EQUALITY, SOVEREIGNTY, AND THE FAMILY IN *MORALES-SANTANA*

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The statutes focus upon two of the most serious of human relationships, that of parent to child and that of individual to the State. They tie each to the other, transforming both while strengthening the bonds of loyalty that connect family with Nation.[1]

The nature of citizenship, like that of the state, is a question which is often disputed . . . .[2]

In *Sessions v. Morales-Santana*,[3] the Supreme Court encountered a body of citizenship law that has long relied on family membership in the construction of the nation's borders and the composition of the polity.[4] The particular statute at issue in the case regulates the transmission of citizenship from American parents to their foreign-born children at birth, a form of citizenship known today as derivative citizenship.[5] When those children are born outside marriage, the derivative citizenship statute makes it more difficult for American fathers, as compared with American mothers, to transmit citizenship to their foreign-born

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[1] Miller v. Albright, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting).

[2] ARISTOTLE, POLITICS bk. III, ch. 1, 1275a, at 93 (Ernest Barker trans., Oxford Univ. Press 1946).

[3] 137 S. Ct. 1678 (2017).

[4] *See* Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

[5] Immigration and Nationality Act of 1952, ch. 477, §§ 301, 309, 66 Stat. 163, 235–36, 238–39. Derivative citizenship is the modern American term for what was traditionally called *jus sanguinis* citizenship — citizenship "by blood." Because of the primary position of *jus soli* citizenship — citizenship by virtue of one's place of birth — in the common law and constitutional conceptions of American citizenship, *see* U.S. CONST. amend. XIV, § 1; United States v. Wong Kim Ark, 169 U.S. 649, 675–76 (1898), in American law *jus sanguinis* citizenship is limited to citizenship transmission from an American parent to his or her foreign-born child.

children.[6] Over the last twenty years, the Supreme Court has considered four gender equal protection challenges to that law.[7] As in previous cases, Luis Morales-Santana's constitutional challenge required the Justices to grapple with two crucial and contested issues: the extent to which constitutional gender equality principles govern regulation and recognition of family relationships, and the nature of the judiciary's role in the enforcement of the Constitution at the border. But in *Morales-Santana*, the Court did something it had never done before: in an opinion that develops a progressive vision of gender equality for the nonmarital family, it declared that a law governing the acquisition of citizenship violates equal protection principles.[8]

Morales-Santana may be an empty victory for the individual who came to the Court seeking justice and recognition, however, as the Justices made the unprecedented decision to remedy the equal protection violation by "leveling down": that is, rather than giving unmarried fathers and their children the benefit of the more generous standard in the citizenship statute, the Court nullified that standard for unmarried American mothers and their children.[9] The remedy ordered by the Court is not entirely clear, but it could very well leave Morales-Santana with no practical relief. In addition, it almost certainly makes some unmarried American mothers and their foreign-born children worse off.[10] How did Morales-Santana end up with a right but, quite possibly, no effective remedy?[11]

This Comment offers an answer to that question — one that accounts for *Morales-Santana*'s clear and forceful repudiation of a body of gender-based citizenship laws that have long shaped the composition of the American polity, its articulation of constitutional equality norms that have the potential to significantly shape how government officials regulate the family, and its unprecedented invalidation of a statute regulating acquisition of citizenship. The remedial choice made by the Court in *Morales-Santana* may be unusual, but this is by no means the first time that the Court has moderated its use of remedial authority while exercising — and entrenching — its power to say what the law is in a highly contentious regulatory domain.

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[6] For accuracy's sake, one should refer to the derivative citizenship statutes, plural, as different statutes apply depending on the date of the foreign-born child's birth. *See infra* note 12.

[7] *See Morales-Santana*, 137 S. Ct. at 1686; Flores-Villar v. United States, 564 U.S. 210 (2011) (mem.) (per curiam), *aff'g by an equally divided Court*, 536 F.3d 990 (9th Cir. 2008); Nguyen v. INS, 533 U.S. 53, 56–57 (2001); Miller v. Albright, 523 U.S. 420, 424–26 (1998) (Stevens, J.).

[8] *Morales-Santana*, 137 S. Ct. at 1697–98.

[9] *Id.* at 1700–01.

[10] *See infra* pp. 209–13.

[11] The constitutional right that Luis Morales-Santana asserted, and that the Court recognized, was that of his citizen father to equal protection of the laws. *Morales-Santana*, 137 S. Ct. at 1688.

The citizenship statute at issue in *Morales-Santana* is complex and messy. It contains multiple sections that differentiate between unmarried mothers and unmarried fathers. The particular section at issue in *Morales-Santana* governs the period of time that an American parent must have been present in the United States in order to transmit citizenship to his or her foreign-born child at birth. All American parents must satisfy a U.S. presence requirement of some sort, but the duration differs significantly based on sundry factors.[12] For an American father in a mixed-nationality couple — the situation in Morales-Santana's case — the statute requires that the father have been present in the United States for ten years prior to the child's birth, five of which must have been after the father turned fourteen.[13] An unmarried American mother in this situation need only have been present in the United States for one year at any point prior to the birth of her foreign-born child for that child to be a citizen at birth.[14]

These little-known provisions that differentiate between American mothers and fathers in the regulation of parent-child citizenship transmission are obscure and ungainly. But they are also deeply rooted in a complex body of laws and policies that have used family membership to delineate the nation's borders and constitute the nation's citizenry since the late eighteenth century.[15] As I show in Part I, well into the twentieth

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[12] Under all currently operative versions of the statute, a foreign-born child of two American parents is a citizen at birth as long as one of the parents "has had a residence in the United States or one of its outlying possessions prior to the [child's] birth." 8 U.S.C. § 1401(c) (2012); Immigration and Nationality Act of 1952, ch. 477, § 301(a)(3), 66 Stat. 163, 235. For a child born before 1986 to a married mixed-nationality couple, the American parent must have been present in the United States for ten years, at least five of which were after the parent turned fourteen. Immigration and Nationality Act of 1952 § 301(a)(7). In 1986, that requirement was reduced to five years, two of them after the American parent turned fourteen. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657. The foreign-born nonmarital child of an American father must satisfy a host of requirements, which differ depending on when the child was born. 8 U.S.C. §§ 1401(g), 1409(a); Immigration and Nationality Act of 1952 §§ 301(a)(7), 309(a). By contrast, the foreign-born child of an unmarried American mother is a citizen at birth as long as the child's mother was present in the United States for a year any time prior to the child's birth. 8 U.S.C. § 1409(c); Immigration and Nationality Act of 1952 § 309(c). Finally, and to complicate matters even further, the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended in scattered sections of 8 U.S.C.), provides automatic citizenship for a foreign-born child with at least one American parent if the child is under the age of eighteen and resides in the United States in the legal and physical custody of the citizen parent. *Id.* sec. 101(a), § 320(a).

[13] Immigration and Nationality Act of 1952 §§ 301(a)(7), 309(a).

[14] *Id.* § 309(c).

[15] Professor Rogers Brubaker's classic study of citizenship drew important attention to the fact that the nation is defined by its membership as much as by its territorial boundaries, and that membership rules governing citizenship deserve scholars' attention. *See* ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY, at xi (1992). For provocative discussions of the role of law in constructing national borders, see Mary L. Dudziak & Leti Volpp, *Introduction* to LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 1 (Mary L. Dudziak & Leti Volpp eds., 2006); and Judith Resnik, *Bordering by Law: The*

century, federal legislators and administrators relied on prevailing gender-based understandings of the parent-child relationship to determine a whole host of issues that arose in the implementation of those laws: which family members would be empowered to convey citizenship and immigration preferences, which families would be privileged, and which family relationships would be recognized.[16] The federal officials who crafted these gender-based membership and entry rules were also guided by ethno-racial conceptions of "Americanness" that coursed through American immigration and citizenship law more generally.[17] Recognizing how these two vectors — gender-traditional conceptions of the parent-child relationship and racial nativism — have shaped American immigration and citizenship law is essential to understanding the development of the obscure parental presence requirement at issue in *Morales-Santana*.

One might assume that gender-based citizenship laws — like so many other laws that openly allocated rights, benefits, and opportunities along gender lines — would have been declared unconstitutional in the era of modern constitutional equality. But the gender-differentiated regulation of derivative citizenship has proved largely resistant to constitutional challenge,[18] though many such challenges have been brought since the 1970s. *Morales-Santana* changes this. In a majority opinion by Justice Ruth Bader Ginsburg that is notable for its clear account of the gender-based stereotypes concerning parental roles that have shaped the derivative citizenship statute in its every detail, the Court declared the parental presence requirement unconstitutional: The gender-based provision at issue "cannot withstand inspection under a Constitution

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Migration of Law, Crimes, Sovereignty, and the Mail, *in* IMMIGRATION, EMIGRATION, AND MIGRATION (Jack Knight ed., 2017). For important discussions of the role of the family in immigration and citizenship law, see JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE (2014); MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965 (2005); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629 (2014); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440 (1998); and Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

16 *See infra* notes 48–61 and accompanying text.

17 *See* Collins, *supra* note 4, *passim*; *see also* GARDNER, *supra* note 15, at 121–56; Abrams, *supra* note 15; Cott, *supra* note 15; Volpp, *supra* note 15. Professor Isabel Medina contends that this pattern holds true even today. M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do with It?*, 28 GEO. IMMIGR. L.J. 391, 403–16 (2014).

18 The very few cases in which gender-based challenges have been successful have been decided by lower federal courts. *See infra* note 118.

that requires the Government to respect the equal dignity and stature of its male and female citizens."[19]

As I elaborate in Part II, *Morales-Santana* has the potential to alter the Constitution's role in the regulation of the family and the border in multiple ways. First, the Court develops a modernizing understanding of gender equality as between nonmarital mothers and fathers, and as between marital and nonmarital families. The specific question in this case was whether Congress can restrict derivative citizenship along gender-discriminatory lines that limit recognition of the father-child relationship outside marriage — lines that, in the modern era, have been disfavored, though not wholly repudiated, in the Court's equal protection jurisprudence.[20] In *Morales-Santana*, without so much as blinking, the Court held that it would approach "all gender-based classifications" with the same judicial skepticism.[21]

Luis Morales-Santana's constitutional challenge was the first case to have focused the Court's attention on the status of nonmarital family relationships since the Court recognized same-sex marriage as a constitutional right. Drawing on the Court's marriage equality jurisprudence — jurisprudence thought by many to reify the line between marital and nonmarital families[22] — *Morales-Santana* repudiates a set of laws and practices that denigrated women as citizens and provides a vision of equality that could have substantial implications for nontraditional families and parents in same-sex and opposite-sex relationships.

Second, and as important, the opinion marks the first time that modern equality principles of any sort have served as grounds for the Court to invalidate a statute governing the acquisition of citizenship.[23] This is not trivial. In the many constitutional challenges to the derivative citizenship statute brought in the last forty years, government lawyers have contended that under what is called the plenary power doctrine, for all persons born outside the United States, the line drawn by Congress between citizen and noncitizen is generated pursuant to the sovereign authority of the United States and is therefore "largely immune from judicial control."[24] Lower courts have generally agreed that Congress has enormous latitude to regulate derivative citizenship — even using gender-based distinctions.[25] Outside the courts, this understanding of largely unfettered political branch authority has shaped the

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[19] *Morales-Santana*, 137 S. Ct. at 1698.

[20] *See infra* p. 188.

[21] *Morales-Santana*, 137 S. Ct. at 1689 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)).

[22] *See infra* p. 200.

[23] *See infra* note 195.

[24] Brief for the Petitioner at 15, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)); *see also infra* notes 117, 200.

[25] *See infra* notes 118, 151 and accompanying text.

constitutional assumptions and working principles of federal officials who implement the derivative citizenship laws on a daily basis.[26]

By quietly rejecting the contention that federal judges should defer to Congress when it regulates parent-child citizenship transmission along constitutionally suspect lines, *Morales-Santana* constrains an operative understanding of the plenary power doctrine and calls into question a core principle that purportedly undergirds it: that sovereignty necessarily implies a limitation of judicial authority.[27] *Morales-Santana* does not repudiate the plenary power doctrine, but it contains it and raises important questions concerning the doctrine's future reach.

Judicial opinions assume meaning and significance over time,[28] however, and there is no way to predict how, or even whether, *Morales-Santana* will inform the development of constitutional equal protection law or the plenary power doctrine.[29] But understanding the issues raised by Luis Morales-Santana's quest for recognition as an American citizen helps to answer the obvious question that the Court's opinion raises: why recognize a constitutional right to gender equality, but order a remedy that may not have helped anyone as a practical matter and could very well harm some women?

The *Morales-Santana* Court took the unprecedented step of "leveling down" on an interim basis in order to remedy the equal protection violation. What does that mean? The Court's remedies jurisprudence has long held that there are two ways to remedy an equal protection violation: to "level up" by extending the benefit to the excluded class (here, American fathers of foreign-born nonmarital children) or to "level down" by nullifying that portion of the statute that had provided a benefit to another group (here, American mothers of foreign-born nonmarital children). Although the Court has described these two options as effectively equivalent, it had not previously leveled down as it did in *Morales-Santana*. The Court ordered that, on a prospective basis, the longer parental presence requirement in the derivative citizenship statute will apply to all foreign-born children of mixed-nationality couples, including the nonmarital children of American mothers.[30]

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[26] *See infra* notes 119–20 and accompanying text.

[27] *See infra* p. 205.

[28] *See* Sanford Levinson & Jack M. Balkin, *What Are the Facts of* Marbury v. Madison*?*, 20 CONST. COMMENT. 255, 280 (2003) ("Understanding what a case means often requires recognizing what happened after the decision was entered. . . . [T]he meaning of the case to later generations is produced by the later uses and interpretations of it, which continually reframe its meaning and significance in our eyes.").

[29] Justice Neil Gorsuch was confirmed several months after *Morales-Santana* was argued. He did not participate in the resolution of the case, *Morales-Santana*, 137 S. Ct. at 1701, but it seems unlikely that he would have joined Justice Ginsburg's majority opinion.

[30] *Id.* at 1701 ("In the interim, as the Government suggests, § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers.").

As I explain in Part III, the Court's remedy calls out for clarification. The remedy is also perplexing because, while the holding rejects the gender inequalities that have long coursed through American citizenship law, the remedy may leave the particular statute at issue undisturbed, and other illiberal forces that shaped the statute at its conception unexamined. The apparent disjunction between right and remedy in *Morales-Santana* suggests a Court that is intent on exercising its authority while recognizing that judicial interventions that breed controversy may over time undermine that authority. Although there is much that is modern and progressive about *Morales-Santana*, the Court's remedy thus reflects an institutional awareness that is almost as old as the Court itself.[31]

I. FAMILY AND NATION

Luis Morales-Santana was born in the Dominican Republic in 1962.[32] Morales-Santana's American father, José Morales, traveled to the Dominican Republic from Puerto Rico when he was almost nineteen to work for an American sugar company.[33] Morales-Santana's mother was Dominican, and his parents were not married at the time of his birth.[34] About seven years later his parents wed, and roughly six years after that the family moved to the United States,[35] where Morales-Santana has lived ever since.[36]

In 1995 Morales-Santana was convicted of burglary and attempted murder.[37] During his deportation hearing at Fishkill Correctional Facility in 2001, he contested his deportability on the grounds that, as "the son of an American citizen,"[38] he too was a citizen. The immigration judge rejected Morales-Santana's claim to citizenship, incorrectly

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[31] *See, e.g.*, Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)*; see also infra* notes 234, 236.

[32] *Morales-Santana*, 137 S. Ct. at 1688.

[33] *Id.* at 1687; Motion for Reconsideration at 4–5, *In re* Morales-Santana, No. A034 200 190 (B.I.A. Jan. 5, 2006); Letter from Sally Schwartz, Processing Archivist, Old Civil & Military Records, Nat'l Archives & Records Admin., to Luis Morales (June 15, 2010), *in* Certified Administrative Record at 66, Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015) (No. 11-1252). José Morales became a citizen in 1917 under the Jones-Shafroth Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 48 U.S.C. § 733a (2012)). *Morales-Santana*, 137 S. Ct. at 1687.

[34] *Morales-Santana*, 137 S. Ct. at 1688.

[35] *Id.*

[36] *See* Certified Administrative Record Exhibit 2, *Morales-Santana*, 804 F.3d 520 (2d Cir. 2015) (No. 11-1252) (Immigrant Visa and Alien Registration form); Petition to Reopen Removal Proceedings app. A, at 3, *In re* Morales-Santana, No. A034 200 190 (B.I.A. Mar. 3, 2011) (supporting affidavit).

[37] Brief for the Petitioner at 7, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191).

[38] Transcript of Hearing at 19, *In re* Morales-Santana, A34-200-190 (Fishkill Immigration Ct. Jan. 11, 2001). For the sake of consistency, I use the older term "deportation" throughout this

stating that "[b]oth [parents] have to be citizens."[39] But there was a different problem with Morales-Santana's claim to citizenship under the Immigration and Nationality Act of 1952.[40] When José left Puerto Rico for the Dominican Republic, then occupied by the United States, he was twenty days shy of satisfying the ten-year age-calibrated parental presence requirement in the derivative citizenship statute — a requirement that applied to unmarried fathers, but not to unmarried mothers.[41] Unmarried American mothers needed only to have been present in the United States for one year prior to the birth of a foreign-born child for that child to acquire American citizenship at birth.[42]

How did the drafters of that statute arrive at these particular requirements? The answer to this question is important, first, because the judicial project of resolving an equal protection challenge requires the judge to evaluate why the government enlisted gender-based criteria, and to ensure that gender classifications are not used to denigrate "members of either sex" or to impose "artificial constraints" on their opportunities.[43] Second, the historical sources help to explain why the gender-discriminatory provisions at issue in *Morales-Santana* have remained durable fixtures in American citizenship law despite dramatic changes in understandings of gender equality, citizenship, and immigration. Third, those sources reveal a deep historical irony. The ten-year parental presence requirement that stood between Luis Morales-Santana and American citizenship — and that, given the Court's remedy, likely still stands — originated as a response to first-wave feminists' efforts to secure "equal citizenship." That response was partly animated by the gendered and racialized understandings of "Americanness" that informed virtually every corner of American citizenship and immigration law in the late nineteenth and early twentieth centuries.

A. Derivative Citizenship in the Shadow of Exclusion

"History reveals what lurks behind" the derivative citizenship statute, explained Justice Ginsburg in *Morales-Santana*.[44] Her historical

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Comment, which is more familiar to nonspecialists than "removal," the term used in modern immigration statutes.

[39] *Id.*

[40] Ch. 477, §§ 301(a)(7), 309(a), (c), 66 Stat. 163, 236, 238–39.

[41] *Morales-Santana*, 137 S. Ct. at 1686.

[42] *Id.*

[43] United States v. Virginia, 518 U.S. 515, 533 (1996); *see also id.* ("'Inherent differences' between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (acknowledging the "Nation['s] . . . long and unfortunate history of sex discrimination"); Deborah A. Widiss, Note, *Re-viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237 (1998).

[44] *Morales-Santana*, 137 S. Ct. at 1690.

account of that statute is framed by concerns highlighted in the Court's gender equal protection jurisprudence — a jurisprudence she was instrumental in developing in the 1970s in a series of Supreme Court cases she argued as head of the ACLU's Women's Rights Project.[45] Building on that case law, Justice Ginsburg's opinion in *Morales-Santana* examines how the derivative citizenship statute reflects and reinforces stereotypical assumptions about men's and women's roles as parents, both in and outside of marriage. American citizenship law was shaped by the "once entrenched principle of male dominance in marriage, [under which] the husband controlled both wife and child,"[46] she explained, and by the understanding that outside of marriage the "unwed mother [was] the natural and sole guardian of a nonmarital child."[47]

It is difficult to overstate the extent to which these gendered understandings of family governance and recognition once shaped American immigration and citizenship law. Prior to 1934, the text of the derivative citizenship statute recognized only the foreign-born children of American fathers as citizens,[48] thus using the patrilineal norms that had long characterized domestic relations law[49] to regulate membership in the American polity. But those patrilineal norms operated only within the marital family. The derivative citizenship statute said nothing about children born outside marriage.[50] Administrators thus were required to develop guidelines governing the status of foreign-born children of unmarried American parents. When the unmarried American parent was the mother, administrators recognized the child as a citizen, even though the statute recognized only father-child citizenship transmission.[51] In a similar act of interpretive discretion, administrators declined to recognize the nonmarital children of American fathers as citizens — despite the fact that the statute said nothing about the marital status of the father[52] — unless the child was formally "legitimated,"[53] a process that

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[45] *See* FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 31–76 (2009); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2325–27 (2016).

[46] *Morales-Santana*, 137 S. Ct. at 1691.

[47] *Id.*

[48] *See, e.g.*, Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

[49] *See generally* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985).

[50] *See* Act of May 24, 1934, ch. 344, sec. 1, § 1993, 48 Stat. 797, 797; Act of Feb. 10, 1855 § 1; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103–04.

[51] H. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., A REPORT PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, PART 1: PROPOSED CODE WITH EXPLANATORY COMMENTS 18 (Comm. Print 1939) [hereinafter PROPOSED CODE]; *see* Collins, *supra* note 4, at 2199–200.

[52] Act of Feb. 10, 1855 § 1.

[53] Citizenship — Children Born Abroad Out of Wedlock of American Fathers and Alien Mothers, 32 Op. Att'y Gen. 162, 164–65 (1920).

generally required the father to marry the mother.[54] In short, gender-based assumptions regarding parental roles in and outside of marriage coursed through the derivative citizenship statute, both as it was written and as it was implemented.

These assumptions did not manifest themselves in an abstract manner. They divided some families by nationality and helped to constitute others. They allowed some people to cross national borders and settle together in the United States while barring others from doing so. Thus, when the Court in *Morales-Santana* held that the "disparate [gender-based] criteria" in a modern citizenship statute could not survive "under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens,"[55] it articulated a constitutional prohibition on an approach to citizenship that, in one form or another, has shaped the nation's citizenry for two centuries.[56]

That deeply gendered approach to parent-child citizenship transmission was just one part of a complex set of family-based laws that structured entry and political membership along familiar patrilineal lines. Family membership served as both gate and gateway across virtually all areas of immigration and naturalization law and policy. Well into the twentieth century, children of naturalizing fathers were automatically naturalized, but the same was not true of children of naturalizing mothers until 1934.[57] Starting in 1855, a foreign woman who married an American man was automatically naturalized by that marriage, assuming she herself was eligible to naturalize.[58] After the federal gov-

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[54] *See* Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727, 1749–50 (2017).

[55] *Morales-Santana*, 137 S. Ct. at 1698.

[56] Until *Morales-Santana*, the Court had not repudiated *Mackenzie v. Hare*, 239 U.S. 299 (1915), a case in which the Court upheld the constitutionality of the marital expatriation of American women. *See also infra* note 60 and accompanying text.

[57] *See* Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103–04; *see also* Act of Mar. 2, 1907, ch. 2534, § 5, 34 Stat. 1228, 1229 (providing for automatic naturalization of a minor child with a naturalizing "parent"). The 1907 statute was normally interpreted to allow for naturalization through the father only. *See, e.g.*, Citizenship of R. Bryan Owen, 36 Op. Att'y Gen. 197, 200 (1929) ("The last-mentioned authorities plainly negative the idea that minor children acquire a citizenship status by reason of the naturalization of the mother during the lifetime of the father and while the family is living together, and I am aware of no instance where a court has so held."). In 1934, Congress amended the 1907 statute, substituting "father or mother" for "parent." Act of May 24, 1934, ch. 344, sec. 1, § 1993, 48 Stat. 797, 797; *see* Anna Williams Shavers, *Crossing the Border Through Immigration, Importation, Illicit and Other Means and the Implications for Human and Civil Rights*, 27 J. C.R. & ECON. DEV. 501, 522 n.144 (2014).

[58] *See* Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604; Kelly v. Owen, 74 U.S. (7 Wall.) 496, 498 (1868) (observing that only "free white women" were naturalized upon marriage to an American man). This practice lasted until 1922, when the Cable Act, ch. 411, 42 Stat. 1021 (1922), ended the automatic naturalization of foreign wives of citizen husbands but continued to provide for those wives' expedited naturalization. *Id.* § 2. For the authoritative history of this Act, see CANDICE

ernment imposed national-origins quotas on immigration, certain immigrant husbands' family dependents were given exemptions or preferences, thus enabling the family to migrate and settle together.[59] The citizenship of married American women was also compromised by the drive to ensure "family unity" in American nationality law. In the early twentieth century, an American woman who married a noncitizen was automatically denaturalized, a practice known as marital expatriation.[60] A single principle united all of these statutes and policies: the abiding belief that the husband-father determined the national character and political allegiance of his wife and children.[61]

It was this collective body of laws that, after the Nineteenth Amendment was ratified, women's organizations sought to change, pressing for "equal citizenship."[62] But they did not campaign for women's equality in a vacuum. Rather, women seeking equal citizenship in the 1920s and 1930s entered an ongoing and explosive debate over the relationship of family and nation in which the racial composition of the polity was a central concern. This debate shaped the statutory reforms that early twentieth-century feminists achieved,[63] including reforms to the derivative citizenship statute, and, in particular, the development of the ten-year parental presence requirement that Luis Morales-Santana encountered in his deportation hearing in 2001.

The fact that American immigration and citizenship laws openly discriminated on the basis of race is well known. Less familiar are the ways that ethno-racial limitations on entry and political membership were intertwined with gendered rules governing family-based immigration and citizenship. Racial and national-origins restrictions were standard in American citizenship and immigration law until 1965.[64]

LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 19–44 (1998).

59 Immigration Act of 1924, ch. 190, §§ 4(c)–(d), 6(a)(2), 43 Stat. 153, 155.

60 *See* Act of Mar. 2, 1907 § 3; Pequignot v. City of Detroit, 16 F. 211, 213–17 (C.C.E.D. Mich. 1883).

61 *See* BREDBENNER, *supra* note 58, at 19–44; Cott, *supra* note 15, at 1455–58; *see also infra* note 88 and accompanying text.

62 *See generally* BREDBENNER, *supra* note 58, *passim*.

63 For example, when women successfully secured passage of the Cable Act, which ended marital expatriation for some women, that reform was initially subject to the race-salient condition that an American woman who married a man who was "ineligible to citizenship" — a category that included all Asian men — would continue to be denationalized. Cable Act, ch. 411, § 3, 42 Stat. 1021, 1022 (1922).

64 Race-based immigration and naturalization laws and race-salient national-origins quotas were gradually repealed starting in the 1940s and were finally repudiated by Congress in the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), and in the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

The very first naturalization statute, enacted in 1790, limited naturalization to "free white" people,[65] a category that was expanded to include individuals of African descent in 1870.[66] From the 1880s to the middle of the twentieth century, exclusionary immigration laws denominated Chinese people — and, by 1917, all people from the "Asiatic Barred Zone" — as "ineligible to citizenship"[67] and thus, with some exceptions, unable to enter the country. Quotas based on national origin, calibrated in part to limit the arrival of Jewish and Catholic immigrants, were imposed in 1924 as part of a broader effort to control the ethno-racial composition of the polity.[68] Although federal courts sometimes checked discrimination against the Chinese at the state and local levels — most famously in *Yick Wo v. Hopkins*[69] — the Supreme Court upheld the race-based exclusionary laws. In an 1889 case that continues to be cited as *The Chinese Exclusion Case*, the Court declared that "[t]he power of exclusion of foreigners [is] an incident of sovereignty," and that therefore questions arising from the exercise of that sovereignty "are not . . . for judicial determination."[70]

What do these nineteenth- and early twentieth-century ethno-racial limitations on immigration have to do with the development of the derivative citizenship statute? Efforts to exclude those deemed racially undesirable from the United States were not limited to immigration laws. Proponents of race-based exclusion attempted to prevent ethnic Chinese people from acquiring citizenship by any means: *jus soli* birthright citizenship (based on birth within the United States),[71] naturalization, and derivative citizenship. Their efforts to exclude American-born individuals of Chinese descent through a restrictive interpretation of the Citizenship Clause of the Fourteenth Amendment are well known,

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[65] Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103.

[66] Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.

[67] "Asiatic Barred Zone" was the term used to describe the geographical region identified in the Immigration Act of 1917, ch. 29, 39 Stat. 874. It included most of Asia and the Pacific Islands. *See* Jack Wasserman, *Reflections on the Constitutionality of the Immigration and Nationality Act*, 1 IMMIGR. & NAT'LITY L. REV. 51, 54 & n.22 (1977). Individuals from that region were barred from entering the United States unless they fell into a statutory exception. Immigration Act of 1917 § 3; *see also* Geary Act, ch. 60, 27 Stat. 25 (1892); Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58.

[68] Immigration Act of 1924, ch. 190, 43 Stat. 153; *see, e.g.*, 70 Cong. Rec. 3526 (1929) (statement of Rep. O'Connor) (observing that the 1924 national-origins quotas had been intended to exclude "principally two peoples, the Italians and the Jews"); *see also* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 73 (1999) (describing how the quota system was used to restrict immigration from southern and eastern Europe).

[69] 118 U.S. 356 (1886).

[70] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

[71] *See* U.S. CONST. amend. XIV, § 1.

as they were rejected by the Supreme Court in the canonical *United States v. Wong Kim Ark*.[72]

Exclusionists' efforts to restrict derivative citizenship for foreign-born ethnic Chinese children are more obscure, but those efforts were partly responsive to the Court's decision in *Wong Kim Ark*. Once the debate over the citizenship status of American-born ethnic Chinese people was settled in that decision, an American-born ethnic Chinese father could claim citizenship for his foreign-born children under the derivative citizenship statute.[73] Owing to various factors, including restrictions on Chinese immigration, trans-Pacific family formation was not unusual, and children born to Chinese American fathers in China claimed citizenship under the derivative citizenship statute.[74] In the early twentieth century, a combination of xenophobic zeal and concern about fraud led immigration officials to limit recognition of these claims as much as possible. They crafted special requirements for ethnic Chinese children's derivative citizenship claims and imposed procedural hurdles that made it nearly impossible for ethnic Chinese children to prove their claims.[75] These efforts met some resistance in the Supreme Court. For example, in *Ng Fung Ho v. White*,[76] Justice Louis Brandeis

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[72] 169 U.S. 649, 693–94 (1898). *Wong Kim Ark* was a test case brought by pro-exclusion immigration officials who sought to establish that American-born ethnic Chinese people were not American citizens and hence could be denied entry into the country pursuant to the Chinese exclusion laws. *See* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, at 103–06 (2003); Lucy E. Salyer, Wong Kim Ark*: The Contest over Birthright Citizenship*, *in* IMMIGRATION STORIES 51, 65–69 (David A. Martin & Peter H. Schuck eds., 2005). Although properly understood as a case about the government's authority to limit citizenship acquisition under the Citizenship Clause using racial limitations, *Wong Kim Ark* was also about the role of the parent-child relationship in the interpretation of that clause. Exclusionists attempted to use the American-born ethnic Chinese child's relationship with his or her Chinese immigrant father as evidence of the child's allegiance to China, and thus status as an excludable alien "ineligible to citizenship" under the Chinese exclusion laws. *See, e.g.*, George D. Collins, *Are Persons Born in the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 833–34, 838 (1884). In *Wong Kim Ark*, the government argued that the Citizenship Clause, which secures citizenship for all persons born in the United States and "subject to the jurisdiction thereof," was properly understood to incorporate *jus sanguinis* principles — hereditary citizenship — and hence did not extend to children of immigrant parents born in the United States. Brief on Behalf of Appellant at 22–23, *Wong Kim Ark*, 169 U.S. 649 (No. 904). But in *Wong Kim Ark*, the Court rejected that effort to incorporate *jus sanguini*s principles as a limit on the Clause's operation. *Wong Kim Ark*, 169 U.S. at 675–94.

[73] *Wong Kim Ark* thus literally created a second-generation problem for immigration officials and exclusionists. *Cf.* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1249–53 (2016).

[74] In addition to restrictions on the immigration of Chinese women, antimiscegenation laws in many Western states prevented Chinese American men from marrying white women. *See* Sucheng Chan, *The Exclusion of Chinese Women, 1870–1943*, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943, at 94, 125–29 (Sucheng Chan ed., 1991).

[75] LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 210–11 (1995); Collins, *supra* note 4, at 2175–80.

[76] 259 U.S. 276 (1922).

attempted to rein in the deportation of Chinese American citizens, reasoning that "[t]o deport one who so claims to be a citizen, obviously deprives him of liberty . . . [and] may result also in loss of both property and life; or of all that makes life worth living."[77] But immigration officials continued to restrict acquisition of citizenship by foreign-born children of Chinese American fathers. As a doctoral student at the University of Chicago observed in 1940, "[t]he question of [derivative] citizenship, as it exists in Chinese cases, rarely became the problem of any other nationality."[78]

In the 1920s and 1930s, when American women voiced their claim to equal citizenship — and specifically their right to transmit citizenship to their foreign-born children — they did so against the backdrop of an entrenched system of immigration and citizenship laws and policies that were intended to limit citizenship acquisition to those who conformed with prevailing ethno-racial conceptions of "Americanness."[79] In part because of concerns about extending citizenship to individuals who did not conform to those conceptions, American women's quest for equality in the regulation of nationality unfolded in stages. For example, with the passage of the Cable Act[80] in 1922, the practice of marital expatriation was ended for all women except those who married a noncitizen "ineligible to citizenship"[81] — a term of art that included all noncitizen husbands who were racially barred from acquiring citizenship.[82] In 1931, Congress eliminated that race-based marital expatriation provision in the Cable Act,[83] but married American women still did not have the right to transmit citizenship to their foreign-born children.

At a time when race discrimination at the border was neither unconstitutional nor otherwise verboten, and gender discrimination was a routine feature of American law and social practice, legislators and administrators were open about the problems they thought such a right would

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[77] *Id.* at 284.

[78] Wen-Hsien Chen, Chinese Under Both Exclusion and Immigration Laws 284 (June 1940) (unpublished Ph.D. dissertation, University of Chicago) (on file with the Harvard Law School Library).

[79] On this general characterization of immigration and citizenship laws of this period, see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 7–9 (2014); SMITH, *supra* note 15, at 446–48; DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 146–49 (2002); and ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 223–37, 258–64 (2006).

[80] Ch. 411, 42 Stat. 1021 (1922).

[81] *Id.* § 3.

[82] S*ee supra* note 63.

[83] Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1511–12; s*ee also* Volpp, *supra* note 15, at 443–46.

create.[84] For example, in debates over legislation to allow American women to secure citizenship for their foreign-born children, legislators asked a woman testifying in favor of the bill how she would feel if her daughter had to sit next to Chinese and Japanese boys at school.[85]

After feminist organizations successfully secured the right of married women to transmit citizenship to their foreign-born children in 1934, administrators continued to worry about how that shift would increase claims to derivative citizenship and instances of dual citizenship, especially for the wrong sorts of children. Prior to the expansion of derivative citizenship to include children of married American mothers, the statute had contained only a de minimis paternal residence requirement.[86] But after 1934, administrators drafted legislation requiring the American parent to have resided in the United States for ten years in order for citizenship to be transmitted to most foreign-born children born to mixed-nationality couples.[87] It was thought that a significantly longer U.S. parental presence requirement would help prevent acquisition of citizenship by children whose national character had been shaped by a foreign husband-father, as was presumed would be the case under traditional patrilineal theories of how family relationships shaped national identity and character.[88] It was also thought that the ten-year parental presence requirement would help significantly reduce the number of people of Chinese and Mexican descent claiming citizenship under the derivative citizenship statute.[89] Congress enacted the ten-year parental presence requirement as part of the Nationality Act of 1940.[90]

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[84] By the 1930s, although the race-based immigration and naturalization laws were still in full force, several vocal legislators objected to a proviso to a bill that would have explicitly limited derivative citizenship along racial lines. *See* 78 CONG. REC. 7330 (1934) (statement of Rep. Dickstein) (introducing a proviso that would have eliminated parent-child citizenship transmission when the alien parent was "ineligible to citizenship"); *id.* at 7342 (statement of Rep. Martin) (urging that the racial restriction "has no place in a bill, the ostensible purpose of which is to equalize the rights of fathers and mothers"). However, legislators of that era did not object to facially race-neutral requirements that would achieve similar ends.

[85] *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization*, 73d Cong. 37 (1933) (statement of Rep. Kramer).

[86] *See, e.g.*, Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

[87] *See* PROPOSED CODE, *supra* note 51, at 13–14.

[88] *See id.*; Collins, *supra* note 4, at 2205–06.

[89] *See To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 40–41 (1940) (statement of Richard W. Flournoy, Assistant Legal Adviser, Department of State); *id.* at 42 (statement of Rep. Poage); Collins, *supra* note 4, at 2195.

[90] Ch. 876, § 201(g), 54 Stat. 1137, 1139. Special exceptions for American "heads of household" — that is, husband-fathers — minimized limitation of established patrilineal practices. For example, the drafters of the 1940 Act worried that "these residence requirements will impose great hardship in some cases" where the "head of the family" worked abroad for the American government or an American enterprise of some sort. *See* PROPOSED CODE, *supra* note 51, at vi. They

In short, by the 1940s, American women had secured some measure of "equal citizenship," but their success had a price. As women secured greater citizenship rights, administrators and legislators responded by restricting derivative citizenship in other ways — including the development of the ten-year parental presence requirement at issue in *Morales-Santana*.

In addition to campaigning for equal citizenship for married American women, feminists pressed for gender equality as between mothers and fathers of nonmarital children. But they were less successful in that endeavor. Until 1940, no family-based citizenship or immigration statute had explicitly addressed the status of nonmarital children. So judges and officials who implemented and interpreted the nationality laws did what they routinely do when confronted with a case that falls outside the statute: they engaged in a process of interpretation and gap filling to generate precedent and guidelines. This process resulted in a different gender asymmetry than had prevailed in the regulation of derivative citizenship in the marital family. Administrators recognized the relationship of the mother and her nonmarital child for citizenship transmission,[91] largely on the grounds that "much distress and possible criticism would result if [they] enforced separations of mothers and children."[92] With respect to the nonmarital children of American fathers, however, the social and legal norms pushed in the other direction. Administrators refused recognition of those children's citizenship claims unless the child had been fully "legitimated" — a process that generally required the father to marry the child's mother.[93]

In the 1930s, feminists presented bills that would recognize all foreign-born children of an American parent — mother or father, married or unmarried — as citizens, while acknowledging that procedures to prevent fraud would need to be put in place.[94] But administrators and

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therefore proposed a special statutory exception to the 1940 Act's *child* U.S. residence requirement when the citizen parent was the "head of the family" — a legal term of art that, in this period, referred to the husband-father. *See id.*; *see also* Nationality Act of 1940 § 201(g).

[91] PROPOSED CODE, *supra* note 51, at 18.

[92] Letter from I.F. Wixon, Acting Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Sept. 21, 1929) (on file with the Harvard Law School Library); *see also* Collins, *supra* note 4, at 2201–05.

[93] Collins, *supra* note 4, at 2175–80. At a time when interracial marriage was legally forbidden in many states and was generally culturally taboo, this requirement was itself race salient, as the nonmarital children of mixed-race unions could not be legitimated. As I have chronicled at length elsewhere, the race salience of the limits on father-child citizenship transmission outside marriage were understood by early twentieth-century citizenship experts and administrators as part of the standard operation of these laws. *See* Collins, *supra* note 4, *passim*.

[94] *Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the H. Comm. on Immigration and Naturalization*, 72d Cong. 2–9 (1932) [hereinafter *Relating to Naturalization H.R. 5489*] (statements of Burnita Shelton

legislators balked — and not because the status of nonmarital children in American citizenship law was a trivial matter. It was, in fact, a subject of great concern, confusion, and disagreement among administrators.[95] Rather, they balked at feminists' proposals in part because gender equality in the regulation of the rights of nonmarital mothers and fathers ran contrary to these administrators' and legislators' fundamental understanding of family governance and parental roles outside of marriage.[96]

So when Congress finally addressed the status of nonmarital children in the derivative citizenship provision of the Nationality Act of 1940, it limited recognition to the "legitimated" children of American fathers — generally, children who had been brought into the marital family — and required those fathers to satisfy the new ten-year parental presence requirement imposed on American parents in mixed-nationality marriages.[97] By contrast, the foreign-born nonmarital children of American mothers were automatically recognized as citizens as long as the mother "had previously resided in the United States."[98] These provisions were recodified in 1952, with only a single relevant change: Congress increased the parental presence requirement for unmarried mothers to one year.[99] This is the 1952 version of the derivative citizenship statute that governs Luis Morales-Santana's citizenship.

This historical account of the derivative citizenship statute supports three broader observations. First, during a formative period in the development of the derivative citizenship statute, the gender-based regulation of parent-child citizenship transmission was deeply entrenched in American law and practice. Well into the twentieth century, nearly every method of citizenship acquisition and path to immigration was shaped, at least in part, by gender-based family membership rules (the most evident exception being *jus soli* birthright citizenship, secured by the Constitution for individuals born in the United States).

Second, and related, the gender-based regulation of citizenship and immigration had distinctive implications for the rights and status of American parents and their foreign-born children. The gender-based

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Matthews, National Woman's Party); *id.* at 14–18 (statement of Laura M. Berrien, Chair, Committee on International Relations, National Association of Women Lawyers); *see also* H.R. 3673, 73d Cong. (1934); H.R. 5489, 72d Cong. (1931).

95 *See, e.g.*, Memorandum from Green Hackworth, Office of the Solicitor, U.S. Dep't of State, to Richard Flournoy, Office of the Solicitor, U.S. Dep't of State 5 (Aug. 14, 1928) (on file with the Harvard Law School Library).

96 *See, e.g.*, *Relating to Naturalization H.R. 5489*, *supra* note 94, at 5 (statement of Rep. Jenkins) ("The child can not inherit. It would not do, if he could. You are trying to undo what practically all of the big States in the country have held to be the proper procedure (to give to this child consideration) . . . .").

97 Nationality Act of 1940, ch. 876, §§ 201(g), 205, 54 Stat. 1137, 1139–40.

98 *Id.* § 205.

99 *See* Immigration and Nationality Act of 1952, ch. 477, § 309(c), 66 Stat. 163, 238–39.

regulation of nationality compromised not only married American women's stature and dignity but also their political rights, including the right to vote in some states.[100] By contrast, married American men were privileged by the operation of the citizenship laws in multiple ways. For the foreign-born nonmarital children of American fathers, however, the law governing derivative citizenship generally prevented transmission of citizenship altogether. And if the American father's nonmarital child was subject to a race-based exclusion law, he or she was simply prohibited from entering the country. Early twentieth-century feminists were able to bring about some reforms to these laws. But the resistance they confronted was significant and was informed by hard-wired patrilineal thought and ethno-racial nativism that left a lasting imprint on the derivative citizenship statute.

Third, as should now be evident, citizenship was not a stable legal category. The metes and bounds of derivative citizenship were shaped by debates over what constitutes a family and how and when family membership can serve as a proxy for "Americanness." Moreover, what was at stake in these debates mattered to how the derivative citizenship law developed over time. Quite often in the formative period of the derivative citizenship statute, these debates did not occur in the course of abstract deliberations over how family relationships should serve as a basis for citizenship, with the rights, privileges, and status that concept connotes. Instead, they occurred in a setting in which parallel questions concerning the racial and cultural characteristics of who could enter the country and who could be deported were front and center. As a result, the tendency among late nineteenth- and early twentieth-century immigration officials and legislators was to restrict derivative citizenship to the extent they thought practicable. The ten-year age-calibrated parental presence requirement was one device developed in the course of that effort.

B. Gender Equality in the Shadow of the Plenary Power Doctrine

Soon after the Immigration and Nationality Act of 1952 was enacted, the civil rights movement took center stage in American political life, and the Supreme Court assumed a central role in the development of constitutional equality principles. In the 1970s, under the leadership of then-attorney Ruth Bader Ginsburg, many of the gender distinctions that coursed through American law were invalidated under the Equal Protection Clause, and the concept of gender equality in the home and the workplace gained wider acceptance, both socially and legally.[101] But

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[100] *See* BREDBENNER, *supra* note 58, at 4–6.

[101] *See* LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974–1980, at 63–71 (2010). On Ruth Bader Ginsburg's career as a litigator with the ACLU's Women's Rights Project, see STREBEIGH, *supra* note 45, at 46.

until the Court decided *Morales-Santana*, discrimination between unmarried mothers and fathers in American citizenship law proved resistant to constitutional challenge. Although there are surely many reasons why this was so, any explanation must account for the plenary power doctrine and the Court's gender equal protection jurisprudence concerning the status and rights of unmarried fathers. In this section I provide an overview of three Supreme Court cases — *Fiallo v. Bell*,[102] *Miller v. Albright*,[103] and *Nguyen v. INS*[104] — to illuminate the modern forms of legal resistance to recognition of the nonmarital father-child relationship at the border.

In *Fiallo v. Bell*, decided in 1977, three groups of fathers and children challenged the Immigration and Naturalization Service's refusal to recognize the father-child relationship for immigration purposes if the father had not formally "legitimated" his nonmarital child — a process that in most instances continued to require marriage of the parents.[105] By the time *Fiallo* was decided, the Court had repudiated some of the limits on recognition of the relationship of a father and his nonmarital child — limits that were standard in the common law and had been incorporated into modern policies regulating the family. In *Stanley v. Illinois*,[106] for example, a breakthrough case decided in 1972, the Court announced that the relationship between a father and the nonmarital child he had "sired and raised" was constitutionally protected under both due process and equal protection principles.[107] The Court also determined that some legitimation requirements in state law similar to the one in the immigration statute challenged in *Fiallo* were unconstitutional because they created insurmountable barriers to the establishment of a legal father-child relationship.[108]

But in *Fiallo* the Court rejected the plaintiffs' equal protection claims.[109] The precise basis for the Court's holding is difficult to discern. On the one hand, the Court refused to consider the government's argument that constitutional challenges to laws regulating the entry of noncitizens were nonjusticiable pursuant to the plenary power doctrine. It also noted that its "cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of

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[102] 430 U.S. 787 (1977).

[103] 523 U.S. 420 (1998).

[104] 533 U.S. 53 (2001).

[105] *Fiallo*, 430 U.S. at 790–91; 8 U.S.C. § 1101(b)(1)(C)–(D), (b)(2) (1970); *see also* Collins, *supra* note 54, at 1757–58.

[106] 405 U.S. 645 (1972).

[107] *Id.* at 651; *see id.* at 651–58.

[108] Trimble v. Gordon, 430 U.S. 762, 769–70, 773–74 (1977); *see also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (holding that workman's compensation benefits that favor legitimate over illegitimate children violate the Equal Protection Clause).

[109] *Fiallo*, 430 U.S. at 791–92.

Congress to regulate the admission and exclusion of aliens."[110] On the other hand, the Court invoked the traditional sovereignty logic of the plenary power doctrine: "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[111] Thus, the *Fiallo* Court embraced a role for judicial review in immigration cases but, over a dissent by Justice Thurgood Marshall,[112] it rejected the argument that courts should use heightened scrutiny to assess the constitutionality of a gender-based immigration statute.[113] Instead, the Court held that congressional line drawing of the sort at issue in *Fiallo* would survive constitutional challenge so long as it was premised on "a facially legitimate and bona fide reason."[114]

Using this standard, the Court had little problem dismissing the plaintiffs' claim that the immigration statute violated the rights of unmarried fathers and illegitimate children. Notwithstanding the Court's emerging recognition of the constitutional rights of unmarried fathers — and its growing intolerance for laws premised on gender-based stereotypes — the Court announced that the discrimination in the challenged statute was reasonable because of the "*perceived* absence in most cases of close family ties."[115]

Scholars have long debated *Fiallo*'s significance in two fields of constitutional law: judicial separation of powers and equal protection.[116] My goal is not to resolve these debates but rather to observe how *Fiallo* helped shape the conversation about gender and illegitimacy discrimination in American immigration and citizenship law in the lower federal courts and in the political branches. *Fiallo* became a favorite citation of government attorneys, who often emphasized its sovereignty language and who assumed that its deferential standard was applicable in constitutional challenges to the derivative citizenship

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[110] *Id.* at 793 n.5; *see also id.* at 795 n.6 (noting that, although the courts exercise deference with respect to policies pertaining to the entry of aliens, it is not the case "that the Government's power in this area is never subject to judicial review").

[111] *Id.* at 792 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

[112] *Id.* at 800 (Marshall, J., dissenting).

[113] *Id.* at 795 n.6 (majority opinion).

[114] *Id.* at 794 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

[115] *Id.* at 799 (emphasis added). In cases like *Parham v. Hughes*, 441 U.S. 347 (1979), and *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court seemed to qualify its recognition of nonmarital fathers' constitutional equality rights. *See* Mayeri, *supra* note 45, at 2340–42, 2348–50.

[116] *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 158–59 (2002); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 272–73 (2000); Nina Pillard, Comment, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 844–46 (2002); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 22–23, 65–66 (1984); *see also* sources cited *infra* note 142.

statute.[117] Lower federal courts did not deny a role for judicial review in such cases, but they tended to agree with the government that *Fiallo*'s deferential standard governed in gender equal protection challenges to the derivative citizenship statute: "[J]udicial inquiry into immigration legislation is limited in deference to the 'long recognized' power of the political branches . . . 'to expel or exclude aliens.'"[118]

Outside the courts, *Fiallo* has served as a key resource for political branch officials, who have enlisted it in various efforts to preserve limits on recognition of the father-child relationship outside marriage in the legal regulation of the border. In agencies, for example, *Fiallo* has been used to justify a narrow construction of the "legitimation" requirement found in various immigration and citizenship statutes and as authority for the general principle that courts are to defer to the political branches in the regulation of citizenship and immigration.[119] In congressional

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[117] *See, e.g.*, Government's Motion in Limine to Preclude Evidence of Derivative Citizenship at 6, United States v. Flores-Villar, 497 F. Supp. 2d 1160 (S.D. Cal. 2007) (No. 06CR0592), 2007 WL 2976061 ("Congressional power is at its height . . . with respect to matters concerning immigration, alienage, and citizenship. In exercising its broad powers under Article I § 8 of the Constitution 'to establish uniform rules for naturalization,' Congress 'regularly makes rules that would be unacceptable if applied to citizens.'" (quoting *Fiallo,* 430 U.S. at 792)); *see also* Brief for Respondent at 21–22, Willkomm v. Holder, 341 F. App'x 281 (9th Cir. 2009) (No. 06-75631), 2007 WL 3265796; Brief for Respondent at 29, Catwell v. Att'y Gen., 623 F.3d 199 (3d Cir. 2010) (No. 08-4208), 2009 WL 8657092; Brief for Appellants at 10 & n.4, Ablang v. Reno, 52 F.3d 801 (9th Cir. 1995) (No. 93-56129), 1993 WL 13103906.

[118] *Ablang*, 52 F.3d at 804 (quoting *Fiallo*, 430 U.S. at 792); *see also* United States v. Viramontes-Alvarado, 149 F.3d 912, 916 (9th Cir. 1998); Miller v. Christopher, 96 F.3d 1467, 1470 (D.C. Cir. 1996), *aff'd sub nom.* Miller v. Albright, 523 U.S. 420 (1998); *Flores-Villar*, 497 F. Supp. 2d at 1165, *aff'd*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided Court*, 564 U.S. 210 (2011). There have been important exceptions. *See, e.g.*, Wauchope v. U.S. Dep't of State, 985 F.2d 1407, 1414–16 (9th Cir. 1993); LeBrun v. Thornburgh, 777 F. Supp. 1204, 1211 (D.N.J. 1991). In *Wauchope*, the Ninth Circuit invalidated the pre-1934 derivative citizenship statute, which recognized father-child citizenship transmission only, and which continued to govern the citizenship status of foreign-born children born prior to 1934 to American mothers. The Ninth Circuit applied the *Fiallo* standard but concluded that the government could not provide a rational justification for the discrimination. *Wauchope*, 985 F.2d at 1414–16. The Solicitor General did not appeal the decision. *See* Letter from Janet Reno, Att'y Gen., U.S. Dep't of Justice, to Michael Davidson, Senate Legal Counsel, U.S. Senate, at 2 (Oct. 15, 1993), https://www.justice.gov/oip/osg-530d-letters/10-15-1993.pdf [https://perma.cc/QQ23-BD93] ("[T]he Solicitor General decided not to file a petition for a writ of certiorari requesting the Supreme Court to review the decision in *Wauchope* . . . .").

[119] *See, e.g.*, *In re* Reyes, 17 I. & N. Dec. 512, 515–16 (B.I.A. 1980); *In re* Cortez, 16 I. & N. Dec. 289, 291 (B.I.A. 1977); *In re* [Redacted], 2001 WL 34078677, at *3 (Admin. App. Office Oct. 9, 2001); *In re* [Redacted], 1996 WL 33423613, at *5 (Admin. App. Office Oct. 15, 1996); *see also* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1971–80, 2002–06 (2013) (chronicling how would-be citizens' efforts to prove citizenship are defeated at the administrative level in part because of insufficient procedural protections, traceable to the plenary power doctrine). In the past decade, administrative law scholars have shed important light on the ways that agencies have used and developed constitutional norms in their everyday work of implementing statutes. For examinations of the role of constitutional principles and sensibilities in administrative deliberations, see Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801–06, 809–10

debates over immigration and citizenship law reform in the 1970s and 1980s, witnesses who testified against legislative proposals to bring that body of law in line with the Court's gender equality jurisprudence also made the most of *Fiallo*, explaining how the case should be read as a statement of the constitutionality and wisdom of the limitations imposed on recognition of the father-child relationship.[120] In sum, outside the Court, officials used *Fiallo* to reinforce a conception of the relationship of family and nation — or nonmarital family and nation — premised on a traditional understanding of gender-role differentiation that has long informed the fabric of American law, including citizenship and immigration law.[121]

In 1998, this gender-traditional understanding seemed as if it might be subject to judicial reassessment when the Court granted certiorari in *Miller v. Albright*, an equal protection challenge to a gender-based provision in the derivative citizenship statute brought by an American father, Charlie Miller, and his foreign-born daughter, Lorelyn Peñero Miller.[122] The provision at issue mandated that in order to transmit citizenship to his foreign-born nonmarital child, the father had to acknowledge the child in writing prior to the child's eighteenth birthday, a step that Charlie had not taken in time.[123] By 1998, the anti-stereotyping logic of the Court's gender equal protection jurisprudence was well established, thanks to decisions like *United States v. Virginia*,[124] in which the Court invalidated the male-only admissions policy of the Virginia Military Institute[125] and announced that the government was required to provide an "exceedingly persuasive

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(2010); and Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 321–23 (2012).

120 *See, e.g.*, *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees & Int'l Law of the H. Comm. on the Judiciary*, 97th Cong. 859–61 (1981) (statement of Ambassador Diego Asencio, Assistant Secretary for Consular Affairs, Department of State) (testifying that "[i]t is the Department's present position (concurring in the [*Fiallo*] Court's view) that requiring legitimation in such cases is a rational discrimination," *id.* at 860); *see also* Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, *in* THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL 73, 78 (Kim Rubenstein & Katharine G. Young eds., 2016).

121 As Professors William Eskridge and John Ferejohn have observed, the legal structures that define and support family recognition and status are central to the process of constitutional governance: "The American constitution of the family is a microcosm of the larger constitutional evolution of our polity and our public values." WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 252 (2010). For further elaboration of this point, see Collins, *supra* note 54, at 1762.

122 *See Miller*, 523 U.S. at 424–25 (Stevens, J.).

123 *See* 8 U.S.C. § 1409(a)(4) & note (1994); *Miller*, 523 U.S. at 426.

124 518 U.S. 515 (1996).

125 *Id.* at 557. On the development and foundations of the Court's antistereotyping jurisprudence, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

justification" for the use of gender as a regulatory category.[126] But the *Miller* Court issued a badly fractured opinion that revealed deep divisions over fundamental questions about gender equality, the rights of unmarried fathers, and the nature and scope of the plenary power doctrine.

Writing the lead plurality opinion, Justice John Paul Stevens rejected the contention that the acknowledgment requirement was the product of "overbroad stereotypes about the relative abilities of men and women."[127] He emphasized a line of the Court's cases involving unmarried fathers that required courts to look to fathers' "postbirth conduct" to determine their constitutional status and rights.[128] Because Charlie had not played a role in Lorelyn's upbringing, Justice Stevens concluded that "[t]he gender equality principle" of the Court's equal protection jurisprudence was inapplicable in the Millers' case.[129] Justice Antonin Scalia concurred.[130] For him, the case was at bottom about the limits of judicial power and political branch sovereignty. Even if the Justices agreed that the statute violated the Equal Protection Clause, he reasoned, "we could not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen."[131]

Justice Ginsburg dissented. As in her majority opinion in *United States v. Virginia*, she turned to history to unearth the gendered logic of the derivative citizenship statute. In her view, "[t]he history of the treatment of children born abroad to United States citizen parents counsel[ed] skeptical examination of the Government's" proffered justifications for the gender-based distinctions drawn in the derivative citizenship statute.[132] Moreover, this history suggested that the statutory distinction was "surely based on generalizations (stereotypes) about the way women (or men) are" — generalizations that, she argued, also

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[126] *Virginia*, 518 U.S. at 531. These norms were also enshrined in federal statutes intended to facilitate gender equality in domestic labor and the workplace. *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended in scattered sections of 29 U.S.C.); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e & note (2012)). For a discussion of how legislative efforts to secure gender equality may have informed the development of the Court's gender-equality jurisprudence, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1976–77, 1977 n.112 (2003).

[127] *Miller*, 523 U.S. at 434 (quoting Brief of Petitioner at 24, *Miller*, 523 U.S. 420 (No. 96-1060)).

[128] *Id.* at 443. For a discussion of Justice Stevens's resistance to recognition of unmarried fathers' equality rights, see Mayeri, *supra* note 45, at 2346–48.

[129] *Miller*, 523 U.S. at 442; *see also id.* at 443–44.

[130] *Id.* at 452 (Scalia, J., concurring in the judgment).

[131] *Id.* at 455. Only Congress has the power to establish the requirements for acquisition of citizenship by persons born outside the United States, Justice Scalia insisted, and "federal courts cannot exercise that power under the guise of their remedial authority." *Id.* at 456.

[132] *Id.* at 468 (Ginsburg, J., dissenting).

informed Justice Stevens's opinion.[133] In short, the limitation on father-child citizenship transmission was premised on anachronistic stereotypes concerning who cares for children, thus running afoul of elementary principles of the Court's modern equal protection jurisprudence.[134] One problem, however, was that the stereotype seemed all too true in the Millers' case. Lorelyn had been conceived while Charlie was serving in the Air Force in the Philippines; Charlie left the Philippines before Lorelyn's birth and never returned.[135]

Given the many divisions among the Justices in *Miller*,[136] the case generated more questions than answers.[137] In 2001, the Justices revisited the issue in *Nguyen v. INS*. In a 5–4 decision, the Court held that the gender-based paternal acknowledgment provision in the derivative citizenship statute did not violate constitutional equal protection principles.[138] The case involved a challenge to the same provision at issue in *Miller*, but the facts were very different. Unlike Charlie Miller, the father in *Nguyen* had raised his child, Tuan Ahn Nguyen, in the United States from early in Nguyen's life.[139] Nguyen's birth mother, by contrast, had left the family when he was very young.[140] Although there was undoubtedly ambiguity in the constitutional status of the relationship of an unmarried father and his child, it was settled that the relationship between a biological father and the child he had "sired and

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133 *Id.* at 469.

134 *Id.* at 460.

135 *Id.* at 424–25, 439 (Stevens, J.).

136 In addition to the opinions by Justices Stevens, Scalia, and Ginsburg, Justice O'Connor wrote an opinion concurring in the judgment and Justice Breyer wrote a dissenting opinion. Justice O'Connor concurred on the grounds that Lorelyn Peñero Miller lacked third-party standing to assert her father's gender equal protection claim, and that any equal protection claim Lorelyn could assert would be assessed, and would survive, under rational basis review. *Id.* at 445–52 (O'Connor, J., concurring in the judgment). Justice Breyer joined Justice Ginsburg's dissent and wrote separately to explain, inter alia, why the plenary power doctrine was irrelevant in a constitutional challenge to a statute assigning American citizenship at birth. *Id.* at 478–81 (Breyer, J., dissenting).

137 *Compare, e.g.*, Rainey v. Cheever, 510 S.E.2d 823, 824 (Ga. 1999) (holding that a state statute denying the father of a nonmarital child the right to inherit through the child is subject to intermediate scrutiny pursuant to *Miller*), *cert. denied*, 527 U.S. 1044 (1999), *with* Hendrix v. Sec'y of Health & Human Servs., No. 97-5667, 1998 WL 432484, at *4 (6th Cir. July 16, 1998) (citing the plurality opinion in *Miller* to support the claim that sex-based intestacy laws as applied to nonmarital children are "simply a practical consideration and do[] not implicate equal protection"). Justice Thomas dissented from the denial of certiorari in *Rainey*: "[W]hile the fractured decision in *Miller* may demonstrate the need for additional guidance as to the constitutionality of laws differentiating between fathers and mothers of out-of-wedlock children, it does not stand for the proposition that all generalizations based on gender are constitutionally infirm." 527 U.S. at 1047 (Thomas, J., dissenting from denial of certiorari).

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

139 *Id.* at 57.

140 *See id.*

raised" enjoyed constitutional protection.[141] But in *Nguyen*, the Court issued a majority opinion that some commentators argued turned back the clock on the Court's gender equal protection jurisprudence by reviving a form of gender-differentiated biological reasoning about the parent-child relationship that many had thought was dead.[142] "In the case of a citizen mother and a child," Justice Kennedy explained, "the opportunity for a meaningful relationship . . . inheres in the very event of birth."[143] In this respect, he reasoned, her opportunity to form a relationship with the child was "a biological inevitability," while the father's was not.[144] That in *Nguyen* the actual circumstances of the father-child relationship provided a counterexample for that observation was of no moment.

Justice Kennedy also explicitly bracketed the institutional question that had dominated constitutional challenges to the derivative citizenship statute: whether the plenary power doctrine was relevant to the Court's analysis.[145] Instead, he concluded that the statute survived even under the searching level of scrutiny that was required by the Court's equal protection jurisprudence generally.[146]

In a lengthy dissent, Justice Sandra Day O'Connor challenged Justice Kennedy's analysis at every turn.[147] Gender-based laws premised on stereotypes concerning men's and women's capacities and skills "must be viewed not in isolation, but in the context of our Nation's 'long and unfortunate history of sex discrimination.'"[148] With that history in view, she argued, the majority's analysis "articulate[d] a misshapen notion of 'stereotype' and its significance in our equal protection jurisprudence."[149] Many commentators agreed with Justice O'Connor, including then-Professor Nina Pillard, who argued that the plenary power

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141 Stanley v. Illinois, 405 U.S. 645, 651–58 (1972); *see also* Caban v. Mohammed, 441 U.S. 380, 389 (1979).

142 *See, e.g.*, Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1220–21 (2016); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2283–84 (2017); Reva B. Siegel, *Gender and the United States Constitution: Equal Protection, Privacy, and Federalism*, *in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 306, 322–23 (Beverley Baines & Ruth Rubio-Marin eds., 2005).

143 *Nguyen*, 533 U.S. at 65.

144 *Id.*

145 *See* sources cited *supra* notes 117–18.

146 *Nguyen*, 533 U.S. at 61 ("Given [the determination that the statute survives heightened scrutiny], we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power.").

147 *Id.* at 78 (O'Connor, J., dissenting) ("The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, but departs from the guidance of our precedents concerning such classifications in several ways." (citation omitted)).

148 *Id.* at 74 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)).

149 *Id.* at 89.

doctrine was covertly at work in *Nguyen* and had led Justice Kennedy to employ a watered-down equal protection analysis.[150]

In hindsight, Professor Pillard's analysis seemed to anticipate how lower courts would apply *Nguyen*. That opinion was of little help to immigration lawyers seeking a greater role for judicial enforcement of constitutional equality norms at the border. And it may have been even less helpful to advocates of gender parity in the regulation of the nonmarital family. After *Nguyen*, nonmarital children of American fathers continued to bring gender equal protection challenges because the derivative citizenship statute differentiates between nonmarital mothers and fathers in several of its requirements. Following the Supreme Court, the lower courts tended to bracket or avoid the question of what level of scrutiny applied in these cases, concluding that discrimination as between unmarried mothers and fathers was constitutional under *Nguyen*.[151] Moreover, because the Court purported to analyze the derivative citizenship statute as it would any other (nonimmigration or noncitizenship) statute, *Nguyen* could be, and was, easily enlisted as a precedent in domestic family law cases. More so than *Fiallo*, *Nguyen* became a resource for lawyers defending the gender-based regulation of parentage and, more generally, the family.[152] And state courts adjudicating constitutional challenges to such regulations tended to interpret *Nguyen* along similar lines.[153]

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[150] Pillard, *supra* note 116, at 836; *see also* sources cited *supra* note 142. By contrast, some immigration law scholars saw *Nguyen* as evidence of the plenary power doctrine's demise. *See, e.g.*, Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 341–42 (2002).

[151] *See, e.g.*, United States v. Flores-Villar, 536 F.3d 990, 996–97 & n.2 (9th Cir. 2008) (assuming without deciding that "heightened scrutiny" applies in a constitutional challenge to the derivative citizenship statute, citing *Nguyen,* but also appearing to rely on *Fiallo*'s more deferential standard), *aff'd by an equally divided Court*, 564 U.S. 210 (2011); United States v. Flores-Villar, 497 F. Supp. 2d 1160, 1164–65 (S.D. Cal. 2007), *aff'd*, 536 F.3d 990; Willkomm v. Holder, 341 F. App'x 281 (9th Cir. 2009). Other lower courts speculated as to what *Nguyen* meant for the plenary power doctrine in challenges to naturalization statutes that also limit recognition of the father-child relationship outside marriage, and often applied *Fiallo*'s deferential standard. *See, e.g.*, Pierre v. Holder, 738 F.3d 39, 51–52 (2d Cir. 2013); Johnson v. Whitehead, 647 F.3d 120, 127 n.1 (4th Cir. 2011); United States v. Scott, 919 F. Supp. 2d 423, 433–34 (S.D.N.Y. 2013).

[152] *See, e.g.*, Brief in Opposition at 12, 14–15, Amy G. v. M.W., 550 U.S. 934 (2007) (No. 06-1190), 2007 WL 1033755; Brief of Appellants Ricketts, Peterson, Sloup & Acierno at 35, 58, Waters v. Ricketts, 798 F.3d 682 (8th Cir. 2015) (No. 15-1452), 2015 WL 1611868; Reply Brief of Appellant Governor C.L. "Butch" Otter at 6, 27, Latta v. Otter, 771 F.3d 496 (9th Cir. 2014) (Nos. 14-35420, 14-35421), 2014 WL 3909336; Appellant's Final Reply Brief at 14–15, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) (No. 12-0243), 2012 WL 10008154.

[153] *See, e.g.*, Amy G. v. M.W., 47 Cal. Rptr. 3d 297, 308 (Ct. App. 2006) (citing *Nguyen* to support the proposition that allowing a nonbiological father who is the biological mother's husband to claim presumed paternity while prohibiting a nonbiological mother who is the wife of the biological father from doing the same does not violate equal protection); Child Support Enf't Agency v. Doe, 125 P.3d 461, 470 (Haw. 2005) (citing *Nguyen* to support the proposition that statutes that make distinctions between mothers and fathers are constitutional as long as the distinctions are based on "fundamental differences in the way fathers and mothers are situated with respect to proof of

Before turning to *Morales-Santana*, it is important to account for one other dimension of *Nguyen* — a dimension that may help explain why the gender-based distinctions drawn in the derivative citizenship statute have survived in the face of so many constitutional challenges. Nguyen himself was facing deportation because of a prior felony conviction.[154] Nguyen's case thus surfaced an issue that *Miller* had not: successful gender equal protection challenges to the derivative citizenship statute could transform some deportable noncitizen felons into nondeportable citizen felons. It is impossible to know whether — or, if so, just how much — this shaped the Court's analysis in *Nguyen*, but Justice Kennedy thought it relevant to explain that Nguyen's exclusion from citizenship by any route, derivative citizenship or naturalization, was "due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed rigidity or harshness in the citizenship laws."[155]

The deportation posture of *Nguyen* was not unusual. At the turn of the twenty-first century, the derivative citizenship statute was often challenged in court when the individual who claimed citizenship was excludable or deportable.[156] This had also been the case in the early twentieth century, when the foreign-born children of Chinese American fathers generally challenged denial of their status as citizens while in deportation or exclusion proceedings using habeas petitions.[157] Thus, in both eras the process of drawing the line between citizen and noncitizen often occurred in adversarial settings in which shifts in the line between citizen and noncitizen would transform a deportable individual into a nondeportable citizen. The grounds for deportation were very different in those eras. However, in both instances the line between citizen and noncitizen was being determined not in the abstract but in the context of the enforcement of deportation laws that were, at their different moments in time, politically salient and legally contested.

II. *MORALES-SANTANA* AND THE CITIZEN FAMILY

When Luis Morales-Santana appealed to federal court from the Board of Immigration Appeals' rejection of his citizenship claim, he,

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parenthood"); Grimes v. Van Hook-Williams, 839 N.W.2d 237, 245–46 (Mich. Ct. App. 2013) (citing *Nguyen* to support the different standing requirements established for married mothers and alleged fathers in Michigan's Revocation of Paternity Act).

154 *Nguyen*, 533 U.S. at 57.

155 *Id.* at 71.

156 *See* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 309 (2014) (discussing the law of derivative citizenship in the context of removal proceedings).

157 *See supra* pp. 181–83.

too, arrived by way of prison and an Immigration and Customs Enforcement detention center. And as should be apparent, his legal path to recognition as an American citizen was by no means clear.[158] When Morales-Santana asserted that he was an American citizen during his deportation hearing in 2001, the particular set of statutory requirements that governed his citizenship status using both marriage- and gender-based criteria had been established in law and administrative practice for over sixty years. Only one of those requirements — the ten-year age-calibrated parental presence requirement — prevented Morales-Santana from successfully claiming citizenship under the statute. Had his American parent been his mother rather than his father, Morales-Santana would have had to demonstrate that she had been present in the United States for only one year any time prior to his birth — a standard his American father satisfied easily.

Once in federal court, Morales-Santana challenged that gender-based presence requirement on the grounds that it discriminated against his father. But especially after *Nguyen*, the Court's gender equal protection jurisprudence provided ambiguous support for Morales-Santana's case. Moreover, the plenary power doctrine — still vital but perpetually in a state of confusion and decline[159] — had continued to serve as the government's lead argument in efforts to defend these gender-differentiated citizenship laws.

But in *Morales-Santana* the Court, for the first time, invalidated a gender-based distinction used by Congress in determining who is a

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[158] The path was improved somewhat by the Supreme Court's 4–4 division in *Flores-Villar v. United States*, 564 U.S. 210 (2011) (mem.) (per curiam), *aff'g by an equally divided Court*, 536 F.3d 990 (9th Cir. 2008). In *Flores-Villar*, the petitioner challenged the same provision that was at issue in *Morales-Santana*. *See Morales-Santana*, 137 S. Ct. at 1686; *Flores-Villar*, 536 F.3d at 993. Justice Elena Kagan recused herself, as she had been Solicitor General when the government had opposed certiorari in *Flores-Villar*. *Flores-Villar*, 564 U.S. at 210. But the result in *Flores-Villar* suggested that one Justice who had voted in the majority in *Nguyen* voted to reverse in *Flores-Villar*.

[159] Experts in immigration and citizenship law fiercely debate the status, scope, and meaning of plenary power. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) ("It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference."). For important accounts of the plenary power doctrine, see STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 177–222 (1987); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 14–15, 130–38 (1996); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10–12 (2002); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 854–63 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549, 580–600 (1990); and Schuck, *supra* note 116, at 14–34. One thing that most commentators agree on is that the doctrine is in some state of decline. *See, e.g.*, LEGOMSKY, *supra* at 213–17; Motomura, *supra* at 549; Schuck, *supra* note 116, at 58; Spiro, *supra* note 150, at 345–55.

United States citizen and who is not. In a shift that brought the dissenters in *Miller* and *Nguyen* into the majority, the Court declared that "the gender line Congress drew [in the derivative citizenship statute] is incompatible with the requirement that the Government accord to all persons 'the equal protection of the laws.'"[160] With respect to gender equality, the Court affirmed that the antistereotyping logic of its equal protection jurisprudence extends to nonmarital mothers and fathers — an important clarification that could shape the legal regulation of the family in myriad ways. Moreover, and with little to-do, the Court found that the plenary power doctrine was inapplicable — thus rejecting the government's primary theory of the case — and established a clear role for heightened judicial scrutiny in gender equal protection challenges to the laws that govern derivative citizenship. Ultimately, of course, *Morales-Santana*'s jurisprudential importance will be determined by a host of factors, including, perhaps most obviously, judicial appointments to the Supreme Court and the lower federal courts. But *Morales-Santana*'s significance for these two issues — the role of gender equal protection in the regulation of parental status and the role of the Constitution at the border — deserves special attention given that those issues will command the federal courts' attention in the coming decade.

A. Gender Equality and the Nonmarital Family

Morales-Santana's progressive orientation — its modernizing impulse — courses through the decision's discussion of the gender-discriminatory statutory scheme at issue in the case. Looking back at the history of American citizenship law, Justice Ginsburg identified and repudiated common law principles that regard the mother as the child's "natural and sole guardian" outside marriage — principles that directly shaped the citizenship statute that Morales-Santana challenged.[161] Such rules "have a constraining impact,"[162] she explained, and thus result in "'a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver' . . . [and] may disserve men who exercise responsibility for raising their children."[163]

That logic will seem familiar to those who know the Court's gender equal protection jurisprudence, which has long been wary of the use of gender-based classifications grounded in stereotypes about men's and women's preferences, not simply (or even) because classifying individuals based on gender is inherently problematic, but because once memorialized in law, gender-based classifications tend to shape and limit

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[160] *Morales-Santana*, 137 S. Ct. at 1686.

[161] *Id.* at 1691.

[162] *Id.* at 1692–93.

[163] *Id.* at 1693 (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (alteration in original)).

men's and women's opportunities and behaviors in meaningful ways. However, *Morales-Santana* is different from the lion's share of these prior cases in an important respect: the antistereotyping principle has been most clearly and consistently articulated in cases involving marital families.[164] Relying largely on cases that struck down the gender-based allocation of rights and benefits as between marital parents "on the basis of the sex of the qualifying parent,"[165] the Court in *Morales-Santana* held that it would approach "all gender-based classifications," including those that govern the rights and responsibilities of unmarried mothers and fathers, with the same judicial skepticism.[166] In an opinion that quietly abandons the logic of Justices Stevens's and Kennedy's analyses in *Miller* and *Nguyen* — and cites Justice O'Connor's dissent in *Nguyen* approvingly[167] — Justice Ginsburg explained that the gender-differentiated parental presence requirement reproduces "the familiar stereotype" that fathers "would care little about, and have scant contact with, their nonmarital children."[168] If, especially after *Nguyen*, it was unclear whether the nonmarital family — and the unmarried father — had been fully incorporated into the Court's gender equality jurisprudence, *Morales-Santana* clarifies that laws that distinguish between the rights of nonmarital mothers and fathers will be subject to the same skeptical review as other gender-based classifications.

What are the broader implications of this development in the Court's equal protection jurisprudence? Perhaps most significant, the Court's decision in *Morales-Santana* connects its repudiation of gender-traditional limits on the recognition of the father-child relationship outside marriage to the Court's marriage equality jurisprudence. This connection was most certainly not inevitable. Even as proponents of same-sex marriage sought marriage equality, some otherwise sympathetic commentators worried that the same-sex marriage campaign would lead

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164 *See* Mayeri, *supra* note 45, at 2391.

165 *Morales-Santana*, 137 S. Ct. at 1689 (quoting Califano v. Westcott, 443 U.S. 76, 84 (1979)); *see id.* at 1689–90 (citing *Westcott*, 443 U.S. at 88–89 (invalidating statute providing benefits to marital families as a result of unemployment of father but not of mother); Califano v. Goldfarb, 430 U.S. 199, 206–07 (1977) (invalidating Social Security provision granting spousal survivor benefits to widows regardless of dependency but to widowers only if they had been receiving at least one-half support from wives); Weinberger v. Wiesenfeld, 420 U.S. 636, 648–53 (1975) (invalidating Social Security provision granting "Mother's insurance benefits" upon deaths of working husbands but providing no such benefits to fathers upon death of working wife)). The *Morales-Santana* Court also cited *Caban v. Mohammed*, 441 U.S. 380 (1979), a case that struck down a New York adoption law that allowed the mother but not the father of a nonmarital child to veto an adoption, reasoning that the law was premised on "overbroad generalizations." *Id.* at 394; *see Morales-Santana*, 137 S. Ct. at 1692. But as Professor Mayeri has explained, "*Caban* marked the zenith of nonmarital fathers' constitutional rights in the Supreme Court." Mayeri, *supra* note 45, at 2348.

166 *Morales-Santana*, 137 S. Ct. at 1689 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)).

167 *Id.* at 1691.

168 *Id.* at 1692.

to the denigration of nonmarital families, whether same-sex or heterosexual.[169] The Court's opinions in *United States v. Windsor*[170] and *Obergefell v. Hodges*[171] only elevated those concerns. In *Windsor*, the Court extolled the virtues of marriage as a source of "dignity and status"[172] for parents and "integrity and closeness" for their children.[173] In *Obergefell*, the Court portrayed nonmarriage as an existentially lonely status.[174] The marriage-centric vision of family that informs these decisions led Professor Melissa Murray and others to worry that "*Obergefell* foreclose[d] the possibility of further developing [a] jurisprudence . . . to provide more robust constitutional protections for life outside of marriage."[175]

That concern is not unjustified, but *Morales-Santana* demonstrates that the Court itself is able to provide a different reading of its marriage equality cases — one that recognizes the progressive potential of its jurisprudence for nonmarital families and other nontraditional family units. Gender-based distinctions, the Court explained in *Morales-Santana*, must "serve an important governmental interest *today*."[176] The Court took this modernizing message of equal protection law straight out of *Obergefell*, where — according to *Morales-Santana* — the Court "recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[177]

How might this forward-looking understanding of equality shape the regulation of the family more generally? One might begin by querying *Morales-Santana*'s implications for gender-differentiated state laws regulating the parent-child relationship outside marriage that have been sustained and defended by reference to *Nguyen*.[178] In *Morales-Santana*, the Solicitor General warned that recognizing the equality rights of nonmarital fathers would upset myriad state laws that recognize the mother

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169 *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242–43 (2006).

170 133 S. Ct. 2675 (2013).

171 135 S. Ct. 2584 (2015).

172 *Windsor*, 133 S. Ct. at 2692.

173 *Id.* at 2694.

174 *Obergefell*, 135 S. Ct. at 2590, 2600, 2608 (observing that the plaintiffs' "hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions," *id.* at 2608).

175 Melissa Murray, Essay, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1240 (2016); *see also* Clare Huntington, Obergefell*'s Conservativism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–31 (2015).

176 *Morales-Santana*, 137 S. Ct. at 1690.

177 *Id.* (quoting *Obergefell*, 135 S. Ct. at 2603 (omission in original)). For a discussion of the progressive potential of the Court's marriage equality jurisprudence that predates the Court's decision in *Morales-Santana*, see Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017).

178 *See* sources cited *supra* note 153.

as the only parent with a legal relationship to the nonmarital child at birth.[179] On one level the government's assertion was hyperbolic. Although it is true that state laws privilege the nonmarital mother vis-à-vis the father in significant ways, it is incorrect to suggest that state laws do not recognize a legal relationship between the biological father and his nonmarital child at birth. From the day a child is born, laws in virtually every state authorize the state to impose financial responsibility on the biological father, and a complex web of state and federal laws and administrative mechanisms has emerged to enforce that responsibility.[180]

But laws that allocate financial responsibility are not the same as parentage laws that determine legal custody and decisionmaking authority. In the vast majority of states, unmarried biological mothers are the default custodial parent.[181] Critics argue that this entrenches women's status as caretakers of nonmarital children — a legal and social role that, as a systemic matter, places a heavy economic and social burden on unmarried mothers.[182] Others observe that these parentage laws shape the behavior and lives of individual parents and children in nonmarital families by giving the mother disproportionate control over the father's access to his biological nonmarital child.[183] Laws that privilege the nonmarital mother are defended as necessary to protect her autonomy and to recognize the caregiving work that mothers as a general matter perform, perhaps especially outside marriage.[184] Regardless of one's views on the wisdom of such parentage laws, *Morales-Santana* may be a signal that certain laws that allocate parental rights and responsibilities between mothers and fathers outside marriage are vulnerable to challenge.[185]

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[179] Brief for the Petitioner at 10, 30–32, 41 & n.9, 42, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191).

[180] *See* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 182–84 (2015).

[181] *See id.* at 204 & n.204 (collecting state statutes).

[182] *See* Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 60–69 (1995).

[183] *See* Huntington, *supra* note 180, at 171; *see also* KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY 157, 169, 208, 214 (2013).

[184] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 230–33 (1995); Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2081 (2016); *cf.* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 105 (2014); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016). For a discussion of this perspective, see Mayeri, *supra* note 45, at 2338–40.

[185] Of course, any such speculation about the Court's future direction on this issue must be hedged given that Justice Gorsuch did not participate in *Morales-Santana*, and given the likelihood of at least one new appointment to the Court during President Donald Trump's presidency.

The second important facet of the Court's equal protection analysis in *Morales-Santana* is its statement that "[d]istinctions based on parents' marital status . . . are subject to the same heightened scrutiny as distinctions based on gender."[186] This is by no means the first time the Court has expressed disapprobation for discrimination based on illegitimacy, but distinctions based on the marital status of the parents have survived in myriad forms.[187] The *Morales-Santana* Court's open skepticism of distinctions between families and children based on the parents' marital status could loosen the hold of what Professor Serena Mayeri has called "marital supremacy": "the legal privileging of marriage over non-marriage, and marital over nonmarital families."[188] Thus, *Morales-Santana* could be used to challenge laws that favor the marital family or that allocate benefits to married partners or their children.[189]

Relatedly, the opinion could have important implications for the latitude of states in regulating nontraditional family formation — and specifically same-sex and nonbiological parenthood. As Professor Douglas NeJaime has observed, the Court's decision in *Nguyen* has been relied on by some state courts to secure the status of biological parents — and especially biological mothers — above that of all other individuals who have assumed a functional parental role in a child's life.[190] In *Nguyen*, the Court affirmed the significance of biologically distinctive roles of mothers and fathers as a justification for gender differentiation of parental rights and responsibilities. The privileging of biological parenthood has significant implications for same-sex couples, who necessarily can include only one parent with a genetic link to the child, and whose claims to recognition as parents have been restricted in certain states, even after *Obergefell*.[191] *Morales-Santana* thus could provide a

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[186] *Morales-Santana*, 137 S. Ct. at 1700 n.25 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)). Justice Ginsburg cited *Clark v. Jeter*, one of several cases involving illegitimacy discrimination decided by the Court in the 1970s and 1980s. In *Clark* the Court extended "intermediate scrutiny" to "classifications based on . . . illegitimacy," 486 U.S. at 461, but focused on the child's status, not the parents' marital status — a subtle distinction that could be meaningful in challenges to laws that differentiate between parents based on marital status.

[187] *See* Serena Mayeri, Essay, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1350 (2015).

[188] *Id.* at 1279 n.2.

[189] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004).

[190] NeJaime, *supra* note 142, at 2354–55 (discussing *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297 (Ct. App. 2006), in which a state court, citing *Nguyen*, held that a stepmother lacked standing to assert a claim for recognition as a parent of a child she had raised from infancy on the grounds that she had no biological relationship with the child).

[191] The ways in which biological reasoning about parenthood threatens the equal standing and status of same-sex couples is evident in a dissent by Justice Gorsuch from a per curiam opinion issued just two weeks after *Morales-Santana* was decided. *See* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting). Arkansas had refused to list a nonbiological mother who was married to the birth mother on the child's birth certificate, maintaining that birth certificates should

powerful tool for advocates who wish to challenge the deep hold of gendered biological logic on how judges reason about parenthood and legal parental status.

Morales-Santana certainly will not do all the work, however. At issue in that case were the rights of a biological father who had always played a substantial role in his child's life and who, in fact, eventually married the child's mother. In *Nguyen*, which involved a similar set of facts — a nonmarital father who had "sired and raised" his child — the father's constitutional claim was denied because the Court deemed the "moment of birth" dispositive to the allocation of parental rights.[192] However, laws that regard biological mothers as a child's "natural guardian," with rights and responsibilities that dwarf those of both biological nonmarital fathers (as in *Nguyen*) and nonbiological parents (as in practically all cases involving same-sex couples), are in significant tension with *Morales-Santana*'s deep skepticism of gender-based allocations of parental rights and status.

In sum, advocates for those who seek greater recognition of the various functional parenting relationships that exist outside of marriage and biological motherhood will surely use the opinion to press judges and legislators to be more attentive to how "unjustified" forms of inequality that "once passed unnoticed and unchallenged"[193] can shape the lives of parents and children today. It remains to be seen which, if any, forms of inequality will be recognized in the future as "unjustified." But *Morales-Santana* is a ripe resource for proponents of a broader understanding of equality in the family — an understanding that is especially meaningful today, when family formation occurs outside marriage almost as often as it does within marriage's traditional bonds.[194]

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record the child's biological parents. *Id.* at 2077 (majority opinion) (per curiam). In *Pavan* the Court found that Arkansas's practice ran afoul of *Obergefell*'s recognition of marriage equality, as the state did record nonbiological fathers of different-sex couples on birth certificates. *Id.* But Justice Gorsuch dissented, reasoning that "a birth registration regime based on biology" did not offend the equality and due process principles articulated in *Obergefell*. *Id.* at 2079 (Gorsuch, J., dissenting). The recognition of a nonbiological father in a heterosexual couple was merely an exception to a system otherwise designed around a biological regime, he argued. *Id.* Justice Gorsuch cited *Nguyen* in support of this biological regime. *Id.* at 2079 (citing Nguyen v. INS, 533 U.S. 53, 73 (2001)).

[192] *Nguyen*, 533 U.S. at 68.

[193] *Morales-Santana*, 137 S. Ct. at 1684 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).

[194] *See* Brady E. Hamilton et al., *Births: Final Data for 2014*, NAT'L VITAL STAT. REP., Dec. 23, 2015, at 1, 2, 7; *see also Morales-Santana*, 137 S. Ct. at 1693 n.13 (noting that nonmarital fathers often assume a parental role and that in 2015, sixteen percent of single parents of minor children were fathers (citing Brief Amicus Curiae of the ACLU et al. in Support of Respondent at 22, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191))).

B. Sovereignty and Citizenship

To declare the gender-discriminatory derivative citizenship statute at issue in *Morales-Santana* unconstitutional, the Court also had to grapple with a question that has long cast a shadow over constitutional challenges to this statute: what is the scope and nature of the judiciary's authority to enforce constitutional norms at the border? Indeed, for immigration law scholars, the most significant dimension of the Court's opinion in *Morales-Santana* is apparent not so much in what the opinion says as in what it does. Before *Morales-Santana*, the Court had never held that a statute governing the acquisition of citizenship violated equal protection principles.[195] The Court's opinion in *Morales-Santana* changes this and, in the process, rejects the government's long-standing position, grounded in the plenary power doctrine, that the regulation of derivative citizenship is a political branch prerogative subject to extremely limited constitutional oversight by the judiciary. *Morales-Santana* does not repudiate the plenary power doctrine, but it establishes new limits. And it does this at a time when questions about the nature of plenary power in immigration law are among the most pressing in American law.

One could be forgiven for missing *Morales-Santana*'s relevance for debates over plenary power and sovereignty, as those terms appear nowhere in the opinion. The only indication that the scope of judicial authority was even an issue in the case is Justice Ginsburg's passing reference to the government's contention that *Fiallo*'s deferential standard controlled the Court's analysis.[196] But the government's argument went further than that. Citing *The Chinese Exclusion Case*, the Solicitor General urged that derivative citizenship is a form of naturalization[197]

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[195] The closest parallel is probably *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), in which the Court rejected the executive branch's interpretation of the Chinese Exclusion Act to apply to American-born individuals of Chinese descent. *Id.* at 705. But the Court did so based on the Citizenship Clause of the Fourteenth Amendment, not the Equal Protection Clause. *Id.* at 702–05. In the 1950s and 1960s, the Court invalidated several denationalization provisions. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Trop v. Dulles, 356 U.S. 86 (1958). For an important analysis of the emergence of constitutional restrictions on denationalization, see PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC (2013).

[196] *See Morales-Santana*, 137 S. Ct. at 1693–94.

[197] Government attorneys often incorporate language from *Rogers v. Bellei*, 401 U.S. 815 (1971), into their arguments to assert that Congress has virtually unreviewable authority to regulate "citizenship by descent." *Id.* at 830. In *Bellei*, the Court upheld a now-repealed *child* residence requirement that was part of the derivative citizenship statute into the 1970s against a claim that the provision unconstitutionally denationalized foreign-born children of American citizens. *Id.* at 831. The *Bellei* Court stated that the derivative citizenship laws were enacted pursuant to Congress's power to "establish an uniform Rule of Naturalization." *Id.* at 823 (quoting U.S. CONST. art. I, § 8, cl. 4); *see also Wong Kim Ark*, 169 U.S. at 672. But the *Bellei* Court did not consider the relevance of the plenary power doctrine and, in fact, announced what could be considered a more searching

and that "the power to confer or deny citizenship on individuals born abroad . . . is also an aspect of the power to exclude aliens from the Nation"[198] — a power that "is an incident of every independent nation"[199] and "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[200] Summarily dismissing the government's plenary power arguments, Justice Ginsburg explained that because "Morales-Santana claims he is, and since birth has been, a U.S. citizen," his case did not involve an "entry preference for aliens,"[201] as was the case in *Fiallo*. In this single passage, the Court rejected the theory of sovereignty and extreme deference that government lawyers have articulated in constitutional challenges to the derivative citizenship statute since the Court decided *Fiallo*. It was a theory that has shaped the laws governing family-based immigration and citizenship in myriad ways, and that has therefore altered the fates of countless individuals and families.

Some immigration law scholars will question whether *Morales-Santana* changed the scope of the plenary power doctrine because the

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standard: that the conditions imposed on citizenship by descent may not be "unreasonable, arbitrary, or unlawful." *Bellei*, 401 U.S. at 831.

198 Brief for the Petitioner at 15, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191).

199 *Id.* (quoting Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889)).

200 *Id.* (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)). The Solicitor General's emphasis on the sovereignty logic of the Court's plenary power jurisprudence in *Morales-Santana* is characteristic of the approach taken by the government lawyers in all four of the equal protection challenges to the derivative citizenship statute that the Supreme Court has heard in the last two decades. *See, e.g.*, Brief for the United States at 17, Flores-Villar v. United States, 564 U.S. 210 (2011) (No. 09-5801) ("[T]he Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that '[e]very society possesses the undoubted right to determine who shall compose its members.'" (second alteration in original) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893))); *id.* at 17–18 ("[C]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (quoting *Shaughnessy*, 345 U.S. at 210)); Brief for the Respondent at 25, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071) (noting that "[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete" (alteration in original) (internal quotation marks omitted) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))); *id.* at 24 ("[T]he power to deny citizenship is also the power to keep an alien outside the Nation's borders, and that authority 'is an incident of every independent nation.'" (quoting *Chae Chan Ping*, 130 U.S. at 603)); Brief for the Respondent at 14, Miller v. Albright, 523 U.S. 420 (1998) (No. 96-1060) ("The Constitution commits the sovereign power to 'establish an uniform Rule of Naturalization' for the United States to Congress." (quoting U.S. CONST. art. I, § 8, cl. 4)); *id.* at 21 ("[T]he Court 'has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'" (internal quotation marks omitted) (quoting *Fiallo*, 430 U.S. at 792)).

201 *Morales-Santana*, 137 S. Ct. at 1693–94; *see id.* at 1693.

case is about citizenship, not immigration per se,[202] as Justice Ginsburg observed. As discussed, however, in the modern era, the distinction between the two has been relatively unimportant to how lower courts have understood the judicial role in constitutional challenges to the derivative citizenship statute.[203] And, drawing on the language of sovereignty in the Court's plenary power jurisprudence, government lawyers have continued to insist that regulation of derivative citizenship is a political branch prerogative subject only to the most deferential form of judicial scrutiny.[204] In *Morales-Santana*, the Justices' rejection of that understanding and unprecedented invalidation of a statute regulating citizenship acquisition demonstrate that a constraint on judicial authority that the Solicitor General had portrayed as a necessary and inherent dimension of the plenary power doctrine is neither.

Moreover, the Court's summary but clear rejection of such constraints on judicial authority in *Morales-Santana* facilitated an interrogation of the government's justifications wholly unlike that in any other case involving a claim to citizenship acquisition since *United States v. Wong Kim Ark*. The Court probed and rejected every explanation offered by the Solicitor General as "hypothesiz[ed] and invent[ed]."[205] Indeed, the Court chastised the government for failing to subject its explanation for the gender distinction in the statute to "a reality check."[206]

As a practical matter, the Court's searching approach in *Morales-Santana* makes several other gender-discriminatory provisions in the derivative citizenship statute vulnerable to constitutional challenge.[207] And if the plenary power doctrine, or its penumbra, has created space for the cultivation of gender-traditional constitutional understandings of the family in agency interpretations of the derivative citizenship statute,[208] the substantive vision of gender equality articulated in *Morales-*

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[202] Even during the exclusion era, this line of reasoning goes, the Supreme Court distinguished citizenship cases from challenges to exclusion and deportation brought by self-described noncitizens, and in the former class of cases petitioners have had the benefit of judicial oversight. *Cf.* Schuck, *supra* note 116, at 18–19.

[203] *See supra* p. 190. As noted above, this may have changed modestly after *Nguyen*. *See supra* p. 195.

[204] *See supra* notes 198–200.

[205] *Morales-Santana*, 137 S. Ct. at 1697 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[206] *Id.*

[207] Statutory provisions that may be especially vulnerable to challenge after *Morales-Santana* include the legitimation requirement that applies to foreign-born nonmarital children born to American fathers prior to 1986, Immigration and Nationality Act of 1952, ch. 477, § 309, 66 Stat. 163, 238–39, the requirement that the child must be in the unmarried father's custody at the time of legitimation, *id.* § 101(c)(1), and the requirement in the 1986 version of the statute that unmarried fathers, but not unmarried mothers or married citizen parents of either sex, must commit in writing to support their children financially, Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657.

[208] *See supra* pp. 190–91.

Santana could change that by informing how administrators implement the statute in the future.[209] In short, with respect to derivative citizenship, *Morales-Santana* alters how the political branches can use family membership as a basis for national membership by requiring conformity with the gender equality principles that have so significantly shaped American law and society since the late twentieth century.

An important question remains as to whether the Court's rejection of the government's theory of plenary power in *Morales-Santana* will have any significance beyond the regulation of derivative citizenship. The Court's opinion provides little on which to base an informed analysis. Its summary statement distinguishing *Fiallo* as a case about "entry preference[s] for aliens"[210] leaves us guessing as to how the regulation of derivative citizenship is different from the regulation of the entry of noncitizens and why it matters for purposes of constitutional review. Is it that derivative citizenship is not, in fact, a form of naturalization, and therefore does not fall within the scope of the otherwise intact plenary power doctrine? If that is the case, could *Morales-Santana* be interpreted to reinforce the plenary power doctrine's limitations on judicial authority with respect to "entry preference[s]," as the government has suggested in litigation over the constitutionality of President Donald Trump's travel ban suspending entry by nationals of several Muslim-majority countries?[211] Or does the fact that *Morales-Santana* rejects the

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[209] As Professor Sophia Lee has observed, "When the sphere of [an agency's] policymaking discretion is broad, a sense that the Constitution compels, or even merely supports, a certain action may help turn a statutory *can*-do into a policy *will*-do." Lee, *supra* note 119, at 885; *see also id.* at 801–06 (discussing agency constitutional interpretation in the context of equal employment). It may seem naive to think that a Supreme Court opinion requiring that "the Government . . . ensure that the laws in question are administered in a manner free from gender-based discrimination," *Morales-Santana*, 137 S. Ct. at 1686, will have much of an impact on the ways the current administration implements the citizenship laws, beyond what is mandated by the Court's opinion — a mandate that is not entirely clear. *See infra* notes 220–33 and accompanying text. However, officials in future administrations may find that *Morales-Santana* provides resources for an approach to citizenship that is far different from that of prior administrations. In some instances, the egalitarian vision articulated in *Morales-Santana* could result in a restriction of derivative citizenship, as the Court's remedy suggests, *see infra* Part III, pp. 208–21. But in other instances, such as the interpretation of the "legitimation" requirement and the paternal acknowledgement requirement, the mandate to equalize could lead to a more generous approach to recognition of the citizenship claims of nonmarital children of American fathers.

[210] *Morales-Santana*, 137 S. Ct. at 1693.

[211] The very first citation to *Morales-Santana* in any brief is in the government's reply brief filed in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017). The government cites *Morales-Santana* as authority for the proposition that "rational-basis" review applies in challenges to standards used to regulate the entry of aliens into the United States. Reply Brief for the Petitioners at 6, *Int'l Refugee Assistance Project* (No. 16-1436) (quoting *Morales-Santana*, 137 S. Ct. at 1693). As this Comment was going to press, the Court postponed oral argument in *Trump v. International Refugee Assistance Project*. It also requested the parties to brief whether that case was rendered moot by President Trump's Proclamation of September 24, 2017, indefinitely restricting

government's contention that the plenary power doctrine is applicable in derivative citizenship cases mean that the opinion is better understood as a step in a more general decline of that doctrine? If that is the case, could the Court's observation that in crafting statutory citizenship laws the "Constitution . . . requires the Government to respect the equal dignity and stature of its male and female citizens"[212] be relevant to the equal dignity and stature of its Muslim and non-Muslim citizens? After all, depending on the fate of the travel ban put in place by the current administration, some Muslim American citizens could be divided by nationality from their noncitizen family members.[213]

These questions are not directly answerable by *Morales-Santana*, an opinion that seems to say as little as possible about the plenary power doctrine even as it clearly establishes limits on its reach. But *Morales-Santana*'s unprecedented determination that a statute governing citizenship acquisition is unconstitutional under modern equal protection principles makes clear that the contours of that doctrine are neither stable nor inevitable, and that the Court will not necessarily allow the government to avoid judicial enforcement of constitutional norms at the border by invoking that doctrine's legacy.

III. Remedial Uncertainty

For all that *Morales-Santana* establishes — and could potentially establish — with respect to gender equality in the regulation of the family, and with respect to the role of constitutional equality in the regulation of citizenship, it is not at all clear what, if anything, the Court's opinion accomplished for Luis Morales-Santana as a practical matter. When the Court issued its opinion on June 12, 2017, Morales-Santana may have been relieved of the stigma caused by the gender-discriminatory citizenship statute, as Justice Ginsburg explained.[214] However, he may not have achieved more than that, as the Court provided a most unusual remedy.

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the entry of noncitizens from certain countries into the United States. *See* Order, Trump v. Int'l Refugee Assistance Project, No. 16-1436 (U.S. Sept. 25, 2017).

[212] *Morales-Santana*, 137 S. Ct. at 1698.

[213] For an important analysis of the role of constitutional family law principles as a constraint on the political branches' power to regulate the borders, with specific attention to the derivative citizenship cases, see Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247 (2017).

[214] Justice Ginsburg suggested as much when she reasoned that the majority's equal protection ruling was necessary, despite the decision to level down, because "'discrimination itself . . . perpetuat[es] archaic and stereotypic notions' incompatible with the equal treatment guaranteed by the Constitution." *Morales-Santana*, 137 S. Ct. at 1698 n.21 (alteration and omission in original) (internal quotation marks omitted) (quoting Heckler v. Mathews, 465 U.S. 728, 739 (1984)).

Instead of extending the benefit of the shorter parental presence requirement for unmarried American mothers to unmarried American fathers — the remedial path taken by the Second Circuit[215] — the Supreme Court provided an "interim" remedy that "prospectively" nullifies the shorter parental presence requirement for unmarried mothers.[216] Thus, the Court sought to equalize by "leveling down," and by leveling down on a forward-going basis.[217] The remedy crafted in *Morales-Santana* is perplexing in many respects and will generate more litigation and, one hopes, thoughtful analysis by judges, administrators, and legal scholars. My goals in closing are to explain the complexities of the remedy ordered by the Court and to consider why the Court took the unusual step it did to remedy the equal protection violation it identified.

It is important at the outset to appreciate both the puzzle that the Court faced in crafting a remedy and the confusion that the Court's remedy could generate. One complication arises from the fact that there are multiple versions of the derivative citizenship statute that apply, depending on when the child was born[218] — a fact that, as I will explain, may be relevant to how one interprets the remedy provided in *Morales-Santana*. Another complication arises from the fact that the derivative citizenship statute specifies that American citizenship vests at birth. Therefore, the Court was limited in how it could redress the constitutional violation it identified. It could not level down retrospectively by denaturalizing foreign-born nonmarital children of American mothers who had already acquired citizenship derivatively under the more generous standard.[219] Finally, to compound these complications, all of the

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[215] Morales-Santana v. Lynch, 804 F.3d 520, 537–38 (2d Cir. 2015).

[216] *Morales-Santana*, 137 S. Ct. at 1701.

[217] *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 570–72 (2004) (arguing that leveling down, while promoting equal treatment in a material sense, may still express selective disdain for some persons); Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 316–19 (1979) (discussing the choice a court must face, after declaring a law unconstitutional as written, between the law's extension and invalidation); Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1199–201 (1986) (arguing that the Court's substantive concern about women's subordination militates in favor of extension over invalidation in gender equal protection cases); Sabina Mariella, Note, *Leveling Up over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. REV. 219, 238–41 (2016) (arguing that "[w]hen a statute is underinclusive, leveling down . . . will *never* fit the circumstances or remedy a litigant's injury," *id.* at 241).

[218] *See supra* note 12. To make matters worse, different sections of the current statute have different effective dates. *See* Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609, 2618–19 (codified as amended in scattered sections of 8 U.S.C.).

[219] *See* Immigration and Nationality Act of 1952, ch. 477, § 301(a), 66 Stat. 163, 235–36 (stating that a child born outside the United States to an American citizen parent who meets the statutory

operative statutes differentiate between foreign-born children of American parents using both the parents' gender and their marital status. The derivative citizenship statute thus contains at least two forms of discrimination that implicate modern equal protection principles: gender and illegitimacy. In this statutory context, crafting a remedy that extends a benefit to one group to the exclusion of another could exacerbate or create constitutionally problematic divisions.

The remedy crafted by the Court in *Morales-Santana* appears to have accounted for some of these complications but perhaps not others, and the resulting remedial directive is apt to generate confusion. Careful analysis of the penultimate sentence of the opinion in *Morales-Santana* demonstrates this point. The Court directs that "§ 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers."[220] One might expect that the Court intended that in future cases the government is required to apply the longer parental presence requirement in § 1401(a)(7) to the nonmarital children of American mothers. This would be a sensible interpretation of the Court's instructions in many statutory contexts, but in the case of this particular statute it is not clear how this directive should be interpreted.

There are at least three possibilities. The first, which is premised on a literal reading of the Court's order to apply "§ 1401(a)(7)'s now-five-year requirement" prospectively,[221] would have no impact on anyone's citizenship status. How could that be? The provision identified in that sentence, § 1401(a)(7), is from the 1952 version of the derivative citizenship statute and requires that, with the exception of unmarried mothers, the American parent in a mixed-nationality couple have resided in the United States for a total of ten years, five of which must have been after that parent turned fourteen.[222] This is the parental presence requirement that applies to Morales-Santana. But it has been superseded for children born after November 14, 1986.[223] As a consequence, the provision at issue — "§ 1401(a)(7)'s now-five-year requirement"[224] — has no "prospective" application in the sense that it is not the statutory requirement that applies to children born "now."

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requirements is a United States citizen at birth); Afroyim v. Rusk, 387 U.S. 253, 257, 264–65 (1967); Trop v. Dulles, 356 U.S. 86, 92–94 (1958).

220 *Morales-Santana*, 137 S. Ct. at 1701.

221 *Id.*

222 Immigration and Nationality Act of 1952 § 301(a)(7).

223 *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657 (codified as amended at 8 U.S.C. § 1401) ("Section [1401] . . . is amended by striking out 'ten years, at least five' and inserting in lieu thereof 'five years, at least two.'"); Immigration Technical Corrections Act of 1988 § 8(r) ("The amendment made by section 12 shall apply to persons born on or after November 14, 1986.").

224 *Morales-Santana*, 137 S. Ct. at 1701.

Moreover, because the citizenship status of foreign-born nonmarital children born to American mothers prior to the Court's decision in *Morales-Santana* has already vested (it did so at birth), the Court's leveling down remedy cannot affect the citizenship of children subject to the 1952 Act (or, for that matter, any child born before June 12, 2017).[225] Thus, there can be no "prospective" application of the Court's order to apply § 1401(a)(7) to foreign-born nonmarital children of American mothers — children who had the benefit of the one-year parental presence requirement.[226] For better or worse, under this reading of the remedial directive, no one's status as an American citizen would be affected by the Court's opinion in *Morales-Santana*. By reading the remedial directive in isolation, however, this interpretation fails to take into account the opinion's general admonition that "the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination."[227]

A second interpretation of the key remedial directive in *Morales-Santana* begins by recognizing the possibility that the Court's specific reference to § 1401(a)(7) may have been inadvertent. How so? Here, the fact that there are multiple versions of the statute is relevant. Section 1401(a)(7) has been renumbered in the more recent version of the derivative citizenship statute and as of 1986 requires that, as a general matter, for children born to mixed-nationality couples, the American parent of a foreign-born child must have resided in the United States for five years *total*, two of which must have been after the age of fourteen.[228] (Unmarried American mothers of foreign-born children are still required to satisfy a one-year presence requirement.[229]) Perhaps the "now-five-year" requirement described in *Morales-Santana* refers to the total parental presence requirement contained in the amended statute. And if one interprets the term "prospectively" to refer to all cases that are filed or were pending after the Court issued its opinion in *Morales-Santana*, then one might conclude that the Court's remedy requires the government to apply the "now-five-year" total parental presence requirement in a gender-neutral manner in those cases, even if the child was born before the effective date of the 1986 amendment.[230] Under

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[225] *See* sources cited *supra* note 219.

[226] Given this, one might argue that the Court had no choice in this instance but to "level up." *Cf.* Welsh v. United States, 398 U.S. 333, 362 (1970) (Harlan, J., concurring in the result) (explaining that because the Court cannot retroactively order nullification of an underinclusive exemption to a military draft statute, the Court must overturn the criminal conviction of a draft evader or he will "go remediless").

[227] *Morales-Santana*, 137 S. Ct. at 1686.

[228] Immigration and Nationality Act Amendments of 1986 § 12.

[229] 8 U.S.C. § 1409(c) (2012).

[230] With respect to the foreign-born nonmarital children of American mothers, the Court's opinion could not denationalize those children born before June 12, 2017, who are already citizens under

this interpretation, on remand Morales-Santana would have the opportunity to prove that his father satisfied the "now-five-year" total parental presence requirement in the current version of the derivative citizenship statute.

This reading of *Morales-Santana* garners support from the opinion's insistence that "the Government . . . ensure that the laws in question are administered in a manner free from gender-based discrimination."[231] It would also help eliminate the possible confusion created by a remedial directive that orders the government to apply a superseded statute "prospectively." However, it would extend the remedial impact of *Morales-Santana* beyond the specific directive in the opinion — which identifies § 1401(a)(7) as the provision that is subject to the remedial order — and would eliminate the availability of citizenship at birth for a class of children whom Congress identifies as citizens: the foreign-born nonmarital children born after June 12, 2017, to American mothers who could satisfy the one-year presence requirement but not the five-year-total presence requirement. Moreover, this interpretation of the remedy would functionally alter the effective date of the 1986 amendment to the parental presence requirement by requiring the government to apply the five-year-total "general" requirement to foreign-born nonmarital children born before November 14, 1986, to American fathers.

A third possible interpretation of the Court's remedial directive would follow a similar interpretation of the phrase "now-five-year" requirement just described but would enlist a different interpretation of the term "prospectively" — and would yield a different remedial outcome. Under this interpretation, the Court's reference to the "now-five-year" parental presence requirement would be understood to refer to the five-year-total requirement in the 1986 version of the statute. However, it would treat the Court's order to apply this requirement "prospectively" in a gender-neutral fashion to refer to children born after the Court's opinion was announced. Read in this way, the Court's remedy would be best understood to require the government to level down and apply the five-year-total parental presence requirement in the 1986 version of the statute to the citizenship claims of foreign-born nonmarital children born after June 12, 2017, to American mothers.

Like the second interpretation, this reading of the Court's opinion would eliminate any confusion created by a remedial directive that orders the government to apply a superseded statute, § 1401(a)(7), "prospectively." And it would similarly extend the remedial impact of

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the derivative citizenship statute. *See* sources cited *supra* note 219. As a consequence, this interpretation of the Court's remedy would not fully address the discrimination in the 1952 version of the statute because foreign-born nonmarital children born to American mothers before the Court's opinion who acquired citizenship under the 1952 statute would retain their citizenship, and the foreign-born nonmarital children of American fathers subject to that statute still would not have the benefit of the one-year parental presence requirement.

[231] *Morales-Santana*, 137 S. Ct. at 1686.

Morales-Santana beyond the directive in the opinion that explicitly identifies § 1401(a)(7) as the provision that is subject to its remedial order. It would also eliminate the availability of citizenship at birth for a class of children whom Congress identifies as citizens — the foreign-born nonmarital children born after June 12, 2017, to American mothers who could have satisfied the one-year presence requirement but not the five-year-total presence requirement. Finally, this reading would yield a remedy that leaves the gender-discriminatory statute challenged in *Morales-Santana* (the 1952 version) undisturbed, and the foreign-born nonmarital children born to American fathers prior to June 12, 2017 — including Luis Morales-Santana — subject to continuing discrimination.

My goal is not to provide a complete analysis of the many possible interpretations of the remedial directive in *Morales-Santana*, as even this summary account demonstrates that the remedy will require clarification and will generate many questions. The most obvious one is whether anyone's citizenship is affected by the leveling down remedy. Depending on how one answers that question, some lawyers and jurists may query whether the remedy crafted in *Morales-Santana* was a remedy at all. Among federal courts scholars, the Court's decision to level down prospectively could raise the question of whether the Court's opinion is advisory in nature — a point Justice Clarence Thomas possibly suggested in his short opinion concurring in the Court's judgment.[232]

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[232] In Justice Thomas's view, "[t]he Court's remedial holding resolve[d] [the] case." *Id.* at 1701 (Thomas, J., concurring in the judgment in part). "Because [the] respondent cannot obtain relief in any event," he explained, it was unnecessary for the Court to reach any other issue in the case, including the gender equal protection issue at the center of the case. *Id.*; *see also* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 5 (7th ed. Supp. 2017) (raising the question of whether *Morales-Santana* runs afoul of the prohibition on advisory opinions). Scholars have noted the relationship between remedies and concerns about advisory opinions. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 652 (2006) ("Th[e] demand for effective remedies helps explain the prohibition against advisory opinions."). Interpreting *Morales-Santana* to run afoul of the prohibition on advisory opinions would require very narrow interpretation of the remedy and a broad understanding of that concept given how often the Court announces constitutional rights violations but leaves the individual challenger without an effective remedy. *Cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1784–86 (1991) (chronicling various ways that the Court has recognized the existence of constitutional rights without also providing an individually effective remedy for the challenger); *id.* at 1798–802 (evaluating and rejecting the argument that the nonretroactive pronouncement of a constitutional right necessarily constitutes a forbidden advisory opinion). Given the Court's decision to level down in *Morales-Santana*, some might also query whether the remedy gives rise to a standing problem. The Court determined that Morales-Santana had third-party standing to raise his American father's equal protection claim. *Morales-Santana*, 137 S. Ct. at 1688–89. But Justice Thomas's contention that the respondent "cannot obtain relief" could raise a question concerning whether *anyone* has standing to raise an equal protection challenge to the derivative citizenship statute — though Justice Thomas does not make that point. The government made that argument in the *Miller* litigation, and it was rejected by Justice Stevens in his plurality opinion. 523 U.S. 420, 433 (1998) (Stevens, J.). In *Nguyen v. INS*,

Why would the Court have crafted a remedy that will spawn additional litigation and that almost surely eliminates a statutory right of citizenship for at least some class of individuals? It will take legal historians with access to archives just now being made to answer this question in full. But we do know that the Supreme Court sometimes moderates how it exercises judicial review in the process of navigating its relationships with Congress, the executive branch, and state entities — especially in cases involving politically salient issues.[233] This is true with respect to the Court's exercise of its constitutional remedial authority as well.[234] At times, the Court appears to moderate its use of remedial power in ways that help preserve its institutional legitimacy[235] while also asserting its authority to enforce the Constitution.[236] In *Morales-Santana*, the Court used a most searching form of judicial scrutiny[237] in a case involving a legal process that has been politically sensitive and contested throughout American history: line drawing between citizen and noncitizen. The opinion thus stands as an example of how the Court controls its use of remedial authority in ways that

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the Court noted that "all agree" a citizen father has standing to challenge the constitutionality of the derivative citizenship statute on equal protection grounds. 533 U.S. 53, 58 (2001).

[233] In the last several decades, political scientists have focused on institutional development and the Supreme Court's sensitivity to interbranch and federal-state relationships in its decisionmaking process. For a small sample of this literature, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007); Ronald Kahn & Ken I. Kersch, *Introduction* to THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 1 (Ronald Kahn & Ken I. Kersch eds., 2006); Mark A. Graber, *The Problematic Establishment of Judicial Review*, *in* THE SUPREME COURT IN AMERICAN POLITICS 28 (Howard Gillman & Cornell Clayton eds., 1999). A host of public law scholars whose primary institutional appointments are in law schools have also contributed to this literature. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 43–44 (1994).

[234] The well-known example of this is *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955). *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 314–19 (2004); Eskridge & Frickey, *supra* note 233, at 87–88; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 609–13 (1983). For a careful discussion of how federal courts moderate their use of remedial power for institutional reasons in the context of constitutional litigation, see Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 63–70 (2015).

[235] By "legitimacy," I simply mean its legitimacy *as a court*, which "is premised . . . on its status as a legal, as opposed to a political, institution." Kahn & Kersch, *supra* note 233, at 17; *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing different theories of constitutional legitimacy).

[236] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For a discussion of this conventional understanding of *Marbury*, see James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1515–19 (2001).

[237] *See supra* p. 206.

minimize the likelihood of unwanted controversy, while also exercising its power to say what the law is.[238]

To appreciate this point, it is helpful to understand what the Court's remedial options were in *Morales-Santana*. Reading the majority opinion, one might assume that the Court's primary choice was between extension of a benefit to the excluded class and nullification of that benefit. But those were only two of the possible options. Justice Thomas's very short concurring opinion — joined by Justice Alito — expressed skepticism that the Court "even ha[d] the 'power to provide relief of the sort requested in this suit — namely, conferral of citizenship on a basis other than that prescribed by Congress.'"[239] The internal quotation paraphrases the concurring opinion penned by Justice Scalia in *Miller v. Albright*, in which he set out his theory of nonremediability of any constitutional challenge to Congress's regulation of derivative citizenship — a theory grounded in the notion that the political branches have sovereign authority to regulate the admission of aliens.[240] The Court in *Morales-Santana* — and in *Nguyen* — declined to adopt the nonremediability theory, possibly because it is premised on a constitutional conception of the federal courts' powerlessness in citizenship cases that a majority of the Justices have not embraced.[241]

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[238] It is also a significant example of the Court's tendency in the last few decades to restrict remedies generally. *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224–25 (2003).

[239] *Morales-Santana*, 137 S. Ct. at 1701 (Thomas, J., concurring in the judgment in part) (quoting Nguyen v. INS, 533 U.S. 53, 73 (2001) (Scalia, J., concurring) (citing Miller v. Albright, 523 U.S. 420, 452 (1998) (Scalia, J., concurring))).

[240] *See Miller*, 523 U.S. at 452–56 (Scalia, J., concurring in the judgment); *see also id.* at 459 ("[T]his is not a case in which we have the power to remedy the alleged equal protection violation by either expanding or limiting the benefits conferred so as to deny or grant them equally to all.").

[241] The theory that the federal courts lack power to remedy equal protection violations in the regulation of derivative citizenship by conferral of citizenship was also rejected by a majority of the Justices in *Miller*, a fact that Justice Scalia acknowledged in *Nguyen*. 533 U.S. at 73 (Scalia, J., concurring); *cf. id.* at 71–72 (majority opinion) (recounting but declining to rely on the government's argument that "the Court cannot grant the relief petitioners request: the conferral of citizenship on terms other than those specified by Congress"). Justice Scalia's position in *Miller* is in tension with *United States v. Wong Kim Ark*, in which the Court rejected the government's contention that American-born children of immigrants were not citizens under the Citizenship Clause, *see* 169 U.S. 649, 693–94 (1898), a holding that was understood to result in their recognition as citizens, *id.* at 704–05. Justice Scalia also urged that Congress had expressly ruled out judicial "severing of a limitation on citizenship" in 8 U.S.C. § 1421. *See Miller*, 523 U.S. at 457 (Scalia, J., concurring in the judgment). As Justice Breyer noted in his dissenting opinion in *Miller*, however, that statute explicitly governs judicial procedures in naturalization proceedings, not derivative citizenship. *Id.* at 489–90 (Breyer, J., dissenting). Justice Breyer could have added that two other statutes expressly authorize judicial review of citizenship claims. *See* 8 U.S.C. § 1503(a) (2012) (providing that a person "within the United States" whose claim to "a right or privilege as a national of the United States" has been denied "may institute an action under [28 U.S.C. § 2201] . . . for a judgment declaring him to be a national of the United States"); *id.* § 1252(b)(5)(A) ("If the petitioner [in removal proceedings] claims to be a national of the United States and the court of appeals finds . . . that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide

Once the notion that the federal courts lack remedial authority altogether had been rejected, the question in *Morales-Santana* became how to remedy the constitutional violation.[242] In the relevant line of constitutional remedies decisions, legislative intent is the touchstone of the analysis,[243] and nullification and extension of a statutory benefit are generally presented as equivalent remedies for an equal protection violation — though the Court has also long maintained that extension is generally preferred over nullification.[244] Justice Ginsburg acknowledged the preference for extension but found that *Morales-Santana* "is hardly the typical case."[245] One reason that extension was not preferred here, she explained, was that leveling up would have exacerbated the statute's discrimination as between nonmarital and marital children — an outcome that would be in significant tension with

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the nationality claim."); *see also id.* § 1252(a)(2)(D) ("Nothing . . . in any . . . provision in this chapter . . . which limits or eliminates judicial review shall be construed as precluding review of constitutional claims . . . filed with an appropriate court of appeals in accordance with this section." (internal punctuation omitted)). Moreover, the statute providing for judicial review of citizenship claims asserted by individuals in deportation proceedings largely codified the Court's holding in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), which established a constitutional due process and habeas right to judicial review of such claims. *See* Agosto v. INS, 436 U.S. 748, 753 (1978) ("In carving out this class of cases [for judicial review], Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings."). Given the various statutory provisions that facilitate judicial review of citizenship claims, it is difficult to interpret § 1421 as a "clear statement of congressional intent" that "the severing of a limitation on citizenship [is] improper." *Miller*, 523 U.S. at 457 (Scalia, J., concurring in the judgment).

242 Notably, in her dissent in *Nguyen*, Justice O'Connor considered the remedial issue presented there — whether to nullify or extend the parental acknowledgment requirement that applies to unmarried fathers but not unmarried mothers — and found that with respect to that statutory provision, extension of the more generous standard to unmarried fathers was the appropriate remedy. 533 U.S. at 94–96 (O'Connor, J., dissenting).

243 *See* Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part) (insisting that a court "should not use its remedial powers to circumvent the intent of the legislature"). In most cases presenting the possibility of nullification, the Court has put great weight on the presence of a severability clause. *See id.* at 90 (majority opinion) ("The presence in the Social Security Act of a strong severability clause . . . likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse."). The 1952 Immigration and Nationality Act contains a severability clause. Ch. 477, § 406, 66 Stat. 163, 281 ("If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby."). But Justice Ginsburg did not discuss the role, if any, that clause played in crafting the remedy in *Morales-Santana*. The literature on severability is vast and will likely increase after *Morales-Santana*. For a very helpful and evocative recent contribution, see Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010).

244 Heckler v. Mathews, 465 U.S. 728, 740 (1984) ("[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." (quoting Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931))); *Westcott*, 443 U.S. at 89 (noting that ordinarily "extension, rather than nullification, is the proper course").

245 *Morales-Santana*, 137 S. Ct. at 1701.

the understanding that "[d]istinctions based on parents' marital status" are constitutionally suspect.[246] Another reason was that, in her view, in this instance congressional intent pointed toward leveling down. Justice Ginsburg maintained that extension would render the "special" one-year parental presence requirement for the nonmarital children of American mothers "the general rule" if applied to nonmarital children of American fathers — an outcome that Congress would not have contemplated when it initially drafted the statute.[247]

Ascertaining what a past Congress would have done in cases that raise a remedies question of this sort is notoriously difficult.[248] In *Morales-Santana*, as in many other cases, there were multiple ways to decipher the historical record. In the Court of Appeals for the Second Circuit, for example, Judge Raymond Lohier offered a very different interpretation of the legislative history of the derivative citizenship statute at issue in the case. He concluded that the ten-year parental presence requirement was itself "a significant departure from long-established historical practice,"[249] which before 1940 required the American parent to have resided in the United States for any period of time prior to the child's birth.[250] Given the ambiguity of the legislative record, the Immigration and Nationality Act's severability clause, and the Supreme Court's "binding precedent" counseling extension rather than contraction of a benefit, the Court of Appeals ruled that extension was warranted.[251]

Yet another approach focuses on the fact that the ten-year parental presence requirement put in place in 1940 — and challenged in *Morales-Santana* — is itself a product of a line-drawing process in which some officials were motivated by concerns that implicate modern constitutional equality principles. As discussed above, after first-wave feminists secured married American women's right to transmit citizenship to their foreign-born children in 1934, key administrators were concerned that the child of an American mother married to a foreign husband would be insufficiently "American" — a concern grounded in then-prevailing understandings of the role of the husband-father in the marital home

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[246] *Id.* at 1700 n.25.

[247] *Id.* at 1701. Justice Ginsburg also pointed to the disruption of the statutory scheme and the role that "residence in the country" had long played in American citizenship law. *Id.* at 1700 (quoting Rogers v. Bellei, 401 U.S. 815, 834 (1971)).

[248] *See* Walsh, *supra* note 243, at 752–53 ("[A court's] authority to 'excise' and 'rewrite' is effectively discretionary because the legislative intent test is almost always indeterminate.").

[249] Morales-Santana v. Lynch, 804 F.3d 520, 536 (2d Cir. 2015).

[250] *Id.*; *see also* Act of May 24, 1934, ch. 344, sec. 1, § 1993, 48 Stat. 797, 797; Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

[251] *Morales-Santana*, 804 F.3d at 537; *see id.* at 536–37.

and women's loss of civil identity within marriage.[252] Other officials articulated apprehension about the ethno-racial reach of derivative citizenship — a concern that is wholly inconsistent with modern prohibitions on race and national-origins discrimination, both constitutional and statutory. Thus, putting aside the question of whether the legislative and administrative record would support invalidation of the ten-year parental presence requirement in a direct constitutional challenge,[253] one could reason that extension is the proper route if by nullifying a statutory provision a court would leave in place a broader statutory scheme that was shaped by considerations that are contrary to modern constitutional values.[254] This approach would acknowledge that extension and nullification are not necessarily fungible, notwithstanding declarations in the Court's case law to that effect.[255]

Given the multiple ways of interpreting the legislative record, the complex and troubling history of exclusion that informed the ten-year parental presence requirement, and the Court's established practice of leveling up, how are we to understand the Court's decision to level down

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[252] *See supra* pp. 178–80. This concern informed the Supreme Court's assessment of the validity of restrictions on derivative citizenship as late as the 1970s. *See Bellei*, 401 U.S. at 832 (observing that the government's concern about influence of a noncitizen parent on foreign-born children was especially valid "when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality").

[253] *See* Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 2–3 (2013) (demonstrating that when minorities challenge discriminatory laws, they must show that the government acted with discriminatory purpose, an extraordinarily difficult standard to meet).

[254] *Cf.* Caminker, *supra* note 217, at 1191 (contending that nullification and extension are not always equivalent, and that the presumption that "*no* substantive constitutional norms exist to guide a court's remedial decision is flawed"). In a case decided in 2015 that is nearly identical to *Morales-Santana*, Senior District Judge David Ezra of the Western District of Texas provided just such an analysis. Judge Ezra began by cataloguing the nation's history of race and national-origin discrimination in immigration and citizenship law and observed that at least one purpose of the ten-year parental presence requirement was to buttress enforcement of those laws. Villegas-Sarabia v. Johnson, 123 F. Supp. 3d 870, 883–86 (W.D. Tex. 2015), *argued sub nom.* Villegas-Sarabia v. Duke, No. 15-50993 (5th Cir. Oct. 2, 2017). He then reasoned that "[a] law intended to restrict the ability of citizens to transmit their citizenship to their children on the basis of their race, even if facially race-neutral, raises serious equal protection concerns." *Id.* at 893. Thus, "[e]ven if the 82nd Congress indeed intended that ten years of physical presence be the rule, rather than the exception," he would not "fashion an equal protection remedy based on a law that may itself violate equal protection." *Id.*

[255] *See* Palmer v. Thompson, 403 U.S. 217, 220, 224–25 (1971) (finding no denial of equal protection where a benefit is denied to all, notwithstanding evidence of discriminatory motive). In other words, to paraphrase (and invert) Professor Douglas Rae's famous phrase, equality is not always as pleased with graveyards as it is with vineyards. *See* DOUGLAS RAE, EQUALITIES 129 (1981). Open recognition of Luis Morales-Santana as a citizen also would have been consistent with Justice Ginsburg's opinion in *United States v. Virginia*, in which she required extension of the benefit — that is, admission of women to the Virginia Military Institute — reasoning that "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." 518 U.S. 515, 557 (1996).

in *Morales-Santana*? A 1979 law review article by then-Professor Ruth Bader Ginsburg may help answer that question.[256] As a lawyer, she explained, she had favored extension of the benefit to her clients in equal protection cases.[257] Writing as a professor, however, she recognized that nullification might sometimes be the proper course.[258] Two points are worth noting about Professor Ginsburg's 1979 analysis. First, she directly linked the use of nullification to the need to preserve judicial review.[259] If the Court concluded that the legislature would not have extended the benefit to the excluded class but nullification was not an option, the federal courts would have to "withdraw from the field, leaving line drawing to the political branches without judicial oversight."[260]

Second, although Professor Ginsburg indicated that the legislative intent that matters in crafting a remedy is that of the enacting Congress — a position that is consistent with the Court's precedent both then and today[261] — in some passages it appears that the legislative will of the present Congress could be germane to the question of whether to extend or nullify. The task of crafting a constitutional remedy is "essentially legislative," she observed, but because the "legislature . . . cannot be convened on the spot," the court must provide an "interim solution."[262]

In the cases discussed in Professor Ginsburg's 1979 article, the primary consideration was costs — specifically, financial costs — in challenges to gender-based Social Security benefit programs and whether leveling up would result in public expenses that the legislature would

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[256] Ginsburg, *supra* note 217.

[257] *Id.* at 301–05, 324.

[258] *See id.* at 316–18.

[259] *See id.* at 303, 317–18. Legal scholars have drawn connections between the availability of certain remedies and judicial review more recently as well. *See, e.g.*, Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007) (maintaining that "no workable system of judicial review could function without a large role for severability"); Fallon, *supra* note 232, at 636 ("[T]he Court may regard the award of a particular remedy in a particular kind of case as practically necessary if a right is to be enforced successfully at all.").

[260] Ginsburg, *supra* note 217, at 317; *see also id.* at 318 (contending that nullification is the appropriate course when the other option is to "abandon[] constitutional review" altogether).

[261] *See* United States v. Booker, 543 U.S. 220, 246 (2005) (stating that severability depends on "'what Congress would have intended' in light of the Court's constitutional holding" (quoting Denver Area Educ. Telecomms. Consortium, Inc., v. FCC, 518 U.S. 727, 767 (1996) (opinion of Breyer, J.))).

[262] Ginsburg, *supra* note 217, at 317. Remedies scholars have speculated that this is, in fact, what judges do. *See* Walsh, *supra* note 243, at 752–53. The question of which Congress's intent matters in crafting a remedy was raised at oral argument in *Morales-Santana.* Transcript of Oral Argument at 36–37, 45–48, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191). Of course, most political scientists and like-minded legal scholars would say that the Court's present relationship with the political branches is a crucial factor in much of its decisionmaking. *See, e.g.*, Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009); Eskridge & Frickey, *supra* note 233, at 40.

not want to encounter.[263] What costs would be imposed by a judicial decree that leveled up and recognized Morales-Santana as a citizen? The application of the one-year parental presence requirement to the nonmarital children of American fathers would not trigger the kind of expenditures that were at issue in the Social Security cases, but some of the Justices may have been concerned about a different kind of cost — a cost to the Court's institutional legitimacy and its relationships with the political branches.

In *Morales-Santana*, the Court was faced with a controversy that not only required it to tackle a long-standing question concerning the constitutional status and rights of unmarried fathers but also pulled it into a contest over who qualifies as an American and, most immediately, who is deportable.[264] In the early twentieth century, the expansion of derivative citizenship in response to demands for gender equality was contentious in no small part because it would have converted excludable or deportable noncitizens into citizens who were neither.[265] In the present case, a clear and explicit expansion of the availability of derivative citizenship in response to modern gender equality claims would have done the same — and done so at a time when the question of the Court's role in the enforcement of the Constitution at the border is a subject of intense national debate. Leveling down in *Morales-Santana* allowed the Court to resolve the equal protection challenge that was before it without attracting the kind of attention potentially generated by redrawing the line between citizen and noncitizen in a more inclusive manner.

There were other options. For example, the Court could have shown deference to Congress by crafting an interim remedy that extended the one-year parental presence requirement to individuals such as Morales-Santana[266] as an initial matter, leaving Congress to craft a permanent solution. Or it could have temporarily stayed its judgment to give Congress time to remedy the violation in the manner it saw fit, similar to its approach in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[267] But had the Court issued an interim remedy recognizing

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[263] Ginsburg, *supra* note 217, at 301, 305, 318–19.

[264] For a reading of the *Morales-Santana* litigation by an organization that supports increased restriction of immigration and limitation of birthright citizenship, see Dan Cadman, *Birthright Citizenship Policy Creates Downstream Problems*, CTR. FOR IMMIGR. STUD. (Oct. 5, 2016), http://cis.org/Cadman/Birthright-Citizenship-Policy-Creates-Downstream-Problems [https://perma.cc/Q74C-NZBU].

[265] *See supra* pp. 182–83.

[266] However, had the Court taken this route, Morales-Santana's citizenship would most likely have vested, and hence Congress would have been limited in how it addressed his citizenship status.

[267] 458 U.S. 50, 88 (1982). This proposal was voiced not by the parties but by Justice Kagan. During oral argument, she proposed that upon finding an equal protection violation, the Court could "stay[] our judgment for a period of time and allow[] Congress essentially to do it a different way if it wanted to." Transcript of Oral Argument at 40, *Morales-Santana*, 137 S. Ct. 1678 (No.

Morales-Santana as a citizen, or even had it left the matter entirely in Congress's hands, it may have drawn more attention to the issue and — in the current political climate — triggered a legislative outcome even more disappointing to progressives.

Whether any of the Justices reasoned along these lines behind closed doors is unknowable, of course. But regardless of the precise reasons for the Court's decision to level down, whether doctrinally or practically driven, nothing can change the fact that the burden of the Court's remedy is likely to be felt by persons — nonmarital children — whose status has long been precarious, both in our citizenship laws and in our society.[268] Nor can any explanation eliminate the historical irony that the Court's decision to apply the "general" parental presence requirement to all children of mixed-nationality relationships may have extended the reach of a statutory provision that was initially enacted in part as an effort to limit the effect of gains in women's "equal citizenship" in an earlier era.[269]

A final point. Some may conclude that the Court's remedy in *Morales-Santana* is simply evidence that the plenary power doctrine, or at least its spirit, was at work in the case.[270] This is not implausible. But my analysis of the Court's remedy recognizes that, for better or worse, the Court moderates its use of constitutional remedies in diverse contexts. My analysis also accounts for the fact that the opinion explicitly rejects the proposition that the plenary power doctrine is applicable in constitutional challenges to the derivative citizenship statute, refuses to credit the government's justifications for the gender lines drawn in that statute, and holds that, going forward, statutory citizenship must be administered in conformity with modern constitutional equality principles. In light of these features of the Court's opinion, the decision to level down makes *Morales-Santana* like the many other cases in which the Court's remedial decision was informed at least in part by a desire to defuse the salience of an unprecedented or controversial assertion of judicial power. What, if anything, the Court will do with this power in the future, and how it might build on *Morales-Santana*, are open questions.

15-1191); *see also* Mariella, *supra* note 217, at 253–56 ("[T]he Supreme Court could issue a declaratory judgment holding that the provision is unconstitutional, but stay an injunction . . . to give the legislature time to respond." *Id.* at 254.).

[268] *See* Collins, *supra* note 4, at 2215–19.

[269] *See supra* p. 184.

[270] Such an argument would parallel that developed in Pillard, *supra* note 116.