

Unwed Parents: The Limits of the Constitution

by
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Introduction

As marriage has evolved to become a more egalitarian institution in both form and substance, nonmarriage remains full of antiquated norms and gendered hierarchies.¹ In constitutional terms, while equality and due process considerations have forged an increasingly open and equal marital relation, these gains have largely been limited *to* marriage.² The Constitution has failed to

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¹ See generally Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019) (arguing that “a body of law that once regulated relationships between husbands and wives now occupies a space where marriage no longer formally reaches”). To be clear, this argument concerns how the law regulates nonmarital relationships and does not make claims about the nature of the relationships themselves. This is an important, but easily overlooked, distinction.

² This is not to say that marriage itself, or the constitutional decisions regarding marriage, are without problems of their own. See, e.g., Michael Bou-

reform nonmarriage in similar ways and, as a consequence, it continues to contain “stunningly anachronistic”³ laws and principles.

Nonmarriage is by definition broad, encompassing the many activities and statuses that take place outside of marriage.⁴ The nonmarital cases this essay addresses involve unwed parents, which constitute a small but important slice of the legal issues that arise in the nonmarital domain. The Supreme Court has had occasion to interpret the Constitution’s applicability to nonmarriage in a series of cases addressing unwed fathers; these decisions range from considering whether notice ought to be provided to an unwed father as a constitutional matter before placing his biological child for adoption, to whether disparate requirements for unwed fathers and unwed mothers in transmitting citizenship violate equal protection.⁵ Throughout, the Court has

cai, *Before Loving: The Lost Origins of the Right to Marry*, 2020 UTAH L. REV. 69, 76 (arguing that the Supreme Court’s decision in *Loving v. Virginia* “hides a jurisprudential void that, *a priori*, we have no cause to fill”).

³ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017).

⁴ Because of its breadth, not every constitutional decision addressing nonmarriage is susceptible to this critique. The Supreme Court has, for example, extended rights to unmarried individuals in cases like *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and so provided constitutional protections to groups who were previously excluded. See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1218 (2016) (describing the Court’s “jurisprudence of nonmarriage” and proposing that this case law “can—and should—be read in tandem to confer recognition of, and constitutional protection for, nonmarriage and nonmarital families”).

⁵ I have addressed this constellation of unwed parent cases in depth in a prior article, where I argued that the decisions concerning unwed fathers across different doctrinal areas are best understood together, as products of the same reasoning. See Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J. L. & GENDER 405 (2013) (noting that in deciding the citizenship transmission cases, the Court “relies directly on its treatment of unwed American fathers and mothers in its equal protection doctrine domestically,” all of which “reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child’s life thereafter”). Scholars before and since have analyzed and linked these cases in various important and far-reaching ways. See, e.g., Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221 (2020) (describing the Court’s decisions addressing illegitimacy, including the cases addressing immigration law, as endorsing a logic of maternal certainty); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292

repeatedly upheld dissimilar treatment where it finds the existence of “real” differences between men and women.⁶ Reasoning from the “fact of conception”⁷ and “proof”⁸ of paternity, the Court has consistently concluded that men and women are not “similarly situated”⁹ when it comes to their roles as mothers and fathers. These facts that purportedly distinguish mothers from fathers as a general matter, gain legal significance only outside of the status of marriage.

The most recent of the unwed fathers cases, decided in 2017, is *Sessions v. Morales-Santana*. In an opinion authored by Justice Ginsburg, the Court struck down the different residency lengths

(2016) (analyzing the history surrounding the rise in “nonmarital fathers’ constitutional equality claims” including the derivative citizenship cases); Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2271-85 (2017) (arguing that the Court’s decisions addressing illegitimacy both granted protections outside of marriage and continued to resort to “sex-based differences in reproductive biology,” with the immigration cases “more extensively [relying] on gender differentiation in parenthood . . . in ways that are more punitive to nonmarital parents and children”); Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 *CASE W. RES. L. REV.* 541 (2019) (addressing the various doctrinal areas in which the Supreme Court has upheld a “gendered approach to constitutional parentage” and arguing that *Obergefell v. Hodges* and *Sessions v. Morales-Santana* provide a basis for finding such treatment unconstitutional); Katharine B. Silbaugh, Comment, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 *B.U. L. REV.* 1139, 1156 (1999) (critiquing *Miller v. Albright*, a case involving citizenship transmission, along with the Court’s general jurisprudence addressing parental rights, for failing to “display comprehension of their impact on family law practice, and at times the radical departure from well-reasoned family law practices, that their formal equality approach could signal”).

⁶ See *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (“The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”); Antognini, *From Citizenship to Custody*, *supra* note 5, at 429-46 (describing the rise of the jurisprudence of “real” difference in the immigration and citizenship transmission cases). Serena Mayeri has considered the historical context of these Supreme Court cases in-depth and identified various forces at play behind the Court’s decisions, including feminist disagreement, concluding ultimately that “divorced fathers’ rights and traditionalist conservatism . . . left their ideological fingerprints on the nonmarital fathers cases.” Mayeri, *supra* note 5, at 2380-81.

⁷ *Nguyen*, 533 U.S. at 66.

⁸ *Id.* at 67.

⁹ *Lehr v. Robertson*, 463 U.S. 248, 267 (1983).

required of unwed mothers and unwed fathers prior to transmitting citizenship to their children.¹⁰ The decision has been lauded for eliminating one of the few remaining facial sex-based distinctions,¹¹ and criticized for the remedy it issued in response.¹² This essay does neither. Instead, it argues that *Morales-Santana* signals a clear break from the unwed fathers cases by identifying the role that law plays in constructing what had previously been presented as unassailable fact. This essay engages in a close reading of *Morales-Santana* to show exactly how the Court exposes a set of ostensibly factual observations as legal judgments that rely on outdated notions of fathers and mothers, and which continue to prop up laws that differentiate between parents on the basis of sex to this day.

To be sure, analyzing the Court's reasoning is not necessarily important as a matter of predicting what the Court will do in future cases addressing the constitutional rights of nonmarital families – that has been largely pre-determined by the Court's most recent appointees.¹³ The opinion is also, in many ways,

¹⁰ *Morales-Santana*, 137 S. Ct. 1678. This essay interprets the opinion in the context of the Court's jurisprudence on unwed parents generally, instead of as a product of Justice Ginsburg's jurisprudence specifically. For a consideration of *Morales-Santana* within the larger project of Justice Ginsburg's work on gender equality, see Julie C. Suk, *Justice Ginsburg's Cautious Legacy for the Equal Rights Amendment*, 110 GEO. L.J. 1391 (2022).

¹¹ Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 173-74 (arguing that the Court in *Morales-Santana* and *Pavan v. Smith* did "no small thing" insofar as it "genuinely scrutinized the government's ostensibly biological justifications for threatening the sexes differently in contexts where it has traditionally declined to do so").

¹² Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J. L. & GENDER 177, 178 (2019) ("While Justice Ginsburg's decision in *Morales-Santana* purported to be a strong, historic decision on the merits of equality, the denial of meaningful relief actually weakened the meaning of equality, a consequence with a reach far beyond the contours of this one case.").

¹³ While due process has been particularly imperiled to date, it is not clear that equal protection will fare any better. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)) ("Neither *Roe* nor *Casey* saw fit to invoke this theory [that the Equal Protection Clause houses the right to abortion], and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that ap-

dated, part of a different legal landscape, one in which women and pregnant persons had more rights – to equality, to dignity, to bodily autonomy.¹⁴ The point of this essay then is to reveal the mechanisms by which value judgments become hardened into constitutional axioms in order to recover them as contingent, and therefore contestable, opinions. The nonmarital cases exist in the register of indisputable observation, yet they are based on archaic beliefs about the abilities of men and women that reflect, and continue to reproduce, gender inequality. Thus, how constitutional reasoning leads to these outcomes must be carefully scrutinized—if not to change the law, then at least to understand how it comes to be.

This essay proceeds in two Parts. Part I parses the Court’s opinion in *Morales-Santana* and explains how it differs from the cases that have come before it. This Part spends some time analyzing the Court’s decision to consider the unwed mixed-status family contemplated by the citizenship statutes, as opposed to remaining tethered to the American parents. This shift in perspec-

plies to such classifications.”). *But see* Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights* (2022), <https://ssrn.com/abstract=4315876> (exploring and developing equal protection as a basis for asserting expanded rights post-*Dobbs v. Jackson Women’s Health Org.* in both legal and political arenas).

¹⁴ See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (explaining that until *Dobbs v. Jackson Women’s Health Org.*, “never has the Court reversed a right that the Court itself had justified as important to a group’s equal participation ‘in the economic and social life of the Nation.’ And *no* case retracting a marginalized group’s equal-participation rights earns respect in the constitutional canon.”) (internal citations omitted). This is not to say that equality in accessing abortion and securing reproductive rights more generally was achieved pre-*Dobbs*, especially for poor women of color. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1461 (1991) (“The reproductive freedom of poor women of color . . . is limited significantly not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship.”); Franklin & Siegel, *supra* note 13, at 31 (“the vast majority of women who obtain abortions are poor, and they are disproportionately Black and brown” noting specifically that “[t]he overrepresentation of Black women among those who seek abortions is particularly pronounced in Mississippi, where *Dobbs* arose,” which is also experiencing a “crisis in Black maternal and infant mortality”).

tive allows the Court to uncover the gendered assumptions that lie at the root of these laws. While distinguishing between men and women in terms of how long they have resided in the United States might appear especially removed from being a parent, the reasoning *Morales-Santana* exposes as flawed is foundational to a number of the Court's decisions.¹⁵ In fact, *Morales-Santana* is fundamentally concerned with the question of who is a parent, which renders the Court's opinions in related areas particularly vulnerable despite its assurances to the contrary.

This essay then turns to what the Court did not do. Part II examines what *Morales-Santana* fails to address and thereby redress. It did not identify with any specificity the burdens that might accrue to the caretaking parent, nor did it consider the ways in which same-sex couples are affected by, and could also have helped challenge, the heteronormative family the laws presume. This Part concludes by highlighting the obvious – that the decision not only implicates gender but, critically, citizenship. Yet the Court did not consider the core question of citizenship that was presented to it: it was silent with regard to the racialized history of the citizenship rules, and it fashioned a remedy that wholly ignored the predicament of the respondent, Luis Ramón Morales-Santana. Significantly, even as *Morales-Santana* puts forward a more mutable account of gender, it upholds a categorical definition of citizenship which, perhaps predictably, allows the discrimination against the foreign mother to continue.¹⁶

¹⁵ See Franklin, *supra* note 11, at 34 (describing that “[t]he nexus between biological differences and the sex distinction in *Nguyen* [addressing different requirements imposed on unwed fathers and unwed mothers to prove their relationship to their children] was arguably closer than the nexus between biological differences and the sex distinction in *Morales-Santana*”).

¹⁶ I use the term “foreign” instead of “alien” or “non-American.” Like “alien,” the term “foreign” is found in legal materials, but I prefer it because it is less explicitly, and prejudicially, “other.” I also prefer it to “non-American” because it is less repetitive and does not exclusively turn on being American, or not. The term still retains shades of exclusion, which I think are important to take into consideration, see discussion *infra* Part II.C; it also underscores that I am writing from the perspective of a legal scholar analyzing American law.

I. The Unwed Parents in *Morales-Santana*

At issue in *Sessions v. Morales-Santana* is a provision of the Immigration and Nationality Act (“INA”) that sets forth the requirements parents must satisfy in order to transmit American citizenship to their children born abroad.¹⁷ This Part describes the statute and the ways it links citizenship transmission to differing residency lengths. It then contextualizes the Court’s decision by turning to *Nguyen v. INS*, which addressed a similar provision, to show how *Morales-Santana* replaced what could have easily been a discussion of the biology of the American parents with an analysis of the legal assumptions the statute is making about the mixed-nationality couple before it. Indeed, the Court’s cases on unwed parents provide ample basis for upholding the distinctions *Morales-Santana* ultimately found unconstitutional. This Part concludes by showing how *Morales-Santana* could unsettle current constitutional terrain by providing the rationale for overturning existing precedent on unwed fathers.

A. The INA’s Residency Requirements

The requirements for transmitting citizenship set forth in the INA vary depending on both the nationality and the marital status of the parents.¹⁸ Married partners are the baseline, which the statute addresses in section 1401.¹⁹ The INA does not differentiate between marital couples on the basis of sex,²⁰ only on the basis of nationality. The sole precondition for married parents

¹⁷ If the child is born in the United States, then the child is an American citizen at birth, regardless of the parents’ citizenship status. 8 U.S.C. § 1401(a) (2012).

¹⁸ 8 U.S.C. §§ 1401, 1409 (2012). They also, obviously, differ depending on where the child was born. 8 U.S.C. § 1401(a) (2012).

¹⁹ See *Morales-Santana*, 137 S. Ct. at 1686-87 (describing Section 1401 as “provid[ing] the general framework for acquisition of citizenship at birth”).

²⁰ This was not always the case. Until 1934, the foreign-born child of a married couple could only acquire U.S. citizenship through the father. *Id.* at 1691. Outside of marriage, the situation was reversed. Even though there was no statutorily defined right, “in practice unwed mothers transmitted citizenship to foreign-born children.” Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1680-81 (2000). And despite fathers being able to do so generally, *unwed* fathers were only allowed to transmit citizenship in a set of limited circumstances. *Id.* at 1681.

transmitting citizenship abroad is satisfying a residency requirement, which varies based on the nationality of the American citizen's spouse. For married couples who are both citizens, the statute sets out a mere "had residence" requirement; for couples who are composed of a citizen and a national, the citizen must satisfy a year-long physical residency in the United States or one of its possessions; and, for couples where one "is an alien and the other a citizen of the United States," the statute imposes a five-year residency period on the citizen.²¹

Section 1409 addresses unwed parents.²² Where the parents are unmarried, the statute makes further distinctions on the basis of gender. An unwed mother can transmit citizenship upon giving birth, while an unwed father must satisfy a series of proffers post-birth. Under subsection (a), the child of an unwed father can receive American citizenship directly from him only if: there is clear and convincing evidence of a blood relationship; the father was American at the time of birth; the father has agreed in writing to provide financially for the child; and, while the child was under 18 years of age, the father legitimated the child, acknowledged paternity in writing or under oath, or paternity was adjudicated by a court.²³ Most of section 1409 applies to unwed fathers – subsections (a) and (b) address paternity, while only subsection (c) addresses maternity. Moreover, subsection (c) is framed as an exception – it exempts unwed mothers from subsection (a), which sets out the various requirements an unwed father must satisfy prior to transmitting citizenship. Subsection (c) provides that "[n]otwithstanding the provision of subsection (a)," the unwed mother transmits citizenship to her child automatically upon birth.²⁴

There are also differential residency requirements for the unwed parents depending on their gender. Section 1409 permits the unwed mother to transmit citizenship after having lived in the United States for a significantly shorter period of time than the unwed father. The unwed mother must have "previously been

²¹ 8 U.S.C. § 1401(g) (2012).

²² 8 U.S.C. § 1409 (2012). This is the current version of the statute in place. The cases deal with a slightly different version; the provisions are similar in that they both contain distinctions between unwed parents based on gender.

²³ 8 U.S.C. § 1409(a) (2012).

²⁴ 8 U.S.C. § 1409(c) (2012).

physically present in the United States or its outlying possessions for a continuous period of one year.”²⁵ Meanwhile, the unwed father must have been “physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.”²⁶ The statute aligns wed and unwed parents in the following way: the unwed father shares the same residency requirement as the married couple of different nationalities, while the unwed mother shares the same residency requirement as the married couple composed of a United States citizen and national.

The Court considered this residency scheme that facially distinguishes between unwed parents on the basis of sex in *Morales-Santana*.²⁷ Because of the longer residency requirement imposed on fathers, Luis Ramón Morales-Santana was placed in removal proceedings after being convicted under New York state criminal law.²⁸ His father, José Morales, had left Puerto Rico twenty days before he turned 19.²⁹ Morales moved to pursue employment as a builder-mechanic for an American company located in the Dominican Republic during the period that country was occupied by the United States.³⁰ Because Morales left an officially designated U.S. territory – Puerto Rico – prior to turning 19, he failed to satisfy the statutory five-year physical presence requirement *after* attaining 14 years of age. Therefore, his son, Morales-Santana – who lived in Puerto Rico, and then New York City with his father – was not considered a citizen upon birth, despite the fact that his father eventually married his mother and was added to Morales-Santana’s birth certificate.³¹ Had Morales-Santana’s U.S. citizen parent been the mother, she would have only needed to satisfy

²⁵ *Id.*

²⁶ 8 U.S.C. § 1401(g) (2012).

²⁷ *Morales-Santana*, 137 S. Ct. at 1687.

²⁸ *Id.* at 1688.

²⁹ *Id.* at 1687. At issue in *Morales-Santana* was a prior version of the statute, which required ten years of physical residence prior to the child’s birth, with five occurring after the age of fourteen. *Id.*

³⁰ *Id.* The Second Circuit’s opinion below, in *Morales-Santana v. Lynch*, addresses and rejects the argument that the Dominican Republic was an “outlying possession” of the United States given its military occupation of the country. 804 F.3d 520, 526-27 (2015).

³¹ *Morales-Santana*, 137 S. Ct. at 1688.

the shorter, one-year residency requirement that his father had amply fulfilled.

Perhaps it seems obvious that having a residency requirement turn on whether the parent is a man or a woman violates equal protection. The connection between how long one lives in the United States to one's sex is, on its face, tenuous. But, in considering that very question in *United States v. Flores-Villar*, the Supreme Court affirmed the Ninth Circuit's ruling that such distinctions were constitutional in an evenly split per curiam in 2011.³² And, the Ninth Circuit's reasoning was a relatively straightforward extension of the principles the Court had espoused in prior cases upholding sex-based distinctions in the citizenship context.³³ Let us turn to those cases to understand how the Court has linked parentage to citizenship transmission in finding such distinctions constitutional.

B. *The Lopsided Significance of Biology*

The Court addressed the general question of what gender equality demands in regulating the transmission of citizenship in *Nguyen v. INS*.³⁴ It answered by pointing to the biological differences between men and women in the reproductive process and upholding section 1409(a)(4)'s menu of affirmative requirements imposed on unwed fathers, but not unwed mothers. Despite the Court's rhetoric of inevitability, the distinctions it makes are far from it, as shown by how the relevance of biology waxes and wanes depending on the gender of the parent. Biology is consistently more salient for the woman than for the man.³⁵ The Court

³² *United States v. Flores-Villar*, 564 U.S. 210 (2011) (per curiam). It was a four-four affirmance, with Justice Kagan recusing herself.

³³ See *Nguyen v. U.S.*, 533 U.S. 53, 63 (2001); *Miller v. Albright*, 523 U.S. 420 (1998) (plurality opinion).

³⁴ *Nguyen*, 533 U.S. 53.

³⁵ The term "biology" can encompass the biological process of birth and, separately, a genetic connection. I use the term broadly, and ambiguously, just as it is used by the Court. I also use "sex" and "gender" interchangeably, based on the Court's own use of the terms, and to underscore the ways that both gender and sex can be socially constructed. See Jessica A. Clarke, *Sex Assigned at Birth*, 122 *COLUM. L. REV.* 1821, 1872-73 (2022) (critiquing the reliance of feminist theory on "[t]he biological sex/social gender distinction" noting that "[t]his line of thinking takes for granted that 'sex' means the raw materials of nature"). That said, gender-based distinctions are a separate phenomenon from

establishes motherhood by reference to birth as both proof of a genetic connection and evidence of the parental relationship that will ensue. For the father, biology determines neither proof of a genetic connection nor, where that connection exists, evidence of a parental relationship. While the Court elevates biology for women, it trivializes its importance for men.³⁶

The Court identifies two governmental interests the requirements imposed on the unwed father further. The first governmental interest is proof of a genetic relationship. Given that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood,”³⁷ the Court understands the requirements of (a)(4) as necessary to proving paternity. This is so despite the statute’s separate provision in 1409(a)(1) that “a blood relationship” must be shown by clear and convincing evidence.³⁸ The Court easily dismisses that *biological* requirement – one that would completely satisfy the governmental interest in ensuring a genetic connection – and allows the government to transform it into a *legal* requirement. Instead of recognizing paternity as a matter of fact, it becomes meaningful only when it is recognized as a matter of law – by “legitimation, paternity oath, [or] court order of paternity.”³⁹ Absent the satisfaction of one of these three options, any actual genetic connection between unwed father and child has no purchase. Women must also satisfy this evidentiary requirement; for them, “proof of motherhood . . . is inherent in birth itself.”⁴⁰

sex-based distinctions, as evidenced from the fact that the former can persist even once the latter are eliminated.

³⁶ See also Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 80 (2003) (describing “a lingering notion that in relationships outside of marriage, parental roles are determined by rigid, sex-specific, biological facts, and that—by virtue of their participation in gestation and labor—mothers are the primary parents”).

³⁷ *Nguyen*, 533 U.S. at 63.

³⁸ *Id.* (reasoning that “[t]he Constitution [] does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity”).

³⁹ *Id.*

⁴⁰ *Id.* at 64. Despite the Court’s insistence on the centrality of birth to motherhood, Courtney Cahill has shown how birth and its relationship to motherhood were being legally contested during that very time. See Cahill, *supra* note 5, at 2224-27 (arguing that cases beginning in the 1980s “showed that, con-

The Court also makes biology central to the second governmental interest – but again, only for the mother. The second interest the Court identifies is the “demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties providing a connection between child and citizen parent and, in turn, the United States.”⁴¹ The Court characterizes the interest at stake for the father as “too profound to be satisfied merely by conducting a DNA test.”⁴² As such, the biological connection “does nothing, by itself, to ensure contact between father and child during the child’s minority.”⁴³ The Court frames this interest as moving beyond biology for the mother too, and explains that it addresses the “opportunity for mother and child to develop a real, meaningful relationship”; yet it characterizes the relationship that ensues between mother and child as a “biological inevitability.”⁴⁴ For the woman, birth therefore functions as conclusive proof of a genetic connection and of “a real, meaningful relationship.”⁴⁵ In so doing, the Court collapses the biological event of birth into the social activity of motherhood.⁴⁶ Because the case addresses who gets to claim American citizenship, it also collapses birth and ties to the United States.

trary to the Supreme Court’s suggestion otherwise, pregnancy and birth were not inherent proof of motherhood”).

⁴¹ *Nguyen*, 533 U.S. at 64-65.

⁴² *Id.* at 67. Douglas NeJaime reads the Court’s body of unwed fathers cases as providing a basis for moving beyond biology in recognizing who is a parent: “By focusing on family formation, parental responsibility, and parental conduct, these precedents value social over biological dimensions of parenthood—even though they do not expressly acknowledge a due process interest in parental recognition for nonbiological parents.” Douglas NeJaime, *The Constitution of Parenthood*, 72 *STAN. L. REV.* 261, 269 (2020).

⁴³ *Nguyen*, 533 U.S. at 67. While the moment of birth can be incredibly significant for a mother, and help establish the becoming of a mother for some, it is neither conclusive proof of a genetic connection nor the only way to become a mother. See Cahill, *supra* note 5, at 2258 (“Constitutional maternity generalizes about pregnant women by assuming that pregnancy (as conduct) is inherent proof of motherhood (as status).”).

⁴⁴ *Nguyen*, 533 U.S. at 65.

⁴⁵ *Id.*

⁴⁶ This is a dangerous conflation, with deleterious effects on women and all individuals who can become pregnant. See *Dobbs*, 142 S. Ct. 2228, and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

The event of birth that is so monumental for the mother – a biological imperative that proves both a genetic and a social connection – is reduced to “a few strands of hair” for the father.⁴⁷ Given the centrality of birth to the Court’s understanding of the statute’s distinctions, it would seem that the Court’s concern with the father would be the inverse – his inability to give birth. But, throughout the opinion, the Court is not so much concerned with his reproductive limitations, as it is with his complete absence, which takes many forms and occurs at many different junctures.⁴⁸ The Court catalogs the various reasons and numerous ways the father will be gone: “the number of Americans who take short sojourns abroad” means “that a father might not even know of the conception”; the father will likely not “be present at the birth of the child”; it follows then that the father will likely lack “an initial point of contact with the child”; so it is an open question whether “the father and his biological child will ever meet.”⁴⁹ Looking to how the rules regulate marriage only underscores the weak work birth is actually doing to explain the *father’s* predicament: birth also occurs when a woman is married, yet in that context, it does not lead to any special rights for the mother vis-à-vis the father.⁵⁰

Notwithstanding these shortcomings, the Court’s reasoning in *Nguyen* laid the foundation for the Ninth Circuit’s opinion in *Flores-Villar*.⁵¹ The constitutionality of section 1409 was again at

⁴⁷ *Nguyen*, 533 U.S. at 67 (“Paternity can be established by taking DNA samples even from a few strands of hair, years after the birth. Yet scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child’s minority.”) (internal citation omitted).

⁴⁸ See Antognini, *supra* note 5, at 410 (arguing that the unwed fathers cases “consistently reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child’s life thereafter”).

⁴⁹ *Nguyen*, 533 U.S. at 66-67.

⁵⁰ Feminists have critiqued marriage’s various gender-neutral rules as having come at a cost to women. See Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 V.A. L. REV. 79, 84 (2016) (analyzing the history of the fathers’ rights movement and “exposing the limits of sex neutrality under law as a means to realize substantive gender equality”). The point about the rights that inhere in marriage serves to question the Court’s assertions about the importance of biology, which would presumably not change based on the presence or absence of an independent legal status.

⁵¹ *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008).

issue, but this time the case addressed the differing residency lengths required of unwed mothers and fathers. In upholding the one-year residency for unwed mothers, the Ninth Circuit agreed with the government's asserted rationale that a shorter residency period reduced the likelihood of statelessness for children of unwed mothers, even if "the fit [between means and ends] is not perfect."⁵² The court also agreed that the longer period of time for the unwed father furthered the important interest of "assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen,"⁵³ a variation on *Nguyen's* second governmental interest. The court easily rejected the argument raised by the petitioner, Ruben Flores-Villar, that the statute "perpetuate[s] the stereotypical notion that women should have custody of illegitimate children."⁵⁴ Rather, the Court found that the father's longer residency requirement "furthers the objective of developing a tie between the child, his or her father, and this country."⁵⁵

The wholesale extension of *Nguyen* was possible in *Flores-Villar* because the ultimate concern in both cases is with the father's ties to his child.⁵⁶ While the question in *Flores-Villar* requires the court to consider the relationship between father and country, it is in the service of ensuring that his foreign-born child has a relationship with the United States. This latter relationship is not possible if the child has no relationship with his American father.⁵⁷ Whether the father will pass on American values to his child, and whether the foreign-born child "warrant[s] citizenship," depends on the existence of a relationship between father and child.⁵⁸ The father's perceived absence, from birth and the

⁵² *Id.* at 996.

⁵³ *Id.*

⁵⁴ *Id.* at 997.

⁵⁵ *Id.*

⁵⁶ See Antognini, *supra* note 5, at 447-49 (relying in part on the government's arguments to show that the main concern even in considering the residency requirement was the relationship, or perceived absence thereof, between father and child).

⁵⁷ The government does not attempt to justify the differential residency requirements based on a woman's ability to more quickly absorb American values. See *Morales-Santana*, 804 F.3d at 530.

⁵⁸ As the Second Circuit's opinion in *Morales-Santana* notes, the requirement in the Act is meant to ensure that foreign-born children have a connection

child's life thereafter, is an integral part of the story: the presumed lack of ties with his child means the child will also lack any ties to the United States.

But the other – equally significant and yet unmentioned – consideration is the mother. The American mother is, of course, discernible throughout the opinions. What remains unstated however, is the presence of her counterpart abroad – the unwed *foreign* mother. The unwed foreign mother appears for the very first time in the government's oral arguments to the Supreme Court in *Flores-Villar*.⁵⁹ The Solicitor General, in justifying the longer residency requirement applied to unwed fathers, explains that even if the father were to remain with his foreign-born child, the “alien mother” will also be present.⁶⁰ It is, presumably, her foreign influence the American father will have to counteract. Just like the American mother is inevitably present in her child's life, so too is the foreign mother. The mirror image assumption is that the unwed American mother will have no foreign counterpart to contend with: the foreign father, like the American father, will be gone, not present (if he ever was), and not a part of the family.

These are the foreign figures who have populated the background of the statutes and the decisions, assumed but nowhere addressed. It is the Court's opinion in *Morales-Santana* that finally brings them out into the open and considers them directly.

C. *The Mixed-Status Unwed Parents*

As we have seen, the Court in *Nguyen* examines two parents in isolation from each other: the American mother and the American father. These figures are unrelated – they are each parents in their own right, and have no occasion to interact, either in law or reality. This is because the citizenship of a child born abroad will be in question almost entirely in situations where the only American parent is the father, who was unwed at

to the United States such that the conferral of citizenship is warranted. In this context, the Second Circuit explained: “we see no reason, that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure *are passed on to citizen children born abroad*.” *Id.* (emphasis added).

⁵⁹ See Antognini, *supra* note 5, at 452-53.

⁶⁰ See *id.* at 446-47, n.255, 451-54.

the time of the birth and in a relationship with a foreign woman. Despite these facts, the Court only addresses the American mother in its decisions, who is, under its account, invariably present – during sex, at birth, in the child’s life. By implication, *Nguyen* extends these qualities to the foreign mother. Because the Court’s reasoning turns solely on what biology dictates, it can ignore differences across country, culture, race, and ethnicity. Indeed, wholly absent from these opinions are the mothers who are actually implicated in these cases – the mothers from Vietnam,⁶¹ the Philippines,⁶² Mexico,⁶³ who have given birth to the children seeking citizenship based on the relationship to their American father.

While the government acknowledged in passing the mixed-status families and the relationships it assumed they had in *Flores-Villar*,⁶⁴ it is not until *Morales-Santana* that the Court itself confronts them.⁶⁵ It does so by addressing the statutory scheme that groups unwed mothers with married couples, both of whom are American citizens on the one hand, and unwed fathers with married couples, one of whom is a foreigner on the other.⁶⁶ In *Morales-Santana*, the Court finally explains that the governmental interest in securing “a connection between the foreign-born nonmarital child and the United States” can be accomplished by gender-differentiated means only if the understanding is that the

⁶¹ *Nguyen*, 533 U.S. at 56-57.

⁶² *Miller*, 523 U.S. at 425.

⁶³ *Flores-Villar*, 536 F.3d at 994.

⁶⁴ See Antognini, *supra* note 5, at 451-54 (describing the oral argument to the Supreme Court in *Flores-Villar* where the Solicitor General explains that where the unwed father is at issue, there will be two parents to consider because the foreign mother will be in the picture, and clarifying this same assumption made by Congress and the Court that “the unwed mother, regardless of the unwed father, American or foreign, will retain custody over her child”).

⁶⁵ The government also presents the argument more directly in its briefs, by asserting that the unwed mother will be “the child’s only ‘legally recognized’ parent at the time of childbirth.” *Morales-Santana*, 137 S. Ct. at 1695 (“Instead, [the government] presents a novel argument, one it did not advance in *Flores-Villar*.”).

⁶⁶ *Id.*; Antognini, *supra* note 5, at 451-52 (describing the different statutory pairings and explaining “what the statute assumes and the Court ratifies is that the mother, whether American or foreign, will retain custody” over the child).

unwed father “will not accept parental responsibility.”⁶⁷ Without a relationship to the American father, the reasoning goes, the child will have no connection to America. That the unwed American mother needs no similar “prophylactic” means the statute also assumes that “[t]he alien father, who might transmit foreign ways, was presumptively out of the picture.”⁶⁸ The reason the American unwed mother has a shorter residency requirement is that she will be alone, unaffected by any countervailing foreign influence that would have been imposed by the foreign father. Meanwhile, the American unwed father, if he is still somehow involved, will have to counteract the influence of the foreign mother, who is inevitably present in the child’s life.⁶⁹ “Hardly gender neutral,” the Court writes, “that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children.”⁷⁰

Even the government’s statelessness argument relies on the expectation that the unwed mother will remain with the child while the unwed father will not, which is the only reason the mother, and not the father, would need the government’s protection. Here, too, the Court concludes that the distinctions are based on “the mother’s role as the ‘natural guardian’ of a nonmarital child.”⁷¹

⁶⁷ *Morales-Santana*, 137 S. Ct. at 1695.

⁶⁸ *Id.* at 1692.

⁶⁹ Of course, the cases point to a different set of facts. In *Nguyen, Flores-Villar*, and *Morales-Santana* the child was raised mostly, if not exclusively, by the father. See *Nguyen*, 533 U.S. at 57 (“In June 1975, Nguyen, then almost six years of age, came to the United States. He became a lawful permanent resident and was raised in Texas by Boulais [his father].”); *Flores-Villar*, 536 F.3d at 994 (“[Flores-Villar] grew up in San Diego with his grandmother and father.”); *Morales-Santana*, 137 S. Ct. at 1687 (“Respondent Luis Ramón Morales-Santana moved to the United States at age 13 . . . [and] asserts U.S. citizenship at birth based on the citizenship of his biological father, José Morales, who accepted parental responsibility and included Morales-Santana in his household.”).

⁷⁰ *Morales-Santana*, 137 S. Ct. at 1692.

⁷¹ *Id.* at 1696. The Court relies on data that show that the risk of statelessness applies to unwed fathers as much as, if not more than, unwed mothers. As such, “[o]ne can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U.S.-citizen mothers while ignoring the same risk for children of unwed U.S.-citizen fathers.” *Id.* at 1697.

The opinion in *Morales-Santana* thus lays bare the assumptions undergirding a statutory scheme that dictates that men must have lived longer in the United States than women prior to transmitting citizenship and spins out how those assumptions are uncritically applied to their foreign peers. While the posture of the equal protection analysis channels the comparison to focus on the American mother and father, the Court in *Morales-Santana* resists that narrow framing to reveal that the statute is making an equally crucial distinction between the sexes with regard to their foreign counterparts.

The opinion further imputes these distinctions to be products of law, relics of a legal system that regulated men and women differently within and outside of marriage.⁷² Rather than adhere to a line of reasoning that makes claims about the inevitability of motherhood and the revocability of fatherhood based on the facts of biology, the Court identifies these rules as the legacy of a regime that allowed the husband to control his wife and children in marriage, and absolved him of any responsibility outside it.⁷³ This history shows that ascribing parenthood to mothers and not fathers is not the result of “biology” but rather of “overbroad generalizations” about how men and women are, which the Court has repeatedly found unconstitutional.⁷⁴ Given the *legal* origins of these distinctions, based on outmoded and contestable views about appropriate gender roles, they can be critiqued as such. *Morales-Santana* does just that, breaking apart biology, gender, and who is recognized as a parent.

Yet in the same breath, the Court re-affirms *Nguyen*, as it does the series of cases that require unwed fathers, but not unwed mothers, to show a demonstrable relationship with their child before having any affirmative rights under law.⁷⁵ The opinion goes to great lengths to limit its scope to the discrete connection between residency duration and a parent’s gender: “the

⁷² *Id.* at 1690-91.

⁷³ *Id.* (“During this era, two once habitual, but now untenable, assumptions pervaded our Nation’s citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.”).

⁷⁴ *Id.* at 1692-93.

⁷⁵ This includes cases outside of the citizenship transmission context; the Court cites to *Lehr v. Robertson* and *Caban v. Mohammed*, among others. *See id.* at 1692-94.

physical presence requirements now before us,” it insists, “relate solely to the duration of the parent’s prebirth residency in the United States” and not to “the parent’s filial tie to the child.”⁷⁶

The Court’s reasoning, however, is squarely, if not entirely, about the filial tie between parent and child. The presumptions *Morales-Santana* identifies as the product of an outdated legal regime do not concern the unequal residency lengths – they are centrally about the unequal allocation of parental responsibility. The rules the Court discards are those that determined the “husband controlled both wife and child” in marriage, while “the mother was regarded as the child’s natural and sole guardian” outside of marriage.⁷⁷ In this way, the Court pierces through the reasoning embraced by *Nguyen*, which fundamentally depends on the assumption that the mother will be present at birth as in the child’s life thereafter, while the father will be absent. The differences that *Nguyen* presents as facts about men and women, *Morales-Santana* understands to be the “stunningly anachronistic” rules inherited from a defunct legal regime.⁷⁸ Thus, *Morales-Santana* roundly rejects the view that the capacity and capabilities of unwed fathers and mothers are distinct as a matter of biology. It is not, then, the residency requirement that holds a questionable connection to a parent’s gender, but the very ability to transmit citizenship that does.⁷⁹

D. Disrupting Sex-Based Parentage

Morales-Santana has the possibility of being truly disruptive: its reasoning could overturn not only *Nguyen*, but also many of the unwed fathers cases outside of the citizenship transmission context. While there is no foreign parent in these latter situations, they too uphold distinctions between unwed mothers and fathers based on the presumption that the father will be missing, unknowable, and unprovable. The relationship across these cases

⁷⁶ *Id.* at 1694.

⁷⁷ *Id.* at 1691-92.

⁷⁸ *Id.* at 1693.

⁷⁹ See also Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN. ST. L. REV. 1, 15 (2018) (“Both the paternity-establishment requirement and the length of residency requirement emerge at some attenuation from the facts of pregnancy and childbirth.”).

is circular and self-reinforcing: the very first decision to consider an equal protection challenge in the immigration context, *Fiallo v. Bell*, relied on principles embedded in the domestic parent cases that defined the unwed father as prototypically absent.⁸⁰ Admittedly, the cases differ. One of the central distinctions between them is what Serena Mayeri has identified as the “‘feminist dilemma’” that is presented by the domestic parent cases, which, unlike the citizenship cases, directly implicate the choice of substantive versus formal equality.⁸¹ Notwithstanding this tension and how it might have affected the coalitions and arguments marshalled before the Court, the rationale criticized in *Morales-Santana* is the exact same one supporting the outcomes in the domestic parent cases and therefore subject to the same critique.

Take *Lehr v. Robertson*.⁸² In *Lehr*, the Court affirmed a statutory scheme that required an unwed father, but not an unwed mother, to register in a putative father registry prior to receiving notice of an adoption.⁸³ This requirement applied to *all* unwed fathers and *no* unwed mother. Yet because the Court found that Jonathan Lehr, the father in the case before it, had “never established any custodial, personal, or financial relationship with” his child, it concluded that distinguishing between the sexes in general led to no equal protection violation.⁸⁴ The Court explained that equal protection concerns arise only when “the mother and

⁸⁰ See Antognini, *supra* note 5, at 419 (arguing that “*Stanley* did little to attack the conceptual underpinnings *Fiallo* would later rely on,” namely that “[u]nwed fathers must prove the existence of parental relations, which are otherwise presumed to be absent”).

⁸¹ Mayeri specifically articulates the tension as “how to balance the desire to overcome women’s default responsibility for nonmarital children with concerns that the realities of gender inequality rendered legal sex neutrality antithetical to women’s autonomy and to substantive sex equality.” Mayeri, *supra* note 5, at 2353. The citizenship cases were less divisive insofar as “the fathers’ opponent was the state, and a victory for sex neutrality would not come at mothers’ expense.” *Id.* at 2386-87.

⁸² See *Lehr*, 463 U.S. 248.

⁸³ *Id.* at 263.

⁸⁴ *Id.* at 267. The actual facts surrounding the relationship between Jonathan Lehr and his daughter, Jessica M., appear more complicated than the Court acknowledged. See Antognini, *supra* note 5, at 437-38 (describing the facts argued in the briefs and raised by the dissent); Mayeri, *supra* note 5, at 2634 (discussing the conflicting accounts of Jonathan Lehr’s attempts to establish a relationship with his child).

the father are in fact similarly situated with regard to the relationship to their child.”⁸⁵ Here, however, they are not. The Court extrapolates from *Lehr*’s situation to conclude that unwed parents could never be similarly situated “in fact” because *all* fathers will have failed to grasp the opportunity to develop a relationship, whereas *all* mothers will have successfully done so.

The very reason an unwed father must register is because the statute begins from a presumption that he will not be present in his child’s life; he must disprove such a presumption by formally registering, a requirement the mother does not have. And, rather than engage in a determination of whether there was an existing relationship between father and child, the law sets out only one, very specific proxy – sending a postcard to the putative father registry.⁸⁶ As the Court in *Morales-Santana* explained, this scheme enshrines the “now untenable” presumption that the “unwed mother is the natural and sole guardian of a nonmarital child” while the father is nowhere to be found.⁸⁷

None of this is to imply that the relationship between parent and child does not, or should not, matter – constitutionally or otherwise. Douglas NeJaime has enumerated the many ways that constitutional law prioritizes the recognition of a social relationship over and above a biological one, and identifies the capacity of such reasoning to move beyond the law’s current preference for a strictly gendered, heteronormative family.⁸⁸ The problem, then, is not that the Court values the creation of a relationship, which might also be a way of recognizing the work that goes into pregnancy and labor instead of casting it as an inexorably biolog-

⁸⁵ *Lehr*, 463 U.S. at 267.

⁸⁶ In *Lehr*, the father had begun paternity proceedings in court, which did not satisfy the statute’s enumerated requirements. *Id.* at 265 (“The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge’s determination to require all interested parties to adhere precisely to the procedural requirements of the statute.”).

⁸⁷ *Morales-Santana*, 137 S. Ct. at 1690-91.

⁸⁸ NeJaime, *supra* note 5, at 2268-69 (bringing out a “greater emphasis on parenthood’s social dimensions” as a way of breaking from a biologically-determined hierarchy that privileges the most conventional families and the most conventional roles).

ical process.⁸⁹ The problem is that the Court requires proof of a relationship from the father only, and exclusively in situations where he was not married to the mother. It is these judgments that *Morales-Santana* discloses and discards.

II. Missing from *Morales-Santana*

For all its radical potential, the impact of *Morales-Santana* has been muted.⁹⁰ This Part considers how the opinion is limited by its own terms. The cursory, and one-sided, discussion of the harms that follow from relying on sex-based distinctions; the omission of same-sex couples; and the failure to consider the citizenship question that lies at its core, all provide occasions for the discrimination *Morales-Santana* critiques to continue to occur.

A. *The Burdens of Parenthood*

Despite the Court's decision to finally point out the underlying problem with what had previously been framed strictly as a matter of biology, the opinion presents a truncated view of the harm that follows. *Morales-Santana* is clearly concerned with the general principle that sex-based classifications are problematic because they limit the roles both men and women can take on: legislating based on "traditional notions of the way women and

⁸⁹ See Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 472-73 (2007) (arguing in favor of a constitutional understanding of the "biology plus" test applied to unwed fathers as recognition of the work that goes into gestation and birth).

⁹⁰ See, e.g., Franklin, *supra* note 11, at 5 (discussing *Morales-Santana* and *Pavan v. Smith* and observing that "neither case received much attention," proposing that the reason for *Morales-Santana* was that it "look[ed] like small potatoes" compared to the "vigorous, wide-ranging debate over immigration and citizenship" taking place at the time it was issued). There are, of course, many possible reasons for the subdued effect of *Morales-Santana*. As Cary Franklin has further noted, "[t]he new doctrine generated by these cases will not . . . apply itself." *Id.* at 38. Cases involving "illegitimacy" also hold a marginalized position in constitutional law, which can limit their reach. See, e.g., Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 WASH. U. L. REV. 2063, 2105, 2109 (2022) (addressing the illegitimacy cases and their absence from constitutional law school curricula, proposing as a reason "the desire to erase nonmarriage and prioritize marriage as the normative ideal of adult intimate life" with the attendant effect of "perpetuat[ing], whether consciously or not, illegitimacy's marginalization in law and life").

men are”⁹¹ leads “women to continue to assume the role of primary family caregiver”⁹² and “disserve[s] men who exercise responsibility for raising their children.”⁹³ When the Court gets more granular, its concern is mostly with the latter limitation – not recognizing *men* who have functioned as *fathers*. That is, assuming unwed fathers are “less qualified and entitled than mothers”⁹⁴ or that they are “strangers to”⁹⁵ their children, denies them the parental acknowledgment they ought to receive. The central harm that emerges from *Morales-Santana* then, is failing to acknowledge individuals – mostly men in heterosexual relationships⁹⁶ – who have parented, as parents; so the residency requirements are problematic in that they do not recognize “fathers who have accepted parental responsibility.”⁹⁷ The Court’s decision to center the father communicates a specific vision of parenthood – one that is a benefit rather than a limit, burden, or potential harm.

This narrower definition of the harm is further supported by two passing references: first, the opinion’s agreement with the characterization that the requirements upheld in *Nguyen* were “minimal,”⁹⁸ and second, its description of the shorter residency requirement for mothers as “favorable” in fashioning its remedy.⁹⁹ While these two mentions are admittedly sparse, read together in the broader context of the opinion, they reveal a partial conception of parenthood.

In insisting that *Nguyen* continues to be good law, *Morales-Santana* adopts its language that the affirmative requirements upheld in that case were “minimal” as compared with the rule that the unwed father reside in the United States for five years.¹⁰⁰ The longer quotation *Morales-Santana* cites approvingly from *Nguyen* reasons that section 1409(a)(4) “has not erected inordinate and

⁹¹ *Morales-Santana*, 137 S. Ct. at 1694.

⁹² *Id.* (internal quotation omitted).

⁹³ *Id.*

⁹⁴ *Id.* at 1692 (internal quotation omitted).

⁹⁵ *Id.* at 1695.

⁹⁶ The Court does not address same-sex parents. See discussion *infra* Part II.B.

⁹⁷ *Morales-Santana*, 137 S. Ct. at 1693.

⁹⁸ *Id.* at 1694.

⁹⁹ *Id.* at 1699.

¹⁰⁰ *Id.* at 1694.

unnecessary hurdles to the conferral of citizenship on the children of citizen fathers” and “[o]nly the least onerous of the three options provided for . . . must be satisfied.”¹⁰¹ Elevating the burden imposed by the residency requirement vis-à-vis the paternal acknowledgment requirement is clearly in support of the Court’s decision to affirm *Nguyen* while finding the residency requirement unconstitutional. But the choice to underscore the respective nature of the burdens also implies a particular view about what exactly is at stake in parenting.

It could be that the Court in *Morales-Santana* understands the burdens of pregnancy, including the care undertaken during gestation and the work involved during labor, to be so momentous that the requirements imposed on unwed fathers are “minimal” by comparison. This was decidedly not the view taken by the majority in *Nguyen*, whose opinion only acknowledged that the mother was “present” at birth.¹⁰² *Morales-Santana*, though, which uncovered and rejected the legal rules that absolved unwed fathers of responsibility for their children, could arguably be more solicitous of the effort that goes into birthing a child; affirming the paternal acknowledgment requirement might therefore be a way to appreciate the work of pregnancy and labor.¹⁰³ In this way, *Morales-Santana*’s use of “minimal” in reference to the burden imposed on unwed fathers constitutes a recognition that motherhood can sometimes be “a great burden.”¹⁰⁴ This is precisely the view that Justice O’Connor presented in dissent in

¹⁰¹ *Nguyen*, 533 U.S. at 70-71.

¹⁰² See Hendricks, *supra* note 89, at 469 (describing that the *Nguyen* majority defended itself from stereotyping women as caregivers “by holding that the mother was merely present in the same place at the same time as the child and thus could have a relationship” rather than “assuming an automatic relationship between mother and child” and in so doing “the process of growing a fetus, laboring, and delivering a child [was] reduced to being ‘present’ at the child’s arrival, as if children were dropped in their mothers’ laps by storks”). This hypothetical line of reasoning would further separate parenthood from gestation and birth, given that pregnancy does not produce mothers as a matter of biological inevitability, but rather as a result of the choice to engage in gestation and birth and assume the attendant responsibilities of parenthood.

¹⁰³ Hendricks makes a version of this argument: “Conferring parental rights on gestational mothers would produce better outcomes and be more consistent with the best aspects of existing constitutional precedents.” *Id.* at 429.

¹⁰⁴ *Nguyen*, 533 U.S. at 92 (O’Connor, J., dissenting) (internal quotation marks omitted) (quoting testimony of Burnita Shelton Matthews).

Nguyen, setting forth the harms that stem from ascribing parental responsibility solely to women, which men can freely avoid.¹⁰⁵

Yet this reading stretches *Morales-Santana* too thin, especially when paired with its discussion of the remedy. The Court unequivocally labels the shorter period of time required of mothers as “favorable” treatment, and does not engage with any of the associated burdens imposed on the primary caretaker, or the primary citizenship transmitter. This silence is telling insofar as Justice Ginsburg, author of *Morales-Santana*, had previously criticized a description of section 1409(a)(4) as being “favorable” to the mother.¹⁰⁶ In dissent in *Miller v. Albright*, Justice Ginsburg explained that a statute allowing mothers to transmit citizenship upon birth might appear, on its face, to “treat[] females favorably.”¹⁰⁷ It might even be understood “as a benign preference, an affirmative action of sorts.”¹⁰⁸ But turning to the history of the rules has time and again shown “no high regard or respect for the mother-child affiliation” and should thus serve to question any benign Congressional motive.¹⁰⁹ Justice Ginsburg declines to apply such similar scrutiny to the shorter residency requirement in *Morales-Santana*, accepting as “favorable” a rule that treats women as mothers, and ignoring the ways that motherhood can be unwanted, or a burden.¹¹⁰

Federal courts have adopted the more restrictive view contained in *Morales-Santana* by continuing to uphold the INA’s differential treatment of unwed mothers and fathers. In *Dale v.*

¹⁰⁵ *Id.*

¹⁰⁶ *Miller v. Albright*, 523 U.S. 420 (1998) (plurality opinion). The decision in *Miller* produced only a plurality, which is why the Court took up the same issue later in *Nguyen*.

¹⁰⁷ *Id.* at 460 (Ginsburg, J., dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 468.

¹¹⁰ To state the obvious, even when motherhood is wanted, it can be a burden. See Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 372-77 (“a woman who becomes a parent will likely find that the energy she invests in childrearing will compromise her already constrained opportunities and impair her already unequal compensation in the work force”); NeJaime, *supra* note 5, at 2329 (“The law’s construction of parenthood situates women as biologically connected not only to reproduction but also to child-rearing—itsself a form of uncompensated labor that drastically shapes a woman’s life opportunities.”) (internal citations omitted).

Barr, the Second Circuit relied on *Morales-Santana*'s reaffirmance of *Nguyen*, along with its discussion of the relative burdens at stake.¹¹¹ The court confirmed the constitutionality of now-defunct section 1432(a)(3), which allowed an unwed mother who naturalized, but not an unwed father, to automatically transmit citizenship to her child.

Like in *Nguyen*, the Second Circuit faced a scheme that provided automatic transmission of citizenship for the unwed mother, but not the unwed father, who had to satisfy a series of affirmative requirements, "the most demanding of which required him to obtain custody over his child."¹¹² In affirming the constitutionality of these sex-based requirements, the Second Circuit relied on *Morales-Santana*'s asserted difference between parental residency and filial tie, along with the "minimal" burden the statute imposed on the father.¹¹³ The ability to align *Dale* with those cases addressing filial tie meant the court could resort to the inherent differences between the sexes, describing "the biological inevitability that a mother, by nature of her status as the parent giving birth, 'inherently legitimates' and establishes an immediate biological connection with her child in a way that fathers – as a matter of nature – cannot," even though at issue is the purely legal question of legitimation.¹¹⁴ The Second Circuit also followed *Morales-Santana* in assessing the respective burdens, and considered the residency requirements to be "far broader and deeper" an imposition than satisfying a series of options that included taking full custodial responsibility of a child, in part because for the former, "there was no other course through which the child could derive his father's citizenship."¹¹⁵ That is, assuming the obligations of parenthood by obtaining full legal custody is less onerous as a legal matter than merely residing in a country for a limited period – eventually five years – of time.

Of course, *Morales-Santana* does not mandate this outcome, despite its failure to flesh out the burdens associated with

¹¹¹ *Dale v. Barr*, 967 F.3d 133, 143 (2d Cir. 2020).

¹¹² *Id.* at 144.

¹¹³ *Id.* at 143-44.

¹¹⁴ *Id.* at 143 (approvingly relying on the Second Circuit's reasoning in *Pierre v. Holder*).

¹¹⁵ *Id.* at 144.

parenthood, and despite its decision to affirm *Nguyen*.¹¹⁶ In *Tineo v. Attorney General*, the Third Circuit found the same provision addressed in *Dale* unconstitutional, concluding that the requirement imposed on unwed fathers “was not only onerous, it was impossible” to satisfy.¹¹⁷ Significantly, though, the unwed father in that case had assumed responsibility for his child, which was not true of the unwed father in *Dale*.¹¹⁸ The Third Circuit found the burden impossibly high precisely because “the actual relationship between Felipe Tineo and his child was rendered completely irrelevant.”¹¹⁹ Thus, although *Morales-Santana* provides the basis for *Tineo* to identify and overturn an ultimately gendered distinction, the harm the court registered was that of denying a father the recognition of having assumed parental responsibility. Such reasoning not only stunts constitutional analysis, it also perpetuates the underlying presumption that unwed fathers are absent by acknowledging an equal protection problem only once men choose to assume fatherhood.

While *Morales-Santana*’s focus on the harm to the unwed father is understandable given the question posed by the case, it is not inevitable. The opinion declines to discuss the harms that follow from undertaking the responsibilities of parenthood, remaining general in its concern over role limitations that involve caretaking.¹²⁰ When *Morales-Santana* does articulate a more de-

¹¹⁶ The concurrence in *Dale v. Barr* states as much. Judge Rakoff explains that for the unwed father to be on “equal footing with the unwed mother” under section 1432(a)(3), “there is nothing an unwed father can do, short of marrying and divorcing the biological mother of his child.” *Dale*, 967 F.3d at 148 (Rakoff, J., concurring). While not challenging the reasoning in *Morales-Santana* regarding respective burdens, the concurrence notes that “[r]equiring marriage and divorce for equal treatment cannot be described as minimal.” *Id.*

¹¹⁷ *Tineo v. Att’y Gen.* U.S., 937 F.3d 200, 215 (3d Cir. 2019).

¹¹⁸ Compare *Dale*, 967 F.3d at 135 (“Dale spent his childhood living in the New York City home of his maternal grandmother. From time to time, his mother lived there too, but he was primarily raised by his grandmother. Dale never shared a home with his father.”), with *Tineo*, 937 F.3d at 205 (“Tineo came to live with his father once his birth mother died in 1984. He was admitted to the United States He was 15 years old at the time and lived with his father until he turned 21 in 1990.”).

¹¹⁹ *Tineo*, 937 F.3d at 215.

¹²⁰ See Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians’ Amicus Brief in Flores-Villar v. U.S.*, 91 B.U. L. REV. 1485, 1495 (2011) (describing the reality that “foreign mothers of nonmarital children fathered by

tailed vision, it narrows in on the denial of parenthood, with special attention paid to the father. This means that the responsibilities associated with being a parent, when they are chosen in the context of fatherhood, are now seen principally as a benefit. Yet, to fully remedy the discrimination identified in *Morales-Santana*, it is essential to acknowledge how parenthood has functioned as a burden, and how it has specifically limited the roles of women who have been cast as mothers. Understanding parenthood as a possible harm persists only in dissent, where motherhood is described not merely as a boon but also a burden.¹²¹ This dimension of parenthood is especially important to recuperate in our current constitutional landscape, given how breezily some of the justices have characterized the experience of pregnancy and potential motherhood.¹²²

B. *Same-Sex Parents*

The opinion in *Morales-Santana* is notable for omitting any consideration of same-sex parents and how the residency requirements might exclude or disadvantage them. The Court focuses exclusively on the heterosexual nonmarital family, only obliquely acknowledging same-sex couples in a lone cite to *Obergefell v. Hodges*.¹²³ The existence of same-sex couples and

Americans are left facing the burdens and social stigma of unwed motherhood alone” but deciding strategically to focus on the anti-classification argument rather than on this anti-subordination concern in the Amicus Brief submitted in *Flores-Villar*).

¹²¹ *Nguyen*, 533 U.S. at 92 (O’Connor, J., dissenting).

¹²² See *Dobbs*, 142 S. Ct. at 2258-59 (listing reasons why Americans believe abortions can be restricted, including “‘safe haven’ laws, which generally allow women to drop off babies anonymously” and the assurance “that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home,” thus minimizing the ten months of pregnancy, the event of birth, and the substantial post-partum period, while also ignoring concerns over health, capacity, or other life considerations that impact the decision to terminate a pregnancy). *But see* Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 460 (2013) (uncovering the legal and social construction of pregnancy as an injury, a definition which “does not solely describe women’s experiences of pregnancies that result from rape but describes women’s experiences of unwanted pregnancy as a general matter”).

¹²³ It relies on *Obergefell* for support of the general principle that the constitution can incorporate evolving understandings of equality. *Morales-Santana*,

the fact that they parent, both of which the Court has approvingly observed before,¹²⁴ is not once mentioned in an opinion where the Court is chipping away at the rhetoric of birth and biology. The reality that two persons of the same sex can and do parent in the absence of birth or a genetic connection seems relevant to a decision that considers the contestability of claiming that one gender has a particular proclivity towards parenting. Addressing same-sex couples might also have facilitated a discussion of the different ways to parent, underscoring the contingency of a regime based on the primacy of the biological mother.¹²⁵ Indeed, failing to recognize same-sex parents further positions parenthood as an exclusively heterosexual practice, where fatherhood is recognized only in tandem with motherhood.¹²⁶

It is always difficult to reach any sort of affirmative conclusion based on a negative, or an absence of discussion; thus, the Court's lack of engagement with same-sex couples might or might not be meaningful in future constitutional decisions. Yet, looking at how federal courts, and the Department of State, have approached same-sex couples since *Morales-Santana* helps identify how a more robust engagement with dismantling gendered stereotypes in relation to same-sex couples could have furthered the project that the opinion initiated.

The Ninth Circuit considered the transmission of citizenship in the context of a same-sex couple in *Dvash-Banks v. Pompeo*, two years after *Morales-Santana* was decided. The couple was

137 S. Ct. at 1691. The Court had occasion to directly consider same-sex couples that same term in the context of marriage. See *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

¹²⁴ See *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (“As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples.”).

¹²⁵ See NeJaime, *supra* note 5, at 2315-16 (“[T]he collapse of gendered parental statuses has occurred in only one direction: women can be legal ‘fathers,’ but men cannot be legal ‘mothers.’ On this view, biological mothers are indispensable—essential to the legal family.”).

¹²⁶ See *id.* at 2330-31 (describing the challenges gay men face in becoming parents through surrogacy given how “[t]he recognition, and the corresponding production of ‘motherless’ families, threatens gender-differentiation—not merely biological sex differentiation”).

married, but because they were a gay male couple who relied on a surrogate to give birth to twins, the State Department interpreted the birth to have taken place “out of wedlock” under the INA.¹²⁷ Only one of the men in the couple had American citizenship, and he was genetically related to only one of his twin sons; because of this, the State Department issued American citizenship to that one son who shared his genetic makeup.¹²⁸ The Board of Immigration Appeals agreed, but the Ninth Circuit overturned its decision. It did so by applying section 1401, which addresses married parents, and which “does not require a person born during their parents’ marriage to demonstrate a biological relationship with both of their married parents.”¹²⁹

While a victory from the viewpoint of marriage equality, the Ninth Circuit’s decision does not do much to rid the nonmarital space from the gender-differentiated hierarchies of birth and biology. The presence of marriage has historically meant that law could ignore biology, mainly where the father was concerned. The Supreme Court most plainly announced its view in *Michael H. v. Gerald D.*, when Justice Scalia declared that “nature itself . . . makes no provision for dual fatherhood” and decided that the father of the child was the mother’s husband, rather than her lover, who was also genetically related to the child.¹³⁰

¹²⁷ *Dvash-Banks v. Pompeo*, No. CV 18–523–JFW (JCx), 2019 WL 911799, at *4 (9th Cir. Feb. 21, 2019) (explaining that the State Department guidance imposes a biological requirement for married couples to satisfy the “in wedlock” requirement of the INA “by requiring that, to be considered ‘in wedlock’ (and, thus to be covered by Section 301), a child born outside of the United States must have a biological relationship with both of his or her married parents”).

¹²⁸ *Id.* at *2.

¹²⁹ *Id.* at *7. See Leticia Saucedo & Rose Cuison Villazor, *Illegitimate Citizenship Rules*, 97 WASH. U.L. REV. 1179, 1227–30 (2020) (discussing *Dvash-Banks* as one example of how immigration rules prioritize marriage and discriminate against non-marital partners and, importantly, their children).

¹³⁰ 491 U.S. 110, 118 (1989). See also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 479–80 (1990) (“The state’s interest in the marital family, expressed in *Michael H.*, is coterminous with its interest in assuring that every child has neither more nor less than one mother and one father. . . . Just as this child could not have two fathers, the Court would not have left her with no father.”).

Following the decision in *Dvash-Banks*, the Department of State issued regulations in 2021, stating that if the parents are married to each other, and one is a U.S. citizen, the child will acquire citizenship at birth “if they have a genetic or gestational tie to at least one of their parents”; but, the “[r]equirements for children born to unmarried parents remain unchanged.”¹³¹ This guidance resolves the problem of *Dvash-Banks*, and provides some flexibility for when biology matters within marriage; it does, however, little else. Outside of marriage, a father must prove a genetic connection, while a woman must prove a genetic or gestational one, thus still limiting paths to parentage for same-sex and different-sex couples.¹³² Moreover, parents who are unmarried might not receive any citizenship recognition based on a surrogacy agreement if the American citizen has no genetic relation to the child. Although women are no longer inevitably mothers, and men are no longer never fathers, biology still anchors the determination of who gets to be a parent outside of marriage.¹³³

¹³¹ Press Statement, *U.S. Citizenship Transmission and Assisted Reproductive Technology*, U.S. DEP’T STATE (May 18, 2021), <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/>.

¹³² These requirements exclude, for example, an individual who relied on a surrogate, without a genetic connection to any parent, both within and outside of marriage. It also prevents the child born to a surrogate from acquiring American citizenship where a couple is not married and the American citizen parent has no genetic connection to the child. *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, U.S. DEP’T STATE <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html> (last visited Nov. 10, 2022).

¹³³ Compare with UNIF. PARENTAGE ACT § 703 *Parentage of Child of Assisted Reproduction* (2017) (“An individual who consents under section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”); § 801(3) *Definitions* (“‘Surrogacy agreement’ means an agreement between one or more intended parents and a woman who is not an intended parent in which the woman agrees to become pregnant through assisted reproduction and which provides that each intended parent is a parent of a child conceived under the agreement”). The Uniform Parentage Act (“UPA”) makes no mention of the marital status of the parents in determining parentage. The UPA also streamlines how individuals can become parents, regardless of gender and regardless of whether they share a genetic or gestational link with the child. See UNIF. PARENTAGE ACT § 201 *Establishment of a Parent-Child Relationship* (2017).

C. Beyond Gender: Citizenship and Race

Despite the Court's long overdue reckoning with the gendered assumptions underlying the INA's regulation of unwed fathers and mothers, *Morales-Santana* fails to grapple with the foundational question of citizenship transmission. The Court is well-aware that the case crucially concerns birthright citizenship: "Morales-Santana claims he is, and since birth has been, a U.S. citizen."¹³⁴ It does not, however, provide any meaningful consideration of the issue. Rather than materialize in a weaker level of scrutiny, a critique that has been leveled against the Court before,¹³⁵ this limitation manifests itself in the Court's inability to fashion a remedy that responds to the plight of children born abroad to unwed American parents.¹³⁶ The very reason *Morales-Santana* is before the Court is to request that his citizenship be recognized, regardless of the sex of his American parent.¹³⁷ That, the Court declines to do.

In failing to address the question of citizenship, the opinion has little to say about who can raise American citizens, and who can claim American citizenship. It also says little about the race-salient ways that citizenship laws continue to dictate the composition of our families and our nation. The Court avoids discussing

¹³⁴ *Morales-Santana*, 137 S. Ct. at 1693-94.

¹³⁵ See, e.g., Nina Pillard, Comment, *Plenary Power Underground in Nguyen v. INS: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 836 (2002) (arguing that the Supreme Court in *Nguyen v. INS* "took the plenary power doctrine underground" by "implicitly taking the immigration context into account even while it expressly denied doing so"). In *Morales-Santana*, however, the Court engages in an inquiry that it has yet to apply to its domestic cases.

¹³⁶ Scholars have proposed reasons for the Court's decision to level up, including the preservation of its institutional legitimacy, see Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 214 (2017), and "a blind acceptance of leveling down," see Thomas, *supra* note 12, at 217.

¹³⁷ He was raised by his father, had lived in the United States for most of his life, and was seeking American citizenship. *Morales-Santana*, 137 S. Ct. at 1687.

race, either in determining the parties that come before it,¹³⁸ or in shaping the laws establishing citizenship.¹³⁹

Yet the history of the rules reveals not only a deeply sexist bent but also an indisputably racist one.¹⁴⁰ As Kristin Collins has shown, “[a]lthough the statutes governing parent-child citizenship transmission were facially race neutral, the practices and legal regulation of family formation and recognition were not.”¹⁴¹ Allowing unwed mothers to transmit citizenship to their children was a notable exception,¹⁴² albeit of a piece with the inability of unwed fathers to do so. As we have seen, the gendered assumption that the father would be absent and the mother present was also, importantly, a judgment about the national identity of the

¹³⁸ As Isabel Medina has observed, “[d]ue in part to the current system’s reliance on criminal convictions as the engine driving deportations, and the government’s aggressive posture at litigating derivative citizenship in the removal process and criminal prosecution context, the populations most deprived of the benefit of derivative citizenship are poor or lower middle class black and Latino families.” 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, 394 (2014).

¹³⁹ See Jennifer M. Chacón, *Immigration and Race*, in *THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES* (Devon Carbado, et al. eds. 2022) (discussing citizenship and immigration law and locating Trump’s recent policies within “the deep history of race and migration” where “immigration law has not just mirrored but has also constructed understandings of race in the United States”).

¹⁴⁰ See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 71 (2006) (“As discriminatory as the laws of immigration have been, the laws of citizenship betray an even more dismal record of racial exclusion. From this country’s inception, the laws regulating who was or could become a citizen were tainted by racial prejudice.”). Dorothy Roberts, in discussing debates in the 1990s over the citizenship of children of undocumented immigrants born domestically, locates the source of the inequality in the origins of the concept of citizenship itself. See Dorothy E. Roberts, *Who May Give Birth to Citizens? Reproduction, Eugenics and Immigration*, 1 *RUTGERS RACE & LAW REV.* 129, 131 (1998) (“The definition of citizenship in America has always been exclusionary. . . . It had to do that because there was a large group of people living in the United States who were slaves.”).

¹⁴¹ Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2138 (2014).

¹⁴² *Id.* at 2206 (“Administrators’ willingness to accommodate the foreign-born children of unwed American mothers stands out as an exception in the historical record.”).

child, who would be subjected to the “alien” influence of the foreign mother, but not of the foreign father.¹⁴³ The concern, then, is not only, or not really, with the absence of the unwed American father; it is, above all, with the presence of the foreign mother. And it is specifically the children of foreign mothers that the law declines to recognize as American citizens. In much less palatable but more explicit terms, the intended aim of the citizenship laws, as understood at the time, was to prevent “illegitimate half-castes born in semi-barbarous countries of American fathers and native women” from becoming American citizens.¹⁴⁴

This history is absent from the Court’s opinion, and the remedy it issues both reinforces and expands the bases for limiting access to American citizenship. Of course, acknowledging the racialized history of the rules might not have made a difference in the outcome – but it would have made it more difficult to ignore the ways that gender and race intersect, and continue to interact in casting the foreign woman as worthy of suspicion and disdain.

After *Morales-Santana*, the Department of State published its updated Foreign Affairs Manual, which addresses, in one of its many sections, the incidence of paternity and maternity fraud in claims of American citizenship for children born abroad.¹⁴⁵ As context, the Manual “represents the State Department’s unilateral declarations and is not the product of a formal adjudication or notice-and-comment rulemaking or congressional action”¹⁴⁶; it is routinely used in guiding the determination of U.S. citizenship

¹⁴³ See Blanche Bong Cook, *Johnny Applesseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the “WHP”) or Johnny and the WHP*, 31 *YALE J.L. & FEMINISM* 57, 129 (2019) (noting that while “the Court was highly critical of the gender implications of the statute, it did not grapple with the racial context of § 1409, let alone the Supreme Court’s materialized animus against foreign women or its self-serving narratives about the untrustworthiness of foreign women”).

¹⁴⁴ See Collins, *supra* note 120, at 1492 (quoting the statement of Edwin Borchard, “one of the most well-respected citizenship law experts of the early Twentieth Century”).

¹⁴⁵ U.S. DEP’T. STATE, FOREIGN AFFAIRS MANUAL, 8 FAM § 301.4 *Acquisition by Birth Abroad to U.S. Citizen Parent(s) and Evolution of Key Statutes* (2022), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>.

¹⁴⁶ *Dvash-Banks*, 2019 WL 911799, at *5.

applications for children born abroad.¹⁴⁷ The Manual explains that instances of maternity fraud, which involve a citizen mother, “are relatively rare but can occur.”¹⁴⁸ Paternity fraud, on the other hand, appears to be more frequent¹⁴⁹; the Manual further explains, “[p]aternity fraud is most commonly found in cases where the claimed biological mother is an alien.”¹⁵⁰ That is, the problem of paternity fraud is not caused by the American father, but by the foreign woman: her presence increases the probability that a U.S. citizen father will either be lied to, or will lie.¹⁵¹ While these discussions no longer refer to “native women,” the set of assumptions about foreign mothers remains intact, untouched by the decision in *Morales-Santana*.

Conclusion

The Court in *Morales-Santana* went some way towards exposing the legal, rather than biological, basis for the gender-differentiated assumptions made in determining who is a parent, and found them unconstitutional. In this way, the opinion contains the seeds to unsettle current case law that continues to up-

¹⁴⁷ *Id.* at *2.

¹⁴⁸ U.S. DEP’T. STATE, FOREIGN AFFAIRS MANUAL, 8 FAM § 301.4-1(E)(3) *Maternity Issues* (2022), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>. The FAM provides no data, or citation, in support of its assertion.

¹⁴⁹ Unlike with maternity fraud, there is no assertion that paternity fraud is rare. U.S. DEP’T. STATE, FOREIGN AFFAIRS MANUAL, 8 FAM § 301.4-1(E)(2) *Paternity Issues* (2022), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>.

¹⁵⁰ *Id.*

¹⁵¹ The Foreign Affairs Manual indicates that the former situation, where the father is lied to, “is properly considered false, rather than fraudulent.” *Id.* There is no explanation for how the FAM reaches the conclusion that paternity fraud is more common when the biological mother is non-American. Presumably, most cases in which an American father seeks to transmit citizenship to his child will involve a foreign mother. But, unless the Bureau of Consular Affairs has information that distinguishes the citizenship applications of the children of American fathers based on the nationality of the mother, and also inquires into whether the mother is still involved with the father or the child (which the opinions demonstrate is not always the case), this distinction could only be based on the difference in citizenship claims made by U.S. citizen fathers versus U.S. citizen mothers. This general difference in incidence of fraud between applications is clearly insufficient to conclude, as the FAM does, that the foreign mother is to blame.

hold distinctions between unwed parents based on sex. But the Court stops short of its potential: it does not spell out the harms that stem from assuming parenthood; it ignores the ways its decision implicates same-sex parents; and it minimizes the role race plays in constructing families and allocating citizenship. As such, nonmarital families still lie just beyond the Constitution's reach.