
VIRGINIA LAW REVIEW

VOLUME 100

JUNE 2014

NUMBER 4

ARTICLES

IMMIGRATION'S FAMILY VALUES

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INTRODUCTION

FAMILY relationships are central to modern immigration and citizenship law. The vast majority of immigrants who acquire permanent residency each year do so based on family ties.¹ Likewise, a common method of avoiding deportation is a demonstration of harm to a family member.² In addition, children born outside the United States to U.S. citizen parents are often citizens from birth based on their parentage.³ Lawful immigration status provides substantial benefits: It confers the right to work in the United States, gives increased protections against deportation, and allows family members to live together who might otherwise be torn apart. Citizenship provides additional rights, including the right

¹ See Immigration and Nationality Act (“INA”) § 101(b), 8 U.S.C. § 1101(b) (2012) (defining “child” and “parent”); INA § 201(b), 8 U.S.C. § 1151(b) (admissions for immediate relatives of U.S. citizens); INA § 203(a), 8 U.S.C. § 1153(a) (admissions for family preference immigrants); Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., 2011 Yearbook of Immigration Statistics 18–19 (2012) (providing statistics on all forms of immigration for years up to and including 2011).

² See INA § 240A (requirements for cancellation of removal).

³ See *id.* §§ 301, 309 (transmission of citizenship outside of the United States).

to vote or run for office, and the right to remain in the country, even after the commission of a serious crime.

Determining who counts as a “parent” or “child” for immigration and citizenship purposes, then, can have life-changing consequences for an individual. Often, parentage will be obvious. For example, a married man and woman and their genetic children are an easy case, especially if both parents have cared for or financially supported the children. But in an increasing number of cases, parentage is more difficult to determine. Sometimes a marital father—the man married to a child’s birth mother—is not that child’s genetic father. Sometimes a child’s primary caretaker, or “functional parent,” is a parent’s significant other, unrelated to the child by marriage or genes. Some genetic parents have no intention of actually parenting: They are egg or sperm donors, helping a person who cannot conceive to become a parent by intention. And, of course, sometimes a child’s genetic father may not know he is a parent at all.

Every area of law that relies on definitions of “parent” and “child” must ultimately grapple with the questions of which parent-child relationships to recognize and how these relationships must be proven. Legislators and judges working in these areas, however, have not been consistent about these definitions. Each state in the United States has its own family law and inheritance law. The federal government, because it administers programs that provide benefits or impose burdens based on family ties, has developed its own methods for defining these relationships.⁴ In its role as regulator of immigration and citizenship, the federal government has developed its own definitions of family through congressional action—the Immigration and Nationality Act (“INA”)—and agency action and practice, including official regulations, the Foreign Affairs Manual, and memoranda of understanding.

State family law and immigration and citizenship law have developed differing and sometimes conflicting methods of balancing the parentage claims of various types of parents: marital, genetic, functional, and intentional.⁵ Immigration and citizenship law, as this Article will show, of-

⁴ See Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 *Iowa L. Rev.* 1467, 1483–510 (2013) (discussing parentage rules in social security and military-benefits law).

⁵ See Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 *Geo. Mason L. Rev.* 419, 421–23 (2013) (describing judicial recognition of functional parenthood). See generally Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 *Hastings L.J.* 597 (2002) (discussing courts’ treatment of parenthood through assisted reproductive technology).

ten reach different conclusions about parentage than those reached under state family law. A person who would be considered a “parent” in a child custody dispute in California or an inheritance case in New Jersey might not be a “parent” if he tries to sponsor his child for an immigrant visa or transmit birthright citizenship to a foreign-born child. These differences in definition sometimes result in the functional breakup of an otherwise intact family.

Recent examples abound. Marital fathers who take DNA tests to prove paternity for immigration or citizenship purposes sometimes discover to their surprise that they are not the genetic parents of the children they have raised.⁶ Were this to happen in a custody or child support case, a functional or marital father might nevertheless find himself eligible for custody or visitation or liable for child support. But the lack of a genetic relationship in the immigration and citizenship context can strip such a father of the right to transmit citizenship or sponsor a child for an immigrant visa. Similarly, a U.S. citizen woman who undergoes in vitro fertilization (“IVF”) using donor eggs and gives birth abroad must inquire into the citizenship status of the *egg donor* if she wants to ensure that her child will be a U.S. citizen.⁷ Without a genetic connection, she cannot transmit citizenship herself, even if she gives birth to the child; it is the citizenship status of the genetic parent, the egg donor, that matters. In no state court would a mother be denied parentage of a child she bore using donor eggs, unless there was an agreement that she was a gestational surrogate for the donor. Immigration and citizenship law also retain distinctions based on the marital status of parents that would be unacceptable under the family law of many states. Unmarried fathers bear a much higher burden in transmitting citizenship to their foreign-born children, while unmarried mothers bear a lesser burden than unmarried fathers or married parents of either sex.⁸

⁶ See, e.g., Rachel L. Swarns, DNA Tests Offer Immigrants Hope or Despair, N.Y. Times, Apr. 10, 2007, at A1.

⁷ 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); see, e.g., Michele Chabin, In Vitro Babies Denied U.S. Citizenship, USA Today (Mar. 19, 2012, 6:23 PM), <http://www.usatoday.com/news/world/story/2012-03-19/in-vitro-citizenship/53656616/1>.

⁸ See INA §§ 301, 309; *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 73 (2001) (upholding INA provision that distinguishes between children of married and unmarried parents in citizenship transmission); see also Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v Albright*, 1998 Sup. Ct. Rev. 1, 1–2 (discussing gender-differentiated INA rule).

Parentage—and how the law should determine it—has been an issue of great interest to legal scholars in recent years. Scholars have analyzed and critiqued the government's definitions of parentage in the contexts of custody disputes,⁹ child support,¹⁰ federal benefits,¹¹ adoption,¹² welfare law,¹³ child abuse cases,¹⁴ assisted reproductive technologies (“ART”),¹⁵ donor-assisted reproduction,¹⁶ gestational surrogacy,¹⁷ caregiving,¹⁸ and even the costs associated with pregnancy.¹⁹ Scholars of immigration and citizenship have likewise explored the ways in which these areas of law craft their own definitions of family,²⁰ and many have argued that immigration and citizenship law's definitions of “family” should be broadened to match those of state family law.²¹

⁹ See, e.g., Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. Pa. L. Rev. 921, 928 (2005).

¹⁰ See, e.g., Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 Ind. L. Rev. 611, 614 (2009).

¹¹ See, e.g., Joslin, *supra* note 4, at 1473–75.

¹² See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 Duke L.J. 1077, 1083–84 (2003).

¹³ See, e.g., Tonya L. Brito, *The Welfarization of Family Law*, 48 U. Kan. L. Rev. 229, 264 (2000).

¹⁴ See, e.g., James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. Rev. 755, 758 (2009).

¹⁵ See, e.g., Dorothy E. Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209, 213–14 (1995); Storror, *supra* note 5, at 602–03.

¹⁶ See, e.g., Naomi Cahn, *The New Kinship*, 100 Geo. L.J. 367, 368–74 (2012); I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 Geo. L.J. 431 (2012).

¹⁷ See, e.g., Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 Ind. L.J. 1223, 1227 (2013).

¹⁸ See, e.g., Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va. L. Rev. 385, 388 (2008).

¹⁹ See, e.g., Shari Motro, *Preglimony*, 63 Stan. L. Rev. 647, 694 (2011).

²⁰ See, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625, 1628–33 (2007); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 Wis. L. Rev. 345, 347–48; Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 Geo. Immigr. L.J. 807, 808–09 (2011); María Pablón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 Harv. Latino L. Rev. 229, 230 (2008); Titshaw, *supra* note 7, at 55.

²¹ See, e.g., Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 Yale Hum. Rts. & Dev. L.J. 120, 123–24 (2009); Fernando Colon-Navarro, *Familia e Inmigración: What Happened to Family Unity?*, 19 Fla. J. Int'l L. 491, 491–93 (2007); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 Colum. Hum. Rts. L. Rev. 509, 510–13 (2010); Lori

This Article offers a systematic examination of how determinations of parentage operate in immigration and citizenship law. As a descriptive matter, we argue that immigration and citizenship law generally use more stringent standards for determining parentage than state family law, despite their common origins. Rather than simply noting that the differences exist, we take an institutional approach to understanding why. We 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. State family law's primary interests are in privatizing the dependency of children and, somewhat secondarily, in children's physical and psychological well-being. Immigration and citizenship law, in contrast, implicate the federal government's interest in achieving optimal numbers of immigrants and citizens. In addition, because the benefits of lawful immigrant status and U.S. citizenship are so extensive, an important state interest in determining parentage in the immigration and citizenship context is the ferreting out and prevention of fraud. Because of these differences, variations in institutional actors' attitudes toward various kinds of parentage may be inevitable, or, at the very least, understandable. Put differently, since the values at stake in immigration and citizenship law differ so greatly from the values of family law, it should be no surprise that the "family values" espoused by immigration and citizenship law are very different from those we are accustomed to seeing in family court.

We do not, however, believe that these institutional differences mean that current immigration and citizenship laws are optimal. We argue, rather, that a clear understanding of immigration and citizenship laws' "family values" shows that these laws' approaches to parentage fail to adequately account for the crucial federal interest of protecting its citi-

A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 *Hofstra L. Rev.* 1271, 1273–74 (2008); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 *Va. J. Soc. Pol'y & L.* 58, 58–60 (2006); Janice D. Villiers, *Brave New World: The Use and Potential Misuse of DNA Technology in Immigration Law*, 30 *B.C. Third World L.J.* 239, 270–71 (2010); Victoria Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 *Yale L.J.* 862, 864–65 (2011); Monique Lee Hawthorne, Comment, *Family Unity in Immigration Law: Broadening the Scope of "Family,"* 11 *Lewis & Clark L. Rev.* 809, 810–11 (2007); Aubry Holland, Comment, *The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law*, 96 *Calif. L. Rev.* 1049, 1049–51 (2008).

zens' and residents' right to family reunification. Current federal policy privileges interests in limiting membership and in fraud prevention at the expense of allowing U.S. citizens and lawful permanent residents to exercise their own liberty interests in preserving parent-child relationships. We argue that the interests of individual citizens are also national interests that the federal government should embrace as its own, and that recognition of intentional and functional parentage deserves a more prominent place in the nation's definition of parentage in the immigration and citizenship context. The reason for this, however, is not that federal immigration and citizenship law should defer to state family law norms. Indeed, the difference in interests may result in different rules, which may be more stringent—but also might be more expansive—than current family law norms.

Part I of this Article will argue that family law has undergone a shift from privileging the marital family—largely as a proxy for the genetic family—to privileging genetic relationships, provable by DNA testing, and functional relationships, demonstrated by an ongoing relationship between parents and children. It will argue that this expansion of recognition beyond the marital family developed because it served the central purposes of family law—the privatization of dependency and the creation of stable families for children. Part II will show how immigration and citizenship law responded differently to the same changes in technology, developing a fixation on genetic testing, with functional relationships recognized only to supplement, not to substitute for, genetic relationships. Part III will offer a critique of the current immigration and citizenship regime. We posit that immigration and citizenship law developed differently from family law because the institutional commitments of these areas of law are different: Two of the central commitments are fraud prevention and achieving optimal numbers of immigrants and citizens. We argue that any reform must necessarily take into account the unique institutional context, but that immigration and citizenship law also must integrate the family reunification interests, especially those of U.S. citizens, and that the current regime fails to do so adequately.

I. PARENTAGE IN FAMILY LAW

There are many ways a state court determining parentage could go about making such a determination. A court could find that the individuals who are the child's genetic parents, based on DNA tests, are the

child's legal parents (what we call here "genetic parentage"). Or a court could determine that the child's parents are the gestational mother and her spouse ("marital parentage"). Instead, a court could ask who has been engaged in day-to-day caretaking functions for the child and who has a developed psychological relationship with the child ("functional parentage"). Finally, a court could ask who intended to become the child's parent ("intentional parentage"); for example, is the man who is indisputably the child's genetic parent someone who intended to be a parent to the child, or did he intend merely to be a sperm donor? This Part will demonstrate that state law approaches to parentage vary but are connected by two common goals: the privatization of dependency and stability for children.

A. Parentage at Common Law

The law has always been forced to decide who counts as a "parent." The roots of the law of parentage, however, lie in a period when marriage was officially the preferred and only legally sanctioned space for childbearing, when scientific proof of genetic parentage was impossible, and when the legal implications of parentage were markedly different from those today. Thus, at common law, the dominant form of maternity was based on gestation and birth, and the dominant form of paternity was based on marriage.

When common law tests for determining parentage developed in England and were transported to the United States in the eighteenth century, parenthood meant something very different than it does today.²² It looked much more like a property relationship, in which parents—fathers, really—"owned" their children.²³ Husbands wielded considerable power over children born into marriage, just as under the doctrine of coverture they wielded power over their wives.²⁴ For example, married fathers were entitled to "the benefits of [their] children's labour."²⁵ They

²² For a fascinating history of shifts in the legal status of children in England and America, see generally Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (2005).

²³ Blackstone used the word "property," for example, to justify the right of a man to recover his wife, child, or servant from anyone who "wrongfully detain[ed]" them, comparing them to "property in goods or chattels personal." 3 William Blackstone, *Commentaries* *4.

²⁴ See, e.g., Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 *Yale L.J.* 1669, 1682–83 (2000).

²⁵ 1 William Blackstone, *Commentaries* *441.

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also had the power to correct their children in a “reasonable manner”²⁶—the standard for which, of course, has evolved over time. In contrast to the “legal power of a father,” the mother was “entitled to no power, but only to reverence and respect.”²⁷ The primary responsibility that accompanied the married father’s power over his children was that of maintenance: He had to support them financially.²⁸ He also had a duty of protection and a duty to provide an appropriate education.²⁹

This power, however, existed only with regard to children born in marriage. Marriage set out a bright-line division between children claimed by a particular man and those who were not. Because of the disabilities attached to illegitimacy and the uncertainties surrounding the support of illegitimate children, the common law held to the “fundamental principle . . . that marriage is the proof of paternity.”³⁰ Early English courts applied the “rule of the four seas” with absolute inflexibility to deem children legitimate in the face of certain evidence that the woman’s husband was not the child’s father. A court would not admit evidence of a child’s illegitimacy even if the “husband had been confined in a dungeon, for years before the birth of the child, and had never seen any person but the jailer,” so long as the husband was “within the four seas” of England for the nine months prior to the child’s birth.³¹ And “if the husband had been absent, beyond sea, for five years, and had returned only one day before the birth of the child, such child would have been legitimate.”³²

Ultimately the absurdity of the rule, as applied to the children of wives who lived apart from their husbands, led to its abandonment in 1732.³³ In the century following, American courts wrestled with how

²⁶ Id. at *440.

²⁷ Id. at *441.

²⁸ Id. at *434–38.

²⁹ Id. at *434.

³⁰ Harris Nicolas, *A Treatise on the Law of Adulterine Bastardy* 1 (London, William Pickering 1836) (emphasis omitted).

³¹ Tapping Reeve, *The Law of Baron and Femme, of Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of the Courts of Chancery* 399 (Albany, William Gould, 3d ed. 1862).

³² Id.

³³ Nicolas, *supra* note 30, at 126–29 (discussing *Pendrell v. Pendrell*, in which an English justice allowed a jury to consider the probability of intercourse between the husband and wife).

much evidence was sufficient to rebut the presumption of legitimacy.³⁴ One might think of these doctrines as the precursors to modern-day blood and DNA testing—methods for demonstrating the lack of a biological connection. Where the ironclad marital presumption had been an unreasonably blunt instrument that treated marriage to a child's mother as a proxy for genetic paternity, the tests for rebutting it honed its accuracy.

The marital presumption of paternity, as a practical matter, meant that a man's non-genetic child might nonetheless be his legal child. On the flip side, children born outside of marriage were often *not* the legal children of the men who were, in fact, their genetic fathers. Under the common law, an illegitimate child was *filius nullius*, or the "son of nobody."³⁵ Such a child could not inherit and did not have a surname at birth but could only gain one by reputation.³⁶ By the end of the eighteenth century, several states had begun to soften some of the disabilities attaching to illegitimacy. For example, in Virginia, a nonmarital child could inherit through the mother, and if the father recognized the child and married the mother, the child could also inherit from the father as if born in wedlock.³⁷ By the nineteenth century, a number of states permitted inheritance only through the mother, but some permitted inheritance through the father if the father acknowledged his paternity in writing.³⁸ And in some states, nonmarital children could be legitimated if their parents subsequently married.³⁹ All of these doctrines, however, involved a nonmarital father reaching out and affirmatively choosing legal parenthood; the doctrines did not impose it on him.

Absent a father's choice to become involved, an unmarried mother shouldered the primary responsibility for the child.⁴⁰ If the father was unknown, she carried that burden alone, but in practice it appears the financial responsibility often fell on her town or parish.⁴¹ This practice

³⁴ See, e.g., *Stegall v. Stegall*, 22 F. Cas. 1226, 1226–30 (C.C.D. Va. 1825) (No. 13,351); *Tate v. Penne*, 7 Mart. (n.s.) 548, 554 (La. 1829); *Commonwealth v. Shepherd*, 6 Binn. 283, 283–85 (Pa. 1814).

³⁵ 1 William Blackstone, *Commentaries* *458.

³⁶ *Id.* at *458–59.

³⁷ *Id.* at *458 n.16.

³⁸ *Reeve*, *supra* note 31, at 404 n.1.

³⁹ *Id.* at 400 n.1.

⁴⁰ See, e.g., *Simmons v. Bull*, 21 Ala. 501, 504 (1852); *Wright v. Wright*, 2 Mass. (1 Tyng) 109, 110 (1806); *Comment, Extent of a Parent's Duty of Support*, 32 *Yale L.J.* 825, 827 (1923).

⁴¹ *Reeve*, *supra* note 31, at 410–11.

began to put pressure on states to find ways to force nonmarital fathers to support their children. A number of states passed “bastardy” statutes in derogation of the common law to establish a support obligation, and by the mid-nineteenth century these statutes were common.⁴²

Just as the doctrine that developed to rebut the marital presumption of paternity resembles a primitive form of DNA testing to *disprove* paternity, the bastardy statutes were the precursors of today’s system of using DNA testing to *prove* paternity of nonmarital fathers. The bastardy statutes served two goals: making the father share “equally” in the support of the child and protecting the locality from the expense of supporting the child. Under these bastardy statutes, the father’s sole legal tie to the child was financial. The statutes conferred on him no parental authority.⁴³ He was not entitled to the custody and services of the child.⁴⁴ He did not exercise parental authority the way a married father could. Thus, the law disaggregated the rights and responsibilities of fatherhood for unmarried men. The married father held the entire bundle of rights and responsibilities, but the unmarried father, even if charged with a duty of support, did not exercise parental authority over the child.

B. Family Law in the Twentieth Century

1. Social and Technological Change

This relentless focus on marriage shifted dramatically in the twentieth century. Although marriage continued to dominate courts’ and legislatures’ thinking, it declined in importance as contraception became widely available, women became financially independent, cohabitation before marriage became widespread, and nonmarital births soared.⁴⁵ By the end of the century, about a third of all children were born out of wedlock, and by 2011, this figure had risen to forty-one percent.⁴⁶ Thus illegitimacy began to lose its social—and legal—stigma. Some states amended their codes to declare that all children are deemed legitimate by law; others saw their laws struck down by the U.S. Supreme Court

⁴² *Id.* at 411 n.1.

⁴³ See *Perkins v. Mobley*, 4 Ohio St. 668, 672–73 (1855).

⁴⁴ *Id.*

⁴⁵ See Joanna L. Grossman & Lawrence M. Friedman, *Inside the Castle: Law and the Family in 20th Century America* 121–41 (2011).

⁴⁶ *Id.* at 20; Ctrs. for Disease Control & Prevention, *Unmarried Childbearing*, <http://www.cdc.gov/nchs/fastats/unmarry.htm> (last visited Mar. 30, 2014).

for unlawful discrimination against nonmarital children.⁴⁷ These changes lowered the stakes in parentage determinations. A court that found a child not to be the child of the mother's husband would not necessarily be dooming that child to social stigma and financial destitution.

Further, blood testing and DNA testing began to undermine the marital presumption of paternity and open up the possibility of genetic fathers asserting their own claims to custodial rights to their nonmarital children or, on the other hand, giving mothers and the state the power to demonstrate with certainty the genetic father of a child. Early blood testing, referred to as "ABO" testing, was of limited use, because it could not conclusively prove parentage; it could only reliably *exclude* the possibility of parentage in cases in which the child's blood type could not be produced by the combination of the parents' types.⁴⁸ A later blood test developed in the twentieth century, the human leukocyte antigen ("HLA") test, allowed scientists to identify antigen markers, which are inherited from a child's parents, in white blood cells.⁴⁹ This form of testing was more accurate; "only about one out of a thousand people will have a similar HLA type."⁵⁰ The gold standard in testing, however, arose at the end of the twentieth century. DNA testing is universally preferred over ABO and HLA testing because it can provide the most conclusive scientific evidence of a parental relationship. DNA testing can be performed on blood or other material, such as a tissue sample from a cheek swab. DNA testing rests on the principle that each person's DNA is unique and its structure remains unchanged throughout a person's life—what is often referred to as a person's "genetic code."⁵¹ DNA testing provides much greater certainty of a biological relationship between father and child. Today, most, if not all, states have statutes governing the use of DNA testing for establishing paternity.⁵²

⁴⁷ See Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 *Tex. L. Rev.* 829, 845 (1966). For a more complete description of the Supreme Court's jurisprudence in this area, see Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 *Fla. L. Rev.* 345, 346–66 (2011).

⁴⁸ Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 *BYU L. Rev.* 129, 131–32 (1994).

⁴⁹ *Id.* at 132–33.

⁵⁰ *Id.* at 133 (quoting Paul I. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 *J. Fam. L.* 543, 543–44 (1978)).

⁵¹ *Id.* at 136–37.

⁵² See, e.g., *Conn. Gen. Stat.* § 46b-168 (2013).

In addition to increased genetic certainty, the twentieth century gave rise to new family forms. Stepparent and blended families increased markedly, and lesbian, gay, bisexual, and transgender (“LGBT”) people began to have children, often through adoptive or functional parenting of offspring from previous, opposite-sex marriages or relationships. Technological advances meant that LGBT individuals and people struggling with infertility alike could reproduce using artificial insemination or IVF, often with the help of sperm donors, egg donors, or gestational surrogates. The result of these social and technological changes was a broadening of the range of possible legal parents for particular children. The common law had only considered the possibility of a gestational and genetic mother, a marital father, and a genetic father. Today, there is a possibility of a genetic father, genetic mother, gestational mother, functional parents, and intentional parents. Parentage law has had to scramble to keep up.

2. *The Legal Response*

The legal response to these social and technological changes has not been simple and is far from resolved, even today. Parentage is an issue of state law, and each state has dealt with parentage in its own way. Some generalizations, however, are possible. Many states have moved toward a system that credits genetic parentage more extensively than ever before, moving away from a pure marital presumption of paternity and allowing this presumption to be rebutted by genetic fathers. Simultaneously, states, prodded by the federal government, have begun holding nonmarital fathers financially accountable for their genetic children, especially if there is no rival marital father in the way. Lastly, many states have begun to recognize *de facto* parental relationships—relationships based not on genetics or marriage but instead on functioning as a family. The result has been a simultaneous expansion of the role of genetic and functional parentage to the detriment—although certainly not the demise—of marital parentage.

a. *The Erosion of Marital Parentage*

Many states have developed robust exceptions to the marital presumption of paternity, allowing genetic, nonmarital fathers to rebut the presumption and gain legal parent status, often resulting in custody or visitation of their nonmarital children. This change has occurred despite

the U.S. Supreme Court's refusal to mandate it. During the 1970s and 1980s, it appeared that the marital presumption might be under serious constitutional attack. The Supreme Court decided several cases involving the rights of unmarried fathers, and the implication appeared to be that their rights to procedural due process were robust enough that they might be able to challenge the rights of non-genetic, marital fathers.⁵³ One such case, in holding that "[p]arental rights do not spring full-blown from the biological connection between parent and child,"⁵⁴ made it appear that the rights of genetic fathers are determined by a combination of genetics plus functional relationships, not through marriage alone. A putative father's right to constitutional protection would depend on whether he had "com[e] forward to participate in the rearing of his child."⁵⁵ But in *Michael H. v. Gerald D.*, in a badly fractured opinion, the Court failed to extend this right to cases where the genetic father had competition in the form of a man married to the mother when the child was born.⁵⁶ Justice Scalia's plurality opinion emphasized the historical deference given to marital fathers at common law and contrasted it with the complete lack of common law protection for what he termed "adulterous natural father[s]."⁵⁷ Because the opinion was a mere plurality, however, the precedential value of the case going forward was in doubt. Justice Stevens provided a key fifth vote, and in his concurrence, he noted that he read the California statute at issue to give the genetic father the ability to intervene in the case as an interested third party, not as completely divested of procedural due process rights.⁵⁸

After *Michael H.*, the states were left with little guidance as to how to weigh genetic, marital, and functional paternity. Clearly, following the previous cases, genetic fathers had some right to legal parentage where they also functioned as a parent and where there was no marital father with whom to compete. But the extent of this functional parenting was

⁵³ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 284 (1983); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁵⁴ *Lehr*, 463 U.S. at 260 (citing *Caban*, 441 U.S. at 397).

⁵⁵ *Id.* at 261 (quoting *Caban*, 441 U.S. at 392).

⁵⁶ 491 U.S. at 120 (plurality opinion).

⁵⁷ *Id.* Professor June Carbone has characterized Justice Scalia's plurality opinion as an "insistence on freezing constitutional meaning in terms of the circumstances (and patriarchy) of 1787." June Carbone, *Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 *Hofstra L. Rev.* 859, 862 (2011).

⁵⁸ *Michael H.*, 491 U.S. at 132–33 (Stevens, J., concurring).

in question, as was—due to Justice Stevens’s crucial fifth vote—the strength of the genetic parent’s ability to challenge the marital father. Taken as a whole, the case law that developed after *Michael H.* appears to be in disarray, but individual states have internally coherent systems that take particular positions on the relative role that biology and marriage should play in determining paternity. Professors June Carbone and Naomi Cahn have argued that the states can be grouped as follows: those that embrace the “importance of marriage . . . in relatively absolute terms”; those that embrace the “importance of biology”; and those that take a “contextualist” approach, embracing function or using a best-interests-of-the-child approach.⁵⁹

Thus, in Utah, a genetic father was denied the right to assert paternity during the genetic mother and marital father’s divorce proceeding, even though there was no longer any “spousal unity” to preserve.⁶⁰ The Utah Supreme Court explained: “The parent-child relationships created by marriage last beyond the dissolution of the individual marriage. . . . Favoring legitimacy . . . promotes family harmony between parents and children by protecting and preserving these crucial relationships.”⁶¹ In contrast, the Iowa Supreme Court determined that unmarried fathers have a constitutional due process right to demonstrate paternity,⁶² despite the U.S. Supreme Court’s refusal to recognize just such a right in *Michael H.*⁶³ The Iowa Supreme Court recognized the state’s interest in “promoting the sanctity and stability of the family,” but it weighed that interest against “the significance of the parent-child relationship in the context of due process,” seemingly equating “the parent-child relationship” with a genetic relationship.⁶⁴ It also concluded that a hearing would further the interests of “recogniz[ing] truth and discourag[ing] deceit” and “encouraging fathers to take responsibility for their chil-

⁵⁹ June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 *Fam. L.Q.* 219, 220–21 (2011).

⁶⁰ *Pearson v. Pearson*, 2008 UT 24, ¶ 11, 182 P.3d 353, 355.

⁶¹ *Id.* ¶ 17, 182 P.3d at 356–57; see also *CW v. LV*, 2001 PA Super 332, ¶ 5, 788 A.2d 1002, 1005 (holding that the “presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents” and that its goal is to achieve “the preservation of families” and to protect “the integrity of a functioning marital unit” while making children “secure in knowing who their parents are” (quoting *Martin v. Martin*, 710 A.2d 61, 63 (Pa. Super. Ct. 1998) (emphasis omitted))).

⁶² *Callender v. Skiles*, 591 N.W.2d 182, 190–92 (Iowa 1999).

⁶³ 491 U.S. at 119–21 (plurality opinion).

⁶⁴ *Callender*, 591 N.W.2d at 191.

dren.”⁶⁵ Some states consider both marriage and genetics, considering the context and the extent to which the genetic father’s interests will interfere with an ongoing marriage and vice-versa.⁶⁶ For example, even states that allow genetic fathers to claim parenthood sometimes apply a best-interests-of-the-child standard to determine whether to allow such suits to go forward.⁶⁷

b. The Rise of Genetic Parentage

Genetic fathers now sometimes win parentage battles against marital fathers. What happens when there is *no* marital father? There, the state is not in the position of deciding between two men who want rights; instead, it is trying to identify a man it can require to support a particular child. DNA testing has made an enormous difference in the law of non-marital fathers and child support. Now that the genetic father of any given child can be proved with near certainty, states have set up complex systems to find ways to force genetic fathers to come forward and support their offspring. Where marriage used to do most of the work in defining the parent-child relationship (for men, no marriage equaled no relationship), genetics has taken over.

Unlike the erosion of the marital presumption of paternity, which was largely a creature of state statutory and case law, the increased use of DNA testing to conscript unmarried fathers into paying child support was driven by Congress. This push began in the 1970s when Congress began to see large numbers of single mothers on welfare rolls as a problem that could be solved through child support payments. Numerous federal statutes encouraged states to establish programs that would help

⁶⁵ *Id.*; see also *In re Adoption of Kelsey S.*, 823 P.2d 1216, 1228 (Cal. 1992) (en banc) (stating that “we must not read too much into *Michael H.*”); *In re Adoption of B.G.S.*, 556 So. 2d 545, 549 n.2 (La. 1990) (characterizing the *Michael H.* plurality as a “departure” from previous law); *In re J.W.T.*, 872 S.W.2d 189, 196 & n.21, 198 (Tex. 1994) (concluding that *Michael H.* was “an aberration,” and holding that a statute that precluded an alleged father from rebutting the marital presumption or claiming rights by establishing his paternity violated due process).

⁶⁶ June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 *Whittier J. Child & Fam. Advoc.* 3, 3–8 (2007). Compare *H.S. v. Superior Court*, 108 Cal. Rptr. 3d 723, 728 (Ct. App. 2010) (finding for marital father), with *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 311–13 (Ct. App. 2000) (allowing genetic father to rebut marital presumption).

⁶⁷ See, e.g., *R.N. v. J.M.*, 61 S.W.3d 149, 157 (Ark. 2001).

to identify genetic fathers of welfare-eligible children⁶⁸ on the theory that identifying fathers would reduce welfare costs.⁶⁹

Following Congress's intervention, establishment of paternity increased dramatically. But this was not primarily due to blood or DNA testing. Rather, Congress developed an ingenious mechanism: the Voluntary Acknowledgement of Paternity, or "VAP." Under the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), states are required to authorize VAPs in order to receive federal welfare funds.⁷⁰ VAP forms must be offered to all parents at hospitals and birth records offices.⁷¹ The birth mother and the man claiming paternity each sign the VAP, and it is then filed with the state records office.⁷² Either party may rescind it within sixty days of the child's birth.⁷³ If a nonmarital father refuses to sign the VAP, he cannot have his name appear on

⁶⁸ See, e.g., Family Support Act of 1988, Pub. L. No. 100-485, §§ 101(a), 111(b), 112(a), 102 Stat. 2343, 2344-46, 2349-50 (codified as amended in scattered sections of 5, 26, and 42 U.S.C.) (mandating wage withholding of new or modified child support orders and making genetic testing available if a party requested it in a dispute and providing federal funding for ninety percent of the costs of the testing); Social Service Amendments of 1974, Pub. L. No. 93-647, §§ 452(a), 453(b), 88 Stat. 2337, 2351, 2353 (1975) (codified as amended at 42 U.S.C. §§ 651-62 (2006)) (requiring states receiving federal funds to undertake to establish paternity and secure support for individuals receiving Aid to Families with Dependent Children ("AFDC")) and establishing a child support enforcement program that allowed states to use social security records to locate parents and required state welfare agencies to establish parental locator services); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 325(a)(2), 110 Stat. 2105, 2224 (1996) (codified as amended at 42 U.S.C. § 666(c)(1) (2006)) (creating a new requirement that state child support agencies have the authority to order genetic tests for the purpose of establishing paternity without first obtaining any judicial or administrative order).

⁶⁹ For critiques of this theory, see, e.g., Brito, *supra* note 13, at 264 (recognizing that many fathers who do not pay their support obligations "have insufficient income . . . because they are young, uneducated, and lack significant work experience"); Ann Cammett, *Deadbeats, Deadbrokees, and Prisoners*, 18 *Geo. J. on Poverty L. & Pol'y* 127, 130 (2011) (arguing that policy fails to "distinguish[] deadbeats from 'deadbrokees'—those who simply don't have the ability to pay"); Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 *J. Pol'y Analysis & Mgmt.* 44, 45 (1998) (arguing that many fathers "are more appropriately characterized as 'turnips,' noncustodial fathers who cannot afford to pay child support without impoverishing themselves or their new families" (emphasis omitted)).

⁷⁰ 42 U.S.C. § 666(a)(5)(C) (2006).

⁷¹ *Id.* § 666(a)(5)(C)(ii)-(iii).

⁷² One study found that up to 78.5% of nonmarital births result in VAPs. Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 *Am. U. J. Gender Soc. Pol'y & L.* 467, 477 (2012).

⁷³ 42 U.S.C. § 666(a)(5)(D)(ii) (2006).

the child's birth certificate.⁷⁴ The VAP is considered a legal finding of paternity without the necessity of judicial or administrative proceedings.⁷⁵ States cannot require blood or genetic tests in conjunction with the signing of a VAP, although they may offer them. A man, therefore, could sign a VAP knowing full well that he is not the genetic father of the child.⁷⁶ The VAP gives, in effect, the same protection as marriage to a family that wants a particular man to have the role of "father" within it.⁷⁷

Just as the marital presumption can be rebutted, a VAP can be rescinded. After sixty days, the only grounds for rescission are "fraud, duress, or material mistake of fact."⁷⁸ PRWORA does not specify what constitutes "fraud" or "material mistake," and so state courts and legislatures have stepped in to fill the gap. Some states allow challenges at any time to a VAP based on genetic tests demonstrating that the man who signed it is not the genetic father.⁷⁹ Others have extended the statute of limitations of rescission from sixty days to two or more years.⁸⁰ Some states, however, preclude a VAP from being challenged if the parties failed to seek genetic tests within the sixty-day statutory term for rescission.⁸¹ Still others specify that the fraud or mistake of fact must go be-

⁷⁴ See *id.* § 666(a)(5)(D)(i)(I). The father's name can also be included on the birth certificate if he has been adjudicated to be the father by a court or administrative tribunal. See *id.* § 666(a)(5)(D)(i)(II).

⁷⁵ See *id.* § 666(a)(5)(D)(ii).

⁷⁶ Cf. *Van Weelde v. Van Weelde*, 110 So. 3d 918, 921–22 (Fla. Dist. Ct. App. 2013) (noting that because Florida law does not require that the "person to be named as the father" on a VAP be the biological father, "it is not clear that [signing with such knowledge] constituted fraud").

⁷⁷ See, e.g., *Ipock v. Ipock*, 403 S.W.3d 580, 586 (Ky. Ct. App. 2013) (holding that the standard for rescinding a VAP is the same as for rebutting a marital presumption of paternity); see also *Carbone & Cahn*, *supra* note 59, at 233 (arguing that VAPs "are similar to marriage in establishing parenthood without requiring a court order"); *Harris*, *supra* note 72, at 478 (noting that many parents use VAPs to "memorialize their relationship as co-parents and to identify themselves and their child as a family").

⁷⁸ 42 U.S.C. § 666(a)(5)(D)(iii).

⁷⁹ See, e.g., Ga. Code Ann. § 19-7-54(a) (2010); Md. Code Ann., Fam. Law § 5-1038 (LexisNexis 2012).

⁸⁰ See, e.g., Alaska Stat. § 25.27.166 (2012) (extending the statute of limitations of rescission to three years); Minn. Stat. § 257.57(b) (2012) (extending the statute of limitations of rescission to two years).

⁸¹ See, e.g., *In re Paternity of H.H.*, 879 N.E.2d 1175, 1177–78 (Ind. Ct. App. 2008); *In re Paternity of Cheryl*, 746 N.E.2d 488, 500 (Mass. 2001).

yond the mere failure to seek genetic testing.⁸² And some courts, despite allowing non-genetic fathers to challenge VAPs after the sixty-day limit, will find that fathers are equitably estopped from doing so where it would not be in the best interests of the children they have been functionally parenting.⁸³

The result of the VAP system, like the marital presumption, is that fathers who are not genetic parents may nevertheless find themselves legal parents. Although the tests employed vary across states, they often balance the importance of genetic parenthood against established functional relationships.

c. The Birth of Functional Recognition

So far, then, we have seen that states have chipped away at the marital presumption of paternity and introduced, with the federal government's help, a way to lock nonmarital fathers into legal parenthood using VAPs. In both types of situations, the vast majority of cases do not require the state to consider genetic parenthood. The parents are either married or they voluntarily sign a VAP, and the genetic identity of the father is never questioned. In those cases where there is a dispute about genetic identity, marriage, genetics, and functional parenthood compete for primacy and states have come to different conclusions regarding how to weigh their importance. Some states have moved toward a more functional approach, asking whether a particular father has acted the part of parent; others prefer a more rigid approach, privileging marital and genetic relationships over others, and marital relationships over genetic ones where there is a marriage to protect.

There is a third category of cases, however, that involves neither the marital presumption nor a VAP but turns instead on pure functional parentage. In these instances, often but not always involving same-sex couples, an adult takes on a parental role knowing full well that he (or, increasingly, she) is not the child's genetic parent, and is not married to the child's genetic parent.⁸⁴ Courts have developed new tests for determining whether the non-genetic parent in these circumstances should

⁸² See, e.g., *Westchester Cnty. Dep't of Soc. Servs. ex rel. Melissa B. v. Robert W.R.*, 803 N.Y.S.2d 672, 679 (N.Y. App. Div. 2005); *Wooddell v. Lagerquist*, No. 2121-11-3, 2012 WL 5866481, at *7 (Va. Ct. App. Nov. 20, 2012).

⁸³ See, e.g., *Jerry C. v. April H.*, No. F059797, 2011 WL 439567, at *3 (Cal. Ct. App. Feb. 9, 2011).

⁸⁴ See *Laufer-Ukeles & Blecher-Prigat*, *supra* note 5, at 428–36.

have custody and visitation rights or a child support obligation. As with the marital presumption and VAP cases, the states vary considerably in their willingness to extend rights to functional parents.

Some states have given formal legal recognition to purely functional relationships through statuses such as “de facto parent,” “*in loco parentis*,” or “psychological parent.” These cases arise when a nonmarital, non-genetic parent finds him or herself shut out of a child’s life due to a breakup with the child’s legal parent. Some states have given de facto parents legal standing equal to a legal parent’s (once that standing has been established in court). This means that the de facto parent can petition for custody or visitation and also may be liable for child support.⁸⁵ Others do not put de facto and legal parents on equal footing, but do allow de facto parents to establish custody or visitation if they can overcome the presumption that the legal parent’s wishes are in the best interests of the child.⁸⁶

Nonmarital, non-genetic parents may also become “parents by estoppel.” In addition to the instances where signatories to VAPs may be bound to their agreements despite genetic testing to the contrary, estoppel can also be used to preserve a father’s rights when a legal mother encouraged him to take on a parental role.⁸⁷

⁸⁵ See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005); *In re E.L.M.C.*, 100 P.3d 546, 559, 565 (Colo. App. 2004) (affirming recognition of the “psychological parent” doctrine and allowing a former same-sex partner to petition for equal parenting time); *Smith v. Guest*, 16 A.3d 920, 924 (Del. 2011); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004); *V.C. v. M.J.B.*, 748 A.2d 539, 549–50, (N.J. 2000); *Jones v. Jones*, 2005 PA Super 337, ¶ 11, 884 A.2d 915, 917–18; *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (en banc); *In re Clifford K.*, 619 S.E.2d 138, 159 (W. Va. 2005); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

⁸⁶ See, e.g., *Janice M. v. Margaret K.*, 948 A.2d 73, 87, 93 (Md. 2008) (denying a lesbian co-parent who did not formally adopt the child legal parent status, requiring instead that she demonstrate that the legal parent is “either unfit or that exceptional circumstances exist” just as any other third party would be required to do); *Debra H. v. Janice R.*, 930 N.E.2d 184, 193 (N.Y. 2010) (explaining, in dicta, that the de facto parent doctrine would “trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult’s level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party.”); *Mason v. Dwinnell*, 660 S.E.2d 58, 70 (N.C. Ct. App. 2008); *Jacob v. Shultz-Jacob*, 2007 PA Super 118, ¶ 10, 923 A.2d 473, 477–78; *Stadter v. Siperko*, 661 S.E.2d 494, 497–98 (Va. Ct. App. 2008).

⁸⁷ The American Law Institute has taken a strong position on parents by estoppel, recommending they be “afforded all of the privileges of a legal parent.” *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.03 cmt. b (2002).

Equitable estoppel is sometimes used to prevent husbands from denying paternity at the dissolution of a marriage. Estoppel typically requires a showing of “(1) conduct or words amounting to a representation; (2) reasonable reliance; and (3) resulting prejudice.”⁸⁸ In *Pietros v. Pietros*, the Supreme Court of Rhode Island held that a husband in a divorce proceeding was equitably estopped from refuting his paternity of a child born to the marriage to avoid a child support obligation.⁸⁹ In that case, the husband knew at the time of the marriage that he was not biologically related to the child, had promised to support the child, and had lived with the child and his mother, leading the child to bond with him.⁹⁰ The court reasoned that “[the husband’s] liability for child-support payments is a result of his voluntary and continuous course of conduct as the child’s only father.”⁹¹ It concluded that its decision, therefore, worked “[n]o injustice.”⁹²

In at least one case, *Steven W. v. Matthew S.*, a functional father ended up winning against a marital, genetic father.⁹³ In that case, the California Court of Appeal confronted two men, each of whom was a presumed father under the Uniform Parentage Act (“UPA”)—one because he was the mother’s husband, and the other because he lived with the mother and received the child into his home and held it out openly as his natural child.⁹⁴ Blood tests demonstrated that the mother’s husband was, in fact, the biological father of her child.⁹⁵ Nevertheless, the court held that the other man, who had formed a parent-child relationship, was the child’s legal father. In so doing, it cited the UPA’s instruction that conflicting presumptions should be resolved in favor of the presumption “founded on the weightier consideration of policy and logic,” noting that “the familial relationship between the child and the man purporting to be the child’s father is considerably more palpable than the biological relation-

⁸⁸ Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547, 578 (2000).

⁸⁹ 638 A.2d 545, 545 (R.I. 1994); see also *M.H.B. v. H.T.B.*, 498 A.2d 775, 780 (N.J. 1985) (finding that a non-genetic father married to a mother “engaged in a voluntary and knowing course of conduct” with regard to her child on which the child relied and that the non-genetic father was therefore “equitably estopped from denying a continuing obligation to provide child support” on her behalf).

⁹⁰ *Pietros*, 638 A.2d at 547.

⁹¹ *Id.* at 548.

⁹² *Id.*

⁹³ 39 Cal. Rptr. 2d 535 (Ct. App. 1995).

⁹⁴ *Id.* at 537–39.

⁹⁵ *Id.* at 537.

ship of actual paternity.”⁹⁶ This outcome would have been unthinkable at common law, or even under nineteenth-century bastardy statutes; it recognizes fathers not merely as a source of ready cash but as involved parents who can develop lasting psychological bonds with their children, even absent a genetic tie.

Importantly, in each of these cases functional parenthood can be determined only after actual parenting has occurred. Whereas marital or genetic parenthood can be established at a child’s birth, functional parenthood can only be established over time.⁹⁷ It takes another conceptual category—intentional parentage—to account for families where a nonmarital, non-genetic parent is given legal status prior to engaging in functional parenting.

d. Nascent Recognition of Intentional Families

In theory, all parenthood is “intentional.” Heterosexual intercourse can lead to pregnancy, and it generally requires the consent of at least one person. But as Professor Richard Storrow has observed, “coitus . . . can be a nonprocreative act”; in contrast, individuals who utilize ART are doing so solely because they intend to be parents.⁹⁸ Individuals and couples can attempt to become parents in a variety of ways. A woman could seek to become a single parent by enlisting the aid of a sperm donor and undergoing artificial insemination; similarly, a heterosexual couple with male infertility issues or a lesbian couple could also use this method. An infertile woman could enlist the aid of an egg donor and undergo IVF. Or, any manner of people might choose to seek a gestational surrogate.

Often, there will be some overlap between genetic, marital, functional, and intentional parentage in these cases. For example, a married, male-female couple suffering from male infertility might use a sperm donor; the resulting child would be the genetic and gestational child of the wife, and the marital child of the husband, as well as the intentional child of both, and (we would hope) the functional child of both. At least

⁹⁶ Id. at 539 (internal quotation marks omitted).

⁹⁷ Laufer-Ukeles & Blecher-Prigat, *supra* note 5, at 463–65 (noting that functional relationships cannot be established at birth). But see Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & Fam. Stud. 231, 236–37 (2007) (arguing that a “social father” can be established at birth by considering “the actions of the father during the pregnancy, his presence at the birth, and his intention to care for the child”).

⁹⁸ Storrow, *supra* note 5, at 597–98.

in theory, however, a person could be a parent “by pure intention.”⁹⁹ Professor Noa Ben-Asher has persuasively argued, however, that the people who successfully claim legal parentage are almost always those who have contributed at least one of three elements: egg, sperm, or gestation.¹⁰⁰ So a genetic father who contracts with a surrogate and keeps up his end of the bargain (paying hospital bills, for example), thereby demonstrating intentional parenthood as well, is more likely to obtain legal rights than one who hires a surrogate *and* a sperm donor. Similarly, a mother may choose to gestate a fetus conceived using a donor egg and donor sperm, and still be adjudicated a legal parent if that was the intention of all the parties. And a few states allow surrogacy even where neither of the intended parents provides gametes.¹⁰¹ Although genetic relationships are still important in ART cases, these relationships can sometimes be altered legally through contract and, where necessary, formal adoption proceedings.¹⁰² No state, for example, considers a sperm donor who donates sperm at a medical facility to an intentional parent who is a stranger to him to be the legal father of any resulting children.¹⁰³ Genetic relationships only go so far. But of all of the categories of parentage we have so far set out, the law surrounding intentional parentage is still the least developed.

Note that it is in the realm of intentional and functional parentage that there is the possibility of a conflict between potential mothers.¹⁰⁴ Until lesbian couples began openly co-parenting, custody awards to fathers became common enough for stepmothers to be in a position to compete with children’s genetic mothers for primacy, and ART made the possi-

⁹⁹ Id. at 601.

¹⁰⁰ Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 *Yale J.L. & Feminism* 207, 217–18 (2010) (providing commentary from various scholars, including Professor Ben-Asher).

¹⁰¹ See, e.g., *Tex. Fam. Code Ann.* §§ 160.754, 160.762 (West 2008) (allowing gestational surrogacy without a requirement that either intentional parent provides gametes); *Va. Code Ann.* §§ 20-156, 20-159 (2008) (allowing all surrogacy); *Wash. Rev. Code* § 26.26.101 (2012) (allowing gestational surrogacy without requiring gametes from intentional parents).

¹⁰² Linda D. Elrod, *A Child’s Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 *BYU J. Pub. L.* 245, 266 (2011).

¹⁰³ For a critique, see Cahn, *supra* note 16, at 416–17.

¹⁰⁴ See Jennifer S. Hendricks, *Essentially a Mother*, 13 *Wm. & Mary J. Women & L.* 429, 431 (2007) (stating that “science has since split biological motherhood into two parts: begetting by the ‘genetic mother’ and bearing by the ‘gestational mother.’ The free market has splintered off a third role: expecting. Formerly a euphemism for pregnancy, it now applies to an ‘intended mother,’ who can achieve this state by contracting out the begetting and bearing.” (footnotes omitted)).

bility of split maternity—between, say, an egg donor, gestational surrogate, and intentional mother—real, all gestational mothers were simply presumed to be genetic, and legal, mothers. One reason that the law of functional and intentional parenting is so in flux is that it is new, and that it requires courts and legislatures to weigh the relative value of different aspects of mothering.

C. Family Law Values

Marriage, then, has lost its primacy in state law determinations of parentage, but it has not entirely been replaced. Where genetic testing demonstrates paternity, legal rights sometimes, but not always, follow. The rights of marital fathers sometimes still trump the rights of genetic fathers, but many states have moved to a system that privileges genetic relationships. Functional relationships matter, both to buttress genetic claims to fatherhood and independently, through doctrines such as the *de facto* parent doctrine. And when ART is involved, genetic relationships are sometimes not as important as the intention of the parties involved.

Each of the doctrinal developments discussed reflects the values and interests of the family law system. These values, in turn, lead to particular definitions of “parent” and “child.” Family law, by and large, has two primary goals. The first is the privatization of dependency,¹⁰⁵ in other words, ensuring that individual people, and not the state, bear the economic burden that children entail.¹⁰⁶ The family law system wants to

¹⁰⁵ See Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 *Am. U. J. Gender Soc. Pol’y & L.* 415, 417 (2005) (arguing that “society has called upon family law to address the economic needs of women and children at precisely the moment when it is dismantling the welfare state and public financial assistance has become increasingly scarce”); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *Am. U. J. Gender Soc. Pol’y & L.* 13, 14 (2000) (stating that the “assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem”); Laura A. Rosenbury, *Friends with Benefits?*, 106 *Mich. L. Rev.* 189, 193 (2007) (arguing that, even after the demise of coverture, legal recognition of families functioned to privatize the dependency of children); cf. Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 *Am. U. J. Gender Soc. Pol’y & L.* 347, 377 (2012) (arguing that “[t]he fact that family law permits some children conceived by donor insemination to have only one legal parent, even when they might need support . . . confirms the limits of the privatization of dependency as family law’s theoretical foundation”).

¹⁰⁶ This focus is not inevitable. Many European countries, for example, have taken on much more of the economic burden of children at the state level. It merely reflects the current reality of American law.

make sure one or two adults have a legal responsibility to provide for the support and care of each child, thus reducing the likelihood that a child will become a public charge. The second (and it may be a distant second) goal is to provide stable, safe, and nurturing homes for children. Taken together, these family law values explain why states would expand recognition to functional and intentional parents. Recognition of functional parenthood serves both these interests. There, an adult has already taken responsibility for the care of a child, and a bond between parent and child has already formed. In these cases, formalizing the relationship serves the state's interest in privatizing welfare and arguably does the state no accompanying harm, and will likely further the well-being of the child. Recognition of intentional parenthood also arguably serves these interests. In these cases, the parents have also stepped forward to take responsibility for the child. They have demonstrated their commitment to parenthood through the expense and difficulty they have endured to bring the child into existence. Thus assigning them legal responsibility for the child serves the state's interest in making sure that the child is provided for.¹⁰⁷

Another way in which family law pursues both of these interests is through family privacy—the notion that families should be left alone unless there is a good reason to intervene. Traditionally the state did not interfere in a married father's authority over his family at all.¹⁰⁸ As divorce became more common, the state began to interfere at divorce, making decisions about the best interests of the child at this particular point in time.¹⁰⁹ As public welfare became more common, it too occasioned a reason for interfering in the intact family.¹¹⁰ In instances of abuse or neglect, the state will intervene in the best interests of the child. But the state does not take it upon itself to monitor the ongoing family relationship absent these indicia of difficulty. So long as the family appears to be functioning properly, the state stays out of it.

Thus, doctrines such as *de facto* parenthood and the enforceability of gestational surrogacy contracts have developed not from a pervasive regulatory scheme intended to shape families *ex ante*, but instead from

¹⁰⁷ See Storrow, *supra* note 5, at 601–02, 663–64.

¹⁰⁸ See Hendrik Hartog, *Man and Wife in America: A History* 8–9 (2000).

¹⁰⁹ See Grossman & Friedman, *supra* note 45, at 123; cf. *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (refusing to intervene in marriage if there is no separation).

¹¹⁰ *Wyman v. James*, 400 U.S. 309, 318–19 (1971); Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 104–05 (2002).

litigation and legislation responding to disputes. It is only when a problem arises that we get new law. Courts began, for example, to recognize *de facto* parents long after thousands, perhaps millions, of these relationships existed, unrecognized by law. When family law does intervene, it generally intervenes retrospectively. Its twin goals of ensuring the well-being of children and privatizing dependency are often best met by recognizing the family that *has* been, rather than the family that could be. Children become attached to their caregivers and financially dependent on them. In circumstances where a marital father, functional father, or functional mother has been acting the part of parent, recognition of the functional relationship may be the best way to fulfill family law's goals. The exception that proves the rule is intentional parenthood. Traditional family law has trouble adjudicating claims of intentional parenthood precisely because it is usually so backward-looking. As Professor Dara Purvis has recently argued, this orientation leaves a "parentage void" for children of ART.¹¹¹

We do not want to oversimplify here. As we have shown, the doctrinal choices made by state courts and legislatures vary widely. The balancing of marital, genetic, functional, and intentional relationships can shift dramatically from state to state. But we do think it is fair to say that each state's courts and lawmakers believe that their law protects children's well-being and the public fisc. A state that retains the marital presumption of paternity does so because its lawmakers believe that protecting the marital family is good for children; a state that allows genetic fathers to gain parental rights easily does so because its lawmakers believe that the genetic tie is important, or that ensuring genetic fathers are on the hook for child support will keep welfare costs down. Their methods may differ, and their opinions about what the "best interests of the child" are may be diametrically opposed to one another, but their underlying goals are largely congruent.¹¹²

¹¹¹ Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *Yale J.L. & Feminism* 210, 210, 212–13 (2012) (advocating the use of pre-birth parentage orders to remedy the problem).

¹¹² Cf. Naomi R. Cahn, *Review Essay, The Moral Complexities of Family Law*, 50 *Stan. L. Rev.* 225, 269 (1997) (showing that two family law scholars' "divergent solutions for achieving children's well-being illustrate the conflicting moralities affecting contemporary family law").

II. IMMIGRATION LAW'S "FAMILY VALUES"

Now we shift to the world of immigration and citizenship. As in family law, immigration and citizenship law must make determinations regarding who should be considered a legal parent. Like the history of family law, the history of immigration and citizenship law involves a complicated relationship between marriage, genetics, function, and intention. This history, however, deviates from the history of family law in important ways. Current immigration and citizenship law, broadly speaking, each apply more stringent tests in determining parentage. Because the history of immigration and citizenship law is so intertwined, this Part will begin with this combined history before focusing on current immigration law. Part III will pick up where the history leaves off regarding citizenship law.

A. *A History of Family Recognition in Immigration and Citizenship Law*

1. *Early Jus Sanguinis Rules*

Nearly from our nation's inception, family relationships have been recognized for immigration and citizenship purposes. As a nation of immigrants, the country had to establish rules for the acquisition of citizenship early on. The most significant rule the young country adopted was the British rule of *jus soli* citizenship: Birth on American soil automatically conferred citizenship.¹¹³ This rule required no explicit recognition of parentage. Congress passed its first naturalization act in 1790, which provided for the naturalization of "free white person[s]" of "good character" who had resided in the United States for two years, as well as for their children who were living in the United States and under twenty-one years of age.¹¹⁴ Importantly for our purposes, the 1790 Act also provided for the transmission of citizenship from U.S. citizens to their children born abroad, a form of citizenship commonly known as *jus sanguini-*

¹¹³ This rule was, unsurprisingly, applied in a discriminatory fashion. Children of slaves were not citizens, despite their American birth, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04 (1856), and neither were Native Americans, see *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). The Fourteenth Amendment, U.S. Const. amend. XIV, largely solved the race discrimination problem; the Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924), solved the dual sovereignty problem.

¹¹⁴ Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103–04.

nis, or the “rule of blood.”¹¹⁵ Regarding these children, the Act provided: “the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens”—but with the exception that “the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.”¹¹⁶ Similar acts followed in 1795 and 1802.¹¹⁷

The language of these acts was quite ambiguous. As Justice Ginsburg has observed,

One could read the words “children of citizens” to mean that the child of a United States citizen mother and a foreign father would qualify for citizenship if the father had at some point resided in the country. Or . . . the words might mean that both parents had to be United States citizens for citizenship to pass.¹¹⁸

With the norms of coverture supplying the “interpretive template,”¹¹⁹ courts consistently interpreted the Act of 1802—which provided citizenship to “children of persons who now are, or have been citizens of the United States” if their fathers had ever resided in the United States¹²⁰—as permitting citizenship transmission between a citizen-father and his foreign-born child regardless of the citizenship status of the mother.¹²¹ Some courts went further, interpreting the statute to allow citizenship transmission *only* from father to child, not U.S. citizen mother to child.¹²²

¹¹⁵ *Id.* § 1, 1 Stat. at 104; Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 *Yale L.J.* 545, 553 (1921).

¹¹⁶ Act of Mar. 26, 1790 § 1, 1 Stat. at 104.

¹¹⁷ Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, 414–15; Act of Apr. 14, 1802, ch. 28, 2 Stat. 153, 153–55.

¹¹⁸ *Miller v. Albright*, 523 U.S. 420, 461 (1998) (Ginsburg, J., dissenting) (citations omitted).

¹¹⁹ Collins, *supra* note 24, at 1686.

¹²⁰ Act of Apr. 14, 1802, § 4, 2 Stat. at 155.

¹²¹ See *Charles v. Monson & Brimfield Mfg.*, 34 Mass. (17 Pick.) 70, 76 (1835) (holding that a marital child born abroad to a U.S. citizen father and Canadian mother was a U.S. citizen); *Peck v. Young*, 26 Wend. 613, 627–28 (N.Y. 1841); *Davis v. Hall*, 10 S.C.L. (1 Nott & McC.) 292, 294 (Constitutional Ct. App. S.C. 1818).

¹²² See *Davis*, 10 S.C.L. at 294 (holding that a child born to a U.S. citizen father and a Cherokee mother is a citizen, and noting “although it is apparent, that the child or children of a citizen mother, by an alien father, cannot inherit, yet, the converse of the rule is expressly admitted by the proviso, viz: that where the father has thus resided, the child or children may inherit”); see also *Peck*, 26 Wend. at 627 (holding that citizenship is transmitted from father to legitimate child).

There was a drafting problem with the 1802 statute: Its language included only those children who *already* had been born, not those who might be born after its passage.¹²³ Congress rectified this problem in 1855, but it went a step further, clarifying that it was U.S. citizen fathers, rather than mothers, who could transmit citizenship to their children.¹²⁴ The Act further provided that “any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.”¹²⁵ Thus the married woman’s citizenship followed that of her husband, and it was still the man’s citizenship that mattered for determining the citizenship of the children. Under the Act, a man’s U.S. citizenship was the root of the citizenship of his family: Marriage automatically conferred citizenship on his wife, and the children of the marriage acquired citizenship at birth. Consistent with the norms of coverture, this law reinforced the principle that the man was the legal and political head of the household.¹²⁶ In the words of one of the bill’s sponsors, “by the act of marriage itself the political character of the wife shall at once conform to the political character of the husband.”¹²⁷ Not only was it clear in the nineteenth century that these early citizenship laws permitted transmission of citizenship from fathers rather than mothers, it was clear that the children acquiring citizenship at birth had to be *legitimate* children.¹²⁸

¹²³ See *Sasportas v. De la Motta*, 31 S.C. Eq. (10 Rich. Eq.) 38, 47 (Ct. App. Eq. S.C. 1858) (“The supposed defect of the Act of 1802, was in the omission to provide for children of foreign birth of parents who became citizens by birth or naturalization after April, 1802 . . .”).

¹²⁴ Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.

¹²⁵ *Id.* § 2, 10 Stat. at 604.

¹²⁶ Kristin A. Collins, Essay, A Short History of Sex and Citizenship: The Historians’ Amicus Brief in *Flores-Villar v. United States*, 91 B.U. L. Rev. 1485, 1490 (2011).

¹²⁷ Cong. Globe, 33d Cong., 1st Sess. 170 (1853) (statement of Rep. Cutting).

¹²⁸ Collins, *supra* note 24, at 1689–90; see also *Guyer v. Smith*, 22 Md. 239, 249 (Md. 1864) (holding that children “not born in lawful wedlock . . . under our law [are] *nullius filii*, and clearly therefore not within the provisions of [the citizenship act]”). As Kristin Collins has shown, the citizenship question at issue in *Guyer* and subsequent cases was adjudicated in a “racially salient” way. In cases involving children of American fathers married to Samoan mothers, the Department of State held the marriages inapplicable because polygamy was lawful in the place where they were celebrated, so the children could have been born into a marriage that would not be recognized under U.S. law. Thus, the marital presumption was applied to marriages between whites in countries such as England, but held to not apply in many mixed-race marriages. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. (forthcoming 2014) [hereinafter Collins, *Illegitimate Borders*].

The interaction of the marital presumption of paternity with nineteenth-century courts' interpretations of these early citizenship acts meant that, almost certainly, citizenship sometimes passed from U.S. citizen fathers to foreign-born marital children to whom they were not biologically related. And considering these children were foreign-born, it is likely that many of them had non-U.S. citizen genetic fathers. Thus it becomes clear that it was marriage rather than blood that was doing the work in the Acts of 1790, 1802, and 1855. Marriage was the conduit by which a man could transfer citizenship to the children of his wife, whether or not they were his biological children. To the extent Congress conceived of blood ties as being the instrument of citizenship transmission, marriage served as an imperfect proxy for those blood ties. Using marriage as a proxy for a blood relationship is not at all surprising, considering it would have been the best available means at that time for assuring a blood relationship between father and child. Not until the twentieth century did Congress require an *actual* blood relationship between parent and child in some cases.¹²⁹

What about nonmarital children of U.S. citizen *mothers*? Professor Kristin Collins, canvassing the limited available sources, has concluded that “although some nineteenth-century immigration officials treated nonmarital children as *nullius filius* even with regard to inheritance of the mother’s citizenship, by the early 1900s nonmarital children were able to inherit citizenship from their mothers.”¹³⁰ That transmission of citizenship occurred even though it was contrary to the statutory text in effect at the time, which permitted transmission through only the father;¹³¹ but the practice was eventually codified in the Nationality Act of 1940.¹³² The differential treatment of unmarried fathers and mothers

¹²⁹ See *infra* Subsection II.A.3.

¹³⁰ Collins, *supra* note 24, at 1689 (footnotes omitted); see also Staff of H. Comm. on Immigration & Naturalization, 76th Cong., Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments 431 (Comm. Print 1939) (“[T]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother.”).

¹³¹ Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934) (“Under the old practice a child born abroad of an unmarried American mother acquired American citizenship, though strictly this seemed in conflict with the statutory rule of descent through the father.” (footnote omitted)).

¹³² See Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1137, 1139–40 (providing for citizenship at birth of children of unmarried mothers if the “mother had the nationality of the

with respect to their ability to transmit citizenship to their children is unsurprising in light of gender-based assumptions about parenting that were widespread at the time and that are reflected in family law.

2. *Early Immigration Law and the Cable Act*

So far, our discussion has revolved around citizenship. That is because immigration was largely unrestricted. The first restrictive federal immigration law was not passed until 1875; later acts, including the infamous Chinese Exclusion Act of 1882, targeted Chinese laborers.¹³³ But even though these early acts did not explicitly grant family-based immigration status (instead simply excluding particular national origin groups from entry), their enforcement did reflect a policy of family reunification. For example, the law allowed entry to Chinese merchants (as opposed to laborers), and courts interpreted “merchant” to include not only the merchant himself but also his wife and children: “The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either.”¹³⁴

When Congress did finally pass restrictive quota laws beginning in 1921, these laws included explicit preferences for family members. Because, when these laws were first passed, a wife’s citizenship followed her husband’s,¹³⁵ only fathers could make use of the family reunification preferences, just as only fathers could transmit citizenship to their foreign-born children.¹³⁶

The passage of the Cable Act¹³⁷ in 1922 marked an important step forward in women’s rights under the citizenship laws. The Cable Act promised that “the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.”¹³⁸ Foreign women who married U.S. citizens would no longer be automatically naturalized but would become “naturalized upon full and complete compliance with all requirements of

United States at the time of the child’s birth, and had previously resided in the United States or one of its outlying possessions”).

¹³³ See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 *Colum. L. Rev.* 641, 643–45 (2005).

¹³⁴ *In re Chung Toy Ho*, 42 F. 398, 400 (D. Or. 1890).

¹³⁵ Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604 (repealed 1922); Act of Mar. 2, 1907, ch. 2534, §§ 3–4, 34 Stat. 1228, 1228–29 (repealed 1922).

¹³⁶ Emergency Quota Act, ch. 8, § 2, 42 Stat. 5, 5–6 (1921) (repealed 1952).

¹³⁷ Act of Sept. 22, 1922, ch. 411, 42 Stat. 1021 (repealed 1940).

¹³⁸ *Id.* at 1021–22.

the naturalization laws.”¹³⁹ Importantly, the Act also ended the automatic expatriation of most American women who married foreign nationals.¹⁴⁰

Independent citizenship for women created a new possibility. Since a woman retained her citizenship upon marriage, a U.S. citizen mother might want to sponsor her child for immigration status or transmit citizenship to a foreign-born child even if the father was not a U.S. citizen. The Cable Act did not solve this problem. Instead, Congress took a full twelve years to declare that mothers could transmit citizenship.¹⁴¹ In 1934, Congress finally passed an Act that allowed mothers as well as fathers to transmit citizenship to their foreign-born children.¹⁴² Interestingly, this Act represented the first time that Congress, as a practical matter, required a verifiable blood relationship for transmission of citizenship between a U.S. citizen parent and her foreign-born child.¹⁴³ The fact of birth, of course, would confirm the blood relationship between a mother and her child, and in most cases, a birth certificate would have probably sufficed to demonstrate her child’s right to U.S. citizenship. Fathers still transmitted citizenship because of marriage to the child’s birth mother, not because of a blood tie to the child.

3. Nationality Act of 1940

The Nationality Act of 1940 marked a significant increase in specificity of the provisions governing *jus sanguinis* transmission of citizenship. For example, it provided separate rules for a foreign-born child whose parents were both citizens,¹⁴⁴ a foreign-born child whose parents were a citizen and a non-citizen national,¹⁴⁵ a child born in an outlying U.S. possession who had at least one citizen for a parent,¹⁴⁶ and a foreign-

¹³⁹ Id. at 1022. Under the Cable Act, a woman’s marriage to a U.S. citizen did ease the naturalization requirements in two respects: (1) no declaration of intent to apply for citizenship was required, and (2) the residence requirement was reduced from five years to one. Id.

¹⁴⁰ Id. at 1022.

¹⁴¹ Act of May 24, 1934, ch. 344, sec. 1, § 1993, 48 Stat. 797 (repealed 1940).

¹⁴² Id.

¹⁴³ As Professor Collins has shown, it is true that citizenship was being granted to children born out of wedlock to U.S. citizen women prior to the 1934 Act. Collins, *supra* note 24, at 1692. Immigration officials appear to have assumed a blood relationship where mothers claimed to have given birth to an illegitimate child. Nevertheless, the 1934 Act was the first time Congress required a verifiable blood relationship.

¹⁴⁴ Nationality Act of 1940, ch. 876, § 201(c), 54 Stat. 1137, 1138 (repealed 1952).

¹⁴⁵ Id. § 201(d), 54 Stat. at 1138.

¹⁴⁶ Id. § 201(e), 54 Stat. at 1138.

born child whose parents were a citizen and an alien.¹⁴⁷ Further, the Act explicitly recognized, for the first time, the possibility of citizenship transmission to nonmarital children.¹⁴⁸ This was the first instance in which Congress required a man to show something besides marriage to demonstrate a parental relationship; the mechanism Congress chose was a requirement that “paternity [be] established during minority, by legitimation, or adjudication of a competent court.”¹⁴⁹ In cases in which legitimation or court adjudication had not occurred, “if the mother had the nationality of the United States at the time of the child’s birth, and had previously resided in the United States or one of its outlying possessions, [then the child would] be held to have acquired at birth [the mother’s] nationality status.”¹⁵⁰ Considering together the provisions governing children born in wedlock and children born out of wedlock, *birth* provided the necessary connection between mother and child, whether or not the mother was married, and *marriage* provided the necessary connection between father and child if the father was married to the child’s mother. But for an unmarried father to transmit citizenship, Congress demanded special proof of his connection to the child. Over the next several decades, Congress continued to tinker with the requirements for transmission of citizenship by unmarried fathers; for example, in the Immigration and Nationality Act of 1952, it eliminated “adjudication of a competent court” as one of the ways paternity could be established to make most of the citizenship-at-birth provisions applicable to children born out of wedlock.¹⁵¹

4. *Immigration and Nationality Act of 1965*

The passage of the Immigration and Nationality Act of 1965 marked a dramatic shift in U.S. immigration policy.¹⁵² The Act abolished the nationality-based quota system that had been in place since 1921 and focused immigration policy on skills-based immigration and, as relevant

¹⁴⁷ Id. § 201(g), 54 Stat. at 1139.

¹⁴⁸ Id. § 205, 54 Stat. at 1139; id. § 102(h), 54 Stat. at 1138.

¹⁴⁹ Id. § 205, 54 Stat. at 1139.

¹⁵⁰ Id. at 1140.

¹⁵¹ Immigration and Nationality Act of 1952, ch. 477, § 309, 66 Stat. 163, 238–39 (current version at 8 U.S.C. § 1409 (2012)).

¹⁵² Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (current version in scattered sections of 8 U.S.C.).

here, family reunification.¹⁵³ Suddenly, family relationships became the centerpiece not only of *jus sanguinis* citizenship transmission, but also of legal immigration—a change that affected vast numbers of people.

The 1965 Act established categories of family members and assigned a level of preference for the allocation of visas to each category, subject to certain numerical limitations.¹⁵⁴ The one category not subject to numerical limitation was that of “immediate relatives.”¹⁵⁵ At that time, “immediate relatives” included the children, spouses, and parents of U.S. citizens—with “parents” referring only to parents of U.S. citizens who were at least twenty-one years old.¹⁵⁶ The remaining family categories in descending order of preference were: unmarried sons or daughters of U.S. citizens; spouses and unmarried sons or daughters of lawful permanent residents; married sons or daughters of U.S. citizens; and brothers or sisters of U.S. citizens. This family-based preference system, in substantially similar form, remains to this day.¹⁵⁷

Family-based immigration preferences, of course, required that petitioners and beneficiaries be able to demonstrate the family relationships that entitled the beneficiaries to a preferential status. The rules for demonstrating those relationships varied by the sex and marital status of the petitioner. A mother, whether married or not, who petitioned on behalf of her child generally needed to produce only a birth certificate for her child that listed her as the mother.¹⁵⁸ Where a birth certificate was unavailable, secondary evidence—“such as civil, church, or school records, photographs, and other documentation to establish the claimed relationship”—could suffice, but the Immigration and Naturalization Service (“INS”) had authority to require proof of unsuccessful efforts to obtain the birth certificate.¹⁵⁹ If married, the mother also might have needed to produce a marriage certificate but *only* if her present married name did not appear on her child’s birth certificate.¹⁶⁰ By contrast, a father, as a matter of course, had to produce both his child’s birth certificate *and* a certificate of marriage to the child’s mother, as well as proof

¹⁵³ Id. §§ 1–3, 79 Stat. at 911–13 (current version at 8 U.S.C. §§ 1151–53 (2012)).

¹⁵⁴ Id. § 3, 79 Stat. at 912–13 (current version at 8 U.S.C. § 1153 (2012)).

¹⁵⁵ Id. § 1, 79 Stat. at 911 (current version at 8 U.S.C. § 1151 (2012)).

¹⁵⁶ Id.

¹⁵⁷ See INA §§ 201(b)(2)(A)(i), 203(a); Kerry Abrams, What Makes the Family Special?, 80 U. Chi. L. Rev. 7, 15–16 (2013).

¹⁵⁸ 8 C.F.R. § 204.2(d)(3) (1968).

¹⁵⁹ Shen, 16 I. & N. Dec. 612, 614 (B.I.A. 1978).

¹⁶⁰ 8 C.F.R. § 204.2(d)(6).

of legal termination of any previous marriages.¹⁶¹ Although the regulations do not specifically mention how the petitions of unmarried fathers for their children should have been treated, case law shows that unmarried fathers could obtain visas for their children but only if those children were legitimated.¹⁶² Blood tests could also be required but, because of the state of technology at that time, such testing could show only whether a claimed relationship was impossible; it could not demonstrate the likelihood of the truth of a claimed relationship.¹⁶³ Thus, as with citizenship law, birth remained the means by which a mother demonstrated parentage of a child, and marriage remained the primary means by which a father demonstrated parentage of a child.

B. Current Law: The Perseverance of Marriage and the Triumph of the Genetic Tie

Today's immigration and citizenship laws continue to incorporate a complex understanding of marital, genetic, functional, and intentional forms of parentage. As the history outlined above shows, the understanding of these relationships, as in family law, has moved away from marriage and increasingly incorporates genetic relationships. As in family law, marriage still plays an important role in the immigration context, but genetics have begun to undercut it substantially. But, unlike family law in many states, in immigration law, the lack of a genetic tie can be used to undercut marital parentage, even where no competing genetic parent exists. In addition, functional parentage, except in the case of some refugees, is understood not as an alternative to genetic parentage but as a supplement, or even an additional requirement. Intentional parentage has made some inroads (in the adoption context) but ART has

¹⁶¹ Id. § 204.2(d)(3). As with a mother who, without her child's birth certificate, claimed an immigration benefit on behalf of her child, secondary evidence could suffice where a father, without his child's birth certificate, claimed a benefit on behalf of his child. *Wong*, 16 I. & N. Dec. 646, 648–49 (B.I.A. 1978).

¹⁶² See *Lau v. Kiley*, 563 F.2d 543, 544–46 (2d Cir. 1977); *Wong*, 16 I. & N. Dec. at 648. A father did not necessarily need to take an active step—such as marrying his child's mother or filing a paternity action—to make his child legitimate; it was enough if a statute simply declared that all children were "legitimate." See *Lau*, 563 F.2d at 544–46.

¹⁶³ See 8 C.F.R. § 204.2(d)(8) (1968) ("[T]he district director may require that blood tests be conducted of the petitioner, beneficiary, and other family members. . . . [A] visa petition may be approved on condition that the results of any requested blood tests will show that the existence of the claimed relationship *is not precluded*." (emphasis added)); see also *infra* Part II.B.2.

confounded the immigration and citizenship system and led to results that seem perverse from a family law perspective (and, as we will argue in Part III, from an immigration and citizenship perspective as well). This Subpart will explore how immigration law deals with each of these types of parentage.

1. *Marital and Nonmarital Parents and Children*

Marriage and the nuclear family form the basis for the majority of family-based immigration because the INA requires that visas be allocated according to a list of preferences that privilege the marital relationship and marital children.¹⁶⁴ Most significantly, visas are available without quotas to “immediate relatives,” which include spouses and children.¹⁶⁵

The relevant INA provision does not explicitly require a blood relationship between married parents and their children. Rather, INA Section 101(b)(1)(A) defines a “child” as “a child born in wedlock.” But the INA treats nonmarital children differently. A nonmarital child qualifies as a “child” under INA Section 101(b)(1)(C) if she is legitimated before age eighteen and is in the custody of the legitimating parent or parents.¹⁶⁶ Or, if not legitimated, INA Section 101(b)(1)(D) requires a relationship between the nonmarital child and her “*natural* mother” or “*natural* father,” implying that a blood relationship is required.¹⁶⁷

The plain textual difference between Sections 101(b)(1)(A) and 101(b)(1)(D) can be read to imply that, although a blood relationship is required between a nonmarital child and a parent, a blood relationship is *not* required between a marital child and a parent. Nevertheless, U.S. Citizenship and Immigration Services (“USCIS”), the subdivision of the Department of Homeland Security (“DHS”) that evaluates visa petitions, appears not to make that distinction, treating immigration benefits that rest on such parent-child relationships as always requiring blood relationships.¹⁶⁸ Typically primary documentation, such as marriage certifi-

¹⁶⁴ See INA §§ 201(b)(2)(A)(i), 203(a).

¹⁶⁵ *Id.* § 201(b)(2)(A)(i).

¹⁶⁶ Again, it could be enough that a local statute declares that all children are legitimate. See, e.g., *Brandao v. U.S. Att’y Gen.*, 654 F.3d 427, 429–30 (3d Cir. 2011); *Cardoso*, 19 I. & N. Dec. 5, 7 (B.I.A. 1983).

¹⁶⁷ INA § 101(b)(1)(D) (emphasis added).

¹⁶⁸ See 8 C.F.R. § 204.2(d) (2013) (listing requirements for visa petitions on behalf of children); U.S. Citizenship & Immigration Servs., Adjudicator’s Field Manual § 21.2(d)(1)

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cates and birth certificates, will suffice to demonstrate the claimed relationship between petitioner and beneficiary but, where such records are shown to be unavailable, secondary evidence, such as church or school records, may suffice.¹⁶⁹ Where all such records are unavailable or insufficiently reliable, petitioners may need to submit the results of genetic tests.¹⁷⁰

The official USCIS position is that “blood testing is not and should not be a routine part of the adjudications process,” but “it can be an extremely valuable tool in cases when it otherwise would be impossible to verify a relationship.”¹⁷¹ Under current law, USCIS may require ABO or HLA testing.¹⁷² USCIS itself, however, considers these tests “obsolete,”¹⁷³ and, indeed, they are now more difficult to obtain than DNA tests.¹⁷⁴ Instead, DNA testing has become a de facto requirement for those petitioners who are unable to sufficiently prove their claimed relationships through primary or secondary documentation. Although conceding a lack of regulatory authority to require DNA testing, USCIS notes that “field offices may have no alternative to suggesting DNA testing as a means of establishing [a] relationship.”¹⁷⁵ That reality accords with a 2008 guidance memorandum from Michael Aytes, then-USCIS Associate Director of Domestic Operations, which “remind[ed] officers that USCIS cannot require DNA testing to establish a claimed biological relationship. However, in situations where credible evidence is insufficient to prove the claimed biological relationship, officers may suggest and consider DNA testing results.”¹⁷⁶

[hereinafter AFM] (providing guidelines for parentage testing in adjudicating family-based visa petitions). Notably, that section of the AFM is titled “Factors Common to the Adjudication of *All* Relative Visa Petitions.” *Id.* § 21.2 (emphasis added).

¹⁶⁹ 8 C.F.R. § 204.1(f)–(g) (2013).

¹⁷⁰ *Id.* § 204.2(d)(2)(vi).

¹⁷¹ AFM § 21.2(d)(1)(B).

¹⁷² 8 C.F.R. § 204.2(d)(2)(vi).

¹⁷³ U.S. Citizenship & Immigration Servs., USCIS Response to the Citizenship and Immigration Services Ombudsman’s 2009 Annual Report 9 (Oct. 16, 2009).

¹⁷⁴ See Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm’r, Office of Programs, to Regional Directors 2, 4 (July 24, 2000) (noting that the “tests are no longer widely available for testing by laboratories” and that HLA testing requires live human blood cells, which must be tested “within just a few days”).

¹⁷⁵ AFM § 21.2(d)(1)(B).

¹⁷⁶ Memorandum from Michael L. Aytes, Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., to Field Leadership 2 (Mar. 19, 2008) (emphasis and footnote omitted).

Because genetic testing should only be suggested “when it otherwise would be impossible to verify a relationship”¹⁷⁷ and because petitioners “bear[] the burden of proof to establish eligibility for the benefit sought,”¹⁷⁸ it follows that if petitioners choose not to undergo DNA testing when it is suggested, their applications will be denied for insufficient evidence. As was reported in 2008 by the *Wall Street Journal* and is discussed below in Part II.C.1, the cases of many purported relatives of East African refugees were placed “on hold” because “they refused to supply a DNA sample.”¹⁷⁹ The *Washington Post* has similarly reported stories of Iranian immigrants being told “[n]o DNA test, no visa,” even where their family relationships were fully documented.¹⁸⁰

Although we could find no large-scale studies of the phenomenon, based on available Board of Immigration Appeals (“BIA”) decisions, a common scenario in which DNA testing is suggested by USCIS officials appears to be where a birth certificate was registered years after an actual birth. In other words, a noncitizen sought an immigration benefit based on a parental relationship with a U.S. citizen or permanent resident and needed to obtain a birth certificate in order to prove the relationship, but there was no birth certificate, and so the applicant had to go through a process of obtaining one. These processes vary from jurisdiction to jurisdiction. Arizona, for example, has a fairly stringent process, which requires a notarized affidavit from a family member who has personal knowledge of when and where the child was born; an independent factual document established before the child was five years old that includes the child’s name, date and place of birth, and date the document was created (this might be a baptismal certificate or a midwife’s certificate); and a document establishing the mother’s presence in Arizona on the date of birth.¹⁸¹ In contrast, many children born abroad, especially those born in developing countries, will have difficulty obtaining a reliable birth certificate and great ease in gaining a suspect one.

Nigeria is a good example of how difficult it can be to obtain a legitimate birth certificate. In Nigeria, only thirty percent of births are regis-

¹⁷⁷ AFM § 21.2(d)(1)(B).

¹⁷⁸ Id. § 21.2(c)(1).

¹⁷⁹ Miriam Jordan, *Refugee Program Halted As DNA Tests Show Fraud*, *Wall St. J.*, Aug. 20, 2008, at A3.

¹⁸⁰ N.C. Aizenman, *DNA Testing a Mixed Bag for Immigrants*, *Wash. Post*, Oct. 25, 2006, at A1.

¹⁸¹ *Ariz. Admin. Code* § R9-19-207 (2011).

tered at birth.¹⁸² Unregistered children often come from rural areas; are members of particular indigenous, religious, or ethnic groups; are from very poor families; have single or teenaged mothers; and/or have parents who were displaced by war or civil conflicts.¹⁸³ Because of the Nigerian Civil War that occurred from 1967 to 1970, there was a cohort of births during that time period that went virtually unregistered. Even today, the process of obtaining a birth certificate after the fact is unclear. According to the Immigration and Refugee Board of Canada, Nigerian officials have provided “conflicting information on how to obtain a birth certificate.”¹⁸⁴ One official claimed that an adult could receive only an “attestation letter” rather than a birth certificate, a document that requires the applicant to swear to his or her age before the High Court of Justice and then go to a local office to obtain the letter. An attestation letter does not require a visit to a hospital, even if the birth occurred in one.¹⁸⁵ Another official, however, claimed that instead, the applicant, if born at a hospital, should obtain a birth document from the hospital and then take it to a government office to have it registered.¹⁸⁶ It is not clear what information is required in order for an attestation letter to issue (one Nigerian official described it simply as “a lot of information”).¹⁸⁷ Without clear rules on how and under what circumstances a birth certificate or attestation should issue, it is understandable that USCIS officials might view documents from such a country with a more jaundiced eye than those from a country with more consistently applied rules and frequent birth registration.¹⁸⁸

Indeed, the BIA requires much more extensive proof of parentage where a birth certificate has been issued years after the birth or not at all.

¹⁸² UNICEF Nigeria, Information Sheet: Birth Registration 1 (July 2007), http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_BirthRegistration.pdf.

¹⁸³ *Id.* at 2.

¹⁸⁴ Immigration & Refugee Bd. of Can., NGA103787.E, Nigeria: Requirements and Procedures an Adult Must Fulfill to Obtain a Birth Certificate, Including for Those Who Apply from Within the Country and from Abroad (2011), available at <http://www.refworld.org/docid/4e548de42.html>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (internal quotation marks omitted).

¹⁸⁸ According to UNICEF figures, industrialized countries had a birth registration rate of ninety-eight percent in 2000, but the world average that year was only fifty-nine percent. Sub-Saharan Africa ranked last as a region, with only twenty-nine percent of births registered. UNICEF Innocenti Research Ctr., Birth Registration: Right from the Start, 9 UNICEF Innocenti Digest 8 (Mar. 2002).

It does so because “[w]here a birth is unregistered, the accuracy of the reported information is called into question.”¹⁸⁹ If a birth has been registered years after it occurred, the BIA requires the petitioner to submit “secondary evidence, such as medical, religious, or school records that identify the mother and father of the individual.” In addition, “[s]worn affidavits of those having personal knowledge of the fact may also be accepted (e.g., health care workers, clergy, relatives, and close friends with personal knowledge of the birth).”¹⁹⁰ The BIA also routinely notes that “[b]lood or DNA test results may also be submitted.”¹⁹¹ This linguistic construction avoids describing DNA tests as a requirement—which they are not, under the INA or Code of Federal Regulations (“CFR”)—but the context in which it is used strongly suggests they are a *de facto* requirement. We found no appeals to the BIA in which an applicant successfully supplemented a late-filed or non-existent birth certificate and did not supply DNA evidence. Instead, DNA evidence is often strongly suggested by the BIA,¹⁹² and the BIA even sometimes remands cases where a petitioner was not directly told that DNA evidence was an “alternative” to other documentary evidence.¹⁹³

¹⁸⁹ Athar, 2007 WL 4182369, at *1 (B.I.A. Oct. 18, 2007) (per curiam) (citing Bueno, 21 I. & N. Dec. 1029, 1032 (B.I.A. 1997); Ma, 20 I. & N. Dec. 394, 397 (B.I.A. 1991); Serna, 16 I. & N. Dec. 643, 643–45 (B.I.A. 1978)).

¹⁹⁰ Athar, 2007 WL 4182369, at *1 (citing 8 C.F.R. §§ 103.2(b), 204.2(d)(2)(v)).

¹⁹¹ See, e.g., *id.* (citing 8 C.F.R. § 204.2(d)(2)(vi)); see also Biala, 2008 WL 5181806, at *1 (B.I.A. Nov. 17, 2008) (per curiam) (identical language); Bhatt, 2008 WL 2400981, at *1 (B.I.A. May 29, 2008) (per curiam) (identical language); Ara, 2008 WL 2400998, at *1 (B.I.A. May 27, 2008) (per curiam) (identical language); Patel, 2008 WL 655853, at *1 (B.I.A. Feb. 8, 2008) (per curiam) (identical language); Singh, 2007 WL 3301702, at *1 (B.I.A. Sept. 27, 2007) (per curiam) (identical language); Louizaire, 2006 WL 3922204, at *1 (B.I.A. Dec. 11, 2006) (per curiam) (identical language).

¹⁹² See, e.g., Mubiru, 2009 WL 3250340, at *1 (B.I.A. Sept. 29, 2009) (dismissing appeal where “[a]s of this date, the record contains no DNA evidence, and the single sworn declaration submitted on appeal, which was executed by the beneficiary’s and petitioner’s mother, is insufficient for the purpose of establishing the beneficiary’s parentage”); Asomani, 2006 WL 3712606, at *1 (B.I.A. Nov. 14, 2006) (per curiam) (dismissing appeal where petitioner had been granted sufficient time to obtain the results of a DNA test but failed to do so).

¹⁹³ See, e.g., Malik, 2006 WL 3203683, at *1 (B.I.A. Aug. 25, 2006) (concluding remand was warranted where petitioner was not advised that “she may submit evidence of DNA testing as an alternative”); Mohamed, 2006 WL 901412, at *1 (B.I.A. Feb. 1, 2006) (holding petitioner may “submit secondary evidence such as sworn affidavits, or a document from a competent governmental authority that the birth certificate does not exist or is unavailable” and “may submit evidence of DNA testing as an alternative”); cf. Presume, 2009 WL 773198, at *1 (B.I.A. Feb. 27, 2009) (noting that “petitioner stated that she did not know she could pursue DNA testing”).

In addition to proof of a genetic tie, there is another hurdle for those who seek visas through the relationship between a nonmarital child and her “natural father.”¹⁹⁴ In that case, the statute requires a petitioner to demonstrate a “bona fide parent-child relationship” between the child and father, even though no similar requirement exists when a petitioner claims a relationship between a nonmarital child and her “natural mother,” or, for that matter, a married parent.¹⁹⁵ Further, the regulations are quite specific about what type of functional parenthood is required from unmarried fathers. First, the “bona fide parent-child relationship” must be established while the child is unmarried and under the age of twenty-one years.¹⁹⁶ Second, the father must show “[e]motional and/or financial ties or a genuine concern and interest . . . for the child’s support, instruction, and general welfare.”¹⁹⁷ Third, “[t]here should be evidence that the father and child actually lived together or that the father held the child out as being his own, that he provided for some or all of the child’s needs, or that in general the father’s behavior evidenced a genuine concern for the child.”¹⁹⁸ Finally, the “most persuasive evidence” of a “bona fide parent-child relationship” is documentary evidence related to “financial responsibility by the father,” such as “money order receipts or cancelled checks showing the father’s financial support of the beneficiary; the father’s income tax returns; the father’s medical or insurance records which include the beneficiary as a dependent; school records for the beneficiary; correspondence between the parties; or . . . affidavits of [those] knowledgeable about the relationship.”¹⁹⁹ Thus, the requirement of a “bona fide parent-child relationship” between child and father adds a layer of required functional parenthood, as defined by the government, on top of the baseline requirement of genetic parenthood. This definition is heavily tilted toward financial support, rather than caregiving.²⁰⁰

¹⁹⁴ INA § 101(b)(1)(D) (2012).

¹⁹⁵ *Id.* After *Fiallo v. Bell*, 430 U.S. 787, 799–800 (1977), held that the Constitution permits discrimination against fathers and their nonmarital children, Congress amended the statute to allow those children to petition for visas but only if they have a “bona fide parent-child relationship” with their “natural father[s].” INA § 101(b)(1)(D).

¹⁹⁶ 8 C.F.R. § 204.2(d)(2)(iii) (2013).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Holland, *supra* note 21, at 1070–71 (discussing how the determination of a bona fide parent-child relationship between a father and an illegitimate child is skewed toward the traditional gendered definition of fatherhood).

2. *Stepparents and Stepchildren: Marital, Not Functional*

The INA's treatment of stepparents and children can lead to surprising results when compared to its treatment of genetic parents, sometimes privileging stepparents over genetic parents. Under the INA, a stepchild qualifies as a "child," "whether or not born out of wedlock, provided the child ha[s] not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred."²⁰¹ Here, marriage is creating parentage, because there is no blood relationship between stepparent and child, and no statutory requirement of a functional relationship between the stepparent and child. Permitting benefits through such relationships is not especially surprising, considering the importance of marriage in determining parental rights and responsibilities. But it does seem odd that, in some cases, stepparents can sponsor their stepchildren for visas even when those children's genetic parents cannot. Consider the relationship between an unmarried father and his child. If the child is not legitimate under local law and if the father cannot demonstrate a "bona fide parent-child relationship" with her—for example, if he has not financially supported the child—then the genetic father cannot petition for a visa on her behalf.²⁰² But if her father marries, his wife becomes the child's stepparent and can sponsor her for a visa, so long as the marriage happens before the child's eighteenth birthday, *even if* there is no functional relationship between the stepmother and child.²⁰³ Thus, in some cases, the law requires both genetic parenthood and functional parenthood from a "natural father" but requires from a stepparent only marriage to a child's genetic mother or father. One commentator has noted that the "stepparent-child relationship is one of the few modern relationships that immigration law accepts without imposing additional statutory hurdles."²⁰⁴ Although the relationship is "modern," it is also dependent on the law's more traditional reliance on marriage as a sharp

²⁰¹ INA § 101(b)(1)(B) (2012).

²⁰² See *id.* § 101(b)(1)(C), (D); 8 C.F.R. § 204.2(d)(2)(iii) (2013).

²⁰³ See *Palmer v. Reddy*, 622 F.2d 463, 464 (9th Cir. 1980) (holding that a U.S. citizen stepmother could petition for a stepdaughter because immigration benefits are "available to stepchildren as a class without further qualification"); 8 C.F.R. § 204.2(d)(2)(iv) (requiring only evidence that a stepparent was validly married to a beneficiary child's parent before the child reached eighteen years of age); see also *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531 (9th Cir. 2004) (affirming the *Palmer* rule and reversing a BIA decision that required petitioner to show strength of his relationship to stepchild); *McMillan*, 17 I. & N. Dec. 605, 606 (B.I.A. Jan. 13, 1981) (adopting the *Palmer* rule).

²⁰⁴ Holland, *supra* note 21, at 1075.

dividing line between legally protected parent-child relationships and those that are not recognized, a far cry from recognition of functional relationships.²⁰⁵ Indeed, the stepparent-child relationship is the one example where immigration law's definition of parentage is broader and more inclusive than state family law's. Stepparents, under state family law, must either adopt their spouse's children or demonstrate a functional parenting relationship with them in order to obtain legal parent status.

3. *Functional and Intentional Parentage*

Although unmarried genetic fathers are required to demonstrate a "bona fide parent-child relationship" with their child in order to access immigration benefits, there is no purely functional parentage currently recognized in U.S. immigration law. This failure has produced sustained critique from the scholarly community. Professor Shani King, for example, has observed that "[i]n many cultures, parenting is considered a shared responsibility among a number of people . . . reflecting a much more communal concept of family."²⁰⁶ Yet under U.S. law, a person merely functioning as a parent will never be able to sponsor a child for lawful immigration status, no matter how close the relationship. Doctrines such as *de facto* parenthood, psychological parenthood, and equitable estoppel have made no inroads in the immigration context. Nor does the United States allow more distant relatives to sponsor children for immigrant visas, even if the relative is functioning in a parent-like role.²⁰⁷

As for intentional parentage, just as it does with unmarried genetic fathers, immigration law requires adoptive parents to demonstrate not only intent but also an additional layer of functional parenthood. In general, a child must be "adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years."²⁰⁸ Specifically, the requirement that adoptive parents have "legal custody" of adopted children means that

²⁰⁵ Id. at 1078 ("Although step-relationships are not traditional in their allocation of parental responsibilities, they are nonetheless rewarded in the immigration policy framework because they preserve important aspects of marital unity.").

²⁰⁶ King, *supra* note 21, at 520.

²⁰⁷ In contrast, some other countries, such as Canada, define "family" more broadly to include grandparents or aunts and uncles of a child if the child's parents are deceased. See Hawthorne, *supra* note 21, at 827–28.

²⁰⁸ INA § 101(b)(1)(E)(i) (2012).

those parents must have, through official state law processes, assumed responsibility for the child.²⁰⁹ Moreover, the requirement that the adopted child has “resided with” the adoptive parent or parents means that they must be living together in a “familial relationship,” which apparently is one in which adoptive parents can demonstrate that they exercise “parental control.”²¹⁰ There is an exception—which actually accounts for a large number of the adoptive children who obtain legal status—for “orphan[s],” defined as children who have experienced the death, disappearance, or abandonment of both or sometimes just one parent.²¹¹ This exception reflects the fact that when a parent initially adopts a child, there will be no functional relationship because one has not yet had time to develop. In the cases where a child has been adopted but is not an orphan, the functional relationship required prevents parents from relinquishing legal parentage to a relative solely to facilitate immigration status for their child.

Turning to ART, immigration law is quite murky in regard to the status of children conceived through artificial means. There is no published guidance for how parent-child relationships that result from ART should be treated for immigration purposes.²¹² Thus, a child born through ART would need to try to fit one of the INA’s definitions of “child,” such as being a child born in wedlock, a stepchild, a legitimated child, a child born out of wedlock with a genetic tie to a petitioning father or mother, or an adopted child.²¹³ As a practical matter, the result is that petitioners and beneficiaries are likely to receive immigration benefits, irrespective of their genetic relationships, if they appear on paper as if they are a part of a “traditional” family—that is, one headed by a married, heterosexual couple who conceived their child through natural means. That is so because, in the typical case, birth certificates and marriage certificates suffice to demonstrate the required relationship for a family-based visa petition.²¹⁴ For example, if a married woman petitions on behalf of a child

²⁰⁹ 8 C.F.R. § 204.2(d)(2)(vii)(A) (2013).

²¹⁰ *Id.* § 204.2(d)(2)(vii)(B) (“Evidence of parental control may include, but is not limited to, evidence that the adoptive parent owns or maintains the property where the child resides and provides financial support and day-to-day supervision.”).

²¹¹ INA § 101(b)(1)(F).

²¹² See generally Scott Titshaw, *Assisted Reproductive Technology and the INA, VOICE: An Immigr. Dialogue* (Nov./Dec. 2011), <http://www.ailadownloads.org/seminars/seminar120816resources.pdf>.

²¹³ See INA § 101(b)(1).

²¹⁴ See 8 C.F.R. § 204.2(d)(2)(i)–(iv); AFM § 21.2(d)(1)(B).

she gestated—but who was conceived with donor egg and sperm—and she submits a marriage certificate with names that match those listed as parents on her child's birth certificate, then the petition likely will be approved. There would be no reason for an adjudicator to suspect that the mother and child and father and child were not genetically related. But families who look unusual could run into problems. For example, an adjudicator may see red flags in petitions by same-sex couples, petitions by mothers who are more than forty years older than their children (and thus may have used an egg donor), and petitions by parents whose race differs from that of their children. Those circumstances could suggest a birth through ART and trigger additional scrutiny, including genetic tests.²¹⁵ In certain circumstances, parents whose genetically unrelated children were born through ART may be able to use marriage or adoption to qualify each child as a “child” under the INA, but the viability of those strategies would depend on the specific facts of each case. As the immigration system now stands, the status of children born through ART is unclear, and we have not found enough cases addressing the issue to identify any policies or patterns in how those children are treated.

C. Immigration Law's “Family Values”

The differential treatment of parentage in immigration and family law has generated ample criticism. Professor David Thronson, for example, has argued that immigration law's treatment of parent-child relationships is out of step with family law, and that this is “partially a result of the exceptionalism of immigration law and the notion that immigration law is different with different rules.”²¹⁶ Scholars likewise argue that state family law treats children better than immigration law, and that immigration law should “modernize” or “enter the mainstream” to harmonize with state family law.²¹⁷

²¹⁵ See 8 C.F.R. § 204.2(d)(2)(vi).

²¹⁶ David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 *Hastings L.J.* 453, 507 (2008); see Carr, *supra* note 21, at 123; King, *supra* note 21, at 512–13; see also Nikki Smith, *Children's Rights Nationally and Internationally During the Deportation of Their Parents or Themselves: Does the Right to Sovereignty Trump the Best Interest of the Child?*, 5 *the crit: Critical Stud. J.* 1, 1–2 (2012) (arguing that best interests should trump).

²¹⁷ See, e.g., Holland, *supra* note 21, at 1085–86 (arguing that immigration law should “modernize”); David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 *Fordham Urb. L.J.* 393, 403 (2010) (arguing that immigration law should enter the family law “mainstream”); David B. Thronson, *Thinking Small: The Need*

We agree that immigration law and state family law are currently not in harmony with one another and that immigration law can do better than it currently does. However, we disagree with the notion that state family law is in harmony with itself; as we showed in Part I, state family law is diverse and non-uniform. We also disagree with the notion that immigration law and state family law *should* be in harmony with one another. Because of the strikingly different legal context in which immigration law decisions are made, it seems to us impractical to expect immigration law to conform exactly to state family law norms—even if those norms were uniform.

Instead of pressing for harmonization of immigration law and state family law, we think a more viable alternative is to examine immigration law's treatment of family on its own terms and using its own values. That does not mean that immigration law should not be subjected to sustained critique—it absolutely should be—but we think that this critique should be made using immigration law's own institutional values. Any proposal that encourages DHS and the State Department to develop broader strategies for family recognition must take into account the unique government interests at stake in immigration cases and how they differ from the interests of state family law. This does not mean that the crafters of immigration law cannot take family law into account; rather, they should consider the goals of the source law and adopt family law doctrine where these doctrines will help meet the goals of immigration law, or tweak them in ways that are appropriate to meeting these goals.

1. *Optimal Immigration*

As we discussed in Part I, family law has two core goals: the privatization of dependency and the physical and psychological well-being of children. Parentage rules are just one of the many ways in which the family law system attempts to further these goals; other rules include the best interests of the child standard applied in many child custody cases, the standards applied in determining unfitness in abuse and neglect cases, and child support guidelines. In contrast, the primary goal of immigration law is not to privatize children's dependency or ensure their

for Big Changes in Immigration Law's Treatment of Children, 14 U.C. Davis J. Juv. L. & Pol'y 239, 262 (2010) (stating that "[o]utside the realm of immigration law, the primacy of children's interests in legal decisions regarding family is ubiquitous" and citing family law's "best interest [of the child] standard" as evidence).

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well-being. Instead, immigration law is concerned with admitting an optimal number of new potential citizens and temporary workers each year and in removing those noncitizens that the state deems to be dangerous or undesirable. Placing limits on certain categories of immigrants may prevent large disruptions to labor markets, minimize risk to the solvency of social safety net programs, and protect national security interests. Family reunification plays a role in these value judgments, as we will argue, but it will always be constrained by the law's other goal of optimal immigration. In addition, the state has a strong interest in preventing the fraudulent acquisition of benefits.

Because of these differing interests, the questions asked by immigration officials differ from those asked by family court judges. Unlike family law, immigration law does not ask, "how has this family been functioning?" but instead, "how will this family function if we allow them to live here together?" These questions involve different government interests and invoke different constitutional issues. They are likely to lead, at least sometimes, to different results.

The INA privileges family-based immigration over other types, but its legislative history on the reason it does so is scant.²¹⁸ As one of us has argued elsewhere, there are numerous reasons why a nation might prefer family-based immigration to other forms, such as employment-based immigration or a lottery system.²¹⁹ The government might believe, for example, that family members are more likely to effectively integrate each other into American culture and society than an employer is to integrate an employee.²²⁰ Or, it might believe that family members can more effectively screen each other than can employers. For example, an individual might know which of his siblings is hard-working and likely to be successful over time, while an employer might be concerned only about a specific position it needs filled in the immediate future and worry little about a worker's long-term success in the economy.²²¹

²¹⁸ See H.R. Rep. No. 85-1199, pt. 2, at 8 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020–21 (stating that the INA "implements the underlying intentions of our immigration laws regarding the preservation of the family unit").

²¹⁹ Abrams, *supra* note 157.

²²⁰ *Id.* at 16.

²²¹ See *id.* at 20–21; cf. Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. Chi. L. Rev. 1285, 1323 (2012) (arguing that delegation of screening to family members may be beneficial because families have access to private information about migrants but that family members' preferences may not always mirror the government's).

Because of this interest, any immigration policy that gives deference to family relationships should contemplate how particular relationships will help it to most effectively implement its goals. Although U.S. immigration policy has been faulted for failing to recognize parentage relationships as broadly as some states have in divorce or inheritance contexts, a better critique would argue that it has failed to recognize parental relationships that clearly meet its own immigration goals. If integration, for example, is the government's goal, it would be wise to maximize the number of people considered "children" of lawful permanent residents, regardless of what the past relationship of these children has been to their parents, so long as the children are going to be members of the household. Children, who learn languages quickly and are in a formative time of their lives, are more likely than adults to integrate quickly and likely to bring this integration home to their families.²²²

If, in turn, the government's interest is in effective screening, then we might expect to see more emphasis on the qualities a parent or child brings to the country. For example, a U.S. citizen can sponsor a parent as an "immediate relative" so long as the child is over the age of twenty-one when the sponsorship occurs.²²³ If the purpose behind this provision is to allow the adult child, and not an employer, to screen for parents who are likely to be an economic boon rather than a burden, the government might ask the child to ensure that the parents will be economically solvent. And it does—individuals who sponsor a family member must sign an affidavit of support in which they promise to support the sponsored immigrant for ten years or until the immigrant becomes a citizen, and they are required to demonstrate their economic wherewithal to do so.²²⁴ We might also expect to see a system that grants extensive discretion to officials to deny visas to individuals whom they believe will be a drain on society. And indeed, the INA offers extensive discretion throughout its provisions to State Department and DHS officials to decline to grant visas to individuals who they have reason to believe will not abide by their terms or are likely to become a public charge.²²⁵

Integration and screening are both government interests that go to the right balance of immigrants; optimal immigration also implies the right overall number of immigrants. Currently, the INA allows family-based

²²² Abrams, *supra* note 157, at 18–19.

²²³ INA § 201(b)(2)(A)(i) (2012).

²²⁴ *Id.* §§ 212(a)(4)(C), 213A.

²²⁵ *Id.* § 212(a)(4).

immigration using a flexible formula that in practice leads to somewhere between five hundred thousand and one million family members admitted each year.²²⁶ Presumably, members of Congress believe that an increase in these numbers would be suboptimal (or they would not have limited immigration so severely). The current backlogs in the family-based categories are enormous; as of November 1, 2013, there were 4,210,971 family members with outstanding visa petitions, many of whom had been waiting for years.²²⁷ If the government's main interest were simply in reunifying families, waiting lists like this would be unacceptable. Instead, keeping the overall number of lawful immigrants at around one million per year seems to be a more important goal. In addition, the government seems to care about balancing the origins of the families who do come. By creating caps on the number of immigrants who can come from particular countries, the INA artificially lowers legal immigration from countries that have the greatest demand for immigration to the United States. For example, unmarried sons and daughters of U.S. citizens who filed their visa petitions in January of 2007 are currently having their petitions granted, except for those who are from Mexico and the Philippines, whose petitions are now being granted only for those who filed in October of 1993 and August of 2001, respectively.²²⁸ The government's interest does not appear to be only in obtaining the right number of immigrants, but also in ensuring that these immigrants are not largely Mexican or Filipino.

The government's interest in optimal immigration, to be sure, may not be optimally realized. As noted above, many of the current features of immigration law undermine its goals. It may also be misguided. Country caps, for example, have been critiqued as racist remnants of national origins quotas.²²⁹ The argument here, however, is that critiquing the cur-

²²⁶ See Office of Immigration Statistics, Dep't of Homeland Sec., 2011 Yearbook of Immigration Statistics 18 tbl.6 (2012); see also Abrams, *supra* note 157, at 7 n.1 (calculating 857,658 family-based immigrants out of 1,062,040 total immigrants for fiscal year 2011).

²²⁷ Dep't of State, Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2013, at 2 (2013), available at <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>.

²²⁸ Bureau of Consular Affairs, Dep't of State, Visa Bulletin No. 65: Immigrant Numbers for February 2014 (2014), http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_february2014.pdf.

²²⁹ See, e.g., Bill Ong Hing, Reason over Hysteria—Keynote Essay, 12 Loy. J. Pub. Int. L. 275, 286–88 (2011) (arguing that country caps discriminate against Mexicans and encourage illegal immigration by giving individuals from countries with large backlogs no other

rent system is best done by attending to the government's goals and showing why the system is counterproductive or misguided, rather than through a side-by-side comparison to what is offered in state family law. The desired outcome might be very similar, but the route to getting there is likely to be quite different on the immigration side.

In addition to its primary interest in optimal immigration, immigration law has another interest not shared to the same extent by state family law—prevention of fraud. This interest, unlike optimal immigration, is not the core animating interest of the field but rather an unfortunate by-product of circumstances. Where great benefits are available, some will always try to obtain them fraudulently.²³⁰

The prevalence of fraud in immigration cases is a matter of some contention. As Professor Ming Chen has recently argued, in immigration enforcement, just as in any other form of bureaucracy, “where you stand . . . depends on where you sit.”²³¹ Government officials generally report high rates of fraud. For example, prior to the enactment of the Immigration Marriage Fraud Amendments (“IMFA”) in 1986, the INS produced a survey estimating that thirty percent of spousal petitions were fraudulent.²³² Several years later, in a case captioned *Manwani v. Immigration & Naturalization Service* that challenged portions of IMFA, the INS conceded the invalidity of the survey that produced the thirty percent estimate.²³³ As it turned out, this figure was obtained by asking INS field investigators in three cities whether they *suspected* fraud, not whether there was proven fraud.²³⁴

choice); Charles J. Ogletree, Jr., Conference Paper, *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755, 761 (2000) (arguing that the country caps are an example of the “implicit and explicit racial biases [that] still pervade all four major avenues of legal immigration”).

²³⁰ See Kerry Abrams, *Marriage Fraud*, 100 Calif. L. Rev. 1, 44 (2012).

²³¹ Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 Berkeley J. Emp. & Lab. L. 227, 230 (2012) (internal quotation marks omitted).

²³² *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary, 99th Cong.* 35 (1985) (statement of Alan C. Nelson, Comm'r, Immigration & Naturalization Serv.); H.R. Rep. No. 99-906, at 6 (1986).

²³³ 736 F. Supp. 1367, 1373 (W.D.N.C. 1990).

²³⁴ *Id.*

The government has also produced evidence of high rates of fraud in other contexts, including employment-based immigration and asylum.²³⁵ For example, for several years, the State Department ran a resettlement program for families of refugees. Once a refugee was admitted and resettled in the United States, she could file an Affidavit of Relationship so that her spouse and children could join her. In 2008, USCIS received reports of fraud among refugees of several East African nations and decided to start taking DNA samples of applicants for the program.²³⁶ It found high rates of fraud—in more than eighty percent of cases, applicants either claimed at least one relationship that was disproved by DNA testing or refused to be tested.²³⁷ Consequently, the program was suspended for several years. It has since resumed and now is closely monitored for fraud.²³⁸ Mandatory DNA testing is one alternative being considered.²³⁹

Reports by former consular officers and immigration officers also opine that there are high levels of fraud in the immigration system. One former consular officer, for example, writes that “[a]n overwhelming percentage of all petitions to bring foreign spouses or fiancés to the United States illegally . . . are approved.”²⁴⁰ The author cites to no studies to back up this claim, but the tone of the article is one of exasperation from having witnessed case after case where the author suspected fraud but was not able to do anything to stop it. And certainly, enough immigrants are indicted each year for criminal immigration fraud that, assuming clear-cut criminal cases are just the tip of the iceberg, there may be many, many more cases of successful immigration fraud.²⁴¹

²³⁵ See, e.g., Scott F. Cooper, *New Immigration Law Challenges and Strategies for Employers*, in *New Developments in Immigration Enforcement and Compliance* 7, 8 (Michaela Falls ed., 2010).

²³⁶ Jordan, *supra* note 179, at A3.

²³⁷ Bureau of Population, Refugees, and Migration, Dep’t of State, *Fraud in the Refugee Family Reunification (Priority Three) Program* (2009), <http://www.state.gov/j/prm/releases/factsheets/2009/181066.htm>.

²³⁸ See Andorra Bruno, Cong. Research Serv., RL31269, *Refugee Admissions and Resettlement Policy* 5–6 (2013).

²³⁹ See generally Emily Holland, Comment, *Moving the Virtual Border to the Cellular Level: Mandatory DNA Testing and the U.S. Refugee Family Reunification Program*, 99 *Calif. L. Rev.* 1635 (2011).

²⁴⁰ David Seminara, *Hello, I Love You, Won’t You Tell Me Your Name: Inside the Green Card Marriage Phenomenon*, 2008 *Center for Immigration Studies* 1, <http://www.cis.org/sites/cis.org/files/articles/2008/back1408.pdf>.

²⁴¹ For a summary of prosecuted immigration fraud, see Ruth Ellen Wasem, Cong. Research Serv., RL34007, *Immigration Fraud: Policies, Investigations, and Issues* 4–14 (2007).

In contrast, critics of the government—civil rights lawyers, legal scholars, and immigration practitioners—often claim very low rates of fraud.²⁴² They point to the ever-shifting claims by the INS about the prevalence of fraud as evidence of its insignificance. They also question the very notion of “fraud” as a stable concept. Immigrants often commit fraud because there is no legal avenue for immigration. As one commentator has argued, “The mobilization of fraudulent identity for immigration purposes is often informed and justified by migrants’ distinctive sense of legitimacy, justice, and morality.”²⁴³ Thus, prior to the striking down of the Defense of Marriage Act, gay immigrants frequently entered into “fraudulent” marriages with members of the opposite sex, but did so because they wanted to be reunified with their real partners.²⁴⁴ Many of the African refugees and immigrants suspected of parentage fraud are sponsoring a niece, nephew, sibling, or the child of a close friend—a person they consider to be a family member, but who is not considered to be a close enough relative to count for immigration purposes. The argument here is not that these claims are not technically “fraudulent,” but that the government’s interest in preventing and prosecuting this kind of fraud may be weaker than in prosecuting the “marriage fraud rings” that match potential immigrants with citizens willing to marry for a price. By failing to create a mechanism for functional family members to seek family reunification, the government encourages them to fraudulently claim genetic or marital relationships instead. This problem may be exacerbated in the refugee context, where genetic families have been torn apart by war and functional relationships have arisen to take their place.²⁴⁵ These “fraudulent” relationships are ones that push the boundaries of the system in an attempt to obtain family reunification that would otherwise be unavailable. They may have more in common with the “paper sons”—Chinese immigrants who claimed U.S.

²⁴² See, e.g., Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, but Not Its Demise*, 24 N. Ill. U. L. Rev. 153, 192 (2004); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 New Eng. L. Rev. 417, 439–40 (2011); Samantha L. Chetrit, Note, *Surviving an Immigration Marriage Fraud Investigation: All You Need Is Love, Luck, and Tight Privacy Controls*, 77 Brook. L. Rev. 709, 711, 741 (2012).

²⁴³ Jaeeun Kim, *Establishing Identity: Documents, Performance, and Biometric Information in Immigration Proceedings*, 36 Law & Soc. Inquiry 760, 764 (2011).

²⁴⁴ See Abrams, *supra* note 230, at 51.

²⁴⁵ See Holland, *supra* note 239, at 1682 (“U.S. officials must come to understand the ‘typical’ refugee family: one that encompasses non-biological kinship relationships and bonds born of war, enormous suffering, and emergency.”).

citizenship through birth at a time when Chinese laborers were excluded from entry by racist statutes—than with criminal hucksters.²⁴⁶

Regardless of whether fraud is rampant or rare, justified or not, it seems unsurprising that the government would be concerned about it, especially in the immigration context. Of course, the government cares about fraud in other contexts as well—welfare, insurance, and housing, for example. But, in the immigration context, fraud is especially troubling, because the parties to it can part ways after committing it. Contrast immigration to, for example, welfare fraud. In order to commit welfare fraud, a parent must keep up the ruse of parenting a particular child for years. This is certainly possible to do, but it is difficult. To commit immigration fraud, a parent need only claim parentage for as long as it takes to get the visa approved, gain admission, or receive adjustment of status. Then “parent” and “child” could go their separate ways. It is thus quite possible to use parental status instrumentally in a way that is more difficult in other contexts. And in the immigration context, the benefit at stake is enormous. The ability to live and work in the United States can be a life-changing opportunity. When this significant of a benefit is offered without the requirement of long-term consequences, the incentive to engage in fraud is heightened, and it makes sense that the government would be particularly anxious about it.²⁴⁷

In contrast to state family law, where recognition of functional or intentional parenthood may ensure that each child is parented by *someone*, limiting parentage determinations to only those involving marriage or genetic ties provides strong checks on fraud in the immigration context. It helps ensure that benefits are going only to intended recipients. Recognizing functional or intentional parentage, by contrast, could be especially threatening to the government's anti-fraud interest. That does not mean that the government should not consider recognizing family ties more broadly; it simply means that doing so creates a host of new fraud-related problems that would need to be dealt with.

²⁴⁶ For an interesting account of one paper son's story, see Steve Kwok, *My Father Was a Paper Son*, Angel Island Immigration Station Foundation, <http://www.aiisf.org/stories-by-author/737-my-father-was-a-paper-son> (last visited Mar. 1, 2014).

²⁴⁷ This argument builds on the observations regarding marriage fraud made in Abrams, *supra* note 230, at 30–37.

2. Family Reunification

A second important “value” of immigration law is family reunification. This interest can be understood as the interest of individual U.S. citizens and residents writ large. If each individual has a personal interest in living with his or her chosen family members, then the nation as a whole has an interest in facilitating these individual interests. Family reunification is a right of each citizen of the United States and, taken in the aggregate, should be understood as a government interest.

Family reunification is conceptually distinct from the family law values of preserving children’s physical and psychological well-being and privatizing dependency, although the concepts overlap. In family law, a particular child is presumed to be regulated by law and the law must decide how to ensure that private actors, and not the public, care for that child and what circumstances will best promote the child’s welfare. The goals of family reunification are simultaneously broader and narrower than family law’s interests. Sometimes, reunification will further the well-being of children, sometimes it may not; sometimes it may privatize dependency, and sometimes it may create yet another child in need of public assistance. Regardless of its overlap with family law values, the immigration law value of family reunification is important and autonomous.

Family reunification is widely understood to be an inalienable right, both in U.S. constitutional law and international human rights law. As currently interpreted by the U.S. Supreme Court, the U.S. Constitution protects family rights. For example, in *Troxel v. Granville*, the Court protected the rights of parents to make decisions about the “care, custody, and control” of their children without intervention from outsiders—even if those outsiders are the child’s grandparents.²⁴⁸ And in *Moore v. City of East Cleveland*, it protected the right of family members to live together even in a non-nuclear form; zoning laws may not “slic[e] [too] deeply” into the traditional family.²⁴⁹ This right was strengthened and refined in cases such as *Santosky v. Kramer*²⁵⁰ and *Smith v. Organization*

²⁴⁸ 530 U.S. 57, 68–75 (2000).

²⁴⁹ 431 U.S. 494, 498–500 (1977).

²⁵⁰ 455 U.S. 745, 747–48 (1982) (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).

of *Foster Families for Equality and Reform*,²⁵¹ which reaffirmed the procedural due process rights of parents where they are in danger of having their children taken away. Taken together, these cases can be understood to require the government to defer to families' desires to reside together. U.S. constitutional case law, however, focuses on the rights of parents to the custody of their children; children's best interests are presumed to flow from this custodial control.²⁵²

The international human rights claim for a right to family reunification is more explicit than the one embedded in U.S. constitutional law, and more child-focused. Many international conventions and treaties include this right; for example, the Convention on the Rights of the Child ("CRC") grants each child "as far as possible, the right to know and be cared for by his or her parents."²⁵³ Article 9(1) specifically bans the separation of children from their parents except under specific circumstances, generally where the parent has been abusive or neglectful.²⁵⁴ Likewise, the International Covenant on Civil and Political Rights ("ICCPR") recognizes the family as "the natural and fundamental group unit of society" and holds that it "is entitled to protection by society and the [s]tate."²⁵⁵ Despite these broad articulations of family rights, many commentators have observed that in practice these rights have proven difficult to enforce.²⁵⁶

The goal of family reunification lies in tension with the goal of optimal immigration. Family reunification is backward-looking. To facilitate reunification, government actors must ask, "how has this family func-

²⁵¹ 431 U.S. 816, 846 (1977) (recognizing that biological parents have a "constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right[s]").

²⁵² See Ann Laquer Estin, *Where (in the World) Do Children Belong?*, 25 *BYU J. Pub. L.* 217, 227-28 (2011) (noting that "[o]ur constitutional tradition includes strong protection for parental rights" but that "[w]e do not have a similarly robust constitutional tradition addressing children's constitutional interest in protection of their family relationships").

²⁵³ Convention on the Rights of the Child, art. 7(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter *CRC*].

²⁵⁴ *Id.* at 47.

²⁵⁵ International Covenant on Civil and Political Rights, art. 23(1), Dec. 16, 1966, 999 U.N.T.S. 171; see *CRC*, supra note 253, at 45; see also International Covenant on Economic, Social and Cultural Rights, art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3 (stating in part that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society").

²⁵⁶ See, e.g., Berta Esperanza Hernández-Truyol, *Asking the Family Question*, 38 *Fam. L.Q.* 481, 481-86 (2004); Sonia Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 *Berkeley J. Int'l L.* 213, 213-15 (2003).

tioned in the past?” In contrast, optimal immigration is forward-looking. Government actors must predict which families will do well—as immigrants and potential citizens—in the future. When conflicts arise, the current U.S. system often allows the optimal immigration interest to overwhelm the family reunification interest. We believe this result is unfortunate, and represents a failure of the existing immigration law system to adequately account for the family reunification interest. For example, the requirement that a nonmarital, genetic father establish a “bona fide parent-child relationship” with his child by demonstrating financial support jibes poorly with the family reunification interest, because it excludes many, many fathers who likely have close parent-child relationships but are not breadwinning parents. We do not believe, however, that this rule is a failure because it fails to protect family law’s interest in children’s well-being. In fact, the rule may very well further family law’s interest in privatizing dependency. Rather, the rule is a failure because it denies a U.S. citizen or resident his right to continue living with or near a parent (or child) with whom he already has an established familial relationship.

Why does our immigration law system appear to fail so spectacularly to effect its goal of family reunification? There are several pieces of the puzzle that are worth teasing out. First, and often overlooked, is the United States’s unusually generous *jus soli* citizenship norm. Many countries do not automatically grant citizenship to every person born within the geographic boundaries of the country.²⁵⁷ The United States’s unusually broad rule means as a practical matter that there will be many mixed-status families—families with U.S. citizen children and immigrant (often undocumented) parents. If an immigrant parent is deported, the U.S. citizen child will arguably be in a position to press a moral claim for family reunification. Of course, it is important to recognize that family reunification can often be effected not by granting legal status to the parent but by allowing the child to leave with the parent. The United States deports thousands of noncitizens every year who have U.S. citizen children. These deportations may break up these families, or they may not, because in many cases the noncitizens take their U.S. citizen children with them (sometimes referred to as “de facto deporta-

²⁵⁷ See Patrick Weil, Access to Citizenship: A Comparison of Twenty-Five Nationality Laws, *in* *Citizenship Today: Global Perspectives and Practices* 17, 17–35 (T. Alexander Aleinikoff & Douglas Klumeyer eds., 2001).

tion”).²⁵⁸ Just because a family relationship was not considered close enough to merit cancellation of removal does not necessarily mean that the family will not continue to recognize itself privately. It does not even mean that the relationship will not be recognized for other purposes; a family denied family-based immigration benefits might still be a “family” for tax, social security, divorce, or inheritance purposes.²⁵⁹ It follows that an important question the government should ask (and currently does not) in removal cases is whether the family can, as a factual matter, stay together. If, for example, the parent’s home country would not recognize the parent-child relationship, there might be a stronger claim for family reunification than in a case where it would.

A second feature of current law is a weakness in the family reunification principle itself. Even if there is a fundamental right to custody and control of one’s children and a fundamental right of families to reside together, the Supreme Court—which hears family law cases only very occasionally—has only considered these rights thus far in the context of genetic relationships. *Troxel* involved a genetic mother’s claim of exclusive custody and decision-making rights against genetic, paternal grandparents’ claim for visitation;²⁶⁰ *Moore* involved a woman’s right to co-reside with her genetic grandsons, even where the sons had different parents (they were cousins instead of brothers).²⁶¹ In neither of these cases did the Court affirm the rights of a functional or intentional parent to parental rights. If anything, the cases could be read to strengthen the notion that rights inhere in biology. Other Supreme Court cases cut in the direction of vindicating the rights of marital fathers over genetic fathers; the plurality in *Michael H. v. Gerald D.*, for example, famously held that the State of California could prefer the traditional, marital father over an “adulterous natural father” when crafting its paternity law.²⁶² Similarly, the articulation of the family reunification right in international human rights law focuses on the family as the “natural” and fundamental unit of society, thus reifying genetic relationships over functional or intentional ones. A stronger attention to the family reunifi-

²⁵⁸ See Amanda Colvin, Comment, Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution, 53 St. Louis U. L.J. 219, 226–31 (2008).

²⁵⁹ See Abrams, *supra* note 230, at 14–39 (categorizing different definitions of “marriage” across various public benefits schemes).

²⁶⁰ *Troxel*, 530 U.S. at 60–61.

²⁶¹ *Moore*, 431 U.S. at 495–97.

²⁶² 491 U.S. 110, 130 (1988).

cation interest would do much good in immigration law, preventing, for example, the deportation of many parents of U.S. citizens; but as currently articulated, it would not necessarily mandate a change in many of the parentage rules currently embedded in the INA.

A third—and possibly the most important—reason that family reunification has been an under-enforced value in immigration law is judicial deference to Congress and the executive branch. Despite a structural commitment, through the family admissions and cancellation of removal provisions in the INA, and a constitutional commitment, through *Troxel*, *Moore*, and similar cases, U.S. law fails to provide an enforceable right to family reunification. The argument for an enforceable right would go something like this: There is a fundamental right to reside as a family and to parent one's child (or live with and be parented by one's parent); the refusal to extend immigrant status to functional (or intentional or nonmarital) parents violates this right; in order to curtail this fundamental right, the government must craft a law that passes strict scrutiny.

Immigration laws, however, are almost never subjected to heightened scrutiny. Immigration jurisprudence contains another doctrine that conflicts with the notion that family reunification is constitutionally required. Under the “plenary power doctrine,” where Congress (or the executive) legislates (or enforces) in the immigration area, courts will apply a much more deferential standard of review than they normally would.²⁶³ Thus, in *Fiallo v. Bell*, a case challenging the definition of “parent” and “child” for nonmarital children, the Supreme Court refused to strike down the relevant portions of the INA, despite the “double-barreled discrimination” based on both gender and illegitimacy embraced by the statute.²⁶⁴ In other words, even if there is a constitutional right to live with one's family, courts under-enforce this right by refusing to second-guess the federal government's aims when its immigration policy results in curtailment of this right. Similarly, courts do not enforce the family reunification principles articulated in human rights instruments. Courts, for example, refuse to follow the CRC because the United States has not ratified it.²⁶⁵ As a result, immigration laws are extremely unlikely to be struck down by courts.

²⁶³ See Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America 192–219* (1987).

²⁶⁴ 430 U.S. 787, 792–800 (1977) (internal quotation marks omitted).

²⁶⁵ See *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006) (“The United States has not ratified the CRC, and, accordingly, the treaty cannot give rise to an individual-

Taken together, these three features of the current legal landscape mean that even if family reunification is an important underlying purpose of immigration law, it is a difficult one for an individual to press before a court. The large number of *jus soli* citizens who might press the claim has made courts and legislatures reluctant to broaden parentage beyond marital and genetic types; coupled with the genetic bias of existing constitutional and international law and the extreme deference given to the political branches in immigration cases, this means that the parentage rules have been largely immune from attack.

But if family reunification is an important government interest, it needs to be more thoughtfully and explicitly incorporated into definitions of parentage so that it is not effectively trumped by the optimal immigration interest and fears of fraud. This critique could be made throughout immigration law (for example, counseling against such strict standards for cancellation of removal where a U.S. citizen child is at stake),²⁶⁶ but here we are focused on parentage. One possibility for change is to look to the courts. It is quite possible that *Fiallo* was wrongly decided; as one of us has argued previously, deference based on “plenary power” should be at its nadir in cases involving definitions of family, traditionally an issue left to the states.²⁶⁷ But even with *Fiallo* firmly in place, the government—both Congress and the executive—should incorporate family reunification into its constellation of interests. If anything, the existence of a doctrine such as plenary power that limits judicial review should mean that the other branches of government have an especially important obligation to represent the interests of their citizens

ly enforceable right.”); *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1188 (8th Cir. 2005) (holding that the court “need not consider international law” where “Congress has clearly expressed in the INA its intent to remove certain aliens” and the United States has not ratified the CRC); *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 234 (2d Cir. 2005) (holding that, even if the CRC has become customary international law, Congress may “preclude the application . . . to a particular situation by treaties or statutes that occupy the field,” and concluding that Congress did so where it “enacted legislation defining the circumstances under which hardship to a child may appropriately be considered as a ground for granting relief from removal to a nonpermanent resident alien” (citations omitted) (internal quotation marks omitted)); cf. *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1010–12 (9th Cir. 2005) (holding that, if it is assumed the CRC has the force of customary international law, the INA, as applied, did not violate the CRC because the “exceptional and extremely unusual hardship” test considered the “best interests of the child”).

²⁶⁶ For a good example of this critique, see Jacqueline Bhabha, *The “Mere Fortuity of Birth”?: Children, Mothers, Borders, and the Meaning of Citizenship*, in *Migrations and Mobilities: Citizenship, Borders, and Gender 187* (Seyla Benhabib & Judith Resnik eds., 2009).

²⁶⁷ See Abrams, *supra* note 20.

and residents when they make and enforce laws that affect family interests.

Clearly, there is no “quick fix” for the problems of enforcing a complex immigration policy. But an important first step toward change is understanding that functional and intentional parental relationships are worth protecting—regardless of the family law of the states that have an interest in those relationships. If a parent and child have an effectively functioning relationship, then their relationship should count for immigration purposes because it has the same salient characteristics that a marital or genetic-based parentage relationship would have: Parent and child are likely to benefit from each others’ presence; they are likely to assist each other with integration into the American polity; and one is likely to be an effective “screener” for the other. To the extent that this kind of relationship does not effectively fulfill those goals, a marital or genetic-based parentage relationship seems just as unlikely to. If Congress finds that parent-child relationships are not good proxies for optimal immigration and that family reunification concerns do not trump the government’s interest in refusing to recognize them, then it should amend the INA across the board, not hold functional and intentional parentage relationships to a higher standard than other kinds of families. In fact, if Congress adequately considered family reunification interests and explicitly thought through the reasons why families contribute to optimal immigration, it might completely reconfigure how family-based immigration works. Consider, for example, the “parenting visa” concept suggested by Professors Ann Estin and David Thronson. A citizen or resident child might have a good claim for a temporary visa for the person who is his or her functional caretaker because that caretaker contributes to “optimal immigration” by being a needed temporary worker and because the citizen-child deserves to be parented by the adult she has always known as her caretaker.²⁶⁸ The genetic relationship between the child and the parent would be irrelevant; instead, it is the function provided by the adult that matters.

Of course, recognition of functional and intentional relationships is difficult, especially given the heightened concerns regarding fraud in the immigration context. But Congress has periodically amended the INA to

²⁶⁸ See Ann Laquer Estin & David B. Thronson, *The Parenting Visa* (Apr. 15, 2014) (unpublished manuscript) (on file with author) (arguing that a new “parenting visa” should be created, in which a citizen could sponsor a nonmarital co-parent for a visa).

deal with similar problems in the context of marriage fraud, an area that is more likely to lead to fraud given that fraudulently sponsoring a child would be more likely to lead to a legally binding obligation to continue her support. Under the INA, a person can receive lawful permanent resident status based on a new marriage.²⁶⁹ But that status is conditional for two years.²⁷⁰ Shortly before the conditional status expires, the couple must petition to have the conditional status removed. This usually requires a paper hearing but occasionally requires a personal interview. USCIS will consider a number of factors in determining whether the marriage is bona fide or was entered into to fraudulently gain benefits.²⁷¹ If USCIS determines the marriage was genuine, the conditional status is removed and the person receives lawful permanent status. But if USCIS makes an adverse determination, then the permanent resident status is terminated. In essence, USCIS is imposing a functional marriage test. It asks not just whether a couple is formally married but whether they *act* like they are married.²⁷²

A similar conditional status could be attached to benefits that stem from functional or intentional parent-child relationships. After an initial period USCIS could decide whether the parent and child are functioning as a family. They might consider living arrangements, church and school records, financial arrangements, and affidavits of third parties. If USCIS is satisfied that the relationship exists, it could remove the conditional status and grant the full benefit. But this approach would not be without its challenges. As with marriage, it would run the risk of requiring conformity to majority views of how a family should act, and these views may not translate cross-culturally. Also, it would be difficult to implement if a child is not a minor. This approach would also create a significant administrative burden; as with any case in which a functional, rather than a genetic or marital, relationship must be proven, demonstrating such a relationship requires more than a piece of paper or a DNA test.

²⁶⁹ INA § 216A (2012).

²⁷⁰ *Id.*

²⁷¹ 8 C.F.R. § 216.4(a)(5) (2013).

²⁷² See Abrams, *supra* note 20, at 1682–86.

III. CITIZENSHIP LAW'S "FAMILY VALUES"

Citizenship law, like immigration law, is generally more restrictive in its recognition of parent-child relationships than state family law. However, in some respects, it is even more stringent than immigration law. Sometimes this increased restriction flows from the different values at stake in citizenship law; in other instances, it is an unfortunate relic of a racist past—one that lawmakers (and enforcers) need to reconsider.

As discussed in Section II.A, the history of citizenship law, like the history of immigration law, is rife with examples of marriage used as a proxy for a close parental tie. As marriage lost its grip on family law in the twentieth century, and as blood and DNA testing began to make genetic parenthood easier to demonstrate, the importance of marital, genetic, functional, and intentional parenthood shifted in family law, providing broadened recognition of new types of parentage. As with immigration law, however, citizenship law has largely ignored this broadening trend. If anything, it has become more constrained, requiring not only marital parentage but genetic parentage as well, and sometimes requiring functional parentage in addition to genetic parentage in the case of unmarried fathers. And citizenship law is most backward in dealing with intentional parents who use ART, completely failing to comprehend the reasons why citizenship might pass from parent to child by reverting to a eugenic understanding of capacity for citizenship.

A. Blood and Marriage

1. Marital Parents

As we discussed previously, most citizenship in the United States is acquired simply through birth on American soil. *Jus soli* citizenship, as this is called (the "right of soil"), provides a simple and broad rule of citizenship transmission to the many people born each year on American soil, including those born of visitors or undocumented immigrants.²⁷³ This rule repudiates the racist past of the United States, in which slaves born on U.S. soil were nevertheless not considered citizens, nor given

²⁷³ See U.S. Const. amend. XIV, § 1; INA § 301(a).

the rights of property ownership, voting, or jury service that many citizens were granted.²⁷⁴

The second most frequent method of acquiring citizenship is through naturalization. Here, parentage can play a role. For example, if the U.S. permanent resident parent of a permanent resident child naturalizes, the child will also become naturalized as the derivative of the parent.²⁷⁵ Many of the same critiques we make regarding *jus sanguinis* citizenship also apply under these circumstances, but we focus here on *jus sanguinis*.

Jus sanguinis citizenship (the “right of blood”) refers to citizenship that is transmitted from parent to child at birth. Because of its broad *jus soli* rule for all children born in the United States, American law limits *jus sanguinis* transmission to children born outside the United States. Sections 301 through 309 of the INA lay out the current requirements for acquisition of citizenship at birth.²⁷⁶ Most relevant here are several provisions of Section 301, which grant citizenship to certain children born in wedlock,²⁷⁷ and Section 309, which grants citizenship to certain children born out of wedlock. These provisions of the INA are notorious for maintaining a differential system based on the marital status and gender of the citizen parent. This remains true despite several unsuccessful equal protection challenges brought to the Supreme Court over the last two decades.²⁷⁸ Although the Court in *Nguyen v. Immigration & Naturalization Service*, the only case to completely reach the merits, analyzed the issue as a question of whether gender discrimination could be justified under intermediate scrutiny,²⁷⁹ we argue here that the cases and the statute they concern could also be critiqued as examples of current citizenship law failing to effectively meet its own goals.

²⁷⁴ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04 (1857) (holding blacks incapable of acquiring citizenship), *superseded by constitutional amendment*, U.S. Const. amend. XIV, § 1.

²⁷⁵ INA §§ 320–321.

²⁷⁶ See *id.* §§ 301–309.

²⁷⁷ Interestingly, § 301 never specifies that it applies to children born in wedlock. *Id.* § 301. Only by recognizing that § 309 applies to children born out of wedlock does it become apparent that § 301 applies to children born in wedlock. *Id.* § 309. This structural “anomaly” in the statute is the legacy of the citizenship statutes discussed above, which all presumed marriage between a child’s parents.

²⁷⁸ See *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam); *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998).

²⁷⁹ 533 U.S. at 60–71.

On its face, the INA appears to require a blood relationship between parent and child only when the citizen parent is an unmarried father. Section 301, which governs children born in wedlock, says nothing about a genetic relationship. Section 309 makes no mention of such a relationship where the citizen parent is the mother. Section 309, however, does require that a child seeking citizenship based on an out-of-wedlock birth to a U.S. citizen *father* demonstrate a blood relationship “by clear and convincing evidence.”²⁸⁰ As we saw in our previous discussion of the history of citizenship law, it was the recognition of unmarried fathers as potential parents that led to the addition of a blood relationship requirement.²⁸¹ As discussed above, when only married fathers and gestational mothers were considered parents, no blood relationship had to be proven.

Despite the text of the statute and historical evidence to the contrary, however, the State Department now interprets Section 301—regulating citizenship transmission by *married* parents—to contain a blood requirement.²⁸² In many instances, DNA testing does not produce a match. For example, a marital father may have assumed his wife’s child was his genetic child when instead the child was the result of an affair.²⁸³ The Foreign Affairs Manual (“FAM”), the governing handbook for State Department officials, includes a section entitled “Blood Relationship Essential.”²⁸⁴ That section explains:

The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child’s own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including

²⁸⁰ INA § 309(a)(1).

²⁸¹ See *supra* Part II.A.

²⁸² 7 U.S. Dep’t of State, Foreign Affairs Manual § 1131.4-1(a) (2013) [hereinafter FAM].

²⁸³ Villiers, *supra* note 21, at 251.

²⁸⁴ FAM, *supra* note 282, § 1131.4; see also *id.* § 1131.2 (“At least one *natural* parent must have been a U.S. citizen” (emphasis added)).

blood relationship and legal relationship, where applicable, is on the person making such claim.²⁸⁵

Further on, the FAM repeats the same idea: “[The marital] presumption is not determinative in citizenship cases . . . because an actual blood relationship to a U.S. citizen parent is required.”²⁸⁶ As we have seen, the FAM’s characterization of the historical treatment of genetic parentage is inaccurate: The laws have not “always contemplated” a blood relationship but rather have assumed that a marital or gestational relationship was enough. Moreover, the INA does not include such a requirement for any parent but an unmarried father.

In contrast, the U.S. Court of Appeals for the Ninth Circuit has held that a blood relationship is not required for married parents under Section 301.²⁸⁷ In *Scales v. Immigration & Naturalization Service*, the petitioner argued that he was a U.S. citizen in order to challenge his removability after being convicted in state court of a drug trafficking offense.²⁸⁸ He was born in the Philippines to a Filipina mother, but the U.S. citizen who was the petitioner’s legal and functional father had met the petitioner’s mother only seven months prior to the petitioner’s birth, and they were married just a few weeks before that birth.²⁸⁹ The petitioner relied on the marital presumption of paternity to argue that he was a child of the marriage,²⁹⁰ meaning his claim to citizenship should be governed by INA Section 301.

The BIA held that the petitioner was not a citizen, because his father had signed an affidavit of non-paternity when he applied for the petitioner’s immigrant visa when the family relocated to the United States.²⁹¹ It relied on the State Department’s FAM to conclude that “to acquire United States citizenship at birth there must be a blood relation-

²⁸⁵ Id. § 1131.4-1(a).

²⁸⁶ Id. § 1131.4-1(c).

²⁸⁷ *Scales v. Immigration & Naturalization Serv.*, 232 F.3d 1159, 1166 (9th Cir. 2000).

²⁸⁸ Id. at 1162.

²⁸⁹ Id. at 1161–62.

²⁹⁰ Id. at 1162.

²⁹¹ Id. It is unsurprising that the petitioner’s father would have understood his son to be a non-citizen and that his son would nevertheless later claim citizenship. *Jus sanguinis* citizenship is a complex area, and the difference between citizenship and lawful immigration status can be nominal unless deportation is at stake, as in *Scales*. See *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam); *Nguyen*, 533 U.S. 53.

ship between the child and the parent through whom citizenship is claimed.”²⁹²

The Ninth Circuit declined to defer to the State Department’s position, noting that the INA gives the Secretary of State authority to determine the citizenship of persons *outside* the United States.²⁹³ For persons *inside* the United States, the Attorney General determines citizenship, and the courts of appeals have jurisdiction to determine nationality claims.²⁹⁴ This division of authority means that the citizenship of a person in *Scales*’s situation will turn on whether he applies for citizenship while abroad or whether he raises citizenship as a defense in a removal proceeding.²⁹⁵

Having declined to adopt the State Department’s view, the Ninth Circuit relied on a “straightforward reading” of the INA to determine that there is no requirement of a blood relationship.²⁹⁶ Because Section 309 requires a blood relationship between a child born out of wedlock and the citizen through whom that child claims citizenship, the court reasoned that “[i]f Congress had wanted to ensure the same about a person born in wedlock, ‘it knew how to do so.’”²⁹⁷ It also held that an affidavit of non-paternity, even if sufficient “to overcome the state law presumption” of paternity, “does not defeat . . . acquisition of citizenship” under Section 301.²⁹⁸ Thus, *Scales* put the Ninth Circuit at odds with the State Department as to whether a child born to married parents, at least one of whom is a U.S. citizen, is required to have a blood relationship to the citizen parent in order to gain citizenship at birth. As of this writing, no other circuit has confronted this question. In 2005, the Ninth Circuit extended *Scales* in *Solis-Espinoza v. Gonzales* to cases in which the marital parent is a wife instead of a husband.²⁹⁹ This understanding of parent-

²⁹² *Scales*, 232 F.3d at 1162 (quoting the reasoning of the BIA).

²⁹³ *Id.* at 1165.

²⁹⁴ *Id.* at 1161, 1165.

²⁹⁵ See Degtyareva, *supra* note 21, at 871. If he applies while abroad, his citizenship will be denied by the State Department. If he raises citizenship as a defense in removal proceedings, his success, at least until the Supreme Court speaks, will depend on which circuit has jurisdiction over his removal proceedings. So far, the Ninth Circuit is the only one to have weighed in on the question of whether § 301 requires a blood relationship.

²⁹⁶ *Scales*, 232 F.3d at 1164.

²⁹⁷ *Id.* (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)).

²⁹⁸ *Id.*; see also Titshaw, *supra* note 7, at 109–10 (examining the *Scales* holding); Logan Bobo, Note, *Wedlock, Blood Relationship, and Citizenship*, 14 *Cardozo J.L. & Gender* 351, 352 (2008) (arguing for the *Scales* holding as a matter of policy).

²⁹⁹ 401 F.3d 1090, 1091–92, 1094 (9th Cir. 2005).

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age further undercuts a biological rationale for the marital presumption. Where a wife, rather than a husband, seeks legal parentage based on marriage, there is no chance that the child is her genetic child.

Even though the State Department requires a blood relationship between parent and marital child, it reverts to the marital presumption of paternity to under-enforce this requirement. The State Department's FAM notes that determination of blood ties between a parent and child "can usually be accomplished by review of documentary evidence provided by the claimant."³⁰⁰ It notes, however, that "[i]f there are indications that call into question the filiations, despite the existence of a marriage, the consular officer shall consult the Fraud Prevention Manager" and the Consular Affairs Office of the Fraud Prevention Program.³⁰¹ It identifies the following circumstances that may give reason to doubt the presumption that a child born to a married woman is the legitimate issue of the marriage:

- (1) Conception or birth of a child when either of the alleged biological parents was married to another;
- (2) Naming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents; and
- (3) Evidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother.³⁰²

If any of these circumstances arise, then "the consular officer is expected to investigate carefully."³⁰³

It is easy to imagine, however, situations in which a married woman gives birth to a child whose natural father is not the woman's husband without triggering any of these red flags. The government is unlikely to know, for example, if a mother has had an adulterous relationship. Further, the FAM's instructions on genetic testing show that such tests are not standard procedure; rather, "genetic testing should be used only if other credible proof does not establish to the satisfaction of the adju-"

³⁰⁰ FAM, supra note 282, § 1110 app. A, at c. Presumably, as in the immigration context, this evidence would include primary evidence, such as birth certificates and marriage records, and perhaps secondary evidence, such as church and school records. See AFM § 21.2(d)(1)(B).

³⁰¹ FAM, supra note 282, § 1130 app. E, at d.

³⁰² Id. § 1131.4-1(c).

³⁰³ Id. § 1130 app. E, at d.

cating officer that the relationship exists.”³⁰⁴ Therefore, it is unlikely the State Department would ever become aware of many of these situations. Instead, as a matter of practice, most people claiming citizenship who have proper documentation of relevant births and marriages will receive it, whether or not they are biologically related to the parent through whom they are claiming citizenship. The burden of proving an actual genetic relationship, then, will fall disproportionately on people from countries that cannot reliably produce the vital records necessary to prove a right to citizenship at birth.

2. *Nonmarital Parents*

What about the situations where the child is clearly born to unmarried parents? In these circumstances the INA is clear—a blood relationship is necessary, but only if the citizen parent is the father (although once again the FAM imposes, contrary to the INA’s text, a requirement that mothers be genetically related as well).³⁰⁵ Where the father is the citizen parent, the genetic tie must be established “by clear and convincing evidence.”³⁰⁶ Although this is not a mandate for DNA evidence, it effectively functions as one.³⁰⁷

For unmarried fathers, however, the INA goes further. It requires not only a genetic relationship, but a particular type of functional relationship. The father must have “agreed in writing to provide financial support for the person until the person reaches the age of 18 years,” and “while the person is under the age of 18 years,” one of three things must happen: “(A) the person is legitimated under the law of the person’s residence or domicile, (B) the father acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court.”³⁰⁸

Many commentators have observed that this requirement has serious problems of over- and under-inclusivity.³⁰⁹ It encompasses fathers who

³⁰⁴ Id. § 1110 app. A, at d.

³⁰⁵ INA § 309 (2012); FAM, supra note 282, § 1131.4-1(b)(1).

³⁰⁶ INA § 309(a)(1).

³⁰⁷ See infra Subsection III.B.2.

³⁰⁸ INA § 309(a)(3)–(4).

³⁰⁹ See, e.g., Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 Emory L.J. 1271, 1282 (2005); Pillard & Aleinikoff, supra note 8, at 20–21; Katharine B. Silbaugh, Comment, *Miller v. Albright*: Problems of Constitutionalization in Family Law, 79 B.U. L. Rev. 1139, 1159 (1999).

have been sued for child support, who are more likely than others to have had “paternity . . . established by adjudication of a competent court.” It does not, however, include fathers who are actually caring for their nonmarital children, especially if they are single parents. A custodial father who is not in a dispute with a child’s mother is unlikely to seek a court order or to have one imposed on him. Indeed, the constitutional challenges, thus far unsuccessful at the Supreme Court level, to Section 309 involve fathers who were functional, as well as genetic fathers. The father in *Nguyen*, for example, was the petitioner’s custodial parent for many years after the petitioner’s mother had abandoned him, and the petitioner verified the blood relationship to his father through DNA testing submitted in a state court parentage proceeding only once he realized he needed to demonstrate a relationship to claim citizenship.³¹⁰ And in *United States v. Flores-Villar*, the petitioner’s father was both the petitioner’s biological father and his custodial parent since the petitioner’s infancy.³¹¹ By requiring a functional relationship of a particular type, the INA creates a perverse system in which children of fathers who have been sued for child support are more likely to be U.S. citizens than children of fathers who voluntarily care for and support them. In contrast, citizenship law requires no functional relationship whatsoever when the single U.S. citizen parent is an unmarried mother. The mother must simply be a U.S. citizen at the time of the child’s birth.³¹²

Citizenship law, then, shuffles the importance of marital, genetic, and functional parent-child relationships differently than family law. Genetics are used to undercut marital parentage even without a competing ge-

³¹⁰ 533 U.S. at 57.

³¹¹ 536 F.3d 990, 994 (9th Cir. 2008), aff’d by an equally divided court, 131 S. Ct. 2312 (2011) (per curiam).

³¹² INA § 309(c). Although we do not go into the details here, the INA also distinguishes the amount of time a U.S. citizen parent must have resided in the United States based on gender and marital status. For example, a child of a married U.S. citizen parent or unmarried U.S. citizen father must show that the citizen parent “was physically present in the United States . . . for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.” Id. § 301(g). In contrast, a child of an unmarried mother must only show that the mother “had previously been physically present in the United States . . . for a continuous period of one year.” Id. § 309(c). In *Flores-Villar v. United States*, 131 S. Ct. 2312, the father was a teenager when his child was born and could not show the requisite number of years of residence prior to the child’s birth because he was too young. Had he been the child’s mother, it would not have mattered how old he was when the child was born as long as the requirement of one year of continuous physical presence was met.

netic father's presence. Where no marriage exists, genetics are essential to proof, especially for fathers, but function will also be crucial. The functional relationship sought by the statute, however, is a formalistic one that does not actually seek to answer the question of whether a particular man is "acting like a father." Instead, like the marital presumption before it, it looks to particular indicia—such as whether a child has been legitimated (often through marriage to the mother) or whether a court has ordered that the father is a legal parent (often based on a DNA test)—and then presumes a functional relationship based on these fairly rigid criteria. As a result, citizenship law is far more exclusionary than much of state family law. The same person who might likely be declared a legal parent under state family law will often find himself to be a legal stranger to his child for citizenship law purposes. And it is more exclusionary than immigration law as well. The nonmarital, genetic father who could demonstrate his "bona fide parent-child relationship" to his child under immigration law might not be able to do so under citizenship law, unless he has been sued for child support by the child's mother.

3. *Functional and Intentional Parentage*

Although citizenship law requires a proven functional relationship to buttress a claim of genetic parentage by an unmarried father, it does not provide any way for a merely functional parent to transmit citizenship absent a genetic tie. This feature of the statute has been the subject of much critique, much of it along the same lines as the critiques of immigration law's failure to recognize functional parentage.³¹³

As for intentional parentage, the INA treats adoptive children differently than genetic children. Adoptive children do not acquire citizenship at birth under INA Section 301 or Section 309. Instead, they may acquire derivative citizenship through an adoptive U.S. citizen parent under INA Section 320 or Section 322.³¹⁴ To acquire citizenship, an adopted child must have been under sixteen years of age when adopted and must have "been in the legal custody of, and . . . resided with, the adopt-

³¹³ See, e.g., Degtyareva, *supra* note 21, at 883–85 (arguing that a "bona fide parent-child relationship is not only necessary but also sufficient to establish the type of family relationship that immigration law seeks to preserve" and that the "legislative history of the citizenship-by-descent provisions suggests that they were intended to honor the bona fide parent-child relationship").

³¹⁴ See INA §§ 320(b), 322(c).

ing parent or parents for at least two years.”³¹⁵ Those requirements look not just to intent in establishing a parent-child relationship, but also to function because of the requirements of legal custody and residency. These requirements are more stringent than state family law requirements, in which the fact of adoption itself is enough to confer a recognizable parent-child relationship.

It is where citizenship law reacts to ART that the law becomes, for lack of a better word, bizarre. The FAM does not seem to even consider situations where a U.S. citizen parent might seek to bear a child who is not her own genetic material. Instead, it refers to mothers who gestate unrelated fetuses as “surrogate” mothers, even where they are the intentional mothers.³¹⁶ Professor Scott Titshaw has aptly described this approach as “focus[ing] like a laser on zygotes and the sperm and eggs that produced them.”³¹⁷ The result, as Titshaw shows, is that if a married husband and wife undergo ART using sperm and egg donors, it will be the donors, and not the legal, intended parents, whose citizenship matters.³¹⁸ If two married U.S. citizens underwent IVF using donor sperm and donor eggs, then the citizenship of the resulting child would be determined based on the nationality of the *donors*. And whether the most stringent rules for unmarried fathers or more lax rules for unmarried mothers set forth in Section 309 applied would depend on whether the donors were married *to each other*—an extremely unlikely scenario, to say the least!

What if, instead, it is a U.S. citizen wife and U.S. citizen husband who hire a surrogate to give birth abroad to their genetic children? One would think, given the FAM’s approach to donor gametes, that it would be the citizenship of the wife and husband (the “donors”) that would matter, and that they would be treated as married U.S. citizens. But instead, the FAM treats this scenario as a birth “out of wedlock,” despite the marriage of the intentional parents.³¹⁹ In the next breath, it reverts to its focus on gametes, stating that “[t]he status of the surrogate mother is immaterial to the issue of citizenship transmission. The child is consid-

³¹⁵ Id. § 101(b)(1)(E)(i).

³¹⁶ FAM, supra note 282, § 1131.4-2.

³¹⁷ Titshaw, supra note 7, at 103.

³¹⁸ Id.; see Karen S. Law, Irene Steffas & Derek Strain, A Child’s Claim to Citizenship: Birth, Surrogacy, and Adoption, *in* Immigration Practice Pointers: Tips for Handling Complex Cases 766, 769 (2010–2011 ed. 2010).

³¹⁹ FAM, supra note 282, § 1131.4-2(b).

ered the offspring of the biological parents and the appropriate INA section is applied.”³²⁰ Surrogacy appears to undo a marriage, even where it does nothing to alter the focus on the gamete providers’ citizenship.

The unfortunate result is that intentional parents living abroad who use donor eggs and sperm have been unable to transmit citizenship to their children.³²¹ Those children would have been U.S. citizens only if the donor egg or sperm came from a U.S. citizen. Until recently, that has been so, even if the intentional mother was also the gestational mother.³²²

A recent State Department update, apparently released in early 2014, seems to ameliorate some but not all of the results described above. According to the update, “in order to transmit U.S. citizenship to a child conceived through [ART], a U.S. citizen father must be the genetic parent and a U.S. citizen mother must be either the genetic or the gestational and legal mother of the child at the time and place of the child’s birth.”³²³

The text of the update raises as many questions as it answers. Must the father be a U.S. citizen, or is it enough that the gestational mother is, even if the donor egg comes from a foreign national? And is it sufficient if only the father is a U.S. citizen and the mother and the egg donor are foreign nationals? The plain text appears to mean that a U.S. citizen mother and U.S. citizen father who use the father’s sperm and a donor egg will have a U.S. citizen child if the mother gives birth, regardless of the nationality of the donor. But that seems odd in light of the *jus sanguinis* rules in Section 309 of the INA, which permit transmission of citizenship when only one parent is a U.S. citizen.

At any rate, the update does not appear to affect the unfortunate results that can occur in cases of surrogacy. And the State Department’s interpretation of the INA is still focusing on biology, even if it is making a concession for gestational mothers who use donor eggs.

³²⁰ Id. § 1131.4-2(c).

³²¹ See Chabin, *supra* note 7.

³²² Id.

³²³ U.S. Dep’t of State, Bureau of Consular Affairs, Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad, <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html> (last visited Feb. 22, 2014).

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B. Citizenship Law's "Family Values"

Just as with immigration law, it is easy to critique the rules of citizenship law as antiquated and out of sync with family law norms. But as with immigration law, we believe that citizenship law serves different functions than state family law, and, as such, will likely develop different parentage rules. The problem with current citizenship transmission law is not that it doesn't mirror state family law, which is in serious disarray, especially regarding surrogacy and ART, but that it fails spectacularly to further its own goals.

Many of citizenship law's "family values" mirror those of immigration law. But *jus sanguinis* citizenship differs conceptually from immigration in ways that we think are important and often overlooked. The state interests underlying citizenship transmission and immigration policy should not be conflated. This Subpart will show how the interests at stake in citizenship cases differ both from family and from immigration law.

1. Optimal Citizenship

In the immigration context, the government clearly has an interest in limiting immigration to numbers it considers tenable. Citizenship is more problematic. The United States, through the Citizenship Clause of the Fourteenth Amendment, has adopted a very broad citizenship rule, whereby any person "born . . . in the United States, and subject to the jurisdiction thereof" is automatically a U.S. citizen.³²⁴ This expansive *jus soli* rule stands in sharp contrast to the less generous rules of many other countries.³²⁵ Thus, the number of people seeking this form of citizenship is small, and citizenship is fairly simple to acquire in many cases; an expectant parent must return home (or enter the United States for the first time) in order to ensure that his or her child will have it.³²⁶ To the extent that the government's claim in the immigration context stems from its purported ability to control immigration, it has largely foregone an ability to control citizenship because of the Fourteenth Amendment.

The government's claim to limit citizenship transmission seems weak on moral terms. Unlike immigration policy, which considers how to best

³²⁴ U.S. Const. amend. XIV, § 1.

³²⁵ See Weil, *supra* note 257, at 20–28.

³²⁶ See Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. Times, Mar. 28, 2011, <http://www.nytimes.com/2011/03/29/us/29babies.html>.

allow individuals to become potential members of society, or naturalization policy, which determines how to allow potential members to become members, *jus sanguinis* citizenship, like *jus soli* citizenship, sets forth rules by which the government *must* accept certain people as members, whether or not they turn out to be desirable citizens. Put differently, immigration law and naturalization law are both consensual; an immigrant must consent to become a member of society, and the government must consent to the immigrant's inclusion. *Jus soli* and *jus sanguinis* citizenship, on the other hand, are ascriptive; once it has set forth the general rule, the government has no legitimate interest in specific cases in retaining some people but rejecting others.

The weakness of this interest has not stopped the government from trying to limit *jus sanguinis* citizenship, but it calls into question its authority to do so. In *Nguyen*, for example, the Supreme Court upheld the portions of INA Section 301 and Section 309 that discriminated against the nonmarital children of unmarried U.S. citizen men in transmission of citizenship.³²⁷ One concern apparently shared by Congress and the Court alike was the possibility of holding men accountable for their sexual dalliances abroad. The *Nguyen* Court went to great lengths to emphasize, for example, the number of *nights* spent abroad by the average U.S. citizen and the number of male military personnel stationed abroad annually.³²⁸ The clear implication was that absent strict rules limiting the transmission of citizenship from unmarried fathers to their children born abroad, the number of children of soldiers and tourists who might choose to claim U.S. citizenship would be vast. In family law, of course, the state's interest is in conferring parentage on a father if there is one available. State courts and legislatures *want* to conscript as many nonmarital fathers as possible into paying child support to privatize their children's dependency. Many scholars have argued that the fear expressed in *Nguyen* is greatly exaggerated (a would-be citizen would, for example, have to know who his father was in order to get a DNA sample to prove citizenship, and that would be unlikely in many cases).³²⁹ Accu-

³²⁷ *Nguyen*, 533 U.S. 53.

³²⁸ *Id.* at 65–66; cf. Laura Weinrib, Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in *Nguyen v. INS*, 12 Colum. J. Gender & L. 222, 268 (2003) (arguing that the suppression in the record of the details of Nguyen's own sexual assault on a child—the reason for his removal—was “a necessary component of the legal system that continues to exclude him”).

³²⁹ See, e.g., Kim Shayo Buchanan, *Lawrence v. Geduldig*: Regulating Women's Sexuality, 56 Emory L.J. 1235, 1244 (2007); Pillard & Aleinikoff, *supra* note 8, at 23.

racy aside, however, it is not at all clear that there is a legitimate government interest in restricting who can choose to exercise citizenship, or in protecting male U.S. citizens' ability to spread their seed abroad, in contrast to the legitimate interest in limiting legal immigration.³³⁰

Instead, an outdated and pernicious government interest continues to underlie modern citizenship determinations—the indelibility of blood. As discussed earlier, the first naturalization statute, passed in 1790, limited naturalization to “free white person[s].” Traditionally, citizenship law, especially the *jus sanguinis* variety, operated within a worldview that linked race to the proper exercise of citizenship and a common belief that racial characteristics were transmitted from generation to generation. The very phrase *jus sanguinis*—literally “right of blood”—implies that allegiance to a nation can be transmitted through blood. This notion, popular during the nineteenth century and early twentieth century, was the basis of a race-based citizenship policy that has now been abandoned. For example, the ability to naturalize was denied to Chinese immigrants not because there was a desire to limit immigration overall, but because Chinese in particular were considered racially incapable of exercising citizenship. “[T]hose people,” explained one senator, “have no appreciation of [republican] government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out.”³³¹ Another observer argued that *jus soli* citizenship should be denied to Chinese-Americans because such people were “Chinese from their very birth in all respects, just as much so as though they had been born and reared in China” and were “utterly unfit, wholly incompetent, to exercise the important privileges of an American citizen.”³³² This understanding of race as a productive measure of capacity

³³⁰ Professor Ann Scales has argued that the true government interest protected by the Court in *Nguyen* is militarism:

The spoils of war have always included the ability—though now nominally prohibited—to rape, prostitute, kill, or otherwise possess and then abandon the women belonging to the enemy. This is how the enemy is broken. Thus are the soldiers, in part, compensated. To grant automatic citizenship to their children, thereby subjecting each and every soldier-father to the possibility of paternity suits, child support payments, and the like, might deprive combat of some of its appeal. It would miss the existential and deeply gendered point of mayhem.

Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 Berkeley J. Gender L. & Just. 369, 379 (2005).

³³¹ Cong. Globe, 42nd Cong., 1st Sess. 499 (1866) (statement of Sen. Edgar Cowan).

³³² George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 Am. L. Rev. 831, 834 (1884).

for citizenship led to obsessive evaluation of the racial background of applicants for naturalization or lawful immigrant status.³³³

Our national understanding of racial identity has changed significantly since the days of Chinese exclusion. One would be hard-pressed to find an immigration officer who believes that the ability to become American is transmitted through blood. Instead, the theory of *jus sanguinis* today must be that American identity is transmitted through an upbringing by an American parent.³³⁴ A person born on U.S. soil is presumed to have the requisite connection to the polity; a person born outside the geographic bounds of the United States must demonstrate this connection through a parent. The INA's requirement of some physical presence in the United States on the part of the *parent* in order for citizenship to be transmitted to a foreign-born child supports this interpretation.³³⁵ A parent who has never herself lived in the United States is unlikely to raise her child as an "American." So does the differential treatment of a child of two American citizens versus only one. In the case of two citizens, the only residence requirement is that one parent have had "a residence" of unspecified length at some time.³³⁶ But if a married couple consists of one citizen and one noncitizen, the residency requirement is extended to five years, two of which must be after the age of fourteen.³³⁷ With a noncitizen parent competing for acculturation of the child, the citizen parent is held to a higher standard of American identity. This must be, not because living for several years in the United States changed the citizen's genetic makeup in a way that is heritable, but rather because a person who lived for several years in the United States is more likely to identify as American, and more likely to pass that affinity on to his or her child through parenting.

Despite the modern theory of parent-child citizenship transmission, determinations of citizenship transmission still require a genetic tie. The effect of this requirement, coupled with the illegitimacy discrimination embedded in the INA, is that foreign-born children of U.S. citizens are less likely to be deemed citizens if they are from developing countries or

³³³ Martha Gardner, *The Qualities of a Citizen: Women, Immigration, and Citizenship, 1870–1965*, at 142–45 (2005) (documenting racial evaluations of immigrants in INS files).

³³⁴ Hence the different rules for citizenship transmission where one parent is not American—the American parent has competition for influence in the child's upbringing.

³³⁵ See INA § 301(c)–(g) (2012).

³³⁶ *Id.* § 301(c).

³³⁷ *Id.* § 301(g).

countries where nonmarital children are more common.³³⁸ A nonmarital child automatically must demonstrate a blood relationship that a marital child need not, and the marital child must demonstrate this relationship in cases where there is reason to doubt the genetic tie, a situation more likely in countries where records are commonly lost or forged. Thus, an understanding of citizenship that had its roots in a racial theory of biology has been repurposed to racially discriminatory effect, even in an era when we no longer believe the racial theory at the heart of the law.

So if loyalty or capacity for citizenship cannot be transmitted through one's genes, why does the current INA maintain this fiction, and take it so far as to inquire into the citizenship of egg donors instead of a child's intended, gestational mother? One reason may be fear of fraud. As in immigration law, there is a potential concern regarding fraud in citizenship cases. But this issue does not seem to be an animating concern the way it has been in immigration cases. In theory, a person seeking citizenship could create false documents. But the small number of these cases compared to the larger number of immigration cases has meant that citizenship fraud has received less concern and attention. It may, however, partially explain the reason for reading a blood relationship into INA Section 301 (citizenship transmitted by married couples). The fear here would be that a couple might marry only to confer citizenship on a child who is not the genetic child of the U.S. citizen-member of the couple. This potential fraud functions similarly to immigration marriage fraud, although the potential for it is likely much smaller. The main reason why fraud is largely a non-issue in the citizenship context is likely the broad *jus soli* rule. All a person who wants to obtain U.S. citizenship for her child must do is show up in the United States to give birth there. This can be expensive, and a tourist visa might be denied if the mother is noticeably pregnant, but in most cases it would be easier and cheaper than finding a U.S. citizen to marry and going through the process of obtaining a certificate of citizenship for the child. As with the "optimal" immigration or citizenship interest, then, the government's interest in restricting family relationships seems weaker in this context.

Indeed, the interest seems so much weaker that decisions such as *Nguyen*, *Miller*, and *Flores-Villar* seem indefensible. The *Nguyen* Court's application of intermediate scrutiny to uphold INA Sections 301 and 309, for example, relies on a rigid notion of biological sex and out-

³³⁸ See Collins, *Illegitimate Borders*, supra note 128.

dated and stereotypical conceptions of fathering that many find offensive. A *New York Times* editorial that ran on Father's Day after the *Flores-Villar* decision, for example, was simply titled, "The Court Disses Fathers."³³⁹ The relatively toothless "intermediate scrutiny" applied by the Court may reflect a latent concern that the plenary power doctrine, which led to rational basis review of gender and illegitimacy discrimination in the immigration context in *Fiallo v. Bell*, might also apply in citizenship cases. But as shown above, birthright citizenship, because it occurs at *birth* and not once the would-be citizen has done something to earn it, is outside the government's legitimate interest in optimal immigration, either categorically (because any person born a citizen has an independent right to that citizenship, regardless of how undeserving he is) or structurally (because the law has chosen to grant citizenship to a category of persons at birth, regardless of anything these persons have done to deserve it). Plenary power, which gives the political branches control over immigration to protect the nation's interests in foreign affairs, seems a poor fit with citizenship transmission.

2. *Family Reunification . . . and Exercising Citizenship*

As in the immigration context, the government has an interest in family reunification as a representative of the aggregate interests of its citizens. If one of the benefits of citizenship is being able to live in the country of citizenship with family members who are also citizens, then the government should work to vindicate this interest on behalf of its citizens.

This interest, however, unlike the interest in immigration law, seems to be ancillary to a larger interest that the government has on behalf of its citizens—their interest in exercising their own citizenship. Each U.S. citizen has an interest in exercising his or her rights as a citizen, whether these are the right to vote, to remain in the country, to enter the country, to run for office—or to transmit citizenship to a foreign-born child. Thus, the rights of two people are implicated in any *jus sanguinis* case. The parent who is transmitting citizenship is exercising his or her right to do so, and the child obtaining citizenship has an interest in acquiring and using that citizenship.

³³⁹ Editorial, *The Court Disses Fathers*, *N.Y. Times*, June 19, 2011, at WK7, available at <http://www.nytimes.com/2011/06/19/opinion/19sun3.html>.

If anything, then, the family reunification interest possessed by the government on behalf of its citizens is augmented when a citizen makes a claim to transmit citizenship rather than to sponsor a relative for an immigrant visa, augmented by the interest in recognition of the citizenship status of members of the nation. The government should be concerned not only about making sure that its citizens are allowed to live full family lives, but that its citizens are not deprived of lawful status and that they can exercise that citizenship effectively.

The citizenship context involves some of the most egregious errors currently made by the U.S. government. 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. And the practice of encouraging DNA testing of children of married parents and then using a negative test to prove “fraud” in a clearly functional father-child relationship likewise reverts to archaic understandings of race and nationality popular during the eugenics movement. That these cases can unnecessarily damage father-child relationships seems obvious.³⁴⁰ Even though the federal government’s core interest in citizenship cases is not family law’s interest in the well-being of children, its core interest in allowing citizens to maintain their own family relationships and to provide them the autonomy to create families they choose strongly suggests that the citizenship laws need major reappraisals.

CONCLUSION

Immigration and citizenship law deal with parentage in ways that often seem misguided and counterproductive. Scholars are right to critique the way these areas of the law have selectively incorporated parentage tests drawn from state family law. This Article has shown, however, that the government interests at stake in immigration and citizenship cases differ substantially from those at issue in family law. In order to productively engage—and critique—immigration and citizenship law, careful attention must be brought to bear on the interests at stake.

One possible critique of our approach is that the interests at stake in state family law and the government interests at stake in fostering family reunification are not very different. What harm is there in arguing, for

³⁴⁰ See, e.g., Swarns, *supra* note 6.

example, that immigration courts take into consideration the “best interests of the child” just as they would in family court if those interests largely dovetail with family reunification interests?

Our response to this critique is two-fold. First, the best interests test was developed and is used in a very specific context: where one legal parent is pitted against another. It is thus confined to circumstances in which the parents, and not the state, have put the parent-child relationship at issue.³⁴¹ In contrast, immigration and citizenship cases almost always involve the state trying to disprove a relationship claimed by a parent and child, or to discount the importance of this relationship in the context of a deportation. “Best interests,” while important, are simply not the subject in question. Asking immigration courts to allow this interest to trump the other important government interests at stake seems wildly aspirational at best and potentially harmful at worst.

Second, there has been far too little sustained inquiry into the nature of the government’s interest in family-based immigration and citizenship. Too often, it is simply assumed that the government has a legitimate interest in regulating these relationships. It is unclear from the legislative history, for example, why the United States chose to give such broad recognition to family relationships in immigration law. By offering our own analysis of the interests at stake, we have provided a first step in what we hope will be an engaged dialogue among policy-makers, legislators, judges, and scholars about what interests are legitimate for the government to address through immigration and citizenship law. Carefully delineating the government interests at stake provides two important functions. It helps to identify what policy prescriptions are appropriate and how to achieve them. And it also provides limits on what the government may do. These limits are especially important in a field where judicial review has been so severely curtailed.

³⁴¹ Immigration law is not the only area in which the best interests test threatens to escape its bounds. Professor I. Glenn Cohen has recently argued that there is an emerging “Best Interests of the Resulting Child” test that allows the government to put limits on the rights of people to reproduce using ART. I. Glenn Cohen, *Beyond Best Interests*, 96 *Minn. L. Rev.* 1187 (2012). For a thoughtful analysis of how the best interests test might productively be applied in the context of parental incarceration, see Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 *U. Colo. L. Rev.* 793, 795–806 (2011). We believe that this is so despite the use in many human rights instruments of “best interests” language. See Starr & Brillmayer, *supra* note 256, at 222–26 (noting that best interests is a core purpose in human rights protection of children).

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Problems of parentage in immigration and citizenship cases are not going away. If anything, the Court's recent decision in *United States v. Windsor* to strike down the Defense of Marriage Act³⁴² will open up these areas of federal law to a new host of issues. Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples, even though in many of these instances there is no chance that the marital parent is also the genetic parent. Just as state law has had to decide how to extend the law to parentage determinations for LGBT couples, so too will immigration and citizenship law have to grapple with this issue. Understanding the values at stake is an important step in crafting a policy that succeeds not on family law's terms, but on its own.

³⁴² 133 S. Ct. 2675 (2013).

