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From Citizenship to Custody: Unwed Fathers Abroad and at Home

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FROM CITIZENSHIP TO CUSTODY: UNWED FATHERS ABROAD AND AT HOME

ALBERTINA ANTOGNINI*

The sex-based distinctions of the Immigration and Nationality Act (“INA”) have been remarkably resilient in the face of numerous equal protection challenges. In *Miller v. Albright*, *Nguyen v. INS*, and most recently *United States v. Flores-Villar*—collectively the “citizenship transmission cases”—the Supreme Court has upheld the constitutionality of the INA’s provisions that require unwed fathers, but not unwed mothers, to take a series of affirmative steps in order to transmit citizenship to their children born abroad.

The conventional account of these citizenship transmission cases is that the Court upholds sex-based distinctions that would otherwise fail heightened scrutiny because the immigration and citizenship context in which they arise typically affords plenary power to Congress. This Article argues that the conventional account is incomplete. The citizenship transmission cases are not best understood as examples of immigration law exceptionalism. To the contrary, they are remarkably consistent with the Court’s treatment of unwed fathers and mothers in its equal protection jurisprudence generally. An in-depth comparison of the citizenship transmission cases with the Court’s decisions regarding the rights of unwed fathers in a variety of other legal contexts reveals a uniform picture of how the Court approaches parental roles in the absence of a marital union—the Court assumes that the absence of legal ties with the father at the time of his child’s birth results in his real absence for purposes of establishing both paternity and a father-child relationship. The corollary to the unwed father’s absence is the unwed mother’s presence—the unwed mother is presumed throughout these decisions to remain with the child.

Underlying both the INA and the Court’s decisions endorsing the statute is therefore a consistent custody determination: the unwed mother, whether she is foreign or American, is understood to invariably retain custody over the child. This Article evaluates the potential consequences of making explicit the custody determina-

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tion that is implicit in the Court's citizenship transmission cases; uncovering the custody decision assumed by these rules, and assessing it on its own terms, provides reasons to question this recurring sex-based determination. This Article concludes by noting an important limitation of focusing on the gender-related aspects of the statute, namely the exclusion of any discussion concerning its citizenship-related repercussions.

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INTRODUCTION

Few sex-based distinctions survive heightened constitutional scrutiny. Yet those that distinguish between unwed American fathers and mothers are remarkably resilient. Section 309 of the Immigration and Nationality Act ("INA") contains one such distinction: under its provisions, an unwed American mother who has a child abroad with a non-American partner transmits her citizenship automatically to her child, while an unwed American father in the same position can do so only after satisfying a series of affirma-

tive requirements, including agreeing in writing to provide financial support to his child until the child is eighteen years old.¹

The Supreme Court has upheld the difference between fathers and mothers in the face of equal protection challenges brought by unwed American fathers first in *Miller v. Albright*,² and then again a few years later in *Nguyen v. INS*.³ Scholars have been uniform in their agreement that these cases are “sexist, narrow-minded, and patently conservative.”⁴ Yet the Court has continued to confirm the constitutionality of the INA’s distinctions. Two terms ago, it had occasion to revisit the issue in *Flores-Villar v. United States*, where it affirmed the lower court’s opinion, once more upholding a similar sex-based classification in an evenly split per curiam opinion.⁵

The conventional account of why these “citizenship transmission” cases survive heightened scrutiny is that the Court eschews the analysis it typically applies to sex-based distinctions for something weaker.⁶ Scholars and practitioners have attempted to explain this weaker scrutiny by pointing

¹ Immigration and Nationality Act (INA) § 309(a), (c), 8 U.S.C. § 1409(a), (c) (2006).

² 523 U.S. 420 (1998) (plurality opinion).

³ 533 U.S. 53 (2001).

⁴ See Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 245–50 (2003) (discussing the nearly unanimous scholarly response to the Court’s decisions in *Miller* and *Nguyen*). The criticisms are premised on varying reasons and normative ends, but they have consistently focused on the Court’s simplification of the role of men and women in their roles as fathers and mothers. See, e.g., Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1282 (2005) (“The picture of men as unemotional, unattached sexual beings with no connection to the children they father is astounding and deeply troubling.”); Katharine B. Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139, 1160 (1999) (criticizing the Court for simplifying the complexities of family law in favor of constitutionalization).

⁵ 131 S. Ct. 2312 (2011) (per curiam). *Miller*, *Nguyen* and *Flores-Villar* are difficult cases, as indicated by the frequent split between the justices. However, all three are consistent in upholding the sex-based distinctions.

⁶ See, e.g., Jacqueline Barrett, Notes & Comments, *Nguyen v. INS: Are Sex-Based Citizenship Laws Really Constitutional?*, 16 TEMP. INT’L & COMP. L.J. 391, 403 (2002) (“While the *Nguyen* court recited [the] standard for heightened scrutiny of gender-based classifications, it failed to follow precedent in the field.”); Morgan G. Miranda, Note, *A (Stateless) Stranger in a Strange Land: Flores-Villar and the Potential for Statelessness Under U.S. Law*, 15 J. GENDER RACE & JUST. 379, 414–15 (2012) (noting that “the majority in *Nguyen*, though purporting to apply intermediate scrutiny, applied a standard more akin to rational basis”); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power*, 1998 SUP. CT. REV. 1, 18 (1998) (“Under modern equal protection doctrine . . . Section 309(a) [of the Immigration and Nationality Act] impermissibly uses sex as an inexact proxy for other attributes of unwed parents, fosters stereotypes that ‘reflect and reinforce historical patterns of discrimination,’ and eschews sex-neutral standards that could serve the government’s purposes as well or better.”) (citation omitted); Debra L. Satinoff, Comment, *Sex-Based Discrimination in U.S. Immigration Law: The High Court’s Lost Opportunity to Bridge the Gap Between What We Say and What We Do*, 47 AM. U. L. REV. 1353, 1391 (1998) (noting that the Court has subjected the line of cases since *Fiallo* to a “facially legitimate scrutiny test” and that “[r]ecently, the Supreme Court, although purportedly not applying the *Fiallo* test, could not reach any consensus about how sex-based immigration or ‘citizenship’ laws should be analyzed”).

to the context in which the decisions are made, arguing that because the Court is considering issues related to citizenship, it applies the extreme judicial deference known as plenary power that is found in immigration law.⁷ The concern over immigration law exceptionalism⁸ has led a number of scholars, joined by some of the Justices, to urge the Court to consider these cases not to be about immigration or even citizenship, but rather to address them as decisions about the rights of American citizen mothers and fathers.⁹ Implicit in these claims is the assumption that the Court treats unwed fathers and mothers differently than it would in a purely domestic context, and upholds otherwise outdated sex-based distinctions because of the anomalous context of citizenship and immigration.¹⁰

⁷ See, e.g., Nina Pillard, Case Comment, *Plenary Power Underground* in *Nguyen v. INS: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 846–47 (2002) (“Rather than viewing the distortions in the Court’s equal protection analysis as evidence that it was straining to avoid overt reliance on the plenary power doctrine, we could equally understand the version of equal protection that the Court applied [in *Nguyen*] as . . . employing the functional equivalent of plenary power deference without acknowledging that it is doing so.”); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 628–29 (2008) (“Though Justice Kennedy claims not to address whether the plenary power should continue to modify the scrutiny given to federal government’s classifications [in *Nguyen*], it is difficult to accept his equal protection analysis without a suspicion that the special context of immigration is influencing the outcome.”); Weinrib, *supra* note 4 at 248 (“The most palpable difference between [*Nguyen*] and other equal protection decisions, including those involving non-marital children, is that *Nguyen* is about immigration and citizenship.”).

⁸ See, e.g., Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1062 (1994) (explaining “immigration law exceptionalism” whereby “[c]ourts have routinely emphasized that constitutional principles applicable elsewhere are of little effect within the immigration domain.”); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L. Q. 925, 937 (1995) (“Immigration commentators are well aware that our field has long been a constitutional oddity. For the most part, the Supreme Court has not applied to immigration cases the constitutional norms familiar in other areas of public law.”).

⁹ See, e.g., Kristin Collins & Linda Kerber, *Sexing Citizenship*, SLATE, NOV. 9, 2010, http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/sexing_citizenship.single.html (“*Flores-Villar* isn’t a case about keeping out illegal immigrants. It is a case about the rights of American mothers and fathers to equal protection of the law.”); *Miller v. Albright*, 523 U.S. 420, 476–78 (1998) (Breyer, J., dissenting) (arguing that because “[t]his case is about American citizenship and its transmission from an American parent to his child” rather than the “naturalization of aliens” then “the same standard of review must apply when a married American couple travel abroad or temporarily work abroad and have a child as when a single American parent has a child born abroad out of wedlock”).

¹⁰ See, e.g., Joanna Grossman, *The 2000-2001 Supreme Court Term On Women’s Rights: A Mixed Bag of Split Decisions*, FINDLAW (July 3, 2001), <http://writ.news.findlaw.com/grossman/20010703.html> (arguing that “*Nguyen* turns back the clock nearly three decades, eroding the equal protection jurisprudence that had been successfully eliminating gender-based stereotypes from the law.”); Aubry Holland, Comment, *The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law*, 96 CAL. L. REV. 1049, 1085 (2008) (arguing generally that “[u]nlike the advancements made in family law, immigration policies have failed to adequately modernize and accommodate the growth of non-traditional family structures,” noting that unmarried fathers have been

This Article argues that the conventional understanding of the citizenship transmission cases is critically incomplete. These cases are not best described as examples of immigration law exceptionalism. Rather, in determining the respective rights of unwed American fathers and mothers to transmit citizenship to their children born abroad, the Court relies directly on its treatment of unwed American fathers and mothers in its equal protection doctrine domestically. This point has been mostly overlooked in the literature, and there has yet to be an in-depth analysis comparing the laws governing unwed parents in the citizenship transmission to those in other state law contexts.¹¹ That analysis is the principal task of this Article.

Somewhat complicating this undertaking is the fact that the INA and the family it addresses sit uneasily on the border of two “exceptional” fields.¹² The sections of the INA addressing citizenship do not clearly fall within the plenary power doctrine of immigration law,¹³ and many unwed fathers and mothers fall outside of what is traditionally considered to be family law.¹⁴ The family indicated by the provisions of the INA exists on the

recognized in family law where they have undertaken custodial or personal responsibility over their children).

¹¹ A small number of scholars have noted the similarities in the Court’s treatment of unwed parents although in different contexts and varying depth. *See, e.g.*, Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1175–97 (2010) (addressing the similarities among equal protection cases concerning “[i]llicit heterosex,” in arguing more broadly that the Court applies a less demanding equal protection analysis in cases involving the consequences of illicit sex); Gabriel J. Chin, Essay, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMM. L.J. 257, 258 (2000) (arguing that many cases understood to be a product of plenary power would have come out the same domestically, including those addressing race, Communist affiliation, and sex and illegitimacy); Kristin Collins, Note, *When Fathers’ Rights are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1673 (2000) (suggesting that heightened scrutiny, as shown by *Miller*, is ill-equipped to address the question of parental rights because “both weak and strong applications of the equal protection test fail to reveal the coercive nature of the legal regime underlying § 1409”); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 430 (2007) (arguing that the constitutional test applied to unwed fathers throughout the Court’s equal protection jurisprudence including the cases addressing citizenship should apply to the consideration of surrogacy contracts and reproductive technology).

¹² While immigration law exceptionalism has been nearly entirely defined by judicial deference, *see supra* note 8, “family law exceptionalism” has been considered to be more widespread and refers to “the myriad ways in which the family and its law are deemed, either descriptively, or normatively, to be special.” Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 753 (2010).

¹³ Given that the Court upheld the sex-based distinctions between unmarried parents for the transmission of citizenship to children born abroad under equal protection scrutiny, the Court explained that “[it] need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’ immigration and naturalization power.” *Nguyen v. INS*, 533 U.S. 53, 61 (2001).

¹⁴ For instance, standard family law textbooks do not consider many of the unwed mother and father cases. *See, e.g.*, JUDITH AREEN ET AL., JR., FAMILY LAW CASES AND MATERIALS XX (Robert C. Clark et al. eds., 6th ed. 2012) (including *Lalli v. Lalli*, but excluding *Trimble v. Gordon* and *Gomez v. Perez*, cases about inheritance and child support, respectively, where the parents are unmarried). I use the terms “family” and “fam-

border in two other ways—it lies outside of a legally recognized relationship as the man and woman are unwed, and outside of the territory of the United States as these rules only become relevant abroad.¹⁵

Yet a close reading of the Court's equal protection cases addressing unwed parents across borders, both geographical and doctrinal, shows that its decisions consistently reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child's life thereafter. As a result, the unwed father at home and abroad must prove both a biological link and an ensuing relationship with his child.¹⁶ Looking beyond the citizenship transmission cases to the Court's general treatment of unwed fathers and mothers reveals that the family designated by the INA—which I term the “citizen family”—and the family addressed by state law—which I term the “domestic family”—overlap in core respects. Indeed, it is sometimes difficult to separate the citizen family, which is composed of the mixed-status couples before the Court in the citizenship transmission cases,¹⁷ from the domestic family, given the Court's myopic focus on the American parents in its citizenship transmission decisions.

The goal of this Article is not to question immigration law exceptionalism,¹⁸ but rather to go beyond what is understood to be exceptional and uncover deep-seated similarities that span across different bodies of law considering the relationship between unwed parents and their children. An examination of the decisions concerning unwed parents is essential in an era where the prevalence of births to parents who are unmarried is increasing

ily law” broadly to encompass the formation and dissolution of core relationships between adults and children.

¹⁵ There are two recognized means of transmitting citizenship based on birth in the United States: by place, *jus soli*, which is recognized by the U.S. Constitution, or blood relation, *jus sanguinis*, which is recognized by statute. STEPHEN LEGOMSKY & CRISTINA RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1290–94 (5th ed. 2009) (describing each means of citizenship transmission). Both ultimately depend on place of birth, for *jus sanguinis* comes into play only outside the borders of the United States. *Id.*

¹⁶ See discussion *infra* Part III. I use the term “unwed father” to describe the male parent of a nonmarital child so as to not have to rely on the “legitimate” or “illegitimate” status of the child, unless the characterization of a particular case or situation requires it. While the father of a nonmarital child can technically be married at the time, I mean to invoke the father's relation to the child he has fathered in the absence of a marital relationship with the child's mother. As a factual matter, none of the citizenship transmission cases address an otherwise married father at the time of the child's birth. In employing this term I also aim to equalize the use of “unwed father” and “unwed mother,” with full awareness of the very different socio-cultural connotations surrounding each figure.

¹⁷ *Miller v. Albright*, 523 U.S. 420, 424 (1998) (noting that the specific challenge in that case was to “the distinction drawn by INA § 309 between the child of an alien father and a citizen mother, on the one hand, and the child of an alien mother and a citizen father, on the other”).

¹⁸ For one account of plenary power and its repercussions see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 548 (1990) (examining the contradiction between constitutional norms subject to the plenary power doctrine of immigration law and “subconstitutional” norms that seem to circumscribe the problems posed by plenary power).

domestically and abroad.¹⁹ Although rarely acknowledged, the Court defines the bounds of the family in its decisions addressing citizenship as it defines the borders of citizenship in its domestic decisions addressing the treatment of the family by state laws.²⁰ It is important to note then where the Court makes assumptions about unwed American parents domestically and abroad, and where it extends those assumptions to the non-American halves of the relationship the INA considers.

Although framed in the terminology of unwed parents, these assumptions are, at their most basic, decisions about who will retain custody over the child. The INA sets forth rules based on the expectation that the mother will always retain custody in the absence of a marital relationship; and the Court affirms this sex-based allocation of parental rights, on which citizenship depends. It does so, however, without looking to a contemporary law of custody that has developed beyond a reliance on explicit gender-based preferences.²¹ Thus, embedded in the Court's decisions, is an alternate framework for understanding and ultimately critiquing the contours of the family incorporated by the citizenship transmission cases—that of custody law, which is hidden in plain sight.²²

¹⁹ In 2007, 39.7% of births were to unmarried women. See Gardiner Harris, *Out-of-Wedlock Birthrates Are Soaring*, U.S. Reports, N.Y. TIMES (May 13, 2009), <http://www.nytimes.com/2009/05/13/health/13mothers.html> (noting that births to unmarried women are also increasing in Iceland and Sweden). See also STEPHANIE J. VENTURA, NAT'L CTR. FOR HEALTH STATISTICS, CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES, NCHS DATA BRIEF, NO. 18, (May 2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.htm>.

²⁰ Family law textbooks do not include *Fiallo*, or for that matter *Miller*, or *Nguyen*, in their discussions of custody or paternity. See, e.g., AREEN et al., *supra* note 14, at 376–83, 524–34, 984–1000 (discussing unmarried fathers, children born out of wedlock and custody issues between unmarried couples without any mention of *Fiallo*, *Miller*, or *Nguyen*; including the Ninth Circuit's decision in *Flores-Villar* under the section addressing marriage, sex-discrimination, and the Fourteenth Amendment without any reference to paternity, custody, or children born out of wedlock). Scholars have, however, initiated the call to awareness of the various ways in which family and immigration law overlap some years ago. See, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1631–32 (2007) (“Just as family law scholarship has neglected to consider immigration law as family law, immigration scholarship has largely passed by the family law aspects of immigration.”); Kristin Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1762–69 (2005) (examining the federal government's role in the regulation of the family and arguing that the paradigm of state sovereignty over domestic relations should be understood as an “invention”).

²¹ See, e.g., Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIM. LAW. 451, 454–55 (2012) (describing how after the 1970s legislatures and courts systematically wiped out the “tender years” doctrine and replaced it with a gender neutral “best interests of the child” standard).

²² See ANTHONY G. AMSTERDAM & JEROME BRUNNER, *MINDING THE LAW* 113 (2000) (“Well-wrought narratives are so successful in making their answers to [] questions seem like ‘the real thing’ that they virtually blind us to the subtle architecture of their construction.”); see also discussion *infra* Part III.

This Article proceeds in three parts. Part I analyzes *Fiallo v. Bell*,²³ the first Supreme Court case to consider an equal protection challenge to the INA's treatment of the unwed father in the context of immigration legislation. Because *Fiallo*, decided squarely as an immigration case, is understood to be emblematic of the plenary power doctrine, it is not typically analyzed in conjunction with *Miller*, *Nguyen*, or *Flores-Villar*, in the treatment of sex-based distinctions.²⁴ *Fiallo*, however, sets forth the two central justifications for differentiating between unwed fathers and mothers that have defined the Court's citizenship jurisprudence in the subsequent four decades: the perceived absence of family ties between unwed fathers and their children, and the lurking problems of proof that arise in paternity determinations. While there is no dispute that plenary power dictates *Fiallo*'s analysis, I argue that its effect is evidenced not in the substance of its joint justifications, which are taken directly from the Court's cases considering unwed parents in the state statutes of the time, but in the absence of any elaboration for its reasons.

Part II examines how these justifications are maintained and expanded in the citizenship transmission context beginning with *Miller*²⁵ and ending with *Flores-Villar*,²⁶ which left differential sex-based residency requirements intact. The deference that characterized *Fiallo*'s adherence to plenary power is replaced by the discussion of "real" difference²⁷ in the Court's decisions that directly assess the equal protection challenges. These two Parts focus on the mother and father figures, which are not initially considered in conjunction and are only gradually brought into a direct comparison by the Court in its citizenship and domestic state law cases.²⁸ Part II concludes by disclosing

²³ 430 U.S. 787 (1977).

²⁴ *But see* Kristin A. Collins, *Fiallo v. Bell in Congress: Plenary Power, Coordinate Branches, and Gender-Based Nationality Laws* (forthcoming) (on file with the author) (tracing the significance of *Fiallo* in both Congress and the courts with the aim of contextualizing the transmission of citizenship cases within the larger institutional life of the plenary power doctrine); Satinoff, *supra* note 6, at 1358–64 (analyzing *Fiallo* in conjunction with *Miller*, which at the time were the only two cases to have been decided by the Court).

²⁵ 523 U.S. 420 (1998).

²⁶ 131 S. Ct. 2312, 2313 (2011) (per curiam).

²⁷ *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (Scalia, J., concurring) ("The difference between men and women in relation to the birth process is a real one . . .").

²⁸ The focus of this Article is on the father, the mother, and their unwed status, rather than on the child and his or her "illegitimacy." While the issue of illegitimacy is certainly relevant, this Article examines instead the Court's treatment of the parents, and their relation. This focus mimics the law's treatment of citizenship transmission both in the INA and by the Court in the citizenship transmission cases. Since 1995, the INA no longer distinguishes on the basis of "legitimacy" or "illegitimacy," but on the basis of "in wedlock" and "out of wedlock" which refers to the relations between the parents. Immigration and Nationality Act, Amendment, PUB. L. NO. 104-51, § 1, 109 Stat. 467 (1995) (codified as amended at INA § 309; 8 U.S.C. § 1409 (2006)) (defining the application of citizenship and nationality laws to children "born out of wedlock."). For a consideration of the different treatment of unwed father and mothers through the lens of illegitimacy, see Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 *RUTGERS L. REV.* 73, 83 (2003) (discussing *Nguyen v. INS* and *Fiallo v. Bell* as examples

the custody determination that underlies both the INA and the Court's opinions, thereby identifying an alternative framework to understand the citizenship transmission cases.

Part III presents the potential repercussions of addressing this custody determination directly. I suggest that the Court's reliance on the unwed father and mother paradigm in determining citizenship is unnecessary. A better approach would be for the Court to acknowledge explicitly the custody determination that is implicit in its analysis and to make use of the insights provided by contemporary custody law. Unlike the Court's current approach—which compares the unwed U.S. citizen mother with the unwed U.S. citizen father in what becomes an abstracted and strictly American family—adopting a custody-like framework overtly would force the Court to address the two mixed-status parents and their child before it. The turn toward custody would also require the Court to openly decide rather than surmise which parent will remain with the child, a decision that custody law directly considers. Finally, this custody-based critique elaborates on views already raised, piecemeal, in the Court's dissenting voices and the parties' articulation of the harm caused by differentiating between unwed parents based on sex.²⁹

This Article concludes by questioning the Court's focus on heteronormative notions of motherhood and fatherhood, which persist even within a custody framework. The emphasis on the sex-based nature of the INA's distinctions may also not be conducive to reviewing how the regulation of citizenship takes place. Rather, such an emphasis may conceal considerations regarding the limits set on the number of citizens recognized by the statute and their potentially race-based repercussions. Ultimately, the aim here is to enable critical consideration of the concepts that are being employed, under an account that reveals how they are being deployed.

I. IMMIGRATION DEFERENCE AND DENIAL OF DIFFERENCE: *FIALLO v. BELL*

Despite its laconic take on unwed fathers and their children, *Fiallo v. Bell* set forth the framework the Court adheres to in its decisions regarding the citizen family to this day. Justice Powell, writing for the majority, upheld the exclusion of unwed fathers, but not unwed mothers, from the statutory definition of a parent-child relationship.³⁰ While *Fiallo* was decided under

of sex-based illegitimacy classifications); Linda K. Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance*, 13 WM. & MARY J. WOMEN & L. 129, 150–53 (2006) (describing unequal citizenship transmission law as an example of Congress exercising “the bias of bastardy against non-marital fathers”).

²⁹ While this turn may counsel a move away from equal protection entirely, see Silbaugh, *supra* note 4, it is not a necessary implication and can merely supplement, rather than displace, the current constitutional framework.

³⁰ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

the judicial deference required by immigration legislation, the subsequent citizenship transmission cases have preserved this distinction between unwed parents under the intermediate scrutiny applied to sex-based categorizations.³¹

The Court sanctioned the exclusion of unwed fathers and their children from attaining preferential immigration status by virtue of their parent-child relationship, which would have enabled the recipient to, depending on the situation, bypass the applicable numerical quotas or the labor certification requirement.³² In so doing, *Fiallo* provided two central justifications for why unwed fathers and their children could reasonably be excluded: the absence of family ties between unwed father and child, and problems with proving paternity.³³ The Court, however, reached its decision without addressing the presence of the family directly, instead equating it with any other entity Congress regulates in the realm of immigration where the scope of judicial review is “limited.”³⁴

This Part begins by addressing the two justifications laid out by *Fiallo* and situates them squarely within the terrain of decisions addressing unwed American fathers and mothers in state law. It follows with an analysis of how the standard of review dictated by the plenary power doctrine allowed a near total absence in the Court’s opinion of a discussion of the family recognized by immigration law.

A. *Dual Justifications: “Perceived Absence” of Family Ties and “Problems of Proof That Usually Lurk”*

Fiallo involved a challenge brought by three fathers and their biological children to Section 101(b)(1) of the INA alleging equal protection and due process violations based on a finding that they were statutorily ineligible for preferential immigration status.³⁵ Upholding Section 101(b)(1)’s exclusion of unwed fathers from the definition of “parent,” and their children born outside of marriage from the definition of “child,”³⁶ the Court emphasized its limited role and briefly reasoned: “Congress obviously has determined

³¹ I refrain here from engaging in the debate as to whether the scrutiny for sex-based distinctions in general has been heightened by *United States v. Virginia*, 518 U.S. 515 (1996). See discussion *infra* note 297.

³² *Fiallo*, 430 U.S. at 789-90.

³³ *Id.* at 799.

³⁴ *Id.* at 792.

³⁵ *Id.* at 791. Appellants challenged the constitutionality of INA § 101(b)(1), defining child, and § 101(b)(2), defining parent, on the basis of the First, Fifth, and Ninth Amendments.

³⁶ INA § 101(b)(1) defined a child as an unmarried person under twenty-one who is a legitimate or legitimated child, stepchild, or adopted child or an illegitimate child of a natural mother. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (1958) (current version at INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2006)). The definition for who constituted a parent under the statute relies on the definition of “child.” INA § 101(b)(2), 8 U.S.C. § 1101(b)(2) (1958) (current version at INA § 101(b)(2), 8 U.S.C. § 1101(b)(2) (2006)).

that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.”³⁷ In choosing these two particular bases to rely on, the Court articulated its reasoning in terms of that which cannot actually be observed—a perceived³⁸ absence as opposed to an actual one, and lurking³⁹ problems of proof as opposed to present ones. Together, the “perceived absence” of close family ties and the concern with “serious problems of proof that usually lurk” in paternity decisions have enabled provisions of the INA differentiating between men and women in their parental roles to withstand various equal protection challenges.

Stated without much elaboration, these justifications seem difficult to reconcile with the Court’s treatment of unwed fathers and their children in its domestic equal protection decisions. A few years prior to *Fiallo*, the Court held in *Stanley v. Illinois* that the statutory exclusion of unwed fathers from a definition of “parent” in a dependency proceeding was constitutionally unacceptable, violating due process and equal protection.⁴⁰ Addressing the treatment of unwed fathers by Illinois law in *Trimble v. Gordon*, the Court similarly held that problems of proof with paternity determinations “do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate.”⁴¹

While some scholars consider the Court’s holding in *Fiallo* to be plainly contradictory to the principles articulated in cases like *Stanley* or *Trimble*,⁴² a continuous theme runs through all these cases: an unwed father, unlike an unwed mother, begins from an absence he must refute both in terms of proving paternity and establishing the existence of a parental relationship with

³⁷ *Fiallo*, 430 U.S. at 799.

³⁸ “To apprehend through one of the senses, esp. sight; to become aware of by seeing, hearing, etc.; to see; to detect.” *Perceive Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/1140537> (last visited Mar. 28, 2013) (subscription required).

³⁹ “Of things: To escape observation, to be concealed or latent.” *Lurk Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/111322> (last visited Mar. 28, 2013) (subscription required).

⁴⁰ *Stanley v. Illinois*, 405 U.S. 645, 657–59 (1972).

⁴¹ 430 U.S. 762, 772 (1977). There is some scholarship that addresses *Fiallo* in conjunction with the proof of paternity cases such as *Trimble*; those that do, however, are in the illegitimacy context, which assume, rather than assess, the overlap among the decisions. See, e.g., Laurence C. Nolan, “Unwed Children” and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence, 28 CAP. U. L. REV. 1, 19–31 (1999) (discussing *Fiallo* and other federal cases addressing illegitimacy in surveying the Supreme Court cases between 1968 and 1989).

⁴² See, e.g., Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failure of Legal Images*, 51 HASTINGS L. J. 557, 573–74 (2000) (contrasting the decision in *Fiallo v. Bell* with other cases of the time, including *Stanley v. Illinois*); Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There A Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 310–11 (2000) (offering the contradiction between the decisions in *Trimble v. Gordon* and *Fiallo v. Bell* as proof of immigration law exceptionalism).

his child. A comparison of the family in both contexts reveals that the Court's treatment of the citizen family and the domestic family are more similar than they are distinct.

1. "Perceived Absence" of Family Ties

The "perceived absence . . . of family ties"⁴³ between father and child kept a discussion of the family largely absent from the Court's decision in *Fiallo*, given that little justification is required for what is visibly not there. This perceived absence was also present in *Stanley*, functioning as the baseline from which the Court allowed the unwed father "to make his case."⁴⁴ Both decisions were reached without addressing the difference in treatment between unwed fathers and mothers directly. *Stanley* compared the unwed father with all other Illinois parents, and *Fiallo* evaluated whether the unwed father was similar to the INA's other statutory exclusions, which addressed children.⁴⁵ The unwed mother's absence from the Court's opinions implied her presence with respect to her child—to the Court, the mother's family ties were too obvious to address.

In both the immigration and domestic equal protection cases, the unwed father begins from an absence—the absence of the legal tie of marriage—which the Court extends to indicate an absence of real ties with his children. The demand for proof of the unwed father's relationship with his children relies heavily on the legitimation paradigm—in demonstrating a bona fide relationship with his child, the father does the work that legitimating a child, through marriage or other means, would have accomplished. The Court in *Stanley* held that states may not discriminate against unwed fathers by presuming them unfit parents, but left undisturbed the fact that states may hinge their legal recognition of the unwed father on requiring him to prove his relationship by affirmative, legally cognizable acts, equivalent to the affirmative act of marriage.⁴⁶ *Fiallo* rigidly instituted *Stanley's* assumption of paternal absence, with no opportunity for even a hearing to prove the exception.

The limited reference to the family that took place in *Fiallo* was in the context of recognizing that the provision granting preferential immigration status was aimed at keeping families united.⁴⁷ Unwed fathers, however, were excluded from this family in the first instance. Justice Powell justified the

⁴³ *Fiallo v. Bell*, 430 U.S. 787, 799 (1977).

⁴⁴ *Stanley v. Illinois*, 405 U.S. 645, 654–55 (1972).

⁴⁵ *Fiallo*, 430 U.S. at 797–99.

⁴⁶ *Stanley v. Illinois*, 405 U.S. 645, 657 n.9, 658–59 (1972) ("Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined.")

⁴⁷ *Fiallo*, 430 U.S. at 795 n.6 ("It is true that the legislative history of the provision at issue here establishes that congressional concern was directed at the problem of keeping families of United States citizens and immigrants united.") (internal citations omitted).

exclusion by looking to the legislative history of the INA, where he emphasized Congress's specific concern with the plight of the unwed mother.⁴⁸ Noting that unwed fathers were not the intended beneficiaries of the amendments, Justice Powell concluded that they were reasonably excluded from the family that Congress intended to reunite.⁴⁹

Despite the appearance of the unwed mother in the discussion of the Act's legislative history, the Court in *Fiallo* avoided a direct comparison with the father. Instead, the Court compared the exclusion of the unwed father from preferential immigration status under INA Section 101(b)(1), with the exclusion of a child over twenty-one years of age, or a child who was adopted after the age of fourteen.⁵⁰ That is, the Court compared the unwed father to grown or married children—the unwed father, similar to the child over twenty-one years of age, did not exhibit the family ties required by Congress for preferential immigration status. The unwed mother remained estranged from a comparison with the unwed father and mostly absent from the Court's opinion. The mothers who were before the Court in *Fiallo*, however, did not fit easily into this perception. Nowhere did the Court mention the mother who left her child, married another, and expressed a desire to leave her son.⁵¹ Nor did it discuss the mother who supported the family financially and who chose not to marry,⁵² or the mother who died.⁵³ These were the actual mothers in the facts before the Court, yet the only

⁴⁸ *Id.* at 797 (discussing amendments made to the Immigration and Nationality Act in 1957).

⁴⁹ *Id.* Compare Brief for Appellees at 16, 38, *Fiallo v. Levi*, 426 U.S. 919 (1976), *sub nom.* *Fiallo v. Bell*, 430 U.S. 787 (1977) (No. 75-6297), 1976 WL 181347, at *16, *38 [hereinafter *Fiallo Appellees Brief*] (explaining that “Congress sought to encourage families to reunify when they became separated by the immigration of a close family member to the United States, and then only under circumstances where it was likely that the separation had occasioned extreme emotional, financial, or social hardship to the family,” arguing that including the children of unwed fathers would not “advance the goal of reuniting family members who would be living together” given that “[n]o such intimacy generally exists between natural fathers and their illegitimate children, especially those who have never chosen to legitimate their son or daughter”) with Brief for Appellants at 31–37, *Fiallo v. Levi*, 426 U.S. 919 (1976), *sub nom.* *Fiallo v. Bell*, 430 U.S. 787 (1977) (No. 75-6297), 1976 WL 181347, at *31–37 [hereinafter *Fiallo Appellant Brief*] (arguing that the legislative history shows a general aim to reunite the family regardless of legitimacy, without focusing on the unwed mother).

⁵⁰ *Fiallo*, 430 U.S. at 797–98. Not all distinctions in the law relating to immigration preference of immediate relatives are based on age; the one other distinction is based on the marital status of the child.

⁵¹ These are the facts of Cleophus Warner and his son Serge, appellants in *Fiallo*. While Serge was visiting his father in the United States, Cleophus received a letter from Serge's mother saying that she had married, was moving to an undisclosed location, and did not want Serge to return to her. Serge had been born in the French West Indies. *Fiallo Appellant Brief*, *supra* note 49, at *7–8.

⁵² Ramon Fiallo-Sone, a citizen from the Dominican Republic, was the primary caretaker of his son, Ramon Fiallo, while Celia Rodriguez, Ramon Jr.'s mother, worked and provided for both Ramon and his son; for “personal reasons,” the parents decided not to marry. *Id.* at *10–11.

⁵³ The mother of Trevor and Earl Wilson died in New York. They were unable to petition for their father to take care of them in the United States and so were living

mother present in the opinion, foreign or American, was the mother who remained with her child and who Congress intended to help.⁵⁴

The mother was also largely absent from the Court's decisions addressing the domestic family, and did not figure prominently in *Stanley*. Similar to *Fiallo*, the Court in *Stanley* did not engage in a direct comparison between the two unwed parents; instead, it addressed the equal protection violation based on the argument that the unwed father was denied a right given to all other parents.⁵⁵

The Court was not, however, directly presented with the question of whether a sex-based distinction between unwed fathers and mothers violated the Constitution.⁵⁶ *Fiallo* and *Stanley* can be further distinguished by Justice White's acknowledgment in *Stanley* that the unwed father may have a relationship with his children. The *Stanley* Court faced the question of whether Illinois could constitutionally define "parents" to mean "the father and mother of a legitimate child, or the survivor of them; or the natural mother of an illegitimate child, [including] any adoptive parent, but [] not [] unwed fathers" for the purpose of a neglect hearing.⁵⁷ Answering in the negative, *Stanley* relied on the aim of the Juvenile Act which, similar to Section 101(b)(1) of the INA, was partly "to strengthen the minor's family ties whenever possible."⁵⁸ Discussing the family writ large, the Court asserted that its decisions have "frequently emphasized the importance of the family," noting that the law has not "refused to recognize those family relationships unlegitimized by a marriage ceremony."⁵⁹ The Court concluded that Peter Stanley,⁶⁰ the unwed father, "was entitled to a hearing on his fitness as

without either of their parents. Trevor and Earl, at the time of the lawsuit, were permanent residents and their father, Arthur Wilson, was in Jamaica. *Id.* at *12.

⁵⁴ The majority of the Court's brief discussion of the mother is during its explanation of the legislative history, noting "Congress was specifically concerned with the relationship between a child born out of wedlock and his or her natural mother. . . ." *Fiallo*, 430 U.S. at 797.

⁵⁵ The father in *Stanley* is compared to other parents and not their children. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). Moreover, the decision relies mostly on due process grounds, rather than on equal protection grounds. See Case Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1602 (1972) ("[S]ignificantly, in *Stanley v. Illinois* the Court avoided a clarification of the sexual classification issue as well as the fundamental interest issue.").

⁵⁶ The Supreme Court of Illinois engaged in a direct comparison, holding that "[t]he distinction between the class of mothers and the class of fathers is rationally related to the purposes of the Juvenile Court Act, . . . and thus it is not constitutionally mandated that Stanley be accorded the rights which accrue to the class of natural mothers of illegitimate children." *Stanley v. Stanley*, 256 N.E.2d 814, 815 (Ill. 1970). Peter Stanley argued the equal protection violation in State court, yet enlarged the comparison to encompass all other parents on appeal before the Supreme Court. See *Stanley*, 405 U.S. at 665 (Burger, J., dissenting).

⁵⁷ *Stanley*, 405 U.S. at 650 (internal quotation marks and citation omitted).

⁵⁸ *Id.* at 652 (internal quotation marks and citation omitted).

⁵⁹ *Id.* at 651-52.

⁶⁰ Petitioner's name was introduced in the first line of the opinion, as was the name of the mother of their children, which was Joan Stanley. *Stanley*, 405 U.S. at 646. By contrast, the names of Appellants in *Fiallo* appeared only once in the majority's opinion, in a

a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.”⁶¹

Crucially, however, the Court’s decision remained largely at the level of paternal possibility. It did not assess the actual relationship between Stanley and his three children, nor did it address the relations between unwed fathers and their children generally. The only question before the Court was whether the unwed father merited a hearing prior to having his children taken away upon the death of their mother. “It may be,” the *Stanley* Court admitted, “that most unmarried fathers are unsuitable and neglectful parents”; or even that “Stanley is such a parent and that his children should be placed in other hands.”⁶² These perceived family ties were not germane to the Court’s decision,⁶³ it was sufficient merely that “all unmarried fathers are not in this category.”⁶⁴ The gains made by Stanley were real insofar as the Court rejected a “one-dimensional” construction of unwed fathers.⁶⁵ Yet despite its bold language, *Stanley*’s holding was limited—it extended only to allow the unwed father “to make his case.”⁶⁶

While *Fiallo* rejected even the opportunity for a hearing given the Court’s blanket reluctance to assess the statute’s means vis-à-vis its ends,⁶⁷ *Stanley* did little to attack the conceptual underpinnings *Fiallo* would later rely on. Unwed fathers must prove the existence of parental relations, which are otherwise presumed to be absent. Under the current version of the INA section that was challenged in *Fiallo*, the unwed father, like Peter Stanley, receives only an opportunity to prove that he is in fact “unusual”;⁶⁸ he must show he has a bona fide relationship with his child.⁶⁹ By contrast, the unwed mother has no bona fide relationship requirement.⁷⁰

footnote. *Fiallo v. Bell*, 430 U.S. 787, 790 n.3 (1977). If anything, this difference tracks the acknowledgment by the Court of the parties, and the facts, before it.

⁶¹ *Stanley*, 405 U.S. at 649.

⁶² *Id.* at 654.

⁶³ The Court’s choice to rely on a due process rationale facilitated avoiding this determination. See discussion *supra* note 55 (analyzing *Stanley*’s decision to rely principally on due process instead of equal protection grounds and potential repercussions thereof).

⁶⁴ *Stanley*, 405 U.S. at 654.

⁶⁵ *Id.* at 655.

⁶⁶ *Id.*

⁶⁷ 430 U.S. 787, 798–99 (1977).

⁶⁸ *Stanley*, 405 U.S. at 666 (Burger, J., dissenting) (“Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children.”)

⁶⁹ The current version of INA § 101(b)(1) still requires some affirmative action on behalf of the father and not the mother. Amended in 1986, the statute presently reads that a child born out of wedlock will be considered a child “by virtue of the relationship of the child to its natural mother or to its natural father if the father has a bona fide parent-child relationship with the person.” Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986) (amending INA §101(b)(1)(D)) (current version at INA §101(b)(1)(D), 8 U.S.C. §1101(b)(1)(d) (2006)) (emphasis added).

⁷⁰ INA §101(b)(1)(D), 8 U.S.C. §1101(b)(1)(d) (2006).

2. "Problems of Proof That Usually Lurk"

The second justification *Fiallo* offered for excluding unwed fathers was based on "the serious problems of proof that usually lurk in paternity determinations."⁷¹ Biological ties were subject to problems of proof abroad and domestically, and *Fiallo* relied on a state law case discussing the significance of paternity determinations for support.⁷² While many of the cases addressing the domestic family differed from *Fiallo* in outcome—in that the problems of proof were not insurmountable—the difference can be explained not by any different views concerning the unwed *parents*, but largely by their focus on the distinctions between legitimate and illegitimate *children*.⁷³ This focus also obscured the fact that the state laws in these cases nearly unanimously placed restrictions on the relationship between the child and the unwed father, rather than the child and the unwed mother.⁷⁴ Both domestically and abroad then, problems were particular to the unwed father rather than the unwed mother. In the context of immigration, problems that were merely lurking were sufficient to exclude the unwed father under INA Section 101(b)(1).

In providing the paternity justification in *Fiallo*, Justice Powell cited to *Trimble v. Gordon*,⁷⁵ one of the many cases addressing illegitimacy during the late 1960s and 1970s.⁷⁶ In *Trimble*, which he also authored and which was issued during the same term as *Fiallo*, Justice Powell explained that "[o]ur . . . decisions demonstrate a sensitivity to 'the lurking problems with respect to proof of paternity,' and the need . . . to draw 'arbitrary lines . . . to facilitate potentially difficult problems of proof.'"⁷⁷ Justice Powell did not find those problems fatal in *Trimble*, holding that the exclusion of illegitimate, but not legitimate, children from the ability to inherit from their fathers violated equal protection.⁷⁸ Acknowledging the difficulties in

⁷¹ *Fiallo*, 430 U.S. at 799.

⁷² *Id.* (relying on *Trimble v. Gordon*, 430 U.S. 762 (1977)).

⁷³ See, e.g., *Trimble*, 430 U.S. at 770 (reasoning that while "parents have the ability to conform their conduct to societal norms, [] their illegitimate children can affect neither their parents' conduct nor their own status" in striking down a statute that discriminated against illegitimate children); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (striking down a statute that excluded illegitimate children from a right to support from their natural fathers, reasoning that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally"). See also discussion *infra* notes 83–91.

⁷⁴ See, e.g., *Trimble*, 430 U.S. at 764 (statute excluding the illegitimate child of a natural father from inheriting his estate); *Gomez*, 409 U.S. at 535 (statute granting a right of support to the legitimate, but not illegitimate, children of the natural father); *Weber*, 406 U.S. at 164 (statute preventing the illegitimate child of a natural father from recovering workmen's compensation benefit). See also discussion *infra* notes 83–91.

⁷⁵ *Trimble*, 430 U.S. 762.

⁷⁶ *Fiallo*, 430 U.S. at 766 n.11 (listing cases and noting "[*Fiallo*] represents the 12th time since 1968 that we have considered the constitutionality of alleged discrimination on the basis of illegitimacy.>").

⁷⁷ *Trimble*, 430 U.S. at 771 (citations omitted).

⁷⁸ *Id.* at 765–66, 772.

determining paternity, he nevertheless reasoned that while “[t]hose problems are not to be lightly brushed aside, [] neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.”⁷⁹

The Court heeded problems in *Fiallo* that it did not in *Trimble* or in the other cases addressing proof of paternity in the context of state law classifications. Yet the difference in outcome is not properly located in a different understanding of the roles of the unwed parents, or in the substantive effect of plenary power; rather, it is better located in the Court’s focus on the children in the domestic state law cases.⁸⁰ That is, while the paternity determination in *Fiallo* was raised in the context of a child’s relation vis-à-vis the unwed parent, the domestic cases compared the differential treatment between children, legitimate and illegitimate, a choice largely dictated by petitioners.⁸¹ Thus, an important basis for the distinction between the cases is how the equal protection challenge was framed—whether it addressed the children or the parents.⁸²

The domestic cases considering proof of paternity did not have to confront the legal distinctions between unwed fathers and mothers because they did not have to. Accordingly, these state law cases did not address the relationship presumed to exist between parents and their children, or that the illegitimate child was generally suing for legal recognition of the unwed father-child relationship that the unwed mother-child relationship already had.⁸³ These cases also largely failed to raise the issue that the children of unwed fathers in particular were disadvantaged. Instead, they tended to fo-

⁷⁹ *Id.* at 771 (quoting *Gomez*, 409 U.S. at 538). For the initial case that contained the language exhibiting concern about the lurking problems in paternity determinations, see *Gomez*, 409 U.S. at 538. *Gomez* held that a Texas court could not prevent an illegitimate child from receiving a judicially enforceable right of support from her natural father. *Id.*

⁸⁰ Appellants in *Fiallo* challenged the law on grounds that it was discriminatory “on [the] double-barreled bases of sex and illegitimacy founded on archaic and overbroad stereotypes.” *Fiallo* Appellant Brief, *supra* note 49, at *54. The Court briefly considered and dismissed both arguments in tandem. *Fiallo*, 430 U.S. at 794. While I argue that the Court’s decision to disregard these arguments is very much linked to its adherence to plenary power, see discussion *infra*, Part I.B, its justifications nevertheless reflect the standard conceptions of unwed fathers and mothers present in the cases of the time.

⁸¹ See *Davis*, *supra* note 28, at 89–97 (discussing the history of the legitimacy litigation and the various factors leading to a strategic focus on the illegitimate child rather than the sex-based distinctions between unwed parents).

⁸² In the citizenship transmission context, *Miller* likely dissuaded petitioners from bringing sex-discrimination claims based on the effects on the child; in that case, two of the Justices believed the child could not raise a gender discrimination claim given that “the discriminatory impact of the provision [fell] on petitioner’s father, Charlie Miller, who [was] no longer a party to this suit.” *Miller v. Albright*, 523 U.S. 420, 445–46 (1998) (plurality opinion) (O’Connor, J., concurring).

⁸³ Louisiana was an anomaly; it excluded the child of an unwed mother from bringing a suit for wrongful death of a mother. Every other state allowed illegitimate children to sue for a mother’s death, but precluded them in differing ways from suing for an unwed father’s death. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (addressing the relation between an unwed mother and her child); see also *Davis*, *supra* note 28, at 95 (citing HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 69–70 n. 44 (1971)).

cus on the distinctions between classes of children without noting that illegitimacy was nearly always raised, or paternity made problematic, in the context of an unwed father and his child.⁸⁴ The posture of the cases precluded any a discussion about the propriety of sex-based distinctions between unwed fathers and mothers that remained at the foundation of these rules.⁸⁵

The assumptions about the mother's presence and the father's accompanying absence embedded in the structure of the claims brought before the Court also emerged in its reasons for striking down the state statutes. Despite not speaking directly to the parental roles, the illegitimacy cases exhibited an understanding of the respective roles of unwed fathers and mothers consistent with the unwed parents in *Fiallo* and *Stanley*. In *Levy v. Louisiana*, for instance, the Court held that preventing illegitimate children from being denied recovery upon the death of their mother was a violation of the constitutional guarantee of equal protection.⁸⁶ The Court took care to explain that "the[] children, though illegitimate, were dependent on [their mother]; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."⁸⁷

⁸⁴ There are only two cases from this period that address a child's relation with an unwed mother, both from Louisiana. *Levy*, 391 U.S. 68 (right of illegitimate children of to inherit from mother); *Glonn v. Am. Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968) (right of mother of illegitimate child to cause of action for child's death where Louisiana wrongful death statute barred recovery to parents of illegitimates). In *Glonn*, the sole concern postulated and quickly dismissed with regard to motherhood was the "conceivable[] . . . temptation to some to assert motherhood fraudulently." 391 U.S. at 76.

⁸⁵ Moreover, the illegitimacy cases were not entirely consistent in holding for the illegitimate child—in *Labine v. Vincent*, the Court upheld a statute differentiating between legitimate and illegitimate children in Louisiana by placing a higher burden on illegitimate children to be able to inherit as within the state's power to make laws for the distribution of property. *Labine v. Vincent*, 401 U.S. 532 (1971); see *Davis*, *supra* note 28, at 96 (noting that while *Labine* was "ostensibly at odds with the result in *Levy*, the Court's reasoning was fully consistent with *Levy*'s analytical approach insofar as both cases focused exclusively on the impact of the law on children and implicitly accepted sex-based distinctions between parents in the illegitimacy context").

⁸⁶ *Levy*, 391 U.S. at 72. Louisiana was alone in this matter because it was the only state at the time that did not allow for a suit for wrongful death of a mother by her illegitimate child; every other state allowed illegitimate children to sue for a mother's death, but were precluded in differing ways from suing for an unwed father's death. It was also an anomaly in that it required both fathers and mothers to support their children born out of wedlock. See *Davis*, *supra* note 28, at 94–95 (discussing the persistence of illegitimacy classifications and the different litigation strategies which have addressed them); see also Brief for Appellant at 12–13, *Levy v. Louisiana*, 391 U.S. 68 (1968) (No. 58), 1967 WL 113865, at *12–13 [hereinafter *Levy Appellant Brief*] (discussing the strangeness of the Louisiana death statute and its unreasonableness given that both mothers and fathers of illegitimate children are legally required to support them).

⁸⁷ *Levy*, 391 U.S. at 72. This was also an argument advanced by Appellant's brief: "Whatever the result with regard to fathers, the argument against recovery is without any force whatever as to mothers of illegitimate children, with whom, as in this case, they will usually have a more intimate relationship." *Levy Appellant Brief*, *supra* note 86 at *18.

In a subsequent case, *Weber v. Aetna Cas. & Sur. Co.*,⁸⁸ the Court followed *Levy*'s reasoning, holding that excluding illegitimate children from sharing equally in the workmen compensation benefits of their deceased father violated equal protection.⁸⁹ Conspicuously absent from *Weber*, however, was the language regarding the "biological" and "spiritual" connection between a father and his child that the Court had invoked with respect to a mother and her child in *Levy*. Instead, Justice Powell conceded without much difficulty that "[i]t may perhaps be said that statutory distinctions between the legitimate and illegitimate reflect closer family relationships in that the illegitimate is more often not under care in the home of the father nor even supported by him."⁹⁰ Thus, the state law cases, while different in outcome, are not fundamentally at odds with *Fiallo*'s constitutional assumptions about the respective roles of unwed fathers and mothers.⁹¹

In addition to the domestic problems of proof present in paternity determinations, *Fiallo* expressed concern with problems of fraud in a foreign land.⁹² Placing *Trimble* closer to home, the Court appeared wary of the problems that could arise "when [paternity] depends upon events that may have occurred in foreign countries many years earlier," which it linked to the "problems of proof and the potential for fraudulent visa applications."⁹³

A closer analysis provides reasons to be skeptical of the Court's emphasis on the foreign in general. For one, such concerns are specific to the unwed father who has not legitimated his child. Where a father married the child's mother or legitimated his child abroad, actions that are equally dependent on procedures in foreign countries, this foreign aspect did not raise concerns for either the Court or the government.⁹⁴ Further, the type of paternity-establishing evidence an unwed father would likely offer in support of his relation to his citizen child is the same kind of proof required of parents who are recognized by the statute.⁹⁵ Needless to say, the Court exhibited no concerns with foreign procedures when the unwed American woman traveled abroad; the element of the foreign was only suspect when tied to deter-

⁸⁸ 406 U.S. 164 (1972).

⁸⁹ *Id.* at 165.

⁹⁰ *Id.* at 173.

⁹¹ Although the stirring rhetoric of the state law cases is used spiritedly by the dissent in *Fiallo*. See *Fiallo v. Bell*, 430 U.S. 787, 809, 813, 815 (1977) (Marshall, J., dissenting).

⁹² See *Fiallo*, 430 U.S. at 799 n.8 ("[O]ur cases clearly indicate that legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area.") (quoting *Trimble*, 430 U.S. at 772).

⁹³ *Id.*

⁹⁴ A child may be legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile. INA § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (1976) (current version at INA § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (2006)). A father may also be wed abroad.

⁹⁵ See *Fiallo* Appellant Brief, *supra* note 49, at *45 (explaining that the proof of paternity required of a U.S. citizen stepmother to petition for the entry of her U.S. citizen husband's illegitimate non-citizen child would, functionally, be the same as the proof that that father would hypothetically furnish to establish paternity himself—but that the statute, perversely, accepts such proof in the former scenario only).

minations of paternity, as opposed to maternity. Rather than being worried about foreignness per se then, the Court's expressed concern is with the American man in a foreign country and the foreign woman he might encounter.⁹⁶

The government located its concerns with paternity more explicitly on the act of birth, which became the focal moment given the lack of marital ties. In *Fiallo*, the government relied on what can and cannot be seen at that moment, which confirmed the presence of the mother and the absence of the father: "Unlike the identity of the mother, which will often appear on the birth certificate and which frequently can be corroborated by the testimony of relatives, midwives, or medical personnel, the sole evidence that a man has fathered a particular child is often the testimony of the mother, and she may not know."⁹⁷ Even if the father were to be present during birth, the government rendered the import of such presence questionable, given the mother's suggested promiscuity—"she may not know" who is the father of her child, and "two or more men may claim paternity of the same child."⁹⁸ In due course, the Court would recognize a concern based on the perception that "[t]here are . . . men out there who are being Johnny Appleseed."⁹⁹

Although the government portrayed the unwed foreign mother as having numerous, even simultaneous, sexual partners such that she may not be aware of the biological father, these were not the foreign mothers before the Court in *Fiallo*, who remained absent from the opinion.¹⁰⁰ The only unwed foreign mother recognized by the Court and the statute is the mother of an American citizen or legal permanent resident, hinging her recognition entirely on her status as mother.¹⁰¹ Similar to the cases addressing illegitimacy of the time, the *Fiallo* Court considered only one possible set of unmarried

⁹⁶ In the context of the American military, the government encouraged marriage of soldiers with the "war brides" of World War II while instituting procedures making it more difficult to do so during the Korean and Vietnamese wars. See Kristin A. Collins, Essay, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in Flores-Villar v. United States*, 91 B.U. L. Rev. 1485, 1492–93 (2011) (discussing the race-salient repercussion of these gender-based laws and the change in military practice post-WWII to encourage casual sexual relations in lieu of marriage to discourage American soldiers from marrying their South East Asian girlfriends during the Korean and Vietnam wars); see also SUSAN ZEIGER, ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY 5 (2010) (discussing the category of "war bride," which established the rights of the foreign wives of American soldiers, but was denied to many couples in intercultural war marriages, especially African-American GIs with European wives and white and black GIs with Japanese wives or fiancées).

⁹⁷ *Fiallo Appellees Brief*, *supra* note 49, at *44–45.

⁹⁸ *Id.* at *24.

⁹⁹ Oral Argument at 34:08, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), available at http://www.oyez.org/cases/2000-2009/2000/2000_99_2071.

¹⁰⁰ See *supra* notes 50–54 and accompanying text.

¹⁰¹ See *Fiallo*, 430 U.S. at 797 (noting that the INA was amended to allow for inclusion of the mother-child relationship including "both the illegitimate alien child of a citizen mother and the alien mother of a citizen born out of wedlock") (internal citations omitted).

parents: the present-by-default mother and the absent, unreliably identified, father.¹⁰²

The *Fiallo* Court addressed neither the illegitimacy nor the sex-based discrimination arguments that were raised by the appellants, but the foundation for future decisions considering sex-based distinctions was nevertheless laid. The baseline role for the unwed father in the context of biological paternity was set to be uncertain and potentially non-existent, akin to the baseline role set for the unwed father in the context of family ties.

B. Plenary Power: Deference over Difference

The *Fiallo* majority began its analysis of INA section 101(b)(1) by overtly appealing to the context in which it was made: “At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation.”¹⁰³ This judicial deference does not, as we have seen, necessarily implicate a “different” jurisprudence addressing unwed fathers and mothers; it does, however, account for the lack of elaboration provided by the Court in justifying Congress’s decision. In its decision to defer, the Court rejected repeated requests to treat this matter concerning the family as unique, or different from a typical immigration case. Instead, the family was approached like any other entity within immigration law. In so doing, the Court assumed that the citizen family was like its domestic counterpart, but under the cover provided by plenary power.

Appellants in *Fiallo* presented numerous arguments for why the Court should consider its facts “unique,” most of which centered on the subject of the family.¹⁰⁴ The family unit—and the ideology of altruism associated with it—were deployed by appellants to distinguish the case from the Court’s prior immigration-related decisions.¹⁰⁵ Pointing to the different nature of the claim, appellants argued that their situation did not involve “foreign policy concerns” or reflect a legislative desire to exclude certain groups “who were specifically and clearly perceived to pose a grave threat to the national se-

¹⁰² For the purpose of transmitting citizenship to a child within a marriage, there is no distinction between a foreign father and a foreign mother, or between an American father and an American mother, given that the rules are gender neutral. INA § 301(a), 8 U.S.C. § 1401(a) (1952) (current version at INA § 301(a), 8 U.S.C. § 1401(a) (2006)).

¹⁰³ *Fiallo*, 430 U.S. at 792.

¹⁰⁴ See *Fiallo* Appellant Brief, *supra* note 49, at *52 (arguing that “[n]o other immigration case has come to this Court with the unique coalescing of factors which exist in this case”).

¹⁰⁵ See *id.* at 19–23, 53–55 (discussing the “fundamental constitutional interests in family association” and arguing that “none of the prior cases implicated the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship and association in this country with their parents or children or the privileges or immunities of their citizenship and residency”). Janet Halley describes this notion of “family,” as invoked by the appellants, as an ideology of domestic intimacy. See Janet Halley, *What is Family Law?*, 23 *YALE J.L. & HUMAN.* 1, 3 (2011) (“In the corresponding ideology, the husband, wife, and child constituted ‘the family’ and lived in an affective, sentimental, altruistic, ascriptive, and morally saturated legal and social space.”).

curity."¹⁰⁶ They further argued that *Fiallo* was atypical as an immigration case, given that it involved the rights of United States citizens and legal permanent residents to form familial relationships.¹⁰⁷ Appellants even ascribed the family's altruistic associations to congressional motives: "Congress was motivated by a benevolent and generous desire to confer a benefit on United States citizens and permanent residents."¹⁰⁸

Appellants' arguments were unsuccessful. The Court's nearly exclusive focus on the immigration-related aspects of *Fiallo* meant that the opinion discussed neither the particulars of the families before the Court, nor the family relations the INA was intended to facilitate. Symptomatic of this silence was the majority's refusal to acknowledge the existence or potential relevance of *Stanley* despite appellants' insistence,¹⁰⁹ and despite the dissents by Justice Marshall¹¹⁰ and the lower court.¹¹¹

Instead, Justice Powell analogized *Fiallo* to *Kleindienst v. Mandel*,¹¹² an immigration case that did not involve familial relations and upheld the Attorney General's denial of a visa to Ernest E. Mandel, a self-described "revolutionary Marxist."¹¹³ The Court noted that Mandel, a non-resident who was at the time outside of the United States,¹¹⁴ did not have a constitutional right of entry and the First Amendment right of American citizens to hear Mandel speak at a series of engagements in universities across the United States did not mandate his admission.¹¹⁵ The Court in *Fiallo* and *Kleindienst* cited in turn to *Galvan v. Press*,¹¹⁶ a decision upholding the deportation of a once-member of the Communist party who had lived in the United States for thirty-six years.¹¹⁷ Relying on these cases, the *Fiallo* Court explained its def-

¹⁰⁶ *Fiallo* Appellant Brief, *supra* note 49, at *53-54.

¹⁰⁷ *See id.* at *30, *53-55 (arguing that the law served to "deny [petitioners] their constitutionally fundamental interests in familial association and companionship, solely because of the gender of the parent and the illegitimate status of the child"; and that none of the prior cases cited by the government involved this combination of constitutionally protected interests).

¹⁰⁸ *Id.* at *38.

¹⁰⁹ *See id.* at *20 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972), and arguing: "The invalidity of stereotypes which depict the father of an illegitimate child as having little interest in and only a superficial relationship with his child and with the child's mother is confirmed by current social science literature and by the facts of the plaintiffs' cases.").

¹¹⁰ *See Fiallo v. Bell*, 430 U.S. 787, 810 (1977) (Marshall, J., dissenting) (referring to *Stanley*'s discussion of the importance of a father's relationship with his child and noting that "[i]t is no less important for a child to be cared for by its . . . parent when that parent is male rather than female." (citing *Stanley*, 405 U.S. at 651)).

¹¹¹ *Fiallo v. Levi*, 406 F. Supp. 162, 171-72 (E.D.N.Y. 1975) (Weinstein, J., dissenting) (urging recognition of the ties between unwed fathers and their children and arguing that "[c]ourts now recognize that unwed fathers, like unwed mothers, often have strong ties of affection to their illegitimate children and desire a continuing relationship with them") [hereinafter *Fiallo v. Levi*].

¹¹² 408 U.S. 753 (1972).

¹¹³ *Id.* at 756 (internal quotation marks omitted).

¹¹⁴ *Id.* at 762.

¹¹⁵ *Id.* at 770.

¹¹⁶ 347 U.S. 522 (1954).

¹¹⁷ *Id.* at 532 (Black, J., dissenting).

erence to Congress in matters of “the admission of aliens and their right to remain” as a necessity, “touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.”¹¹⁸ The deference required by plenary power therefore negated any sort of special, or exceptional, treatment for the family that was at the center of the challenged provisions.

In likening *Fiallo* to *Kleindienst* and *Galvan*, the Court very conspicuously placed the family distinctly in the realm of the political.¹¹⁹ The minimal acknowledgment that *Fiallo* did give the family—in discussing the purpose of the statute—was placed exclusively within “the Nation’s sovereign power to admit or exclude foreigners in accordance with perceived national interests.”¹²⁰ Regulating the family, by defining what constituted that family, was positioned as merely a way of regulating the entry of aliens, in line with Congress’s general power over the entry and removal of, for instance, Communist party members.¹²¹ The family was therefore identified with the sole purpose of being subsequently normalized as another vehicle of immigration regulation.

Significantly, the Court noted that the family that was being normalized within the exceptional realm of immigration included that of the citizen: “[C]ongressional concern was directed at ‘the problem of keeping families of United States *citizens* and immigrants united.’”¹²² The question of what constituted the citizen family was subsumed into the larger question of immigration regulation. Doing so did not mean changing the family as it was recognized in domestic law in any substantial way; rather, it meant that the Court did not have to explain the assumptions it incorporated about that family, as long as there was a facially legitimate and bona fide reason. The Court provided not one, but two justifications.

The Court concluded that Congress was allowed to reach such a decision, even if “it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties.”¹²³ The decision about the

¹¹⁸ *Fiallo v. Bell*, 430 U.S. 787, 792–93 (1977). The Court explicitly stated that “[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Id.* at 792–93 (citations omitted).

¹¹⁹ The Court explicitly cited to both *Galvan* and *Kleindienst* as examples of recent cases where it had not departed from the rule that Congressional power over immigration limited any judicial review in that area and stated that “[w]e are no more inclined to reconsider this line of cases today than we were five years ago.” *Id.* at 792–93 n.4.

¹²⁰ *Id.* at 795 n.6.

¹²¹ *Id.* Justice Black’s dissent in *Galvan* appealed to petitioner’s long residence in the United States and the family he was a part of: “He has an American wife to whom he has been married for twenty years, four children all born here, and a stepson who served this country as a paratrooper.” 347 U.S. at 522, 532 (1954). (Black, J., dissenting).

¹²² *Fiallo*, 430 U.S. at 795 n.6 (quoting H.R. REP. NO. 1199-85, at 7 (1957); 1957 U.S.C. C.A.N. 2016, 2020) (emphasis added).

¹²³ *Id.* at 798.

strength of family ties was made by proxy; that proxy, based on sex in the absence of marriage or legitimation, was constitutional both domestically and abroad insofar as it involved the unwed father. In the domestic context, that absence formed the frequently unevaluated baseline for the Court's decisions. In the immigration context, the perceived absence of the father's family ties with his child and physical relations with the mother were the only justifications necessary.¹²⁴ The principal effect of the Court's immigration deference was that it enabled the proxy to go unanalyzed, and obscured the work that the assumptions about the domestic family were doing in the Court's decisions regarding the citizen family.

II. THE CITIZENSHIP TRANSMISSION CASES: UNWED AMERICAN FATHERS ABROAD

Over two decades after *Fiallo*, the Supreme Court again addressed the INA's treatment of unwed fathers, mothers, and their children born abroad in *Miller v. Albright*,¹²⁵ which resulted in a much-discussed plurality opinion.¹²⁶ The Court considered the same issue a few years later in *Nguyen v. INS*, where it held that the imposition of affirmative acts on the unwed father and not the unwed mother does not violate equal protection;¹²⁷ most recently, the Court in *Flores-Villar v. United States*,¹²⁸ affirmed a decision upholding a longer residency requirement for unwed fathers in a related provision of the INA.¹²⁹ While *Fiallo* was decided explicitly within the ambit of immigration law, *Miller*, *Nguyen*, and *Flores-Villar* considered provisions that address the transmission of citizenship "at birth."¹³⁰

This Part analyzes *Miller* and *Nguyen* alongside the contemporary cases considering unwed fathers domestically, including *Caban v. Mohammed*¹³¹ and *Lehr v. Robertson*,¹³² under the rubric provided by the two justifications first articulated in *Fiallo*.¹³³ It concludes by examining the arguments

¹²⁴ See *id.* at 799 ("In any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision.").

¹²⁵ 523 U.S. 420 (1998).

¹²⁶ See, e.g., Pillard & Aleinikoff, *supra* note 6, at 2–4 (arguing that *Miller* represents a decline in the plenary power doctrine and urging the political branches to use full-fledged constitutional norms); see also Nikki Ahrenholz, *Miller v. Albright: Continuing to Discriminate on the Basis of Gender and Illegitimacy*, 76 DENV. U. L. REV. 281, 281–82 (1998) (arguing that the plurality applied the incorrect level of equal protection scrutiny in deciding *Miller*).

¹²⁷ *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

¹²⁸ 131 S. Ct. 2312 (2011) (per curiam).

¹²⁹ See *United States v. Flores-Villar*, 537 F.3d 990, 996–98, 1000 (9th Cir. 2008).

¹³⁰ See *Miller v. Albright*, 523 U.S. 420, 429–33 (1998); *Nguyen*, 533 U.S. at 58–59; *Flores-Villar*, 536 F.3d 990 at 993 (each considering INA §§ 390(a), (c), 8 U.S.C. §§ 1409(a)).

¹³¹ 441 U.S. 380 (1979).

¹³² 463 U.S. 248 (1983).

¹³³ 430 U.S. at 799.

presented in *Flores-Villar* and evaluating what that case reveals about fathers and mothers in the absence of marital ties. In particular, the arguments raised in *Flores-Villar* render explicit the custody determination that underlies the transmission of citizenship defined by the INA and sanctioned by the Court, based on a uniform decision about which parent will remain with the child.

A. *Enduring Justifications and the Rise of “Real” Difference: Miller and Nguyen*

Both *Miller* and *Nguyen* involved a challenge to INA Section 309(a)(4), which requires the unwed father to complete one of three affirmative actions before he can transmit citizenship to his child born abroad: legitimating his child under the law of the child’s residence or domicile; acknowledging his paternity under oath; or establishing paternity through adjudication of a competent court, all before the child reaches the age of eighteen.¹³⁴ The unwed mother has no similar requirements. The prerequisites she must satisfy are possessing American nationality at the time of the child’s birth and having lived in the United States for a period of one year; the unwed father also must satisfy equivalent, if not more rigorous, conditions along each of these dimensions.¹³⁵

The Court replaced its cursory deference in *Fiallo* with a jurisprudence of “real” difference in its decision to apply strict scrutiny to the distinctions between the unwed American father and mother.¹³⁶ While *Miller* and *Nguyen* declined to decide whether the deference applied in *Fiallo* was mandatory in this context,¹³⁷ the justifications first voiced in *Fiallo* remained the two inter-

¹³⁴ See *Miller*, 523 U.S. at 429–33; *Nguyen*, 533 U.S. at 58–60; see also INA § 309(a)(4), 8 U.S.C. § 1409(a)(4) (2006). While technically possible that the child or the mother undertake these requirements, the unwed father still retains a fair amount of control over that decision. See Pillard & Aleinikoff, *supra* note 6, at 23 (“As a formal matter, Section 304(a)(4)(C) does permit a child to seek a paternity adjudication against an unwilling father As a practical matter, however, his decision will virtually always be definitive.”).

¹³⁵ INA § 309(a)(1), 8 U.S.C. § 1409(a)(1) (2006) (requiring blood relationship with father); INA § 309(b), 8 U.S.C. § 1409(b) (2006) (referring to residency requirement for father in 1401(g), which is being “physically present in the United States . . . for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years”); INA § 309(c), 8 U.S.C. § 1409(c) (2006) (conferring automatic citizenship on the children of United States citizen mothers if the mother had previously been in the United States continuously for a period of at least one year).

¹³⁶ See *Nguyen*, 533 U.S. at 73 (“The difference between men and women in relation to the birth process is a real one”); Hendricks, *supra* note 11, at 450 (arguing that “[t]he Court’s starting point in the unwed father cases was the premise of the real difference between biological motherhood and biological fatherhood, a premise that is intuitively justified even if sometimes exaggerated”).

¹³⁷ In both *Nguyen*, 533 U.S. at 60–61, and *Miller*, 523 U.S. at 434 n.11, the Court held that the challenged provisions satisfied heightened scrutiny. The Court in *Nguyen* applied heightened scrutiny throughout, and declined to decide whether the deference explicitly espoused in *Fiallo* was required. *Nguyen*, 533 U.S. at 61 (“[W]e need not

ests that shaped the Court's reasoning and subsequent outcomes: the perceived absence of family ties transitioned into "the opportunity to develop a meaningful relationship" between the unwed father and his child,¹³⁸ while the problems of proof specific to paternity determinations still lurked, despite the separate requirement of a blood relationship in INA section 309(a)(1).¹³⁹

Although the majority's opinion has been criticized as a "stranger to our precedents,"¹⁴⁰ *Nguyen* is very much at home in the Court's domestic jurisprudence addressing unmarried men and women, as was *Miller* before it. Prior to these opinions, the Court considered a series of equal protection challenges to various state law schemes treating unwed fathers and mothers differently, including the two seminal family law cases of *Caban v. Mohammed*¹⁴¹ and *Lehr v. Robertson*.¹⁴² These cases, among others relied on by the parties and the Court,¹⁴³ are deemed to have settled the constitutional recognition of unwed fathers upon proof of a biological connection in addition to a verifiable relationship with their child, otherwise known as the "biology plus" test.¹⁴⁴

This Part traces how the dual justifications in the citizenship transmission cases mirror the "biology plus" requirement of the domestic cases;¹⁴⁵ it follows with an analysis of the Court's heightened standard of scrutiny, which requires reasons that *Fiallo*'s deference did not demand, and depends heavily on the act of birth in defining the real difference between the unwed parents.

decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power.").

¹³⁸ *Miller*, 523 U.S. at 440.

¹³⁹ A father will be able to transmit citizenship to his child born out of wedlock if "a blood relationship between the person and the father is established by clear and convincing evidence." INA § 309(a)(1); 8 U.S.C. § 1409(a)(1) (2006).

¹⁴⁰ *Nguyen*, 533 U.S. at 74 (O'Connor, J., dissenting).

¹⁴¹ 441 U.S. 380 (1979).

¹⁴² 463 U.S. 248 (1983).

¹⁴³ These additional cases are discussed *infra* at Parts II.B.1–2.

¹⁴⁴ See Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 832 (2006) ("The 'biology-plus' cases demonstrate the legal landscape for unwed fathers in constitutional jurisprudence: biology, on its own, does not entitle a man to the rights of parentage. . . . [T]he Court has defined paternity as something more than biology and appears to have included a functional component in its analysis.").

¹⁴⁵ Hendricks makes a similar claim about this line of cases that includes *Lehr*, 463 U.S. at 248, *Caban*, 441 U.S. at 380, and *Stanley v. Illinois*, 405 U.S. 645 (1972), in proposing that the Court should adopt a model of equality informed by the mother's gestational period and act of birth. See Hendricks, *supra* note 11, at 472 (arguing in support of the "biology plus" criteria that "treats the mother's gestation both as biology and as analogous to the affirmative acts of parenting required for men to establish parental rights under the unwed father cases"). In fact, Hendricks criticizes *Nguyen* for minimizing the importance of the biological difference between men and women. *Id.*

1. “Opportunity to Develop a Meaningful Relationship”

The Court in *Miller* and *Nguyen* recognized that one of the two central governmental objectives in placing additional requirements on the unwed father is to foster the development of a relationship between citizen parent and child. The particular interest defined by *Nguyen* was “to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”¹⁴⁶ While the Court framed the requirements in gender-neutral terms, INA section 309(a)(4), by its own account, applies only to fathers.¹⁴⁷ The state law cases affirmed a similar statutory structure requiring the unwed father to prove a relationship with his child before being granted legal recognition,¹⁴⁸ given the Court’s acknowledgment of only the possibility that the unwed father may form one. The perceived absence of family ties continues to define the unwed father, a necessary precondition to ensuring the opportunity for developing a relationship.

Enunciated first in Justice Stevens’s *Miller* plurality opinion, the Court justified the affirmative acts imposed on the unwed father based on the presence and absence perceived at the moment of birth, an argument that had been previously raised but not considered.¹⁴⁹ Justice Stevens explained that “[u]nlike the citizen father,” the mother “certainly knows of her child’s existence and typically will have custody of the child immediately after the birth.”¹⁵⁰ The father, on the other hand, “due to the normal interval of nine months between conception and birth . . . may not even know that his child exists, and the child may not know the father’s identity.”¹⁵¹ Writing for the majority in *Nguyen*, Justice Kennedy likened the acts contained in INA section 309(a)(4) to the event of birth for the unwed mother—“the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth” while that “same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed

¹⁴⁶ *Nguyen*, 533 U.S. at 64–65.

¹⁴⁷ INA § 309(a)(4), 8 U.S.C. § 1409(a)(4) (2006). In its discussion, the Court in *Nguyen* cites to 8 U.S.C. § 1409.

¹⁴⁸ See *infra* of notes 177–202, discussion *Caban*, 441 U.S. 380, and *Lehr*, 463 U.S. 248.

¹⁴⁹ See *Nguyen v. INS*, 533 U.S. 53, 64 (2001) (noting “the mother is always present at birth but [] the father need not be”); *Miller v. Albright*, 523 U.S. 420, 440 (1998) (noting that Congress may have reasonably intended the formal requirements of 8 U.S.C. § 1409(a)(4) to ensure fathers the opportunity to develop a meaningful relationship with their children that mothers have based on the fact a mother knows of her baby’s existence and often has custody at birth). The government raised an argument based on the event of birth in *Fiallo*. See *Fiallo Appellees Brief*, *supra* note 49, at *44–45.

¹⁵⁰ *Miller*, 523 U.S. at 440.

¹⁵¹ *Id.*

father.”¹⁵² Accordingly, he noted: “[The statute] takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred on the latter.”¹⁵³

While the opinions treat the event of birth as the central distinguishing act—a “biological difference”¹⁵⁴ difficult to contest—the Court’s justification for the different requirements imposed upon unwed mothers and fathers depends on what occurs after that event. What counts, according to the Court, is the subsequent relationship—“the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”¹⁵⁵ As the government argued in *Miller*, the requirements of INA Section 309(a)(4) are important because they “provide some assurance that the father’s commitments to the child will be real, not formulaic, and that the child’s ties to his or her citizen parent, and therefore to the United States, will at least begin to develop during childhood.”¹⁵⁶

In recognizing the real event of birth as legally significant, the “real” relationship rapidly becomes indistinguishable from its legal recognition. The government followed this line of reasoning in *Miller*, arguing that the “mother has an established legal relationship with her child from the moment of birth,” while for the American father, “there is no such established legal relationship at birth.”¹⁵⁷ The fact of birth quickly assumes legal relevance for both the government and the Court, to the exclusion of any other reality, including the father’s potential presence at that moment. Indeed, it is insufficient that the father may be physically present at birth, or that he be aware of that birth.¹⁵⁸ The premise that matters is the father’s *legal* absence at birth, which points to his *real* absence—the absence of family ties—afterwards. The statute is thus geared toward ensuring that a real relationship takes place by requiring a legal one: the unwed father must legitimate his child, acknowledge his child, or have his paternity adjudicated by a court.¹⁵⁹ The opinions in *Miller* and *Nguyen* confirm as much—they are not concerned with the real relationships the unwed fathers may have developed with their children but with whether the requirements of INA Section 309(a)(4) have been satisfied. The only father recognized by the Court con-

¹⁵² *Nguyen*, 533 U.S. at 65.

¹⁵³ *Id.* at 66–67.

¹⁵⁴ *Id.* at 64.

¹⁵⁵ *Id.* at 65.

¹⁵⁶ Brief for the Respondent at 28, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060), 1997 WL 433315, at *28 [hereinafter *Miller* Brief for the Respondent].

¹⁵⁷ *Id.* at *24–25, *28–29 (relying on the family statute in Texas, where Boulais lived, establishing legal obligations on unwed mothers and fathers).

¹⁵⁸ See *Nguyen*, 533 U.S. at 86 (O’Connor, J., dissenting) (“Under the present law, the statute on its face accords different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though those two individuals are similarly situated with respect to the ‘opportunity’ for a relationship.”).

¹⁵⁹ INA § 309(a)(4), 8 U.S.C. § 1409(a)(4) (2006).

tinues to be the married father, whose affirmative act of marriage must be replicated by other means. Unless there is a legal tie that binds, the Court has difficulties finding a real one.

The unwed father finds his apex in the itinerant figure of the military serviceman, whose absence is central to the government's briefs and the Court's opinions. Charlie Miller, the unwed American father in *Miller*, was in the service of the United States Air Force during the time of conception;¹⁶⁰ Joseph Boulais, the unwed American father in *Nguyen*, was also once a serviceman.¹⁶¹ In both cases, military men feature prominently not only in the facts, but also the reasoning employed by the Court.

In *Miller*, the government presented its version of the facts as "the usual scenario" of how U.S. citizen men become dubious fathers: the account is that of a single "American man, overseas briefly on temporary military duty [who] has an affair of unclear origin, duration or substance with an alien woman."¹⁶² The murky origins of the affair colored the government's explanation of the ensuing paternity: "Having allegedly fathered a child who remains with her mother," the government postulated, "he returns home, developing no parent-child relationship with his putative daughter during her minority."¹⁶³ While the facts of *Miller* did involve a serviceman and a daughter who lived in the Philippines, little else was discussed regarding their relation.¹⁶⁴

Instead, the Court agreed with the government that the scenario is commonplace: "Given the size of the American military establishment that has been stationed in various parts of the world for the past half century, it is reasonable to assume that this case is not unusual."¹⁶⁵ In dissent, Justice

¹⁶⁰ *Miller*, 523 U.S. at 425.

¹⁶¹ At the time of Nguyen's conception Boulais was in the employ of a military contractor. Boulais did serve in the United States Army; he was, however, stationed in Germany, not in Vietnam, where he later fathered a child. Brief of Petitioners at 4–5, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1706737, at *4–5 [hereinafter *Nguyen* Brief of Petitioners].

¹⁶² *Miller* Brief for the Respondent at *29 n.16. The choice to include the origin, in addition to the duration or substance of the affair is an interesting one, and functions to minimize the active participation of the father even at the time of conception.

¹⁶³ *Id.*

¹⁶⁴ Neither the briefs to the Court nor the Court itself elaborated upon the nature or the extent of the relationship between Charlie Miller and his daughter, Lorelyn Penero Miller. See *Miller* Brief for the Respondent, *supra* note 156 (discussing blood relationship of parties only); Brief of Amici Curiae the American Civil Liberties Union and NOW Legal Defense and Education Fund in Support of Petitioners at 2, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060), 1997 WL 327565, at *2 [hereinafter *Miller* Brief of Amici Curiae the ACLU] (same); *Miller*, 523 U.S. 420 (noting Miller's physical absence from the Philippines but failing to discuss whether he had a relationship with his daughter).

¹⁶⁵ *Miller*, 523 U.S. at 439. Cf. *Stanley v. Illinois*, 405 U.S. 645, 666 (1972) ("Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children.") (Burger, C.J., dissenting).

Breyer reminded the Court that the statute affects “all Americans who live or travel abroad,” not just military personnel “stationed in the Far East.”¹⁶⁶

The Court continued to rely on the military man in *Nguyen*, taking care to note how many servicemen were stationed abroad the year in which Boulais’s son, Tuan Anh Nguyen, was born.¹⁶⁷ Boulais himself was not a serviceman at the time, but was working overseas as a private citizen for a military contractor.¹⁶⁸ The Court was nevertheless explicit in its concerns “with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.”¹⁶⁹ In this context “the [nine]-month interval between conception and birth” that takes place “overseas and out of wedlock,” exacerbates the man’s inevitable absence.¹⁷⁰ The government also appealed to the military man’s associations with national security, linking the necessity of the American military presence abroad with the weakness of the borders at home: “At a time when democracy was under attack throughout the world and the United States faced grave problems in defending its interests and citizens abroad, Congress undertook . . . [to] protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset.”¹⁷¹

While the *Nguyen* Court emphasized the absence of the serviceman father, who is presumed to be fighting a foreign war to protect the borders at home, the Court assumed that the mother could give birth on American soil—even if serving abroad in the Armed forces. As Justice Stevens noted, had the citizen parent been “a female member of the Air Force,” then “[INA Section 309] quite probably would have been irrelevant and petitioner would have become a citizen at birth by force of the Constitution itself.”¹⁷² Justice Kennedy later repeated this same point in *Nguyen*: “[A] citizen mother expecting a child and living abroad has the right to reenter the United States so the child can be born here and be a 14th Amendment citizen.”¹⁷³ Even if the father were present, at birth or otherwise, it would be inconsequential, given that “the unmarried father as a general rule cannot control where the child will be born.”¹⁷⁴ The father is removed entirely from the comparison, as the Court considers the relative situation of different mothers—“the statute simply ensures equivalence between two expectant

¹⁶⁶ *Miller*, 523 U.S. at 486 (Breyer, J., dissenting).

¹⁶⁷ *Nguyen v. INS*, 533 U.S. 53, 65 (2001).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Brief for the Respondent at 13–14, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1868100, at *13–14 (citation omitted) [hereinafter *Nguyen* Respondent Brief].

¹⁷² *Miller v. Albright*, 523 U.S. 420, 442–43 (1998).

¹⁷³ *Nguyen*, 533 U.S. at 61.

¹⁷⁴ *Id.*

mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so."¹⁷⁵

The military man and woman are merely their domestic counterparts who have decided to enlist and are stationed abroad. Indeed, by assuming the absence of the unwed father and upholding the affirmative requirements placed on him by the INA, *Miller* and *Nguyen* draw upon assumptions from the various decisions addressing the treatment of unwed fathers in state laws. In doing so, the Court relied most heavily on *Lehr v. Robertson*, in which it held that "the mere existence of a biological link does not merit equivalent protection" where the father failed to "grasp the opportunity to develop a relationship with his child."¹⁷⁶ Though *Lehr* is typically understood as distinct from other domestic unwed father cases decided since *Fiallo*, all of these cases preserved similar distinctions between unwed parents.

In particular, *Lehr* is understood as a departure from *Caban v. Mohammed*,¹⁷⁷ a case decided a few years earlier. In *Caban*, Justice Powell, writing for the majority, held that a New York State statute allowing an unwed mother, but not an unwed father, to veto an adoption of their child, violated equal protection.¹⁷⁸ However, while the outcome in *Caban* favors the unwed father,¹⁷⁹ the Court did little to attack its uniform assumptions concerning unwed parents, which laid the foundation for its later decision in *Lehr*.

The Court in *Caban* does seem to reject rigid presumptions about parental roles. In analyzing the sex-based distinction, Justice Powell asserted that "maternal and paternal roles are not invariably different in importance."¹⁸⁰ Leaving aside the question of an unwed father's relation to his newborn, he explained that "[t]he present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother."¹⁸¹ In striking down the statute, the Court recognized different types of unwed fathers and mothers—the statute failed precisely because it "excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers."¹⁸²

Yet the Court allowed for the more standard conception of unwed fathers to remain intact, explaining that in "cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privi-

¹⁷⁵ *Id.*

¹⁷⁶ *Lehr v. Robertson*, 463 U.S. 248 (1983).

¹⁷⁷ 441 U.S. 380 (1979).

¹⁷⁸ *Id.* at 382, 388–394.

¹⁷⁹ See Chin, *supra* note 11, at 272–73 (arguing that *Caban* and *Stanley* are "egregious cases" that can be distinguished from other unwed fathers cases in that "what was at stake was the right to have any relationship whatsoever with their children, or when they satisfied conditions which other parents were not required to meet").

¹⁸⁰ *Caban*, 441 U.S. at 389.

¹⁸¹ *Id.*

¹⁸² *Id.* at 394.

lege of vetoing the adoption of that child."¹⁸³ Where the father had not proven that the baseline absence is inapplicable to his particular situation, the Court may find that unwed fathers and mothers are not similarly situated. Accordingly, as in *Stanley*, the unwed father in *Caban* must still prove that he is "unusual," in that he has a relationship with his child, to receive the recognition automatically given the unwed mother.¹⁸⁴

The limits of *Caban's* paternal acknowledgment seem particularly clear when analyzed alongside *Parham v. Hughes*, which was issued the same day and upheld the denial of a wrongful death action brought on behalf of a child born to unwed parents.¹⁸⁵ In a plurality opinion, the Court considered a Georgia statute requiring that the unwed father legitimate his child before being able to sue for wrongful death, while allowing the unwed mother to sue without taking any affirmative steps.¹⁸⁶ In what the dissent deemed "a startling circularity,"¹⁸⁷ the plurality reasoned that the statute did not classify based on gender given that fathers and mothers are not similarly situated in the first instance—mothers cannot legitimate their child, while fathers can—without questioning the initial difference that required the father, but not the mother, to do so.¹⁸⁸ The Court thus effectively replaced the legal fact of legitimation for any "real" difference between unwed fathers and mothers.

The unwed father's presumptive absence was decisively sealed in the case of *Lehr v. Robertson*.¹⁸⁹ The Court held that neither equal protection nor due process were violated by preventing an unwed father who had not enrolled in the "putative father" registry from being notified of his child's adoption.¹⁹⁰ The Court explained that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."¹⁹¹ Again, although the Court framed the relationship in the gender-neutral terminology of "parent and child," the only relevant criterion for the mother was, by default, the fact that she gave birth to her child; just the father had to supplement the fact of biology with the establishment of a perceptible relationship.¹⁹² Relying on the escape valve provided by *Caban*, the Court noted that where a father had not come forward to claim a relationship with his child, the mother and father were not similarly situated.¹⁹³

¹⁸³ *Id.* at 392.

¹⁸⁴ See *supra* note 68 (discussing *Stanley* Court's treatment of Peter Stanley as "unusual").

¹⁸⁵ 441 U.S. 347 (1979) (plurality opinion).

¹⁸⁶ *Id.* at 348–49.

¹⁸⁷ *Id.* at 361 (White, J., dissenting).

¹⁸⁸ *Id.* at 356.

¹⁸⁹ 463 U.S. 248 (1983).

¹⁹⁰ *Id.* at 265, 267–68.

¹⁹¹ *Id.* at 266–67.

¹⁹² *Id.*

¹⁹³ *Id.* at 267–68. See *Caban v. Mohammed*, 441 U.S. 380, 389, 392 (1979) ("In those cases where the father never has come forward to participate in the rearing of his

Like the citizenship transmission cases, the extent to which the Court recognized an unwed father's relationship in the domestic equal protection cases was in large part dependent on the relationship's legal visibility, that is, on whether it had been formalized.¹⁹⁴ The Court distinguished the father in *Lehr* from the father in *Caban* because the latter had a sustained custodial relationship with his child.¹⁹⁵ But, while purporting to make this distinction on the basis of the absence of real ties, the Court in *Lehr* did so based on the absence of legal ones. Because the father was not listed in the putative registry and did not satisfy the statutory definition of any of the other categories of fathers recognized for purposes of receiving notice,¹⁹⁶ the Court refused to recognize any ties he may have actually had with his child.

The dissent in *Lehr* raised a set of facts that were nowhere discussed by the Court—the father, Jonathan Lehr, argued that he had visited Lorraine Robertson and their daughter Jessica M. in the hospital after birth until Lorraine began to conceal her whereabouts from him.¹⁹⁷ He repeatedly attempted to locate Lorraine and his daughter, with varying success until he decided to hire a private detective, and offered to set up a trust fund for Jessica, which Lorraine refused.¹⁹⁸ While these facts are contested by Lorraine,¹⁹⁹ the Court is satisfied purely by proxy – because the unwed father did not complete the affirmative steps required by statute, he is not recognized by law. Similarly, in *Parham* the plurality found no equal protection violation, despite recognizing that the father “sign[ed] the child’s birth certificate and contribute[d] to his support”;²⁰⁰ and that his child took his name

child, nothing in the Equal Protection clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.”)

¹⁹⁴ Melissa Murray submits that many of the unwed father cases decided by the Court under state law can be best understood as upholding a preference for the marital family, or families that approximate the marital family. Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 400–12 (2012) (arguing that the series of unwed father cases are better understood as exhibiting a preference for placing a child in a marital or marital-like family over a non-marital or non-marital-like family, rather than purely as decisions about the relationship of the parent to the child). She notes, however, that “[t]hrough *Stanley* and *Caban* vindicate the rights of fathers who function in the manner of married fathers, the Court is quick to note that the easiest – and preferred – way to perfect one’s paternal rights is to not only act like a married father, but to actually be married to the child’s mother.” *Id.* at 408 n.115.

¹⁹⁵ *Lehr*, 462 U.S. at 261.

¹⁹⁶ The categories of fathers entitled to receive notice under the law include those who have been formally recognized as such by legal process, such as any person adjudicated in court to be the child’s father or any person recorded on the child’s birth certificate, as well as those who have otherwise been established as the father, for example by living with the child and holding themselves out to be the father, or where the child’s mother identifies them as the father. N.Y. Dom. Rel. Law. §§ 111-a(2)(a), (2)(d), (2)(e), (2)(f).

¹⁹⁷ *Lehr*, 463 at 269–72 (White, J., dissenting).

¹⁹⁸ *Id.* at 269 (White, J., dissenting).

¹⁹⁹ Brief for Appellees Robertson at 8 n.2, *Lehr v. Robertson*, 463 U.S. 248 (1983) (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 215, at *8 n.2.

²⁰⁰ *Parham v. Hughes*, 441 U.S. 347, 349 (1979) (plurality opinion).

and was visited by him on a regular basis.²⁰¹ The absence of the father's formal legitimation during the child's lifetime resulted in the Court's inability to recognize the unwed father's presence after his child's death.²⁰²

The desire for a legally recognized relationship can be understood even more literally as a marriage-like alternative. The Court makes its reasoning explicit in *Quilloin v. Walcott*,²⁰³ which considered the different veto powers granted in cases of adoption between fathers, wed and unwed, rather than between the unwed father and mother.²⁰⁴ In order for the unwed father to acquire the same veto power as a wed father, he must have legitimated his offspring, either through marriage or recognition.²⁰⁵ The brief on behalf of the unwed father quoted testimony that he "had loved and cared for the child," had provided him with "food, clothing, and medical care . . . and sen[t] [his] child to kindergarten and actually [took] him most of the time."²⁰⁶ The brief continued by asking "[i]n what manner does this factual situation differ from the cases of many short-lived marriages and divorce?"²⁰⁷ Justice Marshall, writing for the Court, answered by relying on the fact, or form, of marriage, reasoning that "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage."²⁰⁸

Despite the Court's general reluctance to recognize the unwed father's actual attempts to form a relationship with his child, the *Lehr* Court, as in *Miller* and *Nguyen*, nevertheless emphasized the opportunity to do so: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."²⁰⁹ The father has a choice "to grasp[] that opportunity and . . . enjoy the blessings of the parent-child relationship."²¹⁰ This is a choice, however, that the unwed mother does not possess.²¹¹ And it is a choice that

²⁰¹ *Id.*

²⁰² See also *Michael H. v. Gerald D.*, 491 U.S. 110, 111 (1989) (plurality opinion) (holding under substantive due process that a presumption that the married father is the actual father of a child born in wedlock does not violate the rights of the biological father, despite blood tests that prove the unwed father's paternity and despite holding out his biological daughter as his own).

²⁰³ 434 U.S. 246 (1978).

²⁰⁴ Brief for Appellant at 4, *Quilloin v. Walcott*, 434 U.S. 246 (1978) (No. 76-6372), 1977 WL 189165, at *5 [hereinafter *Quilloin* Brief for Appellant].

²⁰⁵ *Quilloin*, 434 U.S. at 248-49.

²⁰⁶ *Quilloin* Brief for Appellant, *supra* note 204, at *19.

²⁰⁷ *Id.*

²⁰⁸ *Quilloin*, 434 U.S. at 256.

²⁰⁹ *Lehr*, 463 U.S. at 262 (analyzing the due process claim).

²¹⁰ *Id.*

²¹¹ This element of choice is cabined to becoming a father; being a mother is more of an imperative. See, e.g., Collins, *When Fathers' Rights are Mothers' Duties*, *supra* note 11, at 1700 (noting that "[t]he current citizenship regime recognizes that women are obliged by law to assume responsibility for a nonmarital child, and that fathers have a choice to assume that legal burden"); see also discussion *infra* Part III.B.

carries with it constitutional consequences—if the father “fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.”²¹² Nor would the Court find the unwed parents similarly situated until the unwed father had decided to grasp that opportunity.²¹³ The necessity for an opportunity only arises from a deficiency; the unwed fathers in the domestic and citizenship transmission cases are similar in the assumption that they both begin from a dearth—of marriage and thus of family ties.

The Court’s opinions in the citizenship transmission cases are comparable to its domestic equal protection cases dealing with unwed fathers in another important respect—they address only the American parents. While in *Miller*, Justice Stevens acknowledged that INA Section 309 deals with “the distinction drawn . . . between the child of an alien father and a citizen mother, on the one hand, and the child of an alien mother and a citizen father, on the other,”²¹⁴ the “alien mother” makes few appearances in the cases. The potentially present foreign mother is nowhere addressed,²¹⁵ nor is the mother, foreign or American, who is absent from her child’s life, either by choice or accident.²¹⁶ The Court only considers the American mother who will carry her child and take responsibility for its care.²¹⁷ While the nature of the equal protection claim focuses the Court’s analysis on the American parents, it does not necessitate the exclusion of the other parents involved in the relationship. The American mother and father are, however, the only relevant actors in both the Court’s decisions addressing the domestic family of state law and the citizen family of federal law.

The absence of the foreign parent in the citizenship transmission cases addressing the American father and the non-American mother is striking. This is especially so given the Court’s determination that the citizen mother, unlike the citizen father, will typically retain custody over the child— “[w]hen a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child’s existence and typically will have custody of the child immediately after the birth.”²¹⁸ Understood in conjunction with the Court’s determination that the American father will likely be absent from birth and the child’s life thereafter, the Court reaches the decision that the foreign mother, like her American

²¹² *Lehr*, 463 U.S. at 262.

²¹³ *See id.* at 265–68 (analyzing the equal protection claim).

²¹⁴ *Miller v. Albright*, 523 U.S. 420, 424 (1998).

²¹⁵ Petitioner Lorena Penero lived in the Philippines at least until she was twenty-one years of age, presumably living with her mother, Luz Penero. *Id.* at 425.

²¹⁶ Boulais lost contact with his son’s biological mother and she never again contacted him. Nguyen Brief of Petitioners, *supra* note 161, at *5–6.

²¹⁷ *See Nguyen v. INS*, 533 U.S. 53, 65 (2001) (“In the case of a citizen mother and a child born overseas . . . [t]he mother knows that the child is in being and is hers and has an initial point of contact with him.”).

²¹⁸ *Miller*, 523 U.S. at 438.

counterpart, will also retain custody over the child. This decision of some significance is, however, made by implication only.

2. *Problems of Proof Still Lurking*

The *Miller* plurality and *Nguyen* opinion reiterated the concern initially voiced in *Fiallo* over proving a blood relationship between father and child, and the difficulties particular to paternity determinations. The Court continued to emphasize blood ties as a justification for the post-birth requirements imposed on fathers, despite a statutory scheme that already requires “clear and convincing” evidence of a blood relationship between father and child;²¹⁹ it also remained despite the increased accuracy and prevalence of paternity testing.²²⁰ The Court’s insistence on proof of biological ties can be understood, however, by its adherence to the biology component of the “biology plus” cases, relying on the unwed father framework it erected domestically in its equal protection jurisprudence.

The Court’s concerns with “assuring that a biological parent-child relationship exists” in the citizenship context continue to center around birth, relying on the familiar absence of the father and presence of the mother during that crucial event.²²¹ Its reasons were again stated in terms of what can be observed: “The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record.”²²² The Court explained that even if the unwed father were present at birth, “that circumstance is not incontrovertible proof of fatherhood”²²³ given, as previously noted, the potential promiscuity of the foreign woman, and the otherwise murky origins of the conception. The Court thus situated the biological difference in the act of birth, even though what takes place before, at the moment of conception, is arguably the determinative factor in establishing paternity.²²⁴

²¹⁹ INA § 309(a)(1), 8 U.S.C. § 1409(a)(1) (2006).

²²⁰ See *Miller*, 523 U.S. at 484–85 (Breyer, J., dissenting) (noting that “the added protection is unnecessary in light of inexpensive DNA testing that will prove paternity with certainty” and that “a different provision of the statute . . . already requires proof of paternity”).

²²¹ *Nguyen*, 533 U.S. at 62; see also *Miller*, 523 U.S. at 435–36.

²²² *Miller*, 523 U.S. at 436.

²²³ *Nguyen*, 533 U.S. at 62.

²²⁴ The Court does not recognize this prior event, despite its importance in terms of biology, and so what takes place during the moment of conception is not directly addressed. See Weinrib, *supra* note 4 at 251 (addressing the absence of sex and sexuality in the Court’s equal protection jurisprudence with a focus on *Nguyen*). Cases involving in vitro fertilization or surrogacy have proved challenging to the government given the Court’s emphasis on the event of birth. The State Department has, at least in one instance, found that where the mother has used assisted reproductive technology, the acts of carrying and giving birth to the child does not confer citizenship but rather the “nationality” of the egg or the sperm, determined by the citizenship of the donor. See Joanna L. Grossman, *Flag-Waving Gametes: Biology, Not Gestation or Parenting, Determines Whether*

As in *Fiallo*, the Court relied on the language and reasoning of *Trimble v. Gordon*,²²⁵ a case about the right of illegitimate children to inherit, which is also captured in other similar cases of the period, most notably *Lalli v. Lalli*.²²⁶ The plurality in *Lalli* upheld the constitutionality of a statute denying a child born to unwed parents the inheritance of his father because he had failed to obtain proof of paternity during the father's lifetime.²²⁷ Its reasoning is nearly verbatim to that of *Miller* and *Nguyen*: while "[e]stablishing maternity is seldom difficult," there are "peculiar problems of proof" involved in questions of paternal inheritance.²²⁸ Elaborating on those peculiar problems, the Court explained that the birth of the child takes place in the presence of others, and "[i]n most cases, the child remains with the mother and for a time is necessarily reared by her" whereas "[p]roof of paternity . . . frequently is difficult when the father is not part of a formal family unit."²²⁹ This is especially so where the American mother, like her foreign counterpart, "may not know *who* is responsible for her pregnancy."²³⁰

Similar to the fixed eighteen-year cutoff in INA Section 309(a)(4), the Court in *Lalli* upheld the exclusion of a child born out of wedlock from being included as a distributee of his father's estate, on the basis that there was no judicial decree establishing paternity during the father's lifetime, despite facts that indicated the existence of a parental relationship during the father's life.²³¹ The lack of formal family ties between unwed father and child trumped any acknowledgment of real physical ties with the mother, or his child—even in situations where the latter was proven to a 99.98% certainty.²³²

Similar to the concerns raised in *Fiallo*, the problems with proving paternity domestically were geared toward the issue of fraud more than difficulty. In *Parham v. Hughes*, the Court recognized the State's "interest in avoiding fraudulent claims of paternity," and expressed concern that "a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the father of the deceased child."²³³ The absent father during the life of his child has transformed into a legion of men claiming

Children Born Abroad Acquire Citizenship From U.S. Citizen Parents, VERDICT (April 3, 2012), <http://verdict.justia.com/2012/04/03/flag-waving-gametes>. This decision is arguably in tension with the Court's opinions.

²²⁵ 430 U.S. 762 (1977).

²²⁶ 439 U.S. 259 (1978) (plurality opinion). Neither *Miller* nor *Nguyen* cite directly to *Lalli*, which was decided the term after *Fiallo*.

²²⁷ *Id.* at 274–76.

²²⁸ *Id.* at 267–68.

²²⁹ *Id.* at 269.

²³⁰ *Id.* (quoting *In re Ortiz*, 303 N.Y.S.2d 806, 812 (1969) (emphasis in original)).

²³¹ *Id.* at 262–64 (evidence of the parent-child relationship that was excluded from consideration included notarized documents where the deceased father referred to appellant as "my son" as well as several affidavits acknowledging relationship openly).

²³² See *Nguyen* Brief of Petitioners, *supra* note 161, at *7 (noting that DNA test results indicated to a certainty of 99.98% that Boulais was *Nguyen's* father).

²³³ *Parham v. Hughes*, 441 U.S. 347, 357 (1979).

paternity for the purpose of wrongful death suits. The image of the fraudulent and opportunistic father affirmed the Supreme Court of Georgia's reasoning in *Hughes v. Parham*, which postulated that the Georgia General Assembly may have concluded that the unwed father who failed to legitimate his child "suffers no real loss from the child's wrongful death."²³⁴

These claims of fraud could similarly apply to unwed mothers, given the separation of the fraudulent act from the biological act. Moreover, as Justice O'Connor noted in her dissent in *Nguyen*, there is a difference between the occurrence of an event and proof of that event.²³⁵ While it is conceivable that some women may submit a fraudulent birth certificate, that possibility is entertained neither by the Court nor the present regulatory scheme. In assessing paternity fraud, the current United States State Department's Foreign Affairs Manual allows for the possibility of unconscious and conscious mistakes by unwed fathers, and provides pointers for determining when fraud may occur. One of the six guidelines it lists for paternity fraud is that the child is born out of wedlock.²³⁶ The very fact of an unwed father is sufficient to raise suspicions. The fact of being unwed for a mother is not, however, determinative. Rather, such "[c]ases in which an unmarried U.S. citizen woman falsely claims a child as her natural child for citizenship purposes are relatively rare but can occur."²³⁷

In cases dealing with unwed fathers domestically, the Court's initial reluctance to allow DNA testing in lieu of some form of legal legitimation²³⁸ waned as it began to recognize the DNA test's ability to resolve problems of proof in paternity actions. As the Court acknowledged in *Pickett v. Brown*, a case involving a Tennessee law that placed a two-year statute of limitations on paternity legitimation: "[T]he relationship between a statute of limitations and the State's interest in preventing the litigation of stale or fraudulent

²³⁴ *Hughes v. Parham*, 243 S.E.2d 867, 869–70 (Ga. 1978) (postulating the different ends served by the Georgia statute excluding the fathers of illegitimate children from the benefits of a wrongful death action). The perceived lack of loss upon death mirrors the assumption of lack of ties during the child's life.

²³⁵ *Nguyen*, 533 U.S. at 85 (O'Connor, J., dissenting). Justice O'Connor distinguished between the requirement that a child and unwed father develop ties before the age of eighteen and that the proof also be satisfied before the child turns eighteen, noting that "it is difficult to see how the requirement that *proof of such opportunity* be obtained before the child turns 18 substantially furthers the asserted interest" given that "it is entirely possible that a father and child will have the opportunity to develop a relationship . . . without obtaining the proof of the opportunity during the child's minority." *Id.*

²³⁶ 7 *Foreign Affairs Manual* (FAM) 1131.5-3a(1) (2012). Congress has delegated to the State Department the administration and enforcement of citizenship laws with regards to individuals who are outside the territory of the United States; the Foreign Affairs Manual sets forth the Department of State's interpretation of the rules regulating citizenship. See Grossman, *supra* note 224 (explaining what the Foreign Affairs Manual sets forth in determining who is a parent for purposes of citizenship transmission).

²³⁷ *Id.* at 1131.5-4a.

²³⁸ See *Mills v. Habluetzel*, 456 U.S. 91, 98 n.4 (1982) ("We previously have recognized that blood tests are highly probative in proving paternity, but disagree with appellant's contention that their existence negates the State's interest in avoiding the prosecution of stale or fraudulent claims.") (internal citation omitted).

paternity claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof surrounding paternity actions.²³⁹ *Pickett*, however, was decided in the context of an equal protection challenge based on the rights of children, rather than on the rights of their unwed parents.²⁴⁰

In the citizenship transmission cases, the Court declined to allow even this small inroad of recognition considering the rights of unwed parents; it paired the problems of proof with a concern about what happens abroad, and the potential unavailability of genetic testing in foreign countries.²⁴¹ The real anxiety over the influence of the foreign—woman or territory—remained fastened exclusively to the unwed father, preventing the Court from adopting even the gradual acceptance of DNA testing allowed by the state cases.

While the Court did not acknowledge the redundancy of the lurking problems of proof justification where proof of paternity was already required by “clear and convincing” evidence under INA Section 309(a)(1), the government did gradually eliminate the paternity justification from its arguments. In *Miller*, the government recognized that the biological connection demanded by INA Section 309(a)(1) satisfied proof of paternity and conceded that subsection (a)(4) “must therefore reflect, at least in part, some other congressional concern.”²⁴² The government identified that concern as the development, before the child reached the age of majority, of ties to the citizen parent and, in turn, to the United States.²⁴³ The government abandoned the biological ties justification entirely in *Nguyen*. The two interests it presented were those of ensuring the establishment of a “sufficiently recognized or formal relationship” between the citizen parent and the United States, and “preventing such children from being stateless.”²⁴⁴ The statelessness justification, which would become the government’s central argument in *Flores-Villar*, made its first real appearance in the context of INA Section 309(a)(4).²⁴⁵ The Court, however, remained silent on the issue of statelessness, continuing to rely on its biology-plus justifications in the context of citizenship.

²³⁹ See *Pickett v. Brown*, 462 U.S. 1, 17 (1983) (holding that statute of limitations imposed on paternity and child support actions violated equal protection).

²⁴⁰ See *id.* at 17–18.

²⁴¹ See *Nguyen v. INS*, 533 U.S. 53, 63–65 (2001) (discussing problems of proof of paternity in foreign countries where fathers may no longer be present and may not even be aware of the child’s existence); *Miller v. Albright*, 523 U.S. 420, 437 (1998) (noting potential unavailability of genetic testing in foreign countries).

²⁴² *Miller* Brief for the Respondent, *supra* note 156, at *27.

²⁴³ *Id.* at *28.

²⁴⁴ *Nguyen* Respondent Brief, *supra* note 171, at *11.

²⁴⁵ The government argued that it had already raised arguments about statelessness in *Miller*. *Id.* at *11 n.6. However, the statelessness justification had only been advanced in the context of discussing the different residential requirements imposed on men and women in INA § 309(a) and (c), not in the context of § 309(a)(4). See *Miller* Brief for Respondent, *supra* note 156, at *24, *33–34 (explaining that while the only provision at issue is INA § 309(a)(4), “[f]or the sake of completeness, however, we shall address the other features of Section 309 as well”).

3. *Heightened Scrutiny: Rise of "Real" Difference*

Where plenary power permitted the Court in *Fiallo* to avoid considering the family, the heightened scrutiny analysis of the citizenship transmission cases compelled the Court to directly address the unwed parents before it. The rise of a jurisprudence of "real" difference, based on the event of birth and its attendant circumstances, replaced the silence allowed by judicial deference, without fundamentally different results.

Although scholars have criticized the Court's equal protection analysis in *Miller* and *Nguyen* as uncharacteristically weak, it is very much in line with the Court's gender-based analysis of unwed fathers and mothers in the domestic context. What has changed with the advent of a jurisprudence of difference is that, perhaps paradoxically, the continued use of the family as an entity of citizenship regulation has been increasingly obscured. The site of the family, however, persists as a means of regulating entry into the nation, and the demarcation of family relations occupies a functional role in the Court's citizenship transmission decisions.

At a basic level, the shift to heightened scrutiny meant that the unwed mother and father figures that were avoided in *Fiallo* had to be directly addressed. In *Nguyen*, the Court defined the distinction between the unwed parents as one based on a "real" difference, located in the event of birth: "The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender."²⁴⁶ The difference the Court articulated was not, however, the physical act of birth itself but the "relation to the birth process."²⁴⁷ The Court simultaneously relied on a biological distinction—men do not give birth—while locating the relevant comparison in the parents' post-birth conduct. The Court depended on the fact of birth only insofar as it is connected to the relations between parent and child that occur thereafter.

According to the Court, birth must remain part of the equation because where the mother has no post-birth requirements a direct comparison between the post-birth conduct of the parents is difficult.²⁴⁸ The Court first set forth this reasoning in *Miller*, noting that "it is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a legal relationship between parent and child—the birth itself for citizen mothers, but postbirth [sic] con-

²⁴⁶ *Nguyen*, 533 U.S. at 73.

²⁴⁷ *Id.*

²⁴⁸ For the unwed mother, the only relevant act is the birth itself. See Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93, 111 (2000) (arguing that "[u]nder the law, the children of unmarried U.S. women embody the U.S. nation at the moment of birth").

duct for citizen fathers and their offspring.”²⁴⁹ The Court’s statement is telling in that the event of birth creates not only a child but also a “legal relationship,” collapsing the real difference into a legal one.

The American father and mother exist parallel to each other in Sections 309(a) and (c) of the INA, yet the Court’s citizenship transmission cases bring them together as if they formed the contours of a domestic family.²⁵⁰ The Court’s decision to directly address the equal protection challenge comparing the unwed mother and father places these two figures at the center of its citizenship opinions. Focusing on the distinctions between the unwed parents, however, conceals the explicitly political question of who is recognized as an American citizen. The Court has exchanged the deference that enabled its silence on the reasons for upholding a statute excluding unwed fathers for discussions of difference that shield the political nature of the decision to transmit citizenship. That Congress’s choice to recognize family relations impacts the regulation of American citizenship—explicitly acknowledged by *Fiallo* in the context of immigration—is obscured by the discussion of domestic-based gender issues.

Although the presence of the military abroad injects some awareness of the foreign into the Court’s opinions, the domestic family remains squarely at their center. Accordingly, the citizenship-related consequences of how the INA defines, and the Court decides, the transmission of citizenship, are unaddressed.²⁵¹ Those consequences may take a variety of forms; the Court’s current decisions fail to consider any possible repercussion. Looking to concerns animating past discussions leads to some fundamental reasons to question the Court’s silence on the issue. In 1933, for instance, Congress considered a proposal to amend a precursor to the INA that would have

²⁴⁹ *Miller v. Albright*, 523 U.S. 420, 443 (1998). This is not meant to imply that the difference based on birth is not a “real” one, but rather to attempt to pin down and understand the Court’s assignment of difference. Scholars such as Laura Weinrib note the potential pitfalls of retreating to formal equality in light of this “real” difference between men and women. *See* Weinrib, *supra* note 4, at 230 (“One must be careful, however, not to conclude too hastily that laws burdening fathers must uniformly be stamped out in the interest of equality. There is indeed a set of real differences between fathers and mothers for the purposes of pregnancy law in particular and for family law more generally.”).

²⁵⁰ The American family is also the focus, in its domestic form, of the briefs before the Court in these cases. *See, e.g.*, Brief of the National Women’s Law Center et al. as Amici Curiae Supporting Petitioners at 9–12, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1702034, at *9–12 [hereinafter *Nguyen* Brief of the National Women’s Law Center] (discussing statistics relevant to out-of-wedlock births for fathers and mothers in the United States); *Miller* Brief of Amici Curiae the ACLU, *supra* note 164, at *7 (citing to domestic studies showing fathers to be as competent as mothers in raising children). *But see* *Nguyen* Brief of the National Women’s Law Center, *supra* at *11 n.10 (discussing family planning services available abroad).

²⁵¹ Legal scholars have undertaken the project of recuperating the race-based origins of the sex-based citizenship laws. *See* Kristin A. Collins, “*Illegitimate Half-Castes*” and the Citizen Family: Race, Sex, and the Practice of Citizenship Past and Present (forthcoming) (on file with the author) (linking the history of the *jus sanguinis* citizenship laws to the 1864 case of *Guyer v. Smith* to support the claim that the sex-based rules were also deeply race-salient in logic and operation).

allowed American married mothers to transmit citizenship to their children on the same terms as married fathers. Congressman Charles Kramer, expressing unease about the composition of the nation, asked Burnita Shelton Matthews, an attorney speaking in support of the amendment, about the effects of such a change: "Don't you feel," he questioned, "that we are increasing the probability of bringing in more of the Chinese and Japanese, and 'what have you', from those nations over there, by reason of this bill?"²⁵²

The plainly racist inquiry is telling in that it reveals an essential element missing from the Court's current discussions. The question expresses Congress's concerns with how citizenship transmission affects which, and how many, potential citizens it recognizes; it also discloses underlying prejudices and preferences that are encoded into that decision. The Court's opinions evade that question entirely, as they once evaded the direct comparison between the unwed father and mother. In so doing, possible prejudices remain unsaid and restrictions unnoticed. Thus, by focusing only on the American halves of the citizen family, various citizenship-related consequences for how the family is defined in the first instance, and of the inherently political nature of such a determination, remain unanalyzed.²⁵³

B. *A Move Toward Custody*: Flores-Villar

The final equal protection challenge to reach the Court addressed the differing residency requirements imposed on unwed fathers and mothers prior to transmitting citizenship to their child. The Court of Appeals for the Ninth Circuit upheld the constitutionality of the differential requirements placed on each unwed parent. After granting certiorari, the Supreme Court was ultimately silent on the question, affirming the judgment in an evenly split per curiam.²⁵⁴ Both the Ninth Circuit's opinion and the arguments presented by the government to the Supreme Court followed the reasoning set in place from *Fiallo* to *Nguyen*.

Nevertheless, *Flores-Villar v. United States* signaled the potential for a fundamental shift with the emergence of the foreign woman, the "alien

²⁵² "No; I do not feel that way," replied Matthews. *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, And Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 before the H. Comm. on Immigration and Naturalization*, 73d Cong. 37 (1933) (statement of Burnita Shelton Matthews, Attorney, National Woman's Party).

²⁵³ The acknowledgment of the family as a political entity also has repercussions for the domestic family. Decisions addressing the bounds of family relations and family membership raise questions about what outcomes are being generated and how. See Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 *YALE J.L. & HUMAN.* 189, 290 (2011) ("The division of intellectual labor between Family Law and Poverty Law or Welfare Law . . . obscures the state's constant, conscious use of the family as a private welfare system.").

²⁵⁴ *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam).

mother.”²⁵⁵ For the first time in this line of cases, the existence of the alien mother was confronted and her role in the statute and the opinions was more directly set forth in the oral arguments before the Court. The discovery of the unwed mother beyond her domestic guise, and the relationship she is presumed to have with her child, present a possible departure from the Court’s strict reliance on unwed parenthood and a move toward the framework provided by a custody determination.

1. *Perceived Absence of Country Ties*

Ruben Flores-Villar, the son of an American father and foreign mother, was denied American citizenship because his father had not satisfied the residency requirement of INA Section 309(a).²⁵⁶ Complying with the residency requirement demanded that the unwed father be present in the United States for ten years, five of which had to take place after his fourteenth birthday,²⁵⁷ a physical impossibility for Ruben Trinidad Floresvillar-Sandez who was sixteen years old when his son, the petitioner, was born.²⁵⁸ Had Ruben Flores-Villar’s mother been the parent with American citizenship, he would have had American citizenship transmitted to him at birth; the unwed American mother only had, and continues to have, a one-year continuous physical presence requirement.²⁵⁹

While the prior citizenship transmission cases did not directly address the INA’s residency requirement, the *Nguyen* Court identified the relevant state interest as ensuring that the citizen parent and child “have some demonstrated opportunity to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, every-day ties that provide a connection between child and citizen parent and, in turn, the United States.”²⁶⁰ The Court thus raised the triangular relationship between parent, child, and territory, but mainly analyzed only one angle—the opportunity to develop a real relationship between parent and child. The focus of the residency requirement is on another possible, yet previously ignored relation—between parent and territory.

The reason for requiring the unwed father to live in the United States for a longer amount of time than the unwed mother is not obvious. Neither

²⁵⁵ Oral Argument at 40:00, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (No. 09-5801), available at http://www.oyez.org/cases/2010-2019/2010/2010_09_5801 [hereinafter *Flores-Villar* Oral Argument].

²⁵⁶ *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008).

²⁵⁷ INA § 301(a)(7), 8 U.S.C. § 1401(a)(7) (1970). The statute has since been amended and currently reads that the unwed father must be physically present in the United States for a total of five years, two of which must be after the age of fourteen. INA § 301(g), 8 U.S.C. § 1401(g) (2006).

²⁵⁸ *Flores-Villar*, 536 F.3d at 994.

²⁵⁹ INA § 309(c), 8 U.S.C. § 1409(c) (1970) (current version at INA § 309(c), 8 U.S.C. § 1409(c) (2006)).

²⁶⁰ *Nguyen v. INS*, 533 U.S. 53, 64–65 (2001).

the government nor the Ninth Circuit in *Flores-Villar* provided an account of how the increased residency requirement for unwed fathers in particular furthers the “connection between child and citizen parent and, in turn, the United States.”²⁶¹ Instead of considering the specific relation between parent and territory that the statutory requirement directly addresses, the Ninth Circuit adhered to *Nguyen*’s general tripartite formulation, without explaining how or where the length of residency potentially figures.²⁶²

The government similarly avoided connecting residency to parental or territorial relations. Before the Ninth Circuit, the government argued that the State’s “interest in fostering ties between the foreign-born child and the United States” was furthered “by ensuring that the father developed significant ties with the country at an age of maturity,” without explaining how.²⁶³ Before the Supreme Court, the government emphasized the importance of residency requirements and of actual ties to the United States in defining citizenship in general.²⁶⁴ Missing from its analysis was a reason why such ties differed according to gender—why the unwed father needed more time than the unwed mother to build a connection to the territory of the United States before being able to transmit that connection to his child.

While the link between father and country is at the forefront of the residency requirement, the relation between father and child remains in the background. It is this second, tacit connection that provides the structure in which the Court can uphold the differential statutory requirements. As the government disclosed in its oral argument to the Supreme Court: “One of the important factors Congress has looked at is [the child’s] connection to a U.S. citizen that is in turn a proxy for what likely connection to the United States will be.”²⁶⁵ The articulation of the relation is not principally between father and country, but between American citizen and child, in this case, father and child.²⁶⁶ And it is the relationship between father and child that determines the child’s relationship with the United States.

The framework that allows the residency requirement to endure is the one established and carried forward from *Fiallo* to *Nguyen* and *Stanley* to

²⁶¹ *Id.*

²⁶² The extent of the Court’s consideration of the relationship between the residency requirement and the government’s stated goal was upholding the requirement because “it furthers the objective of developing a tie between the child, his or her father, and this country.” *Flores-Villar*, 536 F.3d at 997.

²⁶³ Brief for Appellee United States at 26–27, *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (No. 07-50445), 2008 WL 1848810, at *14.

²⁶⁴ Brief for the United States at *20–21, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2010) (No. 09-5801), 2010 WL 3392008, at *20–21 [hereinafter *Flores-Villar* Brief for the United States].

²⁶⁵ *Flores-Villar* Oral Argument, *supra* note 255, at 31:30.

²⁶⁶ The government acknowledged that “the residency requirement is what measures the connection of the parent to the United States, not the child to the parent,” but quickly transitioned to an argument that “the same point obtains, that at the moment of birth in another country . . . the father doesn’t have a meaningful connection to the child[.]” *Id.* at 50:50.

Lehr—the perceived absence of ties between father and child, and thus the need for the potential to develop a relationship that would otherwise not exist. The “real, everyday ties”²⁶⁷ that matter are those between father and child, not between father and country. The unwed father’s absence and mother’s perennial presence continue to form the interpretative framework through which the father can be required to be “more” present, and the mother “less,” even in the territory of the United States.

2. *Problems of Statelessness*

The statelessness justification that the government first advanced in *Miller* and then in *Nguyen* under INA Section 309(a)(4) was finally relevant to the residency requirement at issue in *Flores-Villar*.²⁶⁸ The government focused on this second state interest, which evolved from a concern about problems of proof with paternity to a concern about the statelessness of children born abroad. The Ninth Circuit sustained the validity of the interest without much difficulty, holding that avoiding stateless children was an important objective substantially furthered by the chosen means.²⁶⁹

The government relied on the general notion that unwed parents are not always similarly situated for purposes of equal protection and specifically that children of unmarried women are at a greater risk of statelessness given that most *jus sanguinis* countries recognize only the nationality of the mother.²⁷⁰ In contending that the shortened residency requirement for unwed mothers is constitutional, the government explained that “[t]he difference in each parent’s situation is attributable to what this Court in *Nguyen* described as the ‘significant difference between the respective relationships of unwed mothers and unwed fathers to the potential citizen at the time of birth.’”²⁷¹ The government therefore linked the possibility of statelessness to the different relationships that an unwed mother and father are presumed to have with their child.

In so doing, it relied on the slippage between the “real” and the “legal” by reasoning that the real differences based on the act of birth identified in *Nguyen* became the legal ones the Court ultimately sanctioned: “Congress’s decision to apply a shorter physical-presence requirement to unwed mothers was based on the legal reality . . . that an unwed mother is established at the time of her child’s birth as the child’s legal parent while the unwed father usually is not.”²⁷² Taking *Nguyen* as the starting point, the government extra-

²⁶⁷ *Nguyen v. INS*, 533 U.S. 53, 54 (2001).

²⁶⁸ See *supra* text accompanying notes 244–245.

²⁶⁹ *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008).

²⁷⁰ This “state of affairs create[s] a substantial risk that a child born to an unwed U.S. citizen mother in a country employing *jus sanguinis* laws would be stateless at birth unless the mother could pass her citizenship to her child.” *Flores-Villar* Brief for the United States, *supra* note 264, at *33.

²⁷¹ *Id.* at *32 (internal citation omitted).

²⁷² *Id.* at *39.

polated the Court's decisions abroad—that is, “[i]f . . . it is permissible for Congress to apply different rules regarding the conferral of citizenship based on the different positions an unwed mother and an unwed father occupy with respect to the child at the time of birth, it is surely within Congress's constitutional authority to take account of the fact that other countries do so as well.”²⁷³

The logic employed is a familiar one. In *Parham*, the plurality looked to the reality of the legal difference between unwed parents to affirm the statutory distinctions between unwed fathers and mothers. The “fact” is, the Court in *Parham* explained, that mothers and fathers of illegitimate children are not similarly situated; yet the Court's recognition of this real difference was based on the legal one that “only a father can by voluntary unilateral action make an illegitimate child legitimate.”²⁷⁴ Thus, the “fact” of birth that was the starting point for the differences between parents had become a legal axiom that cannot be assailed.²⁷⁵

Beneath the surface of the statelessness justification remain the lurking problems of proof with paternity determinations. The government in *Flores-Villar* relied on the unwed father paradigm in explaining its particular concern with the unwed mother—“the application of foreign law, combined with potential problems of proof and paternal inaction, puts the foreign-born child of an unwed U.S. citizen mother at a significantly greater risk of being stateless at the time of birth.”²⁷⁶ It does not seem to matter that the twin problems of proof and paternal inaction are rendered obsolete by the statute's operation—the residency requirements are triggered only once the unwed father has satisfied INA Section 309(a), including the affirmative acts of (a)(4).²⁷⁷ Indeed, the government remained silent about the possibility that, according to *Nguyen's* reasoning, the unwed mother and father would at this point be similarly situated.

In its justifications, the government replaced its concern with being unable to identify a child's father—fatherlessness—with a concern for being unable to identify a state for that child—statelessness. Similar considerations animated both asserted objectives. What disappeared from the government's

²⁷³ *Id.* at *40 (internal citation omitted). The accuracy of the ultimately empirical assumption that the child of an unwed American woman is more likely to be stateless is debated at length in the briefs submitted to the Court, and will not be addressed here.

²⁷⁴ *Parham v. Hughes*, 441 U.S. 347, 355 (1979).

²⁷⁵ Justice Ginsburg questions the government based on a similar line of reasoning, trying to flesh out the difference between facts, opinions, and laws: “you said . . . this has nothing to do with stereotypes, this is the way the law was. But wasn't the law shaped because of the vision of the world of being divided into married couples where the father is what counted, and . . . the law didn't regard [unwed fathers] as having any kind of obligation?” *Flores-Villar Oral Argument*, *supra* note 255, at 49:55.

²⁷⁶ *Flores-Villar Brief for the United States*, *supra* note 264, at *38.

²⁷⁷ INA § 309(a), 8 U.S.C. § 1409(a) (2006) (stating that the provisions of INA § 301(g) shall apply only “if” the requirements of INA § 309(a) are satisfied).

arguments was the Court's recognition of the unwed mother's mobility,²⁷⁸ even though such mobility would seem relevant to the question of her child's potential statelessness and her ability to prevent it.²⁷⁹

3. *Silent Scrutiny: The "Alien" Mother*

While asserting that it was following the heightened scrutiny of *Nguyen*, the Ninth Circuit's pithy statements affirming the interests asserted by the government were reminiscent of the Supreme Court's reticence in *Fiallo*.²⁸⁰ Its abridged equal protection analysis revealed little about the unwed mother and father. The briefs to the Supreme Court were more informative, and presented the relevant considerations for the purpose of an equal protection analysis.

Appellant's brief and those of amici focused on a direct comparison between the unwed mother and father,²⁸¹ while the government treated the unwed mother as exceptional.²⁸² The government thus reverted to the familiar comparison between the unwed mother and all other American parents, expanding the focal point of the equal protection lens to the pre-*Miller* and *Nguyen* analyses undertaken by the Court.

The most accurate comparison considering the statutory requirements imposed on parents is a bit more complicated. Under the law as it applied to Flores-Villar and as it remains today, married parents who are both Ameri-

²⁷⁸ *Nguyen v. INS*, 533 U.S. 53, 61 (2001) ("[A] citizen mother expecting a child and living abroad has the right to reenter the United States so the child can be born here and be a 14th Amendment citizen.").

²⁷⁹ See Appellant's Opening Brief at 34–35, *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (No. 07-50445), 2008 WL 891254, at *34–35 [hereinafter *Flores-Villar* Appellant's Opening Brief] ("Furthermore, there is no rational reason to . . . render it physically impossible for [the unwed father] to confer citizenship on a child born abroad and out-of-wedlock, especially when a woman, who has a greater ability to cho[o]se where a child is born, can confer citizenship on her children.").

²⁸⁰ See *Flores-Villar*, 536 F.3d at 993 (summarizing holding that even applying intermediate scrutiny, the residency requirements of the INA sections 301(a)(7) and 309 survive).

²⁸¹ See, e.g., Brief of the National Women's Law Center Brief of the National Women's Law Center et al. as Amici Curiae Supporting Petitioner at 7, *Flores-Villar*, 131 S. Ct. 2312 (2011) (No. 09-5801), 2010 WL 2602010, at *7 [hereinafter *Flores-Villar* Brief of the National Women's Law Center] (describing how statute facially discriminates on the basis of gender); *Flores-Villar* Appellant's Opening Brief, *supra* note 279, at *7 (arguing that the residency requirements in the INA "discriminate against United States citizen fathers on the basis of both gender and age in violation of the equal protection clause of the Fifth Amendment of the United States Constitution").

²⁸² See *Flores-Villar* Brief for the United States, *supra* note 264, at *22–23 (arguing that unwed mothers and fathers are not similarly situated with respect to the risk of statelessness and that this justified the exceptional treatment given only to unwed mothers in the form of a lower residency requirement). The title to one of the sections in the government's brief is illustrative of this attempt to avoid a direct comparison: "Congress Constitutionally May Apply A Shorter Physical-Presence Requirement To Unmarried U.S. Citizen Mothers of Foreign-Born Children Than To All Other U.S. Citizen Parents of Foreign-Born Children." *Id.* at 22.

can citizens need only have had one of them reside in the United States, for no specified period of time, before transmitting citizenship to their child born abroad.²⁸³ The American citizen of a married couple composed of a citizen and an American national must have lived in the United States for a continuous period of at least one year—like the unwed American mother.²⁸⁴ Meanwhile, the longer residency requirements that are imposed on unwed American citizen fathers are the same as those imposed on the American citizen spouse in marriages of mixed nationalities.²⁸⁵

Thus, considering the unwed mother in the context of how the statute treats various parental couplings reveals a slightly different picture than the one initially presented. The relevant comparison is not between the unwed American mother and all the other parents, but rather between the unwed American father and married couples with only one American citizen, and the unwed American mother and married couples who are composed of one American citizen and one American national.²⁸⁶

These particular pairings, placing each unwed American parent alongside different couples, raise the question of what makes each group alike for purposes of citizenship transmission. One reason the government articulated in its brief was that in addition to its interest in reducing statelessness, the State had an interest in the child's American-ness, noting that a child born abroad to parents of different nationalities "is likely to be more alien than American in character."²⁸⁷ The government explained that this concern over an adequate connection to America was what, in 1952, motivated Congress to add a residency requirement for the unwed mother before transmitting citizenship to her illegitimate child: "Congress sought to strengthen the assurance of a connection to the United States."²⁸⁸ Yet this consideration alone does not explain why the unwed mother is placed with the group that is "more" American in character, and the unwed father with the group that is "less."

Putting aside whether Congress's additional interest in reducing statelessness together with ensuring that citizens have a connection to the United States may account for the differential residency requirements between unwed fathers and couples of mixed nationalities on the one hand, and unwed mothers and married American citizens and American nationals on the other,

²⁸³ INA § 301(d), 8 U.S.C. § 1401(d) (2006).

²⁸⁴ INA § 301(g), 8 U.S.C. § 1401(g) (2006).

²⁸⁵ The government explained the rules more clearly in its brief. Flores Villar Brief for the United States, *supra* note 264, at *2–3 (citing INA § 301(a); 8 U.S.C. § 1409(a) (1970)).

²⁸⁶ The term American nationals indicates persons who are not citizens but live in the outlying possessions of the United States, as distinguished from foreign nationals who are not citizens and live outside United States' territory entirely.

²⁸⁷ *Id.* at *27 (internal quotations omitted) (quoting *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 431 (1940)).

²⁸⁸ *Id.* at *29–30.

the government raised a third consideration. During oral argument before the Court, the government characterized Petitioner's argument to be that the unwed mother, "as this Court understood in *Nguyen*, may be the only either legal parent or the only parent at the moment of birth with the requisite connection to the child."²⁸⁹ From that starting point, the government reasoned, "the mother in that circumstance is very much like the two citizen parent family, the only parents . . . with a connection to the United States."²⁹⁰ The unwed father, however, is not in the same position, given that at the moment of birth there is "likely to be no recognized father" but "only the mother."²⁹¹

The government further explained that the unwed father remains distinct from the unwed mother even where he legitimates his child—"the reason why, is [that] when a child is legitimated, there are two parents who have the strong connection that was described in this Court's decision in *Nguyen* to that child, the U.S. citizen father, but also the mother, the alien mother in that country. So you have two parents whose interests have to be taken into account."²⁹² In other words, the father who has legitimated his child is assumed to always be accompanied by the unwed mother who, under the government's account, will remain with her child, akin to a family of mixed-nationalities. Meanwhile, the American mother, who under the government's account would remain with her child and unaccompanied, would be more similar to a family composed only of American citizens and nationals. In support of its contention, the government turned to *Lehr*, noting that "the cases involving illegitimates that this Court has had in a domestic context . . . [are] instructive."²⁹³

The lines spoken by government's counsel directly reveal the foreign individuals who have heretofore been obscured by an unswerving focus on the unwed American parents. In so doing, two unmarried mixed status couples are uncovered—that of the American man and the foreign woman and the American woman and the foreign man—along with the presumed interaction between them: what the statute assumes and the Court ratifies is that the mother, whether American or foreign, will retain custody. The decision made by Congress and the Court is the same every time, for every situation in which the parents are unmarried, even where the father may have legitimated his child—the unwed mother, regardless of the unwed father, America or foreign, will retain custody over her child. Under this formula-

²⁸⁹ Flores-Villar Oral Argument, *supra* note 255, at 36:15.

²⁹⁰ *Id.* at 36:31.

²⁹¹ *Id.* at 40:15; *see also* Brief for the Respondent at 17, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1868100, at *17 (noting that the mother's legal right to custody and control of her illegitimate child was established not only under domestic laws, but under "the law of most other nations" at the time of the child's birth in that case).

²⁹² Flores-Villar Oral Argument, *supra* note 255, at 39:46.

²⁹³ *Id.* at 40:23.

tion of the rules, an alternative framework of decision-making and analysis is presented—that of custody law.

III. TOWARD A CUSTODY FRAMEWORK

It is unsurprising that the Court looks to its domestic decisions for direction in cases considering the unwed American father and mother abroad. It does not, however, follow that the Court must recreate the domestic family on foreign soil. Despite the Court's nearly exclusive focus on the American father and mother in its citizenship transmission cases, it is deciding how each parent interacts in the context of a relationship with their foreign partners and their children. What emerges—most directly in *Flores-Villar* but also throughout the Court's prior cases—is that the decisions about how each parent can transmit citizenship are actually premised on a particular custody determination embedded in INA Section 309. The provisions of the INA dictate the transmission of citizenship based on the assumption that the unwed mother, whether she be American or foreign, abroad or in the United States, will retain custody over her child. The Court endorses that custody determination by affirming these rules and, in so doing, potentially reinforces it.

The Court reaches these decisions, however, without ever openly addressing the question of custody. Rather, it relies on an implicit custody determination and cites to a line of its own cases that begin from the assumption that the mother, not the father, will retain custody of the child in the absence of marital ties. This is problematic for a number of reasons. These unwed father cases are not explicitly decisions about who retains custody over the child.²⁹⁴ As such, these cases lack a framework for addressing the determination of which parent should retain custody.²⁹⁵ They also have little to say about the foreign mother, and whether she actually will retain custody over her child.

²⁹⁴ Although each of the unwed father cases can certainly be understood as allocating custody, they do not openly engage in assessing the parents' relations with their children and deciding which parent should remain with the child. In *Stanley*, for instance, in deciding that the unwed father is entitled to a hearing upon the death of the mother, the Court was essentially deciding that custody could not be removed from him automatically. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (stating that "the dismemberment of his family" was at stake). *Lehr* can also be understood as ultimately allocating custody of the child with the mother insofar as the Court allowed the adoption of *Lehr's* children by another man to go forward. *Lehr v. Robertson*, 463 U.S. 248, 250 (1983) (holding that state law requiring fathers to take specific affirmative steps to receive notice of the impending adoption of their biological children); see also Murray, *supra* note 194, at 400–12 (discussing a custodial preference for the marital family in the unwed father cases).

²⁹⁵ It is difficult to clearly delineate the bounds of cases addressing custody law, given that there is much overlap with other fields, including trusts and estates, juvenile law, and so on. This Article uses custody law to encompass the various state law schemes addressing parents' custody over their children at a moment of separation.

Acknowledging the custody determination that is inherent in these citizenship decisions triggers a set of rules and assumptions different from those the Court currently relies on. The shift away from the unwed father cases to a more direct acknowledgment of custody and its analytic framework would allow the Court to move beyond the circumscribed focus on the unwed father and mother and more fully address the relationship between the American parents, their foreign partners, and their child.²⁹⁶ Looking to custody would also impact the substance of the Court's decisions. For, custody law has considered and mostly abandoned the absolute maternal presumption that undergirds the rules transmitting citizenship. Finally, this move toward a custody framework is particularly relevant to the citizenship transmission cases—the custody decision is not only embedded in the Court's analysis, but custody-based notions addressing the role of gender in determining who is a parent are present in the Court's own criticisms and in the parties' attempts to articulate the harm at stake in differentiating between fathers and mothers as such.

Custody law therefore provides a robust alternative framework not only to understand but also to critique the Court's citizenship transmission decisions.²⁹⁷ The following considerations regarding the turn toward custody assume the continued relevance of the equal protection analysis generally; while it is not the only legal approach available, it is important to address how the doctrine may function in the citizenship transmission context beyond a limited adherence to the unwed father cases.²⁹⁸ This Part offers some preliminary proposals for how conceptualizing the decisions about citizenship in terms of custody may affect the determination of who should be able

²⁹⁶ State laws regulating custody consider all three actors who are addressed by INA Section 309—the mother, father, and child. *See, e.g.*, V.A.M.S. § 452.375(2) (2012) (“‘Joint legal custody’ means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child . . .”).

²⁹⁷ This proposal stands despite the impact that *United States v. Virginia*, 518 U.S. 515 (1996), may have on the Court's equal protection jurisprudence addressing sex-based distinctions. While I remain skeptical that *Virginia* would affect the Court's enduring equal protection analysis in the unwed parent cases, support for this contention is unnecessary—even if *Virginia* set forth a more searching standard, turning to custody provides a rubric that is most relevant in the citizenship transmission context. A tangential but important point is that this turn should not be taken as a necessary indictment of the biology-plus framework in the domestic context.

²⁹⁸ Some scholars question the efficacy of having equal protection address parental or familial rights. *See* Silbaugh, *supra* note 4 (arguing against the constitutionalization of family law issues given the Supreme Court's reluctance to address the complexities of family law, as exemplified by its decision in *Miller v. Albright*); Collins, *When Fathers' Rights are Mothers' Duties*, *supra* note 11 (questioning the ability of the equal protection analysis to ferret out discrimination in the context of parental relations, relying on the circular reasoning espoused in *Parham v. Hughes* as support). States have, however, incorporated equal protection ideals in reforming their custody laws to adhere to gender-neutral alternatives. *See* Alexandra Selfridge, *Equal Protection and Gender Preference in Divorce Contests Over Custody*, 16 J. CONTEMP. LEGAL ISSUES 165, 168–70 (2007) (describing states' need for gender-neutral standards for resolving custody disputes and their ensuing adoption of gender-neutral statutes).

to transmit citizenship to their children and how it might take place. This Part concludes by identifying the ways in which custody-related notions are already present in the Court's dissenting voices and the parties before it, as well as noting some of the limits inherent in the approach.

A. *Some Preliminary Proposals*

The Supreme Court has little case law addressing custody, as it is by and large a product of state law.²⁹⁹ The Court, however, looked to state law when considering matters related to the family,³⁰⁰ just as Congress has looked to the states when fashioning citizenship rules based on family relations.³⁰¹ The potential relevance of custody to the decisions addressing citizenship is two-fold: the regulations set out by Congress can be understood as fashioning rules based on the assumption that the unwed mother will always retain custody over the child, and the Court can employ lessons learned from custody about the use of sex-based distinctions in order to assess those assumptions. Having already identified the custody determination that undergirds the INA as it does the Court's decisions, this section focuses on what use that recognition may serve. While my proposal centers on the Court's mode of analysis, the turn toward custody is equally, and vigorously, applicable to Congress, in particular when choosing specific state laws to consider in designing the rules regulating citizenship.³⁰²

At its most obvious, insights from custody law provide an easy critique to the assumption underlying these decisions, vocalized in Justice Scalia's query to probe the petitioner's lawyer in *Flores-Villar* on whether the argu-

²⁹⁹ See *In re Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.”). *But see, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding state courts may not consider a parent's decision to enter an interracial marriage and the negative consequences that doing so may have on the child in determining custody).

³⁰⁰ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 69–70 (2000) (observing how state law schemes take into account the parental relationship in allowing or denying nonparental visitation).

³⁰¹ See *Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in the Matters of Nationality: Hearing on H.R. 5849 Before the H. Comm. On Immigration and Naturalization*, 72d Cong. 3–4 (1931) (discussing the laws of the States in recognizing the fathers of illegitimate children).

³⁰² In revising the transmission of citizenship rules under the INA, Congress could consider drawing from state laws addressing custody determinations instead of rules regulating illegitimacy, as it had previously done. The passage of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000) (amending 8 U.S.C. § 1431 (2000)), granting citizenship automatically to certain foreign-born, biological or adopted children of American citizens, underscores the real possibility that Congress may consider reforming the rules regulating citizenship at birth. See David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 510–11 (2008) (discussing the Child Citizenship Act's expansion of Congress's recognition of the family in the broader context of how immigration law functions unintentionally as custody law).

ment against a stereotype is in fact an argument against a reality: “Do you say it is not true that if there is a[n] . . . illegitimate child, it is much more likely that the woman will end up caring for it than the father would?”³⁰³ The question is fundamentally about who retains custody over the child. The answer provided by the Court and Congress is that it will always be the mother. Recognizing that the citizenship rules are based on an implicit custody determination identifies the maternal preference embedded in the rules, as well as in Scalia’s question. Employing a custody law framework to analyze it provides well-trodden reasons for at least questioning the tenacious adherence to this sex-based model.³⁰⁴

Custody law has on the whole eschewed sex-based allocations of parental responsibilities in favor of a gender-neutral approach to parenting.³⁰⁵ In particular, custody law today has rejected sex-based rules that reflect the conclusion that the woman, as the mother, is the only parent who always will, or should, have custody over the child.³⁰⁶ This is not to say that because custody law has abandoned a sex-based framework, so should the Court in its citizenship decisions. What custody law provides is the imprint of a history of reforms and the experience of a productive dialogue regarding the roles of the father and mother figures. This dialogue contains well-developed arguments on either side of the debate that prove instructive, including propositions that gender-neutral alternatives may not actually lead to the most equitable outcomes for fathers³⁰⁷ or mothers,³⁰⁸ if custody over the child is

³⁰³ Flores-Villar Oral Argument, *supra* note 255, at 1:07.

³⁰⁴ See, e.g., Sarah Pinkerton, *Custodial Rights of California Mothers and Fathers: A Brief History*, 16 J. COMTEMP. LEGAL ISSUES 155, 163 (2007) (describing California’s history which came to rest on the gender neutral best interests of the child standard and generalizing that “California’s vacillating journey has paralleled the trek taken by nearly all other states”). Even scholars who criticize versions of the gender-neutral rules often still adhere to a gender-neutral formulation. See, e.g., Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 497–98 (1988) (arguing against the imposition of court-ordered joint custody and instead in favor of the gender-neutral primary caretaker presumption).

³⁰⁵ See generally Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIMONIAL L. 451 (2012) (providing an overview of the evolution from a system that considered children to be paternal property to the institution of gender-neutral joint custody, primary caretaker, and best interests of the child presumptions).

³⁰⁶ See Ariel Ayanna, *From Children’s Interests to Parental Responsibility: Degendering Parenthood Through Custodial Obligation*, 19 UCLA WOMEN’S L.J. 1, 11–12 (2012) (noting the well-known trend that “[w]ith the rise of formal sex equality beginning in the 1970s, the ‘tender years’ presumption and, with it, formal maternal preference, slowly became obsolete”). See generally Stephen J. Bahr, Jerry D. Howe, Meggin Morrill Mann & Matthew S. Bhar, *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247 (1994) (analyzing the effects of the abolition of the maternal presumption on court decisions awarding custody).

³⁰⁷ See Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’Y REV. 769, 770 (2004) (noting arguments of fathers’ rights groups who criticize judges for continuing to enforce a maternal presumption despite gender neutrality, as evidenced by the fact that judges award mothers custody in the majority of cases).

the desired end. Thus, the central benefit of custody lies not in its substantive conclusions but in uncovering its presence and incorporating its more nuanced discussions surrounding gender-neutral alternatives, which have the further benefit of hindsight given the experience of reforms.³⁰⁹

Regardless of the particularities of the custody decision imported by the Court, an awareness of the custody determination *tout court* would expand the narrow focus of the Court's current jurisprudence to consider the foreign parents. There is otherwise little occasion to identify and analyze how Congress is defining the interaction between the American parent and his or her partner. Moreover, given the scrutiny required by equal protection, Congress's seemingly empirical assessment about which parent remains with the child can, and should, be explicitly addressed by the Court, rather than implicitly affirmed.³¹⁰

The move away from the abstracted American family of the opinions would also allow the focus to fall on who functions as a parent to the child. The citizenship transmission cases are currently fixed at a level of abstraction in which the mixed-status parties that are addressed by the statute are not recognized, and the absent mothers and present fathers before the Court are ignored. Yet, given that a motivating concern for the requirements in INA Section 309(a)(4), expressed by both the government and the Court, is who will remain with the child, custody law facilitates that determination by looking to a series of considerations captured in any of its gender-neutral alternatives, including joint custody, the primary caretaker presumption, or an inquiry into the best interests of the child.³¹¹

Replacing the Court's abstractions with a contextualized inquiry would flesh out the analysis that it currently assumes. At their core, decisions about custody are decisions about who can be a parent to the child, in the embedded context of a relationship. In custody determinations, the unwed father is not absolutely differentiated from the unwed mother—rather, he has re-

³⁰⁸ See Susan B. Jacobs, *The Hidden Gender Bias Behind the "Best Interests of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 849-50 (1997) [hereinafter Jacobs, *The Hidden Gender Bias*] (arguing that the vague best-interests-of-the-child standard leads to subjective judicial decision-making, with the effect of penalizing single mothers and their children).

³⁰⁹ Diverse opinions pepper the debate throughout family law. Compare Rena K. Ulliver, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 130 (1978) (arguing that while "it is disquieting to conclude that the maternal presumption should be defended and preserved . . ." it is also the case that "at this point in history the law should recognize a woman's option to keep the children whose daily care she has so disproportionately assumed"), with *Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986) ("[T]he tender years doctrine was perhaps useful in a society in which fathers traditionally worked outside the home and mothers did not; however, since that pattern is no longer prevalent . . . the tender years doctrine is equally anachronistic.").

³¹⁰ The form of this argument would follow those made with respect to statelessness in *Flores-Villar*. See generally Flores-Villar Brief for the United States, *supra* note 264.

³¹¹ These proposals would likely still be subject to an age cut-off in determining whether citizenship was transmitted at birth.

ceived both recognition and custody over his child.³¹² A study published a few years prior to *Nguyen* already noted the substantial numbers of unwed fathers gaining custody over their children in court disputes.³¹³ These decisions provide a strong counterpoint to the recurring custody determination that the rules and the Court assume in the citizenship transmission context. Significantly, the turn to custody would also direct the emphasis away from the “unweddedness” of the parents, as once was the case with the “illegitimacy” of the child, the legal marker the Court presently relies on in place of the actual ties shared by the parent and child.³¹⁴ Such a development is especially timely given the steady rise of children born to parents who are not married.

Addressing the custody determination embedded in these rules also emphasizes the mutability of the Court’s initial allocation and raises the question of how custody itself is affected by the automatic grant of citizenship via the American mother or father. Allowing a parent to transmit citizenship automatically to their child may be a factor in the decision regarding which parent remains with the child in the first place.³¹⁵ This would mean that the INA’s automatic allocation of custody facilitates the unwed mother’s retention of custody, and does not just endorse a static, *a priori* custody decision.

The question of which parent retains custody must be considered in conjunction with how citizenship is transmitted in order to assess the effect both may have on the three relevant actors. For instance, granting the unwed American father the ability to transmit citizenship automatically, based on DNA testing or on some other proof of parentage, may in turn facilitate his ability to retain custody over his child. The father’s ability to transmit citi-

³¹² See, e.g., *Ragghanti v. Reyes*, 123 Cal. App. 4th 989 (2004) (affirming trial court’s order of custody to unmarried father when the mother sought to move away, on the basis of the child’s best interests).

³¹³ See *Johnson v. Louis*, 654 N.W.2d 886, 891 (Iowa 2002) (holding that a statute preventing the child of an unmarried father from receiving child support for postsecondary education when a child whose parents were divorced would have been entitled to such a subsidy, did not violate equal protection); Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215, 230–31 (1997) (noting that “[i]n the twenty years following [Stanley], unwed fathers have made appreciable strides toward achieving equal footing with that of unmarried mothers in securing custody of their children” and that “a substantial number of unmarried fathers [are] seeking court-ordered awards and winning”). This is not to imply that unwed fathers are always recognized in custody determinations on equal terms as divorced fathers, but more so than in the strictly unwed father context. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978); see also, *supra* notes 203–08 and accompanying text.

³¹⁴ See *supra* notes 185–13 and accompanying text.

³¹⁵ There may of course be variations of how this could play out as an empirical matter, and many variables would have to be accounted for, including whether there is an awareness on behalf of the parents of the potential to transmit citizenship. For the purpose of this discussion it is sufficient to note that it raises a question to be further developed. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950–52 (1979) (proposing an alternative framework for understanding the role of the law by considering the effects of the legal system on private relations outside of the courtroom).

zanship automatically may then turn out to actually be harmful to the unwed mother by creating an uneven power dynamic between the American father and the foreign mother, but may be desirable for their child; these different possible schemes are accompanied by varying degrees of normative desirability, which depend on the perspective of each actor.³¹⁶ Decoupling the transmission of citizenship from the decision of who retains custody is therefore important to understand the potential consequences each decision may have on the different actors.

These are merely some introductory observations of the ways in which the recognition of custody, on its own terms, may impact the Court's analysis or Congress's amendments; they require further research and development.³¹⁷ It is worth emphasizing that the move to sex-neutrality in custody determinations has not been without its detractors. On the contrary, there have been many, and varied, criticisms, ranging from whether the different gender-neutral standards are actually sex-neutral in practice,³¹⁸ to whether they are effective in advancing sex equality.³¹⁹ These criticisms do not eliminate the relevance of the custody framework. Rather, they merely complicate the discussions surrounding the role of sex in deciding custody in the citizenship transmission context.

At the very least, looking to the developments in custody law provides a familiar point of comparison. The rules of custody law reflect an understanding, in theory if not in reality, that the mother, unwed or divorced, is not always presumed to be the parent with whom the child will, or should, live. This rather uncontroversial realization is one that the rules regulating citizenship, and the decisions affirming them, have yet to consider.

B. Custody as Critique

The alternative framework custody law provides is especially appealing for yet another reason—it is already implicit in the arguments raised by the parties and in the Court's dissenting voices. In developing the harm at stake

³¹⁶ See, e.g., Weinrib, *supra* note 4, at 247–48, 271–72 (considering the potential benefits and pitfalls of allowing citizenship to transmit automatically from unwed father to child in the context of *Nguyen v. INS*, 533 U.S. 53 (2001)).

³¹⁷ One concern, for instance, is that the custody framework is based on an adversarial model as questions typically arise in moments of separation. This may not always be true of the citizenship cases before the Court.

³¹⁸ See, e.g., Artis, *supra* note 307, at 771 (finding that gender preferences factor into judges' gender neutral custody determinations); Jacobs, *supra* note 308 (arguing that best interests of the child is a vague standard allowing for judicial subjectivity and gender bias, but also noting that other gender neutral alternatives are no better in promoting equality).

³¹⁹ See Martha L. Fineman, *Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality*, 3 CAN. J. WOMEN & L. 88, 91 (1989) (arguing that a "gender-neutral framework" in custody determinations "masks real inequalities between women and men" given that it is "applied in a gendered world to gendered lives").

in the citizenship cases, the parties before the Court rely on an articulation of the harm that has been recognized by courts deciding questions involving custody—that of the limited roles assigned to fathers and mothers.³²⁰ The parties use custody in a more substantive way as well: the harm in the citizenship transmission cases has been defined as the inability of fathers and mothers to retain custody over their child.³²¹ Much of the criticism leveled by the Court itself also relies on concepts adopted directly from custody, as seen in the Justices' use of certain gender-neutral parenting terms. Thus, custody provides the parties and the Court with both a concrete harm, and a language to articulate the harm that accrues in deciding who is a parent based purely on sex.

In defining the harm initially, parties contesting the sex-based laws in the immigration and citizenship cases exhibited a concern with the limited recognition granted the father, and the repercussions on the mother's ability to remain with and care for her child. The discrimination-based arguments raised in *Fiallo* recognized the harm to the father as “rest[ing] upon archaic and overbroad stereotypes concerning the character of unwed fathers and their relationship to their illegitimate children.”³²² The harm to the mother in these rules not recognizing the unwed father was characterized as the increased difficulty of being a mother and the potential damage to her ability to care for her children.³²³

By the time of *Miller* and *Nguyen*, the parties' arguments understood the law's treatment of unwed fathers and mothers as problematic because it reinforced rigid gender roles along both axes. One of the harms of the INA, as articulated by amicus in *Miller*, was that the statute was rooted in the notion “that the American father is never anything more than the proverbial breadwinner who remains aloof from day-to-day childrearing duties” while the American mother “has a natural and primary function of caring for the children and the home, so that no further proof of her connection to her

³²⁰ See, e.g., *In re Marriage of Hansen*, 733 N.W.2d 683, 692–93 (Iowa 2007) (“While some families function along traditional lines with a primary breadwinner and primary caregiver, other families employ a more undifferentiated role for spouses or even reverse ‘traditional’ roles. A one-size-fits-all approach in which joint physical care is universally disfavored is thus subject to serious question given current social realities.”).

³²¹ See *Miller* Brief of Amici Curiae the ACLU, *supra* note 164, at *11–12.

³²² Brief for the Appellants at 24–25, *Fiallo v. Bell*, 430 U.S. 787 (1977) (No. 75-6297), 1976 WL 181344, at *24–25.

³²³ *Id.* at *24 n.17. A similar argument appeared in *Trimble*, where appellants asserted that the Illinois law prohibiting the illegitimate child from inheriting from his father discriminated against the surviving mother. *Trimble v. Gordon*, 430 U.S. 762, 766 (1977) (concluding that the statute is unconstitutional because it discriminates against illegitimate children and declining to reach the sex discrimination argument). The concern was that “[t]he child’s mother, his sole surviving parent, . . . has the onerous task of supporting a child who has no claim against his father’s estate,” which in turn “will burden or frustrate the mother in obtaining, retaining, or exercising the custody and care of the child.” Brief of the Appellants at 57, *Trimble v. Gordon*, 430 U.S. 762 (1977) (No. 75-5952), 1976 WL 181301, at *57.

children is necessary.”³²⁴ Petitioners in *Nguyen* followed similar reasoning, arguing that INA Section 309(a)(4) depended on overbroad generalizations regarding men and women, with dire consequences for families who did not follow the familiar roles—*Nguyen* itself “clearly underscores the danger . . . of permitting sex-based stereotypes to define legal rights.”³²⁵

These arguments exhibited a further understanding that the heightened role required of mothers and the lesser role required of fathers made it more difficult for each unwed partner to parent. The harm was thus understood as the prevention of men and women from functioning as fathers and mothers. Indeed, amicus in *Miller* defined the harm at stake as the interference with the natural parents’ ability to retain custody over their children: “The stereotype on which [INA Section 309] is based—the image of the mother as connected by nature to her children while fathers are not—is harmful to both mothers and fathers in many areas, particularly in custody determinations.”³²⁶

The various opinions in the citizenship transmission cases demonstrated little consensus between the majorities, pluralities, and dissents about when the law’s different treatment of unwed fathers and mothers was harmful, and to whom such harm accrued. Characterizing INA Section 309(a)(4) in *Miller*, Justice Stevens asserted that the statute actually favored the father and disadvantaged the mother. Reasoning that the requirements imposed by INA Section 309(a)(4) were minimal compared with the requirements imposed by the decision to carry and birth the child, Justice Stevens concluded “[i]t seems obvious that the burdens imposed on the female citizen are more severe than those imposed on the male citizen.”³²⁷ Justice Kennedy echoed such observations in *Nguyen*, noting that while the mother’s requirement was satisfied at the moment of birth, the unwed father or his child had the benefit of eighteen years to satisfy the demands of INA Section 309(a)(4).³²⁸

Dissents in both cases reflected an understanding of the harm more akin to the arguments presented by appellants before them. In *Miller*, Justice Breyer defined the harm in terms contradictory to the plurality, arguing that the statute made it more difficult for the unwed father to transmit citizenship to his children born abroad.³²⁹ The effect, Justice Breyer argued, was to deny recognition to the different familial roles undertaken by both mothers and fathers—“either men or women may be caretakers . . . either men or women may be ‘breadwinners.’”³³⁰ In *Nguyen*, Justice O’Connor broke away from the standard definition of the injury by raising a point that had previously

³²⁴ Miller Brief of Amici Curiae the ACLU, *supra* note 164, at *8. *But see* Silbaugh, *supra* note 4, at 1155 (criticizing the ACLU’s brief in *Miller* for “speak[ing] of the roles of fathers and mothers in an almost cartoonish way”).

³²⁵ Nguyen Brief of Petitioners, *supra* note 161, at *15.

³²⁶ Miller Brief of Amici Curiae the ACLU, *supra* note 164, at *11.

³²⁷ *Miller v. Albright*, 523 U.S. 420, 434 (1998).

³²⁸ *Nguyen v. INS*, 533 U.S. 53, 61–62 (2001).

³²⁹ *Miller*, 523 U.S. at 481 (Breyer, J., dissenting).

³³⁰ *Id.* at 488.

only been implied—namely, that taking care of a child born out of wedlock was a burden, not a benefit that falls on the woman but escapes the man.³³¹ Justice O'Connor characterized INA Section 309(a)(4) as a law that the mother is “‘bound’ to serve”: “‘when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background.’”³³² Thus, Justice O'Connor defined the harm not as being *to* motherhood, but stemming *from* motherhood. The desirability of retaining custody was no longer understood as an unquestioned good, but demanded a different normative assessment.³³³

In presenting alternative proposals, Justices Breyer and O'Connor advanced criticisms informed in particular by custody law. Instead of sex, Justice Breyer offered the categories of “Caretaker” and “Noncaretaker Parents” in order to satisfy Congress’s ends and also avoid equating sex with caretaking.³³⁴ His criticism of the Court’s endorsement of a sex-based requirement when a gender-neutral one would satisfy the government’s asserted aims stems directly from developments in custody law recognized well over a decade prior to *Miller*—“we hold today that there is a presumption in favor of the primary caretaker parent, if he or she meets the minimum, objective standard for being a fit parent . . . regardless of sex.”³³⁵ Justice Breyer’s appeal to recognize a parent on the basis of a caretaker standard instead of on the basis of sex succeeded the evolution of a sex-neutral rule in decisions concerning who should retain custody over a child in the event of a divorce or separation.³³⁶ The parties in *Miller* relied on custody law to articulate the harm produced by sex-based distinctions in the parental

³³¹ *Nguyen*, 533 U.S. at 92–94 (O’Connor, J., dissenting).

³³² *Id.* at 92 (O’Connor, J., dissenting) (quoting *Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in the Matters of Nationality: Hearing on H.R. 5849 Before the H. Comm. On Immigration and Naturalization, 72d Cong. 3 (1931)*).

³³³ See Collins, *When Fathers’ Rights are Mothers’ Duties*, *supra* note 11, at 1682–1703 (arguing that history of coverture explains the allocation of parental responsibilities in INA Section 309, allowing men to remain sexually active without the bearing the consequences of children born as a result). Arguably, Justices Kennedy and Stevens share a similar view, given their position that the unwed father’s requirements are less onerous than the unwed mother’s. See *supra* notes 327–28.

³³⁴ *Miller*, 523 U.S. at 487 (Breyer, J., dissenting).

³³⁵ *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981) (Neely, J.); see also Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 180–82 (1984) (arguing in favor of the sex-neutral, primary caretaker presumption in custody decisions). *But see* Selfridge, *supra* note 298, at 173 n.31 (arguing that the primary caretaker presumption generally, and for Judge Neely particularly, functions as a thinly-veiled proxy for granting custody to the mother).

³³⁶ See James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making about Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 917–19 (2002) (describing the rise of the gender-neutral primary caretaker presumption and how it is currently one factor to consider in the more dominant best interests of the child analysis); see also Marcia O’Kelly, *Blessing the Tie That Binds: Preference for the Primary Caretaker As Custodian*, 63 N.D. L. REV. 481, 537–42 (1987) (noting that while its justifications are genuinely gender-neutral the primary caretaker presumption may be critiqued by

context;³³⁷ Justice Breyer's appeal to custody law aimed to recognize that both fathers and mothers, even if unwed, may be caretakers of their children.

While Justice Breyer acknowledged the ability of both partners to parent, Justice O'Connor focused on the choice not to parent, also by relying on the framework provided by custody. In arguing that INA Section 309(a)(4) reflected outdated stereotypes of mothers and fathers, Justice O'Connor turned directly to domestic custody laws, observing that "our States' child custody and support laws no longer assume that mothers alone are 'bound' to serve as 'natural guardians' of nonmarital children."³³⁸ As proof, Justice O'Connor cited to statutes addressing these areas—an Arizona statute establishing equal duties of support for mothers and fathers³³⁹ and a California rule abolishing the tender years presumption in custody decisions.³⁴⁰ That is, the framework Justice O'Connor relied on to challenge the majority's sex-based assumptions was one that developed by addressing mothers, fathers and their children in the context of a custody determination.³⁴¹

Moreover, Justice O'Connor's suggestion that motherhood itself can be a burden is also a possibility that could be acknowledged by a custody determination. Basing the citizenship transmission cases on a custody framework would more easily take the decision *not* to parent, by both sexes, into account. In particular, bringing the two parents into the analysis required by custody would recognize that there may be an element of choice in the decision of whether to be a mother, not only a father, that is mostly absent from the unwed parent cases.³⁴²

Far from being a monolithic entity, family law provides different models of parenting that Congress and the Court can consider in fashioning rules based on family relations. Accepting that the principal aim is to eradicate sex-based inequalities, questions must be asked regarding which custody rule should be adopted in the citizenship context either by the Court or Congress and what it should look like. Should it be modeled on joint custody or

some as a maternal presumption in disguise given that it is a role usually filled by women).

³³⁷ Miller Brief of Amici Curiae the ACLU, *supra* note 164, at *9–10 (discussing the various negative effects that sex-based distinctions have been reported to have in custody determinations for both men and women).

³³⁸ *Nguyen v. INS*, 533 U.S. 53, 92 (2001) (O'Connor, J., dissenting).

³³⁹ AZ. REV. STAT. ANN. § 25-501 (1999) ("every person has the duty to provide all reasonable support for that person's natural and adopted minor, unemancipated children").

³⁴⁰ CAL. CIV. CODE § 4600 (West 1972) (current version at CAL. CIV. CODE § 3020 (West 2000)).

³⁴¹ This framework was adopted also by the amici in this case. See *Nguyen Brief of the National Women's Law Center*, *supra* note 250, at *19 (relying on a series of state statutes addressing support of children, some decided in the context of custody and dissolution of a marriage, to support its contention that gender-based distinctions have been abandoned).

³⁴² The limited discussion of maternal choice recognized by the Court in the citizenship transmission context is the choice to abort. See *Miller v. Albright*, 523 U.S. 420, 433 (1998) ("If the citizen mother is an unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion[.]").

the primary caretaker presumption? Would it require affirmative steps on behalf of both the mother and the father or render the transmission of citizenship automatic for both parents? In striving for equality, should the Court or Congress equalize up or down?

This focus on the respective roles of the parents in designing rules regulating citizenship is, ultimately, limited. Looking only to the rules' impact on gender does not provide a complete proposal for reform, as numerous constructions could feasibly render the mother and father "equal." The importance of sex and parental roles inevitably comes up against the question of what citizenship or immigration policy Congress chooses to institute. The issue is not only, or most immediately, about which direction sex equality should take. Rather, it is also about which, and how many, United States citizens Congress decides to recognize.³⁴³ Looking to custody provides a starting point—it introduces the child to whom citizenship may accrue into the analysis and identifies the conditional nature of the relationship between the determination of who receives citizenship and who retains custody. It also forces the analysis into the next step, which is to more explicitly unite the considerations of sex with politics in deciding how citizenship should be transmitted.

CONCLUSION

The deep-seated similarities present throughout the Court's equal protection jurisprudence addressing unwed fathers have been largely overlooked. The decisions beginning with *Fiallo* and ending in *Flores-Villar* are most completely understood as the product of a larger legal structure that treats mothers one way and fathers another. Yet the unwed father cases are rarely considered in tandem, spanning fields as diverse as family law, trusts and estates law, and immigration and nationality law. Bringing these seemingly discrete decisions together into a larger whole unifies an otherwise disjointed thread and reveals the law's role in shaping our conception of unwed parents and their children.

The Court's citizenship transmission decisions are part and parcel of its jurisprudence addressing fathers and mothers who are unwed—the unwed father exists dubiously in the absence of a legal relation, while the unwed

³⁴³ The question of what remedy is available were the Court to find that the INA was a violation of equal protection raises similar issues. The Justices' discussion here switches from gender to politics, disagreeing as to whether it is within their power to rule on a remedy. In *Nguyen*, Justice O'Connor suggested that severance of the provision addressing men would be the appropriate course of action. *Nguyen*, 533 U.S. at 94–97 (O'Connor, J., dissenting). In contrast, in *Miller*, Scalia hesitated to find any role for courts in expanding or limiting the statute as it would entail conferring or denying citizenship. *Miller v. Albright*, 523 U.S. 420, 457–59 (1998) (Scalia, J., concurring) ("I know of no instance, however, in which this Court has severed an unconstitutional restriction upon the grant of immigration or citizenship. It is in my view incompatible with the plenary power of Congress over those fields . . .").

mother exists certainly given the biological fact of birth. Uncovering the way men and women are treated in their roles as unwed fathers and mothers is crucial to the formulation of any relevant proposal for reform. It is particularly important where, as here, a certain set of decisions is understood to be “exceptional”; describing as different what is actually the same is deeply troubling, all the more invidious because it remains invisible.

An analysis of the citizenship transmission cases alongside the Court’s domestic cases provides glimpses into the source of its reasons for continuing to uphold sex-based distinctions. An especially salient strand that emerges is the Court’s conception of, and reliance on, the fact of birth. The extent to which the fact of birth does work in the citizenship transmission cases becomes clear as they proceed; the attenuated relation between the act of birth and the status of citizenship is, once exposed, rather easy to grasp. Indeed, the event of birth has justified decisions about who is an American citizen and how long a parent must live in the territory of the United States, depending on whether that parent is a man or a woman.

This particular difference is more difficult to see when it does work in the “natural”³⁴⁴ context of unwed mothers and fathers. Understanding its role within the citizenship transmission cases raises reasons to be wary of the work it is doing in the context of unwed mothers and fathers writ large. The fact that women as a class have the potential to give birth will arguably always be present in such comparisons. Yet the progression of these unwed father cases reveals the various ways in which “real” biological differences become legal ones that perpetuate the entrenchment of a discourse of difference. In these cases, the *real* difference of the act of birth has prevented unwed fathers and mothers from being similarly situated for the *legal* purpose of transmitting citizenship. The line between the legal and the real, as between the act of birth and the creation of an ensuing relationship, is perceptibly porous.³⁴⁵ For this reason, we should question the Court’s reliance on the real biological difference of the “event of birth” as the basis for its comparisons between men and women;³⁴⁶ the link between these real differences and the legal distinctions they are used to justify must be carefully scrutinized.

This Article has analyzed the differences between men and women as fathers and mothers. The questions raised herein have, however, wider appli-

³⁴⁴ See *Spence v. Durham*, 198 S.E.2d 537, 547 (N.C. 1973) (“It is universally recognized that the mother is the natural custodian of her young . . . [O]ther things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother’s love and devotion for which there is no substitute”) (quoting 2 NELSON, *DIVORCE AND ANNULMENT* §15.09 at 226–29 (2d ed. 1961)).

³⁴⁵ *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (“ . . . the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth.”)

³⁴⁶ See discussion *supra*, note at 272–304; see also Dan Slater, Op-Ed., *Darwin Was Wrong About Dating*, N.Y. TIMES, Jan. 12, 2013, at SR1 (describing the difference between the evolution of biology and the evolution of the culture surrounding that biology).

cability. Not only are births to unwed parents increasing, but so are births with the use of assisted reproductive technology. While heterosexual partners are the most common users of the technology, same-sex couples are included in this demographic.³⁴⁷ Cases in which a biological link may be partly or entirely absent between the intended parent and child test the limits of using birth, at times decoupled from biology, in defining who is an American citizen.³⁴⁸

The backdrop of difference based on sex also obscures the racial component associated with births to unwed parents domestically,³⁴⁹ and the race-based restrictions that once explicitly defined who could be a citizen.³⁵⁰ Decisions about how to define the bounds of illegitimacy and who to allow into the borders of the United States have a deeply racist history. The emphasis, by the parties and the Court, on unwed American mothers and fathers functions to marginalize the racially exclusive nature of the decisions that always recognize the children of mothers, but only sometimes those of fathers.³⁵¹ Accordingly, little attention is paid by the Court or the parties before it to the question of how Congress decides to confer citizenship—rather than define difference—or how the rules in place affect the number of American citizens who are born abroad—rather than which unmarried parent they disadvantage, or benefit.

What was clear in *Fiallo* that has been lost in the cases focusing on the American parents is how the family functions as one of the many entities

³⁴⁷ See Scott Titshaw, *Sorry Ma'am, Your Baby Is An Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 115–16 (2010) (noting that while the majority of couples using assisted reproductive technologies (ART) are of different sexes, immigration and nationality rules regulating ART will disproportionately affect same-sex couples whose options for creating a family include, significantly, ART).

³⁴⁸ *Id.*; see *supra* note 224 (explaining the unintended consequences of the State Department's regulation allowing a child born through ART or a surrogate to acquire citizenship only if sperm or egg is a U.S. citizen); see also 7 FAM 1131.4-2 (recognizing child if citizen mother and/or citizen father provided either egg and/or sperm).

³⁴⁹ See Murray, *supra* note 194, at 413–16, 425–26 (analyzing the costs of coupling the stigma of illegitimacy with same-sex marriage advocacy efforts, emphasizing the importance of recuperating the racial component of out of wedlock births and their association with young, single, African American mothers).

³⁵⁰ See generally CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 22–35, 135–36 (1998) (addressing the interplay between race and citizenship through marriage and the various ways that marriage interacted with men or women unable to naturalize due to their race); MAE N. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (examining the history of race and national origins quota in immigration law and the construction of the illegal alien); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (analyzing how gender and race intersected in U.S. immigration laws historically to bar Asian women and men from access to citizenship).

³⁵¹ See Collins, *"Illegitimate Half-Castes" and the Citizen Family*, *supra* note 251 (discussing the race-salient origins of personal status laws governing citizenship in a gender asymmetrical fashion).

Congress deploys in the realm of immigration and citizenship legislation.³⁵² Recovering the use of the family as a site of regulation is important in the decisions defining citizenship, as it is in the Court's domestic decisions defining parenthood. Significantly, while the citizen and the domestic families overlap in core respects, they are nevertheless distinct for the purpose of determining if, and how, they are to merge, by both Congress and the Court.

³⁵² In the immigration context, the political nature of regulating the family is especially salient in current proposals for reform that focus on reducing or eliminating family-based immigration. See Editorial, *Time to Strengthen Family Immigration*, N.Y. TIMES, March 24, 2013, at A22 (supporting the importance of family unification in immigration law, in the face of conservative political opposition to family-based immigration).