy of the otherwise dead concept of legitimation. In embracing *jus parentis*, agencies tasked with implementing immigration and nationality law should defer to state and foreign civil court determinations of parentage

²³ Hong, *Removing Citizens*, *supra* note 21, at 278, 347–54.

²⁴ This Article proposes allowing a family to choose, for the purposes of immigration and nationality law, to apply the laws of the jurisdiction where the parent-child relationship was initiated or the laws of the U.S. state where the child or parent live or intend to live. For further discussion, *see infra* Part IV.

and relinquish the imposition of biological supremacy on the parent-child relationship.

I. BLOOD LINES: THE CONSTRUCTION OF CITIZENSHIP

A close examination of the theoretical framework of birthright citizenship in the United States helps explain why biological supremacy has taken such a strong hold in immigration and nationality law. As a foundation for further analysis, this section will define and briefly explore the two dominant forms of birthright citizenship utilized around the world: *jus soli* (“right of soil” citizenship acquired through birth within a country’s territory) and *jus sanguinis* (“right of blood” citizenship acquired through a relationship to citizen parents). Although many countries employ just one of these doctrines, both operate in U.S. law. Comparing *jus soli* and *jus sanguinis* highlights the dark ideological underpinnings of *jus sanguinis* nationality, which not only constitutes a meaningful portion of American birthright citizenship, but also forms the conceptual and analytical basis for much of American family-based immigration. In both nature and effect, *jus sanguinis* has troubling implications for U.S. nationality law, animated by race-based exclusionism and reliant upon heterosexist patriarchal dominance to carry out that racist mandate.

The significance of this analysis is that *jus sanguinis* is inextricably linked to a narrow, regressive vision of blood-based belonging, as applied in both nationality and immigration. By the logic of *jus sanguinis*, blood relationships determine belonging in both family and nation. That vision of belonging means that lineage—and, more specifically, race—plays a central role in *jus sanguinis* citizenship. Likewise, sexual conformity is an integral feature of *jus sanguinis* because it fails to fully recognize same-sex couples as parents.

Because *jus sanguinis* is so deeply focused on purity of lineage, it is no surprise that immigration and nationality law, premised upon the doctrine of blood as belonging, remains fixated on the antiquated biological notion of legitimation, well past its utility or usage in any other field of law. If blood is belonging, then the social construct of parentage means little compared to the biological “fact” of legitimation.²⁵ Thus, *jus sanguinis* is the conceptual antecedent to the pernicious biological supremacy found in immigration and

²⁵ Paradoxically, until blood typing and DNA testing became widely available, paternity presumptions in family law relied upon the “fact” of a genetic link between father and child as evidenced by marriage to the mother or the father’s affirmative acknowledgment of paternity. The presumption of maternity has historically been treated with near absolute credulity. Although maternity has traditionally been seen as easily verifiable—as Justice Stevens said, “[t]he blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates,” *Miller v. Albright*, 523 U.S. 420, 436 (1998)—it has not been unheard of throughout history for women to hide a pregnancy and pass off a child as someone else’s. This is just one example of how clumsy gendered assumptions about parentage serve social norms and

nationality law, and xenophobic exclusionism operationalized through sexual and reproductive control of women and queer people is an integral part of that story.

A. Birthright Citizenship

Birthright citizenship, as its name suggests, describes a legal doctrine of entitlement to nationality at birth. In a functional sense, it is the question of how innate nationality is granted and verified. There are two primary forms of birthright citizenship utilized by countries around the world: *jus soli* and *jus sanguinis*.²⁶ The United States recognizes both forms.²⁷

In an ideological sense, birthright citizenship raises some of the deepest political, spiritual, and moral questions faced by any society: who are we and who do we want to be? In this examination of the underpinnings of birthright citizenship in the United States, we find uncomfortable answers to these questions: for centuries, who we wanted to be, as evinced by a constellation of racially targeted immigration laws, was a nation of straight white Christian men. While the Thirteenth and Fourteenth Amendments transformed the constituency of the United States, racial exclusion remained a dominant feature of immigration and nationality law.²⁸ Today, a narrowly circumscribed *jus sanguinis* doctrine persists as an outdated but powerful tool of ethno-nationalism animated by a patriarchal heterosexist dominance paradigm.

1. Jus Soli: *Belonging by Birthplace*

Jus soli, or “right of soil,” is the principle that a person born inside the borders of a nation is a citizen at birth.²⁹ It is premised in a notion of belonging by virtue of being born inside a country’s territory, as opposed to belong-

reproductive conformity rather than representing real objective truths about each individual family.

²⁶ See Collins, *Illegitimate Borders*, *supra* note 21, at 2219–20 n.340 (discussing the “modern birthright citizenship regimes, *jus sanguinis* and *jus soli*”).

²⁷ See Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 198 (2010).

²⁸ See, e.g., An Act to Establish an Uniform Rule of Naturalization, 1st Cong., Sess. 2, ch. 3, 1 Stat. 103 (1790); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (holding resident non-citizens could be refused entry in the U.S. on the basis of race); *Fong Yue Ting v. United States*, 149 U.S. 698, 723–24 (1893) (holding non-citizen legal residents could be removed because of their race). See also Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–15 (1998) (providing an overview of discriminatory immigration laws); Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255, 264–67, 269, 272 (2008) (describing the racist elements of early immigration and nationality law).

²⁹ See, e.g., Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1682 (2017) (defining *jus soli* citizenship).

ing based on ethnic identity. This principle is enshrined in the Fourteenth Amendment to the Constitution: “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”³⁰ American *jus soli*, following the British common law tradition,³¹ stood in contrast to the prevailing legal approach to citizenship in Europe as a rebuke of colonial Europe’s ethno-nationalist vision of citizenship and belonging. *Jus soli* was an egalitarian approach to deciding who deserved to belong in America—a belonging of being, rather than lineage. In an era when laws about immigration and naturalization were deeply marred by overt racism,³² birthright citizenship offered a different vision of American identity. In 1868, Justice Gray wrote in *United States v. Wong Kim Ark* that the Fourteenth Amendment “affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens.”³³

2. Jus Sanguinis: *Belonging by Blood*

Jus sanguinis, or “right of blood,” is the doctrine of heritable nationality.³⁴ This was added to American nationality law by statute in order to allow U.S. citizens to pass on their nationality to their children born outside the territorial boundaries of the United States.³⁵ American *jus sanguinis* citizenship is codified primarily in section 301 of the Immigration and Nationality Act, which provides birthright citizenship to an individual born outside the United States and its territories based upon the nationality and residency of the individual’s parents.³⁶ Inherent in section 301 is the assumption that a child’s parents are married at the time that child is born. Section 309 of the INA specifies, in highly gendered terms, the conditions under which section 301 is applicable to children born out of wedlock.³⁷ By equating blood with family, the INA, consistent with family law at the time, created a scheme of tracing lineage that was very different for mothers and fathers. Specifically,

³⁰ U.S. CONST. amend. XIV, § 1. *See also* INA 301(a), 8 U.S.C. 1401(a) (“The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof; (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property . . .”).

³¹ Villazor, *supra* note 29, at 1682 (“The concept of acquiring citizenship by birth stems from English common law. *Calvin v. Smith*, a foundational case decided in 1608, held that persons born in Scotland—then within the sovereignty of the King of England—were English subjects.”) (citing *Calvin’s Case* (1608), 77 Eng. Rep. 377, 7 Co. Rep. 1 a).

³² *See* Hernández-López, *supra* note 28.

³³ *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

³⁴ *See* Villazor, *supra* note 29.

³⁵ *See id.* at 1683.

³⁶ 8 U.S.C. § 1408.

³⁷ *See id.* § 1409.

when conferring citizenship upon a child born abroad, unmarried U.S. citizen mothers have faced fewer restrictions and shorter residency requirements than unmarried U.S. citizen fathers.³⁸ Until recently, those gender-based distinctions have largely remained.³⁹

3. *Roots of Family-Based Immigration*

The principles of *jus sanguinis* also form a large part of the theoretical foundation of the United States' family-based immigration system,⁴⁰ and the two share a common definition of the parent-child relationship.⁴¹ One of the fundamental values that shapes American immigration law, albeit imperfectly, is family unity. Immigration law seeks, at least in part, to allow families to live together by passing immigration status from one family member to another. One vital detail in family-based immigration is, of course, who counts as family. In answering that question, family-based immigration laws rely upon the same conceptual assumptions and understandings as *jus sanguinis* citizenship.

The parent-child relationship in the context of family-based immigration is defined in similar terms, and with similar gender disparities, as in the birthright citizenship context. Specifically, the qualifying parent-child relationship is outlined in INA section 101(b), which defines "child" and "parent."⁴² The precise edges of this definition are critically important to U.S. citizen and resident parents seeking to sponsor their children for immigration benefits. Further, how the parent-child relationship is defined is also crucial in cases of U.S. citizen and legal permanent resident children sponsoring their parents for immigration benefits. The case of *Schreiber v. McCamert*, discussed in Part II.C., illuminated the ways in which the blood-bound principles of *jus sanguinis* have illogically infected family-based immigration through a biological supremacist interpretation of the concept of legitimation.

B. *Bad Blood*

In many ways, the constitutional framers were right to be skeptical of *jus sanguinis* citizenship. It is a nationality regime premised on the notion of genetic purity as political identity. Given the historical instability of blood-based kinship, although genetic ties did not serve as "the basis of the legal

³⁸ *Id.* But see *Sessions v. Morales-Santana*, ___ U.S. ___, ___, 137 S. Ct. 1678, 1700–01 (2017) (striking down gender-based distinction in §§ 1401(a)(7) and 1409(a) and (c)).

³⁹ 8 U.S.C. § 1409. For more details on the precise contours of *jus sanguinis* citizenship, see generally Hong, *supra* note 21 (presenting the derivative citizenship scheme).

⁴⁰ See Collins, *Illegitimate Borders*, *supra* note 21, at 2219 (noting "the complex interrelationship of family-based immigration preferences and derivative citizenship law").

⁴¹ 8 U.S.C. § 1101(b)(1)(B).

⁴² 8 U.S.C. § 1101(b).

practice of *jus sanguinis*, but only its myth,⁴³ it has been a powerful and consuming myth. Given the history of *jus sanguinis* as a tool of European ethno-nationalism,⁴⁴ there should be no surprise that it has brought similar problems to U.S. law. Both the means and the ends of biological supremacy in nationality law have been the perpetuation of racial exclusion and sexual stereotypes, as embodied in the doctrine of *jus sanguinis*—blood as belonging, regulated through the female body.

Indeed, privileging biological families over other families furthers race-based exclusion in a concrete sense. By exalting blood as the primary (and sometimes exclusive) determiner of a parent-child relationship, legal actors ensure the preservation of an American bloodline as the top priority. Scholars have argued that this is not an accident but the foreseeable—even intentional—consequence of nationality law’s racist values.⁴⁵ Kerry Abrams and Kent Piacenti argue that “immigration and citizenship law use different parentage tests than family law not because lawmakers have failed to properly incorporate family law principles, but because lawmakers’ interests are not the same in diverse contexts.”⁴⁶ Similarly, this focus on biology has agencies and courts clinging to a highly gendered and cisheterosexist regime of family determination based upon sexual stereotypes. Although this regime has been partially unsettled by *Morales-Santana*,⁴⁷ it is far from finished. As will be discussed below, the law continues to focus on blood as kinship and places significant stock in the otherwise obsolete notion of legitimation, which has its roots in an archaic social norm designed to control reproduction and with it, the female body.

1. *Ethno-Nationalism*

Through its nomenclature, history, and function, *jus sanguinis* is premised upon the notion that purity of blood is meaningful and worth preserving and honoring. The troubling foundations of *jus sanguinis* citizenship have been scrutinized by scholars in the U.S. and abroad.⁴⁸ As Dutch scholar

⁴³ Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 707–08 (2011).

⁴⁴ See *infra* Part I.B.1.

⁴⁵ Abrams & Piacenti, *supra* note 21, at 707 (“The practice, for example, of denying citizenship to the children of U.S. citizens born abroad if they were conceived using donor eggs serves no legitimate government purpose—only the historically racist one of keeping American blood lines pure.”); Collins, *Illegitimate Borders*, *supra* note 21, at 2137 (arguing that “a primary and overlooked explanation for the development and durability of gender-asymmetrical *jus sanguinis* citizenship law was the felt need of judges, administrators, and legislators to further the racially nativist policies that were central to American nationality law until 1965”).

⁴⁶ Abrams & Piacenti, *supra* note 21, at 634.

⁴⁷ *Sessions v. Morales-Santana*, ___ U.S. ___, ___, 137 S. Ct. 1678, 1700–01 (2017) (holding gender disparity in INA § 309 unconstitutional). See *infra* Part III.B. for further discussion of *Morales-Santana*.

⁴⁸ Dumbrava, *supra* note 2.

Costica Dumbrava wrote, *jus sanguinis* is “historically tainted because it is rooted in practices and conceptions that rely on ethno-nationalist ideas about political membership.”⁴⁹ Applying that concern to contemporary American nationality law, Kerry Abrams wrote, “The very term *ius sanguinis*—‘right of blood’—makes the genetic tie the sine qua non of belonging. It is this obsession with genetic purity that has linked *ius sanguinis* to tribalism, xenophobia, and even genocide.”⁵⁰ Further, as Kristin Collins has persuasively argued:

[A] primary and overlooked explanation for the development and durability of gender-asymmetrical *jus sanguinis* citizenship law was the felt need of judges, administrators, and legislators to further the racially nativist policies that were central to American nationality law until 1965. At formative moments in the development of American nationality law, gender- and marriage-based domestic relations laws were enlisted by administrators, judges, and legislators to deny the citizenship claims of nonwhite children, especially those who were excludable under the race-based immigration and naturalization laws.⁵¹

The gender-asymmetry of nationality law was “shaped by contemporary norms and mores concerning gender, parental roles, sexuality, and . . . the official imperative to enforce race-based nationality laws.”⁵²

This ethno-nationalism taints and cannot be separated from the conceptual framework of *jus sanguinis*. Blood-as-belonging necessarily rests on the notion that purity of genetic lineage is a way to access membership in the American polity. This ugly reality has been critiqued by scholars,⁵³ but that has made little difference. Although *jus sanguinis* has historically been a social construct or myth, rather than a scientific fact,⁵⁴ that myth has been made real—and even more constraining—by advances in scientific testing. The question we now face is whether we should believe in the construct at

⁴⁹ *Id.* at 1. *But see* Kristin Collins, *Abolishing Ius Sanguinis Citizenship: A Proposal Too Restrained and Too Radical* (EUI Working Paper RSCAS 2015/80 17, 2015) (“Even a cursory review of the historical record thus counsels a cautionary assessment of the contention that *ius sanguinis* citizenship’s tainted past justifies its abolition. First, calls to end *ius sanguinis* citizenship have their own ugly history. Second, although one cannot gainsay that, in certain circumstances, *ius sanguinis* citizenship has been used to maintain ethnic homogeneity, the notion that parents and children do and should share the same political affiliation has also facilitated racial, ethnic, and religious diversification of some political communities. Rather than abolish *ius sanguinis* citizenship wholesale, we should be alert to the ways that it can operate as a tool of ethnic exclusion and degradation in particular socio-legal contexts, and work to minimise those effects”).

⁵⁰ Abrams, *No More Blood*, *supra* note 22, at 27.

⁵¹ Collins, *Illegitimate Borders*, *supra* note 21, at 2137–38 (footnote omitted).

⁵² *Id.* at 2144.

⁵³ *See* Dumbrava, *supra* note 2, at 1–2; Abrams, *No More Blood*, *supra* note 26, at 27.

⁵⁴ Stevens, *supra* note 43, at 707–08.

all given its deep tension with the aspirational American value of ethnic pluralism.

2. *Patriarchy*

Male social and legal dominance has been a fundamental part of American immigration and nationality law since its earliest days. Under the doctrine of coverture or “marital unity,” a non-citizen woman became a citizen upon marrying a U.S. citizen husband.⁵⁵ However, a U.S. citizen woman did not have the same power to confer nationality upon her husband.⁵⁶ In fact, a U.S. citizen woman lost her citizenship when she married a non-citizen.⁵⁷ Gender inequality remained a strong feature of immigration and nationality law throughout the twentieth century. Although some strides were made towards gender equity, progress was incredibly slow and vastly outpaced by the rest of the women’s right movement.⁵⁸ In fact, the Supreme Court continued to justify a gender disparity in the derivative citizenship provisions of the INA well into the twenty-first century.⁵⁹

Although this rampant gender discrimination could be viewed as a manifestation of the patriarchal power structure that permeated other areas of law and society,⁶⁰ the unusual persistence of this discrimination in immigration and nationality law points to a more complicated story. Indeed, the tools of patriarchal gender hierarchy have been enlisted in service of what

⁵⁵ Collins, *Illegitimate Borders*, *supra* note 21, at 2155–56.

⁵⁶ *Id.* at 2156.

⁵⁷ *Id.* (“Indeed, starting with an influential federal appeals court opinion in 1883, the principle of ‘marital unity’ and women’s subordinate and dependent status in marriage translated into laws that stripped American women of their citizenship upon marriage to a foreigner. Congress codified that principle in the Expatriation Act of 1907, and thereby preserved the doctrine of coverture in federal citizenship law” (referencing *Pequignot v. City of Detroit*, 16 F. 211 (C.C.E.D. Mich. 1883) (holding that a woman who became a citizen through her marriage to an American lost her citizenship after her divorce and subsequent marriage to a foreigner) (footnotes omitted)).

⁵⁸ *Id.* at 2157–58 (“Even after 1931, when Congress recognized American women’s right to retain their citizenship upon marriage to a non-citizen, regardless of his race, women’s organizations had to fight several more years to secure citizenship for American women’s foreign-born children. In 1934, married American mothers could, for the first time, secure citizenship for their foreign-born children, although after 1940 their ability to do so was more constrained than that of married American fathers” (footnotes omitted)).

⁵⁹ See *infra* Part III.A.

⁶⁰ See generally 1 WILLIAM BLACKSTONE, COMMENTARIES *441–45 (describing the common law doctrine of coverture, through which a woman’s legal rights were entirely subsumed by her husband); Peggy A. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Women’s Property Acts*, 24 BUFF. L. REV. 683 (1975) (tracing the Married Women’s Property Acts, which effectuated the doctrine of coverture in the U.S.); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 952 (2002) (proposing a “synthetic reading of the Fourteenth and Nineteenth Amendments that would bring to the interpretation of the Equal Protection Clause a knowledge of the family-based status order” such that “a core meaning of equal protection for women is freedom from historic forms of subordination in the family”).

have been called the “racially nativist policies” of immigration and nationality law.⁶¹ This phenomenon is grounded in the ideology of *jus sanguinis*, which places a significant premium on women’s sexual obedience. Throughout various points in Anglo-American history, the maintenance of a bloodline has been achieved through regulation of female sexuality.⁶² Overregulation of female sexual behavior is, in large part, a response to deep-seated male anxiety about genetic contamination in family or nation. Loss of female sexual obedience represented the threat of introducing foreign blood into a family’s—and nation’s—lineage.

Early *jus sanguinis* citizenship law provided that only men could confer citizenship upon their offspring.⁶³ Although *Morales-Santana* represents a strong push against gender discrimination in nationality law, patriarchal ideology still pervades many aspects of the INA and its application by federal agencies. While the methodology has become more subtle, the function of perpetuating the ethnic exclusionism of *jus sanguinis* remains the same.

3. *Sexual and Reproductive Conformity*

A related but distinct feature of a *jus sanguinis*-based construct of citizenship has been the nonrecognition of families created by same-sex parents and others who do not conform to the heteronormative reproduction-oriented family paradigm. Defining parenthood as a biological status rather than a social one denigrates queer families and all those who choose to form families and raise children not genetically related to them. Biological supremacy ensures that same-sex parents, late-in-life mothers, infertile couples, single parents by choice, and other nondominant family structures are excluded

⁶¹ Collins, *Illegitimate Borders*, *supra* note 21, at 2137.

⁶² See generally, e.g., SARA MCDUGALL, *ROYAL BASTARDS: THE BIRTH OF ILLEGITIMACY 800–1230* (2017) (detailing the preservation of royal lineage through the maternal line in 800–1230 C.E.); Kerry Abrams & Peter Brooks, *Marriage As A Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 *YALE J.L. & HUMAN.* 1, 10 (2009) (discussing that pre-1800, adultery was defined as intercourse with a married woman, but not with a married man, because “[s]ex with a married woman . . . might result in a child who was unrelated to her husband becoming that husband’s legal heir.” (emphasis removed)); Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 *CARDOZO L. REV.* 309, 333–34 (1996) (“Through social and criminal sanctions prohibiting sexual contact between white women and Black men, the dominant class sought to guarantee that the boundaries of white lineage were not transgressed and that white bloodlines remained ‘pure.’”) (citing A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEO. L.J.* 1967, 1983 (1989)).

⁶³ Collins, *Illegitimate Borders*, *supra* note 21, at 2157. Nationality law also enforced male dominance by revoking the citizenship of American women who married non-citizens. See *id.* at 2156 (“Indeed, starting with an influential federal appeals court opinion in 1883, the principle of ‘marital unity’ and women’s subordinate and dependent status in marriage translated into laws that stripped American women of their citizenship upon marriage to a foreigner. Congress codified that principle in the Expatriation Act of 1907, and thereby preserved the doctrine of coverture in federal citizenship law.”) (footnote omitted).

from full access to citizenship for their children on the same terms as dominant families. That exclusion advances a normative judgment that queer, infertile, and nonconforming parents are not real parents and their families do not qualify as real families under immigration and nationality law.

Under a blood-bound nationality regime, the children of some queer or otherwise reproductively nonconforming parents will necessarily be excluded from full familial recognition and thereby denied membership in the American polity. This disparity exists despite strides towards equality in other areas of the law.⁶⁴ Again, this is not just an unfortunate side effect of *jus sanguinis*; it is a central feature. Organizing the notion of belonging around (real or implied) genetic lineage serves to police sexual and reproductive conformity. Much as the notion of illegitimacy has been used as a weapon to bring wayward women to heel, the refusal to recognize nondominant family structures reinforces the dominance of a heteronormative reproduction-oriented family paradigm. Given the values of dominant culture in 1965, it is no surprise that the INA would uphold and enforce a white, heterosexual, cisgender, patriarchal, Christian vision of family. Though it may be tempting to imagine we have moved beyond this limited view, Part III demonstrates that sexual and reproductive conformity remains a pressing consideration in the administration of immigration and nationality law.

II. FROM LEGITIMATION TO PARENTAGE IN FAMILY LAW

Despite its persistence in the administration of immigration and nationality law, “legitimation”⁶⁵ has lost power as a legal concept in other areas of law. Once a powerful and well-defined social more and legal doctrine, legitimation has lost value, replaced by the morally neutral concept of parentage in the Uniform Parentage Act and in many states. The discussion below is a

⁶⁴ *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), enshrined a fundamental right to same-sex marriage and represented an important step towards sexual equality, but is far from the end of the struggle for equality for queer Americans. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, __ U.S. ___, 138 S. Ct. 1719 (2018) (holding baker had First Amendment right to refuse to serve same-sex couple); DONALD J. TRUMP, PRESIDENTIAL MEMORANDUM FOR THE SECRETARY OF DEFENSE AND THE SECRETARY OF HOMELAND SECURITY REGARDING MILITARY SERVICE BY TRANSGENDER INDIVIDUALS, 2018 DAILY COMP. PRES. DOC. 188 (Mar. 23, 2018) (disqualifying transgender Americans from serving in the military); HARRIS POLL, ACCELERATING ACCEPTANCE: A SURVEY OF AMERICAN ACCEPTANCE AND ATTITUDES TOWARDS LGBTQ AMERICANS 1, 2 (2018), <https://www.glaad.org/publications/accelerating-acceptance-2018> [<https://perma.cc/47KJ-R4PM>] (indicating that in 2017, for the first time since Harris polling of the issue began, non-LGBTQ Americans’ attitudes towards LGBTQ Americans were more negative than in the prior year).

⁶⁵ The word “legitimation” is evolving and difficult to define for many reasons discussed in this Article. Nonetheless, it may assist the reader to know that the *Black’s Law Dictionary* definition of “legitimation” is “1. The act of making something lawful; authorization. 2. The act or process of authoritatively declaring a person legitimate, esp. a child whose parentage has been unclear.” *Legitimation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

brief overview of the story of legitimation in American law. That story begins with legitimation as a universally accepted concept that could render the a nonmarital child an orphan and a pariah.⁶⁶ After a long struggle to provide rights to so-called illegitimates and their mothers, a series of equal protection challenges essentially destroyed legitimation as a meaningful legal concept in all areas of law with the conspicuous exception of immigration and nationality. Today, family courts adjudicate parentage under a complex and evolving set of principles that still includes marital presumptions, but also encompasses intent, contract rights, best interest of the child, and functional parentage.

A. *Nonmarital Children as “Illegitimates”*

Today, legitimation of a child means “the act or process of authoritatively declaring a person legitimate, esp. a child whose parentage has been unclear.”⁶⁷ However, legitimation, meaning “[t]he action or process of rendering or authoritatively declaring a person to be entitled to full filial rights or to have been born to parents lawfully married to each other,” first appeared in the English language in the middle of the fifteenth century.⁶⁸ Even then, the social inferiority of nonmarital children was not new.⁶⁹ In fact, the notion of “bastardy” as a material distinction between children born in and out of wedlock predates even Old English.⁷⁰ Old Testament biblical references to bastardy evidence the concept’s ancient religious origins and the social stigma attached to illegitimacy.⁷¹

In early American law, legitimation was a concept understood in relation to marriage.⁷² A legitimate child was born to a married mother and presumed to be the biological and legal child of the mother’s husband.⁷³ Under English common law, an illegitimate child, or bastard, was born to an un-

⁶⁶ See John Witte, Jr., *Ishmael’s Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC’Y: THE INT’L J. OF PENOLOGY 327, 334 (2003). See also Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 127 (1966) (“The illegitimate child has traditionally been regarded by society as an inferior being, to be endured but always resented.”).

⁶⁷ *Legitimation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶⁸ OXFORD ENGLISH DICTIONARY, *legitimation*, n. [hereinafter OED] (citing J. Capgrave *Abbreviation of Cron.* (Cambr. Gg.4.12) (“þe duke of Lancastir purchased a legitimation for þe childyrn þat he had begotin of Dame Katerine Swynforth”).

⁶⁹ MCDUGALL, *supra* note 62, at 1 (“Children born outside of wedlock have long been the targets of stigmatization and shame.”).

⁷⁰ The concept of bastardy is found in the Old Testament. “A bastard shall not enter the congregation of the Lord; even to his tenth generation shall he not enter the congregation of the Lord.” Susan E. Satava, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 933 (1996) (quoting Deuteronomy 23:2).

⁷¹ *Id.* at 933–34.

⁷² See NeJaime, *supra* note 21, at 2272.

⁷³ See *id.* at 2266.

married mother and legally considered *filius nullius*, the “child of no one.”⁷⁴ For the balance of American history, the process of legitimation was initiated and controlled by the putative father—the mother was a victim or beneficiary with no agency in the process.⁷⁵ Legitimation was a means of conferring to a man the power to either deem a child his heir or free himself from consequence for extramarital sex. Thus, legitimation was a tool of male dominion over the social and legal family.

The legal and social concept of legitimacy served to police the intimate lives of individuals, promote social conformity, and punish what was viewed as immoral aberrant behavior. During the widespread reign of illegitimacy doctrine in the United States, family and civil courts did not hide their view of legitimacy as a means of social control. For example, the state courts in *Levy v. Louisiana* were clear on this point. In denying nonmarital children the right to sue for a parent’s wrongful death, the Louisiana Court of Appeals based its rationale on “morals and general welfare because it discourages bringing children into the world out of wedlock.”⁷⁶ Prior to the 1980s, jurisprudence on legitimacy issues was often framed in terms of “discouraging” illegitimacy or immoral sexual behavior.⁷⁷ That framing was slow to change.

The consequences of illegitimacy were stark. Illegitimate children were significantly stigmatized (along with their mothers)⁷⁸ and left without legal

⁷⁴ See *id.* at 2272–73; Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1284 (2015).

⁷⁵ See, e.g., HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 19–20 (1997).

⁷⁶ See *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). See also *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972) (“The Louisiana Supreme Court emphasized strongly the State’s interest in protecting ‘legitimate family relationships’”); *Labine v. Vincent*, 401 U.S. 532, 536 n.6 (1971) (“[T]he Louisiana intestate succession statute [which distinguished between legitimate and illegitimate children] . . . clearly has a rational basis in view of Louisiana’s interest in promoting family life”). It is worth noting that the social control animating this legal regime was as much about incentivizing marriage and preserving the appearance of chastity and monogamy as it was about actually regulating individual sexual behavior. See, e.g., *Bernheimer v. First Nat’l Bank of Kan. City*, 225 S.W.2d 745, 751 (Mo. 1949) (noting “[i]t is not the law in this state or generally elsewhere, that a child must be conceived as well as born in wedlock, else he will be a bastard and illegitimate”; instead the law is that a child is legitimate if illegitimate if *born* out of wedlock). See *supra* notes 70–73 and accompanying text.

⁷⁷ See *Bennett v. Toler*, 56 Va. 588, 591 (1860) (“[I]n a great majority of cases the testator is presumed to prefer, as objects of his bounty, legitimate children to bastards. Such a preference tends to discourage vice—to encourage purity and chastity.”); *Succession of Llula*, 6 So. 555, 556 (La. 1889) (“[Legislative intent for the legitimation statutes was] to discourage concubinage, which is the cause of so much dissoluteness and evil.”) (quoting *Dupre v. Caruthers*, 6 La. Ann. 156, 158 (1851)); *Butcher v. Pollard*, 288 N.E.2d 204, 211 (Ohio Ct. App. 1972) (stating that the term child came to mean legitimate child in insurance law because of, among other reasons, “the policy of discouraging illicit relations”).

⁷⁸ See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346 (2011) (“No one would dispute that for most of U.S. history, ‘illegitimate’ children suffered significant legal and societal discrimination.”).

kin or a right to support or inheritance under the law.⁷⁹ In the nineteenth century, illegitimate children began to gain the right to support and inheritance from their mothers.⁸⁰ However, the right of illegitimate children to support and inheritance from their fathers did not come until the mid-twentieth century.⁸¹ Still, as the 1973 UPA drafters noted, many state laws “continued to differentiate very significantly in the legal treatment of legitimate and illegitimate children.”⁸² Discrimination against illegitimate children was so deeply entrenched that it was not until 1968 that the U.S. Supreme Court declared that illegitimate children were in fact legal persons (or rather, that they were “not ‘nonpersons’”).⁸³

In its early form, legitimacy was determined by marriage rather than biology.⁸⁴ Before paternity could be proven through blood typing or genetic testing, marriage was viewed as a *de facto* indicator of biological connection between father and child.⁸⁵ However, it was, of course, an imperfect proxy. As Douglas NeJaime put it, “the law assumed, but did not in fact require, blood ties.”⁸⁶ In fact, the marital presumption could render a child legally legitimate even when the facts showed that the child’s father was not the mother’s husband.⁸⁷ The marital presumption allowed both law and society to act as though a child was born to a faithful marriage, regardless of the true circumstances.⁸⁸ “Indeed, traditionally neither the husband nor wife were permitted to testify to the husband’s ‘nonaccess,’ meaning that the couple themselves could not penetrate the presumption with inconsistent biological facts.”⁸⁹ As long as women participated in the cultural practice of marriage, they retained social respectability and a presumption of chastity in the eyes of the law.

B. *Equal Protection and the Undoing of Illegitimacy*

After millennia of social and legal subordination of nonmarital children, the mid-twentieth century brought a string of successful challenges to the unequal treatment of nonmarital children in the United States. In 1968,

⁷⁹ See NeJaime, *supra* note 21, at 2272–73; Satava, *supra* note 70, at 936.

⁸⁰ See NeJaime, *supra* note 21, at 2274.

⁸¹ See *id.* at 2275.

⁸² UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 1973) [hereinafter 1973 UPA].

⁸³ See *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (“illegitimate children are not ‘nonpersons’”). See also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 165 (1972) (holding that illegitimate children cannot be excluded from receiving an equal share of worker’s compensation benefits for parent’s death); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding that a state may not discriminate against illegitimate children by denying them a right to child support).

⁸⁴ See NeJaime, *supra* note 21, at 2272.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 2272.

⁸⁹ *Id.*

*Levy v. Louisiana*⁹⁰ and *Glon v. American Guarantee and Liability Insurance Company*⁹¹ triggered a cascade of cases that eventually set illegitimate children and their parents on the same footing as legitimate children and their parents in nearly all respects—with one exception: immigration and nationality law.⁹² The line of cases that helped achieve equality for nonmarital children and their parents in all aspects except immigration and nationality began with a focus on Louisiana’s statutory regime, which severely disadvantaged so-called illegitimate children and their mothers in wrongful death, workers’ compensation, and inheritance rights.

In *Levy*, a suit was brought on behalf of five illegitimate children for the wrongful death of their mother.⁹³ The Louisiana court had held that the statute entitling a child to damage for the wrongful death of a parent applied only to a “legitimate child,” thereby denying nonmarital children the right to bring suit.⁹⁴ The Supreme Court held that because the children’s illegitimacy had no rational relation to the wrong inflicted on the mother, the statute violated the Equal Protection Clause of the Fourteenth Amendment.⁹⁵ In a ground-breaking opinion, Justice Douglas declared that the court started its analysis “from the premise that illegitimate children are not ‘nonpersons.’”⁹⁶ As if there were any real doubt about the basic humanity of nonmarital children, Douglas wrote, “They are humans, live, and have their being.”⁹⁷ Therefore, he reasoned, nonmarital children were entitled to protection under the Equal Protection Clause of the Fourteenth Amendment.⁹⁸ Thus, the groundwork was laid for the undoing of illegitimacy.

The same year, the Court tackled a similar factual scenario from the perspective of a parent surviving the death of her child in *Glon*.⁹⁹ In that case, Minnie Brade Glon sued for the wrongful death of her illegitimate son in a federal diversity action.¹⁰⁰ The district court in Louisiana found against Glon in summary judgment on the basis that the mother had no right of action for the death of her illegitimate son under Louisiana law.¹⁰¹ The mother appealed on equal protection grounds and the Fifth Circuit affirmed the district court’s decision.¹⁰² The Supreme Court reversed and held that the statute violated the equal protection clause.¹⁰³ In doing so, the Court rejected

⁹⁰ *Levy v. Louisiana*, 391 U.S. 68 (1968).

⁹¹ *Glon v. Am. Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

⁹² See *infra* Part III. for discussion of the immigration and nationality exception to equal protection for nonmarital children.

⁹³ *Levy*, 391 U.S. at 69.

⁹⁴ *Id.* at 70.

⁹⁵ *Id.* at 71–72.

⁹⁶ *Id.* at 70.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Glon v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 74.

¹⁰² *Id.*

¹⁰³ *Id.* at 76.

the argument that allowing natural mothers to recover for the wrongful deaths of their illegitimate children served “the cause of illegitimacy.”¹⁰⁴

Louisiana experienced a brief respite a few years later with *Labine v. Vincent*, in which the Court held that a Louisiana statute providing that only legitimated children could inherit was not unconstitutional.¹⁰⁵ However, the next year, in *Weber*, the Court struck down Louisiana’s worker’s compensation law, which provided that unacknowledged illegitimate children did not qualify as children for the purposes of a wrongful death claim.¹⁰⁶ The Court held that while protecting “legitimate family relationships” was a legitimate state interest, the statute did not properly promote it.¹⁰⁷ The Court also noted that punishing children for their parents’ actions is unjust.¹⁰⁸ Ultimately, the Court held that the statute violated the Equal Protection Clause by denying equal rights to unacknowledged illegitimate children with no legitimate purpose.¹⁰⁹

What followed was a parade of equal protection cases that eviscerated a centuries-long regime of discrimination against nonmarital children.¹¹⁰ The Court struck down an Illinois state law that made children of unmarried fathers wards of the state upon the death of their mother without a hearing on the father’s parental fitness.¹¹¹ A Texas statutory scheme granting right to support to legitimate children, but not to so-called illegitimate children, was found to be unconstitutional.¹¹² The Court held that the Social Security Act’s denial of benefits to the class of illegitimate children denied that class equal

¹⁰⁴ *Id.* at 75.

¹⁰⁵ *Labine v. Vincent*, 401 U.S. 532, 539–40 (1971).

¹⁰⁶ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

¹⁰⁷ *Id.* at 175.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 176.

¹¹⁰ This line of cases was not without its limitations. Towards the end of the 1970s, the Court found the edge of equality for nonmarital children and their parents with several cases involving the rights of children who were never legitimized, despite their fathers having had the opportunity to do so. *See, e.g.*, *Mathews v. Lucas*, 427 U.S. 495 (1976). The Court held that a never-legitimated son could not inherit from his deceased father outside the presence of a will. *Lalli v. Lalli*, 439 U.S. 259 (1978). A Georgia statute allowing mothers, but not fathers, of illegitimate children to sue for the wrongful death of their illegitimate children was held to be constitutional because it protected legitimate state interests. *Parham v. Hughes*, 441 U.S. 347 (1979). The right to block an adoption remained a complicated question for the Court. The Court upheld a statute providing that the father of illegitimate child could not block adoption. *Quilloin v. Walcott*, 434 U.S. 246 (1978). In a case where an unwed father had unsuccessfully sought to block his child’s adoption, the Court held that states cannot afford unwed mothers greater rights than unwed fathers simply on the basis of sex. *Caban v. Mohammed*, 441 U.S. 380 (1979). The Court highlighted that under the statutory scheme, unwed fathers had no control over the fate of their children, even when a substantial parental relationship was established. However, in a subsequent case, the Court held that a putative father’s due process rights were not violated when his “illegitimate” child was adopted by the mother’s new husband because the putative father did not “participate in the rearing of his [illegitimate] child” or “grasp the opportunity to develop a relationship with [the] child.” *Lehr v. Robertson*, 463 U.S. 248, 248 (1983).

¹¹¹ *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

¹¹² *Gomez v. Perez*, 409 U.S. 535, 539 (1973).

protection.¹¹³ A portion of the Illinois probate code favoring legitimate over illegitimate children was struck down.¹¹⁴ A statute of limitations preventing illegitimate children from seeking support from their fathers unless they were legitimated by age six violated the Equal Protection Clause because the limitation was “not substantially related to [Pennsylvania’s] interest in avoiding the litigation of stale or fraudulent claims. . . .”¹¹⁵

C. Beyond Legitimacy

The Uniform Parentage Act (UPA),¹¹⁶ first issued in 1973 by the National Conference of Commissioners of Uniform State Laws, marked the beginning of the decline of legitimacy and legitimation in family law and, by reference, estates and other areas of law. Drafters of the uniform act intended it to help states implement the new Supreme Court mandate of equality of nonmarital children.¹¹⁷ Although adopted by only a minority of states,¹¹⁸ the 1973 UPA represented a shift in thinking among family law experts, led by Harry Krause.¹¹⁹ As a result, it catalyzed legal reform, helping to eliminate the doctrine of illegitimacy. Less than a decade after the introduction of the UPA, “the legal doctrine of ‘illegitimacy’ had all but disappeared.”¹²⁰ Except with respect to assisted reproductive technology, “marriage no longer divided the country’s children into two classes, the privileged one whose parents were married and the subordinate one whose parents were not.”¹²¹

The 1973 UPA’s central contribution to the downfall of illegitimacy was its recognition of two parents for all children, regardless of the parents’ marital status.¹²² Under the UPA, paternity of a child born to a married woman

¹¹³ *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974).

¹¹⁴ *Trimble v. Gordon*, 430 U.S. 762, 767 (1977).

¹¹⁵ *Clark v. Jeter*, 486 U.S. 456, 457 (1988).

¹¹⁶ 1973 UPA.

¹¹⁷ *See id.*, Prefatory Note.

¹¹⁸ *See id.*, Table of Jurisdictions Wherein Act Has Been Adopted, 9B U.L.A. 377 (2001 & Supp. 2018).

¹¹⁹ Krause served as the reporter-draftsman of the 1973 UPA and his influential book, *Illegitimacy: Law and Social Policy*, is cited in several comments throughout the 1973 UPA. *See* 1973 UPA, Prefatory Note (documenting that Harry Krause served as reporter-draftsman); 1973 UPA § 2, cmt. (citing HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 59–104 (1971)); 1973 UPA § 12, cmt. (citing KRAUSE, *supra* note 119, at 123–44).

¹²⁰ 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).

¹²¹ *Id.* at 212.

¹²² The 1973 UPA was promulgated in an age before complex ART, as the first person conceived and born through in vitro fertilization was born in 1978. *See* Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 899 (2012). However, early forms of ART had been in existence and quiet usage for many years. *See, e.g.*, Recent Development, *Child Conceived by A.I.D. Is Illegitimate but Consenting Husband Held Liable for Support*, 64 COLUM. L. REV. 376, 376 (1964) (explicating *Gursky v.*

was similar to the common law's marital presumption—i.e. the mother's husband would be deemed the father. However, unlike the common law, the UPA also established that a child born to an unmarried mother could have paternity established by a putative father “hold[ing] the child out as his natural child” or signing an acknowledgment of paternity.¹²³ As blood typing and DNA testing became widely available, those methods were added as methods of establishing paternity.¹²⁴ Today, states recognize that a fully valid parental relationship can exist through not only biology, but through many other circumstances, including intent to form a family.¹²⁵ State family courts are coming to recognize the many ways that modern families can be formed and that the parent-child relationship is not limited by biology.¹²⁶ The trajectory of this evolution can be traced to the UPA.

The legal construct of parenthood was also challenged by the rise of assisted reproductive technology (ART). Early ART posed a challenge to courts tasked with determining parentage.¹²⁷ However, this challenge was exacerbated after complex ART was established in the late twentieth century, making it possible to become a parent through reproduction (rather than adoption) but without any genetic connection to the child. Jurists and scholars struggled to make sense of the longstanding legal traditions and the norms upon which they were built in light of new advances that decoupled parenthood from the biological process of reproduction.¹²⁸ Children born with donor gametes pushed family law away from thinking about

Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963), in which a non-genetic father who consented to his wife's artificial insemination with another man's sperm was held liable for child support but the child was determined to be illegitimate); *C.M. v. C.C.*, 377 A.2d 821 (N.Y. Juv. & Dom. Rel. 1977) (concerning an action by a donor of semen used for artificial insemination for visitation rights); *People v. Sorenson*, 437 P.2d 495 (Cal. 1968) (concerning an action for child support against the legal father of a child conceived through artificial insemination).

¹²³ 1973 UPA § 4(a)(4). See also Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 168–69 (2007) (providing an overview and critique of the UPA).

¹²⁴ See Allan Z. Litovsky & Kirsten Schultz, *Scientific Evidence of Paternity: A Survey of State Statutes*, 39 JURIMETRICS J. 79, 82–83 (1998).

¹²⁵ See *infra* Part II.C.3 for a discussion on the “intent test.”

¹²⁶ See, e.g., *Frazier v. Goudschaal*, 295 P.3d 542, 556, 558 (Kan. 2013) (holding co-parenting agreement between biological mother and lesbian partner could not be ignored, did not violate public policy, and was not unenforceable); *Downs v. Gilmore*, 296 P.3d 1140, 1140 (Kan. Ct. App. 2013) (finding nonbiological lesbian partner who lived with and notoriously recognized child conceived by artificial insemination as her child was a presumed parent who had standing to seek parenting time); *Moriggia v. Castelo*, 805 S.E.2d 378, 379 (N.C. Ct. App. 2017) (vacating a trial court order dismissing the custody claim of a non-gestational lesbian mother and emphasizing the importance of the non-gestational mother's intent to co-parent with the gestational mother).

¹²⁷ See, e.g., *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (discussing whether a child conceived through artificial insemination was illegitimate).

¹²⁸ See *People v. Sorenson*, 437 P.2d 495 (Cal. 1968); *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963); see also John Lawrence Hill, *What Does It Mean to Be A “Parent”? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 353 (1991) (“Modern [reproductive] technology has wreaked havoc on conventional and legal notions of parenthood”).

parenthood as a genetic thing, and children born through surrogacy and donor gametes removed biology from parenthood altogether.

Family law is in the midst of redefining the theoretical and legal meaning of parentage. Increasingly, family law courts, scholars, and some legislatures have begun to define parentage by intent or function, rather than solely biology.¹²⁹ This redefinition process is not over and is far from perfect, as many scholars have noted.¹³⁰ However, this process of redefinition provides an important conceptual template for nationality law's definition of the parent-child relationship. At its core, family law is driven towards protection of children, which militates towards a more expansive definition of the parent-child relationship.¹³¹ Family law has aspirations of a flexible and adaptable vision of what makes a family. As Kari Hong has said, "Family law is unique in that its discretionary standards are designed to be responsive to emerging families not yet imagined when statutes were written."¹³² Although the family law landscape is complicated and not uniform,¹³³ it offers significantly more promise for equitable and fair adjudication of immigration and citizenship claims than an outdated fixation with biology.

¹²⁹ See, e.g., Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards A Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 428–35 (2013) (discussing the emergence of the functional parentage doctrine); Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 66–74 (2017) (discussing states that have adopted the functional parentage doctrine and those that have not); 2017 UPA § 102(13) (defining intended parent as an "individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction"); 2017 UPA § 204(a)(2) (creating a presumption of parentage for an individual who "resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual's child"). See also, e.g., *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435 (Wisc. 1995) (holding that a circuit court has equitable power to hear a petition for visitation from a person with a parent-like relationship to the child); Cal. Fam. Code § 7611 (creating a parental presumption for an individual who "receives the child into his or her home and openly holds out the child as his or her natural child"); Vt. Stat. Ann. 15C, § 201 (recognizing a de facto, or functional, parent). But see Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POLY & L. 671, 679 (2012) (noting that "[r]ecognition of de facto parentage, however, is far from universal" and "[s]everal states have rejected it outright").

¹³⁰ Abrams & Piacenti, *supra* note 21, at 650–52; NeJaime, *supra* note 21, at 2268, 2361. But c.f. Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 599 (2018) (arguing that the 2017 UPA addresses many of the critiques of NeJaime's *The Nature of Parenthood*).

¹³¹ See Abrams & Piacenti, *supra* note 21, at 652–53. See also *infra* note 141 and accompanying text outlining the best interest of the child standard, which is the fundamental legal standard for child custody determinations.

¹³² Kari E. Hong, *Famigration (Fam-Imm): The Next Frontier in Immigration Law*, 100 VA. L. REV. ONLINE 63, 80 (2014).

¹³³ See Abrams & Piacenti, *supra* note 21, at 674 (arguing that state family law frameworks are inconsistent and conflicting).

1. *Marital Presumption*

The longest-standing test for determining parentage has been the marital presumption of paternity.¹³⁴ This doctrine assumes that the mother is the person who births a child and that her identity is always immediately verifiable; the father is presumed to be the man to whom the mother is married.¹³⁵ If the mother is unmarried, then the marital presumption does not apply. The marital presumption is essentially a proxy for genetics (or blood) premised upon the social ideal of female sexual monogamy. However, even under British common law, the marital presumption was understood to supersede inconsistent biological facts. In fact, the British common law Lord Mansfield's Rule barred the presentation of evidence that the husband was not the natural father of his wife's child.¹³⁶ This rule was adopted and followed in U.S. courts for many years.¹³⁷

The advent of blood typing and DNA testing brought new forms of evidence into American family courts, and Lord Mansfield's Rule relaxed in many jurisdictions, coming to mean simply a marital presumption of paternity rather than a bar on presentation of contrary evidence.¹³⁸ However, the marital presumption has continued to generally supersede biological claims of parentage.¹³⁹ Today, the marital presumption is still a dominant form of ascertaining legal parentage for marital children,¹⁴⁰ and the presumption is now part of a constellation of considerations.

2. *Best Interest Standard*

The primary consideration in adjudicating legal and physical custody of a child whose parentage is not in dispute is the best interest of the child.¹⁴¹

¹³⁴ Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 817–18 (2004) (demonstrating that the marital presumption of legitimacy traces back to sixteenth century English common law).

¹³⁵ *Id.* at 811–12, 817–18.

¹³⁶ See Voss v. Shalala, 32 F.3d 1269, 1272 n.3 (8th Cir. 1994) (citing Goodright v. Moss, 98 Eng.Rep. 1257 (1777)).

¹³⁷ *Id.* (“The rule stated in *Ford v. Ford* is commonly known as Lord Mansfield's Rule.”) (referencing *Ford v. Ford*, 216 N.W.2d 176, 177 (Neb. 1974)).

¹³⁸ See, e.g., Becker v. Sec'y of Health & Human Servs., 895 F.2d 34, 36 (1st Cir. 1990) (“We recognize that the extent to which this evidentiary rule, known as Lord Mansfield's Rule, bars a mother's testimony is open to argument.”); Javier v. Comm'r of Soc. Sec., 407 F.3d 1244, 1248 n.3 (D.C. Cir. 2005) (“Lord Mansfield's Rule is directed at the admissibility of evidence rather than standing”); Abreu v. Colvin, 152 F. Supp. 3d 166, 172 (S.D.N.Y. 2015) (“New York follows what is known as Lord Mansfield's Rule: the presumption that a child born to a married woman is presumed to be the offspring of her husband.”).

¹³⁹ Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (upholding marital presumption and refusing paternity claim of biological father).

¹⁴⁰ 2017 UPA, § 204.

¹⁴¹ See, e.g., Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 384

This standard offers a potential test, or at least a factor to be considered, in determination of parentage. “Many legal scholars advocate for the application of a best-interest standard as a factor for deciding legal parentage,” particularly in cases involving children conceived with the use of assisted reproductive technologies.¹⁴² Indeed, one benefit of this standard is that it is well developed after many years of use in a custody context.

The 2017 Uniform Parentage Act (2017 UPA) includes a provision for best interest parentage, but makes clear that best interest parentage is subordinate to genetic parentage.¹⁴³ However, courts are increasingly relying upon best interest parentage.¹⁴⁴ Even as early as 1991, in the first case involving a dispute over a surrogacy arrangement in California, the best interest of the child was the court’s prevailing consideration.¹⁴⁵ In upholding the parentage rights of the same-sex couple who hired the surrogate, the judge said that the child in question was “caught in the cross fire” and the child’s best interests “must be our paramount concern.”¹⁴⁶

When the best interest conflicts with biology, constitutional concerns are implicated.¹⁴⁷ However, in *Quilloin v. Walcott*, the Supreme Court upheld the use of the best interest standard even to deny basic parentage rights to a biological father.¹⁴⁸ In that case, “The trial court denied [a biological father’s] petition [to legitimate his biological child], and thereby precluded him from gaining veto authority [over an adoption], on the ground that legitimation was not in the ‘best interests of the child.’”¹⁴⁹ The Court held that

(2008) (“When judges have to award ‘custody’ in cases where two fit parents do not agree, the universal standard is ‘the best interests of the child’”); *see also, e.g.*, D.C. Code § 16-914(a)(1)(A) (D.C.’s custody statute, reading, “In any proceeding between parents in which the custody of a child is raised as an issue, the best interest of the child shall be the primary consideration”); K.S.A. § 23-3201 (Kansas’s custody statute, reading, “The court shall determine custody or residency of a child in accordance with the best interests of the child”).

¹⁴² Jenny Wald, *Legitimate Parents: Construing California’s Uniform Parentage Act to Protect Children Born into Nontraditional Families*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 139, 145 (2005) (quoting Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 130 (2000)).

¹⁴³ Compare REVISED UNIFORM PARENTAGE ACT § 608(c)(3)(2017) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS) with § 506.

¹⁴⁴ *See* David D. Meyer, *The Constitutionality of “Best Interests” Parentage*, 14 WM. & MARY BILL RTS. J. 857, 864 (2006) (citing *In re Jesusa V.*, 10 Cal. Rptr. 3d 205 (Cal. 2004)); *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000); *Doe v. Doe*, 52 P.3d 255 (Haw. 2002); *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001); *Dep’t of Soc. Servs. ex rel. Wright v. Byer*, 678 N.W.2d 586 (S.D. 2004); *G.D.K. v. Dep’t of Fam. Servs.*, 92 P.3d 834 (Wyo. 2004); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 13 (2004) (“In cases in which two . . . [paternity] presumption[s] clash or where one of the presumptions clashes with biological evidence, courts often resolve the issue with reference to a best interest of the child analysis, not by virtue of a blood test”).

¹⁴⁵ Wald, *supra* note 142, at 145 (citing *Adoption of Matthew B.*, 284 Cal. Rptr. 18 (Cal. Ct. App. 1991)).

¹⁴⁶ *Id.*

¹⁴⁷ Meyer, *supra* note 144, at 864–65.

¹⁴⁸ 434 U.S. 246, 254 (1977).

¹⁴⁹ *Id.*

“under the circumstances of this case appellant’s substantive rights were not violated by application of a ‘best interests of the child’ standard.”¹⁵⁰ Although the *Quilloin* holding was far from perfect,¹⁵¹ it supported the idea that biology alone did not make someone a parent.

3. *Intent Test*

Family courts, empowered by statutes and equity interests, are increasingly looking to intent as a dispositive factor in determining parentage. The law has come to recognize the many ways that modern families can be formed. Thus, the parent-child relationship no longer fits within antiquated notions such as “legitimation,” nor is it limited by biology. The most salient question in many paternity cases is whether the parents had the intent to form a family. For example, the Kansas Supreme Court has held that the unmarried same-sex partner of a genetic mother was responsible for child support and entitled to parenting time for two children born through artificial insemination based upon a written agreement that reflected a shared intent to be parents.¹⁵² In another case, the court held that a man who provided sperm directly to a woman, instead of a doctor, still had no claim to paternity because the child was conceived with the intent that the donor would not be a parent.¹⁵³ Similar decisions have emerged in states across the country.¹⁵⁴

4. *Functional Parentage*

Notably, the 2017 UPA includes a provision for the establishment of functional parentage, which would allow an adult to establish parental rights over a child based upon residing with, caring for, and establishing a “bonded

¹⁵⁰ *Id.*

¹⁵¹ *Quilloin* dismissed the idea that parenthood is a fundamental right of a father, regardless of his marital status. Further, Justice Marshall’s opinion rested on broad stereotypes about families, assuming that unmarried fathers are uninvolved in their children’s lives. The Court noted that although the statutory scheme differentiated divorced and never-married fathers, the never-married fathers had never “shouldered any significant responsibility” for the care of their children, whereas divorced fathers had been present in their children’s lives prior to the divorce, and thus rightly had more rights to the child. *Quilloin*, 434 U.S. at 256.

¹⁵² See *Frazier*, 295 P.3d 542, 545. See also *Downs*, No. 108,176, 2013 WL 1010667, *4 (Kan. Ct. App. March 8, 2013) (nonbiological partner was presumed parent with standing to seek parenting time).

¹⁵³ *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (holding sperm donor was within the statutory bar against presumption of paternity for donors who give sperm to a doctor for artificial insemination, even though donor gave sperm directly to the mother instead of a doctor).

¹⁵⁴ *In re C.K.G.*, 173 S.W.3d 714, 730 (Tenn. 2005) (finding a nongenetic gestational mother of triplets conceived using donor eggs was a parent because the genetic father “voluntarily demonstrated the bona fide intent that [the gestational mother] would be the children’s legal mother”); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (holding a couple were the legal parents of a child conceived with donor gametes and gestated by a surrogate because they had the intent to parent the child).

and dependent relationship” with the child over a “significant period” of time.¹⁵⁵ This doctrine, also known as *de facto* parentage, allows a genetically unrelated adult who has fulfilled the role and function of a parent for a meaningful amount of time to gain the legal status of a parent. Many states have already implemented some form of recognition of the rights of adults who have functionally parented a child.¹⁵⁶ Although functional parentage is controversial, its inclusion in the 2017 UPA signals a broad consensus among leading family law scholars in support of the doctrine’s implementation across the country.

In a comment to the new functional parentage section in the 2017 UPA, the Uniform Law Commission noted that most states provide “some parental rights and possibly some parental responsibilities” to a person who “can establish that he or she has developed a strong parent-child relationship with the consent and encouragement of a legal parent.”¹⁵⁷ The Commission noted that “[s]ome states extend rights to such persons under equitable principles,” while others “extend rights to such individuals through broad third party custody and visitation statutes,” and others go so far as to consider those individuals legal parents.¹⁵⁸ Given the complexities of human beings and their families, it would be unrealistic to expect a simple universal answer to how the parent-child relationship should be defined. However, the act of engaging in this messy inquiry is a critical part of reaching fair and appropriate legal outcomes for families. This complex fact-specific analysis stands in contrast to the way immigration law has treated the parent-child relationship, as will be discussed in the next Part.

III. THE PERSISTENCE OF BIOLOGICAL SUPREMACY IN IMMIGRATION & NATIONALITY LAW

Biological supremacy, or privileging biological family relationships above other family relationships, is a central feature of American immigration and nationality law. The result is an exaltation of the biological relationship created through a genetic link between parent and child, and established by DNA evidence. This regime also privileges marriage, which serves as a stand-in for biology, a vestige from a time in which biological connection between father and child were not independently verifiable.¹⁵⁹ Biological supremacy does not mean that biology alone is always the sole determiner of a parent-child relationship, but that biology is held out as the most important factor. Further, in certain critical contexts, a biological link evidenced by

¹⁵⁵ NATIONAL CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, REVISED UNIFORM PARENTAGE ACT § 609(d) (2017) [hereinafter 2017 UPA].

¹⁵⁶ 2017 UPA, Prefatory Note.

¹⁵⁷ 2017 UPA § 609, Comment.

¹⁵⁸ *Id.*

¹⁵⁹ See NeJaime, *supra* note 21, at 2272, 2275.

genetic testing is considered, as Kari Hong put it, the “*sine qua non*” of the parent-child relationship.¹⁶⁰

Even while the societal concept of family evolves and expands,¹⁶¹ key federal agencies have doubled down on a narrow vision of family in the realm of immigration and nationality law. Although the Immigration and Nationality Act has remained largely fixed in recent decades—apparently calcified by political gridlock—agency interpretation has played a critical role in shaping the law. However, instead of following the broader trend towards a more inclusive and expansive vision of the parent-child relationship, federal agencies tasked with enforcing immigration law have repeatedly affirmed and even enhanced a commitment to biological supremacy in defining the parent-child relationship.¹⁶² Even when the Act is silent or equivocal, agencies have expanded the reach of biological supremacy.¹⁶³ Although some non-biologically linked parent-child relationships are recognized for the purposes of immigration and nationality, those relationships are conspicuously positioned as the exception to a rule of biological supremacy.¹⁶⁴ Upon close examination, the ways in which those exceptions are narrowly circumscribed reveal that they are premised upon problematic values inherent to biological supremacy.

A. *The Immigration and Nationality Exception to Equal Protection for “Illegitimates”*

Despite a wave of cases invalidating distinctions between legitimate and illegitimate children (and their parents) on equal protection grounds during the 1960s and 1970s, the Supreme Court treated immigration cases during the same period quite differently. From the 1960s through the 1980s, statutory distinctions between legitimate and illegitimate children were struck down in the contexts of wrongful death, workers’ compensation, inheritance, and support.¹⁶⁵ However, as this section will explain below, during that same period, the Court developed a clear exception that allowed discrimination against children born out of wedlock in immigration law. That exception thrived for decades and abetted the biological supremacy regime that has controlled immigration law in the meantime. Even as late as 2001, the Court upheld legitimacy-based distinctions in immigration law.¹⁶⁶ In fact, as discussed in Part III.B., the fate of the immigration exception is not known, despite the breakthrough of *Morales-Santana*.

¹⁶⁰ See Hong, *Removing Citizens*, *supra* note 21, at 316.

¹⁶¹ See, e.g., Abrams & Piacenti, *supra* note 21, at 639, 641; NeJaime, *supra* note 21, at 2285–87.

¹⁶² See *infra* Part III.C.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *infra* Part II.B.

¹⁶⁶ See *Nguyen v. INS*, 533 U.S. 53, 56, 58–59 (2001).

In 1977, the Supreme Court took a powerful step concretizing an immigration exception¹⁶⁷ to those principles of nondiscrimination. The Court found constitutional a facially discriminatory distinction between mothers of illegitimate children and fathers of illegitimate children in *Fiallo v. Bell*.¹⁶⁸ In that case, a set of unwed natural fathers of illegitimate non-citizen children challenged a portion of the Immigration and Nationality Act that granted “special preference immigration status to aliens who qualify as the ‘children’ or ‘parents’ of United States citizens or lawful permanent residents.”¹⁶⁹ Under the Act, illegitimate children could seek preference through their relationship with their natural mother, but not through their natural father. Natural mothers were also entitled to preferential treatment.¹⁷⁰ The *Fiallo* fathers alleged that they were denied their rights to equal protection, due process, mutual association, privacy, and the right to establish a home and to raise their natural children.¹⁷¹ The Court emphasized the government’s control over immigration, highlighted other acceptable preferential treatment in immigration law, and stated that policy questions should be left to the judgment of the political branches of the government.¹⁷² The Court stated that it was not its role to “probe and test the justifications for the legislative decision” and highlighted that Congress may have determined that fathers and their illegitimate children do not have the requisite “close family ties” or that there may have been concern with “serious problems of proof that usually lurk in paternity determinations”¹⁷³

The Court tackled the issue again in *Miller v. Albright*.¹⁷⁴ The case was decided in a deeply divided plurality opinion that has been said to have “revealed deep divisions over fundamental questions about gender equality, the rights of unmarried fathers, and the nature and scope of the plenary power doctrine.”¹⁷⁵ The case involved a child born in the Philippines to a Filipina mother with no father listed on the birth certificate.¹⁷⁶ Miller’s American father eventually established paternity (after Miller turned 18) and Miller applied to be a U.S. citizen.¹⁷⁷ Miller’s application was denied because she was not legitimated by her father before age eighteen.¹⁷⁸

¹⁶⁷ For a thorough discussion of the phenomenon of immigration exceptionalism, see David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. REV. 583 (2017).

¹⁶⁸ 430 U.S. 787, 800 (1977).

¹⁶⁹ *Id.* at 788.

¹⁷⁰ *Id.* at 788–89.

¹⁷¹ *Id.* at 790.

¹⁷² *Id.* at 792.

¹⁷³ *Id.* at 787.

¹⁷⁴ 523 U.S. 420 (1998).

¹⁷⁵ Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 192 (2017) [hereinafter *Equality, Sovereignty, and the Family*].

¹⁷⁶ *Miller*, 523 U.S. at 424–25.

¹⁷⁷ *Id.* at 425.

¹⁷⁸ *Id.* at 426.

In holding that the statute was constitutional, Justice Stevens reasoned that a child's relationship to her mother "is immediately obvious and is typically established by hospital records and birth certificates."¹⁷⁹ By contrast, Stevens wrote, "the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record."¹⁸⁰ The mother, unlike the father, the Court reasoned, always knows about the child's existence and typically has immediate custody of the child.¹⁸¹ Justice Stevens concluded that "Section 1409(a)(4) . . . is well tailored to address these concerns. The conclusion that Congress may require an affirmative act by unmarried fathers and their children, but not mothers and their children, is directly supported by *Lehr v. Robertson*."¹⁸²

Thus, a plurality of the Court held that the INA Section 309 requirements imposed on children of foreign-born, out-of-wedlock children of American fathers, but not on the foreign-born, out-of-wedlock children of American mothers, were justified by governmental interests in fostering the child's ties with this country and with her citizen parent.¹⁸³ The opinion was entirely dismissive of concerns about the discriminatory implication of the statute's gender disparity:

Writing the lead plurality opinion, Justice John Paul Stevens rejected the contention that the acknowledgment requirement was the product of 'overbroad stereotypes about the relative abilities of men and women.' He emphasized a line of the Court's cases involving unmarried fathers that required courts to look to fathers' 'postbirth conduct' to determine their constitutional status and rights. Because Charlie had not played a role in Lorelyn's upbringing, Justice Stevens concluded that '[t]he gender equality principle' of the Court's equal protection jurisprudence was inapplicable in the Millers' case.¹⁸⁴

The immigration exception to equal protection for nonmarital children was reaffirmed again in 2001 with the case of *Nguyen v. INS*.¹⁸⁵ Nguyen, the son of an unmarried American father and a Vietnamese mother, challenged the gender disparity in the conferral of citizenship to a child born out of wedlock.¹⁸⁶ Nguyen argued that the provision violated equal protection by

¹⁷⁹ *Id.* at 436.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 438.

¹⁸² *Id.* at 441 (citing *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that a putative father had no due process right to be notified of the adoption of a child with whom he never established a relationship)).

¹⁸³ *Miller v. Albright*, 523 U.S. 420, 438 (1998).

¹⁸⁴ *Equality, Sovereignty, and the Family*, *supra* note 175, at 192.

¹⁸⁵ 533 U.S. 53 (2001).

¹⁸⁶ *Id.* at 56-57 ("[8 U.S.C. § 1409] imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. The question before us is whether the statutory distinction is consistent with the

“providing different rules for attainment of citizenship by children born abroad and out of wedlock depending upon whether the one parent with American citizenship is the mother or the father.”¹⁸⁷ Nguyen had lived in Vietnam until he moved to the U.S. with his father at age six and was eventually placed into removal proceedings after pleading guilty to a sex offense.¹⁸⁸ The Court acknowledged that the statute imposed a different set of requirements on children of citizen fathers born abroad than children of citizen mothers born abroad, but held that the statutory distinction was justified by the government’s interests.¹⁸⁹ The Court noted that in cases of citizen mothers, the biological connection to the child is verifiable from birth, and that the government’s interest “is too profound to be satisfied merely by conducting a DNA test.”¹⁹⁰ The Court held that the government’s interest in ensuring that children develop a relationship with their citizen parent and thus, the United States, was also valid, and was adequately furthered by statute.¹⁹¹

*B. The Limits of Biological Supremacy in Immigration
and Nationality Law*

Although courts generally afford significant deference to agency decisions on nationality disputes, some courts have taken initial steps towards dislodging biological supremacy in nationality law. This progress has been inconsistent and limited. Courts tasked with reviewing citizenship determinations of agencies have taken a narrow approach, bound by the conceptual framework of *jus sanguinis* citizenship. Courts have expanded the scope of qualifying parent-child relationships beyond DNA only in a narrow set of circumstances in which legitimation serves as a stand-in for biology. In *Morales-Santana*, its most recent decision on this question, the Supreme Court finally tackled gender discrimination in acquired citizenship. That case represented a change in direction with respect to this issue, but also resulted in the elimination of a statutory avenue for citizenship acquisition.¹⁹²

equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment”).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 57.

¹⁸⁹ *Id.* at 60–61 (“For a gender-based classification to withstand equal protection scrutiny, it must be established “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” For reasons to follow, we conclude § 1409 satisfies this standard” (citations omitted) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

¹⁹⁰ *Id.* at 67.

¹⁹¹ *Id.* at 69.

¹⁹² *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

The Ninth Circuit made limited advances in *Scales v. I.N.S.*¹⁹³ and *Solis-Espinoza v. Gonzales*.¹⁹⁴ Then, in *Morales-Santana*, the Supreme Court struck down the gender-based distinction in the laws controlling derivative citizenship acquisition between unmarried U.S. citizen mothers and fathers.¹⁹⁵ The Court reviewed a denial of relief under an older version of INA sections 301 and 309, which conferred citizenship upon children born to unmarried U.S. citizens living abroad.¹⁹⁶ Under the law in question, unmarried mothers could pass citizenship on to their foreign-born children more easily than unmarried fathers could.¹⁹⁷ In order to pass citizenship to a foreign-born child at birth, a father must have accrued ten years of physical presence in the United States prior to the child's birth, including at least five years of physical presence after age fourteen.¹⁹⁸ However, an unmarried U.S. citizen mother living abroad could confer citizenship upon her child if she had lived continuously in the U.S. for just one year.¹⁹⁹

The exception for unwed mothers was premised on the idea that unwed mothers would be the sole caretakers of their children and foreign unwed fathers would have no influence.²⁰⁰ This gender-based distinction arose from the rationale that an unmarried citizen father must have deep ties to the U.S. in order to counteract the strong influence an unmarried non-citizen mother would have on a child, whereas an unmarried non-citizen father would be uninvolved in the child's life and exert no foreign influence on the child.²⁰¹ Justice Ginsburg noted, "Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their non-marital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture."²⁰²

¹⁹³ 232 F.3d 1159, 1164 (9th Cir. 2000) (blood relationship between a child and a U.S. citizen was not required to establish citizenship under 8 U.S.C. § 1401(g), if the child in question was not born out of wedlock).

¹⁹⁴ 401 F.3d 1090, 1094 (9th Cir. 2005) (holding child not "born out of wedlock" when biological father married to non-biological mother who "legitimated" the child).

¹⁹⁵ See *Morales-Santana*, 137 S. Ct. at 1686 ("We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons 'the equal protection of the laws.'").

¹⁹⁶ See *id.* at 1686 ("This case concerns a gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad, when one parent is a U.S. citizen, the other, a citizen of another nation. The main rule appears in 8 U.S.C. § 1401(a)(7) (1958 ed.), now § 1401(g) (2012 ed.).").

¹⁹⁷ *Id.* at 1687.

¹⁹⁸ *Id.* (citing 8 U.S.C. § 1401(a)(7) (1958) (current version at 8 U.S.C. § 1401(g) (2012)).

¹⁹⁹ *Id.* (citing 8 U.S.C. § 1409(c) (2012)).

²⁰⁰ *Id.* at 1691–92.

²⁰¹ See *Equality, Sovereignty, and the Family*, *supra* note 175, at 217–18.

²⁰² *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017).

Respondent Luis Ramon Morales-Santana was born in the Dominican Republic in 1962 to an unmarried U.S. citizen father and Dominican mother.²⁰³ Morales-Santana's father had been born in Puerto Rico and moved to the Dominican Republic just short of his nineteenth birthday.²⁰⁴ Morales-Santana's parents resided together both before and after his birth.²⁰⁵ His father was involved in his life, and eventually married his mother eight years after his birth.²⁰⁶ However, because Morales-Santana's father lived fewer than five years in the United States after reaching the age of fourteen, he did not satisfy the residency requirement in order to pass citizenship on to his son.²⁰⁷ Morales-Santana's family later moved to New York, and after Morales-Santana became involved with the criminal justice system, he was placed in removal proceedings.²⁰⁸ In those proceedings, Morales-Santana unsuccessfully asserted that he was a U.S. citizen at birth under INA sections 301 and 309.²⁰⁹ Morales-Santana appealed the immigration judge's decision to the Board of Immigration Appeals, which denied his motion.²¹⁰ The United States Court of Appeals for the Second Circuit reversed the BIA decision and found the distinction between unwed mothers and fathers to be unconstitutional.²¹¹

Upon appeal to the Supreme Court, Justice Ginsburg, writing for the majority, held that the "gender-based distinction infecting" the statute violated equal protection principles.²¹² However, the Court decided to equalize the disparity by eliminating the one-year exception for unwed mothers, rather than extending it to unwed fathers.²¹³ Thus, gender equality was restored to the statutory scheme by "leveling down" protections for women rather than "leveling up" protection for men.²¹⁴ When presented the opportunity to remedy a gender disparity in the law, the Court took the path of exclusion, removing a protection afforded to women rather than extending it to men.

Despite its procedural twist,²¹⁵ *Morales-Santana's* substantive analysis was an attack on a gender-based derivative citizenship regime justified by

²⁰³ *Id.* at 1687–88.

²⁰⁴ *Id.* at 1687.

²⁰⁵ *Id.* at 1687–88.

²⁰⁶ *Id.* at 1688.

²⁰⁷ *Id.* at 1687.

²⁰⁸ *Id.* at 1688.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Morales-Santana v. Lynch*, 804 F.3d 520, 524 (2nd Cir. 2015).

²¹² *Morales-Santana*, 137 S. Ct. at 1700–01.

²¹³ *Id.* at 1701.

²¹⁴ *Equality, Sovereignty, and the Family*, *supra* note 175, at 171.

²¹⁵ "Nevertheless, we cannot convert §1409(c)'s exception for unwed mothers into the main rule displacing §1401(a)(7) (covering married couples) and §1409(a) (covering unwed fathers). We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U.S.-citizen and one alien parent, wed or unwed." *Morales-Santana*, 137 S. Ct. at 1686.

archaic sexual stereotypes. Justice Ginsburg's opinion developed "a progressive vision of gender equality for the non-marital family."²¹⁶ Justice Ginsburg noted that "[d]uring this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child."²¹⁷ Ginsburg dismissed the notion that avoiding statelessness was a salient motivator in the creation of the gender distinction in INA section 309.²¹⁸ The Court carefully distinguished *Morales-Santana* from *Fiallo v. Bell*,²¹⁹ *Miller v. Albright*,²²⁰ and *Nguyen v. INS.*,²²¹ saying "Fiallo involved entry preferences for alien children; the case did not present a claim of U.S. citizenship. And Miller and Nguyen addressed a paternal-acknowledgment requirement well met here, not the length of a parent's prebirth residency in the United States."²²² Thus, *Morales-Santana's* impact is narrow, applicable to little more than the specific situation presented in the case.

Some view *Morales-Santana* as a harbinger of the end of a gender-based citizenship regime.²²³ It certainly constitutes a step towards unsettling archaic sexual stereotypes once considered biological facts, such as women's "natural" predisposition to childrearing. If that loose thread is pulled, it will lead to the unsettling of biological supremacy in defining the parent-child relationship. However, it remains to be seen how long it will take for that fiber to unfurl. In the meantime, while *Morales-Santana* represented a rare foray into the specifics of immigration and nationality law, which had previously been a topic the Court seemed hesitant to claim as its purview,²²⁴ it did nothing to disturb the troubling practices of biological supremacy that pervade agency and judicial interpretations of the INA.

C. Legitimation: Thriving Vestiges of Illegitimacy

The ideology of biological supremacy is revealed throughout agencies' and courts' implementation of immigration and nationality law. This ideology is rooted in the principles and assumptions of blood as belonging, which flows from *jus sanguinis* as a construction of citizenship. As discussed in Part I above, this ideology is plagued by ethno-nationalism, patriarchal dominance, and the enforcement of sexual and reproductive conformity. In this section, three examples of biological supremacy are identified and ex-

²¹⁶ *Equality, Sovereignty, and the Family*, *supra* note 175, at 171.

²¹⁷ *Morales-Santana*, 137 S. Ct. at 1690-91.

²¹⁸ *Id.* at 1698.

²¹⁹ 430 U.S. 787 (1977).

²²⁰ 523 U.S. 420 (1988).

²²¹ 533 U.S. 53 (2001).

²²² *Morales-Santana*, 137 S. Ct. at 1684.

²²³ See *Equality, Sovereignty, and the Family*, *supra* note 175, at 174.

²²⁴ See *Chin*, *supra* note 28, at 1 ("For over a century, the Supreme Court has granted federal immigration laws a unique immunity from judicial review.").

amined. This discussion provides critical perspective to anyone who would overestimate the influence of *Morales-Santana*.

1. *The Heterosexist Interpretation of “A Child Born In Wedlock”*

The first example of biological supremacy in agency interpretation of the INA is the U.S. Department of State’s definition of a “child born in wedlock” as related to birthright citizenship of children born abroad. The U.S. Department of State adjudicates citizenship acquired at birth by children born to U.S. citizens abroad.²²⁵ In that capacity, the State Department added a biological element to the determination of the parent-child relationship by narrowing the definition of a child “born in wedlock” to a child whose biological parents are married at the time of the child’s birth.²²⁶ This is the policy that the agency used to determine that Ethan Dvash-Banks was not a U.S. citizen at birth. Although that case was recently resolved by a federal district court in California, it nevertheless provides an instructive example of a more pervasive problem. In addition, the Zaccari-Blixt case remains pending on similar questions.

Section 301(g) of the Immigration and Nationality Act provides that a person born outside the U.S. is a citizen at birth if one of the person’s parents is a non-citizen and “the other [parent is] a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years”²²⁷ However, this section applies only to children born “in wedlock.”²²⁸ According to the Department of State’s Foreign Affairs Manual, “[t]o say a child was born ‘in wedlock’ means that the child’s biological parents were married to each other at the time of the birth of the child.”²²⁹ Of course, that interpretation means that same-sex couples are unable to have children “in wedlock” because, although they can marry one another, same-sex couples cannot be “the child’s biological parents,” as the State Department interprets this policy.

Accordingly, the Department of State apparently concluded that Ethan Dvash-Banks was not a U.S. citizen because he was not born “in wedlock” to his fathers and Ethan had no direct genetic connection to his U.S. citizen

²²⁵ *Martinez-Madera v. Holder*, 559 F.3d 937, 943 (9th Cir. 2009) (Thomas, Cir. J., dissenting) (“We observed that § 1401 [INA § 301] applies if the person claiming citizenship was born ‘in wedlock,’ while § 1409 [INA § 309] applies if the person was born ‘out of wedlock.’”) (citing *Scales v. INS*, 232 F.3d 1159, 1163 (9th Cir. 2000) (in turn quoting 8 U.S.C. § 1101(c)(1) (1976)). See 8 U.S.C. § 1104(a) (2012) and sources cited in U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL 102.1-1, <https://fam.state.gov/fam/08fam/08fam010201.html> [<https://perma.cc/ZP5S-969W>].

²²⁶ U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1140, Appendix E.

²²⁷ 8 U.S.C. § 1401(g) (2012).

²²⁸ See *Martinez-Madera*, 559 F.3d at 939, 942.

²²⁹ U.S. DEP’T OF STATE, *supra* note 226, § 1140, Appendix E.

father, Andrew Dvash-Banks.²³⁰ The State Department's bizarre policy is that a child born to two married parents cannot be born "in wedlock" because those married parents are not the child's biological parents.²³¹ Furthermore, at the consular level, the government also determined that Ethan Dvash-Banks did not qualify as a U.S. citizen under INA Section 309, which applies to children born "out of wedlock" because Ethan did not have a genetic link to Andrew.²³² So, even though Andrew's name was on Ethan's birth certificate, he was not really Ethan's father from birth in the eyes of the United States.

The impact of this policy on same-sex couples like the Dvash-Bankses and the Zaccari-Blixts is profound. Indeed, the Dvash-Bankses' complaint in the Central District of California said that denying Ethan citizenship at birth based upon the sex and sexual orientation of his parents would cause Ethan to suffer "indignity and stigma of unequal treatment imposed and endorsed by the U.S. government."²³³ Under the State Department's logic, married U.S. citizen parents cannot confer citizenship at birth upon their children born abroad unless those parents are of opposite sexes. As the Dvash-Bankses pointed out to the district court, this position violates Supreme Court precedent "guaranteeing equality to same-sex married couples and their families."²³⁴ The State Department's policy denies same-sex couples a material benefit that is afforded to opposite-sex couples and perpetuates the notions that same-sex couples do not have the same right to parent as opposite-sex couples and that families headed by same-sex couples are inferior to those headed by opposite-sex couples.

2. *The Performance of Biology: Gestation as Parenthood*

The strength of biological supremacy in immigration and nationality law can also be found in the 2014 assisted reproductive technology (ART) exception promulgated by several agencies, which changed the definition of the parent-child relationship with respect to children born through assisted reproductive technology. The 2014 change broadened the scope of what had previously been considered a qualifying parent-child relationship by specifically extending that definition to encompass mothers who gestate and birth children conceived using donated eggs.²³⁵ However, rather than starting to

²³⁰ Complaint at ¶ 4, *Dvash-Banks v. U.S. Department of State, et al.*, No. 2:18-cv-00523 (C.D. Cal. Jan. 22, 2018).

²³¹ U.S. DEP'T OF STATE, *supra* note 226, § 1140, Appendix E (defining "in wedlock" and "out of wedlock").

²³² Complaint at ¶ 4, *Dvash-Banks*, No. 2:18-cv-00523.

²³³ *Id.* at ¶ 7.

²³⁴ *Id.* at ¶ 8.

²³⁵ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., PA-2014-009, EFFECT OF ASSISTED REPRODUCTIVE TECHNOLOGY (ART) ON IMMIGRATION AND ACQUISITION OF CITIZENSHIP UNDER THE IMMIGRATION AND NATIONALITY ACT (INA) (2014).

dismantle biological supremacy in the federal agency's interpretation of immigration and nationality law, the 2014 ART exception actually reinforced a commitment to biological supremacy and revealed the normative notions underlying the constellation of policies critiqued in this Article.

Prior to 2014, children born abroad through ART had to be genetically related to a citizen or resident parent in order to qualify as a "child" under INA section 101(b)(1)(D) for the purpose of birthright citizenship or family-based immigration.²³⁶ As technology advanced and agency interpretation of the law stayed the same, families formed through ART were increasingly excluded from immigration and nationality benefits. Regardless of whether a parent intended to have children, formed a contract, or obtained a court order deeming them the parent of a child, that child could not qualify as the U.S. citizen parent's "child" for immigration and nationality purposes unless the child had a genetic link to that parent. Scholars criticized the interpretation, arguing that the pre-2014 approach's dramatic failure to keep pace with advances in reproductive technology unfairly disadvantaged same-sex couples and couples affected by infertility.²³⁷

In 2014, after sustained criticism and several high-profile cases,²³⁸ the Department of State (DOS) and Department of Homeland Security (DHS) announced a curiously narrow change in policy regarding how a subset of children born abroad through assisted reproductive technology (ART) would be treated under immigration and nationality law. In a set of guidance memos, DOS and DHS changed their interpretation of the law, announcing they would now be "interpreting relevant U.S. law" such that a child born abroad would be considered a qualifying child of the non-genetic parent so long as that parent gestated the pregnancy.²³⁹ This change means that a child born abroad can be considered a qualifying child under section 101(b)(1)(D), even if the child has no genetic relationship to the parent, but only if that parent carries the pregnancy herself. By contrast, a parent who contracts a surrogate to carry a child using a donor egg (like Andrew Dvash-Banks did) cannot confer citizenship on the child.²⁴⁰ Under the revised policy, only a

²³⁶ See, e.g., Scott Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 54 (2010) (citing U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 7 § 1446.2-2(c)(4) (2009) ("The basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg.")).

²³⁷ *Id.* ("U.S. immigration and nationality law is lagging decades behind the cutting edge of state and foreign family law in addressing the challenges of ART."); Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 440 (1997).

²³⁸ See, e.g., Titshaw, *supra* note 236, at 118–133 (identifying shortcomings of immigration and nationality law and advocating for reform); Friedland & Epps, *supra* note 237, at 441–58 (arguing for a more liberal interpretation of immigration and nationality law to recognize the parent-child relationship even when created through ART).

²³⁹ EFFECT OF ART UNDER THE INA, *supra* note 235.

²⁴⁰ *Id.*

person who gestates and births a child from a donor gamete may confer citizenship onto that child.

Although this change expanded the scope of what had previously been considered a qualifying parent-child relationship, it actually served to reinforce biological supremacist ideals by confining motherhood to a carefully circumscribed feminine performance of biological maternity through gestation. This extremely narrow expansion of traditional *jus sanguinis* citizenship underscores the thesis of this Article: given the opportunity to update policies in the face of developments in assisted reproductive technology, DOS and DHS renewed their commitment to biological supremacy by including only gestation—the narrowest, most heteronormative, and most biologically based connection—as a qualifying form of parenthood. This policy essentially requires the feminine performance of biological maternity. A parent has to undertake pregnancy, gestation, and delivery in order to earn status as a parent. However, a parent who is unable to gestate and deliver a child, because the parent is either biologically male or otherwise unable to carry a pregnancy, is unable to confer citizenship upon a non-biologically related child born abroad.

The narrowness of the 2014 ART exception, limited to women who perform pregnancy, seems bizarre and difficult to understand if removed from the broader context of traditional cis-heteronormative patriarchal ideals that have reigned immigration and nationality law since its earliest days.²⁴¹ However, when properly contextualized, it is entirely consistent with the story of American immigration law. Women are deemed more inherently valid parents than men, but parenthood must be earned through bodily submission to the physical performance of pregnancy. Meanwhile, parents (of all genders and sexual orientations) who are unable or choose not to undergo pregnancy are disqualified from parental status under this policy.

3. *The Biologically-Focused Notion of Legitimation*

The concept of “legitimation” has become increasingly fraught in recent years as its persisting saliency in immigration and nationality law increasingly diverges from its obsolescence in family law and other areas of law and society. Despite having been essentially replaced by the concept of parentage in family law in many states,²⁴² legitimation remains heavily relied

²⁴¹ See generally Collins, *Illegitimate Borders*, *supra* note 21, at 2157 (explaining that there is an unspoken understanding that “fathers determined the national culture and political allegiance of their children, in addition to that of their wives”).

²⁴² See, e.g., CAL. FAM. CODE § 7610 (West 2019) (creating methods for establishment of the parent-child relationship rather than legitimation in California); KAN. STAT. ANN. §§ 23-2205, 23-2207 (West 2019) (defining the parent child relationship and setting out methods for establishment of parentage without mention of legitimation in Kansas); VT. STAT. ANN. tit. 15C, § 201 (West 2019) (setting out who can establish parentage with no mention of legitimation in Vermont); VT. STAT. ANN. tit. 15C, § 202 (establishing that all children have equal rights regardless of the circumstances of their birth in Vermont).

upon in immigration law. In addition, legitimation has been affirmatively imbued with an element of biological supremacy that has significantly outlasted its original societal context. The agencies tasked with enforcing immigration laws have repeatedly reiterated the validity of legitimation as a determiner of parentage and biology (or biology mimicked through marriage) as an essential feature of legitimation.²⁴³

Legitimation arises in the context of determining what constitutes a qualifying parent-child relationship under the INA, as defined in Section 101(b)(1). The Board of Immigration Appeals (BIA) interprets the verb “legitimate” to include a biological element, despite the statute expressly deferring to state determinations about whether a child has been legitimated.²⁴⁴ The BIA has held that legitimation requires an actual (DNA test) or mimicked (marital presumption or acknowledgment) biological connection between USC parent and non-citizen child.²⁴⁵ In *Bueno-Almonte*, the Board said that “section 101(b)(1)(C) contains the inherent requirement that the beneficiary be the biological child of the petitioner.”²⁴⁶ In making that statement, the Board second guessed state law and added its own legal element not present in INA 101(b)(1)(C). “Although the INA does not define the term ‘legitimated,’ the BIA has interpreted it ‘to refer to a child born out of wedlock who has been accorded legal rights that are identical to those enjoyed by a child born in wedlock.’”²⁴⁷

Although non-biological parent-child relationships are recognized under INA 101(b), those exceptions are narrow extensions of biological supremacist values. The relationship between a parent and a child born in wedlock is recognized without caveats.²⁴⁸ The step-parent and step-child relationship is considered a qualifying relationship, but only if the biological parent and step-parent marry before the child turns eighteen.²⁴⁹ The relationship between adoptive parent and child is recognized, but the law puts an age limit on that recognition.²⁵⁰ This limitation impacts reproductively non-conforming families, such as same-sex parents and adoptive families.

One case testing the U.S. Citizenship and Immigration Services (USCIS) and the BIA’s insistence upon a biological (or pseudo-biological) com-

But see, e.g., GA. CODE ANN. § 19-7-22 (West 2019) (establishing methods of legitimation in Georgia); N.C. GEN. STAT. ANN. § 49-10 (West 2018) (establishing methods of legitimation in North Carolina).

²⁴³ See *In Re Bueno-Almonte*, 21 I. & N. Dec. 1029, 1031 (BIA 1997).

²⁴⁴ See *id.*

²⁴⁵ *Id.* at 1031–32.

²⁴⁶ *Id.* at 1031.

²⁴⁷ *Gil v. Sessions*, 851 F.3d 184, 187 (2d Cir. 2017) (citing *De Los Santos v. Immigration & Naturalization Serv.*, 690 F.2d 56, 58 (2d Cir. 1982)). See also *In re Cabrera*, 21 I. & N. Dec. 589, 591 (BIA 1996) (“In prior precedent decisions, we have defined legitimation as the act of putting a child born out of wedlock in the same legal position as a child born in wedlock.”).

²⁴⁸ See 8 U.S.C. § 1101.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

ponent to legitimation, *Schreiber v. McCament, et al.*, is currently pending in federal court.²⁵¹ The plaintiff, Patrick Schreiber, is a U.S. citizen and retired lieutenant colonel in the U.S. Army who adopted his Korean niece Hyebin at age seventeen after she left her biological family of origin in Korea.²⁵² USCIS and the BIA determined and the BIA affirmed that Lt. Col. Schreiber could not confer status upon Hyebin because she was not adopted by age sixteen nor “legitimated” by age eighteen.²⁵³ Although the INA states that a child qualifies for relief if she is “legitimated under the laws of the child/parent’s state” and the Schreiber’s home state of Kansas, like most states, considers adoption a form of legitimation, USCIS and the BIA rejected the family’s petition because they, like the Department of State, have explicitly attached a biological component to legitimation.²⁵⁴

Under the INA, a U.S. citizen may petition for a qualifying child to receive legal permanent resident status.²⁵⁵ To determine whether Hyebin was a qualifying child of Lt. Col. Schreiber, USCIS correctly looked to Section 101(b)(1) of the INA, which defines child in several ways.²⁵⁶ The dispute in this case arises from INA 101(b)(1)(C), which defines “the term ‘child’” as “a child legitimated under the law of the child’s residence or domicile” prior to age eighteen.²⁵⁷ USCIS found and the BIA affirmed that Hyebin did not qualify as a child under 101(b)(1)(C) solely because there was no biological connection between Hyebin and Lt. Col. Schreiber.²⁵⁸ However, this analysis ignores the other language of Section 101(b)(1)(C), which entrusts the issue of legitimation to “the law of the child’s residence or domicile.”²⁵⁹ The Schreibers’ residence and domicile was Kansas, and under Kansas law, Hyebin was legitimated prior to age eighteen because adoption is a form of legitimation.

The BIA has acknowledged that legitimation is an “evolving, rather than a fixed, concept,”²⁶⁰ but refused to acknowledge that legitimation has been replaced by parentage in the Schreibers’ home state.²⁶¹ As in most states, parentage rests on “questions of fact and law that extend well beyond biology and the marital status of the parents.”²⁶² Specifically, the Parentage

²⁵¹ See Complaint, *Schreiber v. McCament*, 349 F. Supp. 3d 1063 (D. Kan. 2018).

²⁵² *Id.* at ¶¶25, 28; 349 F. Supp. 3d at 1067–68.

²⁵³ *Schreiber*, 349 F. Supp. 3d at 1068–69.

²⁵⁴ Brief of Washburn Univ. School of Law as Amicus Curiae in Support of Plaintiff, at 3, *Schreiber v. McCament*, 349 F. Supp. 3d 1063 (D. Kan. 2018) (No. 2:17-2371).

²⁵⁵ See 8 U.S.C. § 1151(b)(2)(A)(i) (2009); 8 U.S.C. § 1154(a)(1)(A)(i) (2014).

²⁵⁶ *Id.*

²⁵⁷ 8 U.S.C. § 1101(b)(1) (West 2014).

²⁵⁸ Opening Brief of Appellant, at 10, *Schreiber v. McCament*, 349 F. Supp. 3d 1063 (D. Kan. 2018) (No. 2:17-2371).

²⁵⁹ 8 U.S.C. § 1101(b)(1)(C) (West 2014).

²⁶⁰ Opening Brief of Appellant, at 17–18 (quoting *Matter of Cross*, 26 I. & N. Dec. 485, 492 n.8 (BIA 2015)).

²⁶¹ See *Schreiber v. McCament*, 349 F. Supp. 3d 1063, 1081–82 (D. Kan. 2018).

²⁶² See Brief of Amicus Curiae, *Schreiber*, 349 F. Supp. 3d at 5 (No. 2:17-cv-02371-JAR-JPO); KAN. STAT. ANN. § 23-2201 (West 2018).

Act names adoption as a form of parentage.²⁶³ The Act defines the “parent and child relationship” as “the legal relationship existing between a child and the child’s biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations.”²⁶⁴ Because paternity is the modern equivalent of legitimacy, the Parentage Act suggests that adoption is a means of legitimation.²⁶⁵ State law in Kansas does not require a biological connection to establish paternity.²⁶⁶ Therefore, because adoption is a form of establishing parentage under the Parentage Act in the state of Kansas, Hyebin should have been recognized as “a child legitimated under the law of [her] residence” for the purposes of INA 101 (b)(1)(C). However, USCIS and the BIA took a different view, insisting that legitimation always includes a biological component.²⁶⁷

IV. *JUS PARENTIS*: PARENTAGE RIGHT CITIZENSHIP

This Part prescribes several concrete reforms aimed at dismantling biological supremacy in immigration and nationality law. However, these practical changes will have limited effect without a fundamental reimagining of the theoretical mandate of biological supremacy: *jus sanguinis*. As demonstrated in Part I, the ideal of *jus sanguinis* itself is deeply infected with elements of ethno-nationalism,²⁶⁸ patriarchal dominance, and rigid sexual conformity. That ideology will continue to shape the administration of immigration and nationality law until the ideology itself is toppled. Likewise, the unjust consequences explored in Part III will continue to fester so long as our notion of national belonging through family belonging is defined by blood.

²⁶³ See KAN. STAT. ANN. § 23-2201 (West 2018) (“[A]n adoptive parent may be established by proof of adoption.”)

²⁶⁴ See KAN. STAT. ANN. § 23-2205 (West 2018).

²⁶⁵ Adoption as a means of paternity or parentage in Kansas is a concept that predates the current Kansas Parentage Act. Even during the years when legitimation was still in use, Kansas law provided that some forms of adoption could be a means of legitimation. In 1978, the Supreme Court of Kansas discussed the several ways a child could be legitimated in Kansas, including through adoption pursuant to KAN. STAT. ANN. §59-2103. Although the concept has evolved and grown since 1978, the notion that some form of adoption constitutes legitimation is not a novel concept in Kansas. *Aslin v. Seamon*, 587 P.2d 875, 877–78 (Kan. 1978).

²⁶⁶ See KAN. STAT. ANN. § 23-2207 (West 2018).

²⁶⁷ Administrative Record at 67, *Schreiber v. McCament*, No. 2:17-cv-02371 (D. Kan. June 26, 2017), ECF No. 16 (on file with HLS Library). See also Memorandum and Order at 3, *Schreiber v. McCament*, 349 F. Supp. 3d 1063 (D. Kan. 2018) (No. 2:17-cv-02371-JAR-JPO).

²⁶⁸ See also Dumbrava, *supra* note 2, 2–3. But see Kristin Collins, *Abolishing Ius Sanguinis Citizenship: A Proposal Too Restrained and Too Radical*, 17 (Robert Schuman Ctr. for Advanced Stud., EUI Working Paper RSCAS 2015/80) at 17 (“During seventy years of Chinese exclusionary laws, *ius sanguinis* citizenship provided one of the very few routes to entry, and to American citizenship, for ethnic Chinese individuals born outside the U.S.”).

My proposal for reimagining *jus sanguinis* is to reframe the notion of national belonging through blood to national belonging through family. Thus, *jus sanguinis* becomes *jus parentis*—parentage right citizenship.²⁶⁹ Rather than an ethnic belonging through genetic ties, *jus parentis* would recognize that family belonging arises through a complex constellation of psychological and functional qualities. In its application, this approach would preserve the heritability of American nationality to children born abroad, but remove the absolute necessity for a genetic or gestational link between parent and child. This would revoke the theoretical mandate of nationality law (and related immigration law) as arbiter of blood-based belonging.

Central to this prescription is federal deference to state and foreign adjudications of the parent-child relationship.²⁷⁰ Rather than attempting to take on the role of determining who is a parent, the federal government should defer to family law, which continues to advance towards conceptualizing the family as broader than genetic or gestational connection alone. This vision of family allows room for a diversity of family structures, including co-parenting same-sex couples, those who are affected by infertility, and parents who adopt children.

In making this proposal, I answer Kerry Abrams and Kent Piacenti's call "to examine immigration law's treatment of family on its own terms and using its own values."²⁷¹ I am not suggesting that a particular standard or doctrine from family law should be imported into immigration and nationality law, nor making a general prescription that immigration and nationality law emulate family law.²⁷² Given the variety of state-level approaches to family law, there is no singular standard to import or emulate.²⁷³ Instead, this Article has identified the phenomenon of biological supremacy, examined the source of that phenomenon, and revealed its consequences in terms of

²⁶⁹ Other scholars have proposed and discussed a similar concept, "jus filiationis." Rainer Bauböck, *Ius Filiationis: A Defence of Citizenship by Descent*, 6 (ROBERT SCHUMAN CTR. FOR ADVANCED STUD., EUI Working Paper RSCAS 2015/80). See also, e.g., Abrams, *No More Blood*, *supra* note 22 (discussing Bauböck's proposal).

²⁷⁰ For a deeper look at related immigration federalism questions, see generally Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33 (2016).

²⁷¹ Abrams & Piacenti, *supra* note 21, at 674.

²⁷² Compare with Abrams & Piacenti, *supra* note 21, at 673–74 n.217 (citing Aubry Holland, Comment, *The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law*, 96 CAL. L. REV. 1049, 1085–86 (2008)) (proposing that immigration law should be informed by developments in domestic family law "[i]n order to unite more non-traditional families"); David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 262 (2010) (advocating for bringing immigration law into the mainstream by importing the primacy of children's interests in legal decisions regarding family).

²⁷³ See Abrams & Piacenti, *supra* note 21, at 674 (arguing "we disagree with the notion that state family law is in harmony with itself . . . state family law is diverse and non-uniform").

gender disparity, ethno-nationalism, and unjust exclusion of queer and other sexually nonconforming families. As demonstrated in Part II, the question of who has the right to parent a child is not one with a simple universally applicable answer, but the question is most appropriately asked and resolved in family courts, rather than by federal agencies.

In suggesting that immigration and nationality law defer to state family law adjudications of parentage, without imposing additional biological requirements, I rely upon the long-standing convention of deference to state and foreign law, which is already used in INA 101(b)(1)(C) as well as other areas of immigration law. For example, under the “celebration rule,” when a person seeks to confer an immigration benefit upon a spouse, USCIS determines whether the person and spouse were married under the laws where the marriage was performed, not under U.S. law.²⁷⁴ The only exceptions to that deference are a few well-established circumstances in which a marriage is against U.S. public policy, such as polygamy.²⁷⁵ Similarly, a parent-child relationship could be recognized as long as it was valid in the jurisdiction where the relationship formed, unless contrary to public policy.

This approach has an obvious downside in that many countries have more regressive notions of family relationships than the United States. As such, it would be appropriate for a new rule to have some flexibility. For example, an applicant could be permitted to choose to apply either a “celebration rule” analog, as described above, or the laws of the U.S. state where the child or parent live or intend to live. Families who chose the latter option could be required to submit evidence sufficient to establish that they are or would be considered parent and child in the relevant U.S. state.

Looking back at the examples provided in Part III, each agency would, under this proposal, defer to the parentage determinations made in or under the law of the state or country where the child or parent resides. Specifically, the State Department would have to regard Ethan Dvash-Banks, Andrew’s son in the eyes of Canadian law, as a U.S. citizen at birth, by virtue of his father’s U.S. citizenship. In the case of ART, Americans who contract surrogates abroad would need to ensure that either the foreign jurisdiction or their own U.S. state of residence recognized them as parents of their children. And the Schreiber family would receive full recognition under the law be-

²⁷⁴ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ADJUDICATOR’S FIELD MANUAL (“One may normally presume the validity of a marriage upon presentation of a marriage certificate, duly certified by the custodian of the official record. As a general rule, the validity of a marriage is judged by the law of the place of celebration. If the marriage is voidable but no court action to void the marriage has taken place, it will be considered valid for immigration purposes. However, if a marriage is valid in the country where celebrated but considered offensive to public policy of the United States, it will not be recognized as valid for immigration purposes. Plural marriages fall within this category.”) (citing H-, 9 I. & N. Dec. 640, 642 (BIA May 1, 1962) (holding that “polygamous marriage . . . falls within the well-recognized exception to the general rule that the validity of a marriage is determined by the law of the place of celebration”)).

²⁷⁵ *Id.*

cause Hyebin's parentage was determined by Kansas prior to her eighteenth birthday.

CONCLUSION

As state courts and the 2017 Uniform Parentage Act lead family law into the future of parentage defined by intent and function, immigration and nationality cling to a notion of parenthood as a biological status, without regard to the resultant subordination of queer and reproductively nonconforming parents. This Article posits that this biological supremacy is a consequence of the ethno-nationalist and patriarchal ideals of American *jus sanguinis* doctrine. In pursuit of immigration and nationality laws that accord with the fundamental right to form a family and raise children, the construct of national belonging must be reimagined to encompass a broader vision of parenthood, allowing for recognition of non-biological parent-child relationships, which are already recognized in other areas of the law. To that end, this Article proposes the concept of *jus parentis*, a birthright citizenship conferred based on the establishment of parentage rather than a biological connection.