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# Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology

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# DRAFT – NOT FINAL

## **SORRY MA'AM, YOUR BABY IS AN ALIEN: OUTDATED IMMIGRATION RULES AND ASSISTED REPRODUCTIVE TECHNOLOGY**

*Scott Titshaw\**

*The growing use of assisted reproductive technology (ART) and legal recognition of same-sex relationships is raising questions regarding the recognition of parent-child relationships. State and foreign family law have been wrestling with these issues for decades, but U.S. immigration law has lagged far behind.*

*So far, guidance exists on only one ART related issue under the Immigration and Nationality Act (INA): whether a U.S. citizen transmits her citizenship to a child born abroad. Unfortunately, that guidance is contradictory. The U.S. Department of State (DOS) requires genetic kinship for citizenship transmission. The Ninth Circuit Court of Appeals focuses on the parents' marriage, requiring no genetic link between a child born in wedlock and his U.S. citizen parent.*

*Married, different-sex couples are the most likely to use ART to build a family; however, this issue may be more important to same-sex couples. Because birth certificates are the primary evidence used to demonstrate a parent-child relationship, same-sex couples are more likely to suffer from a genetic-relationship requirement.*

*This Article aims to resolve these and other issues regarding INA recognition of parent-child relationships stemming from ART. It briefly reviews the various ways in which state laws have dealt with ART related parentage issues. It then explores the legislative,*

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\* Assistant Professor of Law at Mercer University School of Law. I would like to thank Kyle B. Sill, Lindsey A. Horn, Nathan R. Ross, and the rest of the *Florida Coastal Law Review* for their work in putting together this symposium. I am grateful for the comments of Professor Ted Blumoff, Professor Linda Jellum, Ryan S. James, and Professor Mark Jones. I also appreciate the comments and guidance of Ruth Claiborne and her law partner, Lori Surmay, who have pioneered ART and family-building law in Georgia. Finally, I would like to thank Mercer University School of Law and Dean Daisy Floyd for their confidence and the summer stipend that enabled me to write this Article. Any opinions, mistakes, or anachronisms in the discussion of ART are my own. In spite of Mr. James's kind advice, his views and my conclusions do not necessarily reflect those of the U.S. Department of State.

*administrative, and judicial history of the relevant INA provisions, paying particular attention to developments dealing with “legitimacy,” an issue that raised similar questions during the twentieth century. This Article argues for deference to state and foreign law in determining the parentage of children conceived through ART and in determining whether the child was born “out of wedlock.”*

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“In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.”

— Harry S. Truman<sup>1</sup>

## I. INTRODUCTION

Throughout U.S. history, many important legal questions have turned on recognition of children’s relationships to their married, biological parents. Engrained in our culture and legal system, the law required birth into this family model in order to consider a child legitimate.<sup>2</sup>

Children born to unwed mothers were classified as “illegitimate.” The resulting legal invisibility of their relationships to *both* parents deprived these children of numerous rights and benefits.<sup>3</sup> A child born to a married woman, on the other hand, was generally presumed to be the “legitimate” child of both the mother and her husband regardless of the child’s actual biological paternity, so long as neither the husband nor the biological father objected in a timely manner.<sup>4</sup> Like the common law, U.S. immigration law initially

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<sup>1</sup> Message from Harry S. Truman, President of the United States, to the U.S. House of Representatives (June 25, 1952), *reprinted in* 6 IMMIGRATION AND NATIONALITY ACTS. LEGISLATIVE HISTORIES AND RELATED DOCUMENTS - 1950-1978, at 279 (Oscar M. Trelles II & James F. Bailey III eds., 1979) (vetoing the Immigration and Nationality Act of 1952). Congress overrode the President’s veto two days later, passing the 1952 Act, which still comprises the basic provisions of U.S. immigration law. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965, at 307 (1981).

<sup>2</sup> See Harry D. Krause, *Bringing the Bastard into the Great Society - A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 841-59 (1966) (giving some historical background and describing the complex state of American laws regarding legitimacy up through the 1960s, including distinctions “among ‘adulterine[,]’ ‘bigamous,’ ‘incestuous,’ and ‘legitimate’ bastards,” and their consequences in various areas and jurisdictions); Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2373-74 (2007) (briefly describing the history of discrimination against illegitimate children since Biblical times).

<sup>3</sup> See *infra* notes 198-200 and accompanying text.

<sup>4</sup> See *infra* notes 60-69 and accompanying text. While I reject the legitimacy of the words “legitimate” and “illegitimate” to describe children, I will use these common terms without quotations marks throughout the remainder of this Article in the interest of readability.

considered the child of an unwed mother to be *filius nullius*, legally the “son of nobody.”<sup>5</sup>

Family law discrimination against and among illegitimate children was largely phased out during the twentieth century.<sup>6</sup> A 1920 U.S. Attorney General Opinion explained that common law rules discriminating against illegitimate children “were based on the supposition that by subjecting an illegitimate child to severe disabilities, illicit relations between the sexes would be discouraged.”<sup>7</sup> The Attorney General asserted that this policy of punishing children in order to change adult behavior had been abandoned by 1920.<sup>8</sup> Although it lagged decades behind, U.S. immigration law eventually followed suit, deemphasizing legitimacy distinctions to the point where they now primarily serve to demonstrate the *bona fides* of a father’s relationship with his child or the likelihood that a U.S. citizen parent will transmit American values to a child citizen.<sup>9</sup>

Despite extensive changes to the treatment of illegitimate children and even the requirement of birth in wedlock as a prerequisite for legal legitimacy, the understanding of what it means to be born *in wedlock* or *out of wedlock* has varied very little.<sup>10</sup> Now that is changing.

Use of assisted reproductive technology (ART), surrogacy, and the legal recognition of same-sex relationships are breaking down the traditional assumption that all children are born with two parents, a

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<sup>5</sup> BLACK’S LAW DICTIONARY 705 (9th ed. 2009); *see also* Citizenship—Children Born Abroad Out of Wedlock of American Fathers and Alien Mothers, 32 Op. Att’y Gen. 162 (1920) [hereinafter Children Born Abroad Out of Wedlock].

<sup>6</sup> *See infra* notes 168-83 and accompanying text.

<sup>7</sup> Children Born Abroad Out of Wedlock, *supra* note 5, at 164; *see also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (“The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage.”).

<sup>8</sup> Children Born Abroad Out of Wedlock, *supra* note 5, at 164.

<sup>9</sup> *See infra* notes 214-16 and accompanying text.

<sup>10</sup> Unlike *born in wedlock*, the definition of *legitimacy* has changed a great deal. *See* Krause, *supra* note 2, at 841-45 (describing developments limiting the definition of legitimacy). It was the new definition of all children as legitimate under some state and foreign law that led Congress to amend INA terminology to *in wedlock* and *out of wedlock* in some instances. *See infra* notes 227-31 and accompanying text.

genetic father and his wife, the genetic and gestational mother.<sup>11</sup> While this new challenge is different in many ways, its implications for the definition of a child born in wedlock are just as profound as earlier challenges to legitimacy requirements and consequences.

Although family law clearly lags behind technological innovation in the area of ART,<sup>12</sup> states and foreign family law have been struggling with ART's social and legal consequences for decades.<sup>13</sup> Echoing the history of developments relating to legitimacy, U.S. immigration and nationality law is lagging decades behind the cutting edge of state and foreign family law in addressing the challenges of ART.

So far, the only attempt to address ART expressly in any immigration context was undertaken in the last two decades, when the U.S. Department of State (DOS) amended its Foreign Affairs Manual (FAM) to indicate that a genetic relationship is always required for a U.S. citizen to transmit citizenship to a child upon birth abroad.<sup>14</sup> Thus,

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<sup>11</sup> U.S. immigration law did not recognize adopted children until after World War II. HUTCHINSON, *supra* note 1, at 513-14. Only three years after first imposing quota limits on immigration, Congress had enacted the Immigration Act of 1924, clarifying that "[t]he terms 'child,' 'father,' and 'mother,' do not include a child or parent by adoption unless the adoption took place before January 1, 1924." Immigration Act of 1924, Pub. L. No. 68-138, § 28, 43 Stat. 153, 169 (1924) (amended 1952); *see infra* note 183 and accompanying text.

<sup>12</sup> *See* Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 6 (2003) ("For the last two decades, our judicial system has trailed woefully behind the complex bioethical dilemmas that accompany the rapid advances in biotechnology, biomedicine, and assisted reproductive technologies.").

<sup>13</sup> The effect of ART on traditional family law topics like custody, child support, inheritance, and so forth has been one of the hottest topics of judicial, legislative, and scholarly legal innovation over the past two decades, inspiring a rapidly growing number of law review articles. *See* Paul M. Kurtz, *Annual Survey of Periodical Literature*, 27 FAM. L.Q. 747, 770-73 (1994) (listing three articles focusing on reproductive technology and seven focusing on surrogacy during the relevant time period); Nancy Ver Steegh, *Annual Survey of Periodical Literature*, 43 FAM. L.Q. 1069, 1074-76 (2010) (listing fifteen articles focusing on assisted conception that were published during the most recent period).

<sup>14</sup> *See, e.g.*, U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 7 § 1131.4-2 (2009) [hereinafter FOREIGN AFFAIRS MANUAL 7] (declaring that only the "biological parents" of a child born abroad to a surrogate mother will be considered in determining whether a child is considered born in wedlock for purposes of U.S.

the parent-child relationship depends entirely on whose egg and sperm were used in the ART process.<sup>15</sup> This attempt to federalize the question of parenthood and shoehorn it into the oversimplified worldview of genetic essentialism is misguided.<sup>16</sup> It ignores relevant statutory language, context, and legislative intent.

The Ninth Circuit Court of Appeals has provided a more enlightened construction of the citizenship transmission provisions of the Immigration and Nationality Act (INA). Focusing on the Act's distinct treatment of children born in and out of wedlock, the court held that no genetic relationship is required for a foreign-born child to derive citizenship at birth from the U.S. citizen spouse of a biological parent.<sup>17</sup> In the process, the court considered and expressly rejected the FAM's simple gene-based approach to this issue.<sup>18</sup>

This Article reviews the relevant statutory language and legislative history, as well as federal court, administrative, Attorney General, and Board of Immigration Appeals (BIA) opinions related to the INA definitions of parent-child relationships. In the end, it generally agrees with the Ninth Circuit's conclusion that children conceived through ART should be recognized for purposes of U.S. citizenship transmission at birth if they were not born out of wedlock. This Article extends the Ninth Circuit's reasoning to other areas of parent-child relationship recognition where the INA does not expressly require a biological link. Where Congress has neither expressly provided, nor even indicated intent to the contrary, state or foreign law

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citizenship transmission at birth, but later clarifying that it meant to include only genetic parents, not gestational mothers or surrogates); *id.* § 1446.2-2(c)(4) ("The basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg.").

<sup>15</sup> *Id.* § 1131.4-2(b) (specifically referring to the issue of egg- and sperm-donor identity as the key to citizenship transmission); *id.* § 1131.4-2(c) ("The status of the surrogate mother is immaterial to the issue of citizenship transmission.").

<sup>16</sup> *See infra* notes 231-62 (regarding the argument that society focuses too much on genes as the natural essence of human beings).

<sup>17</sup> *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000). These Ninth Circuit cases dealt with the children of old-fashioned nonmarital relationships, but the court expressly rejected the FAM construction of a blood relationship requirement for U.S. citizenship transmission to a child born in wedlock, and their logic applies at least as strongly in cases involving planned pregnancies using ART. *See infra* Part V.C.

<sup>18</sup> *Scales*, 232 F.3d at 1165-66.

should govern the meaning of familial terms like *parent*, *child*, *legitimate*, and *in wedlock*. This is particularly appropriate in the area of ART. State and foreign family law have addressed issues stemming from ART for decades, but Congress clearly did not anticipate those issues when it defined parent-child relationships almost sixty years ago.

Given the current national debate around immigration reform, there is no better time to raise this issue. This Article argues that the DOS can and should reconsider its view of ART and parentage under existing immigration law, by amending the FAM and issuing regulations in this regard. The Obama administration has the authority to make this change without congressional action based on sound construction of existing statutes; however, if the administration does not act quickly, Congress should include a clarification of these issues in any comprehensive immigration reform legislation it considers.

If U.S. immigration law begins to recognize the real legal and emotional parent-child relationships conceived through ART, many U.S. citizen parents and their children will be able to stay in the United States. This is particularly important to families headed by lesbian and gay couples.

In theory, the vast majority of couples disadvantaged by the DOS's position are married different-sex couples—the vast majority of the population using ART. However, the FAM's blood relationship policy will disproportionately impact same-sex couples. Not only are these couples' options for conceiving or adopting children more limited, but the DOS consular officers are also obviously more likely to question a child's genetic parentage when presented with a birth certificate listing two parents of the same sex. Some couples are already facing this problem and being forced to live in exile abroad in order to stay together with their children.<sup>19</sup> In light of the increasing use of ART by

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<sup>19</sup> The author has personally been in communication with two immigration attorneys who represent lesbian couples, who have been unable to obtain U.S. passports for children conceived through ART because the U.S. citizens' foreign parental recognition was based on their same-sex relationships rather than genetic links to their legally recognized children. This can leave U.S. citizens in *de facto* exile, unable to enter the United States with their children.

same-sex couples, the so-called *Gaby Boom* of the last two decades, this problem is likely to become more common as the years go on.<sup>20</sup>

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<sup>20</sup> See, e.g., Chuck Colbert, *Gay Catholics Refuse to Go Away or Be Quiet*, BOS. GLOBE, Dec. 31, 2000, available at 2000 WLNR 2266671 (“Yet another, perhaps even more hopeful development has sprung up from a most unlikely place: the Catholic lesbian and gay baby boom.”); Jim Dickey, *Gay Baby Boom Parents ‘Just like Ozzie and Harriet,’* SAN JOSE MERCURY NEWS, Oct. 13, 1989, at A1, available at 1989 WLNR 821116 (“Researchers and gay leaders say a gay baby boom is under way.”); Peggy F. Drexler, *Lesbian Mothers Making Men*, VILLAGE VOICE, Aug. 13, 2002, available at 2002 WLNR 11651547 (While “numbers extrapolated from academic studies vary widely[,]” one estimate puts the number of children under age eighteen living with a gay parent at between one million and nine million); Cynthia Leonor Garza, *‘Gayby boom’ in Houston: Same-Sex Parents*, HOUS. CHRON., Oct. 15, 2006, available at 2006 WLNR 17870536 (“In recent decades there have been two baby booms among gays -- or ‘gayby booms’ . . . . The first happened in the 1980s when lesbians began using those reproductive technologies. The second boom came in the 1990s when more gay men began adopting children.”); Debbie Geiger, *Mainstream as Parents: Gay Fathers and Lesbian Mothers Say They are Finding Greater Acceptance These Days*, NEWSDAY, Sept. 28, 2003, at B17, available at 2003 WLNR 933587 (A study by the Human Rights Campaign suggests that at least six million children are being raised by gay or lesbian parents); Jean Latz Griffin, *The Gay Baby Boom: Homosexual Couples Challenge Traditions as They Create New Families*, CHI. TRIB., Sept. 3, 1992, available at 1992 WLNR 4101936 (“Increasing numbers of gay men and lesbians are creating their own families, through adoption, artificial insemination and surrogate motherhood. What amounted to a 1980s baby boom among lesbians . . . is now spreading to men . . . .”); Chloé Harris, *The Village People*, ADVOC., July 15, 2008, available at 2008 WLNR 13297399 (“In case you haven’t noticed, we’re in the midst of a gay and lesbian baby boom.”); Cynthia Hubert, *Birth of Change: Thanks to Medical and Legal Advances, Sadie Karpay-Brody Has Two Mothers Who Both are Her Natural Parents*, SACRAMENTO BEE, Nov. 2, 2003, at L1, available at 2003 WLNR 15934900 (“Increasingly, gay and lesbian couples are having babies, adopting children and seeking to obtain rights as parents, and the courts are responding in their favor.”); Erika Milvy, *The Sourcebook: Planning Vacations for Lesbian, Gay Families*, L.A. TIMES, Feb. 1, 2004, available at 2004 WLNR 19795117 (“The ‘gaby boom’ has meant the birth of a brand new marketing sector.”); Valarie Honeycutt Spears, *Components of a Family: Two Lexington Men Await a Unique Birth*, LEXINGTON HERALD LEADER, June 23, 2002, at A1, available at 2002 WLNR 2074082 (“Nobody’s keeping track of actual numbers, but some observers say increasing numbers of gay male couples are seeking surrogate mothers to help them have children through in-vitro fertilization.”). This phenomenon has not been limited to the United States. See, e.g., Laurence Boutreux, *French Lesbians Cross Belgian Border to Have Babies*, AGENCE FR. PRESSE, Dec. 5, 2005 (noting that because the French bioethical law of 1994 only allows medical assistance with procreation for heterosexual married couples, “French lesbians have been crossing the border to Belgium in search of medical procedures to get pregnant, . . . creating a new sort of

Part II of this Article provides a brief overview and a few significant examples of the rapidly developing recognition of both ART and same-sex relationships in the family law of the United States and some foreign countries. It also points out some limitations regarding the adoption or legitimation of a child, who is already viewed as the *legitimate* child of a particular parent. While not intended to be comprehensive, this discussion provides sufficient background to support the Article's later explanation and argument regarding recognition of parent-child relationships stemming from ART in the context of U.S. immigration and nationality law.

Part III describes the basic definitions of parent-child relationships for transmission of U.S. citizenship and for establishing eligibility for immigration benefits. It differentiates among the various definitions of *parent* and *child* as used in Titles I and II of the INA (dealing with immigration benefits for foreign nationals) and Title III of the INA (dealing with U.S. nationality and citizenship issues). Part IV traces the legislative history and administrative and judicial development of these definitions as immigration law has evolved over the last century, focusing particularly on the relevant development of ideas related to legitimacy under immigration and nationality law.

Part V analyzes, compares, and evaluates the currently conflicting DOS and Ninth Circuit interpretations of the INA provisions defining the parent-child relationship requirements for transmission of U.S. citizenship upon birth abroad. Part V also explains the inordinate effect of a genetic kinship requirement on same-sex parents and their children, and why the Defense of Marriage Act (DOMA) should not alter parent-child recognition. Part VI recommends the most compelling construction of parent-child references for purposes of each title of the INA, concluding with detailed hypothetical illustrations.

This Article concludes that the INA should be read in conjunction with state or foreign family law provisions regarding key familial terms like *legitimate* and *born in wedlock* that are not defined in

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baby boom at Belgian fertility clinics"); Kristine Gough, *Gay and Lesbian Parents Foster a New Baby Boom*, AUSTRALIAN, Jan. 28, 2002, available at 2002 WLNR 5835051 ("A baby boom among the lesbian and gay communities is raising ethical issues in the minds of some, but the mothers and fathers involved are increasingly becoming a routine part of the social fabric.").

the INA, as well as partially defined terms like *parent* and *child* to the extent that questions are not addressed by express provisions in the INA. Because the INA is silent with regard to many issues relating to ART, the family law of the relevant jurisdiction will often be determinative with regard to the recognition of familial relationships. This Article recommends that the DOS and U.S. Citizenship and Immigration Services (USCIS) amend their regulations and manuals to clarify this point. It also recommends Congress clarify and modernize the relevant statutory definitions as a part of any proposal for comprehensive immigration reform.

## II. CHANGING TIMES, CHANGING TREATMENT OF ART AND SAME-SEX CO-PARENTS UNDER STATE AND FOREIGN LAW

The INA's definitions of *parent* and *child* have changed very little since they were originally adopted in the Nationality Act of 1940 and the Immigration and Nationality Act of 1952.<sup>21</sup> But the world has changed. Parents now frequently choose to have children alone or out of wedlock. Same-sex couples have been allowed to marry, register civil unions, and adopt children in many jurisdictions.<sup>22</sup> They and their different-sex counterparts are also utilizing ART and surrogacy more frequently to build families.<sup>23</sup>

### A. *Significance of State and Foreign Family Law for Understanding the INA*

Family relationships between spouses or parents and children are generally defined under state or foreign law, not federal law. These state and foreign law determinations are also important for immigration and other federal laws that turn on family relationships.<sup>24</sup> As the Supreme Court of the United States explained in *De Sylva v. Ballentine*,

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<sup>21</sup> Compare the 1952 language, *infra* text accompanying note 188, with 8 U.S.C. § 1101(b), (c) (2006).

<sup>22</sup> See *infra* notes 196-99 and accompanying text.

<sup>23</sup> See *supra* note 20; see also *infra* notes 39-41 and accompanying text.

<sup>24</sup> *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (focusing on state domestic law to determine whether a child was *legitimate* and, therefore, covered by the term *children* under federal copyright law). *De Sylva* also implies that the federal government might not properly rely on a state law that is “entirely strange to those familiar with [a term’s] usage;” however, “at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deem [sic] state law controlling.” *Id.* at 581.

[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relationships, which is primarily a matter of state concern.<sup>25</sup>

States also tend to recognize parent-child determinations of foreign countries and sister states, even when they stem from parental relationships to which the states have profound public policy objections.<sup>26</sup>

Of course, Congress may ignore state law and expressly define terms used in federal acts in any constitutional manner it wishes. In fact, the INA expressly defines *child* and *parent* for various purposes. However, in this context, the definitions generally assume a recognized parent-child relationship under state or foreign law, and they often turn on additional terms that only state and foreign law define.<sup>27</sup> For instance, the INA defines the word *child* for purposes of immigration benefits and waivers of inadmissibility to include a “child born in wedlock,”<sup>28</sup> “a stepchild,”<sup>29</sup> a “child legitimated under the law of the child’s . . . or . . . father’s residence or domicile,”<sup>30</sup> or an adopted child, if certain additional requirements are fulfilled.<sup>31</sup> While the additional requirements, such as the child’s maximum age at the time of

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<sup>25</sup> *Id.* at 580 (citations omitted).

<sup>26</sup> See, e.g., Nancy D. Polikoff, *Recognizing Partners but not Parents / Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 735 & n.113 (2000) (citing *Starr v. Erez*, 97 CVD 624 (Durham Cnty., N.C. General Court of Justice 1997) (rejecting an argument against recognition of a Washington state second-parent adoption on the basis that it was against North Carolina public policy).

<sup>27</sup> See *supra* note 24; see also *infra* notes 28-31, 208-18 and accompanying text.

<sup>28</sup> 8 U.S.C. § 1101(b)(1)(A) (2006).

<sup>29</sup> *Id.* § 1101(b)(1)(B) (“[A] stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred . . .”).

<sup>30</sup> *Id.* § 1101(b)(1)(C).

<sup>31</sup> *Id.* § 1101(b)(1)(E)-(G).

adoption,<sup>32</sup> are specific federal limitations, the basic terms *in wedlock*, *stepchild*, and *legitimated* adopt traditional state and foreign family law categories without further explication.<sup>33</sup>

Immigration procedures also rely mainly on legally recognized state or foreign documents, such as birth certificates or family registry entries, to prove the existence of family relationships.<sup>34</sup> This procedural reliance may be just as significant in real life cases as the INA's substantive definitions.<sup>35</sup>

### ***B. Developments Regarding ART and Determinations of Parentage***

ART includes the fairly simple procedure of artificial insemination, the use of an artificial instrument to inject sperm into the

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<sup>32</sup> See *id.* § 1101(b)(1)(E)(i) (“[A] child 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 . . .”).

<sup>33</sup> This same approach is applied in other contexts, such as the meaning of *marriage*, an even less defined term under the INA. See Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 550 (2010). The general rule is that a marriage is recognized for immigration purposes if it is valid in the state or country where celebrated and not subject to a sufficiently strong public policy exception under the law of the relevant domicile. *Id.* Unlike the terms *legitimate* and *in or out of wedlock*, there are express federal public policy limitations on the term *marriage* for same-sex marriages, polygamous marriages, and unconsummated proxy marriages, as well as a marriage *bona fides* requirement that refuses recognition of legally valid marriages entered solely for the purpose of obtaining immigration benefits. *Id.* However, such exceptions have not normally been recognized with regard to parent-child relationships. See *infra* notes 219-25 and accompanying text.

<sup>34</sup> See, e.g., 8 C.F.R. § 320.3(b)(i) (2009) (listing only “[t]he child’s birth certificate or record” as acceptable evidence of birth in wedlock for purposes of proving that a child born outside the United States, but residing permanently in the United States, acquires automatic citizenship); *id.* § 322.3(b)(i) (listing only “[t]he child’s birth certificate or record” as acceptable evidence of birth in wedlock for purposes of applying for a certificate of citizenship); 22 C.F.R. § 50.5(a) (1996) (listing “an authentic copy of the record of the birth filed with local authorities, a baptismal certificate, a military hospital certificate of birth, or an affidavit of the doctor or the person attending the birth” as the usual evidence of a child’s birth provided to the DOS to support an application for registration of birth abroad).

<sup>35</sup> See *infra* notes 327-28 and accompanying text (describing the likely acceptance of birth certificates naming parents who comprise a male-female couple).

uterus of a woman, who will carry and eventually give birth to the child (or children).<sup>36</sup> It also includes more complex procedures which manipulate both eggs and sperm outside of a woman's body before inserting them, or the resulting zygotes or embryos, into her fallopian tubes or cervix, respectively.<sup>37</sup>

ART is becoming more and more prevalent.<sup>38</sup> While artificial insemination has been around for centuries,<sup>39</sup> more complex forms of ART, which involve medical handling of eggs as well as sperm, were first used in the United States in 1981.<sup>40</sup> Over the last thirty years, various forms of ART have become increasingly popular, and the complex forms alone now account for over 57,000 births per year, more than one percent of the total number of U.S. births.<sup>41</sup>

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<sup>36</sup> See Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 431 (1997). Although doctors now tend to use more modern terminology (i.e., *intrauterine insemination*), this Article employs the term *artificial insemination*, which appears to still be more common in legal literature and is also still one of the terms employed by the Centers for Disease Control and Prevention. See, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERV. CTRS. FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2009) [hereinafter CDC ART REPORT], available at [http://www.cdc.gov/art/ART2007/PDF/COMPLETE\\_2007\\_ART.pdf](http://www.cdc.gov/art/ART2007/PDF/COMPLETE_2007_ART.pdf).

<sup>37</sup> CDC ART REPORT, *supra* note 36.

<sup>38</sup> See *supra* note 20.

<sup>39</sup> See Linda S. Anderson, *Adding Players to the Game: Parentage Determinations when Assisted Reproductive Technology is Used to Create Families*, 62 ARK. L. REV. 29, 29 (2009). In 1785 a Scottish surgeon successfully used artificial inseminations to assist a married couple who were otherwise unable to reproduce. *Id.* (citing JUDITH F. DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 27-28 (2006)). Artificial insemination has been commonly employed in the United States as a solution for infertile men since the 1930s. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567 (2000).

<sup>40</sup> CDC ART REPORT, *supra* note 36. The world's first baby conceived through in vitro fertilization was Louise Brown, born July 25, 1978, in the United Kingdom. Jennifer Rosenberg, *First Test Tube Baby - Louise Brown*, ABOUT.COM, <http://history1900s.about.com/od/medicaladvancesissues/a/testtubebaby.htm> (last visited Dec. 28, 2010).

<sup>41</sup> See CDC ART REPORT, *supra* note 36, at 15. These figures from the 2007 CDC ART Report cover in vitro fertilization, gamete intrafallopian transfer, and zygote intrafallopian transfer. *Id.* at 46. They do not include children born of the much less

1. Breakdown of Traditional Assumption that Two Married Parents Unite Genetic, Gestational, and Intended Parenthood of Every Legitimate Child

Our society and its laws traditionally assumed the norm of children born with two parents, a genetic father and his wife, the genetic and gestational mother.<sup>42</sup> For most of U.S. history, the only recognized variable in this equation was the parents' marriage.<sup>43</sup> Children born to parents who were not married to each other was so unsettling that lawmakers labeled the resulting children *illegitimate* and saddled them with substantial legal and social disadvantages, intending to punish the parents and deter future conceptions out of wedlock.<sup>44</sup> This unsuccessful effort to punish parents by treating their children as illegitimate has been discredited and largely abandoned.<sup>45</sup> However, similar strategies are now being recycled in debates relating to other, newer variables resulting from conception by ART, surrogate gestation and birth, and the recognition of same-sex couples.<sup>46</sup>

ART creates babies with parents who do not share all the traditional factors of marriage, genetics, gestation, and intended parenthood. While failure of the first assumption led to the classification of children as *illegitimate* in the past, births resulting from ART may involve many more people and create a greater divergence from the traditional factors.<sup>47</sup> Some cases will involve an egg donor, sperm donor, surrogate,<sup>48</sup> and an intended mother or father, or both. If

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technologically complex process of artificial insemination, which is not always performed in a clinic, or even by a physician. *Id.* at 9.

<sup>42</sup> See Anderson, *supra* note 39.

<sup>43</sup> Children Born Abroad Out of Wedlock, *supra* note 5.

<sup>44</sup> *Id.*; see *supra* note 2 and accompanying text (discussing the history of illegitimacy and its immigration consequences).

<sup>45</sup> Children Born Abroad Out of Wedlock, *supra* note 5.

<sup>46</sup> See *infra* note 328.

<sup>47</sup> See, e.g., Summary: Uniform Parentage Act, THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-upa.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upa.asp) (last visited Dec. 28, 2010). "Technology has changed the combinations and permutations of the parent-child relationship" dramatically since 1973 when the first Uniform Parentage Act was promulgated, a development that was reflected in the 2000 revision of the Act and its 2002 amendments. *Id.*

<sup>48</sup> In order to avoid confusion with legal motherhood, this Article will use the term *surrogate* for a woman who carries and gives birth to a child whom she does not

the relevant jurisdiction recognizes same-sex marriage or presumes same-sex joint parenthood based on other forms of legally recognized same-sex relationships, the intended parents can be two mothers or two fathers, who may, or may not, include a genetic parent, a gestational mother, or both.<sup>49</sup> Obviously, there are numerous possible combinations involving these variable factors.

While U.S. immigration law is only now beginning to recognize an issue with its sixty-year-old assumptions about parents and their children, state and foreign family law have been wrestling with these issues for decades.<sup>50</sup> At least thirty-four states now have statutes dealing with ART in some way.<sup>51</sup> Foreign countries have also enacted statutes that regulate the parentage of children conceived through ART.<sup>52</sup>

## 2. The Presumption of Paternity Where an Intended Mother Gives Birth After Artificial Insemination or In Vitro Fertilization

Illegitimacy distinctions focused on the assumption of marriage between a child's genetic parents,<sup>53</sup> but lawmakers and courts have long focused on another assumption as well—the idea that children need two parents.<sup>54</sup> In the context of children born to unmarried parents, this

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intend to raise as her own. It will employ the term *gestational mother* in situations where the woman carrying a child conceived through in vitro fertilization intends to parent the child after birth.

<sup>49</sup> See *infra* notes 99-103 and accompanying text.

<sup>50</sup> Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 951 (2009).

<sup>51</sup> Lewis, *supra* note 50, at 953. However, most of the statutes' express provisions are limited to artificial insemination. *Id.* at 953; see also Human Fertilisation and Embryology Act, 2008, c. 22, § 42 (U.K.).

<sup>52</sup> See Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 226-31 (2009) (describing foreign statutes that provide parentage for lesbian couples in particular); see also Human Fertilisation and Embryology Act, 2008, c. 22, § 35, 42 (U.K.) (explaining both husbands and registered same-sex civil partners who consent to the use of in vitro implantation or artificial insemination are deemed the parent of the resulting child).

<sup>53</sup> See HENRICI DE BRACON, 1 DE LEGIBUS ET CONSUEUDINIBUS 499 (Sir Travers Twiss ed., 1878).

<sup>54</sup> *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 669 (Cal. 2005).

alternative focus sometimes led to compromises alleviating or compensating for the consequences of birth out of wedlock.<sup>55</sup> This alternative focus grew stronger over time as the best interest of the child became the lodestar of modern family law.<sup>56</sup>

Lawmakers and courts pursued the two-parent norm in several different ways. They supported the option of adoption,<sup>57</sup> preferably by a married couple, sacrificing an absolute focus on the genetic connections between parents and children in favor of the preferred two-parent family structure.<sup>58</sup> In the case of an unmarried mother, they also developed legal procedures for recognizing paternity and for legitimation in pursuit of the goal of two-parent responsibility, sometimes even without marriage.<sup>59</sup>

In addition to adoption, legitimation, and paternity actions, the law developed a largely irrefutable presumption that a woman's husband is the father of any child to whom she gives birth during marriage.<sup>60</sup> This presumption sometimes sacrificed a father's genetic connection with a child in favor of the mother's connection and the desirability of two parents who are married to each other.<sup>61</sup> A two-parent household has been considered preferable for providing children with more emotional and financial stability and reducing the likelihood that they will become burdens on state resources.<sup>62</sup>

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<sup>55</sup> See, e.g., Krause, *supra* note 2, at 842-44.

<sup>56</sup> See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2007) (describing the development and eventual widespread adoption of the concept of the best interests of the child standard of modern family law).

<sup>57</sup> See, e.g., OR. REV. STAT. § 109.050 (2010).

<sup>58</sup> Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1763-64 (1998).

<sup>59</sup> *Id.* at 1764.

<sup>60</sup> See 41 AM. JUR. 2D *Illegitimate Children* § 16 (2010) ("The principle that children born in wedlock are presumed to be legitimate is universally recognized.").

<sup>61</sup> See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding the irrefutable presumption and granting the biological mother and her husband custody of the child over the child's biological father).

<sup>62</sup> See *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 669 (Cal. 2005) (recognizing that two mothers would provide a child more financial stability and would prevent the child from becoming a burden on state resources); Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as*

The common law long presumed a husband's paternity of children born to his wife during their marriage as a fundamental principle,<sup>63</sup> and that presumption is still widely accepted today.<sup>64</sup> Although somewhat less absolute today,<sup>65</sup> the presumption of paternity generally remains a very strong one.<sup>66</sup> In fact, Supreme Court Justice Antonin Scalia noted in *Michael H. v. Gerald D.* that he was aware of no case where a state had awarded "substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."<sup>67</sup> His plurality opinion in *Michael H.* found it well established that the common law and states have universally recognized the mother's husband, rather than the *adulterous natural father*, as the *legal father* of a child,<sup>68</sup> pointing to an American Law Reports annotation that noted only a mother and her husband have standing to dispute the presumption of legitimacy of a child born in wedlock.<sup>69</sup>

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*Children*, 48 SANTA CLARA L. REV. 999, 1008-09 (2008) ("Even if the mother's husband is not the natural father of her child, the marriage presumption gives the child a legal father who must provide care and support for the child.").

<sup>63</sup> See *Michael H.*, 491 U.S. at 124 (Scalia, J., plurality opinion) (citing H. NICHOLAS, A TREATISE ON THE LAW OF ADULTURINE BASTARDY 1 (1836) (upholding a California statute establishing a nearly irrefutable presumption of legitimacy, even though blood tests showed a 98.07% probability that another man was the biological father)); HENRICI DE BRACON, *supra* note 53.

<sup>64</sup> See 41 AM. JUR. 2D *Illegitimate Children* § 16 (2010) ("The principle that children born in wedlock are presumed to be legitimate is universally recognized."); LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:3 (2009) (noting at common law, the presumption of paternity stemming from birth in wedlock "was one of the strongest presumptions known to the law").

<sup>65</sup> For instance, Lord Mansfield's Rule, preventing spousal testimony regarding nonaccess, has been abrogated in many jurisdictions. See *Goodright v. Moss*, 98 Eng. Rep. 1257 (1977); see also ELROD, *supra* note 64 ("Although most United States jurisdictions adopted Lord Mansfield's Rule," the rule has been weakened in many jurisdictions and in the Uniform Parentage Act).

<sup>66</sup> See, e.g., *Parker v. Parker*, 950 So. 2d 388, 394 (Fla. 2007). The Florida Supreme Court indicated that the presumption of legitimacy is a constitutional right of a child born in wedlock if it is in his best interest. *Id.*

<sup>67</sup> *Michael H.*, 491 U.S. at 127.

<sup>68</sup> *Id.* at 124-25.

<sup>69</sup> *Id.* at 125-26 (citing Donald M. Zupanec, Annotation, *Who May Dispute Presumption of Legitimacy of Child Conceived or Born During Wedlock*, 53 A.L.R.2d 572 (1957), *superseded by* 90 A.L.R.3d 1032 (1979)). While the immediate issue in *Michael H.* was the existence of a purported due process right on behalf of a child's

The traditional marital paternity presumption is still conclusive in some jurisdictions,<sup>70</sup> and it is rebuttable in even more states, but often only within a brief window of time following the child's birth.<sup>71</sup> Courts generally disallow such rebuttal altogether, where the mother's husband wishes to remain his presumed child's legal father.<sup>72</sup>

In its modern form, the presumption of paternity also applies to children conceived through artificial insemination or in vitro fertilization, even if a donor's sperm is used.<sup>73</sup> Some states directly employ the traditional common law presumption in these cases by utilizing principles like estoppel or limitations based on the best interest of the child to prevent rebuttal.<sup>74</sup> Other states have codified the common law presumption recognizing the husband's paternity and expressly proscribed rebuttal if the husband knowingly consented to the

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*adulterous natural father*, Justice Scalia went into some detail describing the lack of precedent for any *adulterous natural father* being legally recognized where a mother was married at the time of birth, and she and her husband were willing to continue raising the child as their own. *Id.* at 119-27.

<sup>70</sup> *Id.* at 126; *see, e.g.*, *Estate of Cornelious v. Taylor*, 35 Cal. 3d 461, 467 (1984) (refusing to allow a woman to challenge her own presumed paternity in order to claim inheritance from the estate of a man other than her mother's husband); *In re Marriage of A*, 598 P.2d 1258, 1260-61 (Or. Ct. App. 1979) (holding the conclusive statutory presumption of paternity cannot be challenged by wife's testimony).

<sup>71</sup> *See* 14 C.J.S. *Children Out-of-Wedlock* § 30 (2010); *see, e.g.*, *Banta v. Banta*, 782 P.2d 946, 948 (Okla. Civ. App. 1989) (holding the ex-husband maintained custody rights of child that was admittedly not his because the presumption of legitimacy became irrebuttable after two years of life as a family).

<sup>72</sup> *See, e.g.*, *Ex parte Presse v. Koenemann*, 554 So. 2d 406, 418 (Ala. 1989) (upholding presumption of fatherhood by ex-husband for child born during his marriage to the mother over conclusive proof of paternity by her current husband); *Banta*, 782 P.2d at 948 (holding the ex-husband maintained custody rights of child that was admittedly not his biological progeny because the presumption of legitimacy became undisputable after two years of life as a family); *see also* Alan Stephens, Annotation, *Parental Rights of Man Who Is Not Biological or Adoptive Father of Child but Was Husband or Cohabitant of Mother When Child Was Conceived or Born*, 84 A.L.R.4th 655 § 7[a] (1991).

<sup>73</sup> *See* UNIF. PARENTAGE ACT § 705, 9B U.L.A. 72 (Supp. 2010); *see also* Anderson, *supra* note 39, at 34; Jennifer L. Rosato, *Special Issue on the Evolution of Marriage: Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 75 (2006).

<sup>74</sup> *See* Lewis, *supra* note 50, at 969-72.

ART procedure.<sup>75</sup> Finally, some states have adopted specific statutes focusing on artificial insemination that recognize paternity so long as the mother's husband knowingly consented to the donor insemination procedure in writing.<sup>76</sup>

### 3. The Consequences of Surrogacy

Even more factual and legal complexity can arise when a surrogate carries and gives birth to a child whom someone else intends to parent after birth. While a surrogate could use artificial insemination to create and give birth to a child who is genetically related to her, such pregnancies are generally avoided in order to reduce possible psychological and legal complications.<sup>77</sup> On the other hand, it is common for one or both of the intended parents to provide sperm or egg, creating a genetic link to the child.<sup>78</sup>

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<sup>75</sup> See, e.g., DEL. CODE ANN. tit. 13, § 8-705(a) (West 2010) (permitting rebuttal within two years if husband did not consent to this form of ART prior to the child's birth); FLA. STAT. § 742.11(1) (2010); GA. CODE ANN. § 19-7-21 (West 2010); LA. CIV. CODE ANN. art. 188 (2009) (permitting husband to disavow paternity if he did not consent to use of ART); N.H. REV. STAT. ANN. § 168-B:3(II) (2010) (stating the presumption shall not be rebutted if husband consented to use of ART); TEX. FAM. CODE ANN. § 160.705(a) (West 2009) (permitting rebuttal within four years if husband never consented to ART); UTAH CODE ANN. § 78B-15-705(1) (West 2010); WYO. STAT. ANN. § 14-2-905(a) (West 2010); State *ex rel.* H. v. P., 457 N.Y.S.2d 488 (App. Div. 1982) (upholding legitimate parent-child relationship of husband who consented to his wife's artificial insemination in spite of her claim to have actually conceived child through extramarital affair); see also Lewis, *supra* note 50, at 966-72.

<sup>76</sup> See, e.g., ALASKA STAT. § 25.20.045 (2009) ("A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses."); ARIZ. REV. STAT. ANN. § 25-501 (2010); CAL. FAM. CODE § 7613 (West 2009); KAN. STAT. ANN. § 23-128 (2009); NEV. REV. STAT. ANN. § 126.061 (2009); see also Lewis, *supra* note 50, at 958 (noting that children conceived by artificial insemination using donor sperm would be recognized as the mother's husband's legitimate child in the states that have enacted statutes dealing with artificial insemination).

<sup>77</sup> Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 640 (2005); see also *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (illustrating tragic psychological and legal problems that can occur when a gestational surrogate is artificially inseminated and carries and gives birth to a child to whom she is also the genetic mother).

<sup>78</sup> Snyder & Byrn, *supra* note 77, at 641 ("Fertilization of the intended mother's egg with the intended father's sperm and transfer of the resulting embryo(s) into the

Where the parties all agree, some state courts will issue prebirth parentage orders; this allows parental recognition from the time of birth, including initial entry of the intended parents' names on the original hospital records and birth certificate.<sup>79</sup> These are the only surrogacy cases relevant to this Article. Where parents are recognized because of adoption after birth, their cases would fall under the detailed, express requirements set forth in the INA for adoption cases, and thus outside the scope of this Article.<sup>80</sup>

The traditionally assumed unities of parenthood can break down dramatically in the context of surrogacy-based ART cases.<sup>81</sup> Therefore, courts, politicians, and scholars tend to establish different rules for determining parentage, depending on the value they assign to parental intent, genetics, and gestation and delivery of a child.<sup>82</sup>

Like the DOS, some courts initially reacted to ART by relying solely on genetic links.<sup>83</sup> This approach certainly prescribes a uniform and efficient answer to the question of parenthood. However, it is also very controversial. It ignores both intent and gestation, and it has been criticized on both counts.<sup>84</sup> Many courts agree with the critics and

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surrogate's uterus for gestation is now the most preferred method of gestational surrogacy when the intended mother and father can provide both viable eggs and sperm.").

<sup>79</sup> *Id.* at 634-35; *see also id.* app. at 661-62 (chart of surrogacy laws and the possibility of prebirth order proceedings throughout the United States).

<sup>80</sup> *See* 8 U.S.C. § 1101(b)(1)(E)-(G) (2006); *id.* §§ 1431, 1433. Of course, some parents with prebirth parentage orders may not readily qualify under the different requirements for recognition under INA adoption provisions. For example, many jurisdictions do not allow second-parent adoption for same-sex couples. *See infra* note 331 and accompanying text.

<sup>81</sup> *See Snyder & Byrn, supra* note 77, at 639 (describing how normal paternal presumptions must be superseded in surrogacy-based ART cases).

<sup>82</sup> *See Anderson, supra* note 39, at 39-46.

<sup>83</sup> *See, e.g., Belsito v. Clark*, 67 Ohio Misc. 2d 54, 58 (Ohio Ct. Com. Pl. 1994) (focusing on the genetic link between the child and intended parents); *see also Anderson, supra* note 39, at 34; Bender, *supra* note 12, at 14; Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 387-92 (2007).

<sup>84</sup> Some scholars argue that our society improperly treats *the gene* as an almost magical new *sacred essence* of human beings, who are simplified as the sum of their genetic code. *See Bender, supra* note 12, at 39-40. At least one scholar finds the focus on genetics unacceptable, since it undervalues the unique nongenetic biological

refuse to focus on genetics alone.<sup>85</sup> Scholars have argued that the intent of the parties to a surrogacy agreement is the most important factor in determining parentage.<sup>86</sup> Some courts focus mainly on the parties' intent as well.<sup>87</sup> Others do not.<sup>88</sup> Some states even ban surrogacy arrangements.<sup>89</sup> Their enforceability is uncertain in others,<sup>90</sup> but at least thirteen states expressly recognize surrogacy agreements and the intentions of the parties.<sup>91</sup>

Most jurisdictions consider more than one factor in determining the parentage of a child conceived through ART,<sup>92</sup> and their combination can be persuasive. For instance, when an intended father and mother use their genetic material to conceive a child whom this married couple intends to raise after birth, most states will recognize the couple's parental rights even when a gestational surrogate gives birth to the child.<sup>93</sup>

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contributions that women make to the gestation and birth of a child. *See id.* at 39, 43-45.

<sup>85</sup> *See, e.g., In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) (recognizing intended parents without any genetic relationship to child); *McDonald v. McDonald*, 196 A.D.2d 7, 11-12 (N.Y. App. Div. 1994) (rejecting father's petition for sole custody based on genetics alone); *see also Campbell, supra* note 39, at § 3[a].

<sup>86</sup> *See, e.g., Anderson, supra* note 39, at 34.

<sup>87</sup> *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 782-83 (Cal. 1993) (focusing on the parties' prebirth intentions); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293 (looking to an "intent to parent" test); *McDonald*, 196 A.D.2d at 11-12 (rejecting lower court's ruling based on genetics alone, focusing instead on the intent of the parties); *see also Campbell, supra* note 39; Wald, *supra* note 83, at 383-87.

<sup>88</sup> *See, e.g., Belsito*, 67 Ohio Misc. 2d at 58.

<sup>89</sup> Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" *A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454-60 (2009).

<sup>90</sup> *Id.* at 454-560.

<sup>91</sup> *Id.* at 460-66 (listing these states as: Arkansas, California, Florida, Illinois, Nevada, New Hampshire, New Jersey, North Dakota, Tennessee, Texas, Utah, Virginia, and Washington and describing some details of the requirements in each state, including provisions for surrogate mothers to change their minds and contest parentage within a short period after birth in some states).

<sup>92</sup> *See Wald, supra* note 83, at 380-81.

<sup>93</sup> *Id.* at 383; *see, e.g., Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (focusing on the parties' prebirth intentions); *Belsito*, 67 Ohio Misc. 2d at 63-65 (focusing on the genetic link between the child and intended parents).

Despite greater clarity in such circumstances, the clearest thing about the surrogacy cases in general is the lack of consensus among the states regarding rules for determining parentage in cases stemming from ART.<sup>94</sup> This insight is sufficient for purposes of this Article. Since there is no general agreement on recognizable parent-child relationships created through ART and surrogacy arrangements,<sup>95</sup> it does not make sense for immigration officials to step into the debate and federalize the issue where Congress has not. Instead, immigration officials should follow the well-established practice of deferring to state and foreign law regarding who is a *parent*, a *child*, and who is *born in wedlock* within the broad parameters set by the express definitions in the INA.

### ***C. Recognition of Same-Sex Relationships and Presumptions of Parenthood***

More and more jurisdictions are beginning to recognize same-sex marriages, civil unions, and other formalized lesbian and gay male relationships. Currently, same-sex marriage is recognized in five states and the District of Columbia,<sup>96</sup> as well as eleven foreign countries.<sup>97</sup>

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<sup>94</sup> See Wald, *supra* note 83, at 383-92.

<sup>95</sup> See *id.*

<sup>96</sup> The District of Columbia and five states currently issue marriage licenses to same sex couples: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19, available at 2009 WLNR 10673431; Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1, available at 2009 WLNR 6544570 (Vermont's legislature overrode Governor Jim Douglas's veto of Vermont's same-sex marriage bill); see also *Same Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 2010) [hereinafter *NCSL Marriage Report*], <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx>.

Marriage licenses were issued in California following a state supreme court decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Following the passage of a statewide referendum rejecting same-sex marriage in November 2008, new licenses are no longer issued in California; however, California does still recognize the marriages of around 18,000 couples who were married during the seven months when marriage licenses were issued. Maura Dolan, *Battles Brew as Gay Marriage Ban is Upheld. The 6-1 Ruling Concerns Some Who Fear Erosion of Rights in the Future. But Wedded Couples Retain Their Status*, L.A. TIMES, May 27, 2009, at 1, <http://articles.latimes.com/2009/may/27/local/me-gay-marriage27>.

Presumably, any of these jurisdictions that also recognize marriage-based parental presumptions will recognize parent-child relationships stemming from same-sex marriages, such as a woman's rights as the nonbiological mother of her wife's ART-based pregnancy.<sup>98</sup>

Some states and foreign countries that legally recognize relationships other than marriages, such as domestic partnerships in California and civil partnerships in the United Kingdom, also recognize a legitimate legal relationship between both adults and any children born into the union.<sup>99</sup> As with different-sex married couples, these

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In addition to the states that have issued marriage licenses to same-sex couples, Rhode Island, New York, and Maryland have expressly recognized same-sex marriages performed elsewhere. *NCSL Marriage Report, supra*.

<sup>97</sup> See *International Progress Toward the Freedom to Marry*, FREEDOMTOMARRY.ORG (last updated Aug. 2010), <http://www.freedomtomarry.org/pages/international-progress-toward-the-freedom-to-marry>. Currently full marriage equality is recognized for same-sex couples throughout Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. See *id.* Lesbian and gay couples also can marry in Mexico City, and they must be recognized in states throughout Mexico. David Agren, *Mexican States are Ordered to Honor Gay Marriages*, INT'L HERALD TRIB., Aug. 12, 2010, at 4, available at 2010 WLNR 15998265.

<sup>98</sup> Polikoff, *supra* note 52, at 215 (noting the District of Columbia and ten states recognize same-sex marriages or unions with virtually equal consequences to marriage, including presumed parenthood for same-sex marriages and unions to marriage).

<sup>99</sup> See, e.g., CAL. FAM. CODE § 297 (West 2010) ("This act shall be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses."); Human Fertilisation and Embryology Act, 2008, c. 22, § 42 (U.K.) (declaring that a registered same-sex civil partner who consents to her partner's use of in vitro implantation or artificial insemination is to be treated as a legal parent of the child); *Debra H. v. Janice R.*, 930 N.E.2d 184, 197 (N.Y. 2010) (recognizing two mothers of child born via ART in Vermont civil union); Polikoff, *supra* note 52, at 226 (explaining that "[a] number of Canadian provinces, Australia, and several European countries have legislation extending parental status to lesbian couples"); see also Rosato, *supra* note 73, at 76. But see N.J. STAT. ANN. § 26:8A-2 (West 2010) ("All persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including: statutory protection . . . against various forms of discrimination based on domestic partnership status, such as employment, housing and credit discrimination; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption from the personal income tax and the transfer inheritance tax on

parent-child relationships are sometimes recognized without adoption or genetic parental links.<sup>100</sup> Although prebirth parentage orders are more common for lesbian co-parents, some state courts have also granted orders before a gestational surrogate gives birth, declaring both members of gay male couples to be legal parents of a child who is genetically related to one of them.<sup>101</sup> Recently, a few U.S. jurisdictions have also enacted statutes that provide children conceived through artificial insemination with two parents at birth, even if the parents are unmarried, same-sex couples.<sup>102</sup> Here again, the idea is to ensure that a child has two parents, even if they are not both genetically related to the child and even if both parents are of the same sex.<sup>103</sup>

***D. Problems with Adoption: Why it's not Always an Answer***

Once a state or country recognizes a legal parent-child relationship, the parent may be unwilling to surrender that recognition, even if surrender is necessary to undergo a joint adoption with her partner. While second parent adoption is possible in several jurisdictions, it is impossible in many others, including some in the United States.<sup>104</sup>

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the same basis as a spouse.”); Graham, *supra* note 62, at 1026-29 (citing Vermont and Oregon as examples of state partnership laws that would recognize the presumption of parenthood for a registered partner).

<sup>100</sup> See generally *infra* note 127. Of course, many jurisdictions do not treat same-sex couples equally in relation to parental status resulting from ART. See Joyce Kauffman, *Protecting Parentage with Legal Connections*, 32 FAM. ADVOC. 24, 24 (2010) (noting “the law still lags behind when it comes to protecting familial relationships for children whose parents” are the same sex, where most states offer no protections).

<sup>101</sup> Kauffman, *supra* note 100, at 25 (listing Massachusetts, Wisconsin, and California as three examples).

<sup>102</sup> *Id.* at 26 (describing new laws in the District of Columbia and New Mexico as well as a related American Bar Association recommended provision for inclusion in relevant model laws).

<sup>103</sup> See, e.g., *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660 (Cal. 2005) (finding analogous situation of second mother to presumed paternity under the California version of the Uniform Parentage Act even though the couple had not entered a marriage or registered as Domestic Partners in the state).

<sup>104</sup> Polikoff, *supra* note 52, at 204.

Adding an additional complication, adopted children do not acquire U.S. citizenship under INA sections 301 or 309 like children *born of* qualifying parents.<sup>105</sup> They have to rely instead upon derivative citizenship under INA section 320 or apply for naturalization at a later date.<sup>106</sup>

### III. THE DEFINITIONS OF PARENT-CHILD RELATIONSHIPS UNDER THE INA

While there is no federal family law, federal laws—like those governing immigration—can have profound implications on a family and whether it survives as a unit or not. Congress has long recognized this point, and it has constantly made allowances for family unity throughout the last century and a half as it has added more and more restrictions on immigration.<sup>107</sup>

#### A. *The Overarching Immigration Goal of Achieving and Maintaining Family Unity*

Congress has focused particularly on the need to keep parents and children together. As the BIA has recognized, “[t]here can be little doubt that the legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”<sup>108</sup> Federal courts have also repeatedly recognized that a main underlying goal of the INA is the promotion and maintenance of family unity.<sup>109</sup>

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<sup>105</sup> See 8 U.S.C. § 1409 (2006).

<sup>106</sup> See *id.* §§ 1431, 1433.

<sup>107</sup> See HUTCHINSON, *supra* note 1, at 505.

<sup>108</sup> *In re G*, 8 I. & N. Dec. 355 (B.I.A. 1959); see S. REP. NO. 81-1515, at 468 (1950); H.R. REP. NO. 82-1365, at 39 (1952). The BIA has traced congressional intent to prevent, as far as practicable, family separations in the application of immigration restrictions back to some of the first quotas on U.S. admission in the Immigration Act of 1924. *In re A*, 5 I. & N. Dec. 272 (B.I.A. 1954).

<sup>109</sup> See, e.g., *Amezquita-Soto v. INS*, 708 F.2d 898, 903, 908 (3d Cir. 1983) (quoting *Batidas v. INS*, 609 F.2d 101, 105 (3d Cir. 1979)) (the majority found “the separation of family members from one another . . . [to be] a serious matter requiring close and careful scrutiny”). Dissenting Judge Gibbons agreed on that point, citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) for the general notion that “family and relationships between family members occupy a place of central importance in our

Congress made its priority for family unity clear when it first drafted the Immigration and Nationality Act of 1952 which defined the basic provisions *child* and *parent*.<sup>110</sup> Since then, the text of the INA has provided for: (1) quota exempt permanent residence for children and parents of adult U.S. citizens, (2) immigrant visa preferences for the children of lawful permanent residents, (3) derivative status for the children of new permanent residents and nonimmigrant visa holders, and (4) waivers of inadmissibility or removability based on the hardship of children and parents.<sup>111</sup>

Key figures formulating the immigration policy under the executive branch of the U.S. government have also made it clear that “[f]amily reunification has been the centerpiece of our legal immigration system for decades, and it should remain so.”<sup>112</sup> U.S. Attorneys General, such as Robert Kennedy, have also recognized the “well-established policy of maintaining the family unit wherever possible.”<sup>113</sup>

When members of the executive branch waived in pursuit of this policy, Congress has sometimes stepped in to clarify its own strong

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nation’s history and are a fundamental part of the values that underlie our society.” *Amezquita-Soto*, 708 F.2d at 908 (Gibbons, J., dissenting).

<sup>110</sup> Immigration & Naturalization Act, 66 Stat. 166, 171 (1952) (amending the Immigration Act of 1924).

<sup>111</sup> See *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (“[S]even-tier preference system [is] primarily designed to further the basic objective of reuniting families and also to attract to this country aliens with needed skills.”); see also *infra* note 360 and accompanying text.

<sup>112</sup> *Reform of Legal Immigration: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 13 (1995) (INS Commissioner Doris Meissner testified that the Clinton administration supported maintaining the priority of “the reunification of U.S. citizens with their spouses and minor children as legal immigration’s top priority”); see also *In re G*, 8 I. & N. Dec. at 358 (“There can be little doubt that the legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”).

<sup>113</sup> *In re K-W-S*, 9 I. & N. Dec. 396, 409 (Att’y Gen. 1961) (finding the legitimation provision in INA section 101(b)(1)(C) was “intended to implement” this *well-established policy*) (citing H. REP. NO. 82-1365, at 33 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653).

support for the immigration goal of family unity.<sup>114</sup> Just five years after the enactment of the INA, a House Judiciary Committee Report found that “[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children.”<sup>115</sup> Forced to amend the 1952 Act because of the Eisenhower administration’s refusal to treat immigrant children with sufficient liberality, the House Committee chided the Attorney General for reading an unwritten requirement of legitimacy at birth into the definition of *stepchild* under INA section 101(b)(1)(B).<sup>116</sup> The House Committee also found that statutory language throughout the INA “makes it clear that the underlying intent of the legislation was to preserve the family unit upon immigration to the United States.”<sup>117</sup>

**B. Recognition of Parent and Child for Purposes of U.S. Citizenship and Naturalization (INA Sections 101(c), 301, 309, 320, and 322)**

As noted above, the INA defines *child* differently for purposes of immigration benefits and waiver issues under Titles I and II of the Act, than for citizenship and naturalization issues covered under Title III.<sup>118</sup> The general definition under Title III is found at INA section 101(c)(1),<sup>119</sup> which defines the term *child* as “an unmarried person under twenty-one years of age,” which “includes a child legitimated under the law of the child’s [or its father’s] residence or domicile . . . whether in the United States or elsewhere” and certain adopted children.<sup>120</sup> The definition of *parent* for purposes of Title III is even less helpful. It merely indicates that it covers the deceased parent of a posthumous child.<sup>121</sup>

Congress avoided the term *child* entirely in some of the most significant provisions of Title III that hinge on parent-child

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<sup>114</sup> See H.R. REP. NO. 85-1199, at 5-6 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.* at 5-6.

<sup>117</sup> *Id.* at 6.

<sup>118</sup> See *supra* Part III; see also 8 U.S.C. § 1101(b)(1) (2006) (defining *child* for subchapters I and II); *id.* § 1101(c)(1) (defining *child* for subchapter III).

<sup>119</sup> 8 U.S.C. § 1101(c)(1) (2006).

<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> *Id.* § 1101(c)(2).

relationships—the detailed provisions setting forth requirements for transmission of U.S. citizenship upon birth abroad.<sup>122</sup> The most important of these provisions is probably INA section 301, which recognizes the transmission of derivative citizenship for “person[s] *born* outside of the United States . . . *of parents*[,]” one or both of whom are citizens of the United States.<sup>123</sup> INA section 301 details different residence requirements for the citizen parents depending on whether one or both are U.S. citizens.<sup>124</sup> For instance, transmission to “a person born . . . of parents one of whom is an alien, and the other a citizen of the United States” requires that the citizen must have been *physically present* in the United States or its outlying possessions for “five years, at least two of which were after attaining the age of fourteen” prior to the birth of the *person* abroad.<sup>125</sup>

Another key provision is INA section 309(a) which provides for the transmission of U.S. citizenship to “a person born out of wedlock” in certain circumstances, including the existence of “a blood relationship between the person and the father.”<sup>126</sup> INA section 309(c) clarifies that:

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<sup>122</sup> See, e.g., *id.* § 1401 (providing that certain persons are U.S. citizens based on birth abroad *of parents*, one or both of whom is a U.S. citizen); *id.* § 1409 (providing that certain persons are U.S. nationals or citizens based on birth out of wedlock abroad).

<sup>123</sup> See *id.* § 1401(c) (relating to “a person *born* outside of the United States and its outlying possessions *of parents* both of whom are citizens of the United States and one of whom has had a residence in the United States . . . prior to the birth of such person”) (emphasis added); *id.* § 1401(d) (relating to persons born abroad *of parents* consisting of one U.S. citizen and one U.S. national who is not a U.S. citizen); *id.* § 1401(e) (relating to “a person *born* in an outlying possession of the United States *of parents* one of whom is a citizen of the United States”) (emphasis added); *id.* § 1401(g) (relating to “a person *born* outside the geographical limits of the United States and its outlying possessions *of parents* one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years . . . .”) (emphasis added).

<sup>124</sup> *Id.* § 1401; see also *id.* § 1101(a)(21) (defining *national* as “a person owing permanent allegiance to a state”); *id.* § 1101(a)(22) (defining *national of the United States* to include both U.S. citizens and noncitizens who owe “permanent allegiance to the United States”).

<sup>125</sup> *Id.* § 1401(g).

<sup>126</sup> *Id.* § 1409(a)(1).

[A] person born . . . outside of the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States . . . for a continuous period of one year.<sup>127</sup>

Since INA section 309 would otherwise be unnecessary for cases involving “birth out of wedlock,” the very general language of INA section 301, *et seq.*, has been read to apply only in cases of birth in wedlock.<sup>128</sup> However, the INA does not define *in wedlock* or *out of wedlock* or set forth any federal criteria for determining parent-child relationships in the context of wedlock. For instance, the INA is completely silent with regard to any genetic requirement for children born to parents in wedlock.<sup>129</sup>

Unlike INA sections 301 and 309, two other important provisions of Title III, INA sections 320 and 322, do employ the terms *child* and *parent*.<sup>130</sup> Section 320 provides automatic derivative U.S. citizenship to a minor child<sup>131</sup> born abroad, but now residing in the United States in the physical custody of a U.S. citizen parent after admission as a lawful permanent resident.<sup>132</sup> However, INA section 320 does not stop there. It proceeds to specify that it only applies to adopted children if they satisfy the requirements of INA section

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<sup>127</sup> *Id.* § 1409(c).

<sup>128</sup> *See Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000). As discussed below, this assumption of a silent requirement under section 301 equating *in wedlock* to *not out of wedlock*, might be overly rigid in the instance of a civil union, registered partnership, or other relationship, which—although legal and carrying a presumption of parentage—are not designated officially as *marriages*. *See infra* notes 263-325 and accompanying text.

<sup>129</sup> *See Logan Bobo*, Note, *Wedlock, Blood Relationship, and Citizenship*, 14 CARDOZO J.L. & GENDER 351, 353-54 (2008) (noting the silence of the INA in regard to *blood relationship* requirements for citizenship transmission upon birth abroad in arguing that the FAM was wrong to recognize such a requirement).

<sup>130</sup> 8 U.S.C. §§ 1431, 1433 (2006).

<sup>131</sup> *Id.* § 1431(a)(2) (describing a minor child as under the age of eighteen).

<sup>132</sup> *Id.* § 1431(a).

101(b)(1),<sup>133</sup> the definition of *child* that applies to Titles I and II of the INA. Section 322 authorizes U.S. citizen parents to apply for naturalization on behalf of a minor child under similar conditions if the child is not a permanent resident.<sup>134</sup> Since both of these provisions relate to citizenship acquisition *after birth*, they are outside the central focus of this Article.

**C. Recognition of Parent and Child under INA Section 101(b) for Immigration Purposes**

Unlike the various provisions affecting parent-child relationship recognition in the citizenship and naturalization context, INA section 101(b)'s definition of the word *child* applies in a uniform manner throughout INA Titles I and II, which cover noncitizenship related immigration benefits, inadmissibility, and relief from removal. INA section 101(b)(1) expressly enumerates a comprehensive list of parent-child relationship categories that qualify a child for recognition.<sup>135</sup> Then section 101(b)(2) provides that a parent will be recognized "where the relationship exists by reason of any of the circumstances" defining *child* in INA section 101(b)(1).<sup>136</sup>

The categories of *child* listed in INA section 101(b)(1) include a "child born in wedlock."<sup>137</sup> The categories also include:

[A] child legitimated under the law of the child's [or father's] residence or domicile

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<sup>133</sup> *Id.* § 1431(b); *id.* § 1101(b)(1).

<sup>134</sup> *Id.* § 1433.

<sup>135</sup> *Id.* § 1101(b)(1). This definition also specifies that a *child* is "an unmarried person under twenty-one years of age . . ." *Id.*

<sup>136</sup> *Id.* § 1101(b)(2). Although not expressly stated in the INA, the BIA considered the "circumstances leading to a child-parent relationship as specified under subparagraphs (A), (B), (C), (D), or (E)" as well as the legislative history in favor of family unity and other considerations, and came to the reasonable conclusion that "[w]hile for immigration purposes a 'child' ceases to be a child . . . when it reaches the age of twenty-one or becomes married, the parent, once the required relationship has been established, always remains a parent." *In re G*, 8 I. & N. Dec. 355, 357-59 (B.I.A. 1959). Otherwise, some provisions of the INA would be nonsensical. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (describing quota-exempt *immediate relatives* to include "children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age").

<sup>137</sup> 8 U.S.C. § 1101(b)(1)(A) (2006).

. . . , whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.<sup>138</sup>

However, the Act provides no affirmative definition of the terms *in wedlock*,<sup>139</sup> *legitimated*, or *legitimation*.

INA section 101(b)(1)(D) provides for recognition of a “child born out of wedlock” in relation to “its natural mother[,]” or to “its natural father” if the father and child developed “a bona fide parent-child relationship.”<sup>140</sup> While the plain meaning of the term *natural father* as a child’s genetic father may be clear, the meaning of *natural mother* is much less clear in the context of a child whose genetic mother and surrogate or gestational mother are two different people.

Since this Article focuses on unresolved issues relating to children conceived through ART, it will focus primarily on the categories of children born in wedlock. It will also briefly examine the possible meanings of *natural mother*. The INA is clear in expressly stating that *legitimation* will be determined under state or foreign law.<sup>141</sup> While INA section 101(b)(1) also references stepchildren<sup>142</sup> and adopted children,<sup>143</sup> those relationships are based on a marriage or legal adoption occurring *after* birth, so they are largely outside the scope of this Article’s focus on ART.

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<sup>138</sup> *Id.* § 1101(b)(1)(C).

<sup>139</sup> The terms *marriage* and *spouse* are defined in another federal law. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)). However, DOMA should not be read to control the definition of *in wedlock* and *out of wedlock* under the INA. *See infra* notes 339-42 and accompanying text.

<sup>140</sup> 8 U.S.C. § 1101(b)(1)(D).

<sup>141</sup> *See id.* § 1101(b)(1)(C), (c)(1).

<sup>142</sup> *Id.* § 1101(b)(1)(B).

<sup>143</sup> *Id.* § 1101(b)(1)(E)-(G).

**D. Significance of Parent-Child Recognition Throughout the INA**

The word *child* is one of the most important terms in the INA. The primary category of immigrant visa not subject to a specific numerical quota is comprised of *immediate relatives* of U.S. citizens, including parents and children.<sup>144</sup> The INA also expressly defines important terms like *parent*, *father*, and *mother* for purposes of Titles I and II by reference to the definition of *child*.<sup>145</sup> Since other family relationships like *brother*, *sister*, *son*, and *daughter* are not defined in the INA, the definition of *child* controls the meaning of these important terms as well.<sup>146</sup> That is, a brother and sister are only recognized for immigration purposes if both qualify as a *child* of at least one common parent.<sup>147</sup>

The citizenship of children born abroad to U.S. citizens depends on recognition of their relationship with their citizen parents.<sup>148</sup> Recognition as an *immediate relative*, *parent*, *child*, *son*, or *daughter* under U.S. immigration law frequently determines the ability of foreign nationals to obtain a visa, gain admission into the United States, legalize unlawful status, remain in the United States temporarily or permanently, or even be deported.<sup>149</sup> In fact, the vast majority of immigrant visa quota numbers are also allotted to the close relatives of other

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<sup>144</sup> See *id.* § 1151(b)(2)(A). The term *immediate relative* encompasses “children, spouses, and parents of a citizen,” provided that no child can petition for a parent until the child reaches the age of twenty-one. *Id.*

<sup>145</sup> *Id.* § 1101(b)(2). The only express definition of these terms for purposes of Title III is limited to an indication that they “include in the case of a posthumous child a deceased parent, father, and mother.” *Id.* § 1101(c)(2). However, courts and the BIA have frequently referred to the definition of *child* in 8 U.S.C. § 1101(c)(1) to understand the terms *parent*, *father*, and *mother* as used in Title III of the INA. See, e.g., *In re K-W-S*, 9 I. & N. Dec. 396 (B.I.A. 1961).

<sup>146</sup> See, e.g., U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 9 § 40.1 N6, N6.1, N6.2 (2009) [hereinafter FOREIGN AFFAIRS MANUAL 9] (defining *brothers* and *sisters* in relation to their meeting the definition of *child* with regard to at least one common parent).

<sup>147</sup> See *In re K-W-S*, 9 I. & N. Dec. at 407-08.

<sup>148</sup> See 8 U.S.C. § 1401 (2006); see also *infra* notes 397-400 and accompanying text.

<sup>149</sup> Titshaw, *supra* note 33, at 546-49 nn.19-35 (providing detailed citations showing the importance of *immediate relative status* to numerous INA provisions under each of these categories).

immigrants and of qualified applicants for immigrant visas.<sup>150</sup> Altogether, in 2009, around eighty-four percent of lawful permanent residents gained their residency on the basis of recognized family relationships.<sup>151</sup>

#### IV. THE EVOLVING RECOGNITION OF PARENT-CHILD RELATIONSHIPS UNDER U.S. IMMIGRATION AND NATIONALITY LAW

This Part traces important developments in the parent-child relationship definition over the last 230 years, focusing on the way immigration and nationality law eventually followed state law developments in reducing the significance of *legitimacy* for most immigration purposes over the last century.

##### A. *Jus Sanguinis: Parent-Child Relationships Transmitting U.S. Citizenship upon Birth Abroad*

The Fourteenth Amendment of the U.S. Constitution states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>152</sup> This provision expressly guarantees the rule of

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<sup>150</sup> Compare 8 U.S.C. § 1151(c) (2006) (setting aside an annual quota of 226,000 to 480,000 close relatives), with *id.* § 1151(d) (generally limiting employment-based quota numbers to 140,000), and *id.* § 1151(e) (setting a quota of 55,000 diversity-visa-lottery green cards minus the amount of visas allotted to immigrants under the Nicaraguan Adjustment and Central American Relief Act program). Since the spouses and children of employment and diversity-based green card petitioners are entitled to *derivative* employment or diversity green card status under those quotas, most immigrants in the employment visa category and almost half of those in the diversity visa categories also qualify because they are the spouses or children of someone else.

<sup>151</sup> See U.S. DEP’T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2009, at 18-19 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf).

According to the Department of Homeland Security’s (DHS) Yearbook of Immigration Statistics, over sixty-six percent of the people who became lawful permanent residents in Fiscal 2009 did so on the basis of a family-based immigrant visa petition. See *id.* If the dependant family members of those immigrating in employment, asylum, and other categories are included in the total, well over eighty percent of the 2009 lawful permanent residents gained their residency on the basis of their recognized family relationships. See *id.* (Compare Tables 6 and 7).

<sup>152</sup> U.S. CONST. amend. XIV, § 1.

*jus soli*, citizenship by birth on U.S. soil.<sup>153</sup> However, the Constitution does not specifically provide for naturalization or for transmission of citizenship to the children of U.S. citizens upon birth abroad.<sup>154</sup> Therefore, citizenship is available to persons born abroad only as provided by Congress.<sup>155</sup>

Although not guaranteed under the Constitution, American laws and their English predecessors have recognized the concept of *jus sanguinis*, the transmission of citizenship at birth based on parent-child ties rather than birthplace, since at least the fourteenth century.<sup>156</sup> It is the most common basis for conferring citizenship around the world, and the U.S. government has recognized *jus sanguinis* alongside *jus soli* citizenship since the founding of the republic.<sup>157</sup>

In 1790 the First United States Congress enacted “An Act to Establish an Uniform Rule of Naturalization[,]” stating that “the children of citizens of the United States, that may be born beyond the sea . . . shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have

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<sup>153</sup> See *Miller v. Albright*, 523 U.S. 420, 423-24 (1998) (Stevens, J., plurality opinion) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)) (“Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.”); see also Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case* (1608), 9 YALE J.L. & HUMAN. 74 (1997) (describing *Calvin’s Case*, the 400-year-old English decision that was adopted by early U.S. courts as the legal basis of U.S. common law *jus soli* citizenship).

<sup>154</sup> The constitution does, however, empower Congress to “[t]o establish an uniform Rule of Naturalization.” U.S. CONST. art. I, § 8.

<sup>155</sup> *Miller*, 523 U.S. at 424 (“Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress.”) (citing *Wong Kim Ark*, 169 U.S. at 703); see also *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000).

<sup>156</sup> Price, *supra* note 153, at 83 (citing the English statute *De Natis Ultra Mare*, 1351, 25 Edw. 3, ch. 2 (Eng.)).

<sup>157</sup> Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 109-10 (2010) (“Overall, *jus sanguinis* is currently the most common regime, with 69 percent of the countries in Africa, 83 percent of those in Asia, and 41 percent [down from 88 percent] of those in Europe.”); see also *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008) (stating “many countries confer citizenship based on bloodline [*jus sanguinis*] rather than, as the United States does, on place of birth [*jus soli*]”).

never been resident in the United States.”<sup>158</sup> Subsequent Congresses have added detail and tinkered with the conditions for transmission, but the basic idea has remained the same: children of U.S. citizens generally should be recognized as citizens even if they are born abroad.<sup>159</sup> The primary limiting concern expressed in the original Act was the need for young citizens to develop sufficient contacts with American culture and values.<sup>160</sup> Today, the INA still uses a modified version of its initial tactic of ensuring those contacts by requiring parental residency in the United States prior to citizenship transmission.<sup>161</sup>

The 1790 Act’s citizenship transmission provision has been altered in some significant ways. For instance, the 1790 Act was based on the patriarchal assumption that citizenship, like a child’s surname, property, and legitimacy, is transmitted only through the child’s father, not his mother.<sup>162</sup> This sexist concept of citizenship transmission continued in one form or another for 144 years.<sup>163</sup> However, in 1934 Congress extended the ability to transmit citizenship to U.S. citizen mothers who gave birth to a child abroad by amending the provision for

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<sup>158</sup> An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103, 104 (1790), *repealed by* ch. 20, 1 Stat. 414 (1795).

<sup>159</sup> 8 U.S.C. § 1401 (2006).

<sup>160</sup> *See generally* An Act to Establish an Uniform Rule of Naturalization, *supra* note 158.

<sup>161</sup> *See, e.g.*, 8 U.S.C. § 1401(c) (2006) (providing transmission of citizenship to a child born abroad if both parents are U.S. citizens, “one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person”); *id.* § 1401(e) (providing transmission of citizenship to a child born abroad of one U.S. citizen parent, “who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person”).

<sup>162</sup> *See* An Act to Establish an Uniform Rule of Naturalization, *supra* note 158.

<sup>163</sup> *See id.*; An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on that Subject, ch. 20, 1 Stat. 414, 415 (1795), *repealed by* ch. 28, 2 Stat. 153 (1802); An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Acts Heretofore Passed on that Subject, ch. 28, 2 Stat. 153, 155 (1802); An Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof, ch. 71, 10 Stat. 604, 604 (1855); Citizenship, § 1993, 1 Rev. Stat. 350, 350 (1878); Amended § 1993, Equal Nationality Act, Pub. L. No. 73-250, 48 Stat. 797, 797 (1934); *see also* FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1135 (tracing the statutory language for citizenship transmission by birth abroad from 1878 through 1941).

citizenship at birth to apply to “[a]ny child hereafter born out of the limits . . . of the United States, whose father *or mother or both* at the time of the birth of such child is a citizen[,]” so long as the “citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child.”<sup>164</sup>

Six years later, when it finally revised, organized, and codified many divergent citizenship laws in the Nationality Act of 1940, Congress included a citizenship transmission regime conceptually very similar to the one we have today, including a specific breakdown of different categories for transmission based on how many and which parents are U.S. citizens and the corresponding U.S. physical residence requirements.<sup>165</sup> The 1940 Act also introduced the current language providing transmission of citizenship to “person[s] born . . . of parents[,]” rather than to *children, mothers, or fathers*.<sup>166</sup>

The Nationality Act of 1940 included a separate section, providing for transmission of citizenship to the children of unwed U.S. citizen mothers who met U.S. residence requirements, as well as certain children “born out of wedlock” to U.S. citizen fathers if “paternity is established during minority, by legitimation, or adjudication by a competent court.”<sup>167</sup> Section 309(a) of the current INA continues to provide separately for citizenship transmission for these children born abroad “out of wedlock.”<sup>168</sup>

Congress chose to define citizenship transmission without using the term *child* in the 1940 Act and in the current INA.<sup>169</sup> In both cases,

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<sup>164</sup> Equal Nationality Act, *supra* note 163 (emphasis added); *see also* FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1135.6-1. While the INA was not revised to transmit citizenship from U.S. citizen mothers alone until 1934, the DOS, in order to avoid statelessness for children, recognized citizenship transmission from unmarried U.S. citizen mothers to their children from around 1912 until the U.S. Attorney General overruled this practice in 1930, in *Citizenship of Illegitimate Children*, 39 Op. Att’y Gen. 290. *Id.* § 1135.2-2.

<sup>165</sup> *See* Nationality Act of 1940, Pub. L. No. 76-853, § 201, 54 Stat. 1137, 1138; *see also* Matter of M, 3 I. & N. Dec. 850 (B.I.A. 1950) (quoting from the Nationality Act of 1940).

<sup>166</sup> Nationality Act of 1940, *supra* note 165, at 1137, 1138-39.

<sup>167</sup> *Id.* at 1137, 1139.

<sup>168</sup> 8 U.S.C. § 1409 (2006).

<sup>169</sup> *See* Nationality Act of 1940, *supra* note 165; 8 U.S.C. § 1101(c)(1) (2006).

this choice excepted particular categories of children from citizenship transmission. The 1940 law excepted adopted children through this omission.<sup>170</sup> Although the INA now provides for automatic citizen transmission to certain adopted children,<sup>171</sup> that transmission occurs after birth and is provided for separately from the provisions recognizing citizenship transmission at birth, which still exclude adopted children through the same language used in 1940.<sup>172</sup>

As described below, citizenship transmission upon birth abroad is the one area in which there are already important opinions clearly applying to the recognition of parent-child relationships formed through ART.<sup>173</sup> These decisions serve as the starting point for a discussion of INA recognition of nonbiological parent-child relationships. However, it is important to remember the particular significance and the unique language and history of the citizenship transmittal provisions, so as not to extrapolate too much into other contexts like that of U.S. immigration law discussed below.

***B. Immigration History: Valuing Family Unification, Defining Legitimacy, and Deferring to State or Foreign Legal Definitions of Familial Relationships***

The last century saw a great deal of change regarding the terminology and treatment of children born out of wedlock. Congress ameliorated the consequences of birth out of wedlock under U.S. immigration law, and, following the intent of Congress, the BIA became very liberal in finding *legitimate* parent-child or sibling relationships based on marriages that are questionable or even clearly invalid for other immigration purposes, so long as the children were *legitimate* under relevant state or foreign law.

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<sup>170</sup> Compare Nationality Act of 1940, *supra* note 165, § 102(h) (defining *child* to include a child adopted before reaching the age of sixteen), *with id.* § 201(c) (providing for citizenship transmission at birth to “a person born outside of the United States . . . of parents” who were citizens of the United States). See Nationality Act of 1940, *supra* note 165, at 1138-39.

<sup>171</sup> 8 U.S.C. § 1431(b) (2006).

<sup>172</sup> 8 U.S.C. § 1401 (2006).

<sup>173</sup> See *infra* notes 272, 295, 307, 318 and accompanying text.

1. Early Historical Focus on Family Unity and Reliance on  
*Legitimacy* in Determining Parent-Child Relationships Under  
Immigration Law

Congress began recognizing the need to make concessions for the sake of family unity in legislation soon after it began expressly excluding immigrants, felons, and certain prostitutes from the United States in 1875.<sup>174</sup> By 1885 Congress began to set the pattern for twentieth century immigration legislation. The 1885 Act generally prohibited employment-based immigration, stopping the immigration of foreign nationals whose transportation was prepaid in exchange for services to be performed after arrival in the United States.<sup>175</sup> However, it made exceptions to this general prohibition on the basis of particularly desired employment and family-based criteria. The family-based language provided that “nothing in this act shall be construed as prohibiting any individual from assisting any member of his family . . . to migrate . . . to the United States . . . .”<sup>176</sup>

As it created additional obstacles to immigration, Congress provided corresponding exceptions in order to keep families together. For instance, after establishing a literacy requirement for immigrants, it exempted the wife, mother, fiancée, and father over the age of fifty-five

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<sup>174</sup> An Act Supplementary to the Acts in Relation to Immigration, ch. 141, 18 Stat. 477 (1875).

<sup>175</sup> An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories, and the District of Columbia, ch. 164, 23 Stat. 332 (1885).

<sup>176</sup> *Id.* at 333. The 1885 act also provided exceptions for any other “relative or personal friend.” *Id.* However, these categories proved too lenient, and Congress deleted them six years later. HUTCHINSON, *supra* note 1, at 506. A simple, early version of employment-based immigration law is present in section 5 of this 1885 act, as well. See An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories, and the District of Columbia, *supra* note 175, at 333. At the time, it provided the seminal idea of both labor certification and employment preference categories, providing exceptions to general immigration of contract labor for a skilled workman in “any new industry” for which “skilled labor for that purpose cannot be otherwise obtained” and for specific, enumerated categories of professionals: actors, artists, lecturers, singers, and, oddly, domestic servants. *Id.*

of a male resident alien.<sup>177</sup> By 1903 Congress also provided special consideration for the wife or children of a lawfully admitted foreign national, who had applied for citizenship, in the event that they suffered from curable disorders for which they would otherwise be inadmissible.<sup>178</sup>

Before 1921 the basic presumption of federal immigration law was that women and accompanied children under sixteen were allowed to immigrate to the United States, so long as they were not coming as contract labor and they were not subject to one of the criminal, medical, or public charge bases for inadmissibility.<sup>179</sup> Therefore, it is not surprising to encounter no early precedent defining *child* for immigration purposes.<sup>180</sup> However, as Congress invented a complex quota system and other measures to limit immigration to the United States during the twentieth century, family-based categories and exceptions became more and more important. For instance, after Congress imposed the first immigration quota law with family-based exceptions, family relationships and terms like *parent* and *child* took on much greater significance.<sup>181</sup> This importance, in turn, required a more specific understanding of exactly who was a qualifying family member.

The Immigration Act of 1924 offered some negative clarification of the terms *child*, *mother*, and *father*, by specifying that the Act would not cover children adopted after 1923.<sup>182</sup> However, no

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<sup>177</sup> HUTCHINSON, *supra* note 1, at 506 (noting the earlier version of this 1906 literacy requirement appeared in an 1896 act, which only applied to men between the ages of sixteen and sixty).

<sup>178</sup> *Id.* at 507.

<sup>179</sup> See generally IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 1-3 (6th ed. 1998) (recounting the history of immigration laws from an open-door policy to the placement of restrictions without mentioning women and children in those restrictions until the quota system was introduced in 1921).

<sup>180</sup> Of course, federal statutes have relied on family relationships to establish the transmission of U.S. citizenship since the founding of the republic, and there were a number of reported opinions defining the term *child* under U.S. citizenship laws before the issue ever became prominent in the immigration context. See *supra* Part IV.A.

<sup>181</sup> See generally An Act to Limit the Immigration of Aliens into the United States, and for Other Purposes, 190 Stat. 153, at 155 (describing nonquota immigrants).

<sup>182</sup> See An Act to Limit the Immigration of Aliens into the United States, and for Other Purposes, *supra* note 195. The Act also set forth the original version of the current, negative definition of *marriage* under the INA by specifying that the act would not

positive definitions of *child* and *parent* were codified for immigration purposes until 1952.<sup>183</sup> Until then, judges and immigration authorities did not read the word *child* on the basis of a federal or dictionary definition, or even literally. Instead, they relied on common law, state, and foreign definitions of these family law terms when interpreting immigration statutes. At first, they borrowed the common law rule of *filius nullius*, which refused to recognize the parentage of illegitimate children.<sup>184</sup> Then, within a few decades, the understanding of *child* began evolving into a more liberal view that traced the prior move toward recognition of illegitimate children for most purposes under state law.<sup>185</sup>

## 2. The Definitions of *Child* and *Parent* Under Section 101(b) of the Immigration and Nationality Act of 1952

Congress enacted the original Immigration and Nationality Act of 1952 over President Truman's veto with fifty-seven votes (and thirteen abstentions).<sup>186</sup> Codifying, organizing, and amending all prior immigration statutes and policies to create one comprehensive system for the first time,<sup>187</sup> this Act was the most substantial immigration act in U.S. history. Almost sixty years later, it still forms the structure and basic content of the current INA and of most U.S. immigration law.

Congress recognized the importance of providing uniform general definitions of important terms like *child* and *parent* whenever possible.<sup>188</sup> The 1952 version of section 101(b) originally read in its entirety as follows:

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recognize as husband and wife, a couple joined "by reason of a proxy or picture marriage." *Id.*

<sup>183</sup> See *infra* Part V.B.2.

<sup>184</sup> See *infra* Part V.B.2.

<sup>185</sup> See *infra* Part V.B.

<sup>186</sup> HUTCHINSON, *supra* note 1, at 307.

<sup>187</sup> H.R. REP. NO. 82-1365, at 1677 (1952), reprinted in 1952 U.S.C.C.A.N. 1677.

<sup>188</sup> H.R. REP. No. 82-1365, at 1685. The Committee Report called section 101 "one of the most important segments" of the Act. *Id.* at 1683. Some immigration laws had previously offered some clarification of terms like *child*, *mother*, and *father*, but only in the negative sense of specifying certain parent-child relationships that were not covered by the statutes. See, e.g., An Act to Limit the Immigration of Aliens into the United States, and for Other Purposes, *supra* note 181, at 169 (clarifying that the terms

(1) The term “child” means an unmarried person under twenty-one years of age who is—

(A) a legitimate child; or

(B) a stepchild, provided the child had not reached the age of eighteen years at the time of the marriage creating the status of stepchild occurred; or

(C) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of the legitimation.

(2) The terms “parent”, “father”, or “mother” mean a parent, father or mother only where the relationship exists by reason of any of the circumstances set forth in (1) above.<sup>189</sup>

While it has been augmented with detailed new provisions adding adopted children to the definition,<sup>190</sup> this language has survived the last six decades largely intact. In fact, it has only been altered three times—in 1957, 1986 and 1995.<sup>191</sup>

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“‘child,’ ‘father,’ and ‘mother,’ do not include a child or parent by adoption unless the adoption took place before January 1, 1924”).

<sup>189</sup> An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, 66 Stat. 163, 171 (1952).

<sup>190</sup> 8 U.S.C. § 1101(b)(1)(E)-(G) (2006).

<sup>191</sup> See *infra* Parts IV.B.3, IV.B.5, IV.B.6.

According to its legislative history, the 1957 amendment was occasioned by a failure of the Eisenhower administration to apply the Act's definition of *child* in the liberal way in which it had been intended.<sup>192</sup> The 1986 amendment added subsection 101(b)(1)(D), which recognized *bona fide* father-child relationships for *illegitimate* children.<sup>193</sup> The 1995 amendment was intended to facilitate foreign adoptions by changing the words *legitimate* and *illegitimate* to *in wedlock* and *out of wedlock*.<sup>194</sup>

### 3. The Story Behind the 1957 Amendment to INA Section 101(b)(1): An Increasingly Liberal View of *Legitimate* Parent-Child Relationships

Upon enactment of the Immigration and Nationality Act of 1952, immigration authorities and judges finally had definitions of *child*, *parent*, *father*, and *mother* to guide them in applying immigration law.<sup>195</sup> The definitions even incorporated the general concept of *legitimacy*,<sup>196</sup> but did not clarify all ambiguities. In the end, the Eisenhower administration and Congress did not see eye to eye on the significance of *legitimacy* in recognizing some parent-child relationships under the definitions in the new Act.

By 1953 issues had arisen in which the BIA found the terms *stepchild* and *legitimate child*, taken in context, were ambiguous.<sup>197</sup> Therefore, the BIA focused on the legislative intent to keep families together, and read the term *child* to include a stepchild who was

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<sup>192</sup> See *infra* Part IV.B.3.

<sup>193</sup> See *infra* Part IV.B.6.

<sup>194</sup> See *infra* notes 230-31.

<sup>195</sup> An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, *supra* note 189.

<sup>196</sup> See *id.*

<sup>197</sup> See *In re A*, 5 I. & N. Dec. 272, 280 (B.I.A. 1953) (pointing to a patent ambiguity in the original language of INA section 101(b), which uses the term *legitimate child* in paragraph (A), but refers only to *legitimation* “under the law of the *father’s* residence or domicile” with “no reference . . . to legitimation of a child under the law of the mother’s residence or domicile”); *In re M*, 5 I. & N. Dec. 120, 123-24 (B.I.A. 1953) (pointing to varying definitions in legal and general dictionaries and in case law).

originally born out of wedlock and to find a single mother's child was *legitimate* in relation to her.<sup>198</sup>

The Attorney General disagreed with the BIA. He read a requirement of legitimacy at birth into INA section 101(b)(1)(B), and found the term *stepchild* did not cover the two-year-old son of a U.S. citizen's German wife since the child was originally born out of wedlock.<sup>199</sup> He also disagreed with the BIA's conclusion regarding the meaning of *legitimate child* in relation to a single mother.<sup>200</sup> In this case, too, the Attorney General overturned the BIA decision, siding instead with the Immigration and Naturalization Service's restrictive view of INA section 101(b)'s definition of *child*, and concluding that a child "conceived and born out of wedlock" is not a legitimate child in relation to her mother any more than she is to her father.<sup>201</sup> In both cases, the Attorney General expressly invited Congress to draft specific provisions to clarify the issues if it found the results harsh.<sup>202</sup>

Congress did just that. However, House Report 1199, which accompanied the 1957 amendment, bemoaned "the fact that the [House Judiciary] [C]ommittee's attempts to clarify legislative intent remain unsuccessful . . . ."<sup>203</sup> The report cited the same legislative history of the 1952 Act—which the BIA relied on—concluding that "[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united."<sup>204</sup>

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<sup>198</sup> See *In re A*, 5 I. & N. Dec. at 273-74 (citing the Senate and House reports accompanying their respective versions of the immigration act); *In re M*, 5 I. & N. Dec. at 125 (same).

<sup>199</sup> *In re M*, 5 I. & N. Dec. at 126.

<sup>200</sup> *In re A*, 5 I. & N. Dec. at 284.

<sup>201</sup> *Id.*

<sup>202</sup> *In re A*, 5 I. & N. Dec. at 284; *In re M*, 5 I. & N. Dec. at 126.

<sup>203</sup> H.R. REP. NO. 85-1199, at 7 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020 (referring specifically to the Attorney General's opinions in the cases of *In re M*, 5 I. & N. Dec. 120, and *In re A*, 5 I. & N. Dec. 272). While it did not name the cases or give their official citation information, the House Report on public law 85-316 did describe the holdings and specify the exact dates of the Attorney General's opinions in each case. *Id.*

<sup>204</sup> *Id.*; see also *Nation v. Esperdy*, 239 F. Supp. 531, 538 (S.D.N.Y. 1965) ("The debates are hardly more helpful although they do abound with general indications, in

Since its earlier intent had not been heeded, the Committee found a “need for the enactment” of the 1957 amendment to clarify its intent to recognize most illegitimate children under INA section 101(b).<sup>205</sup> Specifically, the 1957 statute specified that the term *child* includes a stepchild, “whether or not born out of wedlock,” and it added two new paragraphs: (E), recognizing adopted children, and (D), recognizing “an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother[.]”<sup>206</sup> As House Report 1199 reasoned, “[s]ympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent . . . .”<sup>207</sup>

The 1957 Committee cited its own 1952 Report on the original INA, which explained “the underlying intentions of our immigration laws regarding the preservation of the family unit.”<sup>208</sup> It also cited the 1952 Senate Report 1515 on its version of the INA for the proposition that “any new immigration law should provide a better method of

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line with the House report, that a principal purpose of the 1957 bill was elimination of the administrative interpretations that had kept families apart.”)

<sup>205</sup> H.R. REP. NO. 85-119.

<sup>206</sup> An Act to Amend the Immigration and Nationality Act, and for Other Purposes, Pub. L. No. 85-316, § 101(b)(i)(B)-(D), 71 Stat. 639 (1957).

<sup>207</sup> H.R. REP. 85-1199. The congressional agreement on this account seemed clear throughout the 1950s. *See id.* (“In view of the clearly expressed legislative intention to keep together the family unit wherever possible, it would appear to be a desirable result, based upon legal and equitable considerations, to adopt a liberal construction. No harm could possibly result from such a construction, and the consequences would fulfill the humane considerations involved in keeping intact the family unit.”); *see also* *Nation*, 239 F. Supp. at 535-36 (citing this 1957 legislative history); *In re K-W-S*, 9 I. & N. Dec. 396, 404 (B.I.A. 1961) (citing this legislative history for the same proposition); H.R. REP. NO. 85-1199 (“The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”); H.R. REP. NO. 82-1365, at 39 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1691 (referring to “the well-established policy of maintaining the family unit wherever possible”); S. REP. NO. 84-1515 (1952), *reprinted in* 4 IMMIGRATION AND NATIONALITY ACTS. LEGISLATIVE HISTORIES AND RELATED DOCUMENTS. 1950-1978, at 468 (Oscar M. Trelles, II & James F. Bailey, III eds. 1952) [hereinafter IMMIGRATION AND NATIONALITY ACTS] (marking on the suggestion that any new immigration law should provide a better method of keeping families of immigrants together by affording a more liberal treatment of children).

<sup>208</sup> H.R. REP. NO. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, at 1680.

keeping families of immigrants together by affording a more liberal treatment of children.”<sup>209</sup>

#### 4. Reliance on State and Foreign Family Law to Determine Issues of *Legitimacy*

Courts and the BIA have generally focused on state and foreign law in determining legitimacy for immigration purposes. Even before the amendment of INA section 101(b) in 1957, the BIA and Attorney General declined to extend the refusal to recognize an illegitimate child’s relationship with her mother to cases where the relevant family law considered a single mother’s child legitimate.<sup>210</sup> In the case of *In re B-S*, the BIA pointed out that legitimacy, like other family law concepts, is governed by the relevant state or country of domicile.<sup>211</sup> Generally, if a child’s birth is recognized as legitimate under the family law of the relevant jurisdiction, it will be recognized everywhere, even in jurisdictions that would not have recognized the birth as legitimate in their state.<sup>212</sup>

The definition of *legitimate* in foreign jurisdictions also controlled its meaning under INA section 101(b) in certain contexts since the term “*legitimate*” . . . is not limited to merely children in the United States.”<sup>213</sup> In fact, the BIA read the undefined, all-inclusive term *legitimate child* in Paragraph (A) to reflect the same reliance on existing state and foreign definitions of *legitimate* expressed in Paragraph (C)’s coverage of a child “legitimated under the law of the *child’s* . . . or . . . the father’s residence or domicile, *whether in or outside the United States*.”<sup>214</sup> Otherwise, “an anomalous situation would be presented, since . . . a legitimated child is regarded as legitimate from birth.”<sup>215</sup> This must have been a comfortable position

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<sup>209</sup> S. REP. NO. 84-1515, reprinted in IMMIGRATION AND NATIONALITY ACTS, *supra* note 207.

<sup>210</sup> *In re B-S*, 6 I. & N. Dec. 305, 310 (B.I.A. 1955).

<sup>211</sup> *Id.* at 309 (citing 1 JAMES SCHOUER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 735 (6th ed. 1921)).

<sup>212</sup> *Id.* (citing *Children Born Abroad Out of Wedlock*, *supra* note 5; *Citizenship of Legitimated Child*, 39 Op. Att’y Gen. 556, 557 (1937)).

<sup>213</sup> *Id.* at 308 (emphasis added).

<sup>214</sup> *Id.* (emphasis in the original).

<sup>215</sup> *Id.* at 309 (citing *Children Born Abroad Out of Wedlock*, *supra* note 5, at 164).

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for the BIA and Attorney General because legitimacy determinations for the purposes of recognizing children born outside of the United States for citizenship purposes had been recognized by the U.S. Attorney General as far back as 1920.<sup>216</sup>

The Supreme Court of the United States has endorsed this approach in other federal contexts.<sup>217</sup> In *De Sylva v. Ballentine*, the Court looked to state family law in determining whether a child was legitimate, and, therefore, covered by the term *children* under federal copyright law.<sup>218</sup> In that case, the Court noted:

The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law . . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relationships, which is primarily a matter of state concern.<sup>219</sup>

The BIA has consistently applied this approach to the INA as well. Even where immigration law would bar the parents as polygamists from entering the United States,<sup>220</sup> the BIA has repeatedly recognized parent-child and sibling relationships of the children of valid polygamous marriages under the INA.<sup>221</sup> Distinguishing between the marriage itself

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<sup>216</sup> See *Children Born Abroad Out of Wedlock*, *supra* note 5. The extreme to which even highly objectionable family law had been recognized by the U.S. immigration authorities is clear from *In re M*, 3 I. & N. Dec. 850, 852-53 (B.I.A. 1950), which explored the details of the Hitler discriminatory legislation concerning interracial marriages and other World War II era laws in order to determine that a child, born in Karlsbad, Czechoslovakia, was her father's *legitimate* child in spite of the later annulment of her parents' marriage.

<sup>217</sup> See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 581-82 (1956) (focusing on state domestic law to determine whether a child was *legitimate* and, therefore, covered by the term *children* under the federal copyright law).

<sup>218</sup> *Id.* at 580.

<sup>219</sup> *Id.* (citations omitted).

<sup>220</sup> *Id.* § 1182(a)(10)(A) (showing how the current version of the century old polygamy bar expressly declares "[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible").

<sup>221</sup> See, e.g., *In re Mohammed Alhaz Uddin*, 2006 WL 3712446 (B.I.A. 2006) (recognizing the stepparent-stepchild relationship between a man's first wife and his

and the resulting parent-child and half-sibling relationship, the BIA explained that “[t]he recognition or nonrecognition of the existence of a polygamous marriage depends on the purpose for which such recognition is invoked.”<sup>222</sup>

In addition to nonspousal relationships stemming from polygamous marriages, U.S. immigration law has also occasionally been stretched to recognize as *legitimate* the children of marriages that were not even valid where celebrated. For instance, in *In re Coletti*, the BIA recognized a child as legitimate based on his parents’ religious marriage ceremony, even though the marriage apparently was not legally valid in Italy, where it was celebrated.<sup>223</sup> While examining

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son by a second polygamous marriage); *In re Fong*, 17 I. & N. Dec. 212, 214 (B.I.A. 1980) (referring to U.S. citizen as the *legitimate child* of his father and his mother, the secondary (concubine) wife in a polygamous marriage); *In re Sandin-Nava*, 14 I. & N. Dec. 88, 91 (B.I.A. 1972) (finding that a U.S. citizen was the legitimate child of his father’s bigamous second marriage because the child’s legitimacy, although not the marriage, was recognized in the relevant jurisdiction, California); *In re Kwan*, 13 I. & N. Dec. 302, 304-05 (B.I.A. 1969) (recognizing two daughters of father’s third wife (concubine) as legitimate based on the relevant Hong Kong law); *In re Mahal*, 12 I. & N. Dec. 409, 410 (B.I.A. 1967) (recognizing the half-brother relationship of half siblings based on the valid Hindu polygamous Pakistani marriage of their mothers to the same man); *In re K-W-S*, 9 I. & N. Dec. 396, 408-10 (B.I.A. 1961) (relying on Chinese law in recognizing child of concubine in polygamous marriage as legitimate); *In re B-S*, 6 I. & N. Dec. 305, 310 (B.I.A. 1955) (refusing to look at a dictionary definition of *legitimacy* alone); see also *In re Kwong*, 15 I. & N. Dec. 312, 313-14 (B.I.A. 1975) (focusing on the fine distinction under Hong Kong law of a *tsip* and a mistress as the key to determining whether the child of a woman other than a man’s primary wife is legitimate under the INA); Scott Titshaw, *A Modest Proposal: To Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act, and the Children of Same-Sex Couples*, 25 Geo. Immigr. L.J. \_\_\_\_ (forthcoming Winter 2011). But see *In re Man*, 16 I. & N. Dec. 543, 544 (B.I.A. 1978) (denying a stepchild’s petition on behalf of her father’s secondary wife or concubine).

<sup>222</sup> *In re H*, 9 I. & N. Dec. 640, 641 (B.I.A. 1962) (footnote omitted) (refusing to recognize a spousal immigrant visa petition in the case of a marriage entered prior to termination of the previous marriage in spite of its validity in Jordan where it was celebrated, while taking note of the fact that polygamous marriages have been recognized as valid for some purposes within the United States).

<sup>223</sup> *In re Coletti*, 11 I. & N. Dec. 551, 556 (B.I.A. 1965) (“Generally, where parties have held themselves out to be man and wife, have lived together over a period of time and have considered themselves married, where there have been children born to the union, particularly where there has been the color of a marriage ceremony, for

parent-child relationships in another case, the BIA agreed with the lenient view of the Solicitor of Labor that:

[i]f the person has always believed that his parents were lawfully married and that he was a legitimate child, I see no public advantage in making a search of the laws of some foreign state in order to prove that his parents were living in sin and that he is a bastard.<sup>224</sup>

However, this liberality probably went a step too far. The BIA generally has not recognized children as *legitimate* where the law of the relevant jurisdiction neither recognizes the validity of their parents' marriage nor their legitimacy as a separate issue.<sup>225</sup> However, the BIA has recognized common law marriages where the relevant jurisdiction does, and it has recognized legitimacy on that basis as well.<sup>226</sup> Until 1995, it also consistently recognized children born out of wedlock as *legitimate*, if their state or country of birth recognized all children as *legitimate*.<sup>227</sup>

5. The 1995 Amendment Changing *Legitimate* and *Illegitimate* to *In Wedlock* and *Out of Wedlock*

The rule that legitimacy under the INA is determined under the law of the relevant state or foreign jurisdiction was very well

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immigration purposes this is a good marriage, even though proof of its formal perfection may be lacking.”)

<sup>224</sup> *In re K*, 7 I. & N. Dec. 492, 494 (B.I.A. 1957).

<sup>225</sup> See, e.g., *In re Rodriguez-Cruz*, 18 I. & N. Dec. 72, 73 (B.I.A. 1981) (overruling *In re K*, to the extent that it based legitimacy on recognition of a religious marriage that was not legally valid in the relevant foreign jurisdiction); *In re Leon*, 15 I. & N. Dec. 248, 249 (B.I.A. 1975) (distinguishing *In re Hernandez* by focusing on the different family law of the state of Michoacán in Mexico to determine that a child of only a religious marriage was not the father's legitimate child); *In re Hernandez*, 14 I. & N. Dec. 608, 613-15 (Att'y Gen. 1974) (recognizing legitimacy of child born into a relationship that was recognized as a common law marriage under the law of the relevant Mexican state, Tamaulipas).

<sup>226</sup> See, e.g., *In re A—E*, 4 I. & N. Dec. 405, 407-08 (B.I.A. 1951) (recognizing a child's legitimacy based on his birth in a common law marriage that was valid in Texas).

<sup>227</sup> See *infra* note 227 and accompanying text.

established by the early 1990s.<sup>228</sup> This meant that any father's biological child would be considered legitimate under the INA, if her country or state of birth did not recognize any distinction between *legitimate* and *illegitimate* children.<sup>229</sup> This was decisive in many cases involving communist and former communist countries, which tended to abolish the concept of *legitimacy*, expressly defining the equality of children regardless of their parents' marital status.<sup>230</sup>

Americans who wished to adopt children from Romania and other former Soviet-bloc countries as the Eastern European adoption market opened up in the early 1990s suffered from a major unintended consequence of this rule. Since all these children were considered *legitimate*, none met the definition of *orphan* under U.S. immigration law, and without the impossible signature of an unknown father, the children in these countries were not eligible to enter the United States under the orphan adoption provision.<sup>231</sup> Congress fixed this problem by amending the definition of *child* under INA section 101(b), substituting the terms *in wedlock* and *out of wedlock* for *legitimate* and *illegitimate*, thus recognizing children born out of wedlock as orphans if officially

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<sup>228</sup> See, e.g., *Lau v. Kiley*, 563 F.2d 543, 548 (2d Cir. 1977) (finding that under Article 15 of the Marriage Law of the People's Republic of China, "all children born in the PRC are legitimate at birth, in the only sense of the term 'legitimate' that is meaningful in the Chinese context" and, therefore, under INA section 101(b)(1)); *In re Kwan*, 13 I. & N. Dec. 302, 304-05 (B.I.A. 1969) (determination of legitimacy is governed by the law applicable at the time and place of a child's birth); *In re Jancar*, 11 I. & N. Dec. 365, 366-68 (B.I.A. 1965) (recognizing Yugoslav child as legitimate based on Yugoslav law recognizing no illegitimacy); *In re B-S*, 6 I. & N. Dec. 305, 310 (B.I.A. 1955).

<sup>229</sup> See *Amezquita-Soto v. INS*, 708 F.2d 898, 906-08 (3d Cir. 1983) (Gibbons, J., dissenting) (citing *In re Sanchez*, 16 I. & N. Dec. 671, 672-73 (B.I.A. 1979), *In re Wong*, 16 I. & N. Dec. 646, 648 (B.I.A. 1978), and *Lau*, 563 F.2d at 548, for this well-established proposition in order to support the finding that children born in New Jersey are also legitimate under this same rationale, but the majority found it unnecessary to reach this issue).

<sup>230</sup> See *In re Jancar*, 11 I. & N. Dec. at 368 n.1 (citing BIA cases recognizing the legitimacy of all children born in similar "Communist or Socialist systems" to that in Yugoslavia, including those in Hungary, Poland, and Romania); see also *Lau*, 563 F.2d at 548 (all children are now legitimate in the People's Republic of China); *id.* at 550-51 (tracing history of change in Chinese law after revolution).

<sup>231</sup> See *DOS Advises on Definition of Orphan*, AM. IMMIGRATION LAW. ASS'N, Dec. 6, 1995, available at InfoNet, Doc. No. 95120691 ("The change was necessary to facilitate the immigration of alien orphan children adopted by U.S. citizens.").

abandoned by their mothers, even without the signatures of absent biological fathers.<sup>232</sup>

Although not the focus of the 1995 amendment, this change also altered the significance of children's *legitimate* birth in other situations where their parents were not married.<sup>233</sup> Now, a child is no longer recognized as *legitimate* just because she is born in a country that does not recognize any distinction based on legitimacy.<sup>234</sup> However, this change has been of little consequence in most cases, due to INA section 101(b)(1)(D), which now recognizes the parent-child relationships of children born out of wedlock to *natural mothers* or to *natural fathers* when a *bona fide* relationship is established.<sup>235</sup>

Although the plain language of amended section 101(b)(1)(A) eliminated recognition of *legitimate* children whose mothers were not married when they were born,<sup>236</sup> there is nothing express or implied in the 1995 amendment that would federalize the concept of *in wedlock* and overturn well-established deference to relevant state or foreign marriage law in determining whether a child's parents were wed at his birth or not.<sup>237</sup> Therefore, the children previously recognized as *legitimate* based on their parents' common law marriages or polygamous marriages will now be recognized as born in wedlock under the amended version of INA section 101(b)(1)(A).<sup>238</sup> Today, this construction should extend to children born into legally recognized

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<sup>232</sup> Immigration and Nationality Act, Amendment, Pub. L. No. 104-51, § 101(b), 108 Stat. 467 (1995) (codified at 8 U.S.C. § 1101(b)(1)(A) (2006)).

<sup>233</sup> See FOREIGN AFFAIRS MANUAL 9, *supra* note 146, § 40.1 N2.1 (2009) ("Section 101(b)(1)(A) of the INA no longer refers to 'legitimate' children but rather to children 'born in wedlock.' Therefore, children born out of wedlock who are deemed 'legitimate' by virtue of host country law would not qualify for 'child' status under section 101(b)(1)(A) . . .")

<sup>234</sup> See *id.*

<sup>235</sup> 8 U.S.C. § 1101(b)(1)(D) (2006).

<sup>236</sup> *Id.* § 1101(b)(1)(A).

<sup>237</sup> See *supra* notes 222, 224-29 and accompanying text.

<sup>238</sup> See, e.g., *In re Mohammed Alhaz Uddin*, 2006 WL 3712446 (B.I.A. 2006) (recognizing the stepparent-stepchild relationship of a man's first wife and the son of his second polygamous wife in a decision that could have been viewed as a qualifying *natural father* relationship under INA section 101(b)(1)(D) or a "child born in wedlock" under *In re Fong*, 17 I. & N. Dec. 212 (B.I.A. 1980), a case referenced in the *In re Mohammed Alhaz Uddin* opinion); see also *supra* note 220 and accompanying text.

same-sex marriages as well, although the parents' marriages would not be recognized for spousal benefits or other purposes under U.S. immigration law.<sup>239</sup> Children born into these marital relationships are born in wedlock under state or foreign law, and U.S. immigration law has long recognized comparable parent-child relationships where the parents' spousal status in relation to each other would not be recognized for immigration purposes.<sup>240</sup>

**C. *The 1986 Amendment to INA Section 309 and the Continuing Significance of Birth In Wedlock in the INA***

In 1986 Congress amended the INA to further “simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock to an American citizen father.”<sup>241</sup> The amendment further liberalized provisions relating to children born out of wedlock,<sup>242</sup> but it also added an express requirement in INA section 309 that a father must prove his blood relationship with his child “by clear and convincing evidence” in order to deter fraudulent claims of citizenship transmission upon birth abroad.<sup>243</sup>

The U.S. Attorney General recognized that the idea of punishing illegitimate children for their parents' sins had been discredited by 1920, and U.S. immigration law later caught up and largely eliminated the INA distinctions on the basis of legitimacy. However, there are two reasons remaining for continuing to distinguish some father-child relationships on the basis of birth out of wedlock, with different

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<sup>239</sup> See *supra* note 220.

<sup>240</sup> See *supra* notes 220-23 and accompanying text.

<sup>241</sup> *Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary H.R.*, 99th Cong. 150 (1986) [hereinafter *Hearings on 1986 Amendments*] (statement of Joan M. Clark, Assistant Secretary of State for Consular Affairs); see also *Miller v. Albright*, 523 U.S. 420, 435-36 (1998) (Stevens, J., plurality opinion).

<sup>242</sup> An Act to Amend the Immigration and Nationality Act, and for Other Purposes, Pub. L. No. 99-653, 100 Stat. 3657 (1986) (replacing the original requirement of legitimation with various options including legitimation, acknowledgement under oath, and establishment of paternity by a competent court and adding 8 U.S.C. § 1101(b)(1)(D), which recognized the *bona fide* relationship of a natural father and his child for purposes of Titles I & II).

<sup>243</sup> *Id.*; see also *Miller*, 523 U.S. at 436; *Hearings on 1986 Amendments*, *supra* note 241, at 155.

consequences under modern immigration law. First, the added requirements for a child born out of wedlock ensures the likelihood that the child will form a bona fide relationship with its father, reinforcing the goal of legitimate family unity while diminishing the risk of fraudulent claims of paternity (or maternity) for the sole purpose of gaining immigration benefits.<sup>244</sup> In the context of INA section 101(b), Congress has made this clear, specifying that a father can either legitimate the child before it reaches the age of eighteen or establish a “bona fide parent-child relationship.”<sup>245</sup> In the context of citizenship transmission, increased ties to a U.S. citizen parent presumably also create a real connection and loyalty to the United States.<sup>246</sup>

Second, in the particular context of citizenship transmission upon birth abroad, Congress sought to increase the likelihood that a U.S. citizen father will pass on American values to his citizen children born out of wedlock by requiring more extensive proof of father-child ties, including a blood relationship.<sup>247</sup> However, the 1986 amendment added the blood-relationship requirement only in the context of an illegitimate birth.

## V. THE CURRENT TREATMENT OF ART FOR PURPOSES OF TRANSMITTING U.S. CITIZENSHIP

It is undisputed that Congress has the authority to specify if, when, and how U.S. citizenship is transmitted to children born to U.S. citizens or nationals abroad. In fact, Congress has felt free to define and redefine the requirements for citizenship transmission in detail so frequently that immigration attorneys often resort to complex charts to determine the requirements for various types of citizenship transmission

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<sup>244</sup> See *Miller*, 523 U.S. at 437-38 (the time limitation in section 309 “provides assurance that the formal act [legitimation, acknowledgement, or judgment of paternity] is based upon reliable evidence, and also deters fraud”); *id.* at 438 (INA section 309 also ensures that a parent has the opportunity to develop a “healthy relationship ... [with] the child while the child is a minor”).

<sup>245</sup> 8 U.S.C. § 1101(b)(1)(C)-(D) (2006).

<sup>246</sup> *Nguyen v. INS*, 533 U.S. 53, 64-65 (2001). Congress has also employed other tools for this purpose as well, such as citizenship retention requirements, which have now been discarded, and residency requirements for parents prior to the date of the citizenship transmitting birth abroad, which remain. See 8 U.S.C. § 1401 (2006).

<sup>247</sup> *Nguyen*, 533 U.S. at 62.

at the relevant time—the date of a particular person’s birth.<sup>248</sup> And courts have upheld the discriminatory treatment of children of U.S. citizens based on their dates of birth as a valid exercise of Congress’s *near plenary* powers with regard to determining the nationality of persons born abroad.<sup>249</sup>

As discussed above, the INA provisions relating to transmission of U.S. citizenship to children born abroad do not use the defined term *child*. Rather, they retain the language first codified in the Nationality Act of 1940: “a person . . . born outside the United States . . . of parents,” at least one of whom was a U.S. citizen.<sup>250</sup> Unfortunately, this language does little to clarify how the transmission law applies to children born through in vitro fertilization or other methods of ART.<sup>251</sup> Adding to the confusion, the Ninth Circuit Court of Appeals and the DOS have interpreted the statutory language in opposite ways.

**A. *The DOS’s FAM and its Zygote-Centered Definition of Children Conceived Through ART***

Not only are there no statutes defining the relationship of parents to their children conceived through ART, but neither the USCIS nor the DOS has issued formal regulations addressing these relationships. However, the DOS has clarified its opinion on ART and surrogacy in

<sup>248</sup> See, e.g., IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 1113-1120 (10th ed. 2006) (appendix B illustrates the numerous combinations of situations and dates of birth that must be reckoned with in determining transmission requirements).

<sup>249</sup> See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 799-800 (1977) (applying a highly deferential standard to congressional decisions regarding immigration policy to find no constitutional violation in a law discriminating in the definition of *child* for immigration purposes between the natural children of U.S. citizen mothers and U.S. citizen fathers); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’ plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (“over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens).

<sup>250</sup> 8 U.S.C. § 1401(c)-(e), (g).

<sup>251</sup> See *id.* § 1101(c)(2) (defining *parent* for Title III purposes by stating the term includes a deceased parent in the case of a posthumous child). Other than this minor clarification, the INA provides no definition of either “parents” or “born of . . . parents” as applied in Title III.

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the context of transmission of citizenship upon birth abroad in its FAM. The FAM is extremely important since U.S. consulates around the world rely on it to determine citizenship transmission issues. It is not, however, an ideal vehicle for establishing new policy guidelines on novel subjects like ART, since it does not result from any legislative or formal regulatory process with public comments or even reasoned explanations.<sup>252</sup> While it is understandable that the DOS initially found it necessary to establish an interim policy for consistently answering a yes-or-no question like the transmission of citizenship in the absence of clear legislative guidance, the formal rule-making process would be a better mid- or long-term solution for dealing with such novel questions that are clearly not contemplated by the controlling statutes. Unfortunately, the DOS initially treated the issue of ART as if the answers were obvious, and neither Congress nor the DOS has acted since the FAM was modified more than a decade ago.

In its construction of the parent-child relationship for purposes of citizenship transmission, the DOS focused like a laser on zygotes and the sperm and eggs that produced them. Accordingly, the DOS only recognizes transmission of U.S. citizenship from a child's genetic parents, even if the intended and legal parents are a married heterosexual couple.<sup>253</sup> "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."<sup>254</sup>

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<sup>252</sup> See *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (commenting on the position of FAM as an *agency manual*, not an interpretation arrived at through the notice-and-comment process involved in the formal regulatory process, and—therefore—not requiring deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

<sup>253</sup> See FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1446.2-2 (providing detailed examples of the zygote-based parent-child requirement). Compare 8 U.S.C. § 1401 (2006), *with id.* § 1409 (Although it does not specify a limitation to children born in wedlock, section 1401 has logically been construed to apply only in that context since the alternative provisions of section 1409 do expressly apply to "children born out of wedlock." Any other reading of these provisions would arguably render much of section 1401 meaningless. *But see infra* notes 430-32 and accompanying text).

<sup>254</sup> FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1131.4-1(a). Although many different-sex couples may not be questioned where both names appear on the birth certificate, the FAM requires that consular officers investigate when that is not the case (e.g., where a surrogate's name is on the birth certificate). *Id.* § 1131.4-1(c)(2).

The FAM specifies the precise treatment of “Citizenship in Artificial and In Vitro Insemination Cases,” clarifying that the DOS will only recognize a parent whose sperm or egg produced the zygote that became the child.<sup>255</sup> The DOS spelled out this point precisely when it discussed the necessary documentation for adjudicating citizenship transmission cases: “The key point is that the INA requires a legal and literal biological/genetic relationship. Thus, [in ART cases,] the basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg.”<sup>256</sup> While this simple focus on the nationality of sperm and ova represents a good understanding of high school biology, it does not necessarily follow from the language of the INA or from relevant legislative history.

The FAM itself provides some explanation for the zygote-centered DOS position, explaining that “[s]ince 1790 [a] prerequisite[] for transmitting U.S. citizenship to children born abroad” has been at least one U.S. citizen parent.<sup>257</sup> This purported focus on precedent sounds comforting, but it cannot actually explain the DOS’s conclusion in the novel modern context of children conceived through ART. These modern facts simply do not fit into the unified traditional view of procreation and childbirth that were clearly assumed by Congress and the courts in prior decades and centuries.<sup>258</sup> For instance, the DOS could just as easily have taken the position that a genetically unrelated gestational carrier transmitted her citizenship to any child she bore—presumably, cases since 1790 have also always recognized the relationship of a woman to any child delivered from her own womb for citizenship transmission purposes. In addition, given that the primary evidence of transmission of citizenship by birth abroad has always been an official record of birth that names both parents, it does not take a giant leap of imagination to assume that men who did not contribute the responsible sperm have been recognized since 1790 as fathers of children born to their wives abroad.

Although the DOS provided no clear explanation for the FAM’s treatment of ART, it appears to be tied to the Latin term *jus sanguinis*,

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<sup>255</sup> *Id.* § 1131.4-2.

<sup>256</sup> *Id.* § 1446.2-2(c)(4).

<sup>257</sup> *Id.* § 1131.2.

<sup>258</sup> *See supra* notes 253-55 and accompanying text.

translated in the FAM as “the law of the bloodline.”<sup>259</sup> The FAM seems to focus on the “historic Roman or civil law” tradition of recognizing the citizenship of a child born outside the territory of his country, rather than on the relevant statutory language in the INA.<sup>260</sup> It defines the term *jus sanguinis*, translates it, and provides its history in a section entitled *Authorities* at the beginning of its discussion of citizenship acquisition.<sup>261</sup> Oddly, the FAM later cites this discussion as the source for its pronouncement that “U.S. citizenship by birth abroad to a U.S. citizen parent is governed by Federal statutes. Only insofar as Congress has provided in such statutes, does the United States follow the traditionally Roman law principle of *jus sanguinis* under which citizenship is acquired by descent.”<sup>262</sup>

While this historical and international perspective of *jus sanguinis* laws may provide some context for illuminating the INA, it is clearly not a federal statute. In fact, it is a source that is entirely absent from the text of immigration statutes, DOS and USCIS regulations, and the published legislative record. The U.S. law from 1790 to 1998 actually reveals no answer to the question of whether genetic paternity is necessary to transmit citizenship. And it is even less likely that the sixth century scholars who drafted the Justinian Code were contemplating the dynamics of in vitro fertilization when they adopted the Latin term *jus sanguinis*.

While it does not ignore the distinction Congress made in providing separately for children *born out of wedlock* in INA section 309, the DOS’s leap of faith in genetic essentialism renders that distinction meaningless for most children conceived through ART. Rather than follow the well-established policy of deferring to state or foreign law to define familial concepts such as *birth out of wedlock*, it applies section 309’s requirement of a *blood relationship* to all children and treats a marriage as irrelevant if the married parents did not both donate genetic material to the zygote that grew into the child. If they did not, the FAM treats the baby as a “child born out of wedlock,” even if the married mother carried and gave birth to the child that she and her

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<sup>259</sup> FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1111(a)(2) (defining and explaining the term *jus sanguinis*).

<sup>260</sup> *Id.* § 1131.1-1(a).

<sup>261</sup> *Id.* § 1111(a)(2).

<sup>262</sup> *Id.* § 1131.1-1(a).

husband planned (probably at great sacrifice) and expected to raise to adulthood.<sup>263</sup>

***B. The Ninth Circuit's Recognition of Parental Relationships to Nonbiological Children Born in Wedlock***

Jurisdiction with regard to citizenship issues is complicated. The DOS has jurisdiction over “the determination of nationality of a person not in the United States.”<sup>264</sup> On the other hand, the jurisdiction for determining nationality issues within the United States now belongs to the DHS.<sup>265</sup> Where provided, Attorney General rulings “with respect to all questions of law shall be controlling.”<sup>266</sup> Finally, questions of citizenship constitute one of the rare areas where Congress has not eliminated federal courts’ appellate jurisdiction over the question of immigration and nationality law.<sup>267</sup>

Pursuant to this jurisdiction, the Ninth Circuit Court of Appeals reviewed and rejected the zygote-centered construction of INA section 301 favored by the FAM.<sup>268</sup> Instead, the Ninth Circuit recognized children born during their parents’ marriage, even in the absence of actual genetic ties to the U.S. citizen parent.<sup>269</sup> The two leading cases,

<sup>263</sup> *Id.* § 1131.4-2; *id.* § 1445.5-7; *id.* § 1446.2-2.

<sup>264</sup> 8 U.S.C. § 1104(a) (2006).

<sup>265</sup> *Id.* § 1103(a)(1) (conferring administration and enforcement of the INA to the DHS except where the INA delegates authority to the Secretary of State or other government actors). Prior to the creation of the DHS and the reorganization of the U.S. immigration system in the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2142, 2205 (codified as amended in several sections of 6 U.S.C. including 6 U.S.C. §§ 111, 291, 371), the Department of Justice had primary authority over the administration and enforcement of the INA within the United States. *See Scales v. INS*, 232 F.3d 1159, 1165 (9th Cir. 2000) (explaining that since the petitioner was within the United States, the Attorney General would make the determination regarding his citizenship).

<sup>266</sup> 8 U.S.C. § 1103(a)(1).

<sup>267</sup> *Id.* § 1252(b)(5)(A); *see Scales*, 232 F.3d at 1161 (describing the restriction of appellate jurisdiction over questions of deportability under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c)(4)(G), 110 Stat. 3009, as well as continuing jurisdiction over certain questions of nationality).

<sup>268</sup> *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093-94 (9th Cir. 2005); *Scales*, 232 F.3d at 1166.

<sup>269</sup> *Solis-Espinoza*, 401 F.3d at 1093; *Scales*, 232 F.3d at 1164, 1166.

*Scales v. INS* and *Solis-Espinoza v. Gonzales*, dealt with the nonbiological legal parents of children conceived through a husband's or wife's nonmarital relationship.<sup>270</sup> The *Scales* court, relying on well-established canons of statutory construction, found "no requirement of a blood relationship between [a foreign born child] . . . and his citizen father" so long as the child's parents were married at the time of the child's birth.<sup>271</sup> While not dealing expressly with children conceived through ART, the court's reasoning for recognizing parentage in wedlock in these cases, is at least as compelling in the context of a biologically unrelated child resulting from a married couple's planned use of ART.<sup>272</sup>

1. *Scales v. INS*

*Scales* was the first federal case to address the issue of whether a genetic relationship is required to transmit U.S. citizenship from a parent to a child born in wedlock abroad.<sup>273</sup> The Ninth Circuit held that it is not.<sup>274</sup>

Stanley Scales Jr. was born in the Philippines in April 1977.<sup>275</sup> His mother, a Philippine citizen, met Stanley Scales Sr., an American citizen-serviceman seven months earlier.<sup>276</sup> One week after their meeting, she informed him that she was pregnant, probably from a prior relationship.<sup>277</sup> They married just weeks before Stanley Jr. was born,<sup>278</sup> and Stanley Sr. treated Stanley Jr. as his own son.<sup>279</sup> However, Stanley Sr. later filed an affidavit with the U.S. government accepting that he

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<sup>270</sup> *Solis-Espinoza*, 401 F.3d at 1092-94; *Scales*, 232 F.3d at 1161-62.

<sup>271</sup> *Scales*, 232 F.3d at 1166; *see also* Bobo, *supra* note 129, at 365-66 (arguing that the Ninth Circuit interpretation of the requirements for citizenship is the correct approach).

<sup>272</sup> *See Solis-Espinoza*, 401 F.3d at 1092-94; *Scales*, 232 F.3d at 1164-66.

<sup>273</sup> *Scales*, 232 F.3d at 1161 (identifying this issue as a question of first impression).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1161-62.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1162.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

was not his son's *natural father*,<sup>280</sup> and the court assumed this to be the case.<sup>281</sup>

The court of appeals recognized the transmission of U.S. citizenship to Stanley Jr. on the basis of his birth, in wedlock, to Stanley Sr.'s wife, in spite of the fact that Stanley Jr. was not his genetic offspring.<sup>282</sup> The court overturned the opinions of both the immigration judge and the BIA.<sup>283</sup> It also considered and expressly rejected the FAM provisions described above, correctly noting they were not binding in that case.<sup>284</sup>

Since the DOS focuses solely on the marriage of sperm and eggs for citizenship transmission purposes, it has classified most children of ART as born out of wedlock.<sup>285</sup> On the other hand, the Ninth Circuit refused to assume this nonstatutory genetic requirement.<sup>286</sup> It focused instead on the statutory distinction between INA section 309, which regulates the citizenship of children born out of wedlock, and INA section 301, which regulates the citizenship of other children "born . . . of parents" abroad.<sup>287</sup>

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<sup>280</sup> *Id.* Stanley Sr. filed the affidavit of nonpaternity to obtain an immigrant visa for Stanley Jr. when the family moved to the United States in 1979. *Id.*

<sup>281</sup> *Id.* at 1164 ("even if the affidavit of non-paternity . . . overcome[s] the state law presumption that Scales is Petitioner's natural father, it does not defeat Petitioner's acquisition of citizenship under § 1401" (citing 8 U.S.C. § 1401 (2006), which does not require a blood relationship for citizenship transmission)).

<sup>282</sup> *Id.* at 1166.

<sup>283</sup> *Id.* at 1162, 1166.

<sup>284</sup> *Id.* at 1165-66 (emphasizing both that *Scales* involved an issue of citizenship for someone present inside, rather than outside the United States (i.e., not in the DOS's jurisdiction), and the status of the FAM as an agency manual, not an interpretation arrived at through the notice-and-comment process involved in the formal regulatory process, and—therefore—not requiring deference under *Chevron*).

<sup>285</sup> See FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1131.2; *id.* § 1445.5-7.

<sup>286</sup> *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005); *Scales*, 232 F.3d at 1165-66.

<sup>287</sup> *Solis-Espinoza*, 401 F.3d at 1092-93; *Scales*, 232 F.3d at 1164, 1165-66. While there have been other changes to the law of citizenship transmission (e.g., a residence requirement was shortened), the relevant language in 8 U.S.C. § 1401(g), covering "a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States . . ." has not changed since enactment of the Immigration and Nationality Act of 1952. Its designation within the Act was changed from paragraph (a)(7) to paragraph (g). See Pub. L. No. 95-432 (1978) (codified at 8 U.S.C. § 1401).

In *Scales*, the court recognized that “[t]he statutory provisions concerning citizenship do not address the situation presented here, where the child is ‘legitimate’ by virtue of his parents being married at the time of his birth, yet he may not be the ‘natural’ . . . child of the citizen parent.”<sup>288</sup> Respecting the significance of the parents’ marriage, it treated Stanley Jr. as “‘legitimate’ by virtue of his parents being married at the time of his birth.”<sup>289</sup> Oddly, although Stanley Jr., as the petitioner in *Scales*, focused on presumed parenthood under Washington state law, the court did not rely on the law of Washington or the Philippines, focusing instead on the dictionary definition of the term to find that Stanley Jr. was *legitimate*.<sup>290</sup> It reasoned that Stanley Sr. transmitted citizenship to his son under INA section 301, even if his affidavit of nonpaternity was sufficient to overcome the state law presumption of genetic paternity.<sup>291</sup>

The court then examined INA section 301, which determines the transmission of citizenship by birth in wedlock.<sup>292</sup> Since INA section 301 merely states that a person is a citizen if she is “born . . . of parents one of whom is an alien, and the other a citizen of the United States[.]” who met requisite U.S. residency requirements prior to the birth of such person, the court found that a “straightforward reading . . . indicates . . . no requirement of a blood relationship.”<sup>293</sup> It also noted that INA section 309 expressly requires a blood relationship for transmission of a father’s citizenship by birth out of wedlock and applied a common canon of statutory construction, reasoning that the omission of similar language in the subsection relating to *children born in wedlock* indicates a purposeful distinction.<sup>294</sup> “If Congress had wanted to ensure the same about a person born in wedlock, ‘it knew how to do so.’”<sup>295</sup>

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<sup>288</sup> *Scales*, 232 F.3d at 1164.

<sup>289</sup> *Id.* at 1164.

<sup>290</sup> *Id.* at 1164 n.8.

<sup>291</sup> *Id.* at 1164 (“[E]ven if the affidavit of non-paternity is sufficiently ‘clear, cogent, and convincing’ to overcome the state law presumption that *Scales* is Petitioner’s natural father, it does not defeat Petitioner’s acquisition of citizenship” under 8 U.S.C. § 1401).

<sup>292</sup> See 8 U.S.C. § 1401 (2006).

<sup>293</sup> *Scales*, 232 F.3d at 1164 (quoting 8 U.S.C. § 1401(g)).

<sup>294</sup> *Id.* at 1164.

<sup>295</sup> *Id.* (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)).

## 2. *Solis-Espinoza v. Gonzales*

Five years after recognizing the husband of a child's biological mother as a citizenship-transmitting parent in *Scales*, the Ninth Circuit extended its reasoning to the wife of a child's biological father in *Solis-Espinoza*.<sup>296</sup>

In *Solis-Espinoza*, Mr. Solis-Espinoza claimed citizenship through Stella Cruz-Dominguez, the U.S. citizen whom he knew as his mother.<sup>297</sup> She was married to his noncitizen biological father at the time Mr. Solis-Espinoza was born in Mexico.<sup>298</sup> The noncitizen woman who gave birth to Mr. Solis-Espinoza abandoned him, and Ms. Cruz-Dominguez was listed as the mother on his birth certificate.<sup>299</sup>

The court found these facts very similar to those in *Scales*, except "with the genders of the parents reversed."<sup>300</sup> Consequently, it followed and extended *Scales*, holding that Mr. Solis-Espinoza was born in wedlock to Ms. Cruz-Dominguez and that she had transmitted her citizenship to him under INA section 301(g).<sup>301</sup>

At first glance, this may appear to be mere recognition of gender-neutrality with regard to the statutory construction recognized in *Scales*. However, because of the lack of gender neutrality in the language of the INA, there are substantial legal differences between the two cases that made *Solis-Espinoza* more difficult.

Although the court in *Scales* found that Stanley Jr. would have met the criteria of a child born in wedlock to Stanley Sr., regardless of state law, the *Solis-Espinoza* opinion relied heavily on the law of California, the family's state of domicile.<sup>302</sup> According to the court, California law would have recognized Mr. Solis-Espinoza for all purposes as a legitimate child from the time of his birth in 1967, since his father publicly acknowledged him and received him into the family

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<sup>296</sup> *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005).

<sup>297</sup> *Id.* at 1091.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 1091-92.

<sup>300</sup> *Id.* at 1093.

<sup>301</sup> *Id.* at 1094.

<sup>302</sup> *Id.* at 1093-94 (discussing the Ninth Circuit's heavy reliance on California law).

with his wife's consent.<sup>303</sup> Therefore, INA section 301 applies to him as a child *born in wedlock*, and—the court reasoned—his genetic father's wife could transmit citizenship to him.<sup>304</sup>

*Solis-Espinoza* also focused on the general intent of Congress in drafting the INA: providing for a liberal treatment of children, promoting family unity and family responsibility, and preventing family separation.<sup>305</sup> While one could argue that a couple, who plans, organizes, and pays for a complex ART process has led to a child's birth, that argument is more difficult in a case like *Solis-Espinoza*, where we do not know when the biological father's wife found out about the pregnancy, let alone whether she planned and approved of it.<sup>306</sup> It is certainly easier to argue citizenship transmission at birth in planned ART cases involving prebirth parentage orders. In fact, in view of cases decided after *Solis-Espinoza*, this case may only remain relevant in the context of ART and possibly a rare case with facts almost identical to *Solis-Espinoza*—a father's wife who stepped into the birth mother's void so quickly that she was listed on the child's original birth certificate.

### 3. *Marquez-Marquez v. Gonzales* and Other Judicial Reactions to *Scales* and *Solis-Espinoza*

Currently, *Scales* and *Solis-Espinoza* are the only precedential decisions relating to nongenetic citizenship transmission by birth in wedlock abroad. The DOS does not appear to have noticed the opinions, and it certainly has not amended the important FAM provisions requiring a citizen sperm or egg for every transmission of U.S. citizenship. No other federal court has addressed the issue directly.

*Scales* and *Solis-Espinoza* are obviously good law in the Ninth Circuit. No reported decision of any court or agency has either

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<sup>303</sup> *Id.* at 1094.

<sup>304</sup> *See id.*

<sup>305</sup> *Id.* (quoting H.R. REP. NO. 85-1199, at 6 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020).

<sup>306</sup> Of course, it is conceivable that she did. As several commentators have pointed out, this form of non-ART surrogacy has been around for thousands of years. *See, e.g., Genesis* 30:3 (English Standard Version) (“Then [Rachel] said, ‘Here is my servant Bilhah; go in to her, so that she may give birth on my behalf, that even I may have children through her.’”).

followed or rejected these opinions elsewhere. However, a number of cases have distinguished and limited the rules of *Scales* and *Solis-Espinoza*, and it is now clear that they will not be extended beyond the context of births abroad during the time a biological parent is married to a qualified U.S. citizen, even in the Ninth Circuit.<sup>307</sup>

While at least one unreported decision of the Administrative Appeals Office (AAO) of USCIS has refused to follow the cases outside of the Ninth Circuit's jurisdiction, finding them unpersuasive, no reported opinion has gone that far.<sup>308</sup> However, a number of decisions have distinguished situations of couples who married *after* the birth of a genetic child of one spouse.<sup>309</sup>

The only other federal court of appeals to address a claim based on the *Scales* and *Solis-Espinoza* precedents was the Fifth Circuit. In *Marquez-Marquez v. Gonzales*, the Fifth Circuit took note of the Ninth Circuit cases before distinguishing them from the case of a biological mother who married a U.S. citizen *after* her child's birth, even though her husband then adopted the child.<sup>310</sup> Unlike *Solis-Espinoza*, the Fifth Circuit in *Marquez-Marquez* rejected reliance on state law, here a New Mexico law making adoption retroactive to birth, in this context as contrary to INA section 301(g), which confers recognition of citizenship at birth.<sup>311</sup> The *Marquez-Marquez* court focused on the language and context of INA section 301, which "relates to individuals who acquire United States citizenship *at birth*; it does not provide for the acquisition of citizenship after birth, by adoption or any other means."<sup>312</sup>

As the court correctly stated, the text of INA section 301 "explicitly addresses only citizenship 'at birth'" and "requires that the

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<sup>307</sup> See *infra* notes 311-30 and accompanying text.

<sup>308</sup> See *In re Applicant*, 2009 WL 1742860 (Mar. 20, 2009) (no Westlaw pagination available) (criticizing the Ninth Circuit opinions for appearing to "equate the terms 'legitimate' with 'born in-wedlock'" and classifying the birth of a child born to a married mother as "out of wedlock," because her husband was not the child's genetic father). The AAO is an administrative appellate office within the Department of Homeland Security, which reviews decisions made by USCIS adjudications officers on petitions and applications for immigration benefits.

<sup>309</sup> See *infra* notes 311-30 and accompanying text.

<sup>310</sup> *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006).

<sup>311</sup> *Id.* at 559-60.

<sup>312</sup> *Id.* at 552 (quoting from the BIA opinion).

‘person’ be ‘born ... of’ a citizen parent.”<sup>313</sup> Further analysis by the court pointed out “section 301(g)’s express requirement that the citizen parent’s United States residency prerequisites be all fulfilled ‘prior to the birth of such person,’ a requirement that would be pointless if the citizen parent could first become the parent of such person more than a decade after the person’s birth.”<sup>314</sup> The court also noted that INA section 322 includes specific provisions relating to the naturalization of adopted “foreign born children” and was unwilling to assume these provisions were only meant for those children whose parents failed to meet the residency requirements under INA section 301.<sup>315</sup> Finally, the court found it comforting that the title of INA section 301 is “Nationals and citizens of United States at birth[,]” and that it was located in a subchapter of the INA entitled “Nationality at Birth and Collective Naturalization.”<sup>316</sup>

The Fifth Circuit’s analysis in *Marquez-Marquez* is consistent with the Ninth Circuit’s analysis in *Scales* and *Solis-Espinoza*, where each court analyzed the petitioner’s circumstance at the time of birth.<sup>317</sup> However, the Fifth Circuit made clear that it had not yet decided “whether we agree with the Ninth Circuit’s interpretation that [INA] section 301(g) imposes no requirement of a blood relationship to the citizen parent for children born in wedlock.”<sup>318</sup>

The refusal to extend *Scales* and *Solis-Espinoza* to situations where marriage to the U.S. citizen parent occurred *after* the birth of his child’s spouse has been unanimous.<sup>319</sup> Additionally, the Fifth Circuit’s refusal to recognize relationships formed after birth under INA section 301 has been followed in several BIA opinions.<sup>320</sup> The Ninth Circuit itself has even followed it.<sup>321</sup>

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<sup>313</sup> *Id.* at 556-57.

<sup>314</sup> *Id.* at 557.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 559.

<sup>318</sup> *Id.*

<sup>319</sup> *See id.*; *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009); *see also infra* note 317.

<sup>320</sup> *In re Andres Guzman-Gomez*, 24 I. & N. Dec. 824 (B.I.A. 2009) (distinguishing *Scales* and *Solis-Espinoza* and refusing to extend their analysis to stepparent relationship entered after child’s birth); *In re Juan Jose Martinez-Madera*, 2006 WL

In *Martinez-Madera v. Holder*, a Ninth Circuit panel cited *Marquez-Marquez* as it refused to recognize that citizenship is transmitted to a child whose mother married a U.S. citizen, not his genetic father, seven years after the child's birth.<sup>322</sup> Mr. Martinez-Madera claimed that his stepfather legitimated him in accordance with California's legitimation statute, which provided that he then be treated as legitimate from birth.<sup>323</sup> However, the majority of the court found that no citizenship had been transmitted for two reasons.<sup>324</sup> First, it disagreed with Mr. Martinez-Madera's reading of the relevant state law, finding instead that California only allowed legitimation of a parent's biological children.<sup>325</sup> Second, it followed the Fifth Circuit's lead with regard to INA section 301, and refused to recognize that citizenship at birth can be acquired retroactively based on a later marriage.<sup>326</sup>

Soon after the decision in *Martinez-Madera*, a Ninth Circuit panel confirmed that, absent a genetic relationship, citizenship cannot be transferred to a child when the father does not marry the child's biological mother until after the child's birth.<sup>327</sup> In *United States v. Marguet-Pillado*, Judge Fernandez's opinion for the court distinguished *Scales* and *Solis-Espinoza*.<sup>328</sup> However, it also seemed to express some doubt about both the wisdom of their "erosion of a biological nexus" and the rationale underlying those opinions.<sup>329</sup>

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2008286 (B.I.A. 2006) (same); *In re Frederick Vallecera Siman*, 2006 WL 901338 (B.I.A. 2006) (same).

<sup>321</sup> *Martinez-Madera*, 559 F.3d at 937.

<sup>322</sup> *Id.* at 942.

<sup>323</sup> *Id.* at 939.

<sup>324</sup> *Id.* at 942.

<sup>325</sup> *Id.* *But see id.* at 944 (Thomas, J., dissenting) (attacking *Marquez-Marquez* because the Fifth Circuit did not explicitly evaluate state law, and arguing that Martinez-Madera was actually "legitimate from the time of his birth" under California state law retroactivity provision).

<sup>326</sup> *Id.* at 942 (majority opinion). The court also gave *Chevron* deference to the BIA opinion in this case, which it had not done in *Scales* or *Solis-Espinoza*. *Id.* The basis for this distinction is not entirely clear; perhaps, while arguing for deference to the DOS regulations in the FAM, the USCIS neglected to argue for deference to the BIA in *Scales* and *Solis-Espinoza*.

<sup>327</sup> *United States v. Marguet-Pillado*, 560 F.3d 1078, 1087 (9th Cir. 2009).

<sup>328</sup> *Id.* at 1083.

<sup>329</sup> *Id.* In fact, Judge Fernandez even cast doubt on the idea that a child born to one married parent without the other's genetic contribution was born in wedlock. *Id.*

**C. *The Inordinate Effect of Blood Relationship Requirements on Same-Sex Couples and Their Children Conceived through ART***

In theory, the vast majority of couples disadvantaged by the FAM's zygote-centered position are married different-sex couples, since they are the vast majority of the population using ART. However, any blood relationship policy will disproportionately impact same-sex couples. Same-sex couples face limited options for conceiving or adopting children, and ART is frequently their only option to build a family.<sup>330</sup> Practical considerations, social reluctance, and assumptions also are likely to result in the very different treatment of straight and gay parents who have a child using artificial insemination, in vitro fertilization, and surrogacy.

According to DOS regulations, an official birth record is normally required to demonstrate a biological parent-child relationship.<sup>331</sup> However, the genetic relationship requirement in the FAM would likely lead officers to inquire further about the biological origin of a child whose birth certificate names two same-sex parents.<sup>332</sup> Such couples are already being harmed and are sometimes forced to live

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Following a reference to the "erosion of a biological nexus" represented by *Scales* and *Solis-Espinoza*, Judge Fernandez wrote that "the erosion does not help Carlos Marguet because he was not only born out of wedlock, but also born years before Michael Marguet married Carlos Marguet's noncitizen mother. . . ." *Id.*

<sup>330</sup> See Legal Issues for Gay and Lesbian Adoption, FINDLAW, <http://family.findlaw.com/adoption/same-sex-adoption/same-sex-parent-rights.html> (last visited Dec. 28, 2010).

<sup>331</sup> See, e.g., 22 C.F.R. § 50.5 (1996) (listing "an authentic copy of the record of the birth filed with local authorities, a baptismal certificate, a military hospital certificate of birth, or an affidavit of the doctor or the person attending the birth" as the usual evidence of a child's birth provided to the DOS to support an application for registration of birth abroad).

<sup>332</sup> This is because of the common sense idea that two persons of the same sex cannot both be the biological parents of the same child. This generally valid assumption may not be entirely accurate, depending on the definition of the requisite parent-child biological relationship. For instance, a reasonable construction of this requirement might recognize both the woman who carries and delivers a child and the egg donor who provided that child's genetic material, as the child's biological mothers. It is also possible that two same-sex parents could both be the biological parent of a child even under the current FAM. For instance, a transgender parent may have been born (or still be) biologically capable of sexual intercourse with another parent of the same legal sex.

in exile abroad in order to stay with their children conceived through ART.<sup>333</sup> Adoption is not a possibility for same-sex couples in many jurisdictions, without first severing legal ties with the child—a step that many parents would hesitate to undergo—particularly gay and lesbian parents, whose parental rights are less secure in many jurisdictions.<sup>334</sup> Up to half of U.S. jurisdictions still do not allow same-sex second-parent adoption,<sup>335</sup> and such adoptions are not always predictable even in those states that do.<sup>336</sup> In light of the increasing use of ART by same-sex couples and the resulting *Gaby Boom* of the last two decades, this problem is likely to become more and more common as the years go on.<sup>337</sup>

Over the last decade, six states and the District of Columbia began legally recognizing same-sex marriages,<sup>338</sup> and three additional states are recognizing same-sex marriages from other jurisdictions.<sup>339</sup> In addition, eleven foreign jurisdictions also recognize same-sex marriages.<sup>340</sup> These rapid changes will inevitably result in increasing immigration by same-sex spouses and their children.

#### ***D. DOMA and its Effect on Gay and Lesbian Couples and Their Children***

Complicating the analysis of the immigration relationship of same-sex couples and their legal children conceived through ART is

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<sup>333</sup> See *supra* note 19 (describing situations involving lesbian couples who have been unable to obtain U.S. passports for children conceived through ART).

<sup>334</sup> See generally Kauffman, *supra* note 100 (discussing the need to legally secure parental relationships).

<sup>335</sup> *Id.* at 25 (estimating that around half of the states allow same-sex second-parent adoptions).

<sup>336</sup> See Christensen, *supra* note 58, at 1764 (even where available, approval of same-sex second-parent adoptions are highly dependent on the discretion of judges and social services personnel).

<sup>337</sup> See *supra* note 20.

<sup>338</sup> Christensen, *supra* note 58, at 1767 n.413.

<sup>339</sup> See *id.* at 1772-74.

<sup>340</sup> Currently full marriage equality is recognized for same-sex couples throughout Argentina, Belgium, Canada, Iceland, Mexico (Mexico City), the Netherlands, Norway, Portugal, South Africa, Spain and Sweden. *International Progress Toward the Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/international-progress-toward-the-freedom-to-marry> (last visited Nov. 2, 2010).

DOMA.<sup>341</sup> DOMA defines the term *marriage*, under all federal law including U.S. immigration law, as an exclusively heterosexual institution, preventing the recognition of same-sex spouses.<sup>342</sup> Currently, this closes the door to same-sex marriage recognition under the INA,<sup>343</sup> and invalidates these marriages for the purposes of spousal-based immigration benefits.

Although it does not address parent-child relationships directly, DOMA conceivably could be read in conjunction with the INA's focus on terms such as *born of parents* and *born in wedlock* to have a tragic secondary effect on these family relationships.<sup>344</sup> However, upon closer examination it becomes clear that the language, context, and legislative history of DOMA do not lead to a reading so broad as to control the legal recognition of children of same-sex parents under the INA.<sup>345</sup> In fact, the language and intent of the INA suggests a liberal recognition of parent-child relationships, even in situations such as polygamy, where the parents are not afforded recognition as *spouses*.<sup>346</sup> Therefore, the INA should be construed to recognize parent-child relationships resulting from same-sex marriages, and under U.S. immigration and nationality law, children of those relationships should be treated the same as a child of different-sex parents where the child is recognized as *born in wedlock* under state or foreign law.<sup>347</sup> This would result in recognition of the parent-child relationship for purposes of INA Titles I and II under INA section 101(b)(1)(A).<sup>348</sup> For purposes of Title III, children should be viewed as *born of* a U.S. citizen if they are legally

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<sup>341</sup> *Id.* at 2.

<sup>342</sup> Defense of Marriage Act (DOMA), Pub. L. No. 104-199, §§ 2(a)-3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006)).

<sup>343</sup> *In re Kandu*, 315 B.R. 123, 134 (Bankr. W.D. Wash. 2004) (“The language of DOMA is clear and unambiguous. It states that, in all acts of Congress, the term ‘marriage’ means only the legal union between one man and one woman, and the word ‘spouse’ refers only to a person of the opposite sex that is a husband or wife.”).

<sup>344</sup> *See generally* 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006) (providing no language or comments regarding the parent-child relationship).

<sup>345</sup> *See* Titshaw, *supra* note 221, at 2.

<sup>346</sup> *See id.* at 11-12; *see also supra* notes 220-22 and accompanying text.

<sup>347</sup> *See generally* Titshaw, *supra* note 221, at 18 (concluding that DOMA should not prevent the recognition of parent-child relationships where the relevant state or foreign jurisdiction recognizes that relationship based on the legal relationship of that child's gay or lesbian parents).

<sup>348</sup> *See id.* at 5-7.

*born in wedlock* to one or more U.S. citizen parent within the relevant jurisdiction.<sup>349</sup>

## VI. INTERPRETING INA SECTIONS 101(B), 301, AND 309 WITH ART AND EXAMPLES

INA section 101(b) defines the terms *child* and *parent*, as employed in Titles I and II, with some detail.<sup>350</sup> However, the INA does so in terms that never anticipated the advent of either same-sex marriage or the commonplace use of ART to conceive children.<sup>351</sup> The list of parent-child categories covered under INA section 101(b) expressly includes parent-child relationships that are not based on genetic links, such as parental marriages that create a *stepchild*<sup>352</sup> or adoption.<sup>353</sup> Therefore, even if one accepts the FAM's absolute focus on genetic connections in the context of citizenship transmission, this focus should not extend to the immigration benefits and waivers covered under Titles I and II of the INA, and the DOS does not claim that it does.<sup>354</sup> The FAM is completely silent with regard to the way parent-child relationships resulting from ART will be viewed under INA section 101(b).<sup>355</sup>

### A. *Genetics and the Meaning of "Child Born in Wedlock" Under INA Section 101(b)(1)(A)*

The Supreme Court of the United States has recognized that it is appropriate to rely on state familial-relationship categorizations such as *legitimacy* when interpreting undefined familial terms in federal legislation.<sup>356</sup> The BIA, along with federal courts, has regularly relied

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<sup>349</sup> *See id.* at 7-8.

<sup>350</sup> *Id.* at 4 n.17.

<sup>351</sup> *Id.* at 4.

<sup>352</sup> *See* 8 U.S.C. § 1101(b)(1)(B) (2006) (“[A] stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time of the marriage creating the status of stepchild occurred[.]”).

<sup>353</sup> *Id.* § 1101(b)(1)(E)-(G).

<sup>354</sup> Jeffrey Gorsky, Chief, Advisory Opinions Div., Dep't of State, Visa Office, Wash. D.C., Presentation at the Am. Immigration Lawyers Ass'n 2010 Annual Conference (July 1, 2010) (indicating that the DOS's genetic transmission requirement for citizenship transmission does not necessarily extend to INA section 101(b)(1)).

<sup>355</sup> *See* Titshaw, *supra* note 221, at 10.

<sup>356</sup> *Id.* at 19.

on foreign, as well as domestic state law, to define familial terms (e.g., *legitimacy*) within INA section 101(b).<sup>357</sup>

In the case of parent-child relationship recognition under INA section 101(b)(1)(A), this well-established deference to state and foreign law is particularly appropriate since the goals of both immigration law and state and foreign family law are very similar. The goal of modern family law is to ensure the best interests of each child,<sup>358</sup> and it generally assumes that interest is best promoted when children enjoy the financial and emotional security of a legally recognized relationship with two parents. The general goal of achieving and maintaining family unity also permeates the original Immigration and Nationality Act of 1952, later revisions of that Act, and U.S. immigration law today.<sup>359</sup>

Clearly, INA definitions and other language first drafted in 1952 or earlier did not anticipate the specific issues arising from ART. Therefore, legislative history in this context should be viewed only in a general sense.<sup>360</sup> However, there is no doubt that the Immigration and Nationality Act of 1952, and the amendments of 1957, 1986 and even 1995, all focused on unifying or keeping families together, and particularly on a liberal understanding of parent-child relationships throughout immigration law.<sup>361</sup> The BIA, federal courts, and immigration officials have noted that parent-child relationships should be treated liberally.<sup>362</sup> There are numerous provisions in the INA that ensure parent-child unity, even in some situations that benefit foreign nationals who entered the United States illegally, or who were convicted of crimes that would otherwise result in their deportation.<sup>363</sup> Absent

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<sup>357</sup> *Id.*

<sup>358</sup> *See id.* at 3.

<sup>359</sup> *See id.* at 13.

<sup>360</sup> *See id.* at 4.

<sup>361</sup> *Id.* at 13.

<sup>362</sup> *Id.* at 11-12.

<sup>363</sup> *See, e.g.*, 8 U.S.C. § 1182(a)(6)(E)(ii) (2006) (providing an exception to inadmissibility based on alien smuggling in certain circumstances where it aided only the parent, spouse, son, or daughter); *id.* § 1182(a)(9)(B)(v) (providing a waiver to inadmissibility due to unlawful presence in the United States to prevent extreme hardship to the parent of a U.S. citizen or lawful permanent resident); *id.* § 1182(h)(1)(B) (providing a waiver to crime based inadmissibility which would result in extreme hardship to a U.S. citizen or lawful permanent resident parent, son, or

express statutory language to the contrary, there is no reason to believe that children conceived through ART should be treated any less liberally.

The legislative history favoring a liberal reading of INA section 101(b)(1)(A) to cover nonbiological, but legal, parent-child relationships at birth, is reinforced by the context of that provision's language.<sup>364</sup> The inclusion of stepchildren and adopted children among those covered under other subsections of INA section 101(b)(1)<sup>365</sup> shows there is no general policy limiting recognition to parents and children with genetic ties. This point is confirmed in the context of INA section 101(b)(1)(A), by contrasting its simple language regarding "a child born in wedlock," to the text of INA section 101(b)(1)(D).<sup>366</sup>

Subparagraph (D) covers children born out of wedlock in relationship to a natural mother or a natural father if they have established a "bona fide parent-child relationship."<sup>367</sup> Since Congress used the terms *natural father* and *natural mother* in the context of a child born out of wedlock in subparagraph (D), it is reasonable to infer meaning from the absence of the word *natural* in the parallel provision of subparagraph (A) covering a child born in wedlock.<sup>368</sup> In fact, if subparagraph (A) were limited to a genetic relationship of children born in wedlock, its only remaining purpose in light of subparagraph (D), would be to recognize children with no bona fide relationship with their U.S. citizen fathers.<sup>369</sup> Given congressional concern for awarding immigration benefits or waivers to only those family members with bona fide familial relationships, it is difficult to accept this reading.<sup>370</sup>

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daughter); *id.* § 1227(a)(1)(H)(i)(I) (providing for a waiver to inadmissibility based on fraud or other material misrepresentations for the parents, sons, or daughters of U.S. citizens and lawful permanent residents); *id.* § 1227(a)(3)(C)(ii) (providing for a waiver of deportability for document fraud where the fraud was solely perpetrated for the benefit of a spouse or child).

<sup>364</sup> *See id.* § 1101(b)(1)(A).

<sup>365</sup> *See generally id.* § 1101.

<sup>366</sup> *See id.* § 1101(b)(1)(A), (D).

<sup>367</sup> *Id.* § 1101(b)(1)(D).

<sup>368</sup> *See id.* § 1101(b)(1)(A), (D).

<sup>369</sup> *See generally id.*

<sup>370</sup> *See supra* note 244 and accompanying text.

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***B. Applying INA Section 101(b)(1) to Children Conceived Through ART with Examples***

It is probably easiest to understand the application of this discussion to the INA in the context of a hypothetical situation: Professor Schweizer, a German citizen, meets and marries Ms. Galicia in Spain, her country of nationality. After several years of unsuccessful attempts at pregnancy, they discover that Professor Schweizer is sterile. They then employ a doctor to artificially inseminate Ms. Galicia using the sperm of an anonymous donor.

Ms. Galicia eventually becomes pregnant and has twins, Juan and Ingo. When Professor Schweizer accepts a unique job offer to come and teach at Mercer University in the United States, the university files an H-1B visa petition on his behalf. The petition for his temporary work visa is approved, and Professor Schweizer and his family apply for his H-1B and their dependant H-4 visas at the U.S. Consulate in Madrid. During their interview, Ms. Galicia explains that she will not work without authorization in the United States because she is so happy to be able to stay home and take care of her twins. After all, she explains, they tried to get pregnant for years before resorting to artificial insemination to conceive Juan and Ingo. Intrigued by her first known encounter with an artificial insemination case, the consular officer decides to explore things further.

Since Ms. Galicia is the genetic and gestational mother of the twins, their case is easily approvable. INA section 101(b)(1)(D) clearly recognizes the parent-child relationship of a child and his natural mother even if he is born out of wedlock.<sup>371</sup> Professor Schweizer also would have qualified as the twins' stepfather under section 101(b)(1)(B).<sup>372</sup> If the consulate takes the approach recommended in this Article, the children would also qualify for H-4 visas, but the analysis would be different. The consular officer would look to the marital status of Professor Schweizer and Ms. Galicia and the birth in

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<sup>371</sup> See 8 U.S.C. § 1101(b)(1)(D) (codifying INA section 101(b)(1)(D)).

<sup>372</sup> See *id.* § 1101(b)(1)(B). A mother's husband can qualify as a stepfather under this section, even if the child is born after their marriage. See, e.g., *In re Fong*, 17 I. & N. Dec. 212, 213 (B.I.A. 1980).

wedlock under Spanish law, recognizing the children as born in wedlock under section 101(b)(1)(A).<sup>373</sup>

The case would be more complicated if a surrogate carried and gave birth to the twins. If a donor's sperm were used in an in vitro fertilization process, the children's birth would not be recognized as *in wedlock* under a genetic-essentialist model, even if Ms. Galicia's egg was used.<sup>374</sup> If a donor egg was used, Ms. Galicia would not be viewed as the child's natural mother, and it would not trigger qualification of the parents under section 101(b)(1)(D) and (B) as described above.<sup>375</sup>

In spite of the DOS's faith in genetic essentialism, it is actually unclear whether a genetic or gestational mother is the *natural mother* under INA section 101(b)(1)(D).<sup>376</sup> In light of the ambiguity of the term *natural mother* and the lack of legislative intent on this issue, it would be best to recognize either the gestational or genetic mother as a *natural mother*, depending on which mother was legally recognized by the relevant jurisdiction. In this case, that should be Ms. Galicia, and her husband would qualify again as a stepfather. Conceding the parent-child relationship of one parent, an even better approach would be to look to Professor Schweizer's and Ms. Galicia's status as parents of children *born in wedlock* under Spanish law and classify this case under section 101(b)(1)(A).<sup>377</sup> This would best comply with the family unity focus of both the INA and modern family law.

If Professor Schweizer were a woman, the analysis would be similar under the more liberal approach described in the prior paragraph. If she and her wife are both recognized as the parents at the birth of the children, they too should be recognized for purposes of immigration law for the same reasons. Since wedlock is involved, the consular officer might raise the additional issue of possible application of DOMA to recognition of their children's birth in wedlock.<sup>378</sup> However, DOMA should not change the outcome in this example. That

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<sup>373</sup> See 8 U.S.C. § 1101(b)(1)(A).

<sup>374</sup> See generally *id.*

<sup>375</sup> See *id.* § 1101(b)(1)(B), (D).

<sup>376</sup> See generally *id.* § 1101(b)(1)(D).

<sup>377</sup> See *id.* § 1101(b)(1)(A).

<sup>378</sup> See generally Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 1-3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006)).

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result is not required by the language of DOMA, and it would undermine the legislative intent of the INA without directly furthering the intent of DOMA.<sup>379</sup>

If the lesbian couple were transplanted to Germany, where they could form an official registered partnership but could not marry, the situation would be different. The INA term *in wedlock* is not broad enough to easily encompass a nonmarital partnership, particularly the German registered partnership, which does not grant all of the rights and duties of marriage. However, Ms. Galicia would still have a claim as the child's natural mother under INA section 101(b)(1)(D), and, if they later marry, Professor Schweizer might have a claim to recognition as a stepparent as well.<sup>380</sup>

Altering the fact scenario one last time, assume Ms. Galicia gave birth to the children, but the registered partners used Professor Schweizer's eggs in the *in vitro* fertilization process. Under the more liberal view of *natural mother*, both women would have a claim to motherhood under INA section 101(b)(1)(D).<sup>381</sup> While the children were born *out of wedlock*, they could each claim two *natural mothers* for U.S. immigration law purposes.<sup>382</sup> This, too, would comport with the general intent of family unity underlying the INA.

### C. *Genetics and the Meaning of INA Section 301*

The DOS is correct when it describes U.S. recognition of citizenship transmission abroad as an example of the legal principle of *jus sanguinis*.<sup>383</sup> The INA provisions in this regard do coincide with that Roman civil law concept.<sup>384</sup> Perhaps they even derive from the principle of *jus sanguinis*. However, that derivation was an indirect one based on our Founding Father's English statutory heritage and colonial life experience. In fact, the statute *De Natis Ultra Mare* of 1351 had recognized that children born abroad of English parents were natural-born subjects well over two centuries before *Calvin's Case* recognized

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<sup>379</sup> See *supra* notes 202-07 and accompanying text.

<sup>380</sup> See 8 U.S.C. § 1101(b)(1)(B), (D) (2006).

<sup>381</sup> See *id.* § 1101(b)(1)(D).

<sup>382</sup> See *id.*

<sup>383</sup> See *supra* note 261 and accompanying text.

<sup>384</sup> See generally 7 FAM 1131.1(a); 8 U.S.C. § 1101(b)(1).

the concept of *jus soli*.<sup>385</sup> As the Ninth Circuit has noted, however, Congress omitted any reference to a blood relationship in the provisions governing births abroad that are not out of wedlock.<sup>386</sup> And, the FAM's genetic-relationship requirement for transmission of citizenship to children "born . . . of parents," is misguided.<sup>387</sup>

#### 1. The Little Problem of *Of*—of Association or of Blood

Whether or not it was intentional, the Ninth Circuit's *Scales* opinion subtly altered the language of INA section 301, paraphrasing "born . . . of parents" as "born to parents."<sup>388</sup> This proved convenient in the *Solis-Espinoza* opinion, which quoted this language from *Scales* when it explained that INA section 309 did not apply to Mr. Solis-Espinoza because he too was "born to parents who were married at the time of his birth."<sup>389</sup> Convenient, because the preposition *of* in the phrase "born . . . of parents" in INA section 301 appears at first glance to support a genetics-based construction. The most common use of the word *of* is for something "[d]erived or coming from" another.<sup>390</sup> That would imply that a child born *of* parents was derived genetically from that parent, or at least derived through gestation and the physical act of birth. However, this reading is incomplete and inconclusive.

The construction of the phrase "born . . . of parents" in the citizenship transmission provisions of INA section 301 is not so straightforward. Although this combination is used four times in section 301,<sup>391</sup> and an additional two times in section 308<sup>392</sup> (relating to

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<sup>385</sup> Price, *supra* note 153, at 83 (citing *De Natis Ultra Mare*, 1351, 25 Edw. 3, ch. 2 (Eng.)).

<sup>386</sup> *Scales v. INS*, 232 F.3d 1159, 1164 (2000).

<sup>387</sup> See *supra* note 252-57 and accompanying text.

<sup>388</sup> See *Scales*, 232 F.3d at 1164 (reasoning that INA section 309 "does not apply to Petitioner . . . because he was born to parents who were married at the time of his birth") (emphasis added).

<sup>389</sup> *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093-94 (9th Cir. 2005) (emphasis added).

<sup>390</sup> AMERICAN HERITAGE DICTIONARY 588 (4th ed. 2000); see also BLACK'S LAW DICTIONARY 975 (5th ed. 1979) (describing *of* as "[a] term denoting that from which anything proceeds; indicating origin, source, descent, and the like . . .").

<sup>391</sup> See 8 U.S.C. § 1401 (2006) (codifying INA section 301).

<sup>392</sup> See *id.* § 1408 (2006) (codifying INA section 308).

“nationals, but not citizens, of the United States”),<sup>393</sup> they never appear without a long descriptive phrase between the words *born* and *of*, as in “a person *born* outside of the United States and its outlying possessions *of parents* both of whom are citizens . . . .”<sup>394</sup> In context, it seems the word *born* relates at least as much to the phrase specifying where or when the person was born as it does to the prepositional phrase *of parents*. Also, the word *of* has more than one meaning. In addition to *derived or coming from*, it also means *associated with, belonging or connected to*, and *possessing or having*.<sup>395</sup> These alternative meanings do not necessarily imply derivation and a genetic connection in the context of children and their parents.

In light of this ambiguity, there appears to be no plain meaning of the expression “born . . . of parents” as used in section 301.<sup>396</sup> Moreover, as the Ninth Circuit recognized in *Scales* and *Solis-Espinoza*, the legislative history and context of section 301 indicate that no genetic relationship is required for citizenship transmission at birth.<sup>397</sup>

## 2. The Context and History of the INA’s Provisions for Transmission of Citizenship at Birth Abroad

INA section 320 now allows for automatic derivation of U.S. citizenship for children who are not genetically related to the transmitting parent or parents.<sup>398</sup> This indicates there is no overarching goal of basing automatic citizenship transmission solely on genetic links, and there is also no reason to read one into section 301 without express language requiring it.

The original 1952 version of section 309 did not include any express genetic relationship requirement for citizenship transmission even upon birth out of wedlock.<sup>399</sup> In 1986 Congress clarified this by

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<sup>393</sup> *Id.*

<sup>394</sup> *Id.* § 1401(c) (emphasis added).

<sup>395</sup> AMERICAN HERITAGE DICTIONARY 1219 (4th ed. 2001); *see also* BLACK’S LAW DICTIONARY 1080 (5th ed. 1979) (“Associated with or connected with . . . . [A]t, or belonging to; in possession of . . .”).

<sup>396</sup> *See* 8 U.S.C. § 1401 (2006).

<sup>397</sup> *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091, 1093 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159, 1164 (9th Cir. 2000).

<sup>398</sup> *See* 8 U.S.C. §§ 1430, 1433 (2006).

<sup>399</sup> *See id.* § 1409.

adding an express blood relationship requirement for father-child recognition under section 309 for the first time.<sup>400</sup> In the process, Congress demonstrated its capacity to make such a change, but it did not alter the similar provisions for transmission of citizenship in section 301.<sup>401</sup> This is particularly telling in light of the way section 309 is structured.<sup>402</sup>

Rather than list each type of parental and residential combination required for a father to transmit citizenship to his child born out of wedlock, section 309(a) expressly references all four subparagraphs of section 301, which use the “born . . . of parents”<sup>403</sup> language, as well as one of two such subparagraphs in section 308, and provides that they “shall [also] apply . . . to a person born out of wedlock if . . . a blood relationship between the person and the father is established by clear and convincing evidence . . . .”<sup>404</sup> It seems unlikely that Congress could add the blood relationship requirement to section 309 in this context without considering an amendment to sections 301 and 308, if it intended to limit recognition of children born in wedlock to blood relationships as well.

As the Supreme Court recognized in *Nguyen*, the 1986 amendment fits neatly together with two reasons remaining for distinguishing between children born in and out of wedlock in the current version of the INA.<sup>405</sup> First, it ensures the opportunity for a true *bona fide* relationship between parent and child, thereby reinforcing the goal of legitimate family unity, while diminishing the risk of fraudulent

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<sup>400</sup> Immigration and Nationality Act of 1952, Pub. L. No. 99-653, § 309, 100 Stat. 3655 (1986).

<sup>401</sup> *See id.*

<sup>402</sup> *See* 8 U.S.C. § 1409 (2006).

<sup>403</sup> *Id.* § 1401.

<sup>404</sup> *Id.* § 1409(a) (“The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if . . . a blood relationship between the person and the father is established by clear and convincing evidence . . . .”).

<sup>405</sup> *Nguyen v. INS*, 533 U.S. 53, 62-66 (2001); *see also supra* notes 414-15 and accompanying text. These amendments added the recognition under INA section 101(b)(1)(D) of a natural father who established a “bona fide parent-child relationship” but did not legitimate his child, as well as both an express blood relationship requirement and additional options for citizenship transmission upon birth out of wedlock abroad in INA section 309. *See* 8 U.S.C. § 1409(a) (2006).

claims of paternity (or maternity) for the sole purpose of gaining immigration benefits.<sup>406</sup> Second, in the particular context of citizenship transmission, birth in wedlock implies that a U.S. citizen is likely to have contact with his child in order to transmit American values and loyalties.<sup>407</sup>

The purpose of establishing the *bona fides* of a parent-child relationship becomes clear when one compares section 301 with section 309, which requires the father of a child born out of wedlock to pledge in writing to support a child financially and to legally legitimate or acknowledge a child before she reaches the age of eighteen.<sup>408</sup> This same purpose is also clear in the immigration context of father-child recognition under section 101(b)(1)(D), which provides an alternative to birth in wedlock for a child whose father establishes a *bona fide* relationship with him.<sup>409</sup>

### 3. Family Unity, Parental Presumptions, and the Language of INA Section 301

The Ninth Circuit holding that a nonbiological father or mother could be recognized as the legal parent of a spouse's child was hardly novel. As Justice Scalia noted in *Michael H. v. Gerald D.*, a child born to a woman during her marriage is legitimate under California law, even if the child's mother's husband is not her natural father.<sup>410</sup> Additionally, states have universally recognized the mother's husband, rather than the adulterous natural father, as the legal father of a child.<sup>411</sup>

Family unity is a central goal of the INA.<sup>412</sup> In addition, the BIA and courts have long embraced a liberal understanding of requirements for parent-child recognition.<sup>413</sup> This goal is clear from the legislative history and the numerous provisions of the INA which attempt to keep parents and children together, even when one parent has entered or remained in the United States illegally or committed a

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<sup>406</sup> See *supra* note 243 and accompanying text.

<sup>407</sup> See *supra* note 245 and accompanying text.

<sup>408</sup> Compare 8 U.S.C. § 1401 (2006), with *id.* § 1409(a)(3)-(4).

<sup>409</sup> See *id.* § 1101(b)(1)(D).

<sup>410</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (Scalia, J., plurality opinion).

<sup>411</sup> *Id.* at 124.

<sup>412</sup> See *supra* note 109 and accompanying text.

<sup>413</sup> See *supra* note 108 and accompanying text.

crime.<sup>414</sup> There is no reason to refuse this liberal treatment to parent-child relationships merely because they were created using technology unanticipated at the time the INA was drafted. The language “born . . . of parents” is broad enough to encompass these new situations as well.<sup>415</sup>

In determining the applicability of general statutes to unanticipated technology in other contexts, courts encountering broad statutory language and legislative history indicating a liberal construction have tended to read statutes liberally to cover the innovations. For instance, in *Diamond v. Chakrabarty*, the Supreme Court found that an engineered microorganism could qualify as “patentable subject matter” under federal patent law, even though Congress clearly never anticipated patenting a life form when it enacted the 1952 Patent Act.<sup>416</sup> The Court’s liberal reading of the Patent Act was based on the Act’s broad language, referring to “any new . . . manufacture, or composition of matter”<sup>417</sup> and on legislative committee reports, which indicated that the law’s subject matter would “include anything under the sun that is made by man.”<sup>418</sup> Of course, the INA’s reference to “a person born . . . of parents”<sup>419</sup> is also broad, and the committee reports accompanying the Immigration and Nationality Act of 1952 and its later amendments clearly indicate a “liberal treatment of children” and family unity under that Act.<sup>420</sup> This should militate in favor of a liberal construction of the INA’s broad language in the context of unanticipated new assisted reproductive technology.

#### ***D. Applying INA Section 301 to Children Conceived Through ART with Examples***

Again, hypothetical examples can help to illustrate why the construction proposed above is preferable to the FAM’s current genetic-essentialist construction of INA section 301.

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<sup>414</sup> See *supra* note 360 and accompanying text.

<sup>415</sup> See generally 8 U.S.C. § 1401 (2006).

<sup>416</sup> *Diamond v. Chakrabarty*, 447 U.S. 303, 309, 316, 318 (1980).

<sup>417</sup> *Id.* at 307.

<sup>418</sup> *Id.* at 309.

<sup>419</sup> 8 U.S.C. § 1401 (2006).

<sup>420</sup> See *supra* note 112 and accompanying text.

U.S. citizen, Dr. Denver, marries Ms. London, British citizen. Dr. Denver is sterile, so his wife becomes pregnant through artificial insemination using donated sperm from Dr. Denver's U.S. citizen brother. If Ms. London gives birth abroad, the DOS would currently ignore Ms. London's husband and focus instead on his brother, the sperm donor, who is not married to Ms. London, leaving the baby born out of wedlock. The DOS would then apply INA section 309 and recognize the child only if the sperm donor legitimates, establishes or adjudicates that the child as *his* own.<sup>421</sup> Dr. Denver could be forced to give up rights to the legal child he intends to parent with Ms. London. Furthermore, if the couple had used a British or anonymous donor, as most doctors recommend, the child would clearly not have been a U.S. citizen.

Further, consider what would happen if Dr. Denver's sister, Debbie, is also infertile, so that she and her U.S. citizen husband used anonymously donated eggs and sperm to conceive a child through in vitro fertilization. Debbie is the gestational mother. If Debbie's baby is born while she is visiting her brother's family in England, the DOS would ignore this U.S. citizen's seven month pregnancy and five hours of labor. If he were not the sperm donor, Debbie's U.S. citizen husband, who planned to raise the child and pay for its college education, would also be irrelevant. In the DOS's view, the true parents for determining their child's citizenship are the sperm and egg donors.<sup>422</sup> Since the donors were unknown, the DOS would presume them to be noncitizens, and Debbie's children would not be recognized as citizens either.<sup>423</sup>

Of course, this construction of INA sections 301 and 309 is far removed from important government goals underlying these provisions, that is, ensuring the opportunity for a meaningful parent-child relationship between the U.S. citizen and his or her child, a relationship that would presumably expose the child to U.S. values and patriotism.<sup>424</sup> The DOS's construction would further the other goal the Supreme Court

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<sup>421</sup> See *supra* note 414 and accompanying text.

<sup>422</sup> See *supra* note 252 and accompanying text.

<sup>423</sup> See FOREIGN AFFAIRS MANUAL 7, *supra* note 14, § 1446.2-2(c)(4) ("If the donor of the egg or sperm is anonymous, the consular officer should assume that the donor is not a U.S. citizen.").

<sup>424</sup> See *supra* note 245 and accompanying text.

of the United States recognized in upholding INA section 309 as constitutional in light of a gender discrimination challenge, ensuring a blood relationship between the U.S. citizen father and a child born out of wedlock.<sup>425</sup> However, INA section 301 does not express that goal with regard to children born in wedlock.<sup>426</sup>

It is spurious, circular logic to use the express blood relationship requirement of section 309 to initially determine that because the sources of egg and sperm are not married to each other, section 309, rather than section 301, applies in a given case. The better procedure in all of these cases is to look to the family law of the relevant jurisdiction to see if a child is born in wedlock to particular parents, at which point, the proper section of the INA, either section 301 or section 309, can be employed to determine whether the child is a U.S. citizen at birth. Under this construction of the INA, Debbie's child would be a U.S. citizen, as would Dr. Denver's, assuming that he is the legally presumed father of the child born to his wife in England.<sup>427</sup>

Changing this example somewhat, let us assume that Dr. Denver is actually a woman. She and Ms. London married in Connecticut, and they are now living temporarily in Belgium, a country that recognizes their same-sex marriage. Since DOMA is probably irrelevant in this context, the analysis of this situation would be precisely the same as that described above. However, the issue of citizenship would be more difficult in a country like the United Kingdom, where marriage is impossible, but where Dr. Denver would be the presumed parent of Ms. London's child if the couple were registered civil partners.<sup>428</sup> In that event, there would be a more difficult question as to whether the child qualifies as a U.S. citizen.

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<sup>425</sup> See *Nguyen v. INS*, 533 U.S. 53, 62-64 (2001).

<sup>426</sup> See 8 U.S.C. § 1401 (2006).

<sup>427</sup> See *id.* § 1401(g) ("The following shall be nationals and citizens of the United States at birth . . . a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years . . .").

<sup>428</sup> See Human Fertilisation and Embryology Act, 2008, c. 22, § 42 (U.K.) (stating that a registered same-sex civil partner who consents to her partner's use of in vitro implantation or artificial insemination is to be treated as a legal parent of the child).

The child, whose parents are not married, would presumably not be *born in wedlock* under United Kingdom law.<sup>429</sup> However, the citizenship transmission provisions in INA section 301 do not expressly require birth in wedlock.<sup>430</sup> Rather, that requirement has been assumed due to the contrast between INA sections 301 and 309, which expressly apply to birth out of wedlock.<sup>431</sup> The difficulty in this case would be in determining whether a child is *born out of wedlock* when the United Kingdom presumes it to be the legal child of two mothers at birth on the basis of their registered civil partnership. If he is not born out of wedlock according to United Kingdom law, is there room for this child who may be born neither *in wedlock* nor *out of wedlock* under INA section 301? This is a difficult, previously unanticipated issue, but there is at least a strong argument that there is.<sup>432</sup>

### ***E. The Constitutional Avoidance Doctrine***

Even if the arguments above were not sufficiently convincing, the Supreme Court recognized in *Zadvydas v. Davis* that an ambiguous immigration statute should be construed, where reasonably possible, in a way that avoids serious constitutional questions.<sup>433</sup> A reading of INA provisions that refused immigration or citizenship recognition for otherwise legally valid parent-child relationships might raise constitutional issues.<sup>434</sup> For instance, the radically different treatment of women and men under sections 301 and 309 would raise different gender-based equal protection arguments than those the Supreme Court rejected in *Miller v. Albright*<sup>435</sup> or *Nguyen v. INS*.<sup>436</sup> In *Nguyen*, the

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<sup>429</sup> *See id.*

<sup>430</sup> *See supra* note 128 and accompanying text.

<sup>431</sup> 8 U.S.C. § 1409 (2006).

<sup>432</sup> *See Titshaw, supra* note 221.

<sup>433</sup> *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (“[I]t is a cardinal principle’ of statutory interpretation, however, that when an Act of Congress raises a ‘serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”).

<sup>434</sup> *See, e.g., Bobo, supra* note 129, at 365 (arguing “there is considerable reason to doubt the constitutionality of a blood relationship requirement” for citizenship transmission upon birth in wedlock abroad, because such a requirement would raise considerable constitutional questions).

<sup>435</sup> *Miller v. Albright*, 523 U.S. 420 (1998).

Court accepted two important government interests: the first is ensuring a biological blood relationship as specified in INA section 309;<sup>437</sup> and the second is ensuring an opportunity to develop “the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”<sup>438</sup> Neither of these interests would apply in a constitutional challenge to a genetic-essentialist construction of INA section 101(b)(1)(A) or INA section 301. Given the close five-to-four decision in *Nguyen*, such a new challenge would likely raise constitutional questions that qualified as serious.<sup>439</sup> In light of the extreme judicial deference to Congress with regard to immigration policy decisions, these arguments might not suffice in the context of a direct constitutional challenge to these INA provisions.<sup>440</sup> However, the constitutional questions are serious enough to influence the choice of one reasonable construction of the provisions over another.

## VII. CONCLUSION

With a few exceptions, the definition and treatment of children born in wedlock have been a sleepy corner of U.S. immigration law since Congress largely abandoned its policy of disadvantaging illegitimate children in the 1950s and 1980s.<sup>441</sup> However, new and unavoidable questions are beginning to arise with the growing

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<sup>436</sup> *Nguyen v. INS*, 533 U.S. 53 (2001). In addition, if the differential treatment of children born out of wedlock were still viewed as punishment for their parents' mistakes, or a disincentive for parents to conceive such children in the future, other constitutional questions might be raised. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (citations omitted) (explaining that, while “[t]he status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage . . . visiting this condemnation on the head of an infant is illogical and unjust”); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (citing *Weber*, 406 U.S. at 175) (finding that “[v]isiting . . . condemnation on the head of an infant is illogical and unjust”); see also *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down a law that did not allow intestate succession from father to an illegitimate child).

<sup>437</sup> *Nguyen*, 533 U.S. at 62; see also 8 U.S.C. § 1409(a)(1) (codifying INA section 309(a)(1)).

<sup>438</sup> *Nguyen*, 533 U.S. at 64-65.

<sup>439</sup> See generally *Nguyen*, 533 U.S. 53.

<sup>440</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”).

<sup>441</sup> See *supra* notes 6-10 and accompanying text.

popularity of ART, both in the United States and abroad. These problems are likely to accelerate as more conflicts develop between rapidly developing domestic family law, foreign family law, and the general silence of U.S. immigration law in this area.

The great issue of the last century in the area of legal parent-child relationships was the recognition and treatment of the biological children of unmarried parents. There were numerous disputes regarding whether, when, and how these *illegitimate* children should be recognized under the INA. In the end, immigration law followed the lead of family law, recognizing most relationships between *illegitimate* children and their parents.<sup>442</sup> Remaining distinctions are largely based on immigration specific concerns like whether there is a bona fide parent-child relationship and—in the area of citizenship transmission—whether the children are sufficiently connected to their parents and the United States to inherit American values.<sup>443</sup>

The growing issue of the current century relates not to the treatment of children born out of wedlock, but to the definition of *out of wedlock* itself. The advent, growing popularity, and legal recognition of both ART and same-sex couples with children are raising questions about what it means to be born in or out of wedlock. These questions were never contemplated a generation ago. Like the earlier questions related to *illegitimate* children, these too relate to real world family relationships that require reconsideration of the legal meaning of words like *parent*, *child*, *brother*, and *sister*.

Someday, there may be consensus regarding the general meaning of *parent* and *child* in a world inhabited by ART and same-sex spouses; however, currently there is not. The INA is silent on some of the questions most hotly contested regarding parent-child recognition in these areas, but state and foreign family law have been dealing with them for years. For now, the DOS, the DHS, federal courts, and Congress would all be well advised to adhere to their best traditions and defer to state and foreign family law on these issues.

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<sup>442</sup> See *supra* notes 6-9, 240-42 and accompanying text.

<sup>443</sup> See *supra* notes 243-45 and accompanying text.