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# Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship

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# ARTICLES

## REMOVING CITIZENS: PARENTHOOD, IMMIGRATION COURTS, AND DERIVATIVE CITIZENSHIP

KARI E. HONG\*

### ABSTRACT

*As a creature of administrative law, Congress has set forth clear, statutory definitions of “parent,” “mother,” “father,” “child,” “son,” and “daughter.” As a practical matter, these terms create a uniform system by which family relationships are recognized and immigration benefits are conferred. In one notable exception, Congress directs adjudicators to look to state law when determining which children are citizens at birth.*

*Derivative citizenship, the legal process whereby birthright citizenship is passed from a citizen to his or her child who is born outside of the United States, is a technical maze. There are at least nine different statutes in effect that may apply to a person, depending on the child’s birth date and the parents’ citizenship and marital status. Derivative citizenship may be conferred both at the time of birth, and, when specific conditions are met, retroactively.*

*Congress made the express policy choice to defer to state definitions of legitimation (also known as parentage) when conferring citizenship. This requires immigration adjudicators to then know, understand, and properly apply the laws of 50 different states when conferring citizenship status.*

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*This article's focus is on a troubling, contemporary application of derivative citizenship that is occurring in removal proceedings. Often times, a child with one citizen parent will grow up, assuming that he or she is a citizen. It is only after committing a crime in their twenties or thirties do they first learn that their parents never filed the paperwork to declare their status. Although they are still eligible to have their derivative citizenship status conferred retroactively, government attorneys are contesting that the parents who raised them are in fact their legal parents. In extreme cases, the government attorneys are first disclosing to some of these people that the men and women who raised them are not in fact their genetic parents.*

*This article highlights numerous problems with this practice. Of most import, the immigration judges and government attorneys are misapplying state law when determining who is and is not a parent of a child. Whereas state laws have made clear that love, support, and care is proof of parentage, (and that collateral challenges to parentage may neither be raised after a set number of years nor by strangers to the family unit) immigration courts are ignoring state law to declare that blood alone is the sine qua non of parentage.*

*This article presents the derivative citizenship scheme, summarizes state law legitimation and parentage statutes, and argues that the immigration courts and government attorneys are grossly distorting family law. Of note, immigration courts are the least desirable forum to adjudicate these claims due to their systematic (and perhaps deliberate) overburdened workload, lack of representation to the alleged (and usually detained) citizen, and the incentive by the government attorney to remove individuals with criminal records, even when those individuals are in fact citizens. The article ends with proposals to remove these claims from a contested removal proceeding and into either administrative or district court proceedings whereby the adjudicator can faithfully apply the complexities of family law without the distraction of knowing someone's criminal history.*

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INTRODUCTION

*Joseph grew up in Arizona and California. His parents had met when his father, Harold, a U.S. citizen, was serving in the Navy. Joseph’s mother Petronila, a Filipino citizen, was studying dressmaking. Unbeknownst to her, Harold saw her at a restaurant, fell in love, and decided to marry her. Harold introduced himself, and after a brief courtship, the two fell in love. Joseph was born. Harold immediately executed an affidavit of paternity and signed the birth certificate as Joseph’s father. When Joseph was seven months old, Harold and Petronila married. Shortly thereafter, the Navy transferred Harold to Japan, moving his new family with him. When Joseph was three and a half years old, the family moved to the United States where Joseph’s two younger brothers were born.<sup>1</sup>*

*Harold served sixteen more years in the Navy. When Joseph was twenty-seven years old, Harold tragically died in a car accident. The death left Joseph devastated. He had been close to his father and felt anchorless without him.*

*Joseph then made a series of bad decisions, resulting in state drug and firearm convictions. Joseph was sentenced to a five-year prison term.*

*On the date of his scheduled release, his brother was outside the Arizona prison, waiting to give Joseph a ride home. As Joseph was packing up his belongings, a correctional officer told Joseph that an immigration hold had been placed on him. Thinking that it was a joke, Joseph continued to prepare for his release. He was a citizen and his father had been a distinguished Navy officer. The correctional officer later returned, explaining that Immigration and Customs Enforcement (ICE)—the agency in charge of apprehending non-citizens—was alleging that Joseph was not a citizen and that his convictions were aggravated felonies, a category of crimes that resulted in automatic and permanent removal from the United States.*

*Joseph was transferred to an immigration detention center and appeared*

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1. All facts in this hypothetical are based on what occurred in *Anderson v. Holder*, No. CV-11-01662-PHX-DGC, 2012 WL 2813868 (D. Ariz. July 10, 2012), *aff’d*, *Anderson v. Holder*, No. 09-70249, 527 Fed. App’x. 602 (9th Cir. Jun. 12, 2013). For full disclosure, the author appeared as co-counsel in these matters.

*without counsel before an immigration judge. When he explained to the judge that he was a citizen, the government attorney gave the judge—and for the first time Joseph—copies of consulate documents recording statements made by Harold and Petronila when they came back to the United States. They both admitted that Petronila was sexually active with another serviceman prior to Joseph's birth, that Harold knew there was a possibility he was not Joseph's biological father, that Harold considered himself Joseph's father, and that Harold had and fully intended to raise Joseph as his own son.*

*Confused and shocked, Joseph called his mother from the detention center. His mother reassured Joseph that Harold was his one and only father and told him that the government was mistaken.*

*In immigration court, the government demanded proof of Joseph's biological tie to Harold. The government argued that absent proof, Joseph was not a citizen and should be removed to the Philippines. The immigration judge agreed and ordered Joseph removed (the technical term for deported),<sup>2</sup> an action that was appealed through the assistance of pro bono counsel.*

*Years later, during a district court action in which Joseph was seeking a declaration of citizenship, the government sought a court order to exhume Harold's body to conclusively prove he was not Joseph's biological father. Although the district court denied the government request, the government lawyers deposed Petronila. Under oath, she admitted Harold was probably not Joseph's biological father and that they had decided years ago to never disclose that fact to him. Joseph's origin never mattered to Harold, and they wanted to make sure it never mattered to Joseph. She explained that she had initially denied the truth to Joseph, trying to keep her promise to her husband to not cast any doubt on their father-son relationship.*

Joseph was eventually permitted to remain in the United States. But his case is not unique. Derivative citizenship is the process by which a foreign-born child will be declared a citizen at birth upon proof that one or both of his citizen-parents meet certain conditions, which include matters such as residency, legitimacy, and date of the parents' naturalization.<sup>3</sup> Seven versions of the derivative citizenship statute exist, and all currently remain in

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2. In 1996, Congress replaced "deportation" (for individuals inside of the country) and "exclusion" (for individuals who legally never entered the country) proceedings with "removal" proceedings. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.). This article will refer to removal proceedings for all immigration proceedings initiated after 1996. Even though removal proceedings is the term for deportation, an alien is charged with either deportable grounds or inadmissibility grounds to ascertain whether the removal can be effected. Compare, 8 U.S.C. § 237 (deportability grounds) with 8 U.S.C. § 212 (inadmissibility grounds).

3. See generally 8 U.S.C. § 1401. The derivative citizen statute is found in the Immigration and Nationality Act (INA) at sections 301-309, which is codified at 8 U.S.C. §§ 1401-1409. Derivative citizenship also has specific rules and conditions for foreign-born children who are adopted by citizens. See, e.g., 8 U.S.C. §§ 1431(b) and 1101(b)(1).

operation, depending on the birth date of the applicant.<sup>4</sup> This article focuses on the situation similar to that of Joseph, where a detained adult (almost always with a criminal conviction) must prove a parent-child relationship not in family court, but in an immigration court. The immigration judge must decide between the applicant's claim that the citizen who raised him is his parent (which if accepted, will result in the grant of retroactive birthright citizenship) versus the government's argument that no such family relationship exists (which will result in declaring the applicant's citizenship to be her country of origin and, given the existence of serious criminal convictions, will result in permanent banishment from the United States).

The most disturbing part about these proceedings is that immigration courts often misunderstand and misapply state law. Most of us often presume that blood and biology tie a parent to a child. We assume the similarity in genes or appearances explains the love and support a family has for one another. In functioning families, these assumptions are never disturbed as children are born, raised, and sent off into the world by the same set of parents who share a genetic history with them.

In state family law, nothing is sacred about a parent's blood tie to his or her child. If a parent neglects or abuses a child (which a biological tie does not prevent), the state can remove the child, regardless of a biological relationship. Likewise, if an adult cares for, supports, loves, and raises a child, family law may recognize the parent-child relationship despite the lack of any biological connection. This principle is true for the modern, contemporary understanding of adoption. But, less widely known are the families like Joseph's, those in which sex outside of marriage raises complicated questions of whether a mother's husband is the biological father to their child, where advances in fertility procedures mask whether a child's mother and father are his or her biological parents, and where same-sex couples seek declarations that both parents of the same gender are the child's mothers or fathers.

When determining who then is a child's parent, all states' legal definitions of paternity (the determination of which man is the legal father of a child), legitimation (the process by which a child born out of wedlock will become legitimated by two parents), and parentage (the more modern procedure for determining which adults will serve as a child's parents), use actual caretaking, financial support, and public acknowledgment—not biology—as the *sine qua non* of the parent-child relationship. When grappling with the highly complicated question of who is a child's parent, most state legislatures and

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4. In the past thirteen years, the Supreme Court has rejected three equal protection challenges to the gender-based disparities codified in the derivative citizenship statute. See *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (per curiam), *aff'g by an equally divided court United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2010) (upholding the five-year residency requirement that citizen fathers must fulfill); *Nguyen v. INS*, 533 U.S. 53, 56-57 (2001) (upholding requirement that fathers, but not mothers legitimate their children); *Miller v. Albright*, 523 U.S. 420, 424 (1998) (upholding that fathers, but not mothers, are required to undertake conduct to establish paternity).



courts arrive at a simple answer: a functioning family is not defined by biology, but by love.

The derivative citizenship statutes are a marked departure from understanding the parent-child relationship in the nuanced, sophisticated manner that state family law does.

First, in the post-1986 version of 8 U.S.C. § 1409 (the statute that applies to citizen fathers of children who are born after 1986), Congress determined that a blood relationship is dispositive to the parent-child relationship.<sup>5</sup> The supremacy of a blood relationship is a radical break from how state courts ascertain parenthood. Congress' requirement of factual proof of a biological relationship is not relevant to—and often inadmissible—in many state paternity, legitimation, and parentage actions. State law will confer a man with the title of natural father based on his conduct (marriage to the natural mother or holding out a child as his own) or a declaration that a specific man is the biological father (made by the natural mother or putative father). Given that Congress expressly defers to state law in defining the parent-child relationship,<sup>6</sup> the federal government's condition that a parent-child relationship is defined only by blood is contrary to state law findings of who is a legal parent.

Second, when applying the pre-1986 version of § 1409 (the statute that applies to citizen fathers of children who are born before 1986), a more troubling trend emerges. The immigration courts and its appellate body—the Board of Immigration Appeals (BIA)—import the post-1986 law into the proceedings and assert that Congress or the relevant state law implicitly require proof of a biological relationship for a parent-child relationship to exist.<sup>7</sup> This is what happened to Joseph. Despite being bound by the version of the law that does not require proof of any biology, in federal district court, the government requested permission to exhume a body to conclusively prove that Harold—the man who had raised Joseph since infancy—was not his “father,” as that term was narrowly defined by the federal government. Although the exhumation request was denied, the government was successful in depositing Joseph's mother to learn and expose family secrets that the two

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5. 8 U.S.C. § 1409 (2001) (requiring a derivative citizenship applicant to prove, *inter alia*, that a “blood relationship between the [claimed citizen] and the father is established by clear and convincing evidence.”).

6. As discussed in Part I, Congress confers immigration benefits based on whether a child has been legitimated under state law. As explained by the Ninth Circuit, “§ 1401 applies if the person claiming citizenship was born ‘in wedlock,’ while § 1409 applies if the person was born ‘out of wedlock.’ [To make this finding] . . . we proceeded to determine whether the petitioner was born in or out of wedlock. To make this determination, we looked to the *relevant state law* of the petitioner's domicile. Indeed, we recognized that the INA provides that a child can be ‘legitimated under the law of the child's residence or domicile.’” *Martinez-Madera v. Holder*, 559 F.3d 937, 943 (Thomas, J., dissenting) (9th Cir. 2009) (quoting 8 U.S.C. § 1101(c) (1) (1976)) (emphasis added).

7. *Compare*, in relevant part, the pre-1986 version of the statute 8 U.S.C. § 1409(a) (1952) (“if the paternity of such child is established while such child is under the age of twenty-one years by legitimation”) with the post-1986 version 8 U.S.C. § 1409(a)(1) (1986)“(1) a blood relationship between the person and the father is established by clear and convincing evidence[.]”.

parents had decided never to disclose to their children. By contrast, state laws do not generally condition any finding of paternity, maternity, legitimacy, or parentage on biology.<sup>8</sup> Moreover, state courts would hesitate to permit the government (or any third party) to unsettle and destroy an existing thirty year father-child relationship, especially when neither the mother nor another man is seeking to identify who then should serve as that person's father.<sup>9</sup>

Third, in both the pre-1986 and post-1986 applications of Section 1409, Congress' requirements for and the immigration courts' adjudication of derivative citizenship claims present substantial due process concerns. Although legal challenges and academic inquiries have focused on the differential treatment that unmarried fathers and unmarried mothers receive in conferring citizenship to their children, they have overlooked the federal government's intrusion into a sphere of family privacy. In the derivative citizenship context, immigration courts routinely renounce a parent-child relationship, which in turn renders the person a delegitimated child or a parentless child, a non-citizen and deportable alien. Regardless of whether the immigration courts' finding of illegitimacy has any estoppel effect, once the federal government has disclosed family secrets or shattered family fictions, the bell cannot be un-rung. The irreparable harm that such a discovery can have on citizen parents, citizen siblings, the community, and the child (even as an adult) is an injury against which state law protects.

Part I of this article provides an overview of derivative citizenship laws, state court adjudications of legitimation claims outside of the immigration context, and immigration court adjudications of legitimacy.

Part II explores why immigration courts are declaring children delegitimated when public policy and constitutional concerns bar state courts from achieving the same result. In particular, three forces combine to prevent immigration courts from serving as competent forums to adjudicate derivative citizenship claims. First, immigration judges are not experts on state law matters, despite the central role that family law—such as marriage and parenthood—has in conferring immigration benefits. Second, well-known structural problems exist with the current immigration courts and the BIA, notably unfettered prosecutorial discretion, lack of meaningful separation between judges and prosecutors, lack of representation for aliens (alleged and actual), and the unrelenting pressures for administrative law judges to seek efficiency over due process.<sup>10</sup> Third, legitimation claims in removal

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8. See *infra* notes 54-56.

9. The State's desire to protect and prevent a child from losing a parent through any parent's subsequent renunciation of a biological tie is deep seated. Since at least 1777, "Lord Mansfield's exclusionary rule of 1777 held that under the law of England, 'the declarations of a father or mother, [could] not be admitted to bastardize the issue born after marriage.'" Diane S. Kaplan, *Why Truth Is Not A Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 70 (2000) (quoting *Goodright v. Moss*, 98 Eng. Rep. 1257 (K.B. 1777)).

10. See Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMM. BULL., 3-4 (Jan. 1, 2008) ("At present, the Attorney General,

proceedings are uniquely vulnerable to error because de-legitimation is an aggressive pretext to remove individuals who have committed aggravated felonies<sup>11</sup> from the United States. Stated another way, immigration courts and the BIA are unable to withstand the unchecked prosecutorial discretion and outside political pressures to remove criminal aliens, which is interfering with a faithful application of family law and objective determination of citizenship.

Part III explores a number of reforms to respond to the problems arising in derivative citizenship adjudications. The article suggests policy and constitutional concerns that compel excising the requirement for a father to prove a biological tie to his child. In addition, many instances exist in which the federal government learned of facts that cast doubt on a person's legitimacy or parentage claim when the parents first brought the child (then an infant or toddler) to the United States. Out of the principle of estoppel, the federal government should be precluded from collaterally attacking a person's claim that his or her citizen parent is his or her parent decades after it learned of contrary facts. These reforms only respond to the population of derivative citizen claimants who need this type of proof. Others receive citizenship only upon establishing such factors as proving that their parents' marriage was in fact valid in the place where it was performed, the citizen parent's prior time in the United States meets either the physical presence or residency requirements, the custodial parent legally separated from her spouse, or the child had an intent to reside permanently in the country before her parents naturalized.

For all derivative citizenship claimants, the existing immigration court and BIA adjudications are inadequate to adjudicate their claims in a full and fair manner. In response, immigration court adjudications of their claims must end. I propose redirecting these applications to administrative interviews before a singular officer or the jurisdiction of federal district courts. Both proceedings would have the advantage of precluding any consideration of a

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our nation's chief prosecutor in terrorism cases, acts as the boss of the judges who decide whether an accused non-citizen should be removed from the United States. At the same time, despite the creation of the DHS and the placement of trial-level immigration prosecutors there, the Attorney General continues to supervise a critical element of the prosecution process, the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals. This conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts.”).

11. An aggravated felony is a term used to describe an offense that Congress has determined warrants the most serious immigration consequences. *See* 8 U.S.C. § 1101(a)(43). An aggravated felony is a deportability ground (which is grounds for removal) and is a bar to most immigration remedies and benefits including tourist visas, adjustment of status, citizenship, and asylum. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). It is not an inadmissibility ground, but the express bars and independent inadmissibility grounds for certain criminal offenses operate to prevent non-citizens from receiving admission if convicted of an offense that is deemed an aggravated felony. By contrast, prior to 1996, only felonies for which a court imposed a prison term of five or more years were considered aggravated felonies. Because of the post-1996 definitions, some misdemeanors may be considered aggravated felonies both prospectively and retroactively.

person's criminal history, since such facts are irrelevant to whether her circumstances of birth afforded her citizenship. This scheme provides the needed protections to ensure all claims of citizenship are objectively and fully considered.

Why does this matter? If someone allegedly committed a serious crime, shouldn't the government's resources be expended in a manner so as to remove this dangerous person from the United States? No matter how flat a pancake, there are still two sides. In this instance, the rush to remove a criminal alien may result in irreparable mistakes. Joseph was in detention, without appointed counsel and without the means to hire an attorney. His case was tried in a federal forum that routinely misunderstands state family law. He was a victim of an administrative law system in which prosecutors can override administrative law judges and judges can lose—and have lost—their jobs for granting too many claims. Although widespread reforms are warranted to assist individuals who seek legal status via the current immigration system, this article is a heightened call to ensure citizens are not subjected to these problematic proceedings. The exact number of derivative citizens who are currently (and mistakenly) detained by the Department of Homeland Security (DHS) is unknown, but likely numbering in the hundreds on an annual basis. Two recent surveys of the detained populations in Arizona and New York estimated that between 1% and 8% of detainees were derivative citizens.<sup>12</sup> Since 1922, the Supreme Court has recognized that “[t]o deport one who so claims to be a citizen obviously deprives him of liberty . . . It may result also in loss of both property and life, or of all that makes life worth living.”<sup>13</sup> Although mistakes in immigration proceedings hurt asylum seekers, family members related to citizens, and others seeking legal status in this country, removing someone who is in fact a citizen is an injury that should never occur, as a constitutional matter.

PART I: REMOVING PARENTS FROM THEIR CHILDREN: AN OVERVIEW OF THE DERIVATIVE CITIZENSHIP STATUTE, STATE LEGITIMACY STATUTES, AND IMMIGRATION COURT ADJUDICATIONS OF LEGITIMACY

In Part I, I provide an overview of derivative citizenship laws, describe states' legitimation and parentage statutes and procedures outside of the

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12. See Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, STATES WITHOUT NATIONS (Blog) (Jul. 15, 2010), <http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html> (reporting that between 2006 and 2008, eighty-two out of 8,027 (or approximately 1%) of ICE detainees who were detained in Arizona were found to be U.S. citizens by an immigration court. That statistic does not include individuals whose initial adverse findings were reversed on appeal. In 2009, a New York City bar report recorded a finding that 8% of detainees in Varick detention facility had “valid claims to U.S. citizenship.”) See *id.*, citing NEW YORK CITY BAR ASSOCIATION IMMIGRATION AND NATIONALITY LAW COMMITTEE, REPORT ON THE RIGHT TO COUNSEL FOR DETAINED INDIVIDUALS IN REMOVAL PROCEEDINGS (Aug. 2009).

13. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

immigration context, and examine immigration court adjudications of legitimacy and parentage.

### A. *An Overview Of Derivative Citizenship*

The United States is unique in that it allows a newborn child to automatically acquire citizenship if he or she is born in the country. Known as *jus soli* (right of soil), the Fourteenth Amendment confers citizenship based on place of birth.<sup>14</sup> The United States is among a minority of countries that grant citizenship based on a person's birthplace. Only thirty of the world's 194 countries—approximately 15%—recognize unconditional birthright citizenship.<sup>15</sup> This number will likely become smaller. Since 1980, a number of countries—including Australia, Ireland, the United Kingdom, and India—have repealed their *jus soli* laws and reserve automatic citizenship to a smaller universe of people who are born within their borders and have one parent who is a citizen or legal resident.<sup>16</sup>

The United States also recognizes *jus sanguinis* (right of blood) which is “the transmission of . . . citizenship from parent to child.”<sup>17</sup> Most countries allow citizenship based on lineage. Like the United States, many countries attach conditions before conferring status. For example, Ireland grants citizenship to children and grandchildren of citizens as long as the person registers with an Irish embassy.<sup>18</sup> Ukraine allows children and grandchildren of any citizen to obtain citizenship if they renounce their former nationality.<sup>19</sup> Greece confers citizenship to anyone who joins its army.<sup>20</sup> And Israel guarantees citizenship to any individual who is Jewish by birth, conversion, or marriage and returns to reside in the country.<sup>21</sup> As an example of a more restrictive policy, Saudi Arabia only grants citizenship to children of married

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14. See *Rogers v. Bellei*, 401 U.S. 815, 828 (1971) (observing that the Fourteenth Amendment citizenship clause “follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute.”) All children born in the United States are automatically citizens. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

15. See JON FEERE, *BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES: A GLOBAL COMPARISON 5* (Center for Immigration Studies, May 2010).

16. See Rainer Baubock, *Who are the citizens of Europe*, EUROZINE (Dec. 23, 2006), available at <http://www.eurozine.com/articles/2006-12-23-baubock-en.html>.

17. See *Miller v. Albright*, 523 U.S. 420, 478 (1993).

18. Irish Nationality and Citizenship Act 1956 (Act No. 26 § 7(3)/1956) (Ir.), available at <http://www.inis.gov.ie/en/INIS/consolidationINCA.pdf/Files/consolidationINCA.pdf>.

19. The Law of Ukraine on Citizenship of Ukraine (2001), c.II. Article 8.

20. Kodikas Ellenikes Ithageneias (Code of Greek Citizenship) A:10 (Greece). (Article 5 of the same code also permits individuals with Greek ethnicity to obtain citizenship if they voluntarily renounce their prior nationality.)

21. Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.). (In 1970, the Israeli government expanded this right to the spouses of those with Jewish ancestry.)

Saudi fathers or unmarried Saudi mothers if the father is unknown.<sup>22</sup> Saudi mothers married to non-Saudi citizens are unable to confer citizenship to their newborn children under any circumstances.<sup>23</sup>

The 2010 U.S. Census estimated that the United States is currently home to 2.4 million foreign-born individuals who derived citizenship from their parents, and that approximately 60,000 derivative citizens are born each year.<sup>24</sup>

### 1. *Historical Evolution Of Derivative Citizenship In The United States*

Derivative citizenship is the means by which U.S. citizenship is conferred to foreign-born children when certain conditions are met.<sup>25</sup> In 1790, Congress enacted the first derivative citizenship statute. The statute granted citizenship to newborn children if both parents were married, if the citizen father was married to a non-citizen mother, or if the citizen mother was married to a non-citizen father and the alien father had resided in the United States for a particular number of years.<sup>26</sup> Over the next two hundred years, Congress modified the length and nature of residency requirements, attached conditions to newborns who were born outside of marriages, and changed presumptions regarding whether the citizen mother or citizen father would more easily confer citizenship to a newborn child.

Evolving equality for women and political pressures primarily fueled the changes. For instance, coverture is the legal doctrine that caused women to lose their independent personhood when they married.<sup>27</sup> Coverture prevented women from entering into contracts, owning property, initiating divorce, voting, retaining earned income, having individual liability attach to their misconduct, and testifying against their husbands.<sup>28</sup> Not surprisingly, a citizen woman who married an alien man lost her own citizenship, not to

22. See Kingdom of Saudi Arabia Ministry of the Interior Ministerial Agency of Civil Affairs, *Saudi Arabian Citizenship System*, [https://www.moi.gov.sa/wps/wcm/connect/121c03004d4bb7c98e2cdfbed7ca8368/EN\\_saudi\\_nationality\\_system.pdf?MOD=AJPERES](https://www.moi.gov.sa/wps/wcm/connect/121c03004d4bb7c98e2cdfbed7ca8368/EN_saudi_nationality_system.pdf?MOD=AJPERES) (describing the Kingdom of Saudi Arabia's citizenship laws).

23. See *id.*

24. See U.S. CENSUS BUREAU, NATIVITY STATUS AND CITIZENSHIP IN THE UNITED STATES: 2009 at 2 tbl.1, available at <http://www.census.gov/prod/2010pubs/acsbr09-16.pdf> (listing 2.4 million "U.S. citizens, born abroad of American parents" and an additional 1.7 million "U.S. citizens, born in Puerto Rico or U.S. Island Areas"); JOE COSTANZO, AMANDA VON KOPPFELDS, MIGRATION POLICY INSTITUTE, COUNTING THE UNCOUNTABLE: OVERSEAS AMERICANS (2013), available at <http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans> (noting that "consular reports of births of U.S. citizens abroad [was] . . . 60,000 in 2009").

25. See generally 8 U.S.C. § 1401. The derivative citizen statute is found in the Immigration and Naturalization Act (INA) §§ 301-309, 8 U.S.C. §§ 301-309.

26. See Michael G. McFarland, Note, *Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations*, 63 N.Y.U. ANN. SURV. AM. L. 467, 480 (2008).

27. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 115-16, 118 (2000).

28. *Id.*

mention the right to confer citizenship to her newborn child.<sup>29</sup> By the 1920s, states began to repeal (or more accurately, modify) the most extreme forms of coverture.<sup>30</sup> The first notable impact on citizenship laws occurred in 1922 when Congress permitted married women to remain U.S. citizens even when marrying an alien (as long as the husband was not Asian).<sup>31</sup> By 1934, Congress permitted citizen women married to alien fathers to again confer citizenship to their newborn children.<sup>32</sup>

In the 1930s and 1940s, isolationism and fears of fascism spurred changes to derivative citizenship laws. In 1934, Congress lengthened the residency requirement for children who had one citizen and one alien parent.<sup>33</sup> Newborn children of these mixed marriages were required to reside in the United States for at least five years before they turned eighteen and take a loyalty oath before they turned twenty-one to acquire citizenship.<sup>34</sup> In 1940, Congress further added a requirement that the citizen parent reside in the United States for at least ten years before he or she could confer citizenship to a newborn child.<sup>35</sup>

In 1952, Congress passed the statute that served as the framework for the modern derivative citizenship statute. Congress designated three types of families to which it would grant citizenship to their foreign-born children: those with two citizen parents, those with one citizen and one national parent,<sup>36</sup> and those with one citizen and one alien

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29. Marian L. Smith, "Any woman who is now or may hereafter be married . . ." *Women and Naturalization, ca. 1802-1940*, PROLOGUE, Summer 1998 available at <http://www.archives.gov/publications/prologue/1998/summer/women-and-naturalization-1.html> ("Just as alien women gained U.S. citizenship by marriage, U.S.-born women often gained foreign nationality (and thereby lost their U.S. citizenship) by marriage to a foreigner. As the law increasingly linked women's citizenship to that of their husbands, the courts frequently found that U.S. citizen women expatriated themselves by marriage to an alien. For many years there was disagreement over whether a woman lost her U.S. citizenship simply by virtue of the marriage, or whether she had to actually leave the United States and take up residence with her husband abroad. Eventually it was decided that between 1866 and 1907 no woman lost her U.S. citizenship by marriage to an alien unless she left the United States.").

30. Despite the purported repeal, coverture cast a long shadow over women's rights and domestic relationships for decades. For instance, until the 1950's and 1960's, women were compelled to take their husbands' last names and their legal domicile attached to their husband, regardless of where they in fact resided. Domestic violence was not a criminal offense until the 1970's, and the marital rape exception was recognized in some states until the 1990's. Even today, coverture still influences legal rights. Spouses may elect not to testify against one another, and many states still have a "one buy, two sell" rule in real estate, which prohibit a married woman who buys property from selling it without her husband's consent.

31. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 164-65 (2000) (discussing the Cable Act of 1922). By 1950, Congress ended the pronounced and far-reaching exclusion of Asian individuals from the numerous benefits of residency and citizenship.

32. Ranjana Natarajan, *Americans and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123, 135 n.68 (1998) (citing Act of Feb. 10, 1855, § 2, 10 Stat. 604 (codified at Revised Statutes § 1993)).

33. *Id.* at 135.

34. See McFarland, *supra* note 26, at 481 n.82 (citing Act of May 24, 1934, Pub. L. No. 73-250, § 1993, 48 Stat. 797, 797).

35. See *id.* at 481-82 n.85 (citing Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1139).

36. A "national" is defined as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(V)(ii)(22)(B). This status currently

parent.<sup>37</sup> In later reforms, children with two alien parents who naturalized were also extended derivative citizenship.<sup>38</sup> Children who had two citizen parents faced the least number of restrictions, and children with one citizen parent and one alien parent faced the most. Within this latter category, a child born out of wedlock whose father was a citizen faced the highest hurdles to clear before citizenship was granted.

## 2. *Modern Statute*

The current law grants citizenship to foreign-born children with two citizen parents, one citizen and one national parent, one citizen and one alien parent, and two alien parents when conditions particular to each family are met. Moreover, the current law confers citizenship to adopted children if their parents are citizens or residents of the United States, and if certain conditions are met before the child turns eighteen years old.<sup>39</sup> To complicate matters further, up to seven different versions of this law exist that may apply to an individual's claim, each with slightly different criteria for each category.<sup>40</sup> When ascertaining which version applies to a person, "derivative citizenship is determined under the law in effect at the time the critical events giving rise to eligibility occurred."<sup>41</sup> If more than one provision may be applicable, the child may elect the provision under which he or she seeks derivative citizenship.<sup>42</sup>

To assist in the understanding of which provisions are currently in operation, the following tables set forth the factors that a child must establish to acquire citizenship:

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applies to individuals born in the American Samoa, Swains Island, and the U.S. Minor Outlying Islands. This status had extended to individuals residing in the U.S. Virgin Islands (citizenship granted to all in 1927), Puerto Rico (citizenship was granted to all in 1917), Guam (citizenship was granted to all in 1950), and the Philippines (national status revoked in 1935 and citizenship never granted). Because the number of nationals who are not U.S. citizens are small, the article will not focus on the rules that affect how they confer citizenship when married to a U.S. citizen.

37. See 8 U.S.C. § 1401(c) (two citizen parents), § 1401(d) (one citizen and one national parent), § 1401(g) (one citizen and one alien parent).

38. See 8 U.S.C. § 1432(a) (1997).

39. For adopted children, the child must return to the United States to receive citizenship. For adopted children with two citizen parents, the moment they enter the United States is the moment that citizenship is granted. Foreign-born children who are adopted and live abroad, must return to the United States for an abbreviated naturalization process before citizenship is granted.

40. A person may be subject to a derivative citizenship statute codified prior to 1986, the statute enacted in 1986, and the Child Citizenship Act of 2000, which went into effect on February 27, 2011. There are also different requirements for individuals subject to the 1952 and 1941 versions of the statute. As a practical matter, most applicants currently in proceedings are subject to laws prior to 1986, after 1986, and after 2001.

41. *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005).

42. *Id.* ("As with all forms of citizenship, derivative citizenship is determined under the law in effect at time the critical events giving rise to eligibility occurred.")



TABLE 1: **BOTH PARENTS ARE CITIZENS: SECTION 1401(c)**

Controlled By Relevant Law	Requirements
1952 8 U.S.C. § 1401(c)	<ul style="list-style-type: none"> <li>● Both parents are U.S. citizens at child's birth and</li> <li>● One parent "had a residence" in the United States prior to child's birth</li> </ul>

TABLE 2: **ONLY ONE CITIZEN PARENT: SECTION 1401(g)**

Controlled By Relevant Law	Requirements
1952 8 U.S.C. § 1401(g)	<ul style="list-style-type: none"> <li>● One parent was a U.S. citizen at child's birth and</li> <li>● Citizen parent was "physically present" in the United States for five years prior to the child's birth (at least two years after age fourteen)</li> </ul>

TABLE 3: **CITIZEN MOTHER AND CHILD BORN OUT OF WEDLOCK: SECTION 1409(c)**

Controlled By Relevant Law	Requirements
1952 8 U.S.C. § 1409(c)	<ul style="list-style-type: none"> <li>● Child born out of wedlock and</li> <li>● Mother was U.S. citizen at child's birth and</li> <li>● Mother was "physically present" in the United States for one year prior to the child's birth</li> </ul>

TABLE 4: **CITIZEN FATHER AND CHILD BORN OUT OF WEDLOCK: SECTION 1409(a)**

Controlled By Relevant Law	Requirements
Prior to 1986 8 U.S.C. § 1409(a)	<ul style="list-style-type: none"> <li>● Child born out of wedlock and</li> <li>● Father was a U.S. citizen at child's birth and</li> <li>● Father was "physically present" in the United States for ten years prior to the child's birth (at least five of those years were after age fourteen) and</li> <li>● Child legitimated before age twenty-one in domicile of child or father</li> </ul>
After 1986 8 U.S.C. § 1409(a)	<ul style="list-style-type: none"> <li>● Child born out of wedlock and</li> <li>● Father was a U.S. citizen at child's birth and</li> <li>● Father parent was "physically present" in the United States for five years prior to the child's birth (at least two of those years after age fourteen) and</li> <li>● A "blood relationship" between the father and child is "established by clear and convincing evidence" and</li> <li>● Father has provided written promise to provide financial support of child until age eighteen and</li> <li>● Before age eighteen, child is legitimated under child's domicile and</li> <li>● Before age eighteen, father acknowledges paternity in writing under oath or competent court adjudicates paternity</li> </ul>

TABLE 5: **TWO NON-CITIZEN PARENTS: SECTION 1432**

Controlled By Relevant Law	Requirements
Prior to 2001 8 U.S.C. § 1432	<ul style="list-style-type: none"> <li>● Parent(s)' naturalization occurs prior to child turning eighteen and</li> <li>● Child has status of lawful permanent residence at time last parent naturalizes or "thereafter begins to reside permanently in the United States while under the age of eighteen years" and</li> <li>● Both parents are naturalized <ul style="list-style-type: none"> <li>○ or if one parent is deceased, surviving parent is naturalized or</li> <li>○ if legal separation, parent with custody naturalized or</li> <li>○ if child born out of wedlock, naturalization of mother</li> </ul> </li> </ul>

TABLE 6: CHILD CITIZENSHIP ACT OF 2000: SECTION 1431

Controlled By Relevant Law	Requirements
February 27, 2001 8 U.S.C. § 1431	<ul style="list-style-type: none"> <li>● Only applies to child born after on or after February 27, 1983 and</li> <li>● At least one parent of the child is a citizen by naturalization or birth and</li> <li>● Child is residing in the United states in legal and physical custody of citizen parent and</li> <li>● Child entered with lawful permanent residence status and               <ul style="list-style-type: none"> <li>○ If adopted, child was eighteen or under when adoption became final</li> <li>○ If adopted, parents of adopted child were married at time of adoption</li> </ul> </li> <li>● For both provisions, “child” means person born in wedlock or legitimated before age eighteen</li> </ul>

To illustrate how family law is applied in derivative citizenship claims, this article will focus only on how citizen fathers confer citizenship to foreign-born children who are born out of wedlock under the pre-1986 and post-1986 versions of Section 1409(a) (Table 4).

The pre-1986 version of Section 1409(a) declared that a foreign-born child who is born out of wedlock shall be a citizen if his or her citizen father resided in the United States for at least ten years prior to the child’s birth and if “the paternity of such child is established while such child is under the age of twenty-one years by legitimation.”<sup>43</sup>

The role of legitimation was further emphasized by the Immigration and Nationality Act’s (INA) definition of who was a “child.” The term “child” was defined as (1) a person born in wedlock; (2) a stepchild, regardless of whether he or she was born in wedlock, if the marriage occurred before age eighteen; (3) a child legitimated under the child or father’s residence if the legitimation occurs prior to age eighteen; and (4) a child born out of wedlock if a “privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person.”<sup>44</sup>

43. As set forth in 8 U.S.C. § 1401(a)(7) (amended 1986): “A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.” As set forth in 8 U.S.C. § 1409 (amended 1986): “The provisions of paragraphs (3) to (5), and (7) of section 1401 . . . shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.”

44. The INA’s definition of a child, as set forth in 8 U.S.C. § 1101(b)(1) (1986):

(A) a child born in wedlock;

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

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

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its

Prior to 1986, a person born out of wedlock would be recognized as a child of a citizen father if the father married the child's mother, the child was legitimated under the laws of a state or foreign country, or the father engaged in conduct that held out the child as his own. A state court order was not necessary to determine whether a parent-child relationship existed. Moreover, once these conditions were met, citizenship was granted *nunc pro tunc* (now for then) from the moment of the child's birth. As will be detailed in section B, *infra*, Congress' liberal recognition of parenthood mirrored the liberal legitimation scheme that states confer on children.

In 1986, this scheme radically changed. Congress substantially altered Section 1409(a) in relevant part to require (1) "a blood relationship between the person and the father is established by clear and convincing evidence"; (2) the father "agreed in writing to provide financial support for the person until the person reaches the age of 18 years"; and (3) while the child is under eighteen years old, a child is legitimated under the laws of his or her residence, the father acknowledges paternity under oath, or a state court finds paternity.<sup>45</sup> This article scrutinizes the provision adopted by Congress that provides that a biological bond determines the father-child relationship.

## B. *State Legitimation Claims*

This section provides a brief overview of how the legitimation concept has evolved in the United States; explains the difference between paternity, legitimation, and parentage; and examines how legitimation statutes are currently operating outside of the immigration context.

### 1. *Evolution Of Legitimacy Concept In The United States*

Children have been born out of wedlock as long as wedlock has existed. Historically, legitimacy was the legal process by which a child was deemed legitimate or not. This determination was traditionally limited to the question of whether the child was born into a marriage, to an unwed mother, or to the mistress of a married man (or for men who maintained two secret families,

natural father if the father has or had a bona fide parent-child relationship with the person. 8 U.S.C. § 1101(b)(1) (1986) (emphasis added).

45. In 1986, Congress amended 8 U.S.C. § 1409 to require that children born out of wedlock be citizens at the time of their birth if:

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court. 8 U.S.C. § 1409 (1987).

which children had been legitimated).<sup>46</sup> For many years and in many countries, the distinction was a significant one. Ancient Greece and Rome conferred different citizenship rights on legitimate and illegitimate children.<sup>47</sup> In England, the right to inherit property depended on whether a son was legitimate or not.<sup>48</sup> Shifting opprobrium towards extramarital affairs and the illegitimate child impacted adoption practices and laws. In the 1600s, the Catholic Church opposed adoption out of fear that philandering men would abuse it to hide the children of their extramarital affairs by adopting them into their families.<sup>49</sup> The social opprobrium of illegitimacy was most often directed at the child. Even though shifting social mores and legal reforms altered the stigma, the social stigma lasted well into the 1960s and beyond.

In the United States, socially and legally, the concept of illegitimacy has altered significantly. The term “bastard” was the recognized legal term for

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46. “Legitimacy is a legal concept. The law makes a child legitimate or illegitimate . . . . Indeed the term ‘illegitimate’ means that which is contrary to law.” *Lau v. Kiley*, 563 F.2d 543, 548 (2d Cir. 1977) (internal citations and modifications omitted).

47. See e.g., Craig Y. Allison, Book Note, 89 MICH. L. REV. 1610, 1612-13 (1991) (reviewing RAPHEAL SEALEY, *WOMEN AND LAW IN CLASSICAL GREECE* (1990)) (“[T]he legal disabilities imposed on Greek women stem from two cultural standards common to all ancient Greek societies: women’s inability under Greek customs to bear weapons and the Greeks’ interest in protecting the legal status of their citizens’ children. Sealey explains the lack of the need for a woman’s consent to marriage as a protection to the legitimacy of citizens’ children. Since Greek law severely disabled illegitimate offspring, the Greek city-state was unwilling to invalidate a marriage on such trivial (to the Greeks) grounds as the lack of consent of the parties. According to Sealey, children, and the orderly inheritance of property by children, simply mattered more to the Greeks than the legal rights of their wives (pp. 259-60).”; Anna Natalie Rol, *U.S. vs. Them: A Perspective on U.S. Immigration Law Arising from United States v. Rosales-Garcia and the Combination of Imprisonment and Deportation*, 90 DENV. U. L. REV. 769, 775 n.46 (2012) (citing Simon Hornblow, *Greece: The History of the Classical Period*, in *THE OXFORD HISTORY OF THE CLASSICAL WORLD* 135 (John Boardman et al. eds., 1986) (“A law of the year 451 [B.C.] restricted citizenship and thus its benefits . . . to persons of citizen descent on both sides . . . . Athenian (and Spartan) stinginess with the citizenship was singled out by panegyrists of Rome as the chief cause of the brevity of their empires.”); *Id.* at 775 n.46 (citing Oswyn Murray, *Life and Society in Classical Greece*, in *THE OXFORD HISTORY OF THE CLASSICAL WORLD* 210) (John Boardman et al. eds., 1986) (“[I]n the classical period the state intervened to establish increasingly stringent rules for citizenship and so for legitimacy: ultimately a citizen must be the offspring of a legally recognized marriage between two Athenian citizens, whose parents must also be citizens . . . . It became impossible for an Athenian to marry a foreigner or to obtain recognition for the children of any other type of liaison: the development is essentially democratic, the imposition of the social norms of the peasant majority on an aristocracy which had previously behaved very differently . . . .”).

48. Note, *The Effect of Legitimation of A Child on the Father’s Right to Curtesy*, 24 HARV. L. REV. 146 (1910) (“So to-day a child born before its parents marry, though legitimated by the law of its domicile, cannot inherit English land.”).

49. Kari E. Hong, *Parens Patri[Archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 12-13 (2003) (“For centuries, the Christian Church had helped coordinate placing orphaned children with relatives and church parishioners. If homes could not be found, the ‘Church began boarding children with worthy widows, paying for the service by collections taken in the various congregations.’ However, by the sixteenth century, adoption in Europe was not common, but when it did occur, was made through informal arrangements that were primarily motivated out of humanitarian or charitable impulses. The Christian Church opposed these arrangements, however, citing concerns that men were abusing adoption as a means to fold their illegitimate children into a legitimate family structure. The Christian Church initiated a campaign to stigmatize adoption by advocating that sex and procreation should be reserved for marriage. By the 1600s, the campaign had achieved its goal, and most Europeans stopped adopting children out of belief that it was ‘unchristian’ or an ‘unnatural’ act to do.”) (citations omitted).

children born out of wedlock.<sup>50</sup> Appearing on birth certificates until the 1960s, the term eventually fell out of favor due to the social mores and changes in adoption law. Although the social stigma attached to illegitimacy no longer exists, 40% of newborns in the United States were born outside of marriage in 2012.<sup>51</sup> As illustrated in a number of state law actions described later, among the 60% of newborns born to married parents, a fair number have parents who have had extramarital affairs with ex-lovers, friends, neighbors, and coworkers who may or may not be asserting parental claims to the child. The current need for ascertaining who is and who is not a legal parent is as pressing as ever.

Most states have repealed or replaced their legitimacy statutes with more-favored parentage statutes. Driven by the 1973 Uniform Parentage Act,<sup>52</sup> the drafters “led a revolution in the law of determination of parentage, paternity actions and child support.”<sup>53</sup> The evolutionary nature of this act was found in Section 2, which provided that “[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents.”<sup>54</sup> The contemporary question for the states shifted from whether a child has illegitimate status, to which adult will serve as a parent to a child.<sup>55</sup>

In 1975, California’s legislature “replaced the concept of legitimacy with the concept of parentage . . . .”<sup>56</sup> Since then, most states rely on parentage statutes to determine who will serve as the “natural parent” to a child. The legal term “natural parent” means the adult who has custody of, responsibility for, and all parental rights in raising a child.<sup>57</sup> All states provide that two adults will serve in this capacity. Likewise, when two adults are declared “natural parents” under legitimation or parentage laws, any competing claims

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50. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 209 n.21 (2009) (observing, in discussion of children with unwed mothers, that “[t]heir children’s birth certificates were sometimes stamped ‘bastard.’”) (citing ANN FESSLER, *THE GIRLS WHO WENT AWAY* (2006); RICKIE SOLINGER, *WAKE UP LITTLE SUSIE* (1992)).

51. Roger Clegg, *Latest Statistics on Out-of-Wedlock Births*, NATIONAL REVIEW ONLINE, Oct. 11, 2013, at 1, available at <http://www.nationalreview.com/corner/360990/latest-statistics-out-wedlock-births-roger-clegg> (“Preliminary data indicate that 40.7 percent of all 2012 births were out-of-wedlock . . .”).

52. The Uniform Parentage Act (UPA) is not legislation, but rather comprehensive recommendations proposed by the Uniform Law Commission for adoption by the states in whole or in part. Uniform Law Commission, *Uniform Parentage Act (1973)*, available at <http://www.uniformlaws.org/shared/docs/parentage/upa73.pdf> (last revised in 2000 and amended in 2002). See generally UNIFORM LAW COMMISSION, <http://uniformlaws.org/Legislation.aspx> (documenting state adoption of the Uniform Parentage Act).

53. *Parentage Act Summary*, Uniform Law Commission, <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act>.

54. Uniform Parentage Act § 2 (1973).

55. Some states still refer to the code under the prior legal term “Bastardy.” Mississippi, for instance, still refers to the relevant code as “Bastardy.” See, e.g., MISS. CODE ANN. § 93-9-1 (West 2014) (referring to Chapter 9 of the relevant code as “Bastardy,” yet qualifying that the code “may be cited as the ‘Mississippi Uniform Law on Paternity’”).

56. *Charisma R. v. Kristina S.*, 175 Cal. App. 4th 361, 371 (Cal. Ct. App. 2009).

57. See Uniform Parentage Act § 102(13) (2002).

of paternity, fatherhood, or motherhood are extinguished.<sup>58</sup>

The derivative citizenship laws, however, complicate the issue by still referring to legitimacy as the marker (and maker) of the parent-child relationship. Because Congress has not yet updated derivative citizenship to rely expressly on parentage determinations, understanding legitimation and paternity are highly relevant in understanding the derivative citizenship scheme.

## 2. *The Difference Between Paternity And Legitimacy*

Whereas legitimacy determines which adult will serve as the parent to a child, paternity is the factual finding of whether a man is the biological father of a child. Often confused, both concepts are only legal constructions and not factual determinations. A man who has established paternity proves only that he is the biological father of a child. This status does not confer custody, visitation, or all of the parental rights that would be afforded to a legitimated father, who is considered the one and only natural father.<sup>59</sup>

A man with a valid paternity claim is not automatically declared the natural father in legitimacy proceedings. A Minnesota court, for example, upheld a paternity action brought by a man who had genetic proof that he was the biological father of a child.<sup>60</sup> The court made clear, however, that the finding of paternity was a limited one. “[E]ven though [a biological father] may establish a presumption of biological fatherhood, whether he should be granted custodial or visitation rights with respect to [the child] is for an independent determination later to be made by the district court.”<sup>61</sup>

When two men are contesting who will serve as a child’s acknowledged father, courts will often declare the man without a biological tie (but instead a relationship with the natural mother) to serve as the one and only natural father, a finding that extinguishes any conflicting paternity findings. When explaining why it selected the husband of the natural mother to serve as the child’s father over uncontested evidence that a different man was the biological father, the California Supreme Court explained, “there is so much more to being a father than merely planting the biological seed. The man who provides the stability, nurturance, family ties, permanence, is more important to a child than the man who has mere biological ties . . . . By finding [the man

58. See generally Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL’Y & L. 671, 702 (2012) (providing an excellent historical discussion of parentage and legitimacy statutes).

59. Compare Uniform Parentage Act § 102(15) (2002) (paternity index) (explaining that paternity is the statistical likelihood of a man being the genetic father of a child), with Uniform Parentage Act § 102(13) (2002) (parent) (“‘Parent’ means an individual who has established a parent-child relationship under Section 201.”), and Uniform Parentage Act § 102(1)-(3), (16) (2002) (acknowledged father, adjudicated father, alleged father, presumed father), and Uniform Parentage Act § 102(11) (2002) (gestational mother).

60. *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001).

61. *Id.* at 69.

who is not the biological father] is the presumed father, this court is protecting and preserving a family unit, the integrity of a family unit.”<sup>62</sup>

Outside of contested actions, paternity is mostly determined without a blood test. As illustrated by the laws of four states detailed in Table 7, most states will find paternity based on whether a man was married to the natural mother when the child is born, a genetic test (if time and standing issues are met), voluntary statements made by one or both of the parents, or conduct such as the father caring for the child as his own:

TABLE 7: PATERNITY STATUTES

California <sup>63</sup>	Minnesota <sup>64</sup>	Arizona <sup>65</sup>	Virginia <sup>66</sup>
<ul style="list-style-type: none"> <li>• Husband cohabiting with wife</li> <li>• Excludes children conceived with reproductive technology if husband or wife consented to it</li> <li>• Excludes sperm donors</li> <li>• Gender neutral application of paternity and parentage</li> </ul>	<ul style="list-style-type: none"> <li>• Prior to birth, marriage to natural mother</li> <li>• After birth, marriage or attempted marriage to natural mother <i>and</i> <ul style="list-style-type: none"> <li>— Filed acknowledgment of paternity with the state;</li> <li>— Listed on birth certificate (with consent); or</li> <li>— Obligated through written promise or court order to financially support the child</li> </ul> </li> <li>• Before child is eighteen, receives the child in his home and openly cares for the child as his natural child</li> <li>• Father and mother executed a written recognition of paternity, which cannot be revoked after sixty days</li> <li>• Genetic test, if supported by affidavit from natural mother or putative father corroborating that prior events could have reasonably resulted in the child's conception</li> </ul>	<ul style="list-style-type: none"> <li>• Marriage to natural mother ten months prior to birth</li> <li>• Genetic tests with a 95% probability</li> <li>• Birth certificate signed by mother and father</li> <li>• Voluntary statement signed by mother and father</li> <li>• If presumed father cannot be located, paternity can be established without written consent</li> <li>• If the child's natural mother is married to another, father must receive consent from the natural mother's husband to claim paternity</li> <li>• Presumption of paternity notice upon engaging in sexual intercourse with natural mother</li> </ul>	<ul style="list-style-type: none"> <li>• Voluntary declaration</li> <li>• Genetic tests, but lack of genetic proof will not defeat paternity if other conditions are met</li> <li>• But paternity finding cannot be revoked if man acknowledged paternity knowing he was not the father, adopted the child, or the child was conceived through reproductive technology</li> </ul>

Blood tests were not admitted into state court proceedings until the 1940s when a sensationalized paternity action against the silent film star Charlie Chaplin marshaled public support for them. A paternity test proved that Charlie Chaplin was not the biological father of a child born to a younger actress with whom he had an affair.<sup>67</sup> Mr. Chaplin's blood test was inadmis-

62. *Jesusa V. v. Heriberto C.*, 32 Cal. 4th 588, 598 (Cal. 2004) (internal quotations omitted).

63. CAL. FAM. CODE § 7630 (West 2014).

64. MINN. STAT. ANN. § 257.55 (West 2014).

65. ARIZ. REV. STAT. ANN. § 25-814 (2014) (West).

66. VA. CODE ANN. §§ 20-49.1, 20-49.3, 20-49.10 (West 2014).

67. *See Berry v. Chaplin*, 74 Cal. App. 2d 652 (Cal. Ct. App. 1946).

sible under California law, and the jury adjudicating his paternity claim found him to be the father of the child, liable for financial support to the mother and child.<sup>68</sup> The public outrage of the perceived injustice compelled California and other states to permit blood tests to be admissible in paternity trials.<sup>69</sup> Even when jury trials were no longer favored as the means to determine paternity, blood tests remained admissible, but available only for limited purposes. The blood test was introduced to prevent men from wrongfully being burdened with the responsibilities of fatherhood.<sup>70</sup>

In contested and uncontested actions, states have never required proof that a father has a biological tie to his child. As an evidentiary matter, prior to DNA technology which was not widely available in the late 1970s and 1980s, blood tests were unable to identify a specific man as the father of a child. “All blood tests for paternity stem from the same basic genetic principle: the biological father and the child share similar genetic markers. However, none of the tests positively identify an individual as the actual father. The basis of the tests’ conclusion is always a negative premise . . . . [B]lood tests can conclusively establish only nonpaternity.”<sup>71</sup>

DNA testing, when combined with other genetic marking tests, increased the probability of paternity to over one-hundred million to one or above 99.999999%.<sup>72</sup> However, not all states have seized upon this technological advance to alter their legal presumptions.<sup>73</sup> DNA tests are admissible in most states, and often times the DNA test will conclusively prove paternity. However, even with advances in technology, blood tests have neither been favored to resolve competing claims of fatherhood nor expeditiously identify the “true father” of any given child.<sup>74</sup>

One of the primary reasons why biology does not have a fundamental role in paternity actions is that paternity statutes are exceedingly protective of family units. Paternity actions traditionally, and in many states still, are not available for a man to seek a relationship with a child whom he believes (or can prove) is his biological son or daughter. Rather, paternity actions are used

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68. The jury could take into consideration whether the child sufficiently looked like Mr. Chaplin to be his child. *Id.* at 665-66. For decades, paternity claims were tried by juries. Ronald J. Richards, *DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS L. REV. 609, 611 n.6 (1988) (“Arbitrators of early paternity cases would often compare ‘father’ and child and decide whether they were similar.”).

69. Ronald J. Richards, *DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS L. REV. 609, 611 n.6 (1988).

70. *Id.*

71. *Id.* at 614.

72. Diane S. Kaplan, *Why Truth Is Not A Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 72 n.10 (2000) (internal quotations omitted).

73. *Id.* at 73-81 (comparing Pennsylvania, Massachusetts, and New York to exemplify states that reject, use, and selectively use DNA tests in determining a child’s parentage).

74. For instance, in Virginia, the statute provides “In the absence of such acknowledgment or if the probability of paternity is less than ninety-eight percent, such relationship may be established as otherwise provided in this chapter.” VA. CODE ANN. § 20-49.1 (West 2014). The rest of the statute refers to a voluntary declaration by the mother and father that the man at issue is the biological father of the child.



for two purposes.

First, states initiate paternity actions to identify which man will provide child support to a natural mother. For these actions, the natural mother or state typically has eighteen years to bring a claim for child support. Many states follow Vermont and Arizona and find that a man's failure to submit to a blood test is conclusive proof that he is the biological father.<sup>75</sup> Arizona took it one step further and codified that a default paternity order may be entered because a man had all the notice required under law when he engaged in sexual intercourse with the natural mother.<sup>76</sup> Biological proof would interfere with the expeditious and accurate identity of which man will serve as a father to a child.

Second, the other type of paternity action involves a natural mother and her husband declaring that the husband is the biological father. In this instance, states will routinely accept a joint declaration from the natural mother and husband (or a man voluntarily claiming paternity) as sufficient proof. Once paternity is declared, many states will not allow a third party to disrupt it. Most states follow rules that place a time limit on any contested paternity action before the child turns one year old (Louisiana),<sup>77</sup> two years old (Oklahoma),<sup>78</sup> three years old (Minnesota),<sup>79</sup> or six years old (Michigan).<sup>80</sup> Some states never permit a third party to claim paternity in these circumstances.<sup>81</sup> Some states limit an action to be brought only within 60

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75. VT. STAT. ANN. tit. 15, § 308 (West 2013); ARIZ. REV. STAT. ANN. § 25-813 (2014).

76. ARIZ. REV. STAT. ANN. § 25-623(A)(6) (stating that notice and jurisdiction to enter paternity order is satisfied when "[t]he individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse.") (repealed 2005).

77. *Miller v. Thibeaux*, — So. 3d —, 2014 WL 551585, at \*3 (La. Ct. App. Feb. 12, 2014) (relying on the paternity statute which states that "[i]f the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.").

78. *Paul v. Williamson*, 322 P.3d 1070, 1073 (Okla. Civ. App. 2014) (commenting that prior law "did not contain a time limitation, but according to [Okla. Stat. Ann. tit. 12, § 1038], a proceeding to vacate an order based on fraud pursuant to [12 Okla. Stat. Ann. tit. 12, § 1031(4)] must be commenced within two (2) years after the filing of the order.").

79. *Clay v. Clay*, 397 N.W.2d 571, 576 (Minn. Ct. App. 1986) ("[Minn. Stat. Ann. § 257.57, subdiv. 1(b)] provides that a child, its natural mother or a man presumed to be the child's father may bring an action for the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55, subdivision 1, clause (a), (b), or (c) only if the action is brought within a reasonable time after the person bringing the action has obtained knowledge of relevant facts, but in no event later than three years after the child's birth . . . . 'The three-year statute of limitations is absolute in that it bars action *even if* the presumed father obtains knowledge of illegitimacy after the running of the statute.'" (quoting *Pierce v. Pierce*, 374 N.W.2d 450, 452 (Minn. Ct. App. 1985))).

80. *McFetridge v. Chiado*, 323 N.W.2d 470, 471 (1982) ("The pertinent statute provides that paternity litigation may be commenced by a child's mother, the putative father, or the Department of Social Services. In addition, a trial court may appoint a guardian ad litem to represent the child's interests. [Mich. Comp. Laws Ann. § 722.714]. In any event, the action is governed by the statutory six-year limitation.").

81. *R.P. v. K.S.W.*, 320 P.3d 1084, 1096 (Utah Ct. App. 2014) (noting that Utah has rejected the recommendation to provide any period of limitations. "Section 608 allows a tribunal to deny or

days after paternity has been established, with the exception of fraud.<sup>82</sup> Many states will only allow the wife or husband to produce blood tests, and not necessarily a man claiming to have had an extra-marital affair with the wife, unless the wife or husband consent to his paternity claim.

The most well-known example of a state limiting when and how a man can raise a paternity claim is *Michael H. v. Gerald D.*<sup>83</sup> *Michael H.* is a 1989 Supreme Court case that—in a four-justice plurality—upheld the lower court’s rejection of Michael H.’s proof that 98.07% certainty existed that he was the child’s biological father. In that case, Gerald D. and Carole D. were married to one another.<sup>84</sup> Gerald D. traveled frequently, and Carole D. was an international model. At one point, Carole D. began an affair with their neighbor, Michael H. She became pregnant and gave birth to a daughter named Victoria. Gerald D. was listed on the birth certificate as the father and always maintained that Victoria was his daughter. California precluded Michael H.’s paternity action because it was initiated after Victoria’s second birthday, and neither the husband nor wife consented to Michael H.’s claim. Michael H. brought a constitutional challenge to the California statute’s preclusion of his paternity claim and denial of his ability to forge a father-daughter bond with Victoria. In rejecting Michael H.’s claim to paternity and fatherhood, the Supreme Court noted that “[w]hat counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so.”<sup>85</sup>

When a natural mother is married to a man who is holding out the child as his own, states mostly prevent an initiation of a paternity action after the child has reached a particular age.<sup>86</sup> Other states follow rules similar to those of Arizona and Minnesota and do not even confer standing to someone outside of the marriage to initiate a contested paternity claim.<sup>87</sup> In such situations, the absence of biological proof is necessary to maintain the

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disregard genetic testing based on principles of estoppel, the inequities of disrupting preexisting relationships with the child, and the best interest of the child.” (citing UTAH CODE ANN. § 78B-15-608 (West 2014)).

82. ARIZ. REV. STAT. ANN. § 25-812(E) (West 2014).

83. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

84. *Id.* at 113-14.

85. *Id.* at 110, 127.

86. After *Michael H.*, California repealed the statute at issue and replaced the two-year limitation period with a requirement that “the action is brought within a reasonable time after obtaining knowledge of relevant facts.” CAL. FAM. CODE § 7630 (West 2014). See *supra* notes 78-81 for examples of statutes that place time limitations on when a paternity action can be challenged.

87. ARIZ. REV. STAT. ANN. § 25-803 (2014); MINN. STAT. ANN. Minn. Rev. Stat. § 257.57 (West 2014). See also *McFetridge v. Chiado*, 323 N.W.2d 470, 471 (Minn. Ct. App. 1982) (“The pertinent statute provides that paternity litigation may be commenced by a child’s mother, the putative father, or the Department of Social Services . . . Absent legislative action, a child may not maintain a paternity action separate from that allowed under the paternity statute and subject to the limitation period.”).

father-child bond between the child and the parent holding out the child as his own. Courts in particular will protect the husband of a natural mother who is raising a child by ensuring that his claims to fatherhood are exclusive.

The protection of the family unit against third party claims to disrupt fatherhood extends to divorce and later discord. States provide that if a natural mother or father has claimed paternity—even when knowing the biological fact to be false—the finding of paternity will not be undone. In divorce situations, often a mother will claim other men fathered the children or the man will claim a child was never his biological son or daughter. In life insurance and wrongful death suits, third parties will be denied their requests to provide dispositive proof of the non-existence of a father-child relationship.<sup>88</sup> Unless a genuine mistake of fact existed that prevented the action from being raised earlier, the courts will dismiss requests to rescind paternity findings outright. As explained by the Georgia Court of Appeals, the purpose of paternity and legitimation statutes is to promote family unity and protect children from the stigma and emotional scars arising from illegitimacy:

[I]t is clear from our examination of the legitimation and paternity statutes that the primary purpose of these statutes is to *provide for the establishment rather than the disestablishment of legitimacy and paternity* . . . . That these statutes should be used to establish legitimacy and paternity is appropriate; it is certainly not in the legitimate child's best interest to be rendered illegitimate. Moreover, public policy will not permit a mother and an alleged father to enlist the aid of the courts to disturb the emotional ties existing between a child and his legal father after sitting on their rights for the first three years of the child's life.<sup>89</sup>

In keeping with this protection of the family unit, most states do not give a child who is born to married parents any standing to pursue a paternity action against a man he or she believes is his or her natural father.<sup>90</sup> The states reason that because such child has a man who is “recognized as the child's legal father,” no legitimate state interest exists in disrupting that legal relationship.<sup>91</sup> Outside of the child support context, courts favor voluntary declarations of paternity and uncontested determinations. Once paternity is established, states strongly favor a child having two parents. Accordingly, they loath to disrupt any bond that a natural father forms with a child he holds out as his own.

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88. *Standard Ins. Co. v. Wandrey*, 395 F. Supp. 2d 830, 834 (E.D. Mo. 2005) (“In this case, Maybelle Wandrey is essentially asking the court to determine the paternity of A.W.(I) and A.W.(II) by exclusion; however, she points to no statutory authority allowing her to challenge paternity. And, as is clear from the statute, Maybelle Wandrey is not a person entitled to bring a paternity action under the UPA.”).

89. *Christ v. Fricks*, 465 S.E.2d 501, 505-06 (Ga. Ct. App. 1995) (emphasis added) (citations omitted).

90. *Sutton v. Diane J.*, No. 273519, 2007 WL 840900, at \*1-3 (Mich. Ct. App. Mar. 20, 2007).

91. *Id.* at \*1.

### 3. *The Purpose of Contemporary Legitimacy and Parentage Statutes*

Parentage statutes determine which adult will serve as a parent—with the full legal rights and responsibilities that such status affords—to a child. The purpose of contemporary parentage laws parallels the two interests advanced by the paternity statute: either (1) the state initiates an action against a particular man to ensure that he is financially responsible for the child; or (2) a family unit wishes to have a legal declaration as to which parents are the natural—and only—parents to a child. Under both scenarios, the parentage and contemporary legitimacy concepts remain a legal construction. Moreover, a child who becomes legitimated benefits from the legal fiction that he or she had been legitimated since birth.

Similar to the paternity statutes, states have adopted various criteria contemplating what conditions are required for an adult to serve as the natural parent for a child. Each state decides questions of legitimacy and parentage by considering a list of factors, the affirmative answer to which would create a legal presumption of a parent-child relationship. In some states, counter evidence (most often paternity tests, but frequently claims that another person has served as parent or the putative parent failed in his or her duties to act like a parent) may rebut this presumption if it is presented within a particular time and by a particular person. In other states, this presumption may not be rebutted. The legitimacy and parentage statutes examine such issues as whether marriage occurred before or after the birth, whether proof of sexual intercourse during the window of conception exists, the declarations by the natural mother (and her husband) as to who is the natural father, the names listed on the birth certificate, and the father's relationship to the child. Of these, genetic or blood testing is only one factor and does not carry any greater weight than the others.

All states tend to have “a policy of liberal construction in favor of finding legitimation, so that children did not end up without a legal father.”<sup>92</sup> Arizona, on one end of the spectrum, has no criteria for legitimacy because it declares that all children born or living in Arizona are legitimated under Arizona law.<sup>93</sup> This automatic presumption of legitimacy gives rise to the informal saying that “There are no bastards in Arizona.”<sup>94</sup> California's law favors conduct as proof of parenthood. The most important criteria it uses to define a father is whether that person “[r]eceives the child in his or her home and openly holds out the child as his or her natural child.”<sup>95</sup> Minnesota

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92. *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 37 (Cal. Ct. App. 2009) (citations omitted).

93. ARIZ. REV. STAT. ANN. § 25-1401 (2014) (“Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.”).

94. See generally Keith Allen & Hanh Quach, *Donor Dilemmas*, Arizona Daily Wildcat, Jan. 31, 1996, [http://wc.arizona.edu/papers/89/89/01\\_3\\_m.html](http://wc.arizona.edu/papers/89/89/01_3_m.html) (“Arizona also has a law stating that there are ‘no bastard children,’ Dunscomb says. This means the parent of every child is to be responsible as the parent.”).

95. CAL. FAM. CODE § 7611(d) (West 2014).

prefers voluntary statements by the adults to determine who is a parent.<sup>96</sup> Virginia, on the other hand, has created specific rules to define who is or is not a parent.<sup>97</sup> Virginia and Minnesota are examples of states with legislatures that are expressly grappling with how and when surrogates and sperm donors will be considered natural parents. Prior to reproductive technology, states did not need to question whether different women were mothers. As illustrated in the statutes of Minnesota and Virginia, legislatures are starting to define the various conditions that must be met for specific women to be declared the natural mother. To help illustrate the various approaches taken by the states, the following chart compares four states that represent the spectrum of how different states are grappling with how to legally define the families in existence.

TABLE 8: LEGITIMACY AND PARENTAGE STATUTES

California <sup>98</sup>	Minnesota <sup>99</sup>	Arizona <sup>100</sup>	Virginia <sup>101</sup>
<ul style="list-style-type: none"> <li>● Marriage and cohabitation to natural mother</li> <li>● Paternity test (only if within two years of birth)</li> <li>● Voluntary declaration</li> <li>● Prior to birth, attempted to marry natural mother</li> <li>● After birth, married natural mother and               <ul style="list-style-type: none"> <li>— Listed on birth certificate (with consent); or</li> <li>— Obligated to financial support by written promise or court order</li> </ul> </li> <li>● Receives the child in his home and openly holds out child as natural child</li> <li>● Sperm donor is not the father</li> </ul>	<p>Motherhood proven by:</p> <ul style="list-style-type: none"> <li>● Birth</li> <li>● Written statement that she is the mother</li> </ul> <p>Fatherhood proven by:</p> <ul style="list-style-type: none"> <li>● Marriage to natural mother</li> <li>● Mother and father stating in writing they are the biological parents; which can be revoked within sixty days. (Recognition of Parentage Order)</li> <li>● A man who is not the husband of a woman can only declare parentage if presumed father renounces presumption in writing</li> <li>● Man seeking to be biological father in face of existing father-child relationship must bring challenge before child turns three years old</li> <li>● Sperm donor is not the father</li> </ul>	<ul style="list-style-type: none"> <li>● “Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock”</li> </ul>	<p>Motherhood proven by:</p> <ul style="list-style-type: none"> <li>● “[H]aving given birth to the child”</li> <li>● If surrogate contract approved by the court, intended mother will be the mother</li> <li>● If surrogate contract not approved by the court, surrogate will be the mother</li> </ul> <p>Fatherhood proven by:</p> <ul style="list-style-type: none"> <li>● Marriage to gestational mother (two years to discover he is not the biological father)</li> <li>● Open cohabitation or sexual intercourse at “probable time of conception”</li> <li>● Course of conduct, such as use of parent’s surname</li> <li>● Alleged parent claiming child on any federal or state document (e.g. taxes)</li> <li>● Genetic testing of 98% certainty <i>if requested by mother</i></li> <li>● Sperm donor is not the father</li> </ul>

96. MINN. STAT. ANN. § 257.75, subdiv. 1 (West 2014) (“The mother and father of a child born to a mother who was not married to the child’s father nor to any other man when the child was conceived nor when the child was born may, in a writing signed by both of them before a notary public and filed with the state registrar of vital statistics, state and acknowledge under oath that they are the biological parents of the child and wish to be recognized as the biological parents.”).

97. VA. CODE ANN. § 20-49.1 (West 2014).

98. CAL. FAM. CODE § 7611 (West 2014).

99. MINN. STAT. ANN. §§ 257.51, 257.54, 257.74, 257.75 (West 2014).

100. ARIZ. REV. STAT. ANN. § 25-1401 (2014).

101. VA. CODE ANN. § 20-49.1 (Westlaw 2014), VA. CODE ANN. § 20-49.4 (Westlaw 2014) (titled “Evidence relating to parentage,” which details actions needed to establish parent-child relationship); VA. CODE ANN. § 20-158(A)(1) (Westlaw 2014) (“The gestational mother of a child is the child’s mother.”); VA. CODE ANN. § 20-158 (A)(2) (Westlaw 2014), VA. CODE ANN. § 20-158(A)(3) (Westlaw

Similar to the paternity actions, when dealing with contested legitimacy claims, the courts will not disrupt existing family units. And like the time and standing issues for paternity claims, states will not permit a third party to initiate a parenting action if two adults are assuming the role of fit parents. Likewise, states will not allow a mother and father who have been deemed parents to rescind or disclaim their parenthood status.

#### 4. *Emerging Issues In Legitimacy and Parentage Claims*

The legal construction of parenthood has been confronted by modern technology and the increased acceptance of same-sex couples. As illustrated in Virginia's parentage laws, parties must follow clear rules if they want a surrogate or intended mother to be declared a child's natural mother.<sup>102</sup> For legislatures that have not defined the parameters of specific families, state courts routinely will engage with the specific facts of the case to determine which adult will be the parent under the state's legitimation laws. As noted by Vermont's Supreme Court, "[i]t is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle."<sup>103</sup> Nonetheless "the courts . . . are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that 'legal strangers' who are de facto parents may be awarded custody or visitation or reached for support."<sup>104</sup>

Different states are devising consistent responses to the emerging issues arising from families consisting of parents with no biological tie or a shared biological tie to their children. California courts, for instance, have declared that their paternity and parentage statutes will have a gender-neutral application.<sup>105</sup> As a result, a lesbian mother who met the conditions under the paternity statute and parentage statute that had been reserved for men, was declared a biological mother and a shared natural mother with her former partner, who was the woman who gave birth to their child.<sup>106</sup>

The California court found that the non-birth mother met the state's

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2014) ("A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother."), VA. CODE ANN. § 20-159 (Westlaw 2014) (section on surrogacy contracts).

102. See VA. CODE ANN. § 20-159 (Westlaw 2014) (section on surrogacy contracts).

103. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968 (2006) (quoting *In re B.L.V.B.* 628 A.2d 1271, 1275-76 (1993)).

104. *Id.*

105. *Charisma R. v. Kristina S.*, 96 Cal. Rptr.3d 26, 33. (Cal. Ct. App. 2009).

106. *Id.*

paternity laws when she “was present during [the child’s] Amalia’s birth and cut the umbilical cord; she gave Amalia a hyphenated last name including her name on Amalia’s birth certificate; she brought Amalia into her and [the birth mother’s] shared home; she held herself out as Amalia’s mother in a birth announcement, a baby shower, a gift registry, an online message board for women trying to conceive, and communications with various people, including the nurse at a ‘well baby’ visit, a visiting former co-worker, and strangers in the street; she shared in the care of Amalia until [the birth mother] went back to work; and she cared for Amalia after [the birth mother] returned to work until [the birth mother] moved out with Amalia.”<sup>107</sup> Upon finding that the non-birth mother met the conditions of paternity and parentage, both mothers were awarded the legal status of being a biological mother to their child.<sup>108</sup>

Reproductive technology has introduced another situation whereby up to five different adults may be involved in the conception and birth of a child. For instance, a child may have received sperm from an anonymous or known sperm donor, an egg from an anonymous or known egg donor, been carried to term and birthed by a surrogate who may not have contributed any genetic material to the child, and raised by two parents who contributed no genetic material to their child. During all uses of reproductive technology, at least three adults are involved in a child’s conception. As illustrated by Table 8, state legislatures have quickly moved to declare a sperm father a legal stranger to a child. The problem of surrogacy is more complicated. Virginia’s statute requires clearly written and filed contracts to determine which woman will be the child’s mother.<sup>109</sup> However, its default rules regarding which woman will be declared the mother in the absence of contracts vary based on whether the surrogate gave birth using her own or another woman’s eggs.<sup>110</sup>

Despite the complicated biological and factual considerations, the parentage laws and court actions have seamlessly declared which parents will serve as the child’s two natural parents. The general presumption is that if the intended parents are married and either use a sperm donor or contract with a surrogate, the intended parents will be declared the natural parents, despite the known absence of any biological tie to a child.<sup>111</sup> Although parentage

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107. *Id.* at 40.

108. *Id.* at 49 (“Kristina has not shown that a similarly situated biological mother opposing a petition to establish presumed parentage would be treated differently under the law if the alleged parent, lacking a biological connection to the child, were a man instead of a woman. In other words, Kristina has not shown that a case involving a man in Charisma’s circumstances would be decided any differently under the law.”).

109. See VA. CODE ANN. § 20-159 (Westlaw 2014) (section on surrogacy contracts).

110. See VA. CODE ANN. 20-158(A)(1) (Westlaw 2014) (“The gestational mother of a child is the child’s mother.”).

111. See *L.F. v. Breit*, 736 S.E.2d 711, 720 (Va. 2013) (“As previously discussed, the assisted conception statute was written specifically with married couples in mind. The statute’s primary purpose is to protect cohesive family units from claims of third-party intruders who served as mere donors.”) (citations omitted).

actions by sperm donors and surrogates occur, the more likely scenario involving parentage arises during divorce when a parent will assert the lack of a biological tie in an attempt to either sever a child's relationship with the other parent or disclaim continuing financial responsibility for the child. These claims are routinely rejected. As illustrated in Virginia's statute, some legislatures are codifying their rejection.<sup>112</sup>

For instance in 1988, a married couple in Ohio conceived a child using an anonymous sperm donor. Both parents declared the husband the father of the child, whom they named Amanda, on the birth certificate and in public.<sup>113</sup> After the divorce, the mother brought an action to "determine the nonexistence of the parent and child relationship" under the legitimation statutes.<sup>114</sup> The Ohio court declared the action contrary to public policy, holding that "in most situations the biological father of a child may be identified if the husband in a relationship is not the biological father. In this case the biological father could never be determined because he is an unknown third-party donor. If [the mother] were allowed to prove the nonexistence of the father and child relationship between Amanda and [the father], Amanda, a child of legitimate birth, would become illegitimate, and since her biological father is unknown, she would never have the opportunity to be legitimized by him. It has never been the policy of this state to encourage the illegitimatization of children."<sup>115</sup> In similar divorce or custody disputes, state courts have denied de-legitimation attempts also through estoppel. "Estoppel is often invoked because of the strong reliance interests that arise from consensual artificial insemination."<sup>116</sup>

When defining parenthood within these emerging families, legitimation, parentage, and paternity laws have proven to be uncannily equipped to ascertain who is a parent of the child—even in the absence of a biological tie or when confronted with conflicting evidence of a biological tie. The ease by

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112. See VA. CODE ANN. § 20-158(A)(2) (Westlaw 2014).

113. *Brooks v. Fair*, 532 N.E.2d 208, 209 (Ohio Ct. App. 1988).

114. *Id.*

115. *Id.* at 213.

116. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 465-66 (2006) (citing *Brown v. Brown*, 83 Ark. App. 217 (Ct. App. 2003)) (husband estopped from denying child support where husband knew wife was using artificial insemination to have child). See also *People v. Sorensen*, 436 P.2d 495, 499 (Cal. 1968) (in a child support proceeding, husband is lawful father of child conceived through artificial insemination born during marriage to child's mother); *In re Buzzanca*, 72 Cal. Rptr.2d 280, 282 (Cal. Ct. App. 1998) (finding virtually all decisions hold husband to be parent based on his consent to artificial insemination); *In re M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (mother of children conceived through artificial insemination may seek to establish paternity of man with whom she had ten-year intimate relationship based on theories of "oral contract or promissory estoppel"); *Levin v. Levin*, 645 N.E.2d 601, 604-05 (Ind. 1994) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood of child); *R.S. v. R.S.*, 670 P.2d 923, 928 (Kan. Ct. App. 1983) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood); *State ex rel. H. v. P.*, 457 N.Y.S.2d 488, 492 (N.Y. App. Div. 1982) (wife estopped from denying husband's paternity where she fostered parent-child relationship); *In re Baby Doe*, 353 S.E.2d 877, 878-79 (S.C. 1987) (husband is legal father of child where he consented to artificial insemination of wife during marriage).



which the parentage and paternity statutes have adapted to the newly formed families indicates the soundness and sophistication of the criteria upon which states rely when declaring who is and who is not a parent.

### C. *Legitimation Claims In Immigration Court*

Returning to the immigration context, the next section examines how immigration law imports and relies on state law to determine the parent-child bond for purposes of conferring citizenship.

#### 1. *How Derivative Citizenship Claims Are Brought Outside Of Immigration Court*

As a preliminary matter, the question arises as to how many people in fact are impacted by derivative citizenship determinations. According to the 2010 Census, three million individuals currently living in the United States were born abroad and derived citizenship from their parents.<sup>117</sup> On an annual basis, approximately 60,000 children who have at least one citizen parent are born each year outside of the country.<sup>118</sup> A sizeable number of these individuals benefit from being born in a marriage with two citizen parents (and thus subject to lenient requirements which are easily met) or live for years without realizing that their assumption of citizenship has been made in error.

The derivative citizenship statute provides automatic citizenship to individuals who fulfill all relevant conditions prior to age eighteen.<sup>119</sup> For adults who are older than eighteen, if they can establish that they fulfilled the relevant conditions, derivative citizenship will be retroactively extended to them.<sup>120</sup> For adults who did not fulfill all conditions before they were 18 years old, they remain eligible to apply for naturalization.<sup>121</sup> If an

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117. US CENSUS BUREAU, NATIVITY STATUS AND CITIZENSHIP IN THE UNITED STATES: 2009, 2 tbl.1 (listing 2.4 million "U.S. citizen[s], born abroad of American parent(s)." An additional 1.7 million are "U.S. citizen[s], born in Puerto Rico or U.S. Island Areas."), available at <http://www.census.gov/prod/2010pubs/acsbr09-16.pdf>.

118. Joe Costanzo & Amanda von Koppenfels, *Counting the Uncountable: Overseas Americans*, Migration Policy Institute, (May 17, 2013) (noting that "consular reports of births of U.S. citizens abroad [was] . . . 60,000 in 2009."), available at <http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans>.

119. 8 U.S.C. §§ 1401-1409 (2014) (see current law, enumerating various conditions based on place of birth, date of birth, and citizenship status of parents); see also Instructions to Form N-600, Application for Certificate of Citizenship, U.S. Citizenship & Immigration Servs., available at <http://www.uscis.gov/sites/default/files/files/form/n-600instr.pdf> (last updated Dec. 12, 2012) (explaining who can file for citizenship, noting that individuals over 18 who met the conditions before their 18th birthday and minors who are currently under 18 years old may file the form or have their parents or guardians file the form on their behalf).

120. 8 U.S.C. §§ 1401-1409 (2014); see also Instructions to Form N-600, Application for Certificate of Citizenship, U.S. Citizenship & Immigration Servs., available at <http://www.uscis.gov/sites/default/files/files/form/n-600instr.pdf> (last updated Dec. 12, 2012).

121. 8 U.S.C. §§ 1422, 1427 (2014); see also Instructions to Form N-600, Application for Certificate of Citizenship, U.S. Citizenship & Immigration Servs., available at <http://www.uscis.gov/>

individual is living outside of the United States, a consular officer may review his or her claims to derivative citizenship.<sup>122</sup> If an individual lives in the United States, he or she may file an affirmative application with the U.S. Citizenship and Immigration Services (USCIS) to request an adjudication of her citizenship claim in a non-adverse forum.<sup>123</sup>

## 2. *How Derivative Citizenship Claims Arise In Immigration Court*

This article focuses on those who assert derivative citizenship claims as a defense in removal proceedings. As a practical matter, these individuals are in proceedings because they committed a crime, usually one that is considered an aggravated felony. In immigration law, if a state or federal offense is deemed an aggravated felony, the most serious of immigration consequences attach. All individuals who are convicted of an aggravated felony—regardless of whether they are without status, on work visas, or are lawful permanent residents with long residences and extensive community ties—are placed in removal proceedings, ordered removed, and prevented from returning to the United States.<sup>124</sup> With only one exception, defenses to removal, which would be otherwise available to a legal resident, family member of a citizen, or asylum seeker, are unavailable.<sup>125</sup>

sites/default/files/files/form/n-600instr.pdf (last updated Dec. 12, 2012) (permitting filing for those under 18 years old) (“if you were under 18 years of age on February 27, 2001, BUT not all of the conditions noted above were met before your 18th birthday, you must qualify for U.S. citizenship in our own right.”).

122. See *Birth of U.S. Citizens Abroad*, U.S. PASSPORT & INTERNATIONAL TRAVEL, U.S. DEP’T OF STATE <http://travel.state.gov/content/passports/english/abroad/events-and-records/birth.html> (last visited Sept. 8, 2014).

123. The USCIS is responsible for receiving and adjudicating affirmative applications for asylum, lawful permanent residence, citizenship, and other benefits available to immigrants and non-immigrants. An individual affirmatively files his or her materials with the USCIS office, an officer reviews the materials, an officer may interview the applicant in a non-adverse setting, and then make the decision whether eligibility for benefits are met. N-600 is the form that must be filed for derivative citizenship. See generally Instructions to Form N-600, Application for Certificate of Citizenship, U.S. Citizenship & Immigration Servs., available at <http://www.uscis.gov/sites/default/files/files/form/n-600instr.pdf>.

124. “The immigration consequences to an alien convicted of an ‘aggravated felony’ are significant.” *United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002). “For example, an alien convicted of an aggravated felony is: (1) subject to deportation, 8 U.S.C. § 1227(a)(2)(A)(iii), and presumed deportable, *id.* § 1228(c); (2) ineligible to seek judicial review of a removal order, *id.* § 1252(a)(2)(C); (3) barred from eligibility for asylum, *id.* § 1158(b)(2)(A)(ii), (B)(i); (4) barred from receiving voluntary departure, *id.* § 1229c(a)(1); (5) disqualified from cancellation of removal, *id.* § 1229b(a)(3); and (6) subject to being taken into custody upon release from confinement, regardless of whether the release is on parole or supervised release, *id.* § 1226(c)(1).” *Id.* at 1210 n.8. See generally 8 U.S.C. § 1101(f)(8) (bar to naturalization and suspension of deportation).

125. See 8 U.S.C. § 1101(f)(8) for partial list of exclusions. The only exception is for individuals who qualify for removal under the Convention Against Torture (“CAT”). A person is eligible for CAT if they can establish that it is more likely than not that they will be tortured if returned to their native country. CAT, however, does not allow a person to travel outside of the United States, receive work authorization, or have a right to be released from detention. 8 C.F.R. § 208.17(a). See also *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008) (“It is significant that Lemus-Galvan seeks review only of the IJ’s denial of *deferral* of removal. There are two forms of relief under the CAT: withholding of removal and deferral of removal. See 8 C.F.R. §§ 208.16(c), 208.17(a). If an IJ determines that an aggravated felony constitutes a ‘particularly serious crime,’ and

Since the enactment of IIRIRA in 1997, a large number individuals—including lawful permanent residents—have been convicted of aggravated felonies because Congress expanded the definition and applied it retroactively to prior offenses.<sup>126</sup> The term “aggravated felony” is a misnomer because it implies that the offense is the worst of the worst. Congress first created the term aggravated felony in 1988, which it limited to murder, drug trafficking crimes, illicit trafficking in firearms, and illicit trafficking in explosives.<sup>127</sup> In 1990, Congress expanded the definition to include (1) particular violent crimes if an imposed sentence was five years or more; (2) more drug offenses; and (3) offenses that occurred under state law and in foreign countries.<sup>128</sup> In 1996, Congress passed IIRIRA and expanded the nature and number of crimes that constitute aggravated felonies to approximately 18 categories of crimes.<sup>129</sup> The current definition includes non-violent drug offenses, misdemeanors, and minor offenses for which sentences were suspended in their entirety.<sup>130</sup> The current crimes are also retroactive in effect, which means that many individuals who were convicted and served their sentences years ago, are newly vulnerable to removal even though the offense did not have serious, or even any, immigration consequences at the date of the conviction.<sup>131</sup>

A radical change in ICE detention policies has also occurred in the past decade, permitting ICE to investigate the immigration status of millions of people with whom it previously was never in contact. Beginning under President George W. Bush’s administration, ICE coordinated unprecedented efforts with state and county governments to identify the immigration status

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denies withholding of removal under the CAT on the basis of the conviction, § 1252(a)(2)(C) bars our review of the denial of withholding. *See* *Unuakhaulu v. Gonzales*, 416 F.3d 931, 937 (9th Cir. 2005) (holding that where denial of withholding of removal is not predicated on petitioner’s aggravated felony conviction, we have jurisdiction to review). However, even if an alien has been convicted of a ‘particularly serious crime,’ and is ineligible for withholding of removal under the CAT, an IJ is required to grant deferral of removal if the alien can establish the likelihood of torture upon return. *See* 8 C.F.R. § 208.17(a).”

126. *See* *Aragon-Ayon v. I.N.S.*, 206 F.3d 847, 851 (9th Cir. 2000) (holding that Congress “clearly manifested an intent for the amended definition of aggravated felony to apply retroactively”).

127. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

128. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

129. *See* 8 U.S.C. § 1101(a)(43).

130. This discrepancy arises because many states impose punishment for a misdemeanor of 365 days (and some even 2 years). Congress states that certain crimes for which a sentence of “at least one year” may constitute an aggravated felony. *See e.g.*, 8 U.S.C. § 1101(a)(43)(F), (G). This means that the overlap of one day in a misdemeanor sentence will turn a minor offense under state law into the worst of the worst under immigration law. If Congress changed the wording of an aggravated sentence to “more than one year” or states amended their misdemeanor sentences to 364 days, the overlap would not occur. *See generally* Laura Murray-Tjan, *A Tale Of Two Typos*, HUFFINGTON POST (July 8, 2013), [http://www.huffingtonpost.com/laura-murraytjan/a-tale-of-two-typos\\_b\\_3563084.html](http://www.huffingtonpost.com/laura-murraytjan/a-tale-of-two-typos_b_3563084.html). Moreover, IIRIRA changed the sentencing provisions from the actual time imposed to potential time imposed. *See* 8 U.S.C. § 1101(a)(48)(B).

131. *See e.g.*, *Tyson v. Holder*, 670 F.3d 1015, 1017 (9th Cir. 2012) (granting relief for an individual who became a lawful permanent resident in 1977, was convicted of a drug offense in 1980, but whose conviction did not have immigration consequences until after 1997 when she left the United States in 2005, which triggered inadmissibility grounds).

of those who were arrested or convicted. “This data sharing has transformed the landscape of immigration enforcement by allowing ICE to effectively run federal immigration checks on every individual booked into a local country jail, usually while still in pre-trial custody.”<sup>132</sup> The national database has fingerprint information “on over 91 million individuals.”<sup>133</sup>

IIRIRA also expanded the number and types of individuals who would be subjected to mandatory and non-mandatory detention. This policy marked a shift from modern practices. In 1952, Congress enacted legislation that limited detention to only those who were flight risks or a danger to society.<sup>134</sup> In the 1980s, Congress resumed large-scale detention as a piece of its immigration policy as a means to house large number of refugees from Haiti, Cuba, and Central America until their claims were adjudicated.<sup>135</sup> However, beginning in 1996, Congress expanded detention to include categories of individuals who had never previously had been detained, including mandatory detentions of people with—and without—criminal convictions.<sup>136</sup> Moreover, large numbers of people without criminal convictions who allegedly violated immigration laws were subjected to detention,<sup>137</sup> an unprecedented

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132. AARTI KOHLI, PETER L. MARKOWITZ, & LISA CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS*, THE CHIEF JUSTICE EARL WARREN INSTITUTE OF LAW AND SOCIAL POLICY, UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW I (October 2011) [hereinafter WARREN REPORT], available at [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

133. *Id.* at 1.

134. *Detention: Impact on Immigrants*, OFFICE OF IMMIGRATION ISSUES, PRESBYTERIAN CHURCH, (“In 1952, Ellis Island was closed and the United States moved away from a system of detention for immigrants unless they were deemed a flight risk or a danger to society. Under this system, immigrants were permitted to remain with family until mandatory court appearances.”), available at [https://www.pcusa.org/site\\_media/media/uploads/\\_immigration/detention\\_impact.pdf](https://www.pcusa.org/site_media/media/uploads/_immigration/detention_impact.pdf).

135. See Gretchen Gavett, *Map: Immigration Detention Facilities, 1981-2011*, Frontline Investigative Reporting Workshop (Oct. 17, 2011), available at <http://investigativereportingworkshop.org/investigations/immigration-detention/htmlmulti/immigration-detention-map/>. The 1980s was also the time when INS privatized and outsourced the building and maintenance of detention facilities to the Corrections Corporations of America. See also *Lawsuit On Detention Of Haitians To Be Tried*, N.Y. TIMES (Mar. 14, 1982), available at <http://www.nytimes.com/1982/03/15/us/around-the-nation-lawsuit-on-detention-of-haitians-to-be-tried.html?action=click&module=Search&region=searchResults&mabReward=relbias%3Ar&url=http%3A%2F%2Fquery.nytimes.com%2Fsearch%2Fsite%2F%23%2Fdetention%2Bhaitian%2F>.

136. See 8 U.S.C. § 1226(c) (listing mandatory detention grounds). The most egregious example is mandatory detention for those “reasonably believed” engaged in terrorist activities. This definition includes people who gave money or food to terrorists at gunpoint after being threatened with death for not permitting the terrorists to rob them. See *Alturo v. U.S. Atty. Gen.*, 716 F.3d 1310, 1313 (11th Cir. 2013) (interpreting the inadmissibility ground to include the following: “the BIA found that he paid an annual \$300 ‘vacuna,’ or war tax, to the AUC over a period of six years in exchange for protection from local guerillas, that the amount of funds provided qualified as ‘material support’ within the meaning of the INA, and that there was no exception to the statutory bar for payments made under duress. The BIA’s factual finding that Alturo paid \$1,800 to a designated terrorist organization is supported by substantial evidence. Alturo himself testified that, from 2000 through 2006, he made six annual payments of \$300 to a paramilitary organization called the Peasant Self-Defense Group of Magdalena Medio, which he noted was ‘the same’ as the AUC. He explained that, in return for the payments, the AUC promised him protection from local guerillas, though he feared retribution if he refused to pay as one of his neighbors was killed for not paying the war tax.”).

137. See 8 U.S.C. § 1226(a) (giving ICE wide discretion to detain individuals with the provision that “an alien may be arrested and detained pending a decision on whether the alien is to be removed

use of detention in modern immigration practices. Much has been written about the adverse impact that detention has on asylum seekers in preventing them from accessing counsel, documentation, witnesses, and other evidence in support of their claims.<sup>138</sup> In the most extreme example, asylees—those with granted asylum claims and are in the country lawfully—were subject to discretionary detention if they failed to apply for a green card within one year of being granted asylum.<sup>139</sup> The right to apply for a green card is discretionary and is not an outright violation of any immigration policy.<sup>140</sup>

Since 2001, the number of ICE detainees has skyrocketed, filling county jails and causing the construction of private institutions for the sole purpose of housing detainees.<sup>141</sup> In 2001, the number of non-citizens annually detained by ICE numbered 95,000.<sup>142</sup> By 2010, the annual detainee population increased to 390,000.<sup>143</sup> The average daily number of detainees grew from 5,000 in 1994, 19,000 in 2001, and 33,000 by 2011.<sup>144</sup>

President Barack Obama's administration has accelerated ICE's detention efforts, an action for which critics have called him the "Deporter-in-Chief."<sup>145</sup> Despite its public promise of leniency, the Obama administration has tripled the detainee population (of which approximately half lacked any criminal record).<sup>146</sup> After receiving criticism for detaining and removing a record number of individuals, "officials promised to continue the White

from the United States."). "Section 1226(a) affords the Government discretion to release an individual on his own recognizance or on bond while his removal case is pending if the Government determines that release would not present a risk of flight or a danger to the community." Preap v. Johnson, 13-CV-5754 YGR, 2014 WL 1995064 at \*4 (N.D. Cal. May 15, 2014).

138. See U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING DETENTION, HUMAN RIGHTS FIRST (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

139. Notes from conversation with Kara Hartzler, Staff Attorney at the Florence Immigrant and Refugee Project, who reported first-hand account of asylees who had been placed in detention because they had not filed for their green cards within one year of being granted status (2012) (on file with author).

140. See *Mugomoke v. Curda*, 2:10-CV-02166 KJM, 2012 WL 113800, at \*8 (E.D. Cal. Jan. 13, 2012) (in adjudicating writ to compel adjudication of a delayed I-485—green card application—filed by an asylee, the government stated that the asylee has the right to live, work, travel in the United States and that the denial of a green card application has no adverse impact on his or her immigration status, other than to prevent him from accruing the time as a lawful permanent resident that will permit naturalization in the future).

141. See *The History of Immigration Detention In the United States*, DETENTION WATCH NETWORK (2008), available at <http://www.detentionwatchnetwork.org/node/2381>.

142. See *Lawmakers Want Better Treatment for Illegal Immigrants Detained In the U.S.*, N.Y. DAILY NEWS (May 15, 2008), available at <http://www.nydailynews.com/latino/lawmakers-better-treatment-illegal-immigrants-detained-u-s-article-1.329750>.

143. See DETENTION WATCH Network, *supra* note 141.

144. See *id.* See also Elise Foley, *No Conviction, No Freedom: Immigration Authorities Locked 33,000 in Limbo*, HUFFINGTON POST (Jan. 27, 2012), [http://www.huffingtonpost.com/2012/01/27/immigration-detention\\_n\\_1231618.html](http://www.huffingtonpost.com/2012/01/27/immigration-detention_n_1231618.html).

145. Anna O. Law, *Lies, Damned Lies, and Obama's Deportation Statistics*, WASH. POST (Apr. 21, 2014), available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/21/lies-damned-lies-and-obamas-deportation-statistics/> (commenting on how statistics used the term deportation, which was replaced by IIRIRA, causing confusion on whether numbers include removals, returns, and reinstatements).

146. WARREN REPORT, *supra* note 132, at 3.

House policy of prioritizing for removal those illegal immigrants with criminal convictions.”<sup>147</sup> This statement belies the fact that 40% of those caught up in President Obama’s sweeps of criminal aliens do not have any criminal conviction and another 16% have been convicted of only low-level offenses.<sup>148</sup>

In response to the economic burdens of housing aliens, Cook County in Illinois most notably has ended its cooperation with ICE.<sup>149</sup> Other municipalities are ending the information sharing out of political or economic concerns. However, the policies, political pressures, and investment in separate detention facilities portend a continued detained population.

Among the 390,000 individuals who are annually detained, a number are citizens and have bona fide derivative citizenship claims. In 2011, the Warren Institute issued findings of its independent investigation that reported 3,600—or 1.6%—of those detained in the Secure Communities program from 2008 to 2011 were citizens.<sup>150</sup> The actual number of derivative citizens and those with derivative citizen claims are unknown. Similar studies of detained populations in specific states, recorded that about 1% and 8% of ICE detainees were derivative citizens.<sup>151</sup> A reasonable estimate from these few studies would place the number of individuals who are asserting derivative citizenship claims in removal proceedings between 50 and 500 people each year. It is these individuals who are the focus of this article.

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147. Brian Bennett, *Obama Administration Reports Record Number of Deportations*, L.A. TIMES (Oct. 18, 2011), available at <http://articles.latimes.com/2011/oct/18/news/la-pn-deportation-ice-20111018>. It should be noted that the policy removes legal immigrants with criminal records as well.

148. See Foley, *supra* note 144 (reporting that Emily Tucker, director of policy and advocacy for the Detention Watch Network, which pushes for limiting detention and deportation, noted that “[t]he fact is, we’re not deporting huge numbers of rapists and murderers” and “they would like us to think that, but that isn’t what is going on.”). “Locking people up is big business. The Corrections Corporation of America, which gives heavily to both parties, is explicit about the connection between immigrant detention policy and the private prison company’s bottom line. ‘[T]he demand for our correctional and detention facilities and services . . . could be adversely affected by changes in existing criminal or immigration laws, crime rates in jurisdictions in which we operate, the relaxation of criminal or immigration enforcement efforts, leniency in conviction, sentencing or deportation practices, and the decriminalization of certain activities that are currently proscribed by criminal laws or the loosening of immigration laws,’ the company wrote in an analysis for investors filed with the U.S. Securities and Exchange Commission. ‘Immigration reform laws which are currently a focus for legislators and politicians at the federal, state and local level also could materially adversely impact us.’” *Id.*

149. See Mike Corradini, *Cook County, Illinois Circumvents Secure Communities and Protects Its Residents*, PHYSICIANS FOR HUMAN RIGHTS (Sept. 14, 2011), available at <http://physiciansforhumanrights.org/blog/cook-county-illinois-circumvents-secure-communities-and-protects-its-residents.html>. See also WARREN REPORT, *supra* note 132 at 3 (listing states and counties opting-out of the Safe Communities Initiative).

150. WARREN REPORT, *supra* note 132, at 4.

151. See Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, STATES WITHOUT NATIONS (July 15, 2010), <http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html> (reporting that between 2006 and 2008, 82 out of 8,027 (or approximately one percent) of ICE detainees who were detained in Arizona were found to be a U.S. citizen by an immigration court. That statistic does not include individuals whose initial adverse findings were reversed on appeal. In 2009, a New York City bar report recorded a finding that eight percent of detainees in Varick detention facility had “valid claims to U.S. citizenship.”).

Regardless of the exact number, the profile of the derivative citizen applicant is an adult, who was arrested for or committed a crime, the crime is considered an aggravated felony,<sup>152</sup> the person is in ICE detention, and the person typically grew up in the United States believing that he or she was a citizen. Most of these individuals proceed *pro se*.<sup>153</sup> For these individuals, if they are found to be not citizens, their crimes result in permanent removal.<sup>154</sup> If they are found to have acquired citizenship from their parents, they will be declared citizens since birth and immediately released from ICE custody.<sup>155</sup> For these individuals, the importance of receiving a fair and full hearing on derivative citizenship claims cannot be overstated.

### 3. *How Immigration Courts Are Adjudicating Legitimacy Claims When The Pre-1986 Statute Applies*

As set forth in Table 4, there are two versions of Section 1409(a) that may apply to a child who was born out of wedlock to a father who was a U.S. citizen at the time of her birth. The pre-1986 statute currently applies to individuals who are twenty-five years or older, which today, remains a sizable population seeking derivative citizenship.<sup>156</sup> The pre-1986 version of

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152. The reason why a criminal conviction is the most likely factor is that in the absence of a conviction, a person who has citizen parents and has been residing in the United States has or is eligible to seek lawful status. More likely than not, a person with those characteristics will then be released once their lawful permanent residence status is discovered. Or, if they did not already have this status, the person would be able to assert that defense in removal proceedings, a defense that would be granted. Notably, to prove the parent-child relationship in this context, a birth certificate or affidavits from the parents is conclusive proof. The need for clear and convincing evidence of a biological tie is not necessary for a citizen parent to petition for his or her citizen child outside of the derivative immigration context.

153. Approximately 41% of all aliens (alleged and actual) are represented by an attorney in immigration court. For those detained under the Secure Communities Program, 24% of all aliens (alleged and actual) appeared at immigration court with counsel. See WARREN REPORT, *supra* note 132, at 2.

154. Because the crimes at issue usually are alleged to be aggravated felonies, the derivative citizenship claim becomes the person's only defense to the removability charge. See, e.g., Anderson v. Holder, 527 F. App'x 602, 604 (9th Cir. 2013) ("Because the record is inconclusive as to whether Anderson's offense involved a federally-controlled substance, he is not removable for committing an aggravated felony.") In Joseph Anderson's case, there was a defense contending that the state conviction was not in fact the aggravated felony that the DHS had charged it to be. Although the Court accepted this defense, if it had not, Joseph would have been removed as an aggravated felon. *Id.*

155. Under the U.S. constitution, the USCIS and Immigration Courts do not have jurisdiction to maintain removal or deportation proceedings over citizens. See Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."); U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923) ("[A]lienage is a jurisdictional fact . . . [and] an order or deportation must be predicated upon a finding of that fact") (citation omitted); See also Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir. 2008) ("There is no dispute that if Torres is a citizen the government has no authority under the INA to detain him, as well as no interest in doing so, and that his detention would be unlawful under the Constitution and under the Non-Detention Act, 18 U.S.C. § 4001.").

156. "The law that controls this case was the law in effect before [the claimed derivative citizen] turned eighteen." United States v. Casasola, 670 F.3d 1023, 1026 (9th Cir. 2012). Because the pre-1986 statute that applies to those who are 28 years or older in 2014, this population remains of an unknown but significant number.

Section 1409(a) confers citizenship if (1) the child was born out of wedlock; (2) the father was a citizen at the child's birth; (3) the father was "physically present" in the United States for ten years prior to the child's birth (and at least five of those years were after age fourteen); and (4) the child was legitimated in the domicile of the child or father.<sup>157</sup> Unlike the post-1986 version of Section 1409(a) (which also is in operation), no requirement exists for the child to produce evidence of a biological tie between the father and child.<sup>158</sup> However, immigration courts and the BIA are consistently importing this requirement into the pre-1986 statute.

On January 21, 2009, BIA issued a decision involving a claimant named Joseph Anderson. Joseph Anderson's father, Harold Anderson, was a U.S. navy officer who met a Filipino woman when he was stationed overseas.<sup>159</sup> She worked as a hostess and began a relationship with Harold.<sup>160</sup> She became pregnant, revealed that she was uncertain as to whether Harold was the biological father, and they developed an exclusive relationship. When the mother gave birth to Joseph, Harold signed the birth certificate, executed an affidavit of paternity, and within seven months, married the mother. When Joseph was three and a half years old, Harold brought his family to the United States. He and his wife had two more children. Joseph grew up believing that Harold was his biological father and that his siblings were his biological brothers. His parents never indicated otherwise. When he was twenty-seven years old, his father died in a car accident. The following year, Joseph was convicted of a drug offense that was deemed an aggravated felony. In removal proceedings, he contended that he acquired citizenship based on his father's citizenship.

The BIA recognized that the pre-1986 version of Section 1409(a) applied to Joseph and that "[u]nder the earlier version of [INA] section 309(a), the child must demonstrate his father's paternity by legitimation under the law of either the child's or the father's residence or domicile while the child is under the age of 21."<sup>161</sup> Despite the correct statement of the pre-1986 statute, the BIA required that Joseph provide clear and convincing evidence of a biological tie to his father, a provision found only in the post-1986 statute. In this particular case, the BIA noted that Joseph provided proof that "[the father] Harold Anderson, Jr. signed the [Joseph's] birth certificate and

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157. 8 U.S.C. § 1409(a) (1981) (amended 1986).

158. 8 U.S.C. § 1409(a).

159. See Opening Brief, *Joseph Anderson v. Holder*, 527 Fed. App'x. 602 (9th Cir. 2011) (No. 09-70249).

160. The author refers to Joseph and Harold by their first names to avoid the confusion from calling both Mr. Anderson. The author implies no disrespect or familiarity by the use of the first name. For full disclosure, however, the author served as co-counsel when Mr. Anderson's case was before the Ninth Circuit.

161. See *Matter of J-C-A-*, No. 035-189-461 (BIA 2009), at 2 n.1; INA § 309(a), the section referred to by the BIA, is codified at 8 U.S.C. § 1409(a).



completed a separate affidavit attesting to his paternity.”<sup>162</sup> Harold Anderson, Jr. and Joseph’s mother also married within seven months of Joseph’s birth and both attested in writing that “[Harold Anderson, Jr.] is [Joseph’s] biological father.”<sup>163</sup>

The BIA nonetheless found that Joseph failed to prove that Harold Anderson, Jr. was his natural father and ordered him removed. The BIA reasoned that “the [claimant] concedes that his mother and Harold Anderson Jr. were unmarried at the time of his birth. *Unless [Joseph] can show that Harold Anderson, Jr. does in fact share a blood relationship with him, the subsequent marriage of [Joseph’s] mother to Harold Anderson, Jr., is irrelevant for the purposes of the respondent’s acquisition of citizenship.* In light of [Joseph’s] refusal to undergo genetic testing, we find that he has failed to meet his burden of proof.”<sup>164</sup> It should be noted that Harold Anderson, Jr. had passed away five years earlier, a fact that did not alter the BIA’s demand for genetic testing.

This case is not an anomaly. When adjudicating claims subject to the pre-1986 law, immigration courts and the BIA are consistently requiring biological proof as the *sine qua non* of whether a citizen is the father to a foreign-born child.<sup>165</sup>

#### D. *Problems Arising From Current Adjudications Of Section 1409*

The following section critiques the immigration courts’ misunderstanding of the pre-1986 version of Section 1409(a) and Congress’ reliance on biology in the post-1986 version of Section 1409(a). Moreover, a comparison between state legitimation laws and the misapplication of those laws in the immigration context suggests that the federal government’s intrusion into the family sphere presents substantive due process concerns.

##### 1. *Immigration Courts Misapply Legitimacy Statutes To Require Parent-Child Relationships To Be Proven By Biological Evidence In Pre-1986 Section 1409(a) Derivative Citizenship Determinations*

As illustrated in the *Anderson v. Holder* case, the BIA and the immigration courts are routinely *ultra vires* including a blood requirement in state or

162. *Id.* at 2.

163. *Id.* at 3.

164. *Id.* (emphasis added).

165. See *Martinez-Madera v. Holder*, 559 F.3d 937, 942 (9th Cir. 2009) *cert. denied*, 130 S. Ct. 1052, 175 L. Ed. 2d 882 (2010). In *Martinez-Madera*, the petitioner was born in 1953, entitling him to the benefit of the pre-1986 statute. The BIA and Ninth Circuit denied the case on the fact that the petitioner’s stepfather legitimated him under California law but did not have a blood relationship to him. See *id.* Of note, the Ninth Circuit affirmed the biological requirement based on its mistaken reliance on the post-1986 statute. *Id.* at 940-41 n.1. In oral argument in a different case, Judge Kimberly Wardlaw noted that mistake. Oral Argument at 13:33, *Anderson v. Holder*, 527 F. App’x 602 (9th Cir. 2013) (No. 09-70249), available at [http://www.ca9.uscourts.gov/media/view.php?pk\\_id=000006940](http://www.ca9.uscourts.gov/media/view.php?pk_id=000006940). No published order or case has corrected that error.

federal law. The immigration courts are either ignoring the state legitimation statutes' clear mandate against biological requirements or simply writing in an implied biology requirement into Section 1409(a) (and even Section 1409(c), which applies to citizen mothers), which is absent from the relevant federal and state statutes. The immigration courts and the BIA are substituting their own definition of a natural parent or child in order to defeat a finding of legitimacy. The immigration courts thus are rendering findings that are contrary to legitimation statutes and contrary to the pre-1986 derivative citizen statute.

2. *Congressional History Fails To Explain Why Congress Amended Section 1409(a) To Add A Biological Requirement In The Post-1986 Law*

The 1986 statute altered legitimacy by requiring a blood relationship to be the dispositive factor in defining the parent-child relationship, a radical break from state legal procedure that built families rather than finding reasons to break them up.

When enacting the 1986 derivative citizenship statute, the decision to add clear and convincing proof of a biological relationship between a parent and child was a puzzling addition. On September 25, 1986, the House Judiciary Committee issued a report in which it recorded the committee voting on House Resolution 4444.<sup>166</sup> The purpose of this bill was "to promote the more efficient operation of consular officers with respect to their immigration related duties."<sup>167</sup> Most of the amendments focused on consular matters that would standardize and expedite how the consulates issue visas. Inserted among these consular provisions, Section 13 proposed to change the INA by "[a]llow[ing] legitimation by the putative father for purposes of deriving citizenship by a blood determination and father acknowledgement while under 18."<sup>168</sup> The first draft of what would later become the amended Section 1409 sounded much more inclusive than how the final version operated. The verb "allow" sounded as if it would make the amendment easier to meet, rather than the actual final outcome that substantially restricts the award of birthright citizenship.

On September 29, 1986, Representative Romano Mazzoli introduced House Resolution 4444 to the entire Congress.<sup>169</sup> When introducing the bill, Rep. Mazzoli explained that "this bill is truly noncontroversial and I urge its adoption by my colleagues."<sup>170</sup> But for this heightened biological requirement, the representative was correct. The rest of the provisions were

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166. See generally H.R. REP. NO. 99-916, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 6182, 6182.

167. *Id.*

168. *Id.* at 2.

169. 132 CONG. REC. H8580 (daily ed. Sept. 29, 1986).

170. *Id.* (statement of Rep. Mazzoli).

technical amendments that did not alter much of immigration law. The wording of Section 1409, however, had changed to reflect its final form. By September 29, 1986, Congress was considering the amendment to Section 1409 to include a provision that “a blood relationship between the child and the father is established by clear and convincing evidence.”<sup>171</sup>

Nothing indicates that Congress was aware of how significantly it was altering the derivative citizenship statute. The bill was passed without debate, comment, or discussion regarding how the proposed changes would differ from existing state parentage statutes. No sponsor had championed the changes. Nor did any discussion take place as to why the existing derivative statute was faulty. The silence in the legislative history on this particular provision suggests that this was a change that was neither robustly sought nor understood when enacted.

### 3. *Congress' Biological Requirement In The Post-1986 Law Is Contrary To The Practices And Public Policy Of The States*

In the immigration context, genetic tests are performed on living or deceased fathers, and living relatives, despite the absence of either parent disclaiming that he was the natural father. The immigration courts—and Congress—assume that the certainty and accuracy afforded by a blood test can expeditiously determine the parent-child relationship with exacting, scientific proof. As a matter of common sense, this logic appears sound. Resolving issues of identity with the cold hard facts promised by a DNA test appear to advance the goals of objectivity and fairness.

However, the reliance on biology as the dispositive factor to define families is contrary to state law. State paternity, legitimation, and parentage statutes have always recognized that families are more complicated than they may appear. When it comes to children, state law acknowledges that families have secrets they are entitled to keep. The central fallacy in Congress' reliance on “clear and convincing evidence” of a blood tie is that the parent-child relationship has been and continues to be a creature of legal construction. The near-inviolable presumption that a husband of a natural mother is the father of a child exists because it covers the factual disorderliness that often lies beneath the surface. As noted by Justice Antonin Scalia, writing for the majority in *Michael H.*, despite the fact that a different man is the biological father of a child, no case in the history of the United States has ever afforded such man the title of father when the husband married to the natural mother has held out the child as his own.<sup>172</sup> Such presumption—and

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171. *Id.*

172. *See* *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (“Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to

protection—is the legal operation of parentage statutes. The post-1986 derivative citizenship statute constitutes an unexplained departure from this tradition.

The post-1986 version of Section 1409(a) (and misapplication of the pre-1986 Section 1409(a)) further serves to violate public policy in three ways:

First, “absent a determination that another man is the father of the child” any proceeding that “would illegitimate the child [is] in violation of the public policy . . . .”<sup>173</sup> Although this excerpt is from a North Carolina case, all states share this public policy. The derivative statute scheme violates this fundamental principle that no child will have an existing parent taken away when no other adult can fill the void. For instance, the recent Ninth Circuit case *Martinez-Madera v. Holder* illustrates how intact, existing families are disrupted through derivative citizenship determinations.<sup>174</sup> The dissenting opinion concisely described the facts of the case:

Juan Jose Martinez-Madera moved to the United States when he was six years old and has now lived here for over forty years. Martinez-Madera’s mother began a relationship with Jesus Gonzales, the man Martinez-Madera regards as his father, when Martinez-Madera was an infant. The [immigration judge] found it undisputed that “since Martinez-Madera’s age of 6 months Mr. Gonzales . . . has held out that Martinez-Madera is to be his son and addresses him and adopted him into the family . . . . He has always held Martinez-Madera out to be a son and part of the family.” Martinez-Madera’s parents had six biological children together between 1954 and 1966. They married in 1960. Throughout his entire childhood, Martinez-Madera lived with his parents and siblings as a family unit. Gonzales provided for the entire family and publicly held himself out as Martinez-Madera’s father.<sup>175</sup>

The dissenting opinion argued that because Jose had been legitimated under California law, he was deemed legitimate since birth and therefore not a child born out of wedlock.<sup>176</sup> The majority disagreed, holding that in the

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the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.”).

173. *Jones v. Patience*, 121 N.C. App. 434, 440 (1996).

174. *See* *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009).

175. *Id.* at 943 (Thomas, J., dissenting) (internal modifications omitted).

176. *Id.* at 943-944 (Thomas, J., dissenting) (“Under California law, Martinez-Madera was clearly born in wedlock and thus derives United States citizenship from his father. The majority ignores the precedent set by *Scales* and *Solis-Espinoza* and in doing so contradicts established public policy and an express provision of the Immigration and Nationality Act (“INA”) . . . . Section 230 applies to Martinez-Madera as well. Martinez-Madera’s non-biological father publicly acknowledged and treated Martinez-Madera as his own son since the age of six months. Section 230 therefore requires this Court to treat Martinez-Madera as legitimate *from the time of his birth*. Thus, § 1409 does not apply and Martinez-Madera derives United States citizenship through his non-biological father pursuant to § 1401.”).

absence of biological proof that Mr. Gonzales fathered Martinez-Madera, no cognizable parent-child relationship existed under state law and under the derivative citizenship statute.<sup>177</sup>

The injury arising from the federal government taking away a parent when no other man is seeking to be the father is a substantial harm. State proceedings do not allow the state, the adults who have served as the parents, or any third party to inflict this injury on a child. In the immigration context, by contrast, the federal government blithely declares that men who declared themselves fathers, signed birth certificates, financially supported a child through adulthood, married the natural mother after the child was born, and in all other ways held out the child as its own, are not fathers to their children. The immigration court's finding of illegitimacy may or may not have *res judicata* effect in other areas of the law. Nonetheless, the federal government's usurpation of legitimation statutes to take a parent away from a child in her own family and in the community (and through removal, out of the country) is contrary to public policy.

Second, the federal government's standing to assert legitimation challenges against the adults who appear in removal proceedings would not be recognized in state courts. By statute, many legislatures will not allow a third party to bring a paternity or legitimacy claim against a family unit where a man is serving as the role of a father to a child. Arizona, for instance, enumerates the parties that may bring a paternity or maternity action: (1) the mother; (2) the father; (3) the guardian; (4) public welfare official; (5) the state, if it is seeking a child support award; (6) an adult child seeking to establish his or her biological parent; and (7) any other party, if such party is seeking custody and parenting time "as part of the proceeding."<sup>178</sup>

Arizona, like other states, limits standing because "Arizona has a strong public policy of preserving the family unit when neither the mother nor the mother's husband disavows the latter's paternity of the child."<sup>179</sup> The derivative citizenship law violates this principle by demanding an intrusion into family privacy that is not afforded in state courts. Indeed, states will not allow a man serving as a father to a child to have his status challenged by a blood test. The legitimation and paternity laws shield such men from these doubts or even disproof. "Any other interpretation of [the standing provi-

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177. *Id.* at 942 ("First, former Cal. Civ.Code § 230 applies only to fathers legitimating their illegitimate *biological* children. The statute does not apply to stepfathers informally adopting stepchildren . . . . As for § 1409, that path to citizenship would require a blood relationship between Petitioner and Gonzales, which does not exist."). It should be noted that the majority opinion applied the wrong version of § 1409 to this case. In footnote 1, the majority properly applied the pre-1986 version but mistakenly attributed the language of the post-1986 statute to the pre-1986 version. *Id.* at 940-41 n.1. The parties never raised this issue. Judge Wardlaw noted this mistake during oral argument in *Anderson* and the error has not been corrected. Oral Argument at 13:33, *Anderson v. Holder*, 527 F. App'x 602 (9th Cir. 2013) (No. 09-70249), available at [http://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000006940](http://www.ca9.uscourts.gov/media/view.php?pk_id=0000006940).

178. ARIZ. REV. STAT. ANN. § 25-803 (2013).

179. *Ban v. Quigley*, 168 Ariz. 196, 199, 812 P.2d 1014, 1017 (Ct. App. 1990).

sions] would defeat the legislature's clear intent to narrow an untimely collateral attack on another person's statutorily presumed paternity."<sup>180</sup> Immigration courts, however, allow the federal government to sever the parent-child relationship, an action not permitted in state court.

Third, the derivative citizenship law violates the state interest in protecting family secrets. States will routinely limit the use of genetic testing, even in proceedings in which paternity or legitimation is unknown. California rejected the request by a natural mother for the parents of her deceased partner—and the child's putative father—to submit to genetic testing for purposes of establishing whether they had a genetic tie to the child.<sup>181</sup> The California court reasoned, that "the substantial invasion of privacy occasioned by a compelled submission to [genetic tests]" overrode whatever evidentiary gain could be had in discovering whether the putative father had been the biological father to the child.<sup>182</sup> Vermont rejected an adult child's request for paternity testing of the man whom he believed was his biological father who had passed away.<sup>183</sup> In rejecting the child's claim that the genetic testing of relatives would provide the necessary proof of paternity he was seeking, the Vermont Supreme Court reasoned, "[p]etitioner's argument also oversimplifies the potential evidentiary issues that might arise in a parentage action. There may, for example, exist facts known only to the father that undermine the genetic test; he could claim that a brother with similar genetic markings is the true father; or that he was merely an anonymous sperm donor; or that his parental rights had been terminated years earlier in another jurisdiction. Thus, even with advances in genetic testing it remains the case that the putative father's availability represents 'a substantial factor contributing to the reliability of the fact-finding process.'"<sup>184</sup> Immigration courts, instead, allow and encourage the discovery and dissemination of private facts previously known only to the parents of a child.

#### 4. *Examples Of Federal Government's Intrusion Upon Existing, Intact Families*

The three Supreme Court (and numerous circuit court) challenges to the heightened criteria that unmarried citizen fathers have to meet (that unwed citizen mothers do not) to confer citizenship to their children have focused only on equal protection concerns. *Miller v. Albright*,<sup>185</sup> *Nguyen v.*

180. *Stephenson v. Nastro In & For County of Maricopa*, 192 Ariz. 475, 484, 967 P.2d 616, 625 (Ct. App. 1998).

181. *See William M. v. Superior Court*, 255 Cal. App. 3d 447, 450 (Cal. Ct. App. 1990).

182. *Id.*

183. *See In re Estate of Alan B. Murcury*, 868 A.2d 680 (Vt. 2004).

184. *Id.* at 685 (quoting *Lalli v. Lalli*, 439 U.S. 259, 271 (1978)).

185. *Miller v. Albright*, 523 U.S. 420, 433 (1998) (although the Court affirmed the BIA finding that the adult daughter had not been legitimated by her biological father before she was 18 years old, the Court did not resolve the petitioner's equal protection claim that "her citizen father should have the same right to transmit citizenship as would a citizen mother.").

*INS*,<sup>186</sup> and *Flores-Villar v. United States*<sup>187</sup> all involved claims that unwed fathers were subjected to impermissible gender-based discrimination when compelled to meet higher evidentiary standards of fatherhood. All challenges were rejected. In each case, the Supreme Court located a reasonable basis to uphold the gender-based differences under the less-than rational review afforded to Congressional actions when exercising its plenary power.

What is overlooked by these and other cases is how the federal government intrudes upon intact, existing families and reveals to the entire community the lack of a biological tie that a parent has to his or her child who is claiming derivative citizenship. Such information is the exclusive province of family privacy.

For instance, in *Solis-Espinoza v. Gonzales*, Eduardo Solis-Espinoza was born in Mexico.<sup>188</sup> His biological father was a Mexican citizen who was married to a U.S. citizen at the time of Eduardo's birth.<sup>189</sup> The complication was that Eduardo was born to his father's mistress, who immediately abandoned all claims of motherhood. Eduardo's biological father returned to the United States and resumed living with his citizen wife, who "acknowledged petitioner from his infancy as a member of her family and raised him as his mother, though he did not in fact have a biological connection with that woman."<sup>190</sup> This woman and her husband further reformed Eduardo's birth certificate to list herself as Eduardo's mother. At age thirty-three, Eduardo committed a drug-related offense that constituted an aggravated felony and was placed in removal proceedings.<sup>191</sup> The immigration judge properly applied state law to find that Eduardo was a legitimated child because his parents were married at the time of the birth.<sup>192</sup> The immigration judge also properly found that, as a legitimated child, Eduardo received the legal presumption that the mother who raised him was his biological, legal, and natural mother.<sup>193</sup> The BIA reversed, finding that because the father and his

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186. *Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) (rejected an equal protection claim brought by a foreign-born son that his unwed father had a higher burden to meet than an unwed mother would on the basis that "§ 1409 addresses an undeniable difference in the circumstance of the parents at the time a child is born, it should be noted, furthermore, that the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis. There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father.).

187. *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011) (per curiam) ("Avoiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests. The means chosen substantially further the objectives. Though the fit is not perfect, it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship.").

188. *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (9th Cir. 2005).

189. *Id.*

190. *Id.*

191. *Id.* at 1092.

192. *Id.*

193. *Id.*

mistress were the child's actual biological parents, Eduardo could not claim that any parent was a citizen at the time of his birth.<sup>194</sup>

This case serves as another example of how a biological requirement is implicitly written into the pre-1986 statute. In this case, the blood tie was applied to the claimant's mother, a requirement that has absolutely no textual support from any of the various laws that would apply to citizen mothers.<sup>195</sup> Without addressing this error, the Ninth Circuit reversed the BIA, properly applying the California legitimation statute to deem the wife's conduct as fully legitimating Eduardo as her son.<sup>196</sup> However, the process of this court proceeding created a public record and revealed family secrets to the child, his siblings, cousins, grandparents, and the greater community. Not only were Eduardo's father's indiscretions exposed, but any claim that his mother sought to be the one and only mother was shattered. Under state law, her marriage would have served as a shield to prevent any third party from asserting and proving such a claim.

Likewise, in *Scales v. INS*, Stanley Scales was born in the Philippines.<sup>197</sup> His citizen father was a US serviceman who met a Filipino woman who revealed she was pregnant from a prior relationship.<sup>198</sup> They fell in love, got married, and Stanley was born.<sup>199</sup> When Stanley was two years old, the family moved to United States where they lived. When Stanley was seven-teen years old, his parents separated. At nineteen years old, he was convicted of a drug-related aggravated felony and placed in deportation proceedings.<sup>200</sup> The BIA rejected Stanley's claim that, because his parents were married at

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194. *Id.*

195. *See supra* tbls.1, 2, & 3.

196. *Solis-Espinoza*, 401 F.3d at 1093-94 ("California Civil Code § 230 provided specifically that a child, such as Solis-Espinoza, who was acknowledged by the father and accepted into the family by the father's wife, was legitimate: The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. *Id.* There appears to be no dispute that petitioner was acknowledged by Solis and was accepted into and raised as a member of the Solis family, with the consent of Cruz-Dominguez. Under the law of California at the relevant time, therefore, Solis-Espinoza was 'for all purposes legitimate' from the time of his birth. Since he was not 'born out of wedlock,' under our decision in *Scales* the blood relationship requirement of § 1409 does not apply to him and he is entitled to be recognized as a citizen under § 1401.

That result is logical. In every practical sense, Cruz-Dominguez was petitioner's mother and he was her son. There is no good reason to treat petitioner otherwise. Public policy supports recognition and maintenance of a family unit. The Immigration and Nationality Act ("INA") was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.").

197. *Scales v. I.N.S.*, 232 F.3d 1159, 1161 (2000).

198. *Id.* at 1162.

199. *Id.*

200. *Id.* ("On January 12, 1996, Petitioner was convicted in the Superior Court for King County, Washington, of a violation of the Uniform Controlled Substances Act, Wash. Rev. Code § 69.50, for possession with intent to deliver cocaine. On February 6, 1996, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause, charging Petitioner as deportable under INA § 241(a)(2)(A)(iii), as an alien convicted of an aggravated felony.").



birth, he was a legitimated child and, ergo, a derivative citizen.<sup>201</sup> When Stanley's father applied for a visa for his return, he admitted that he was not Stanley's biological father but contended that he accepted his son in "every legal sense permissible."<sup>202</sup> The BIA thus contended that Stanley must produce evidence of a biological tie to his father before acquiring citizenship.<sup>203</sup>

*Scales* presents another example of how the BIA impermissibly imported the biological requirement into the application of the pre-1986 version of Section 1409(a). No party challenged the BIA's improper reliance on the wrong statute. Rather, the Ninth Circuit rejected the BIA's contention that Mr. Scales was born out of wedlock because his parents were married at the time of his birth.<sup>204</sup> Because his parents were married, Section 1409(a)<sup>205</sup> did not apply to him. Rather, Section 1401(e)<sup>206</sup> was the statute that applied. "A straightforward reading of § 1401 indicates, however, that there is no requirement of a blood relationship."<sup>207</sup> The Ninth Circuit accordingly held that Mr. Scales derived citizenship from his citizen father.<sup>208</sup>

More important, this case illustrates once again how the federal government invaded a married couple's private life to determine—and publicly reveal—which child is or is not a biological one. Although Mr. Scales "won" his case—he lost his ability to know his father as his biological one, his father lost the presumption that he was his son's father, and relatives, neighbors, and the community once again learned of family matters that had been previously protected by the marriage and the parents' conduct of raising a son together.

Returning to the *Joseph Anderson* case, his parents had never told him that his father might not be his biological father and that he might not be a U.S. citizen. After he served his criminal sentence, he expected to be released. He was surprised that ICE had placed an immigration hold on him and moved him to ICE detention. Assuming it was a mistake, he nonetheless appeared at

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201. *Id.*

202. *Id.* ("In the affidavit, [the senior Mr.] Scales stated that he was not Petitioner's natural father, that his wife was pregnant at the time she and Scales met, and that he 'accept[ed] [Petitioner] as [his] own son in every legal sense permissible, but [ ] did not make any attempts of making a claim for U.S. citizenship for him at this time or at any other time.'") (alteration in original).

203. *Id.* ("The BIA reasoned that, in order 'to acquire United States citizenship at birth there must be a blood relationship between the child and the parent through whom citizenship is claimed,' citing the Foreign Affairs Manual of the State Department. Because there was no evidence in the record that Petitioner was Scales' biological child, the BIA dismissed the appeal.").

204. *Id.* at 1164 ("The INA does expressly require a blood relationship between a person claiming citizenship and a citizen father, if the person is born out of wedlock. See 8 U.S.C. § 1409(a)(1) (setting forth legitimation requirements for a person born out of wedlock to a citizen father). This provision does not apply to Petitioner, however, because he was born to parents who were married at the time of his birth.").

205. See *supra* tbl.4 (enumerating the conditions that a child born out of wedlock must meet).

206. See *supra* tbl.2 (enumerating the conditions that a child of one citizen parent should meet).

207. *Id.*

208. *Id.* at 1166 ("The record is uncontroverted that Petitioner was born to Topaz and Scales during their marriage. There is no requirement of a blood relationship between Petitioner and his citizen father, as there is for an illegitimate child. We therefore hold that Petitioner acquired citizenship at birth under § 1401.").

his immigration hearing. He was twenty-eight years old and appearing *pro se*. The government attorney gave him a file in open court that recorded his parents' statements that had been made twenty-five years earlier when they were securing his visa to first enter into the United States. These written statements revealed that his mother had been a prostitute, and his mother and father both knew that Harold might not be Joseph's biological father.

The federal government revealed to Joseph private matters that his own parents never found important enough to tell him. Given that Harold had passed away, Joseph never had an opportunity to discuss this bombshell with his father.

##### 5. *The Federal Government's Collateral Attack On A Parent's Paternity Or Maternity Claim Impermissibly Interferes With The Family's Right To Privacy*

It is surprising that no party has brought a due process claim against the federal government's intrusion into family affairs. The liberty interest in protecting a unified family from government intrusion is a fundamental and well-established right. Since 1923, the Supreme Court has "consistently acknowledged a 'private realm of family life which the state cannot enter.'"<sup>209</sup> The Supreme Court has cited this liberty interest when striking down laws that interfered with parents' right to educate their children in *Meyer v. Nebraska*<sup>210</sup> and *Pierce v. Society of Sisters*,<sup>211</sup> a municipal housing ordinance that did not extend the definition of family to a grandmother raising her grandchildren in *Moore v. City of East Cleveland*,<sup>212</sup> and an Illinois law removing children from the custody of an unwed father when the natural mother died in *Stanley v. Illinois*.<sup>213</sup>

This liberty interest has been consistently applied in the legitimation and paternity contexts to uphold a parent's right to maintain a bond with his or her child. This liberty interest was relied upon in *Quilloin v. Walcott* when upholding Georgia's adoption statute that required only the consent of the natural mother (and not natural father) for a stepfather to adopt an illegiti-

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209. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). *See, e. g.*, *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *id.* at 495-496 (Goldberg, J., concurring); *id.* at 502-503 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542-544, 549-553 (1961) (Harlan, J., dissenting); *cf. Loving v. Virginia*, 388 U.S. 1, 12 (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

210. *See Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (striking down law prohibiting instruction of German to school children).

211. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (law interfering with how parents educate their children).

212. *See Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977).

213. *See Stanley v. Illinois*, 405 U.S. 645, 655-660 (1971).

mate child.<sup>214</sup> Because that particular unwed father had not expressed any prior interest in raising the child before filing his petition, the Supreme Court found that the statute did not violate any inherent right he had as a parent.<sup>215</sup>

In *Caban v. Mohammed*, because of the same liberty interest, an identical New York law was struck down.<sup>216</sup> In *Caban*, the unwed father seeking to block the stepfather's adoption had helped raise the child, appeared on the birth certificate, and maintained a continuing relationship with the child after the natural mother married another man.<sup>217</sup> In *Lehr v. Robertson*,<sup>218</sup> the Supreme Court addressed a subsequent challenge to New York's amended statute that allowed for a child to be adopted by a stepfather without notice to the biological father. The Supreme Court upheld the lack of notice requirement when the biological father had no contact with his child for over two years prior to the adoption.<sup>219</sup>

In explaining the difference between *Quilloin* and *Caban*, the Supreme Court noted that "[t]he 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. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he 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."<sup>220</sup> The *Lehr* command was subsequently followed in the previously discussed *Michael H.* case when the Supreme Court affirmed the liberty interest that a married man had in raising the child his wife had birthed and whom he claimed as his own.<sup>221</sup> In a notable

214. See *Quilloin v. Walcott*, 434 U.S. 246 (1978).

215. *Id.* at 255 ("Although appellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have had, compare § 74-202 with § 74-105 and § 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, 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. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.").

216. *Caban v. Mohammed*, 441 U.S. 380 (1979).

217. *Id.* at 388-94.

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

219. *Id.* at 262.

220. *Id.*

221. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). ("Michael reads the landmark case of *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972), and the subsequent cases of *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L.Ed.2d 511 (1978), *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L.Ed.2d 297 (1979), and *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L.Ed.2d 614 (1983), as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship-factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.").

holding, *Michael H.* recognized that the husband's liberty interest in rearing his child protected him from paternity claims that would have disrupted his (exclusive) father-daughter relationship.<sup>222</sup>

Outside of the immigration context, the Supreme Court recognizes the limited role that biology plays in child rearing. In addition to the *Michael H.* case, when discussing the rights that foster families have to their children, *Smith v. OFFER* noted that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children."<sup>223</sup> Moreover, it was undisputed that "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."<sup>224</sup>

From these principles, the Court in *Quilloin* observed that, "[w]e have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."<sup>225</sup>

The disclosure of facts that can shake the existential sense of origin of a child—even when such child is an adult—cannot be any proper exercise of federal power.

*Solis-Espinoza* and *Scales* are examples of how couples who were married at a child's birth were asked to provide intimate details about their child's origins, an inquiry against which state law guards. *Michael H.*, for instance, demonstrates how the marital presumption affords the husband and wife immunity from collateral attacks on their exercise of fatherhood (and motherhood). The federal government should not be allowed to breach the marital shield that extends to every other party, including state governments.

*Martinez-Madera* and *Anderson* are examples of how families formed and then raised children shortly after a child's birth. In both instances, a citizen father married a non-citizen mother, held out the son as his own, and raised the child by providing unqualified and unconditional financial, emotional, and parental support. The mothers did not claim that any other man was the father. The fathers did not contend any other man was the father. Until the federal government revealed the facts to Joseph Anderson, Joseph grew up

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222. *Id.* at 124 ("In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.").

223. *Smith v. OFFER*, 431 U.S. 816, 843 (1977).

224. *Id.*

225. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (Stewart, J., concurring) (quoting *Smith v. OFFER*, 431 U.S. 816, 862-863 (1977) (internal quotation marks omitted)).

without ever wondering whether another man had been involved in his conception.<sup>226</sup>

Under the relevant state law, these fathers legitimated their sons, and the parents maintained that the father was the child's one and only natural father. For these families that lacked the marital presumption, the immigration courts grossly erred by refusing the protections that legitimation laws offer the children. As a matter of law, Joseph Anderson and Jose Martinez-Madera were no longer born out-of-wedlock once California and Arizona legitimated them. In California, legitimation occurred when Jose Martinez-Madera's father received his son into his home and voluntarily stated he was Jose's father; in Arizona, legitimation occurred automatically once Harold Anderson complied with the paternity requirements of signing the birth certificate and executing a paternity attestation. In state court, the status of a legitimated child would have afforded both Jose and Joseph protection from the federal government—or any other third party—collaterally attacking their existential knowledge of origins.

Where both parents have raised a child, are the legal parents under state law, maintain that they are the parents, and where no other adult is claiming to be the biological parent, the federal government should establish a compelling interest as to why and how it is permitted to cast doubts and reveal secrets that no other third party or state government is allowed to do. I would contend that the federal government's desire to remove an individual does not meet this standard.

E. *Fundamental Error In Immigration Courts' Adjudication Of Legitimacy Claims: Misunderstanding Legal Construction Of Out Of Wedlock Status*

The fundamental error in immigration courts' adjudications of legitimacy actions is that they confuse historical facts of a parent's marital status with legal constructions of whether a child was or was not born out of wedlock. The term "child born out of wedlock" is a term of art. Under state law, the question of whether a child is born out of wedlock has a legal answer, not a factual one. Once legitimation is established, state law operates to retroactively consider a child legitimated for all times and for all purposes. A child who is legitimated receives the legal fiction that she was not born out of

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226. Anderson v. Holder, No. CV-11-01662-PHX-DGC, 2012 WL 2813868 (D. Ariz. July 10, 2012). Statement of Facts at ¶ 21 ("Joseph first learned about his family secrets and biological origins when the Government disclosed them to Joseph when he was appearing *pro se* in removal proceedings. (Exhibit 6 at 4-5). Even when first confronted by Joseph, Petronila maintained that Harold was Joseph's biological father. (Exhibit 6 at 4-5) In Joseph's words, '[W]hen [I] got these copies of these papers that you guys sent me, or that the prosecution sent me, that's the first time in my life I've ever heard anything like this, in my life . . . [A]fter finding this out, I confronted my mother about it. And, I, and, I told her, I said, you know what, I, I need the truth here. You know. And, she, she swears up and down that that is my father. Unfortunately, he passed away a few years back . . . .' (Exhibit 6 at 4-5))" (on file with author).

wedlock, regardless of what the historical facts are and regardless of whether the child's parents ever married in the future.

The immigration courts, by contrast, focus only on historical facts of the parents' marital status at the time of the child's birth. If a child's parents were unmarried, the immigration courts mark that child as indelibly illegitimate.

If Congress wrote Section 1409 and Section 1401 to focus on a parent's marital status only at the time of a child's birth, the immigration courts would be correct. However, the wording of the statutes mandate a different focus: Was a child "born out of wedlock" or not? The focus is not the parents' marital status but on whether the child was legitimated, which are two significant different inquiries under state law. Section 1401(c)<sup>227</sup> only refers to "a person born outside of the United States . . . of parents both of whom are citizens." Section 1401(e)<sup>228</sup> only refers to "a person born outside of the United States . . . of parents both of whom are citizens." The marital status of these parents is not mentioned anywhere in Section 1401.

The marital status becomes relevant due to the operation of Section 1409, which is titled, "Children born out of wedlock." This statute provides that the provision of Section 1401 "shall apply as of the date of birth to a person *born out of wedlock*" if the "father" meets the conditions enumerated in Section 1409(a)<sup>229</sup> and the "mother" meets the conditions enumerated in Section 1409(c).<sup>230</sup> Under state legitimation and parentage laws, however, once a child is legitimated, she is legitimated from the moment of birth and is not a child born out of wedlock for any purpose. However, under the laws operating in the United States, a legitimated child is not a child born out of wedlock, and thus Section 1409 cannot apply to him or her.

Not all immigration judges confuse these concepts. The immigration judge in *Solis-Espinoza* properly applied state law to find that Eduardo's parents were married at the time of birth and thus he was legitimated. The BIA reversed, citing on the historical fact that his father had an affair and neither his father nor the mistress were married to each other. The Ninth Circuit properly applied state law and upheld with the immigration judge's initial finding, which was resolved exclusively under Section 1401. Likewise, in *Scales* and the dissent in *Martinez-Madera* properly adopted this analysis when determining that under legitimation laws, the child at issue was not born out of wedlock—as a legal matter—and thus only Section 1401 could apply.

Under the contemporary parentage laws of the fifty states, once a child proves that she was legitimated before age eighteen (for the post-1986

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227. 8 U.S.C. § 1401(c); *see supra* tbl.1.

228. 8 U.S.C. § 1401(e); *see supra* tbl.2.

229. 8 U.S.C. § 1409(a); *see supra* tbl.4 (emphasis added).

230. 8 U.S.C. § 1409(c); *see supra* tbl.3.

statute) or age twenty-one (for the pre-1986 statute), Section 1409 can never be relevant to the derivative citizenship statute.<sup>231</sup> This is true regardless of whether the child's parents were ever married. The immigration courts' and BIA's erroneous counter-analysis arises from their focus on the factual circumstances of a parent's marital status. But the legal construction of legitimacy erases such considerations, and as Congress wrote the law, a proper showing of legitimacy should lead a child to rely only on the conditions set forth in Section 1401(c) (if both parents were citizens at the child's birth)<sup>232</sup> or Section 1401(e) (if only one parent was a citizen at the child's birth).<sup>233</sup> If state legitimation laws were applied in the immigration context, the federal government would not disgorge parent-child relationships that existed for decades without challenge. Restated, the federal government should not be able to lacerate state laws' protections of a family against collateral attacks on paternity and maternity.

PART II: ORDERING CITIZENS REMOVED FROM THE UNITED STATES:  
EXAMINING THE STRUCTURAL PROBLEMS OF IMMIGRATION COURTS

Part I explored how the federal government is intruding upon family privacy in ways that are prohibited by state law, state public policy, and federal due process concerns. Why then, are immigration courts unable to curtail—and arguably encouraging—the federal government from acting in a manner that it could not under state law? This question is examined below. Part II.A examines immigration courts lacking expertise in state law, while Part II.B discusses the structural problems preventing meaningful review of complicated issues, and Part II.C examines the unchecked prosecutorial pressures encouraging the removal criminal aliens. These factors combined favor expediency and accuracy over due process.

A. *Immigration Courts Lack Expertise In Applying State Law To Immigration Matters*

A legitimated child is not a child born out of wedlock, regardless of the parents' past and current marital status. The immigration courts' failure to understand that legitimation and paternity are legal constructions created in the absence of, and often contrary to biological evidence, is the fundamental flaw in current adjudications of derivative citizenship claims. Despite the competence of many immigration judges when applying and interpreting immigration law, the legitimation errors are not the first time that immi-

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231. Some foreign legitimation laws may not operate retroactively. If a derivative citizenship claim is controlled by such a foreign law, Section 1409 would apply to a legitimated child.

232. See *supra* tbl.1.

233. See *supra* tbl.2.

gration courts have erred in applying complex questions of state law in immigration proceedings.<sup>234</sup>

Federal circuits do not afford any deference to the BIA's and immigration courts' interpretation of state criminal substantive and procedural laws. "Determining a particular federal or state crime's elements lies beyond the scope of the BIA's [and immigration courts'] delegated power or accumulated expertise."<sup>235</sup> The immigration courts' unfamiliarity with questions of pure state law results in frequent reversals by the federal circuit courts.<sup>236</sup> Accordingly, the immigration courts' inability to understand state law presents the first stumbling block towards accurately resolving legitimation claims.

### B. *Structural Problems In Immigration Courts*

A second more troubling concern is the structural problems inherent in the current administration of all immigration claims. Critics are not limited to scholars and advocates. Rather, immigration judges themselves are vocalizing some of the strongest critiques of the institutions they serve. Judge Dana Marks, a respected San Francisco immigration judge and president of the National Association of Immigration Judges, wrote an article and has testified before Congress to articulate the problems she and her colleagues face.<sup>237</sup> Her primary reform consists of a call to replace the current administrative law courts with Article I courts.<sup>238</sup> Judge Marks seeks such a reform to ensure that the immigration courts and the BIA are independent from political and prosecutorial pressures that are infiltrating the current sys-

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234. Robert Katzmann, Judge, U.S. Court of Appeals for the Second Circuit, Roundtable Discussion at the Brookings Institution for Immigration and the Courts 49 (Feb. 2, 2009) [hereinafter Brookings Report] ("[W]hile recognizing the real problems in the system, we shouldn't forget those immigration judges who are doing outstanding jobs, and, unfortunately, they get tarnished when there are these instances of those immigration judges who are not performing, and, certainly, as a judge on the circuit, I've had occasion to make note of immigration judges who have not performed as we might expect them to perform. But there are so many immigration judges who are very devoted to the work before them, and they should be the models."), available at [http://www.brookings.edu/media/events/2009/2/20%20immigration/20080220\\_immigration.pdf](http://www.brookings.edu/media/events/2009/2/20%20immigration/20080220_immigration.pdf).

235. *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002); see also *Fregozo v. Holder*, 576 F.3d 1030, 1036 (9th Cir. 2009) ("This inquiry involves parsing the elements of a state criminal statute to determine whether it criminalizes conduct that falls outside of the generic federal offense, a task for which, as we have noted, the BIA lacks any particular statutory expertise that would be brought to bear on remand."); *Alsou v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008) (rejecting a government's defense of a BIA decision in part "because of the IJ's lack of expertise in the criminal law. . ."); *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004) (rejecting deference to BIA's definition of moral turpitude because "[i]t is not deploying any insights that it might have obtained from adjudicating immigration cases.").

236. See, e.g., *United States v. Grisel*, 488 F.3d 844, 845–46 (9th Cir. 2007) (en banc) (overturning the BIA's finding that an Oregon state statute is an aggravated felony); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1026–1029 (9th Cir. 2005) (overturning the BIA's finding that a California state statute was an aggravated felony under the categorical and modified categorical approaches.).

237. See Marks, *supra* note 10, at 3.

238. See *id.*



tem.<sup>239</sup> In outlining existing flaws, Judge Marks focuses on the unique and substantial prosecutorial pressures facing immigration judges.

### 1. *Immigration Judges Have Unusually Heavy Workloads*

Most courts have a large workload, but the immigration judges are managing a particularly heavy caseload. Approximately 210 active immigration judges serve in approximately fifty-four locations around the country.<sup>240</sup> As of 2009, each immigration judge heard approximately 1,200 cases each year, which requires him or her to hear and decide, on average, one hundred cases each month at a rate of five cases each day of the week.<sup>241</sup> Such a degree of efficiency is unusual for courts. A federal district judge, by contrast, considers and decides 480 cases each year, at a rate of forty cases each month and just over one case per day.<sup>242</sup> In addition to the fewer number of cases, federal district courts have the benefit of at least two law clerks that assist each judge. In the immigration court system, about four immigration judges share one law clerk.<sup>243</sup> The immigration judges have a larger caseload with less help than federal judges.<sup>244</sup> Chief Judge John Walker, Jr. told Congress that immigration judges suffer from a “severe lack of resources and manpower.”<sup>245</sup> The large docket and pressures to decide cases at the current rate implicitly promote expediency as a valued premium.

### 2. *Immigration Courts Are Not Independent From The Prosecutor*

Unlike criminal or civil courts, the Attorney General serves as the person to whom both the prosecutor’s office and immigration judge are ultimately accountable.<sup>246</sup> For years, “Immigration Judges and members of the BIA [were housed] within the same agency [the Immigration and Nationality

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239. *See id.*

240. *See* Brookings Report, *supra* note 235, at 7.

241. *Id.* at 8.

242. *Id.*

243. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1652 (2010).

244. Brookings Report, *supra* note 235, at 11.

245. *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit).

246. *See* Marks, *supra* note 10, at 3-4 (“At present, the Attorney General, our nation’s chief prosecutor in terrorism cases, acts as the boss of the judges who decide whether an accused non-citizen should be removed from the United States. At the same time, despite the creation of the DHS and the placement of trial-level immigration prosecutors there, the Attorney General continues to supervise a critical element of the prosecution process, the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals. This conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts. There are understandable concerns that the decisions rendered by Immigration Judges are not independent and free from pressure or manipulation.”).

Service (INS)] that prosecuted immigration cases.”<sup>247</sup> The “unusual structure” was criticized, and in 1956 and 1973, minor reforms were made to promote independence among the competing sub-branches of the agency. In 1983, the Executive Office of Immigration Review (EOIR) was created, which finally allowed the INS to formally separate from the immigration courts and its appellate body, the BIA. In 2002, when the DHS formed, the INS was abolished, and the newly formed USCIS (agency to handle administrative immigration matters) and ICE (agency to enforce immigration laws) were placed under the jurisdiction of the DHS. The EOIR remained within the Department of Justice (DOJ).

The placement of the EOIR and ICE into two different agencies has not provided the immigration courts the independence that scholars, advocates, judges, and immigration courts demand.<sup>248</sup> The conflict arises because the Attorney General is the person who sets the prosecutorial agenda for all ICE attorneys and is the person to whom all immigration judges report. Moreover, the Office of Immigration Litigation (OIL) is the department in the DOJ that is the appellate body of ICE attorneys who appear in federal circuit courts. The immediate problem arises because OIL both oversees the prosecution of immigration cases and defends the decisions of the immigration courts and the BIA in federal circuit courts. “In this position the OIL retains a sometimes conflicting dual role which leaves unclear whether the OIL represents the DHS or DOJ. This leads to a serious confusion over whether the OIL attorney is presenting the views held by the DHS or the DOJ to the circuit courts.”<sup>249</sup>

Outside of appellate litigation, Judge Marks has lamented how the Attorney General has interfered with “the independence and impartiality of Immigration Judges” through “actual and perceived encroachments on decisional independence [of the immigration courts].”<sup>250</sup>

First, the Attorney General has diminished the “quasi-judicial” role of the immigration judges by issuing clear regulations that “Immigration Judges are merely Department of Justice attorneys who are designated by the Attorney General to conduct [removal] proceedings, and they are subject to the Attorney General’s *direction and control*.”<sup>251</sup> The clear mandate suggests that immigration judges must be accountable to the Attorney General in ways that other judges are not.

Second, when faced with a conflict between the supervision of the prosecutorial ICE attorneys and the immigration courts, the Attorney General has elected to shield ICE attorneys from any disciplinary actions that any

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247. *Id.* at 8.

248. See Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 691 (2006); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).

249. Marks, *supra* note 10, at 10.

250. *Id.* at 3.

251. *Id.* at 4 n.4 (emphasis added) (citations omitted) (internal quotation marks omitted).

immigration judge may impose. In 1996, Congress mandated immigration courts to receive the power of contempt. The Attorney General has blocked this mandate because ICE opposes “having its attorneys subjected to contempt provisions *by other attorneys with the Department, even if the attorneys do serve as judges.*”<sup>252</sup> As of August 2011, the Attorney General has never promulgated the necessary regulations that would allow immigration judges to receive and exercise the power of contempt.<sup>253</sup>

Third, the Attorney General has promulgated an internal rule that prevents immigration courts from having a meaningful opportunity to contest ICE prosecutorial decisions to detain individuals in certain situations. When an alien is detained, he or she may request a bond hearing in which an immigration judge will decide whether the charges are reasonable, whether good cause would allow the individual to be released on bond pending the adjudication of the case, and the amount of the bond that is reasonable. Regulations, however, allow ICE to seek an automatic stay of release if it merely requests a bond of \$10,000 or more. In 2004 alone, ICE elected to “keep 273 immigrants in custody during deportation proceedings despite judges’ rulings that they be released on bail.”<sup>254</sup> Furthermore, some immigration judges in some jurisdictions reported that “the DHS sets ‘no bond’ as a matter of policy in virtually every case on their docket in order to have the benefit of an automatic stay whenever they want.”<sup>255</sup> ICE attorneys are able to control who is released from detention, which is an advantage that cannot be overstated. In addition, to be able to trump the decision of the immigration court, prolonging the detention of a pro se, indigenous individual prevents him or her from having a meaningful opportunity to locate counsel and earn income to pay an attorney, not to mention imposing a formidable psychological cost for pursuing his or her claims.

### 3. *The Attorney General Has Exerted Improper Political Pressures On Immigration Judges And The BIA*

The criticisms that the immigration judges do not have independence from the prosecutor rest on the premise that the Attorney General would exert his or her prosecutorial agenda over the immigration judges and members who serve on the BIA. The fears are not unfounded.

In the matter of hiring, in 2007, Monica Goodling admitted to Congress

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252. *Id.* at 10 & nn.40-41 (emphasis added) (citations omitted) (internal quotation marks omitted).

253. See John Guendelsberger, *Circuit Court Decisions for July 2011*, IMMIG. L. ADVISOR (EOIR), Aug. 2011, at 16. (“In an Article III court, a person who fails to comply with a subpoena may be found in contempt of court and subject to fines or imprisonment. See Fed. R. Civ. P. 45(e); 18 U.S.C. § 401(3) (giving Federal courts the power to punish disobedience of lawful court orders with fines, imprisonment, or both). This is not the case in Immigration Court.”).

254. Michelle Roberts, *African Immigrant Waits in Jail*, ASSOCIATED PRESS, October 16, 2007.

255. Marks, *supra* note 10, at 12 n.54.

that the political viewpoints of applicants were taken into account when the DOJ hired attorneys to serve as immigration judges.<sup>256</sup> Individuals who expressed sympathies towards aliens were not hired. Those who expressed a desire to support the Attorney General's prosecutorial agenda were.

During the course of their employment, immigration judges are vulnerable to having their substantive decisions subject them to investigation and discipline. The DOJ issued regulations stating that "freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review."<sup>257</sup> Such a confusing caveat has been criticized because "the line between administrative, procedural, and substantive issues is not always a bright or obvious one."<sup>258</sup> Judge Marks has suggested that, "Immigration Judges are placed in the untenable position of being classified by the DOJ as attorney employees who are then subject to discipline for the legitimate exercise of their independent judgment as adjudicators."<sup>259</sup> The fear of a disciplinary investigation into a judge's substantive reasoning is not unfounded. The DOJ's Office of Professional Responsibility has initiated investigations of misconduct against certain judges based on the legal reasoning contained in their decisions.<sup>260</sup>

Immigration judges are also vulnerable to losing their jobs if their decisions stray too far from the political viewpoint of the Attorney General. The most egregious example of this vulnerability was Attorney General John Ashcroft's actions to reduce the membership of the BIA, the sole appellate body charged with reviewing all immigration court decisions. In 2002, the BIA was facing a 57,000 case backlog, which was causing decisions from any appeal to be issued between seven and ten years. The Attorney General responded to the crisis in two notable ways.

The first was to implement regulations authorizing the BIA board members to summarily affirm a denied case by simply stating that the decision was being upheld for reasons that may or may not be stated by the immigration judge. The second response was to reduce the Board's size from twenty-three judges to eleven. The Attorney General fired the Board members who had granted cases at rates higher than the BIA's average. "Those who were asked to leave or were encouraged to leave were those who were seen as being out of line with Attorney General Ashcroft's point of view on immigration."<sup>261</sup>

Attorney General Ashcroft's reforms were successful in achieving his goal. In reducing the 57,000 case backlog, the BIA was widely-criticized for

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256. *Id.* at 9 & n.39.

257. *Id.* at 11, quoting Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,883 (introductory comments introducing new procedural reforms).

258. *Id.*

259. *Id.* at 14.

260. *Id.*

261. Brookings Report, *supra* note 235, at 22.

not spending more than 10 minutes on each case.<sup>262</sup> In practice, this summary affirmance was decried as a means to avoid any meaningful review, but every federal court upheld it against constitutional challenges.

Judge Marks has described the current DOJ internal investigations against the decisions of an immigration judge “with the clear memory of the not-too-distant personnel purge at the BIA” as having a “decidedly chilling effect on Immigration Judges.”<sup>263</sup> Given that only 10% of immigration decisions are appealed (and of those 10% of appeals, 75% are brought by those who are represented by counsel), the immigration courts serve as the only forum in which the vast majority of litigants appear. For derivative citizenship applicants, because they are detained and pro se, this forum is most likely the only forum they face when asserting their birthright citizenship claim.

### C. *Structural Problems With The Appellate Processing Reviewing Immigration Court Decisions*

As set forth above, the immigration judges must navigate outside pressures seeking expediency and prosecutorial outcomes. The current appellate system does not provide a cure for the structural defects.

#### 1. *Background Information On The BIA*

Currently, the BIA has thirteen permanent members and five additional temporary members that adjudicate cases.<sup>264</sup> The BIA is charged with reviewing all immigration court decisions, which requires the BIA to be familiar with the precedent of all eleven federal circuit courts. The federal circuits often interpret provisions of the immigration law that are inconsistent with one another, which leads to a different set of rules applying to individuals based on the federal circuit jurisdiction in which they live.<sup>265</sup>

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262. See Comm. on Fed. Courts, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. ASS'N B. CITY N.Y. 243, 248 (2005); “[T]he Board member who denied [the petitioner’s] appeal is recorded as having decided over 50 cases on October 21, 2002, a rate of one every ten minutes over the course of a nine-hour day.” (quoting *Albathani v. I.N.S.*, 318 F.3d 365, 378-78 (1st Cir. 2003)), *id.*; *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (Posner, J.) (discussing “a pattern of serious misapplications by the board and immigration judges of elementary principles of adjudication.”).

263. Marks, *supra* note 10, at 14.

264. U.S. Dept. of Justice, Bd. of Immig. Appeals, [http://www.justice.gov/eoir/fs/biabios.htm#Temporary\\_Board\\_Members](http://www.justice.gov/eoir/fs/biabios.htm#Temporary_Board_Members) (last visited Sept. 10, 2014).

265. For instance, from 2000 to July 2011, the Ninth Circuit extended the Federal First Offenders Act, 18 U.S.C. § 3607, to applicants whose convictions of simple possession of a controlled substance or less were expunged under state law. See *Lujan-Armenariz v. I.N.S.*, 222 F.3d 728, 749-50 (9th Cir. 2000) (“We hold that the new definition of ‘conviction’ for immigration purposes does not repeal either the Federal First Offender Act or the rule that no alien may be deported based on an offense that could have been tried under the Act, but is instead prosecuted under state law, where the findings are expunged pursuant to a state rehabilitative statute. Both Lujan’s and Roldan’s petitions involve first-time drug offenses for simple possession, and both offenses were expunged under state law. Therefore, the petitioners may not be deported on account of those offenses.”) For

Each immigration judge applies the precedent of the BIA and federal appellate court in which its court is located. The BIA must be equipped to know and apply all of the conflicting circuit authority to the case that is before it.

The BIA's task to properly apply all circuit authority to the cases it reviews is compromised by its large workload and the prosecutorial pressures that the Attorney General may exert. Similar to the immigration court workload, the BIA also has a heavy one. The BIA decides approximately 23,000 cases each year. Although some cases are heard by three judge panels and some are heard only by one judge, each board member is involved in over 1,200 cases each year, which matches the caseload of an immigration judge. The resolution requires a BIA board member to decide, on average, five cases each business day.

Akin to the appointment of immigration judges, all members of the BIA are appointed by the Attorney General and are employees of the DOJ. As mentioned before, in 2002, the board members were purged if they had viewpoints that differed from Attorney General Ashcroft's prosecutorial agenda. No curative regulation or statute to protect existing BIA members from a similar employment purge has been enacted.

## 2. *Criticisms Of The BIA's Adjudication Of Appeals*

The BIA has faced pointed criticism for issuing poorly-reasoned decisions. Given the workload and prosecutorial pressures mentioned above, the BIA's record of producing poorly reasoned decisions is not surprising. Some commentators have suggested that the current uniquely overburdened and under-resourced system may not be an oversight.<sup>266</sup> The earlier example of the BIA misreading or ignoring the statute to import the parent-child biological requirement found only in the post-1986 version of Section 1409(a) into pre-1986 cases and even against citizen mothers governed by Section 1409(c) and Section 1401 sadly is not an aberration. Completely independent from criticisms against the summary affirmance procedures, federal courts have routinely decried the BIA's reasoning in the cases for which it elects to prepare written reasoning. For instance, recent federal court cases have criticized the BIA for:

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these individuals, their prior drug offense would not have adverse immigration consequences if they received the benefit of state expungement statutes. In 2011, the Ninth Circuit overruled *Lujan-Armendariz* and held that its ruling was prospective only for non-citizens convicted before July 2011. See *Nunez-Reyes v. Holder*, 646 F.3d 684, 689-94 (9th Cir. 2011) (citing eight circuit and BIA cases that have rejected the holding in *Lujan-Armendariz*).

266. Brookings Report, *supra* note 235, at 17, 19 (Professor Andrew Schoenholtz opined that the Congressional indifference to the "overburdened and under-resourced system" may be due to the fact that "the political will has not been there to do what should be done properly to ensure that there is a fair process for immigrants who are placed into removal proceedings to at least have a day in court.").

- interpreting immigration law in a manner that “contravenes the statute and leads to absurd and wholly unacceptable results”,<sup>267</sup>
- distorting evidence in an “especially inexplicable” manner to support the denial of a claim when in fact the medical evidence corroborated the grant of the asylum seeker’s claim,<sup>268</sup>
- denying an asylum claim to a wife even though it granted the same claim to her husband based on “seemingly identical” facts and law of which it was aware when denying the wife’s claim,<sup>269</sup>
- making inexplicable “sloppy” errors such as issuing an “incomplete opinion.” “The BIA’s opinion was nonsensical: It referred to a direct appeal rather than to a motion to reconsider or reopen; the second page began mid-sentence and was unrelated to the first page, making the reasoning difficult to follow; and it stated that the new evidence *did* likely affect the outcome of Mohamed’s case, even though it went on to deny the motion . . . . Not only was the BIA’s opinion an example of sloppy adjudication, it contravened considerable precedent.”<sup>270</sup>

In a particularly pointed criticism, a federal court once analogized the BIA’s capricious actions to “Tegwar,” “The Exciting Game Without Any Rules” as documented in the book *Bang the Drum Slowly*.<sup>271</sup> In Tegwar, “[t]he mark, lured into the game by the players’ enthusiasm, would be given a handful of cards and encouraged to make wild bids using a weird vocabulary of calls that changed from round to round. [] The poor cluck would always lose but would be reassured of the game’s legitimacy by the veneer of

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267. *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (“The BIA’s refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by Congress to be oppressive and persecutory, contravenes the statute and leads to absurd and wholly unacceptable results.”).

268. *Mukamsoni v. Ashcroft*, 390 F.3d 110, 123 (1st Cir. 2004) (“The BIA’s interpretation of the medical records is especially inexplicable because, within the very same note from which the BIA takes the quote above, Dr. Wolfe *reiterates* her diagnosis and recommends continued follow-up treatment for Mukamsoni with a new therapist, which would be a nonsensical conclusion if Dr. Wolfe thought Mukamsoni’s PTSD to be fabricated. Viewed as a whole, the BIA’s finding that the medical records “undercut[ ]” rather than corroborated Mukamsoni’s claim is simply unsupported.”).

269. *Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006) (“[T]he agency’s grant of relief from removal to Yan Fang Zhang’s husband apparently on the same ground that it denied relief to her-feared future sterilization based on the birth of two children in the United States. Although the BIA was aware of the former grant of relief when it affirmed the IJ’s denial of relief to Yan Fang Zhang, it failed to address, much less explain, its apparent inconsistent treatment of the couple’s seemingly identical future persecution claims.”) (alteration in original).

270. *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) (emphasis added) (“The BIA abused its discretion, however, by denying the motion in an incomplete opinion and in failing to consider all the attached evidence.”).

271. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 368 (9th Cir. 2003).

rationality that appeared to overlie the seemingly sophisticated game.”<sup>272</sup>

In October 2002, the BIA denied alien claims at a rate of 59%. One year after Attorney General Ashcroft’s reforms were introduced, the denial rate climbed to 86%.<sup>273</sup> By 2005, the denial rate rose to 94%.<sup>274</sup> Today, the denial rate is at 93%. Unlike criminal appeals that have a similarly high denial rate, the denial rate is not the result of the cases lacking legal or factual errors.<sup>275</sup> To the contrary, of the cases that are appealed to the federal courts, approximately up to 11% to 21% of the BIA cases are found to have reversible errors.<sup>276</sup> The BIA thus is unable to serve as a reliable forum to correct any errors that arise from erroneous denials of derivative citizenship claims.

### 3. *Explosion Of Immigration Cases In The Federal Circuits*

As a result of the 2002 summary affirmance procedures, the BIA appeal backlog was in essence transferred to the federal courts. As a practical matter, just under half of all BIA appeals are brought in the Ninth Circuit and another 20% are brought in the Second Circuit. The remaining 30% of BIA appeals are split among the nine other circuits. Although all circuits are facing the pressures, the Ninth Circuit and Second Circuit are particularly impacted by the mushrooming BIA appeals it must now consider along with its existing civil and criminal docket.

In 2001, immigration appeals comprised 4% of the Second Circuit docket. By 2008, the percentage of immigration appeals exploded to 39% of the Second Circuit’s docket.<sup>277</sup> In 2001, immigration appeals represented 23% of the Ninth Circuit docket. By 2008, they tripled to be 60% of the Ninth Circuit’s docket.<sup>278</sup>

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272. *Id.* at 368-69 (The Tegwar comparison was made in response to “[t]he informal custom and practice of the BIA varied wildly, with the BIA in some cases declaring itself the ultimate fact-finder and accepting tendered evidence in various forms, and in other cases, such as this one, categorically rejecting evidence on the ground that it was a purely appellate body. The net result was a process without rules, with an administrative body that morphed without any consistency from fact-finding to pure appellate review of a fixed record.”).

273. ANNA O. LAW, IMMIGRATION BATTLE IN AMERICAN COURTS 151 (2010).

274. Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, <http://articles.latimes.com/2005/may/02/local/me-backlog2>.

275. California courts, by way of comparison, reversed 19% of the civil appeals and 4% of criminal appeals. See JUDICIAL COUNCIL OF CALIFORNIA, 2010 CALIFORNIA COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS 26 (2010), available at <http://www.courts.ca.gov/12941.htm#id7495>.

276. Reversal rates are not published by any circuit court. EOIR however publishes its internal statistics. See John Guendelsberger, *Circuit Court Decisions for December 2010 and Calender [sic] Year 2010 Totals*, IMMIG. L. ADVISOR (EOIR) Jan. 2011, at 6.

277. Brookings Report, *supra* note 235, at 28 (“From my perspective on the Second Circuit, we’ve seen the immigration docket increase from 4 percent of our cases in 2001 to roughly 39 percent of our cases.”).

278. Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1002-03 nn.13-26 (2006) (In 2001, the appeals of BIA cases accounted for 3% of the federal docket. By 2005, federal courts received five times as many BIA appeals as they had prior to 2002. In the Ninth Circuit, immigration cases surged 560% from 2001 to 2004. The increase from 900 cases (2001) to 6,000 (2004) accounts



The increase in immigration appeals being decided by federal circuit courts is even more alarming given that in 1996, Congress stripped the federal courts from considering any factual error made by the BIA.<sup>279</sup> Congress limited the federal courts' jurisdiction to only consider and correct legal and constitutional errors made by the BIA.<sup>280</sup> Factual errors made by the BIA are immune from any correction.

Moreover, as a practical matter, most non-citizens (alleged or actual) are unable to seek review. No circuit court has an automatic stay of removal to allow an individual to remain in the United States while a federal court is reviewing a case.<sup>281</sup> Although the Ninth Circuit has a very liberal stay policy, the Eleventh Circuit does not stay any removal order. Most circuits fall in between, but many do not guarantee a stay and some even deny stays of removal, leaving the non-citizen left to litigate a federal appeal abroad.<sup>282</sup> For pro se litigants and those without financial means to hire a lawyer, the lack of stay effectively ends the appeal. Moreover, for those who are appealing motions to reopen, the non-citizen's departure from the United States, under the law of some circuits, automatically forfeits any claim pending in a federal court.

Congress has provided that an individual may file a habeas petition in a federal district court to establish citizenship.<sup>283</sup> This right is afforded to

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for 45% of the Court's entire docket. In the Second Circuit, due to the 1,400% increase, the Court took the drastic step to eliminate oral argument for asylum cases.)

279. Under IIRIRA, Congress limited appellate review to only legal and not discretionary matters and factual errors. *See* 8 U.S.C. § 1252(a)(2). *See generally* *Kalaw v. I.N.S.*, 133 F.3d 1147, 1151 (9th Cir. 1997). In 2005, the REAL ID Act restored jurisdiction over constitutional questions. *See* 8 U.S.C. § 1252(a)(5).

280. 8 U.S.C. § 1252(a).

281. IIRIRA altered the legal landscape by repealing the automatic stay that a petitioner did receive when filing a petition for review in a federal court of appeal. *See* 8 U.S.C. § 1252(b)(3)(B). Although some circuits devised criteria to permit stays of removal, for example *Abassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998), some circuits held that IIRIRA permitted no stays. *See Weng v. U.S. Att'y Gen.*, 287 F.3d 1335, 1337-40 (11th Cir. 2002) (holding that 8 U.S.C. § 1252(f)(2) bars federal courts from issuing any stays). In 2009, the Supreme Court weighed in, holding that IIRIRA permits stays when heightened criteria is met. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. The fact that the issuance of a stay is left to the court's discretion 'does not mean that no legal standard governs that discretion . . .'" (internal citations omitted)). As a practical matter, depending on where an applicant lives, his or her chances of getting a stay of removal are high, low, and never guaranteed.

282. *See Ricon v. Holder*, 543 F. App'x 483 (5th Cir. 2013) (In this case, ICE removed the petitioner from the country before the Fifth Circuit had an opportunity to issue a stay of removal. In seeking for redress (while outside of the United States), the Fifth Circuit denied the requests for "an order directing Immigration and Customs Enforcement (ICE) to show cause why this court should not impose sanctions, instruct ICE to return Bucio to the United States, or admonish ICE for its usurpation of judicial authority." The Court denied the requests, reasoning that because a "stay is not automatic but is an exercise of judicial discretion based on the circumstances of the case," [.] "ICE violated no order of this court, and Bucio has produced no evidence that ICE effectuates removals in order to thwart rulings on stay motions.").

283. *Flores-Torres v. Mukasey*, 548 F.3d 708, 711 (9th Cir. 2008) ("First, we have held that 'the jurisdiction-stripping provision [of the REAL ID Act] does not apply to federal habeas corpus petitions that do not involve final orders of removal.'" (quoting *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006)).

individuals residing outside of the United States.<sup>284</sup> However, as a practical matter, most removed individuals with derivative citizenship claims lack the knowledge, savvy, or resources to pursue such relief from a foreign country. The BIA and federal courts thus are not the best forums to correct all errors that arise from erroneously denied derivative citizenship claims.

#### D. *The Criminal Alien Problem In Derivative Citizenship Claims*

Calls to reform the immigration court system have been made since the 1980s. Some individuals advocate for an Article I court to replace the current system, and others argue for a truly separate agency that could house the immigration courts and BIA.<sup>285</sup> Without resolving that debate here, it is clear that the procedures under which all applicants, especially *pro se* applicants, are presenting claims of birthright citizenship are far from ideal.

Given the documented political pressures and examples of past and ongoing prosecutorial interference, reasonable inferences can be drawn that a litigant who has a serious criminal history faces extrajudicial hurdles. An individual who raises a derivative citizenship claim in immigration court is most likely doing so because he has been convicted of an aggravated felony for which there is no other defense. The crimes could range in seriousness from murder, rape, sexual assault, child abuse, and illicit drug sales to tax evasion and fraud to petty theft and illegal drug use. Regardless of any mitigating fact that any individual case may present, few people are championing the cause to protect a foreign-born individual who has caused harm or mischief in the United States. Moreover, the current administration, like the last, trumpets the numbers of individuals with criminal convictions it removes with pride and promises for more.<sup>286</sup>

As observed by Judge Marks, the “conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts. There are understandable concerns that the decisions rendered by Immigration Judges are not independent and free from pressure or manipulation.”<sup>287</sup> Understood in this context, the legal and factual errors that arise in adjudicating derivative citizenship claims may have an additional explanation. Family law becomes

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284. See *id.*; “Second, as we concluded recently, ‘[e]ven post-[REAL ID Act], aliens may continue to bring collateral legal challenges to the Attorney General’s detention authority . . . through a petition for habeas corpus.’” (quoting *Casas-Castrillon v. Dept. of Homeland Security*, 535 F.3d 942, 946 (9th Cir. 2008)). *Id.* at 711.

285. Maurice A. Roberts, *Proposed: A Specialized Immigration Court*, 18 SAN DIEGO L. REV. 1, 17-20 (1980); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Report and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525 (1977); Legomsky, *supra* note 249, at 91; Durham, *supra* note 249, at 691.

286. Bennett, *supra* note 147 (“[O]fficials promised to continue the White House policy of prioritizing for removal those illegal immigrants with criminal convictions.”).

287. See Marks, *supra* note 10, at 4.

an expeditious means to remove an undesirable person from the country. Quickly and erroneously determining that a parent-child relationship does not exist under state law allows a prosecutor to take credit for removing another criminal alien from the country. Whether the mistakes of family law arise from intentional error or a failure to understand the nuances of family law, the result is the same. For many prosecutors, denying any benefit—especially birthright citizenship—to someone deemed unworthy of leniency and compassion is a professional victory. Unlike other forums, immigration judges may be unwilling or unable to reign in such an overzealous prosecutor.

The undeniable political pressures to remove criminal aliens undermine the confidence that immigration courts are providing a full and fair forum to litigate derivative citizenship claims. As observed in *Anderson v. Holder*, government attorneys are more concerned in removing a criminal alien than properly understanding or applying derivative citizenship and legitimacy statutes. In criticizing the government's argument that was made before it, the court noted that, "[i]n other words, the government's position is that the word 'legitimation' should be read broadly when a broad reading results in the denial of citizenship, and narrowly when a narrow reading results in the denial of citizenship . . . . Not only does the government's position fail to explain why an alien parent's rights are more worthy of statutory protection than the citizenship interests of someone who spent the vast majority of his life in the United States; it defies the government's own prior assertion that the statute at issue in [three different cases] closely resembles the one at issue here. The government's position is unfair as well as erroneous."<sup>288</sup>

Although the prosecutorial pressures may equally interfere with the factual and legal defenses available to other criminal aliens, the stakes for wrongfully removing a citizen are higher. Under the current system, few could state with confidence that every individual with a criminal conviction receives a fair and full hearing on her claim to citizenship. For this reason, reforms to remove derivative citizenship claims from the jurisdiction of the immigration courts are explored in Part III.

### PART III: REMOVING DERIVATIVE CITIZENSHIP CLAIMS FROM IMMIGRATION COURTS: EXPLORING SOLUTIONS THAT PROVIDE MORE PROTECTIONS TO DERIVATIVE CITIZENS

This article focuses on derivative claims for which legitimacy determinations were dispositive to whether a child acquired citizenship. However, derivative citizen claims can be dependent upon a showing of numerous condition precedents, which include whether the parent or child resided in

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288. *Anderson v. Holder*, 673 F.3d 1089, 1100 (9th Cir. 2012) (emphasis added) (citations omitted).

the United States for the requisite period, whether a citizen parent legally divorced a non-citizen parent, whether parents were legally married at a child's birth, whether the legitimation conditions were met before the child was eighteen (or twenty-one) years old, or whether the child possessed an intent to permanently reside in the United States before the age eighteen. Consider the following examples below.

The 1998 case of *Miller v. Albright* involved a foreign-born woman born to an unmarried Filipino mother and a U.S. citizen father, who was stationed in the Philippines with the U.S. military at the time of his daughter's birth. At age twenty-two, the daughter reconnected with her birth father and obtained a state paternity decree.<sup>289</sup> The question for the Supreme Court was whether such evidence was sufficient to confer derivative citizenship because the order had not been acquired before she was age eighteen.<sup>290</sup>

*Nguyen v. INS*, a 2001 case, concerned a foreign-born man who was born to an unmarried Vietnamese mother and U.S. citizen father working in Vietnam as a businessman.<sup>291</sup> At age six, Mr. Nguyen came to the United States and was raised by his citizen father. When he was twenty-two years old, he committed a crime that constituted an aggravated felony, which placed him in deportation proceedings, and ordered deported. While his case was on appeal, his father "obtained an order of parentage" (which operates retroactively) but failed to have executed a declaration of paternity before his son turned eighteen years old.<sup>292</sup> Mr. Nguyen conceded that his father had not met all age-specific conditions of Section 1409 and raised an equal protection challenge to "Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers . . . ."<sup>293</sup>

The 2011 case of *Flores-Villar v. United States* involved a foreign-born man whose unwed biological father was a sixteen-year-old U.S. citizen and his biological mother was a Mexican citizen.<sup>294</sup> He was brought to the United States when he was two years old for medical treatment and lived with his citizen father and citizen grandmother. At age twenty-three, he was convicted of drug offenses that were deemed aggravated felonies, and he was ordered removed.<sup>295</sup> At issue was Section 1409's provision that an unmarried citizen

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289. See *Miller v. Albright*, 523 U.S. 420, 425-26 (1998).

290. *Id.* at 428 ("We granted certiorari to address the following question:

'Is the distinction in 8 U.S.C. § 1409 between "illegitimate" children of United States citizen mothers and "illegitimate" children of United States citizen fathers a violation of the Fifth Amendment to the United States Constitution?").

291. See *Nguyen v. I.N.S.*, 533 U.S. 53, 57 (2001).

292. *Id.*

293. *Id.* at 62; see also *id.* at 56-57 ("The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. The question before us is whether the statutory distinction is consistent with the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.").

294. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011) (per curiam).

295. *Id.*

father must reside in the United States for five years after his fourteenth birthday.<sup>296</sup> Mr. Flores-Villar challenged the heightened residency requirement for unmarried citizen fathers, a requirement not imposed upon unwed citizen mothers.<sup>297</sup>

These factual situations reveal that many derivative citizenship claims are contingent on facts neither related to biology nor legitimacy. Because the article's original focus—state law abuses in immigration court—exposed a larger systemic problem that arises in derivative citizenship claims, the solutions address the problems that arise in the legitimacy determinations alongside those that do not.

A. *Proposed Protections For Derivative Citizenship Claims That Involve Legitimation*

In response to the state law errors, public policy violations, and due process concerns presented by existing adjudications of derivative citizenship claims in immigration courts, the following two proposals provide protections missing under the current scheme.

1. *Properly-Interpreted Legitimation Laws Will Reduce The Frequency By Which Section 1409 Applies*

The most radical reform is the easiest to obtain: When state law is properly applied, it is difficult to imagine factual situations in which Section 1409 is relevant to derivative citizenship claims. This theorem is true under two circumstances. First, if the operative legitimation law confers a retroactive benefit to a child, which among the 50 states, is the default benefit. Second, if such legitimation occurred before the child was eighteen years old (post-1986 version) or twenty-one years old (pre-1986 version). Perhaps some foreign jurisdictions where a child is legitimated may not have retroactive benefits; if that is the relevant law, a legitimated child would still have been born out of wedlock. If the child is legitimated in the United States, however, Section 1409 should not be triggered.

Instead of dwelling on whether a parent is married or not, Section 1401 and Section 1409 only focus on whether a child was born out of wedlock. The proper inquiry starts with whether a person was legitimated under state law. If yes, was that law retroactive, and did this occur before the child was eighteen (or twenty-one) years old. If the answers to these questions are yes,

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296. *Id.* at 998 (“Rational basis review applies to the claim of age-based discrimination because age is not a suspect class. Flores-Villar’s position is that, because it is legally and physically impossible for United States citizen fathers under age nineteen to confer citizenship upon their foreign-born, illegitimate children even if they have resided in the United States for ten years, whereas an unmarried citizen mother need only show one year of residence, the statutory scheme treats men under nineteen differently from similarly situated men over nineteen.”).

297. *Id.*

Section 1401 applies. Properly applied, Section 1401 was the relevant law in *Scales*<sup>298</sup> and *Solis-Espinoza*<sup>299</sup> and should have been the only section relevant in *Martinez-Madera*,<sup>300</sup> *Joseph Anderson*,<sup>301</sup> *Nguyen*,<sup>302</sup> and *Flores-Villar*.<sup>303</sup> The court would have come to the same outcome in *Flores-Villar* since the citizen father failed to meet the residency requirement of Section 1401(e). Indeed, among the cases surveyed in this article, the only case that Section 1409 would apply to is *Miller v. Albright*.<sup>304</sup> In *Miller*, Section 1409 was properly applied to find that the child did not qualify for derivative citizenship.

Under existing adjudications of derivative citizenship claims, Section 1409 has become the default provision whenever a child has parents who were not married at the time of her birth. The focus on the parents' marital status is erroneous. When the inquiry is whether a child was born out of wedlock, state law provides the answer. Fact-finders should assume that Section 1409 is triggered only rarely if a person was in fact raised and cared for by a citizen parent who continues to assert his paternity and parentage.

The presumption that Section 1409 is inapplicable in the context of a legitimated child appears most consistent with congressional intent. Among the six other ways by which derivative citizenship is acquired, Congress has set minimal standards. The only reasonable inference is that Congress intended for citizenship to be acquired easily when one parent is a citizen and such citizen parent has spent enough time in the United States to develop an allegiance to the country.

Indeed, under Section 1401<sup>305</sup>—which applies to the majority of past claims—and Section 1431<sup>306</sup>—which will likely apply to the majority of future claims—a foreign-born child liberally acquires citizenship from her parent.<sup>307</sup> The current interpretation and application of Section 1409 is a notable aberration. However, when state legitimation laws are properly applied, legitimated children receive the benefit of Section 1401 and Section 1431, rendering the scheme consistently generous.

Recognizing the proper application of state law to the derivative citizenship scheme is essential to correct the current application of claims that may

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298. See *Scales v. I.N.S.*, 232 F.3d 1159 (2000).

299. See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (2004).

300. See *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009).

301. See *Anderson v. Holder*, No. CV-11-01662-PHX-DGG, 2012 WL 2813868 (D. Ariz. Jul. 10, 2012), *aff'd*, *Anderson v. Holder*, 527 Fed. Appx. 602 (9th Cir. Jun. 12, 2013).

302. See *Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

303. See *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011) (per curiam).

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

305. See *supra* tbls. 1 & 2.

306. See *supra* tbl. 6.

307. Section 1431 will apply if a child (born after 1983) entered the United States with a specific legal status. If the child did not enter with that status, Section 1401 and Section 1409 will remain the operative statutes to claims arising from children born after 1983.

arise under Section 1401 and Section 1409. Moreover, ensuring that fact-finders understand state law is equally critical when ascertaining the parent-child relationship under Section 1431, which will be the more applicable statutory provision to future derivative citizenship claims as individuals born after 1983 (those who are currently under twenty-five years old) will begin appearing in immigration detention in higher numbers. This article exposed the ease by which the biological requirement was erroneously imported into pre-1986 statutes. It is critical that the biological requirement is not prospectively imported into the application of Section 1431's understandings of who is a legal parent of a particular child.

The act of parenting is a means by which an individual influences and shapes the values that another will hold in the next generation. "It also entails a right of family that derives from a human right of intellectual and moral autonomy. It entails the right of every individual to affect the culture and embrace, act upon, and advocate privately chosen values. For parents and other guardians, civil freedom brings a right to choose and propagate values [to their children]."<sup>308</sup>

For Congress to reserve automatic citizenship to the children of parents who will transmit an allegiance to the United States is a reasonable exercise of power. Using age and length of residency to reasonably predict which parents have acquired sufficient allegiance is a rational, and likely accurate, means to advance these goals. Because a parent will transmit his or her values to a child, regardless of whether a blood tie exists, the disuse of Section 1409 does not impede the national goals of derivative citizenship. Moreover, by ensuring that any legitimated child of a citizen parent acquires citizenship, the Congressional goal of ensuring that children who acquire citizenship have at least one citizen parent who can transmit fidelity to the United States is advanced.

## 2. *Estoppel for Intact Families For Which Legitimation Is An Issue*

The second reform is to enforce evidentiary rules against the federal government's delay in raising a collateral attack against a person's parentage. In the cases of *Solis-Espinoza*,<sup>309</sup> *Scales*,<sup>310</sup> and *Anderson*,<sup>311</sup> the parent citizen's biological bond to his or her child was cast in doubt because the federal government had acquired information when it issued family visas for the child to first enter the country. Like any other party, once it obtains such knowledge, the federal government has six months to two years (depending

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308. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994).

309. See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091 (2004).

310. See *Scales v. I.N.S.*, 232 F.3d 1159, 1162 (2000).

311. See *Anderson v. Holder*, No. CV-11-01662-PHX-DGC, 2012 WL 2813868 (D. Ariz. July 10, 2012) *aff'd*, *Anderson v. Holder*, No. 09-70249, 527 Fed. App'x. 602 (9th Cir. June 12, 2013).

on state law) to contest the parent's paternity, maternity, or parentage in state court.<sup>312</sup> The immigration courts waive these time-limitations that state law imposes.<sup>313</sup> The federal government must be held to the same standard as every other state and private party.

If legitimation, paternity, maternity, or the marital status of parents is challenged based on information that the federal government collected through prior contacts with the families, it should be estopped from relying on such evidence or releasing it to any party—including the child in any proceedings. As a practical matter, the federal government is producing information from its files that it received twenty or thirty years prior. Unless the disclosure of information is within the time periods provided under state law, such information should be inadmissible in derivative citizenship claims. As an evidentiary rule, this reform ensures that the families are provided the minimal protections that state law provides them.

## B. *Proposed Solutions For All Derivative Citizenship Claims*

Although this article focuses on the problems in applying state law in immigration courts, it exposes systemic flaws that impact all derivative citizenship claims. Accordingly, the following two reforms suggest ending the use of immigration courts as the forum in which derivative citizenship claims are raised. As described in Section II, the fundamental flaw in immigration proceedings is that the Government is too often motivated to remove a person with a serious criminal record rather than seeking to understand the complicated area of derivative citizenship. The following two proposals seek to improve upon the existing adjudication by using existing forums to more fairly and fully determine if a child had acquired automatic citizenship at birth by simply shielding the fact-finder from information about the person's criminal history.

### 1. *Transfers To Administrative Proceedings*

The first proposal is for an administrative interview to replace immigration courts as the forum for adjudicating derivative citizenship claims. Administrative proceedings are used for most affirmative claimants seeking lawful permanent residence and naturalization.<sup>314</sup> The existing USCIS structure provides for a non-confrontational interview with one officer. The individual produces affirmative evidence, and if the Government has contrary evidence

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312. See *supra* notes 54-56.

313. See, e.g., *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1991 (2004); *Scales v. INS*, 232 F.3d 1159 (2000); *id.* (The government initiated proceedings when the children were in their 20s and 30s, well after any state permits a paternity or parentage action to take place).

314. See generally U.S. Citizenship & Immig. Servs., <http://www.uscis.gov> (last visited Sept. 8, 2004) (listing services performed and how the applicants can send in the relevant forms for each type of relief).



or has concerns, the individual is given an opportunity to respond to factual or legal questions before a decision is rendered.<sup>315</sup> If the case is denied, the applicant has the right to an administrative appeal.<sup>316</sup> My proposal is to utilize the existing procedures for all derivative citizenship claims.

This proposal should also preclude a person's criminal record from being known to the officer adjudicating the administrative proceedings. Because the criminal record is irrelevant to whether the person's parents complied with all conditions to confer citizenship, the USCIS officer should be barred from learning about it. The question for the officer in adjudicating derivative citizenship claims is whether the facts and legal questions were resolved at the time of the person's birth (or before age eighteen if born to two parents who later naturalized). If so, the person is automatically deemed a citizen from the moment of birth. The officer's lack of knowledge about which crimes a person committed after birth is essential in removing the taint that a criminal conviction has in current immigration court proceedings.

In removal proceedings, a *prima facie* derivative citizenship claim can be made based on proof that one parent is currently a citizen and one parent was a citizen at the operative time of the relevant statutory provision.<sup>317</sup> Once this claim is asserted, removal proceedings should either terminate or be placed in abeyance until the findings of the administrative proceedings are completed. If the person establishes citizenship, the removal proceedings would be permanently closed. If the person fails to establish citizenship, he or she returns to removal proceedings for adjudications of any defenses that are available to aliens.

Precedent exists to support the removal of certain cases from the jurisdiction of immigration courts. When the post-1986 law changes were made to Section 1409, another provision in that law ended judicial proceedings for foreign-born children who were adopted by citizen parents. The parents wanted their adopted children to acquire citizenship as quickly as possible and initiated naturalization claims, which at the time, were exclusively handled by immigration courts. Senator Bill Bradley amended the existing procedures by terminating court proceedings and diverting all applications to

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315. See generally Submission And Adjudication Of Benefit Requests, 8 C.F.R. § 103.2(b) (2013); U.S. DEPT. OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIG. SERVS., INTEROFFICE MEMORANDUM (June 1, 2007), available at <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/June%202007/RFEFinalRule060107.pdf> (outlining the procedures for USCIS to request further evidence through a Notice to Request For Evidence or "RFE").

316. See generally Form I-290B, <http://www.uscis.gov/i-290b> (last visited Sept. 10, 2014), Form EOIR-29, <http://www.uscis.gov/eoir-29> (last visited Sept. 10, 2014), & Form I-694, <http://www.uscis.gov/i-694> (last visited Sept. 10, 2014) (These forms set forth the regulation, condition, and basis for any administrative appeals.)

317. Akin to the standards applicable to a motion to dismiss, I would propose that if an applicant can allege facts—that if proven true—would meet the requirements of the applicable statutory provision, then the *prima facie* threshold will be met. A hearing then would be required to discover if the alleged facts are indeed true and that the correct statutory provision applies to the case.

be handled administratively by what was then the Immigration and Nationalization Service.<sup>318</sup>

When introducing the changes, Senator Sen. Bradley explained that two forces inspired the reform. The first arose from the delay inherent in any judicial proceeding:

[A] number of New Jersey parents, who told [Senator Bradley] of delayed, anguishing proceedings they had faced when trying to adopt minor children. One such constituent received her baby in December 1981. She filed Application to File a Petition for Naturalization on Behalf of a Child (Form 02) in February 1983, had a preliminary hearing on April 18, 1984 . . . . In other words, her child has been in the United States for more than 4 years and is still not a citizen. Others have waited even longer.<sup>319</sup>

The second concern arose from what appeared to be unnecessary burdens of proof to which the children were subjected. As criticized by Sen. Bradley:

[I]t is beyond me what we hope to get from putting children and their parents through this process. It is clearly not to determine if an infant or a minor child is of 'good moral character' or adheres to the principles of the Constitution. Frequently these children are not even old enough to talk—at least when the process starts!<sup>320</sup>

Sen. Bradley's amendment ended judicial proceedings for adopted children under age sixteen and eliminated the requirements for a minor child to provide proof of good moral character and allegiance to the U.S. Constitution.<sup>321</sup> The amendment proposed that if the child was adopted before age sixteen and the parents were citizens, the child "will be granted a certificate of citizenship; through a simple administrative mechanism."<sup>322</sup> This bill became law.<sup>323</sup> No efforts to return these petitions to judicial proceedings have been made.

The proposed affirmative administrative proceedings for derivative citizenship claims mirror the 1986 reform implemented for adopted children. The proceedings would involve a person appearing before a USCIS officer who

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318. 132 CONG. REC. S17279 (daily ed. October 18, 1986) (statement of Sen. Bill Bradley).

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631. If adoption was finalized in a foreign country and if the child was issued an IR-3 visa, citizenship automatically confers as soon as the child legally enters the United States. If the adoption was not finalized, the child will then be issued an IR-4 visa, which requires the parents to adopt the child in the United States. When that occurs, citizenship automatically confers the day that the adoption is finalized in the United States.

has been trained to handle derivative citizenship claims. The proceedings would be informal, without a government attorney contesting the evidence, and adjudicated in a faster, less intimidating environment than the one offered by immigration courts. This reform would take away the adversity of existing proceedings and secure the release of detained people with prima facie derivative citizenship claims.<sup>324</sup> Moreover, this proceeding would have the evidentiary protections of excluding from consideration a person's criminal conviction and any information contesting a parent's paternity or maternity claim that the federal government had acquired decades earlier and elected not to pursue at that time. This reform then offers significant protections lacking in the current immigration court proceedings.

## 2. *Transfers To Federal Court*

A second proposal is to replace immigration courts with federal district courts as the forum in which derivative citizenship claims are adjudicated. Akin to the proposed administrative proceedings, once a person asserts a prima facie claim to derivative citizenship he or she will be entitled to have his or her derivative citizenship claim removed to a federal district court. The immigration proceedings can either be terminated without prejudice or placed in abeyance while the citizenship question is determined. The claimant should be released from ICE custody while pursuing her derivative citizenship claim.

Under the current system, if a person prevails in the federal appellate court, her claim is remanded to a U.S. district court and not an immigration court for continued proceedings.<sup>325</sup> This proposal builds upon this procedure by ensuring judicial review for all and expanding the jurisdiction to permit

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324. ICE has issued internal memoranda encouraging the release of any detained individual who is pursuing a derivative citizenship claim. In practice, ICE officers often interpret this memoranda to apply only to applicants who have prevailed in immigration court. As a result, applicants whose derivative claims are later granted by federal courts had been subjected to lengthy detentions in an ICE facility.

325. See, e.g., *Ayala-Villanueva v. Holder*, 572 F.3d 736, 740 (9th Cir. 2009) ("Based on the foregoing, we find that there is a genuine factual dispute concerning the identity of Ayala's father and that the resolution of this factual dispute will determine whether or not Ayala acquired derivative citizenship. Accordingly, we transfer the proceedings to the United States District Court for the District of Nevada 'for a new hearing on [his] nationality claim and a decision on that claim as if an action had been brought' for declaratory relief under 28 U.S.C. § 2201." (quoting 8 U.S.C. § 1252(b)(5)(B)) (internal citations omitted)). For derivative citizenship claims, Congress already has provided that federal appellate courts may decide legal questions but must remand factual questions to a federal district court:

Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in

federal courts to consider the entirety of a citizenship claim. In many federal appellate courts, federal district courts are the existing forums to adjudicate naturalization claims if the USCIS has not rendered a decision within 120 days from the interview,<sup>326</sup> to consider habeas petitions made at any time from a person claiming to be a citizen, if the person is outside of the country or in detention,<sup>327</sup> and to adjudicate derivative citizenship claims that have been remanded by federal appellate courts.<sup>328</sup> There, is however, a gap in these jurisdiction-conferring statutes. There is no means recognized in all federal circuits that permits an individual to have judicial review of a claim of citizenship in this country when out of detention.<sup>329</sup> This proposed reform

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which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

8 U.S.C. § 1252(b)(5).

326. 8 U.S.C. § 1447(b) has been held to confer exclusive jurisdiction to district courts if the USCIS does not adjudicate a citizenship application within 120 days. *See, e.g.*, *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2004) (en banc) (“Based on the text of § 1447(b), the context of related statutory provisions, and Congress’ policy objectives, we hold that the district court had exclusive jurisdiction over Appellees’ naturalization applications.”). *See also* *Bustamante v. Napolitano*, 582 F.3d 403, 408 (2d Cir. 2009); *Etape v. Chertoff*, 497 F.3d at 383 (4th Cir. 2007); *Popnikolovski v. U.S. Dep’t of Homeland Sec., Citizenship & Immigration Servs.*, 726 F. Supp. 2d 953, 957 (N.D. Ill. 2010).

327. *See Lewis v. McElroy*, 294 F. App’x 637, 640 (2d Cir. 2008) (“Lewis’s petition, which claims citizenship status, challenges ‘whether the petitioner is an alien.’ 8 U.S.C. 1252(e)(2)(A). As such, his claim is properly raised as a petition for habeas corpus, which is not converted to a petition for review even after the passage of the REAL ID Act. Thus, his petition remains a habeas petition. It is well-settled that *res judicata* has no application in the habeas corpus context.”) (internal quotation marks omitted) (citations omitted) (internal modifications omitted). In some circuits, the right to file a habeas petition has been extended to those who are inside the United States and detained. *See Flores-Torres v. Mukasey*, 548 F.3d 708, 713 (9th Cir. 2008) (“The government’s authority to detain Torres appears to depend on the question of whether he was legitimated by his father under El Salvadoran law. The district court is the appropriate forum to resolve such a claim. We hold that Torres does not have to wait until his removal proceedings are completed and a final removal order is issued before he can secure habeas review of his citizenship claim and of his contention that he may not be detained under the INA.”).

328. The REAL ID Act altered how these petitions are adjudicated. For those filed after the effective date of May 11, 2005, “Section 1252(b)(5) expressly provides for the courts of appeals to review claims of nationality asserted in the course of agency removal proceedings, and to resolve them unless they present disputed factual issues, in which case they should be remanded to a district court for resolution in the first instance. *See* 8 U.S.C. § 1252(b)(5)(A) and (B).” *Jordon v. Att’y Gen. of U.S.*, 424 F.3d 320, 326 (3d Cir. 2005). “Prior to the REAL ID Act, courts were divided over whether these provisions created the ‘exclusive’ means by which nationality claims at least initially make their way to the federal courts, and thus abrogated district courts’ jurisdiction over habeas petitions raising such claims.” *Id.* (citations omitted).

329. *See, e.g.*, *Rios-Valenzuela v. Dep’t of Homeland Sec.*, 506 F.3d 393, 401-02 (5th Cir. 2007) (In denying the petitioner’s request to assume jurisdiction over his derivative citizenship application, the Court observed the following: “The only basis upon which Rios asserts a due process right is that the Government has not recognized his citizenship; thus, to credit Rios’s argument is to find that a due process right inheres naturally in a claim to citizenship itself, which in some circumstances allows the courts to consider—and ultimately recognize—a claim to citizenship outside of the procedures established by Congress. The argument is not without intuitive force; but we decline the invitation to find such a right now . . . . Finally, by its plain terms and judicial interpretation, § 1503(a) does not limit the rights or privileges that trigger its applicability to N-600 applications alone; however, because the parties have neither briefed nor raised the issue, we express no view on how § 1503(a) fits within the full scheme of immigration statutes apart from the narrow facts of this case. Rios does not

allows the district courts to become the first forum to decide these issues without the lengthy delay and procedural problems that exist in the immigration courts.

One advantage of having district courts decide derivative citizenship claims is that the criminal conviction is not relevant to the proceeding and federal judges are accustomed to preventing such information from biasing their adjudications.

A second critical advantage is that federal courts have authority that immigration courts lack to police the actions of the DHS. “[T]he BIA has held that even though district courts may apply the doctrine of equitable estoppel against the INS—relief requested in this case—administrative judges may not.”<sup>330</sup> A person will be able to estop the federal government from relying on the old information contained in its files contesting paternity and maternity only if he or she is proceeding in federal court. The advantage of having the Federal Rules of Evidence cannot be overstated since “the rules of evidence are not applicable to immigration hearings.”<sup>331</sup> Instead, each immigration court is allowed to selectively apply the rules based on a sense of fundamental fairness,<sup>332</sup> which does not provide the same protections that is available under the faithful and consistent application of the Federal Rules of Evidence.

A third advantage is that federal courts are accustomed to confronting complex questions of state law. Their experience in learning new areas of law will better equip them to deal with the legitimacy concepts that are confounding immigration courts and the BIA. Most of all, federal courts have the advantage of not being invested in the outcome of its findings. Unlike the BIA or immigration courts, a federal district judge will not have to address removability issues, which will allow it to focus on the state law questions without the incentive to render findings that support an order of removal. For these reasons, the federal district courts offer superior protections than what is available under the current immigration proceedings.

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have an easy avenue by which he might bring his citizenship claim before the courts, but we do perceive avenues by which he might do so. Accordingly, we will not disturb the statutory scheme established by Congress.”).

330. *Chang v. United States*, 327 F.3d 911, 924 (9th Cir. 2003) (citing *Matter of Hernandez-Puente*, 20 I. & N. Dec. 335, 338-39, 1991 WL 353520 (BIA 1991)).

331. *Saidane v. I.N.S.*, 129 F.3d 1063, 1065 (9th Cir. 1997).

332. *See, e.g., Zeah v. Holder*, 744 F.3d 577, 581 (8th Cir. 2014) (“The traditional rules of evidence do not apply in immigration proceedings, except to the extent due process is implicated. Fairness rather than the rules of evidence govern the admissibility of evidence.”) (citations, internal quotation marks, internal modifications omitted); *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) (“The Federal Rules of Evidence do not apply in INS proceedings, but the less rigid constraints of due process impose outer limits based upon considerations of fairness and reliability.”).

### 3. *A Comparison Of The Proposed Forums*

When compared to one another, the administrative proceedings and federal district courts offer advantages and disadvantages. Administrative proceedings are likely easier and less intimidating for most pro se applicants to maneuver, they are not contested by an adverse government attorney, and the decisions could be rendered in a matter of months. The downside is that if the officer lacks expertise in state law and federal evidentiary rules, the same factual and legal errors occurring in immigration court will occur there. Federal courts have the protections of evidentiary rules, a means to police the conduct of the DHS, and the higher potential to master state law concepts. However, the rules and procedures are daunting for pro se litigants and attorneys not familiar with federal court practices and government attorneys may aggressively litigate the case (for example, seeking the subpoena power of a federal court to compel DNA testing). Also, no guarantee exists that the federal court will have more expertise in state law than an immigration court.

For this reason, I recommend that both avenues remain available to a litigant, and similar to the rights available to applicants presenting naturalization claims, an applicant should be able to elect in which forum he or she prefers to proceed. To borrow the model from 8 U.S.C. § 1447, an applicant may begin in administrative proceedings and request a district court hearing if a decision has not been rendered within 120 days. I would modify that provision by allowing an individual to appeal an adverse decision in federal district court instead of filing an administrative appeal with the USCIS, which takes the claim out of the jurisdiction of the BIA.

Despite both forums' shortfalls, both offer advantages to the existing immigration court adjudications. Of note, both forums proceed without a fact-finder being influenced by impermissible motivations to remove a criminal alien. This reform is one of the most important ones to ensure that potential citizens are receiving all of the process they are due. "The executive may deport certain aliens but has no authority to deport citizens. An assertion of U.S. citizenship is thus a denial of an essential jurisdictional fact in a deportation proceeding."<sup>333</sup> The problem with the existing immigration court structure is that immigration courts are failing to give the jurisdictional question its due in a rush to remove a criminal alien. As evident by the federal appellate cases that overturned erroneous immigration court decisions, the risk of a false negative occurs much too frequently under the current system. The structural problems found in the immigration court and BIA procedures call for systemic reforms. In the meantime, it is important that derivative citizenship claims are removed from this system entirely.

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333. *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2004) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)) (internal quotation marks omitted), *superseded by statute*, REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231(2005), *as recognized in* *Iasu v. Smith*, 511 F.3d 881 (9th Cir. 2007).

## CONCLUSION

The transmission of personal values from a parent to a child is similar to the ways in which a country transmits national values to the next generation of new citizens. It is not surprising then that, since the founding of the country, Congress has been reserving automatic citizenship for foreign-born children whose parents met minimal requirements of citizenship. The modern derivative citizenship scheme presumes that parents who meet certain residency and age requirements will have acquired a sufficient allegiance to the United States to ensure that their children will mirror that fidelity. In operation, the statute liberally confers citizenship to the foreign-born children of citizens.

For purposes of acquiring automatic citizenship, Congress has deferred to and imported state law definitions of the parent-child relationship. When state law is properly applied, Section 1409 will rarely be used because a legitimated child is not born out of wedlock, regardless of her parent's actual marital status at her birth. Because Congress has expressly conditioned citizenship on state-law determinations of legitimacy, immigration courts may not ignore or distort state law to reach a result-oriented decision. Even under the plenary powers doctrine, Congress may not devise policies that intrude upon the sacrosanct privacy rights of existing families. Conditioning derivative citizenship on proof of a biological tie between a natural parent and legitimated child violates these principles.

This article scrutinizes a frequent logical error—that parenthood is defined by biology—that is interfering with faithful applications of legitimacy statutes and proper adjudications of derivative citizenship. Regardless of whether the error is arising from ignorance of state law, an inadequate review system, or an overzealous desire to remove individuals with serious criminal convictions, current immigration courts have proven to be inadequate forums to evaluate the merits of derivative citizenship claims. This article thus proposes that derivative citizenship claims be exclusively decided by a trained administrative officer, a federal district court, or both. The protections are minimal, but will ensure that all claims to citizenship receive full and fair consideration.