
ESSAYS

A SHORT HISTORY OF SEX AND CITIZENSHIP: THE HISTORIANS' AMICUS BRIEF IN *FLORES-VILLAR v. UNITED STATES*

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The historians' amicus brief that follows was submitted to the Supreme Court in *Flores-Villar v. United States*, an equal protection challenge to federal laws that regulate the citizenship status of foreign-born children of American parents.¹ Children born in the United States are citizens by virtue of the Fourteenth Amendment's Citizenship Clause, but the citizenship of foreign-born children of American citizens is governed by federal statute.² When the parents of such children are unmarried, those laws significantly encumber the ability of American fathers to secure citizenship for their children, while providing American mothers with a nearly unfettered ability to do the same. The general question before the Court in *Flores-Villar* – and a question that the Court has addressed in sum and substance on two other occasions during the last thirteen years – was whether the gender-asymmetry in this statutory scheme is consistent with constitutional sex-equality principles.³

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¹ *Flores-Villar v. United States*, No. 09-5801, 2011 WL 2297764 (U.S. June 13, 2011) (per curiam).

² Compare U.S. CONST. amend. XIV, with 8 U.S.C. §§ 1401, 1409 (2006).

³ See *Nguyen v. INS*, 533 U.S. 53, 56-57 (2001); *Miller v. Albright*, 523 U.S. 420, 424 (1998). *Nguyen* and *Miller* involved challenges to the father-only legitimation and proof of paternity requirements of 8 U.S.C. §1409(a)(4) and 8 U.S.C. § 1409(a) (1970), while Ruben Flores-Villar challenged the disparate parental residency requirements that apply, respectively, to fathers and mothers of foreign-born nonmarital children. Compare 8 U.S.C. §§ 1409(a), 1401(a)(7) (1970), with 8 U.S.C. § 1409(c) (1970). Although Congress reduced the duration of the parental residency requirement for nonmarital fathers in 1986, the statute continues to hold mothers and fathers to different standards. Compare 8 U.S.C. §§ 1409(b), 1401(g) (2006), with 8 U.S.C. § 1409(c) (2006).

In a 4-4 decision issued as this essay was going to press, the Court declined to answer this question, affirming the lower court's decision without opinion.⁴ This result leaves the question presented in *Flores-Villar* an open one that the Court may wrestle with again soon. It is all the more pressing, then, that we attend to the history of sex-based regulation of citizenship, and consider how that history illuminates the discriminatory practices that persist in modern citizenship law.

Ruben Flores-Villar was born in Mexico to an American father and a Mexican mother.⁵ Ruben had serious health problems as a newborn, and, with his mother's blessing, his father and paternal grandmother (also a U.S. citizen) brought him to the United States for medical treatment.⁶ Ruben was raised from infancy in his father's American household, and had little if any contact with his mother.⁷ Nevertheless, according to federal statutes that govern derivative citizenship, Ruben is not a U.S. citizen.⁸

To secure citizenship for Ruben, his father had to establish paternity and legitimate Ruben before he turned twenty-one, and prove that he (the father) had lived in the United States for a total of ten years, five of which must have been after he turned fourteen but before Ruben was born.⁹ When Ruben's citizenship was questioned by immigration officials, his father could show that he had legitimated his son as required, but he could not satisfy the parental residency requirement. As he was only sixteen when Ruben was born, he could not possibly have lived in the United States for five years after he turned fourteen but before his son's birth.¹⁰ Under otherwise identical circumstances, were Ruben's mother the American parent, Ruben would unquestionably be an American citizen. Indeed, in that case, even had Ruben lived his entire life in Mexico, he would be an American citizen as long as his mother could satisfy a

⁴ *Flores-Villar*, No. 09-5801, 2011 WL 2297764. Justice Elana Kagan was recused from the case, as she had signed the brief opposing Flores-Villar's petition for a writ of certiorari while serving as Solicitor General of the United States. Brief for the United States in Opposition, *Flores-Villar*, No. 09-5801, 2011 WL 2297764.

⁵ Brief for Petitioner at 1, *Flores-Villar*, No. 09-5801, 2011 WL 2297764.

⁶ *Id.* at 2.

⁷ *Id.* at 2-3.

⁸ The term "derivative citizenship" as used here refers to an individual's acquisition of citizenship by virtue of his or her familial relationship to a citizen.

⁹ See 8 U.S.C. §§ 1401(g), 1409(a) (1970). Ruben Flores-Villar's citizenship status is governed by the 1970 version of sections 1401 and 1409. See *United States v. Flores-Villar*, 497 F.Supp.2d 1160, 1163 (S.D. Cal. 2007). In 1986, Congress added several requirements to the statute governing citizenship transmission between fathers and their nonmarital children, but shortened the parental residency requirement applicable to unmarried citizen fathers to five years, two of which must have been before he turned fourteen but before the birth of the child. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653 § 12, 100 Stat. 3657 (codified at 8 U.S.C. § 1401(g) (2006)).

¹⁰ Brief for Petitioner, *supra* note 5, at 1-2.

single and relatively undemanding requirement: she must have lived in the United States for one year at some point in her life.¹¹

At first blush, the laws challenged in *Flores-Villar* are not easy to place within current debates concerning citizenship or sex equality. Like immigration and naturalization statutes, the laws that govern derivative citizenship are expressions of the polity's power to determine who is a formal, rights-bearing member. But derivative citizenship laws do not involve "naturalization" in any traditional respect: the child who qualifies as a citizen under these laws is not considered a stranger to the nation who must shed one citizenship to don another.¹² Rather, he or she is considered a citizen at birth, and no ceremonial attestation of national allegiance is required.¹³ Thus, the laws that were at issue in *Flores-Villar* secure a form of birthright citizenship – a right to citizenship by virtue of a circumstance or condition in existence at the time of an individual's birth – but not *jus soli* birthright citizenship, which is secured by the Fourteenth Amendment's Citizenship Clause, and is frequently in the news today.¹⁴

As a constitutional sex-equality case, *Flores-Villar* concerned statutes that indisputably qualify as legislation by sex-based classification, thereby raising

¹¹ See 8 U.S.C. § 1409(c) (1970). Justifications for this sex-based system of citizenship laws have evolved over the decades. In *Flores-Villar*, the federal government urged that the more favorable treatment of the nonmarital foreign-born children of citizen mothers was and is justified because of such children's greater risk of statelessness. See Brief for the United States at 38, *Flores-Villar*, No. 09-5801, 2011 WL 2297764. This contention lacks support in both historical and modern sources. See *infra* Brief Amici Curiae of Professors of History, Political Science, and Law in support of Petitioner, *Flores-Villar v. United States*, at 1512-15 [hereinafter Brief of Professors], *reprint of* Brief Amici Curiae of Professors of History, Political Science, and Law in Support of Petitioner at 32-37, *Flores-Villar*, No. 09-5801, 2011 WL 2297764; Brief of Amici Curiae Scholars on Statelessness in Support of Petitioner at 7-27, *Flores-Villar*, No. 09-5801, 2011 WL 2297764.

¹² See *Miller v. Albright*, 523 U.S. 420, 475 (1998) (Breyer, J., dissenting).

¹³ See 8 U.S.C. § 1401.

¹⁴ In the United States the phrase "birthright citizenship" is used to refer to the constitutional right of "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof," to U.S. citizenship. U.S. CONST. amend. XIV, § 1. Globally and historically, however, there are two types of "birthright citizenship": *jus soli* and *jus sanguinis*. Common law countries have tended to follow *jus soli*, which recognizes the child's place of birth as the source of birthright citizenship. By contrast, civil law countries have tended to follow *jus sanguinis*, which recognizes the parents' (or, historically, the marital father's) citizenship as the source of birthright citizenship. See generally Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 YALE L.J. 545, 545-46 (1921). For recent news accounts of efforts to reinterpret or repeal the Fourteenth Amendment's guaranty of *jus soli* citizenship, see, for example, Mark Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 5, 2011, at A1; George Will, *An Argument to Be Made About Immigrant Babies and Citizenship*, WASH. POST, Mar. 28, 2010, at A15.

doubts as to their constitutionality.¹⁵ But at first glance, *Flores-Villar* did not immediately raise any of the principal concerns that have tended to occupy gender equality activists in recent decades, such as women's exclusion from the upper echelons of education, workplace equality, violence against women, or the privileging of heterosexual coupling.¹⁶ Although the case surely concerned men's and women's respective roles and rights as parents (a subject that the Court has wrestled with in more than one equal protection case in recent decades), by privileging unwed mothers and their children, the challenged statutes present an unusual departure from maternalist legislation that, in its most generous forms, has favored *married* women and mothers.¹⁷

In short, *Flores-Villar* appears almost esoteric in the issues it raised. Some might conclude, therefore, that outside of the relatively small class of individuals in Ruben's situation, the case's primary significance was its potential to create bad precedent.¹⁸ But if sex-based derivative citizenship laws seem difficult to place among our modern constitutional concerns, that is in part because our constitutional sensibilities are themselves historically

¹⁵ See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.").

¹⁶ See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996); *United States v. Morrison*, 529 U.S. 598, 602 (2000); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-22 (2007); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010).

¹⁷ "Maternalist" regulations provide legal protection and financial support for women as mothers, and have tended to favor married over unmarried mothers. See MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 201 (1988); Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 *VAND. L. REV.* 1085, 1089-90 (2009). This is not to suggest that unwed mothers have not enjoyed some minimal government support, see *Temporary Assistance to Needy Families (TANF)*, Pub. L. No. 104-193, 110 Stat. 2105 (1996), or greater recognition of their parental rights in contrast to unwed fathers, see *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). But much of the maternalist legislation subject to equal protection challenge has privileged women as wives and married mothers. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 201 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-38 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973). By contrast, historically the laws governing derivative citizenship significantly limited married mothers' ability to transmit citizenship relative to both unmarried mothers and married fathers. See *infra* Brief of Professors, at 1501-06 (original at 9-19).

¹⁸ In particular, the concern was that, if the laws at issue in *Flores-Villar* survived constitutional scrutiny, the Court would issue an opinion that either weakened the robust standard of judicial scrutiny for sex-based classifications announced in *United States v. Virginia*, 518 U.S. 515, 555 (1996), and/or expanded the plenary powers doctrine that limits judicial review in some immigration law cases. See *Fiallo v. Bell*, 430 US 787, 792 (1977). Although the 4-4 tie left the gender-asymmetrical citizenship laws in place, it averted both of these results.

conditioned. Were we living in the 1920s and 1930s, our sensitivities regarding such laws would likely be quite different. Newly armed with the vote, first-wave feminists lobbied Congress for decades to equalize our citizenship laws, including the predecessor policy of the laws challenged in *Flores-Villar*. Early twentieth-century feminists were acutely aware of the practical and symbolic significance of sex-based citizenship laws and would have had no difficulty explaining how those laws were part of this nation's "long and unfortunate history of sex discrimination."¹⁹

An important goal of the historians' amicus brief filed in *Flores-Villar* is to recuperate that understanding by explaining how this ostensibly obscure citizenship law is part of a larger historical phenomenon: the persistence of gender-based sociolegal norms in determining citizenship. Over the last twenty years, scholars working in different fields have examined the various ways in which entrenched beliefs about men's and women's social roles and capacities have shaped, and continue to shape, the conditions under which individuals have been recognized as American citizens in the most minimal sense of that term.²⁰ Several of the books and articles that examine this phenomenon from a historical perspective are the product of the individual efforts of the eight signatories of this amicus brief: Kerry Abrams, Candice Bredbenner, Christopher Capozzola, Nancy Cott, Linda Kerber, Virginia Sapiro, Rogers Smith, and me. I am the principal author of the brief, but all of the signatories played an active role in its production, reading multiple drafts and providing detailed, nuanced comments. From start to finish, Linda Kerber and Kerry Abrams provided enormously helpful counsel regarding strategic and historiographic considerations, and they were intimately involved in the nitty-gritty research, helping me to review thousands of pages of legislative history. Lindsay Harrison, of Jenner & Block in Washington, D.C., brought her considerable talents as an appellate litigator to the task as well, and that firm generously provided the resources – human and financial – necessary to finalize, print, and file the brief.

The production of the historians' amicus brief in *Flores-Villar* presented an unusual opportunity for a group of scholars with shared interests and complementary expertise to think collectively about how the past should

¹⁹ *Virginia*, 518 U.S. at 531 (quoting *Frontiero*, 411 U.S. at 684).

²⁰ In addition to the articles and books authored by the signatories of the brief and cited *infra* and in the amicus brief that follows, see, for example, MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965* (2004); MAI NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 407-08 (2005). For an examination of gender's continuing relevance in U.S. citizenship and immigration laws, see Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 39 (Linda C. McClain & Joanna L. Grossman eds., 2009).

inform the way we assess sex-based regulation of citizenship today. As the product of these efforts, the brief simultaneously contributes to our understanding of why gender continues to shape American citizenship law and attempts to further a nearly century-long quest for sex equality in that regulatory field.

There is no question that, historically, America's citizenship laws were shaped by the kinds of beliefs about men's and women's relative capacities and roles that our modern constitutional sex-equality doctrine is intended to repudiate. Over the course of the late-Eighteenth and Nineteenth Centuries, Congress steadily incorporated the gender-asymmetrical premises and principles of contemporary marriage law into federal citizenship statutes.²¹ In particular, derivative citizenship among family members was regulated according to the concept of "marital unity" – the notion that "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage"²² Following that principle and the related concept that the husband was the "head" of the family, within marriage American men were recognized as the source of citizenship for their foreign-born children starting in 1790; by 1855, they were the source of citizenship for their foreign wives as well.²³ Meanwhile, American women's subordinate and dependent status in marriage was reinforced by citizenship laws that denied their ability to secure citizenship for their foreign-born children and by the Expatriation Act of 1907, which stripped women of their U.S. citizenship upon marriage to a foreigner.²⁴ Outside marriage, the opposite sex-based pattern prevailed with respect to parent-child derivative citizenship. Our citizenship laws and policies have long recognized mothers as a source of citizenship for their nonmarital children, while barring or severely limiting derivative citizenship as between fathers and their nonmarital children.²⁵

If this elaborate matrix of sex-based citizenship laws seems largely foreign to us today, it is not because the "natural" processes of legislation led to the gradual shedding of antiquated notions of men's and women's rights and roles from those laws.²⁶ In fact, one of the striking features of the development of

²¹ See Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1442-43 (1998); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 POL. & SOC'Y 1, 5-9 (1984).

²² 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

²³ See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103; Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; *infra* Brief of Professors, at 1500 (original at 6-7).

²⁴ Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228.

²⁵ See Kristin A. Collins, Note, *When Fathers' Rights Were Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1672-74 (2000).

²⁶ Thus, consistent with Rogers Smith's analysis of the development of citizenship law in the United States, we cannot assume that the story of sex and citizenship law is a

our citizenship laws – and a point emphasized in the amicus brief – is how legal concepts like “marital unity” and male headship were reinforced and preserved in federal citizenship statutes long after they were abandoned and repudiated in other sociolegal contexts.²⁷ Rather, the dismantling of much of this system of sex-based citizenship regulation is attributable to the efforts of first-wave feminists who, operating domestically and internationally, worked tirelessly for sex equality in that field.²⁸

Women’s organizations achieved an important success with the Cable Act of 1922, which partially repealed the Expatriation Act of 1907, and thus ensured at least some women’s right to retain their American citizenship upon marriage to a foreigner.²⁹ But that legislative victory was incomplete. Particularly relevant in this case, despite feminists’ best efforts, the Cable Act did nothing to ensure sex equality as between American mothers and fathers who sought to secure citizenship for their foreign-born children.³⁰ After twelve more years of persistent lobbying by women’s organizations, in 1934 Congress finally equalized parent-child derivative citizenship with respect to married citizen mothers and fathers, at least as a formal matter.³¹ But in the 1930s, Congress rejected bills that would have extended the sex-equality principle to unmarried mothers and fathers.³² Today, derivative citizenship as between mothers and their nonmarital foreign-born children remains virtually unfettered, while fathers of such children are both burdened and protected by an elaborate set of statutory requirements, including the age-calibrated parental residency requirement at issue in *Flores-Villar*.

progressive narrative about America’s natural, linear movement away from “feudal” hierarchies and practices toward full realization of its core liberal-democratic commitments. See ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 15 (1997).

²⁷ See *infra* Brief of Professors, at 1501-06 (original at 9-19).

²⁸ CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 1-14 (1998).

²⁹ Act of Sept. 22, 1922 (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022. The Cable Act’s partial repeal of the Expatriation Act of 1907 was and is rightly heralded as one of the first, and most important, post-Nineteenth Amendment victories for women’s organizations. See KRISTI ANDERSEN, AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL 27 (1996). However, the Act’s limitations were numerous, including – as discussed below – its creation of race-based exceptions to married women’s citizenship rights. See *infra* discussion accompanying notes 33-39.

³⁰ See Cable Act, ch. 411, § 2; BREDBENNER, *supra* note 28, at 168.

³¹ Act of May 24, 1934, ch. 344, 48 Stat. 797, 797-98. For a discussion of how Congress undermined the sex equality achieved in the 1934 Act by creating gender-salient exceptions that benefitted married fathers, see *infra* Brief of Professors, at 1504-06 (original at 15-18).

³² H.R. 14,684, 71st Cong. (1930); S. 3, 71st Cong. (1930); H.R. 5489, 72d Cong. (1931); see also *infra* Brief of Professors, at 1508-09 (original at 23-25).

The amicus brief provides a much more detailed account of this history, but – as the name of the genre implies – it, too, only summarizes the complex ways in which our citizenship laws have been shaped by gender ideology. In addition, the amicus brief is a legal advocacy document that must foreground the facts and analyses judged to be most salient and persuasive in this particular case. I have been asked how these generic limitations and conventions influenced the amicus brief’s presentation of the history of sex-based citizenship laws. Two issues immediately come to mind.

The first is the amicus brief’s limited discussion of the many troubling ways in which our sex-based citizenship laws have operated in a race-salient manner. The history of U.S. citizenship law cannot be understood without due recognition of racism’s central role in shaping the entire regulatory field. The amicus brief is not silent on the subject of race. For example, it discusses how the Cable Act left intact formal race-based restrictions on married women’s citizenship rights by continuing to expatriate American women who married foreign men “ineligible for citizenship” – a reference to the statutory exclusion of Asians from immigration eligibility.³³

But race-based beliefs also influenced – and continue to influence – the operation of the formally race-neutral laws that were at issue in *Flores-Villar*. Limitations on citizenship claims asserted by or on behalf of the nonmarital foreign-born children of American fathers highlight the troubling practice of sexual exploitation of non-white foreign women by white American men. If this suggestion strikes some readers as speculative, consider the statement of Edwin Borchard, one of the most well-respected citizenship law experts of the early Twentieth Century, who in 1912 uncritically declared that it “seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.”³⁴ That quote is included in the amicus brief – and one hopes its significance was not lost on the brief’s most important readers – but there is much more that could be said on this general point.

To take one example, contrast the United States’s welcoming treatment of children born to American soldiers and their European “war brides” during World War II, and its resistance to marriages between American soldiers and their South East Asian girlfriends during the Korean and Vietnam wars. As Susan Zeiger has demonstrated in compelling detail, the difference between

³³ Cable Act, ch. 411, §§ 3, 5, 42 Stat. 1022; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876; *infra* Brief of Professors, at 1503 (original at 12-13). When the Cable Act was enacted, the statutory category of persons “ineligible for citizenship” also included anarchists, polygamists, and a host of others. See Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-77. Kerry Abrams explores the ways that race and sex-based ideologies intersect in federal immigration law in *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643, 677 (2005); see also Volpp, *supra* note 20, at 411-19.

³⁴ EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 612 (1915).

these two historical moments lay not just (or even) in the private conduct of American soldiers, but also in the official policies and practices of the U.S. government.³⁵ During and following World War II, the military encouraged soldiers to wed their European sweethearts, and Congress provided the soldiers' non-Asian war brides and children with special immigration status through the "war brides" acts and transport to the United States.³⁶ Meanwhile, the military thwarted marriages between soldiers and their Asian girlfriends during the Korean and Vietnam wars, instead encouraging and facilitating casual sexual liaisons.³⁷

The impact of these policies was not absolute. Many American soldiers serving in Korea and Vietnam ignored their commanders and eventually brought home wives and children who became American citizens.³⁸ Nevertheless, the military's race-salient policies operated in conjunction with gender-asymmetrical derivative citizenship laws: the predominantly white babies of World War II soldiers became citizens and "baby boomers," while the vast majority of nonmarital Amerasian babies were excluded and became "children of the dust."³⁹

Any complete analysis of the legal and historical significance of sex-based laws governing parent-child derivative citizenship should account for how these laws have operated in conjunction with the military's racialized marriage policies and practices. However, the details of this phenomenon are extremely complex and are still being developed in the secondary literature, making their inclusion in the brief particularly challenging given the very strict filing deadlines and space limitations that come with Supreme Court litigation.⁴⁰

³⁵ See SUSAN ZEIGER, *ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY 2* (2010).

³⁶ See War Brides Act, ch. 591, 59 Stat. 659 (1945) (providing non-quota immigrant status to alien spouses and minor children of members of the armed forces serving during World War II); GI Fiancees Act of June 29, 1946, 60 Stat. 339 (providing special immigration status to the fiancees of World War II armed services members). Starting in 1947, Congress provided a series of time-limited waivers to racial immigration restrictions that had been incorporated into the earlier war brides acts to the exclusion of Asian war brides. See, e.g., Act of July 22, 1947, ch. 289, 60 Stat. 401. However, couples seeking such waivers had only thirty days in which to wed, making them of limited practical significance. See ZEIGER, *supra* note 35, at 181-82.

³⁷ See ZEIGER, *supra* note 35, at 213, 222-25.

³⁸ See *id.* at 182-83.

³⁹ Congress belatedly provided preferred immigration status for Amerasian children of American soldiers with the Amerasian Immigration Amendments. See 8 U.S.C. § 1154(f) (1982) (extending "preferential treatment" in immigrant visa allocation to children fathered by U.S. citizens and born in Korea, Vietnam, Laos, Kampuchea, or Thailand after 1950 and before October 22, 1982).

⁴⁰ Linda Kerber has begun this important work in a recently published essay. See Linda K. Kerber, *Birthright Citizenship: The Vulnerability and Resilience of an American Constitutional Principle*, in JACQUELINE BHABHA, *CHILDREN WITHOUT A STATE: A GLOBAL*

In addition, it is not at all clear that a majority of the sitting justices would consider it a problem, as a constitutional matter, that our citizenship laws insulate male soldiers and the United States from citizenship claims by or on behalf of nonmarital foreign-born children, regardless of the racial dimension of the phenomenon. In *Nguyen v. INS*, for example, Justice Kennedy's majority opinion refers to the significant numbers of nonmarital children fathered by U.S. servicemen as a reason to uphold the limitations on father-child derivative citizenship, rather than as a reason to be skeptical of the validity of these limitations under modern equal protection principles.⁴¹ And in a Ninth Circuit case raising a similar issue, Judge Andrew Kleinfeld was quite candid in his assessment that Congress was well within its constitutional authority to pass a statute that would minimize the burdens created by "paternity and citizenship claims" asserted by "the women the [U.S.] soldiers left behind and their children."⁴² "This may not be pretty," he noted, "but it is a rational basis for a sex distinction."⁴³ In a world where that kind of reasoning is acceptable – in at least some judicial circles – focusing on the fact that the sexual and marital practices of U.S. soldiers abroad have been shaped in part by race-salient government policies seemed more likely to confuse than convince.⁴⁴

On a closely related note, the amicus brief is also selective in how it characterizes the sex-based injury caused by the federal citizenship statutes at issue. Throughout, the brief urges that the gender-asymmetrical regulation of parent-child derivative citizenship is unconstitutional because, by recognizing and prescribing parental roles along sex lines, it effectively circumscribes men's and women's liberty interests as citizen-parents.⁴⁵ That is certainly true, and hence the statutory scheme at issue in *Flores-Villar* runs afoul of constitutional sex-equality principles articulated most recently in *Nevada Department of Human Resources v. Hibbs*, where the Court found that state-sponsored perpetuation of gender-traditional parental roles violates equal protection.⁴⁶

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⁴¹ See *Nguyen v. INS*, 533 U.S. 53, 65 (2001).

⁴² *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1129 (9th Cir. 1999) (Kleinfeld, J., dissenting). Linda Kerber provides a careful and contextualized discussion of Judge Kleinfeld's reasoning in *The Stateless as the Citizen's Other: A View from the United States*, 112 AM. HIST. REV. 1, 6 (2007).

⁴³ *Ahumada-Aguilar*, 189 F.3d at 1129.

⁴⁴ A recent empirical study suggests that combining race and sex discrimination claims is unwise as a strategic matter. See Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1458 (2009) (observing disproportionately high loss rates for individuals who bring discrimination claims based on more than one type of discrimination).

⁴⁵ *Infra* Brief of Professors, at 1499, 1507, 1515 (original at 4, 20, 37).

⁴⁶ 538 U.S. 721, 735 (2003). For a discussion of this aspect of the Court's reasoning in

But there is another important dimension of the injury caused by the laws at issue in *Flores-Villar* that is underdeveloped in the brief. By restricting derivative citizenship as between American fathers and their nonmarital foreign-born children, federal citizenship law perpetuates a system of sexual ethics that privileges men's sexual prerogative outside marriage.⁴⁷ The foreign mothers of nonmarital children fathered by Americans are left facing the burdens and social stigma of unwed motherhood alone. In this regard, *Flores-Villar* implicated the anti-subordination theory of constitutional sex equality – the notion that anti-discrimination principles are not simply intended to remedy a history of wrongful “classification,” but should also repudiate gender-based sociolegal hierarchies that have resulted in women's subordination.⁴⁸ This aspect of the operation of our gender-asymmetrical citizenship laws was suggested in passing during oral argument in *Nguyen v. INS*, when Justice Ginsburg noted wryly, “[t]here are . . . men out there who are being Johnny Appleseed.”⁴⁹ In her dissenting opinion in that case, Justice O'Connor articulated a similar concern, observing that our sex-based citizenship laws are “paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.”⁵⁰

After careful consideration, however, I decided not to emphasize this line of analysis in the amicus brief, for two reasons. First, that formulation of the injury is a poor fit with the facts of *Flores-Villar*. Ruben was raised in his American father's American household from infancy – a fact that makes the government's refusal to recognize him as a citizen particularly troubling.⁵¹ Second, as discussed above, given some jurists' apparent acceptance of a statutory regime that protects American men from paternity claims by nonmarital foreign-born children, and in a doctrinal world in which the majority of the current justices seem more comfortable with the role-prescription logic of the sex-equality doctrine, it seemed prudent to tailor the characterization of sex-based injury accordingly.

Despite the difficult choices that had to be made in drafting the amicus brief reprinted below, my hope is that it not only demonstrates that the laws that

Hibbs, see Reva B. Siegel, “You’ve Come A Long Way, Baby”: *Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006).

⁴⁷ Collins, *supra* note 25, at 1700.

⁴⁸ The anti-subordination and anti-classification theories of equal protection have been discussed by a host of legal scholars. See, e.g., CATHERINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32, 38 (1987); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

⁴⁹ Transcript of Oral Argument at 31, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071); see Kerber, *supra* note 42, at 6.

⁵⁰ *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting).

⁵¹ Brief for Petitioner, *supra* note 5, at 2.

were at issue in *Flores-Villar* are part of this nation's "long and unfortunate history of sex discrimination,"⁵² but also illustrates how those laws implicate central – if contested – commitments regarding both sex equality and citizenship. As a sex-equality case, *Flores-Villar* raised important and complicated questions regarding men's and women's individual liberty to define themselves as parents – free of state-endorsed sex roles – and also illuminated the government's role in supporting a system of sexual ethics that should have no place in a modern constitutional democracy. As a case about citizenship, *Flores-Villar* raised important questions concerning how America defines and designs itself as a nation. The concept of citizenship necessarily implies a political community premised on inclusion and exclusion. And despite important developments in international human rights law, the nation-state remains the primary site for the development and enforcement of individual rights. Precisely because national citizenship status continues as a vital source of individual rights and responsibilities, our constitutional commitment to equal protection of the laws should apply with full force when determining who is and who is not a citizen of the United States. Early twentieth-century feminists understood this fundamental point with respect to sex equality. The historians' amicus brief served its primary purpose if it conveyed that basic message to its readers on the Court.

⁵² *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

**BRIEF AMICI CURIAE OF PROFESSORS OF HISTORY, POLITICAL SCIENCE,
AND LAW IN SUPPORT OF PETITIONER, *FLORES-VILLAR V. UNITED STATES***

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INTEREST OF AMICI CURIAE¹

Amici curiae listed in the Appendix are professors of history, political science, and law with particular expertise in the history of citizenship and gender. Amici have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the law of citizenship and the manner in which that law has been shaped and animated by sex-based stereotypes and outdated gender norms.

¹ The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of amici’s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

[Editors’ Note: this brief has been modified in form to fit the style of the *Boston University Law Review*. As such, internal cross-references have been updated. The brief has not otherwise been altered.]

SUMMARY OF ARGUMENT

Sex-based laws premised on outdated or archaic presumptions about the proper roles of men and women run afoul of well-established constitutional principles, especially when such laws enforce gender-differentiated parental roles. Amici write to elaborate on the history of Congress's use of sex-based classifications in the regulation of citizenship. Amici demonstrate that, in its regulation of intergenerational and interspousal citizenship transmission, Congress has consistently relied on and perpetuated sex-based norms concerning proper parental roles, even when those norms have changed in other contexts and in social practice. As this brief shows, Congress's tendency to regulate citizenship law using anachronistic gender stereotypes is readily apparent in the statutes that govern the citizenship rights of parents of nonmarital foreign-born children.

Historically, the notion that the husband was the legal and political head of the marital family was the single most powerful belief to shape the United States' regulation of *jus sanguinis* citizenship. That principle has informed every aspect of the citizen transmission statutes, including the parental residency requirement at issue here. With respect to married citizen parents, the headship principle led to dramatic differences in the rights of citizen fathers versus mothers to confer citizenship on their foreign-born children. While married citizen fathers could transmit citizenship to their foreign-born children starting in 1790, it was nearly 150 years before Congress recognized the right of any married citizen mothers to do the same.

Outside the bonds of marriage, a mirror opposite pattern prevailed. According to powerful sex-based cultural assumptions, mothers bore full responsibility for children born out of wedlock; fathers played no role in rearing their nonmarital children. Based on these now-archaic assumptions, Congress substantially limited citizenship transmission between citizen fathers and their foreign-born nonmarital children in ways unrelated to the need to ascertain the existence of a biological or meaningful father-child relationship. These limitations persist today. At the same time, Congress was – and continues to be – solicitous of the citizenship claims of nonmarital foreign-born children of citizen mothers.

The historical sources are brimming with evidence of the sex-based assumptions that have animated U.S. citizenship law and that continue to do so. By contrast, those sources contain little evidence that the minimal parental U.S. residency requirement for nonmarital foreign-born children of citizen mothers was predicated on a particular concern about the risk of statelessness for those children. Moreover, to the extent statelessness was a concern, Congress's response was itself shaped by preconceived notions about the respective roles of men and women in rearing their nonmarital children.

ARGUMENT

This Court has recognized time and again that laws that distinguish between men and women based on outdated understandings of their “respective roles”

or “separate spheres” are contrary to constitutional gender-equality principles. See *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). To be sure, this Court has by no means foreclosed the ability of legislatures to draw sex-based distinctions. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001). But one undeniable theme of these decisions is that such distinctions are suspect whenever they presume distinctive societal roles for the sexes, both vis-à-vis each other and vis-à-vis their children. See, e.g., *id.* at 73; *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

In the decision below, the Court of Appeals concluded that the differential parental residency requirements contained in the citizenship statutes in question, 8 U.S.C. § 1401 and § 1409, do not rest on or perpetuate sex-based stereotypes. Amici respectfully disagree. A careful reconstruction of the history of U.S. citizenship law reveals the actual and archaic source of the statutory discrimination at issue. Especially with respect to nonmarital children, Congress has presumed that women are the primary caretakers of such children and that a child accordingly has a different and stronger bond with its mother than with its father. By codifying this and other sex-based assumptions into citizenship laws, Congress has persistently enforced stereotypical views about women as mothers, and men as fathers, long after such views have eroded in other areas of law and practice. See, e.g., *Hibbs*, 538 U.S. at 731 (invalidating state laws attributable to the “pervasive sex-role stereotype that caring for family members is women’s work”).

I. CONGRESSIONAL REGULATION OF INTERGENERATIONAL CITIZENSHIP TRANSMISSION HISTORICALLY PRIVILEGED MARRIED CITIZEN FATHERS’ RIGHTS AND SEVERELY LIMITED THE CITIZENSHIP RIGHTS OF MARRIED CITIZEN MOTHERS.

A. *The Rights of Married Citizen Fathers Under the Citizenship Laws*

Historically, the husband’s position as “head of the household” enhanced men’s cultural, political, and legal authority in myriad contexts beyond the household itself.² Citizenship law was no exception. See Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830-1934*, 103 Am.

² See generally *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (“[T]he civil law . . . has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.”); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981-87, 993-97, 1019-22 (2002) [hereinafter Siegel, *She the People*] (explaining that the husband’s authority in the household provided a foundation for men’s civic participation as voters, jurors, and office holders, and a justification for women’s exclusion from those activities).

Hist. Rev. 1440, 1452 (1998); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 Pol. & Soc’y 1, 11 (1984). Accordingly, the laws governing *jus sanguinis* citizenship privileged the father as the source of citizenship for foreign-born children from 1790, when the first citizenship statute was enacted, until 1934. See Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 (“Act of 1855”); 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, 104. The male headship principle was so powerful that even ambiguous statutory language in the citizenship statutes of 1790, 1795, and 1802 – which referred only to transmission of citizenship to “children of citizens” or “persons” – was generally understood to mean the children of citizen fathers. See 2 James Kent, *Commentaries on American Law* *53 (8th ed. 1854).³

In the mid-nineteenth century, Congress considered a proposal to repudiate the sex bias in the early *jus sanguinis* citizenship statutes. See Cong. Globe, 30th Cong. 1st Sess. 827 (1848) (statement of Sen. Webster) (proposing a bill to confer citizenship on all foreign-born children “of a father or mother being or having been a natural born citizen of the United States”). Instead, in 1855 Congress affirmed the husband-favoring interpretation. Rewording the statute to clarify that only children “whose *fathers* were or shall be at the time of their birth citizens of the United States, shall be deemed . . . citizens of the United States,” Act of 1855, § 1, 10 Stat. at 604 (emphasis added), Congress codified in citizenship law the well-established norm of male headship of the marital family. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 234-35 (1997) (noting that the 1855 Act was “true to the law’s pervasive patriarchalism”).

In keeping with social and legal norms privileging the father as the source of citizenship for dependents in the marital household, Congress also pronounced in 1855 that a non-citizen woman would become an American citizen simply by marrying an American man. Act of 1855, § 2, 10 Stat. at 604. A primary advocate of this change, Representative Cutting of New York, justified it in terms of the “merger” doctrine: “[B]y the act of marriage itself the political character of the wife shall at once conform to the political character of the

³ It was possible to interpret the early citizenship transmission statutes more restrictively to mean that only foreign-born children of two citizen parents would acquire citizenship. See 2 Kent, *supra*, *53; see also Horace Binney, *The Alienigenae of the United States*, 2 Am. L. Reg. 193, 207 (1854). However, as Kent observed, the understanding that citizen fathers could convey citizenship to their foreign-born children regardless of the mother’s citizenship was consistent with the requirement in all of the early citizenship statutes that “the right of citizenship shall not descend to persons whose fathers have never resided within the United States.” Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; see also Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104; 2 Kent, *supra*, *53. That interpretation was also consistent with English law on the point. See 2 Kent, *supra*, *51 (citing 4 Geo. 2, ch. 21 (1731)).

husband.” Cong. Globe, 33d Cong., 1st Sess. 170 (1853) (statement of Rep. Cutting). Cutting assured his fellow congressmen that “there can be no objection to” such a law “because women possess no political rights” of their own. *Id.*

Congress continued to shape the laws governing intergenerational and interspousal citizenship transmission according to the principle of male headship even as the social and legal foundations of that principle began to erode.⁴ Thus, when Congress enacted the Cable Act of 1922, eliminating the American man’s absolute privilege to endow his foreign wife with citizenship simply by marrying her, it continued to reify the male headship principle in citizenship law in other ways. Congress expedited the naturalization process for foreign wives of American citizens, Act of Sept. 22, 1922 (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022, exempted men’s foreign wives from racial quotas, and otherwise gave them preferential immigration status. Act of May 26, 1924, ch. 190, §§ 4(a), 4(d), 13(c), 43 Stat. 153, 155, 162. As discussed below, the American woman who married a foreign husband never received such preferential treatment; instead, for many decades she would be expatriated for marrying a foreigner. *See infra* at 1502-03.

In short, the law governing citizenship transmission reflected and perpetuated prevailing social and legal norms that secured men’s place as head of the marital family and household. Well into the twentieth century, national legislators presumed that the husband determined the political and cultural character of his dependents – wife and children included – and, hence, that the dependents’ citizenship should conform to his. Even in the face of significant changes in married women’s legal status, these presumptions continued to inform citizenship law until they were gradually and imperfectly dislodged.

B. *The Rights of Married Citizen Mothers Under the Citizenship Laws*

The same norms that informed married fathers’ power to transmit citizenship to their foreign-born children conversely led to substantial limitations on the citizenship rights of married mothers. Under the doctrine of coverture, wives had no independent civil or legal identity – they were “dead” in the eyes of the law. *See* Norma Basch, *In the Eyes of the Law: Women,*

⁴ In the late nineteenth and early twentieth centuries, laws giving husbands power over their wives’ legal and economic personae were gradually revised by state legislatures and courts under pressure from advocates. In the 1840s and 1850s, states began to pass married women’s property acts, allowing women to retain some control over their separate property obtained before marriage, and, slightly later, statutes affording wives the right to their own earnings. *See* Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *Geo. L.J.* 1359, 1398-1401 (1983); Reva Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *Yale L.J.* 1073, 1083 (1994). During this period, women began to obtain public law rights as well, including the right to vote. *See* T.A. Larson, *Woman Suffrage in Western America*, 38 *Utah Hist. Q.* 8, 19 (1970); U.S. Const. amend. XIX.

Marriage, and Property in Nineteenth-Century New York 50-55 (1982). A wife's legal and political identity was subsumed into that of her husband. That principle was pervasive, shaping the political and legal rights of women – married and unmarried – and the social expectations imposed upon them.⁵

Even as these powerful social and legal norms were challenged and lost hold in other areas of law, *see supra* note 4, they continued to inform Congress's restriction of married women's citizenship rights. Three examples are especially germane.

First, the principle of male headship was integrated into American citizenship law through the expatriation of American women who married non-citizen husbands. This had not been the common law practice. *See Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) (Story, J.) (“[M]arriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife.”); Candice Lewis Bredbenner, *A Nationality of her Own: Women, Marriage, and the Law of Citizenship* 59 (1998). In the late nineteenth century, however, some courts began expatriating American women who married non-citizens. Thus, in 1883 a federal court held that an American woman lost her citizenship upon marriage to a non-citizen, declaring that “legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative.” *Pequignot v. City of Detroit*, 16 F. 211, 216 (C.C.E.D. Mich. 1883).

Consistent with its tendency to enhance, rather than minimize, the sex-discriminatory function of the citizenship laws, Congress codified the *Pequignot* holding in the Expatriation Act of 1907, which stipulated that “any American woman who marries a foreigner shall take the nationality of her husband.” Act of Mar. 2, 1907 (Expatriation Act), ch. 2534, § 3, 34 Stat. 1228, 1228. Affirming the constitutionality of that Act eight years later, this Court observed that “[t]he identity of the husband and wife is an ancient principle of our jurisprudence [which] worked in many instances for her protection [and which] give[s] dominance to the husband.” *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). As Senator Cable later explained, “for centuries male legislatures and jurists” used America’s “grossly unjust” citizenship laws to “jealously preserve[] the husband’s dominance and . . . limit[] the wife to a negligible sphere of activity and assign[] her to an inconspicuous position in the eyes of

⁵ Because it was assumed that a married woman operated under her husband’s influence and lacked independent will, married women could neither execute contracts nor file suit to defend their rights and property without their husbands’ official participation in the lawsuit. *See* Basch, *supra*, 51. Similar logic deprived all women of the vote and barred them from jury service and office holding, even if they were unmarried. *See* Siegel, *She the People*, 981-86, 993-97. Under the strict common law, a married woman also lacked the right to custody of her children in the event of separation from or death of the husband – a limitation that changed slowly in the nineteenth century. *See* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 235 (1985).

the law.” *American Citizenship Rights of Women: Hearing on S. 992, S. 2760, S. 3968, and S. 4169 Before a Subcomm. of the S. Comm. on Immigration*, 72d Cong. 25 (1933).

After the ratification of the Nineteenth Amendment in 1920, women’s opposition to the Expatriation Act gained force. *See* Bredbenner, *supra*, 81; Cott, 103 *Am. Hist. Rev.* at 1464; Sapiro, 13 *Pol. & Soc’y* at 13. But not all agreed that women’s suffrage paved the way for equal citizenship rights. Resistance was predicated on a persistent valuing of male headship and “marital unity,” which presupposed that a wife must and would conform to the cultural and political character of the husband. *See* 62 *Cong. Rec.* 9061 (1922) (statement of Rep. Mills) (by allowing American women to retain their citizenship upon marriage to a non-citizen, “you violate . . . the existing legal principle of family unity.”).

In 1922, Congress enacted the Cable Act, which ended the automatic expatriation of some, but not all, American women who married non-citizens. Cable Act, ch. 411, § 3, 42 *Stat.* at 1022. Congress’s equalization of women’s citizenship through the Cable Act was equivocal. The law continued to expatriate any American woman who married a non-citizen and resided in her husband’s country for two years, or abroad in any other country for five years. *Id.* No such limitation has ever applied to an American man who opted to live abroad with his non-citizen wife. Moreover, the Cable Act’s sex-equality principle did not extend to those women whose foreign husbands were themselves “ineligible to citizenship” under our naturalization laws. *Id.* §§ 3, 5, 42 *Stat.* at 1022; *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 *Colum. L. Rev.* 641, 662, 694 n.335 (2005). Thus, under the Cable Act the American woman who married a racially ineligible non-citizen was still expatriated. *See* Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 42–43 (1998). No such draconian penalty was visited upon an American man who did the same. *See* Act of May 26, 1924, ch. 190, §§ 4(a), 4(d), 13(c), 43 *Stat.* 153, 155, 162.

Second, until 1934 the male headship principle also prevented recognition of married American women’s capacity to transmit citizenship to their foreign-born children. *See* Bredbenner, *supra*, 84. As discussed above, prior to 1855, the citizenship statutes were interpreted to preclude transmission of citizenship from the married American mother to her foreign-born children. *See* 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, 104; *see also supra* at 1500. Congress affirmed and codified that interpretation in the citizenship statute enacted in 1855. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 *Stat.* 604, 604.

Even after the enactment of the Cable Act in 1922, married women were unable to transmit citizenship to their foreign-born children. Strong resistance to equalization of that right was premised largely on the belief that the husband determined the political and cultural character of the family. *See Relating to*

Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the H. Comm. on Immigration and Naturalization, 72d Cong. 18 (1932) [hereinafter Hearings on H.R. 5489] (Statement of Sen. Green) (“I am still constrained to believe that the man is the head of the family.”); Relating to the 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. 29 (1933) [hereinafter Hearings on H.R. 3673] (statement of Lieut. Col. Fred B. Ryons) (objecting to citizenship transmission by married mothers on the ground that “[t]he head of the family . . . has a perfect right and has an obligation as the head of the family to rule his family”). It was not until 1934 that Congress finally recognized the right of American wives to transmit citizenship to their foreign-born children. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797.

Third, even after Congress introduced formal statutory equality with respect to wives’ ability to transmit citizenship to their foreign-born children, beliefs about married women’s lack of authority and individual identity within marriage continued to shape the citizenship laws in significant ways. Indeed, the equalization of the law regarding married mothers’ and fathers’ right to transmit citizenship in 1934 prompted Congress to introduce a child U.S. residency requirement, see Act of May 24, 1934, ch. 344, § 1, 48 Stat. at 797, and a lengthy age-delimited parental U.S. residency requirement for children of mixed-nationality couples, see Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1138-40; see also *supra* note 3 (noting minimal U.S. residency requirement for fathers prior to 1934).

Although sex-neutral in their wording, the child and parental U.S. residency requirements were not sex-neutral in their origins or statutory design. Repeatedly in the debates over the 1934 and 1940 acts, legislators and witnesses articulated a concern that the foreign-born children of American women in mixed-nationality marriages would not be “American” in character because the foreign husband would establish the character of his dependents. In 1933, an Assistant Secretary of State articulated this shared understanding: “It is hardly necessary to say that, when a woman having American nationality marries a man having the nationality of a foreign country and establishes her home with him in his country, the national character of that country is likely to be stamped upon the children, so that from the standpoint of the United States they are essentially alien in character.” See Letter from Assistant Secretary of State Wilbur J. Carr to the Chairman of the House Committee on Immigration and Naturalization, *reprinted in* Hearings on H.R. 3673 at 9.

The belief that the wife and children conformed to the foreign husband’s cultural practices and political views first led to the inclusion of a five-year age-delimited child U.S. residency requirement in the 1934 Act. See Act of

May 24, 1934, ch. 344, § 1, 48 Stat. at 797. A 1938 letter by a cabinet-level committee appointed by President Roosevelt explained this series of events:

Congress apparently took into consideration the fact that persons born in foreign countries whose *fathers* were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States, and consequently annexed as a condition for retaining citizenship a 5-year period of residence [for the child] in this country between the ages of 13 and 18.

86 Cong. Rec. 11,945 (1940) (letter dated June 1, 1938 from Sec. of State Cordell Hull, Att’y Gen. Homer Cummings, and Sec. of Labor Frances Perkins) (emphasis added).

After the 1934 Act went into effect, however, there was concern that the child residency requirement improperly limited transmission of citizenship to the foreign-born children of American citizen fathers who were married to non-citizens. Such children were believed to conform to the cultural and political character of the American “head of the family” – a legal term of art that, in this period, referred to the husband/father.⁶ The same cabinet-level committee explained that “these [child] residence requirements will impose great hardship in some cases,” especially where the “head of the family” worked abroad for the American government or an American enterprise of some sort. *Id.* Thus, it recommended an exemption from the child residency requirement in such cases. The committee also recommended the imposition of a new requirement that the citizen parent in a mixed-nationality marriage “should have resided at least 10 years in the United States prior to the birth of the child,” which, again, would not apply to those foreign-born children of families where the “head of the family” was an American citizen employed by an American enterprise. *Id.*

As a consequence of these sex-based assumptions about parental roles in marriage, in 1940 Congress re-configured the citizenship transmission statute in a manner that would help preserve husbands’ power and privilege while disproportionately constraining married women’s ability to transmit citizenship to their foreign-born children. The resulting exception to the residency requirements was phrased to relieve the children of citizen *fathers* from the onerous child and parental residency requirements, while severely diminishing the likelihood that the children of citizen *mothers* would benefit from it. The exception was triggered only when the citizen parent “*at the time of the child’s birth* [was] residing abroad *solely or principally in the employment* of the Government of the United States or a bona fide American . . . organization . . . for which *he* receives substantial compensation.” Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. at 1139 (emphasis added). In the 1940s, married women with children were rarely engaged in such employment, especially not

⁶ See, e.g., *Cyclopedic Law Dictionary* 522 (3d ed. 1940) (defining “head of a family” in terms of the relationship between “father and child” or “husband and wife”).

“at the time of [her] child’s birth,” and hence the exception was of little use to citizen mothers.⁷ Even the details of the parental residency requirement thus evince the imprint of the male headship principle and the corresponding belief that the wife and children conformed to the cultural and political character of the husband.

In short, the profound limitations on the citizenship rights of married women – including their right to transmit citizenship to their foreign-born children – were corollaries to the sex-differentiated norm that empowered married men to transmit citizenship to their wives and foreign-born children. Congress’s regulation of *jus sanguinis* and derivative citizenship not only reflected those sex-based norms, but extended their vitality in citizenship law even as similar sex-based distinctions were eroding in other contexts.

II. SEX-BASED GENERALIZATIONS ANIMATED – AND CONTINUE TO ANIMATE – THE DISPARATE CITIZENSHIP RIGHTS OF UNMARRIED CITIZEN FATHERS AND MOTHERS.

Outside the bonds of marriage, a mirror opposite pattern of sex-based regulation of *jus sanguinis* citizenship prevailed. Courts, administrators, and Congress have readily recognized citizenship claims of the foreign-born children of unmarried citizen mothers, and Congress imposed only a minimal parental residency requirement in such cases. By contrast, transmission of citizenship between fathers and their nonmarital foreign-born children was, and is, severely limited.

At first glance, this system may appear to be in tension with the male-privileging norm that operated in the marital context, but the two systems were shaped by the same constellation of sex-based social norms. The man’s headship over his marital family was a right and privilege linked to his control over and responsibilities for his dependents. But the man who fathered a child outside of marriage was presumed to have no relationship with or responsibility for his child. Meanwhile, the woman who had a child out of wedlock experienced the social ignominy of and bore full responsibility for the child.

Through its regulation of *jus sanguinis* citizenship, Congress reinforced and perpetuated these gendered norms regarding men’s and women’s respective roles and responsibilities as parents outside marriage. By codifying a system of citizenship laws that enforced sex-differentiated family roles, Congress constrained individual mothers’ and fathers’ ability to decide how to perform their roles as parents. The statutory provision at issue in this case continues

⁷ Women seeking employment abroad as Foreign Service officers faced almost insurmountable sex discrimination. See Homer L. Calkin, *Women in American Foreign Affairs* 102-103, 110 (1977). Moreover, in the mid-twentieth century, working women were often lawfully dismissed during pregnancy, and few had access to maternity leave or job security after the birth of a child. See Alice Kessler-Harris, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th-Century America* 210-11 (2001).

this transparently sex-discriminatory means of regulating citizenship transmission, even as the social and legal norms regarding nonmarital parenthood have evolved.

A. *Citizenship Transmission from Citizen Fathers to Nonmarital Children*

Premised on the outdated view that fathers have only attenuated relationships with their nonmarital children and that the government should recognize such relationships only in extremely limited circumstances, U.S. citizenship laws have consistently encumbered citizenship transmission from citizen fathers to their nonmarital children.

For much of the nineteenth and early twentieth centuries, domestic relations laws generally insulated men from their nonmarital children by disfavoring those children's claims to property and status, even when the children had been legitimated. See Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 221-22, 232-33 (1985).⁸ Well into the early twentieth century, domestic relations laws in most states resisted recognition of the father-child relationship outside of marriage and demonstrated solicitousness for putative fathers who wished to avoid their parental responsibilities. See *id.* at 199, 217, 231-32. These laws both evinced and perpetuated powerful cultural resistance to men's responsibility for – and relationships with – their nonmarital children.

Such resistance also shaped the regulation of *jus sanguinis* citizenship, even before Congress first addressed the citizenship status of foreign-born nonmarital children in 1940. From 1790 until 1940, the citizenship statutes were silent as to the marital status of the citizen parent. See Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604; 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 Stat. 103, 104. Nevertheless, these statutes were interpreted to allow transmission of citizenship to the marital children of citizen fathers, but not to their illegitimate children. The lead nineteenth-century case in this area, *Guyer v. Smith*, 22 Md. 239 (1864), demonstrates just how rigid this limitation was. In *Guyer*, the father had recognized his children, given them his name, and named them in his will. Yet the court refused to recognize their claims to legitimacy, and thus to citizenship. See *Guyer*, 22 Md. at 249 (finding that the citizen father's children were “illegitimate; under our law *nullius filii*, and clearly therefore not within the provisions of the [1802] Act”).

Courts and administrators gradually recognized the citizenship claims of at least some nonmarital foreign-born children who had been legitimated by the citizen father. See 32 Op. Att'y Gen. 162, 164-65 (1920); House Comm. on

⁸ Under the common law, a nonmarital child was *nullius filius*. The law did not recognize a legal relationship between the child and either of his parents. See 2 Kent, *supra*, *212; see also Wilfrid Hooper, *The Law of Illegitimacy* 25, 122, 135 (1911) (the nonmarital child had no right to inherit, no right to the surname of either parent, and no claim on them for support or education).

Immigration & Naturalization, 76th Cong., Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments 17 (Comm. Print 1939) [hereinafter Proposed Code]. But the legitimation exception was narrow and uncertain, with courts and administrators erecting a high bar when assessing citizenship claims asserted by or on behalf of the nonmarital children of citizen fathers. See, e.g., *Mason ex rel Chen Suey v. Tillinghast*, 26 F.2d 588 (1st Cir. 1928) (affirming rejection of evidence of legitimation for purposes of determining citizenship of foreign-born nonmarital child of American father); *Ng Suey Hi v. Weedon*, 21 F.2d 801, 802 (9th Cir. 1927) (holding that “illegitimate children, born abroad of citizens, being nullius filii” are not citizens under the citizenship statute, and rejecting evidence of legitimation by American father); Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612 (1915) (“[I]t seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.”).

In 1934, Congress had the opportunity to introduce sex equality into the laws governing *jus sanguinis* citizenship for nonmarital children, but it refused to do so. The sex-based understanding that that men played an attenuated and discretionary role in the lives of their nonmarital children provided crucial context for the legislative debates over citizenship transmission to such children. Bills introduced in the early 1930s would have secured parental sex equality with respect to transmission of citizenship to foreign-born children of citizen parents, regardless of the parents’ marital status:

Any child, *whether legitimate or illegitimate*, born out of the limits and jurisdiction of the United States, whose father or mother may be at the time of the birth of such child a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any child whose father or mother had never resided in the United States previous to the birth of such child.

H.R. 14,684, 71st Cong. § 3 (1930) (emphasis added); see also H.R. 5489, 72d Cong. (1931).

Supporters of this bill urged that equal treatment of the citizen mothers and fathers of nonmarital foreign-born children was warranted pursuant to the sex-equality principles that informed the 1922 Cable Act. This included the principle that mothers and fathers should have equal rights to confer citizenship to their nonmarital children, and equal responsibility for such children. See Hearings on H.R. 5489 at 3-5. (Statement of Burnita Shelton Matthews); *id.* at 17-19 (Statement of Laura Berrien); see also Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669, 1693-98 (2000).

Importantly, the proponents of sex equality in citizenship laws were aware that, in the context of the nonmarital child, proof of paternity would be required. They stressed that procedures would have to be adopted in order to ensure that the child was, indeed, the child of the citizen father. See Hearings on H.R. 5489 at 6 (Statement of Burnita Shelton Matthews) (“We may rest

assured, it seems to me, that adequate proof is required before the right to the protection of the country is afforded. It is unlikely that any person entitled to protection under this bill would get it unless proof were conclusive.”). But, beyond that, they sought equal treatment of mothers and fathers in the transmission of citizenship to nonmarital foreign-born children. *Id.* at 3-5, 17-18.

Nevertheless, opponents resisted sex-equality in the regulation of *jus sanguinis* citizenship of nonmarital foreign-born children not primarily because they were worried about fraud, but because it offended the deeply-held view that the law did not – and should not – recognize the relationship of the father and his nonmarital child. As one congressman explained in an exchange with a proponent of the bill: “The child cannot 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) but you are giving an illegitimate child consideration.” Hearings on H.R. 5489 at 5 (statement of Rep. Jenkins). These concerns, as well as stubborn resistance to full gender equality in matters relating to citizenship, were fatal to the inclusion of “illegitimate” in the bill. *See* Bredbenner, *supra*, 230-31; Collins, 109 Yale L.J. at 1697. As a consequence, when Congress in 1934 passed a statute enabling married mothers to transmit citizenship to their foreign-born children, the final version of the bill said nothing concerning parental marital status, but was understood to apply to the foreign-born children of married citizen parents only. *See* 78 Cong. Rec. 7357 (1934) (“[This bill] applies to the children of wives and the children of husbands.”) (statement of Rep. Jenkins); 39 Op. Att’y Gen. 290, 291 (1939) (recognizing “that the applicable statutory provisions [in the citizenship laws] apply only to legitimate children”).⁹

Six years later, Congress finally addressed the citizenship status of foreign-born nonmarital children, making explicit what had been understood for decades: American citizenship law would continue to distance fathers from their nonmarital children. *See* Nationality Act of 1940, ch. 876, §§ 201(g) & 205, 54 Stat. 1137, 1138-40. The Nationality Act of 1940 codified and carried forward many of the pre-existing practices of courts and administrators. But it also extended the law’s sex-based differential treatment of citizen parents by imposing new limitations on transmission of citizenship from citizen fathers to nonmarital foreign-born children through a host of requirements that did not apply to citizen mothers: mandatory legitimation during the child’s minority; a ten-year, age-delimited U.S. residency requirement for the father; and a five-year, age-delimited U.S. residency requirement for the child. *Id.*

⁹ Some sources suggested that the 1934 Act provided statutory authority for transmission of citizenship to the foreign-born nonmarital child of a citizen *mother*. *See In re M-----*, 4 I. & N. Dec. 440 (B.I.A. 1951); Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934).

In 1952, Congress essentially re-codified this system, including the ten-year age-delimited parental residency requirement that applied to citizen fathers of foreign-born nonmarital children, but not to citizen mothers of such children. *See* Immigration and Nationality Act of 1952, ch. 477, §§ 301(a)(7) & 309, 66 Stat. 163, 236-38. It was the 1952 version of this statute that was in effect in 1974 when Petitioner was born. *See* 8 U.S.C. § 1401(a)(7) (1970). Congress has re-codified this basic statute with minor changes on several occasions since then. *See, e.g.*, Act of Nov. 14, 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. But despite advances in legal norms regarding fathers' rights and responsibilities with respect to their nonmarital children,¹⁰ Congress continues to impose a significantly longer residency requirement on citizen fathers of nonmarital children – even where, as here, the father has legitimated the child and has raised him in his American home. *See* 8 U.S.C. §§ 1401(g) & 1409(a) (requiring that fathers of nonmarital foreign-born children satisfy a five-year age-delimited U.S. residency requirement).

In short, consistent with its long-standing tendency, Congress has codified particular and anachronistic sex-based norms concerning father-child relations in the laws governing citizenship transmission to nonmarital foreign-born children. It has done so notwithstanding the erosion of these norms in other areas of law and in individual mothers' and fathers' everyday practices as parents.

B. *Citizenship Transmission from Citizen Mothers to Nonmarital Children*

The United States has been far more solicitous of the citizenship claims of foreign-born nonmarital children of citizen mothers than it has of claims of the nonmarital foreign-born children of citizen fathers. As a general matter, all three branches of the U.S. government have consistently recognized the mother as a source of citizenship for nonmarital, foreign-born children. The ready recognition of the mother-child relationship reflects the sex-based assumption that the mother, but not the father, bears the rights and responsibility of unwed parenthood.¹¹

¹⁰ *See, e.g.*, *Restatement 3d Property (Wills and Other Donative Transfers)* § 2.5 (1999) (“For purposes of intestate succession by, from, or through an individual . . . [a]n individual is the child of his or her genetic parents, whether or not they are married to each other”); *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979) (prohibiting state from distinguishing between unwed mothers and fathers solely on the basis of sex where the father maintains a parent-child relationship).

¹¹ In a departure from the strict common law principle of *nullius filius*, judges and legislators in both England and America gradually began to acknowledge the mother-child relationship outside marriage so as to ensure a responsible care provider and source of material support. *See Wright v. Wright*, 2 Mass. 109, 111 (1806) (Parsons, C.J.) (“[T]o provide for [the bastard’s] support and education, the mother has a right to the custody and control of him, and is bound to maintain him, as his natural guardian.”). As a consequence, by the early twentieth-century, many of the limitations on the legal relationship between the

Officials administering the citizenship laws generally recognized the citizenship claims of foreign-born nonmarital children of citizen mothers long before Congress regulated the subject. *See, e.g.*, Proposed Code at 18 (noting that “the Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother”); Frederick Van Dyne, *Citizenship of the United States* 49 (1904); Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934) (citing a State Department memo of October 27, 1932).¹² A 1939 House Committee report acknowledged this practice and explained that it made sense in a social and legal environment in which, outside marriage, the mother “stands in the place of the father.” Proposed Code at 18. That often-used phrase functioned as a reference to the mother’s superior parental rights and responsibilities with respect to her nonmarital children, and also reflected a social and cultural belief that mothers, not fathers, sustained relationships with nonmarital children. Hence, a 1939 Attorney General Opinion notes that the exclusion of such children from the United States would be “not only harsh, but largely impractical.” 39 Op. Att’y Gen. at 291.

In 1940, Congress codified the administrative practice of maternal transmission of citizenship to nonmarital foreign-born children. Section 205 of the Nationality Act of 1940 provided that if the “mother had the nationality of the United States at the time of the child’s birth, and had previously resided in the United States or one of its outlying possessions,” the child “shall be held to have acquired at birth her nationality status.” *See* Nationality Act of 1940, ch. 876, § 205, 54 Stat. at 1139-40. Thus, unlike the transmission of citizenship to the nonmarital foreign-born children of citizen fathers, citizenship transmission between the citizen mother and nonmarital child was largely unencumbered.¹³ Citizen mothers who wished – or wish – to secure citizenship for their nonmarital foreign-born children have never been required to provide proof of maternity, pledge support for their minor children, satisfy a child residency

nonmarital child and his mother had been repealed. Grossberg, *supra*, 224-25. These changes corresponded with a growing consensus that the mother was the natural and presumed caretaker of her children – a cultural norm that strengthened mothers’ legal custodial rights both in and out of marriage. *Id.* at 209, 225, 234-35.

¹² *But see* 39 Op. Att’y Gen. 290, 290-91 (1939) (acknowledging that nonmarital children of citizen mothers have been recognized as citizens, but finding that such children do not fall within the text of existing legislation and that “resort to the Congress for additional legislation is desirable”).

¹³ Indeed, the primary statutory limitation on transmission of citizenship between American mothers and their nonmarital foreign-born children contained in the Nationality Act of 1940 – that the child would take the citizenship of her American mother only “in the absence of . . . legitimation” by the father – was deleted in the recodification of the provision in the Immigration and Naturalization Act of 1952. *See* Immigration and Nationality Act of 1952, ch. 477, § 309, 66 Stat. at 238-39.

requirement, or satisfy a lengthy age-delimited parental U.S. residency requirement of the sort at issue in this case.¹⁴

The historical sources make clear that Congress's solicitude for the nonmarital foreign-born children of citizen mothers had three primary motivations. *First*, in 1940 Congress was engaged in a massive overhaul of the country's nationality laws, and it sought to standardize numerous administrative practices that had not yet been codified. During this process, Congress was aware of the State Department's recognition of the citizenship of nonmarital foreign-born children of American mothers. *See Proposed Code, supra*, 18. Congress thus codified this long-standing, sex-based, extra-statutory practice.

Second, ready recognition of the mother as the source of *jus sanguinis* citizenship for nonmarital children was consistent with the sex-based presumption that mothers, not fathers, were the caretakers of nonmarital children. Legislators who, as discussed above, were hostile toward proposals to recognize citizenship claims of citizen fathers' nonmarital foreign-born children characterized the State Department's recognition of nonmarital foreign-born children of citizen mothers "as a great boon" for the "unfortunate" mother. Hearings on H.R. 5489 at 5 (statement of Rep. Jenkins).

Third, at a time when nations around the globe were engaged in a concerted effort to rationalize the laws governing citizenship and nationality, the legislators and their advisors were mindful of the sex-based laws and policies of other countries on the question of *jus sanguinis* citizenship of all children, including nonmarital children. *See Proposed Code at 18* (citing *Durward V. Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 *Am. J. Int'l L.* 248, 258-59 (1935)). Accordingly, it appears that congressional recognition of the citizenship claims of the foreign-born children of unwed mothers was fortified by the fact that many other countries had similar practices consistent with prevailing American sex-based views about unmarried mothers' and fathers' legal and caregiving relationships with their children. *See Proposed Code at 18* (noting the rule that the mother "stands in place of the father" for nonmarital children, that such a rule follows Roman law and American domestic law, and that "the laws of some thirty countries" recognize the citizenship status of nonmarital children of citizen mothers).

In the case before the Court, the United States has argued that in 1940 Congress eased the conditions under which mothers transmit citizenship to their foreign-born nonmarital children – and, in particular, exemption from the ten-year age-delimited parental residency requirement – out of concern for the risk of statelessness for that class of children. *See Brief of United States, United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (No. 07-50445),

¹⁴ In 1952, Congress strengthened the parental residency requirement applicable to citizen mothers of foreign-born nonmarital children, increasing it to one year. *See Immigration and Nationality Act of 1952*, ch. 477, § 309(c), 66 Stat. at 238-39.

2008 WL 1848810. Based on the historical sources, this assertion is overstated and incomplete. For example, the primary legislative report on the 1940 Act refers to the risk of statelessness with respect to “foundlings,” but not with respect to the nonmarital foreign-born children of citizen mothers. Proposed Code at 17-18. Proposed Section 203(c), codified in the 1940 Act as Section 204(c), provided that a “child of unknown parentage found in an outlying possession of the United States” would have U.S. nationality until proven otherwise. *Id.* The purpose of that provision, according to the report, was to “prevent unfortunate persons of the class mentioned from being stateless.” Proposed Code at 17. By contrast, the report’s remarks on proposed Section 204, which was to govern the transmission of citizenship from citizen parents to their nonmarital foreign-born children, does not identify statelessness as a concern.¹⁵

Moreover, to the extent that any legislators were focused on the risk of statelessness to the foreign-born nonmarital children of citizen mothers in 1940 when they first created the statutory scheme, their attentiveness was selective in ways that powerfully reflected and perpetuated the sex-based beliefs concerning parental rights and responsibilities that have coursed through our citizenship laws generally.

Nationality and statelessness were subjects of intense study and international concern in the 1930s.¹⁶ The most important American work on the subject was written by Catheryn Seckler-Hudson, a professor and the head of the department of government at American University. *See* Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934).¹⁷ Seckler-Hudson wrote about the risk of statelessness facing the foreign-born nonmarital children of U.S. citizen mothers *and* fathers. *See id.* at 224-25.

As an initial matter, Seckler-Hudson was skeptical that, in 1934, the United States would recognize foreign-born nonmarital children of citizen fathers as American citizens, whether legitimated or not. *See id.* at 224 (“Legitimation does not necessarily offer a remedy [for statelessness] for these children.”); *id.* at 220-21 (citing *Guyer v. Smith*, 22 Md. 239 (1864)). Accordingly, she observed that when such children were born in *jus sanguinis* countries in

¹⁵ Section 204 of the Proposed Code was codified as Section 205 of the 1940 Act.

¹⁶ Nationality law and the related subject of statelessness were primary subjects of consideration at the First Conference for the Codification of International Law at The Hague in 1930. *See* Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 Am. J. Int’l L. 447, 453 (1930).

¹⁷ Seckler-Hudson’s work was well known at the time of its publication and remained a prominently cited source on statelessness. *See, e.g.*, Ellery C. Stowell, Book Review, 30 Am. J. Int’l L. 170 (1936) (reviewing William O’Sullivan Molony, *Nationality and the Peace Treaties* (1934)); Maximilian Koessler, “Subject,” “Citizen,” “National,” and “Permanent Allegiance”, 56 Yale L.J. 58, 69 n.67 (1946); Comment, *The Expatriation Act of 1954*, 64 Yale L.J. 1164, 1196 n.161 (1955); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.15 (1963); *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958).

which they did not acquire nationality through the mother, they “had no effective citizenship.” *Id.* at 221. *Cf.* William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, 45 *Am. J. Int’l L.* 476, 479 (1951) (“[T]he unacknowledged child of an American father born of an alien woman abroad would be stateless, providing the woman’s state does not extend its nationality to the child.”).

In addition – and of particular significance in this case – Seckler-Hudson noted the risk of statelessness for nonmarital children born to American fathers who did not satisfy the parental residency requirement. *See* Seckler-Hudson, *supra*, 220, 225 (“[T]he illegitimate child of a foreign-born father, the father being an American citizen but never having resided in the United States, would not be an American citizen” and “unless the country of his birth gave him its nationality, he would be stateless”).¹⁸ The risks of statelessness for foreign-born nonmarital children of citizen fathers were thus well known when Congress was considering the question of how to regulate citizenship transmission to nonmarital foreign-born children.

Congress was presented with, but chose not to enact, a legislative proposal that would have remedied the various risks of statelessness confronting foreign-born children of American citizen mothers *and* fathers. In her treatise, Seckler-Hudson described a sex-neutral and marriage-neutral citizenship transmission bill that had been introduced in Congress. It was the very same bill, described *supra* at 1508, introduced in the early 1930s that provided that “[a]ny child, legitimate or illegitimate” born abroad of a citizen mother or father was to be an American citizen, subject to a simple (and gender-neutral) parental residency requirement. *See* Seckler-Hudson, *supra*, 222 (quoting H.R. 5489, 72d Cong. (1931)). Despite the fact that the leading authority on statelessness endorsed such legislation, in 1940 and again in 1952 Congress enacted legislation that perpetuated and even intensified the sex inequalities in our *jus sanguinis* citizenship statutes by shoring up substantial barriers to citizenship transmission between a citizen father and his nonmarital foreign-born child.

In sum, it is possible that Congress was concerned about statelessness when it exempted unwed mothers from the lengthy parental residency requirement that applied to unwed fathers. But if this was so, Congress acted on its concern in a sex-discriminatory manner. Congress opted to ignore the acknowledged risk of statelessness that confronted nonmarital foreign-born children of citizen

¹⁸ Seckler-Hudson did not specify whether she was referring to both legitimated and unlegitimated children in this passage, but her view that the United States did not regularly recognize the citizenship of nonmarital foreign-born children of citizen fathers regardless of legitimation suggests that the difference was not dispositive to her views. *See Seckler-Hudson, supra*, 224. In addition, given that the parental residency requirement in 1934 was of unspecified and minimal duration, *see supra* note 3, when Congress enacted the 1940 Act with a 10-year age-delimited parental residency requirement, the risk Seckler-Hudson observed would have increased significantly.

fathers. It also opted to ignore a proposed legislative solution that would have addressed any concern about statelessness in a more thorough, sex-neutral manner. Thus, to the extent that Congress's legislation in this area was prompted by a concern about statelessness, that concern was filtered through and premised on the same constellation of sex-based presumptions regarding how men and women behave as parents that has characterized the United States' approach to citizenship transmission since 1790.

Laws premised on historically rooted sex-based assumptions concerning how men and women behave as parents – and how they *should* behave – have no place in the regulation of citizenship transmission today. Although certainly many nonmarital children are raised exclusively or primarily by their mothers, others – like Petitioner – are raised in their father's household. Our current domestic laws reflect these developments and eschew the antiquated notion that the mother bears singular responsibility for the nonmarital child. *See supra* note 10. It is no longer acceptable for Congress to enact laws that enforce gender-differentiated family roles by limiting individuals' rights as parents through sex-based classifications. The historical record demonstrates, however, that Congress has done just that in its regulation of *jus sanguinis* citizenship. With respect to foreign-born nonmarital children, Congress continues to enforce sex-based stereotypes and, in so doing, prolongs the vitality of gender-traditional beliefs concerning men's and women's respective roles as parents, even as such beliefs have eroded in other areas of law and in our social practices.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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