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How to Explain to Your Twins Why Only One Can Be American: The Right to Citizenship of Children Born to Same-Sex Couples Through Assisted Reproductive Technology

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NOTES

HOW TO EXPLAIN TO YOUR TWINS WHY ONLY ONE CAN BE AMERICAN: THE RIGHT TO CITIZENSHIP OF CHILDREN BORN TO SAME-SEX COUPLES THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY

*Lena K. Bruce**

Sections 301 and 309 of the Immigration and Nationality Act (INA) govern birthright citizenship by descent. Per the U.S. Department of State's (DOS) interpretation of these sections, to transmit citizenship to a child, the U.S. citizen-parent must have a biological connection with the child. For couples who use assisted reproductive technology (ART) to have children, however, this means that one parent will always be barred from transmitting citizenship to their own child. This is because in ART families, at least one parent will always lack the biological connection that the DOS requires to transmit citizenship pursuant to the INA. This policy disproportionately affects same-sex couples since same-sex couples who choose not to adopt rely almost exclusively on ART to have children.

Further, even if the citizen-parent is able to establish a biological connection, the children of married same-sex couples are categorically considered born out of wedlock and therefore subjected to significantly harsher citizenship requirements.

The DOS's interpretation of the INA raises serious concerns about the protection of same-sex couples' constitutional rights. It also prompts policy questions about the importance of biology versus intent in determining parentage. This Note argues that the effects of the DOS's interpretation on same-sex couples can be counteracted through a dual approach. First, Congress must amend the INA to recognize intent-based parentage. Second, until Congress passes such an amendment, federal courts and state legislators must collaborate to protect the rights of same-sex parents.

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INTRODUCTION

Andrew and Elad met at a holiday party.¹ After two years of dating, they got married.² After five years of marriage, they decided it was time to grow their family.³ As a same-sex couple, they turned to assisted reproductive technology (ART) for help.⁴

ART is used to have children without relying on the reproductive organs of the parents.⁵ It includes all fertility treatments in which eggs or embryos are handled outside the body to induce pregnancy.⁶ The two most common ART procedures are artificial insemination and in vitro fertilization.⁷ In artificial insemination, sperm is introduced into the female reproductive system via injection, while during in vitro fertilization, eggs are surgically removed, combined with sperm in a laboratory, and returned to the woman's uterus.⁸ ART procedures also often require donated eggs or sperm and a gestational surrogate.⁹

ART is shattering traditional conceptions about what a family "should" look like.¹⁰ Through ART, a child can have up to five "parents": the sperm donor, the egg donor, the surrogate, and two nonbiologically related individuals who intend to raise the child.¹¹ Even the U.S. Supreme Court has recognized that, today, the "average American family" is difficult to define since the composition of each family can greatly vary.¹²

1. Complaint for Declaratory and Injunctive Relief at 11, *Dvash-Banks v. Pompeo*, No. 2:18-cv-00523, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal. Feb. 21, 2019) [hereinafter *Dvash-Banks Complaint*].

2. *Id.*

3. *Id.*

4. *Id.* at 2.

5. JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 1 (2d ed. 2013).

6. *Id.* at 7.

7. *Id.*

8. *Id.*

9. *Assisted Reproductive Technologies*, SOC'Y FOR ASSISTED REPROD. TECH., <https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies/> [https://perma.cc/7HG7-SBSP] (last visited Nov. 12, 2019). There are two types of surrogacy: traditional surrogates are themselves artificially inseminated, either by the intended father or an anonymous donor, and carry the baby to term. *Overview of the Surrogacy Process*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/overview-of-the-surrogacy-process> [https://perma.cc/VTM4-BF7H] (last visited Nov. 12, 2019). In comparison, gestational surrogates carry babies that were conceived by fertilizing the egg of the intended mother (or anonymous donor) with the sperm of the intended father (or anonymous donor) in a laboratory. *Id.*

10. See John Lawrence Hill, *What Does It Mean to Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991).

11. *Id.*

12. *Troxel v. Granville*, 530 U.S. 57, 63 (2000). While the U.S. Supreme Court was speaking in reference to the role of grandparents in single-parent households, the logic of *Troxel* equally applies in the context of ART.

The use of ART has doubled over the past decade.¹³ Same-sex couples, in particular, increasingly rely on ART to have children.¹⁴ Andrew and Elad Dvash-Banks are one of these couples.¹⁵ They used ART to source anonymous donor eggs and fertilize the eggs with their separate sperm.¹⁶ The resulting embryos were then implanted into a gestational surrogate¹⁷ and, finally, in September 2016, Andrew and Elad became proud parents to twin boys—Aiden and Ethan.¹⁸

After the birth of their children, the couple decided to move from Canada, where the twins were born, to California, to be near Andrew's family.¹⁹ In doing so, however, the Dvash-Banks family encountered a problem: Aiden entered the country with his American passport.²⁰ Ethan, his twin, had to apply for a tourist visa.²¹

The reason for the different treatment is “the nationality of the sperm” that was used to conceive each child.²² Andrew is an American citizen while Elad is Israeli.²³ When the couple sought recognition of their twins' U.S. citizenship, the U.S. consular official in Toronto asked them to submit a DNA test to prove that each child was biologically related to the American parent.²⁴ The result showed, however, that Aiden was conceived with Andrew's sperm and Ethan with that of Elad.²⁵ Since Ethan is not biologically related to the American parent, the Department of State (DOS), through the consulate, denied him citizenship.²⁶

In January 2018, Andrew filed a lawsuit in the Central District of California, on behalf of himself and Ethan, challenging this decision.²⁷ Among other requests, he asked to be recognized as Ethan's parent and, as a result, for Ethan to be declared a U.S. citizen.²⁸

The Dvash-Banks family's plight exemplifies the bewildering intersection of ART and citizenship law. “ART children” like Ethan and Aiden almost always lack a genetic or gestational relationship with at least one of their

13. *Assisted Reproductive Technology (ART)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/UN2V-RGTP>] (last updated Sept. 10, 2019).

14. Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 420 (2011).

15. *See* Dvash-Banks Complaint, *supra* note 1, at 2.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 5, 15.

20. *Id.* at 15.

21. *Id.*

22. *See id.* at 13; Titshaw, *supra* note 14, at 422.

23. Dvash-Banks Complaint, *supra* note 1, at 2.

24. *Id.* at 13.

25. *Id.* at 2.

26. *Id.* at 3.

27. *Id.* at 1, 5.

28. *Id.* at 24.

intended parents.²⁹ However, per its interpretation of the relevant provisions of the Immigration and Nationality Act (INA), the DOS does not recognize a parent-child relationship unless there is such a biological³⁰ connection.³¹

An immediate consequence of this biology-based policy is that the DOS does not recognize the birthright citizenship of many ART children, like Ethan.³² The interpretation makes citizenship transmission dramatically difficult not only by prohibiting “merely” an intended parent from transmitting citizenship but also by positing that a biological parent-child connection is only the threshold, not the rule, to transmit citizenship.³³ In other words, even if the parent establishes a biological relationship with the child, the parent only becomes *eligible* to transmit citizenship.³⁴ Whether citizenship is *actually* transmitted further depends on meeting certain criteria set out in the INA.³⁵

The INA provides two alternative routes for a parent to transmit citizenship. INA section 301 outlines the criteria for transmitting citizenship to children born in wedlock.³⁶ INA section 309 does the same for children born out of wedlock.³⁷ The criteria under section 309 are significantly harder to satisfy than those under section 301.³⁸ Yet, in deciding which children are born in wedlock, biology is once again determinative: per the DOS’s interpretation of the INA, a child is considered born in wedlock only if his or her biological parents are married; it is not enough for the intended parents to be married.³⁹

With one marginal exception applicable to certain lesbian parents, however, the biological parents of a same-sex couples’ ART child will never be married.⁴⁰ This means that the ART children of essentially all same-sex couples are categorically born out of wedlock, even if their intended parents are married.⁴¹ This is particularly alarming since same-sex couples who choose not to adopt rely exclusively on ART to have children.⁴²

29. AM. BAR ASS’N, RESOLUTION WITH REPORT NO. 113, at 1 (2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2017-hod-midyear-electronic-report-book.pdf [<https://perma.cc/X8AL-B596>] [hereinafter ABA RESOLUTION 113].

30. This Note uses the term “biological” to encompass both genetic and gestational relationships.

31. *See infra* Part I.B.2.

32. *See infra* Parts I.B.2, II.B.2.

33. *See infra* Part I.B.2.

34. *See infra* Part I.B.2.

35. *See infra* Parts I.A.1–2.

36. Immigration and Nationality Act (INA) § 301, 8 U.S.C. § 1401 (2012).

37. *Id.* § 1409.

38. *See* Ashley D. Craythorne, Note, *Same-Sex Equality in Immigration Law: The Case for Birthright Citizenship for Foreign-Born Children of U.S. Citizens in Same-Sex Binational Unions*, 97 TEX. L. REV. 645, 663 (2019). *Compare id.*, with INA § 1401.

39. *See infra* Part I.B.2.b.

40. *See infra* Part I.B.2.b.

41. *See infra* Part I.B.2.b.

42. *See* Michael J. Higdon, *Biological Citizenship and the Children of Same-Sex Marriage*, 87 GEO. WASH. L. REV. 124, 168 (2019). LGBTQ couples in which one partner is transgender may provide an exception to this statement if the transgender partner retains the

“Citizenship is man’s basic right for it is nothing less than the right to have rights.”⁴³ The DOS’s denial of this vital right based on a narrow reading of the INA raises serious concerns.⁴⁴ First and foremost, the DOS policy’s effect on same-sex couples prompts questions about the constitutionality of the practice⁴⁵ in light of the recent Supreme Court decisions *United States v. Windsor*,⁴⁶ *Obergefell v. Hodges*,⁴⁷ and *Pavan v. Smith*.⁴⁸ Further, the policy is controversial for its rigid emphasis on biology-based parentage, which appears antithetical to the congressionally established purpose of the INA to protect family unity.⁴⁹

To provide a tailored analysis of and potential solution to DOS’s interpretation of the INA, this Note focuses on (1) the birthright citizenship of (2) ART children (3) who are born abroad (4) to same-sex parents, (5) only one of whom is a U.S. citizen. Part I provides an overview of birthright citizenship with a specific focus on the right to citizenship of children born abroad, as governed by the INA. Part I also details the DOS’s interpretation of the INA and its effects on same-sex couples’ ability to transmit citizenship to their ART children. Part II discusses the assorted concerns raised by DOS’s biology-based interpretation, including questions concerning same-sex couples’ constitutional rights. Part III concludes by proposing a dual approach to counteract the effects of the DOS’s policy on same-sex parents. The dual approach consists of, first, congressional amendment of the INA and, second, collaboration between state legislatures and the federal judiciary.

I. BIRTHRIGHT CITIZENSHIP OF CHILDREN BORN ABROAD THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY

For many, citizenship is an ingredient of identity just as family, language, and ethnicity are.⁵⁰ For all, citizenship is a vessel that brings with it a set of

biological traits of the gender with which they do not identify, allowing for traditional procreation. *See, e.g.*, Jackie Molloy & Denise Grady, *A Family in Transition*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/health/transgender-baby.html> [<https://perma.cc/4K9L-HJNY>] (telling the story of two fathers, one of whom gave birth to their daughter).

43. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). In *Perez*, the Supreme Court held that it was within Congress’s power to strip an American citizen of citizenship if the citizen acted in certain ways. *Id.* at 62 (majority opinion). Justices Hugo Black and William O. Douglas, dissented, arguing that “[t]he power of Congress to withhold [citizenship], modify it, or cancel it does not exist.” *Id.* at 84 (Douglas, J., dissenting). Nine years later, the Court overruled its *Perez* decision in *Afroyim v. Rusk*, explicitly stating, “we agree with the . . . dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship.” 387 U.S. 253, 267 (1967). Through this ruling, the Court emphasized the unassailable value of citizenship. *See id.*

44. *See infra* Part II.

45. *See infra* Part II.A.

46. 133 S. Ct. 2675 (2013).

47. 135 S. Ct. 2584 (2015).

48. 137 S. Ct. 2075 (2017).

49. *See infra* Part II.B.1.

50. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1345 (6th ed. 2015).

incomparable rights.⁵¹ The decision to grant or deny citizenship can be life altering.⁵² The INA outlines, among many other things, the requirements for children born abroad to a U.S. citizen parent to obtain birthright citizenship.⁵³ The authority to interpret these provisions of the INA to make a decision about the “nationality of a person not in the United States” lies with the DOS.⁵⁴

Part I.A provides a limited overview of citizenship by discussing the two kinds of birthright citizenship as they are presented in the Constitution and the INA. Part I.B discusses the importance of the parent-child relationship to birthright citizenship as a segue into the DOS’s interpretation of the INA, which is central to this Note.

A. Birthright Citizenship Under the INA

There are “two sources of citizenship, and two only: birth and naturalization.”⁵⁵ Or, in other words, citizenship acquired at birth and citizenship acquired after birth.⁵⁶ Citizenship acquired at birth (or birthright citizenship), in turn, is based on one of two principles: *jus soli* (“right of the land”) or *jus sanguinis* (“right of the blood”).⁵⁷

Jus soli uses a person’s birthplace to determine citizenship—it “confers a nation’s citizenship on persons born within that nation’s territory.”⁵⁸ The United States has adopted the *jus soli* principle in the Citizenship Clause of the Fourteenth Amendment, according to which anyone can become a U.S. citizen solely by virtue of being born on U.S. soil.⁵⁹

In contrast, *jus sanguinis* (also known as “citizenship by descent”)⁶⁰ prescribes that the parents’ citizenship determines the child’s citizenship,

51. *Id.*

52. Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 VA. L. REV. 629, 631 (2014).

53. INA §§ 301, 309, 8 U.S.C. §§ 1401, 1409 (2012).

54. *Id.* § 1104(a); *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, U.S. DEP’T ST., <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html> [https://perma.cc/BRN4-6H82] (last visited Nov. 12, 2019).

55. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). “Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the Immigration and Nationality Act (INA).” *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization> [https://perma.cc/X8XD-FD7C] (last visited Nov. 12, 2019). The effects of naturalization on the citizenship of ART children is outside the scope of this Note.

56. LEGOMSKY & RODRÍGUEZ, *supra* note 50, at 1263.

57. *Id.*

58. *Id.*; see also Michael G. McFarland, Note, *Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations*, 63 N.Y.U. ANN. SURV. AM. L. 467, 471 (2008) (stating that “any child born within the borders of a state becomes a citizen of that state”).

59. U.S. CONST. amend. XIV, § 1 (declaring that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”).

60. LEGOMSKY & RODRÍGUEZ, *supra* note 50, at 1263.

regardless of where the child is born.⁶¹ As such, *jus sanguinis* governs the citizenship of children born outside the United States to one or more U.S. citizens.⁶² Unlike *jus soli*, *jus sanguinis* is not protected by the Constitution⁶³ but is instead under the purview of the INA.⁶⁴ Since it is based on statute, it is subject to “congressional design.”⁶⁵

INA section 301 governs the citizenship by descent of children born in wedlock,⁶⁶ while INA section 309 governs the citizenship of children born out of wedlock.⁶⁷ The distinction between “in” and “out” of wedlock is critical because it dramatically affects the ease with which the parent-child relationship is legally formed; the INA makes it easier for children born in wedlock to acquire citizenship compared to children born out of wedlock.⁶⁸

As a result of the different criteria mandated by sections 301 and 309, it is possible for a child to acquire *jus sanguinis* citizenship under one section while being denied it under the other.⁶⁹ As such, determining whether a child is born in or out of wedlock is dispositive of whether or not a child can obtain birthright citizenship.⁷⁰ This is particularly important to the ART children of same-sex spouses, like Aiden and Ethan, almost *all* of whom are considered born out of wedlock and therefore subject to INA section 309’s harsher requirements.⁷¹

This Note focuses on *jus sanguinis* to isolate the role parents play in the acquisition of citizenship and, by extension, to analyze the differing

61. *Id.*; McFarland, *supra* note 58, at 471 (explaining that *jus sanguinis* “passes parental citizenship automatically to children”).

62. *See* McFarland, *supra* note 58, at 468.

63. *Id.* at 484–85.

64. *See* INA §§ 301, 309, 8 U.S.C. §§ 1401, 1409 (2012).

65. McFarland, *supra* note 58, at 485; *see* *Miller v. Albright*, 523 U.S. 420, 424 (1998) (holding that “[p]ersons not born in the United States acquire citizenship by birth only as provided by Acts of Congress”); *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898) (finding that the Fourteenth Amendment “has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress”).

66. 8 U.S.C. § 1401. Initially, section 301 appears to generally govern “[n]ationals and citizens of the United States at birth.” *Id.* Even though the statutory language does not explicitly say so, section 301 is interpreted to regulate only children born in wedlock. Scott Titshaw, *Sorry Ma’am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 78 (2010). If section 301’s scope were not limited in this way, it would also control birth out of wedlock and thereby render section 309 redundant. *See id.*

67. 8 U.S.C. § 1409.

68. *See* Craythorne, *supra* note 38, at 663. *Compare* 8 U.S.C. § 1401, *with* 8 U.S.C. § 1409.

69. *See*, for example, the case of the Dvash-Banks family where Ethan was denied citizenship when the DOS applied section 309 but was granted citizenship when the District Court for the Central District of California applied, upon review, section 301. *Compare* Dvash-Banks Complaint, *supra* note 1, at 3 (denying citizenship under section 309), *with* *Dvash-Banks v. Pompeo*, No. 2:18-cv-00523, 2019 U.S. Dist. LEXIS 30525, at *18, *23 (C.D. Cal. Feb. 21, 2019) (granting citizenship under section 301), *appeal docketed*, No. 19-55517 (9th Cir. May 6, 2019).

70. *See supra* note 69 and accompanying text.

71. *See* Titshaw, *supra* note 66, at 105; Craythorne, *supra* note 38, at 650.

treatment faced specifically by same-sex parents in attempting to transmit citizenship to their ART children.

1. Citizenship of Children Born in Wedlock Pursuant to INA Section 301

INA section 301 provides varying sets of requirements for deriving citizenship from a parent based on three distinct groups of foreign-born children: those born to (1) two U.S. citizens,⁷² (2) one U.S. citizen and one noncitizen U.S. national,⁷³ and (3) one U.S. citizen and one alien.⁷⁴ The third permutation is governed by INA section 301(g) and is the focus of this Note.

The heaviest requirements fall on the third group of parents. Under this category, to convey citizenship, the citizen-parent must have been “physically present in the United States or its outlying possessions” for at least five years, “at least two of which were after attaining the age of fourteen years.”⁷⁵ In comparison, under the second group, it is sufficient for the citizen-parent to have resided in the United States for only one year prior to the child’s birth.⁷⁶ Even further, the only requirement under the first group is for the citizen-parent to have “had a residence” in the United States or one of its outlying possessions prior to the birth of the child.⁷⁷

2. Citizenship of Children Born out of Wedlock Pursuant to INA Section 309

Similar to section 301, section 309 sets out varying sets of requirements, but it does so based on the sex of the citizen-parent.⁷⁸ If the child is born out of wedlock to a citizen-father, section 309(a) requires four criteria to be met.⁷⁹ If these criteria are met, section 309(a) redirects to section 301, whose relevant provision (in this case section 301(g), which sets out the physical presence requirements) must *also* be satisfied.⁸⁰ The four criteria are: (1) a blood relationship between the child and the father must be established by clear and convincing evidence; (2) the father must be a national of the United

72. 8 U.S.C. § 1401(c).

73. *Id.* § 1401(d). A noncitizen national is “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” *Id.* § 1101(a)(22)(B).

74. *Id.* § 1401(g). “[A]lien means any person not a citizen or national of the United States.” *Id.* § 1101(a)(3).

75. *Id.* § 1401(g).

76. *Id.* § 1401(d).

77. *Id.* § 1401(c).

78. *See id.* § 1409. An analysis of this sex-based distinction is beyond the scope of this Note. However, for a reckoning of “the gendered construction of the parent-child relationship in American nationality law,” see Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2233 (2014). See also *Sessions v. Morales-Santana*, in which Justice Ginsburg comments that “[s]ections 1401 and 1409 . . . date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are” and accordingly rules that “[t]he gender-based distinction infecting [the relevant sections] . . . violates the equal protection principle.” 137 S. Ct. 1678, 1689, 1700–01 (2017).

79. *See* 8 U.S.C. § 1409(a).

80. *See id.*

States at the time of the child's birth; (3) the father (unless deceased) must agree, in writing, to provide financial support for the child until the age of eighteen; and (4) before the child turns eighteen, the child must be legitimated under the law of the child's residence or domicile, the father must acknowledge paternity of the child in writing under oath, or the paternity of the child must be established by the adjudication of a competent court.⁸¹

In contrast, if a child is born out of wedlock to a citizen-mother, section 309 is silent regarding any additional requirements that need to be met.⁸² Instead, under section 309(c), a child born out of wedlock outside the United States will acquire citizenship from the mother as long as the mother was a U.S. national at the time of birth and had previously resided in the United States for a certain amount of time.⁸³ The physical presence requirement is specified as one year under section 309(c).⁸⁴ However, pursuant to the recent Supreme Court decision in *Sessions v. Morales-Santana*,⁸⁵ the provision, as written, applies only to children born before June 12, 2017 (the date of the decision).⁸⁶ To transmit citizenship to children born abroad out of wedlock on or after that date, the citizen-mother must have resided in the United States for *five* years.⁸⁷

B. The DOS's Interpretation of the INA

Despite painstakingly outlining the rules on *how* to transmit citizenship from parent to child, the INA is unclear on what actually constitutes a parent-child relationship.⁸⁸ As such, the question of *who* can transmit U.S. citizenship to a child remains open to the DOS's interpretation.⁸⁹ The DOS's biology-based interpretation of parentage, however, disproportionately affects the recognition of parent-child relationships between same-sex couples and their ART children.⁹⁰

1. The Ambiguity of the Parent-Child Relationship Under the INA

Defining a parent-child relationship is crucial for two reasons. First, whether, under *jus sanguinis*, a foreign-born child is eligible to acquire U.S. citizenship hinges on the existence of a parent-child relationship.⁹¹ Second, identifying who constitutes the parents of the child is necessary to determine

81. *Id.*

82. *See id.* § 1409(c).

83. *Id.*

84. *Id.*

85. 137 S. Ct. 1678 (2017).

86. *See id.* at 1701.

87. *Id.*

88. *See* 8 U.S.C. § 1101(c); *see also* Titshaw, *supra* note 14, at 418–19.

89. *See supra* note 54 and accompanying text.

90. Titshaw, *supra* note 66, at 56.

91. *See* Titshaw, *supra* note 14, at 415.

whether these parents are married and, in turn, whether the child was born in or out of wedlock.⁹²

The INA does not define what constitutes a parent-child relationship for purposes of INA subchapter III, which governs citizenship and nationality.⁹³ The labyrinthine manner in which the Act defines and uses other relevant terms does not clarify the matter: for instance, while the INA defines “parent” and “child,” erratic definitions of the terms apply to different sections of the Act.⁹⁴ The definition of “child” as it applies to subchapter III is limited because it merely gives an example of who is “included” within the definition.⁹⁵ The definition of “parent” as it applies to subchapter III is “even less helpful”⁹⁶ since it only concerns the posthumous child of a deceased parent.⁹⁷ Further, some provisions that depend most on establishing a parent-child relationship, including sections 301(g) and 309(a), do not refer to a “child” at all.⁹⁸

Lacking guidance from the INA on how to identify a parent-child relationship, courts are having difficulty determining who should be considered the parents of a child and whether the parents are married.⁹⁹ This problem is becoming even more prominent in the age of ART, since ART has disproven the traditional assumption that children are born only when two opposite-sex parents unite “genetics, gestation, and intended parenthood.”¹⁰⁰

2. The DOS’s Interpretation of the INA’s Ambiguity

The ambiguity of the INA in defining “parent-child relationship” opens the door for statutory interpretation. As the authority that enforces the INA’s provisions on citizenship transmission for foreign-born children, the DOS has the prerogative to interpret the Act.¹⁰¹ The DOS, in turn, interprets the INA’s citizenship transmission provisions in two important ways, both of which particularly affect same-sex couples.

92. See 8 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 304.1-2 (2019), <https://fam.state.gov/Fam/FAM.aspx?ID=08FAM> [<https://perma.cc/SA8D-XSJM>] [hereinafter FOREIGN AFFAIRS MANUAL]. Not to mention numerous other reasons the parent-child relationship is crucial for issues besides citizenship, including: inheritance, social security benefits, health insurance, and custody. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346 (2002).

93. See 8 U.S.C. § 1101(c); Titshaw, *supra* note 14, at 418–19.

94. Section 101(b)(1)–(b)(2) defines “child” and “parent” for purposes of subchapters I and II, while section 101(c)(1)–(c)(2) provides more meager definitions of “child” and “parent” for purposes of subchapter III. 8 U.S.C. § 1101(b)(1)–(2), (c)(1)–(2).

95. See *id.* § 1101(c); see also Titshaw, *supra* note 14, at 418.

96. Titshaw, *supra* note 14, at 418–19.

97. 8 U.S.C. § 1101(c)(2).

98. See *id.* §§ 1401(g), 1409(a); see also Titshaw, *supra* note 66, at 76.

99. See Titshaw, *supra* note 66, at 69–70.

100. *Id.* at 63.

101. See *supra* note 54 and accompanying text.

a. *DOS's Understanding of Parentage*

The *Foreign Affairs Manual* (the “*Manual*”) codifies the DOS’s policies and elaborates on DOS’s position that the existence of a parent-child relationship is contingent upon the existence of a “blood” (i.e., biological) relationship.¹⁰² The *Manual* states that

[t]he laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child’s own claim is based, U.S. citizenship is not acquired.¹⁰³

According to the DOS, this is true not only under section 309, which explicitly requires a blood relationship,¹⁰⁴ but *also* under section 301, which is silent on the issue.¹⁰⁵

In other words, for a parent-child relationship to exist, which is the prerequisite for transmitting citizenship, the DOS requires “an actual biological relationship to a U.S. citizen parent.”¹⁰⁶ So, an individual who *intends* to become the parent of a child but does not share a biological connection with the child does not qualify as a parent under the DOS’s interpretation of the INA and cannot transmit citizenship.¹⁰⁷

This biology-based interpretation particularly implicates same-sex couples.¹⁰⁸ Same-sex couples who choose not to adopt rely on gamete donations and ART to have children.¹⁰⁹ This means that, in same-sex relationships, at least one intended parent will always lack a biological connection with the child and, as a result, never be legally recognized as the parent of the child under the INA.¹¹⁰ If the unrecognized “parent” is the only one with U.S. citizenship (like Andrew is), the child will be denied U.S. citizenship for lack of an American parent (like Ethan was).

There is only one narrow exception to this outcome. In 2014, the DOS implemented a minor modification to its policy and now defines the biological mother as *either* the genetic mother *or* the gestational mother.¹¹¹ In other words, a child has a biological connection and therefore can establish

102. FOREIGN AFFAIRS MANUAL, *supra* note 92, § 301.4-1(D).

103. *Id.* § 301.4-1(D)(1)(a).

104. INA § 309, 8 U.S.C. § 1409 (2012); FOREIGN AFFAIRS MANUAL, *supra* note 92, § 301.4-1(D)(1)(b)(1).

105. *See* 8 U.S.C. § 1401; FOREIGN AFFAIRS MANUAL, *supra* note 92, § 301.4-1(D)(1)(d).

106. FOREIGN AFFAIRS MANUAL, *supra* note 92, § 301.4-1(D)(1)(d).

107. *See id.*

108. Higdon, *supra* note 42, at 168–69; Titshaw, *supra* note 66, at 56.

109. *See* Higdon, *supra* note 42, at 168. *See also supra* note 42 for an exception to this statement regarding transgender parents.

110. Higdon, *supra* note 42, at 159.

111. FOREIGN AFFAIRS MANUAL, *supra* note 92, § 301.4-1(D)(1)(c) (stating, “[a] woman may have a biological relationship with her child through either a genetic parental relationship or a gestational relationship”); *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 50, at 1274.

a parent-child relationship with both the woman whose eggs were used in conception *and* the woman who carried and delivered the baby.¹¹² As such, if a child is conceived using the eggs of one mother but is carried by the other mother, both intended parents will be recognized as parents under the INA.¹¹³ However, even this exception provides limited solace to same-sex couples, as the discussion of the *Blixt v. United States Department of State*¹¹⁴ case in Part I.B.2.b suggests.

b. DOS's Understanding of Wedlock

The DOS also holds that for a child to be born in wedlock, and therefore be subject to INA section 301's more lenient citizenship requirements, the child's biological parents must be married.¹¹⁵ The *Manual* states, "[t]he term 'birth in wedlock' has been consistently interpreted to mean birth during the marriage of the biological parents to each other."¹¹⁶ Under this interpretation, a child conceived using donated sperm or eggs will always be born out of wedlock, even if the child's intended parents are married.¹¹⁷

This biology-based interpretation has, again, a disproportionate effect¹¹⁸ on same-sex couples where at least one intended parent always lacks a biological relationship with the child.¹¹⁹ It follows that, although the intended parents of an ART child may be married, the biological parents will never be. As a result, the true consequence of the DOS's interpretation is that *all* ART children of same-sex couples are categorically born out of wedlock and subject to the stricter citizenship requirements under section 309.¹²⁰

The narrow 2014 DOS modification that allows both intended lesbian parents to be considered biological parents is the only exception to this rule.¹²¹ Under the exception, the child of a married lesbian couple is considered born in wedlock *as long as* the baby is conceived from the egg of one mother and carried by the second mother since, in that case, both mothers are considered the biological parents of the child.¹²²

112. See FOREIGN AFFAIRS MANUAL, *supra* note 92 § 301.4-1(D)(1)(c).

113. See *id.* § 304.3-1(b); see also Sarah Mervosh, *Gay U.S. Couple Sues State Dept. for Denying Their Baby Citizenship*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/state-department-assisted-reproductive-citizenship.html> [https://perma.cc/SMJ5-DC9X] (providing a summary of the DOS's policy, including the 2014 exception).

114. No. 1:18-cv-00124 (D.D.C. filed Jan. 22, 2018).

115. FOREIGN AFFAIRS MANUAL, *supra* note 92 § 304.1-2(c).

116. *Id.* § 304.1-2(a).

117. See Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. U. L. REV. 335, 337 (2014).

118. Higdon, *supra* note 42, at 168–69; Titshaw, *supra* note 66, at 56.

119. Higdon, *supra* note 42, at 159.

120. See Titshaw, *supra* note 66, at 105; Craythorne, *supra* note 38, at 650.

121. See *supra* text accompanying notes 111–13.

122. FOREIGN AFFAIRS MANUAL, *supra* note 92, § 304.3-1(b) (stating that “[a] child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens”).

However, as mentioned previously, this exception protects only a very small margin of same-sex couples, and not even all lesbian couples as evidenced by a case that is currently pending before the District Court for the District of Columbia.¹²³ Allison Blixt, a U.S. citizen, filed the case.¹²⁴ Allison's wife, Stefania Zaccari, is an Italian citizen.¹²⁵ The couple has two sons, Lucas and Massimiliano ("Massi"), both of whom were born during Allison's marriage to Stefania.¹²⁶ Allison and Stefania each carried a child who was conceived using their own eggs and sperm from an unknown donor.¹²⁷ Allison conceived and carried Massi while Stefania conceived and carried Lucas.¹²⁸ Both gave birth in England.¹²⁹

Through the U.S. embassy in London, the DOS found that both children were born out of wedlock and applied the stricter provisions of INA section 309.¹³⁰ The DOS found that, even under its modified interpretation, the biological parents of the children were not married since, in both pregnancies, each woman used her own eggs to conceive the child *and* carried the child.¹³¹ This means that each child has only one biological mother.¹³² The children could have been born in wedlock only if, for example, Allison carried a child that was conceived using Stefania's eggs instead of her own.¹³³

The situation of the Zaccari-Blixt family demonstrates that, while the modified the DOS interpretation may be a step in the right direction, it is markedly far from eliminating the prejudicial treatment same-sex ART families are subjected to under the DOS's interpretation of the INA.

II. CITIZEN UNLESS BORN TO SAME-SEX PARENTS: PROBLEMS WITH THE DOS'S INTERPRETATION OF THE INA

Because it disproportionately affects same-sex couples' right to transmit citizenship to their ART children, the DOS's biology-based interpretation of parentage raises serious concerns about the constitutionally protected rights of same-sex couples, as recognized in recent Supreme Court decisions. It also prompts questions about the soundness of relying strictly on biology instead of intent in determining parentage, which appears to contradict the purpose of the INA itself.

123. *See generally* Complaint, Blixt v. U.S. Dep't of State, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018) [hereinafter Zaccari-Blixt Complaint].

124. *Id.* at 4.

125. *Id.* at 11.

126. *Id.* at 12–13.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 14–15.

131. *See id.* at 15.

132. *See id.*

133. *See supra* text accompanying note 122.

A. The DOS's Interpretation and the Constitutional Rights of Same-Sex Couples

Although it may appear that the DOS's interpretation of the INA jeopardizes only the right of ART children to citizenship, this is incorrect.¹³⁴ The DOS's interpretation also calls into question the right to *transmit* citizenship, which belongs to the parents of ART children.¹³⁵ Accordingly, same-sex parents' constitutional rights are implicated.

In a series of cases that culminated in the legalization of same-sex marriage, the Supreme Court expanded LGBTQ rights over the span of two decades.¹³⁶ In *United States v. Windsor*,¹³⁷ the Court struck down section 3 of the Defense of Marriage Act¹³⁸ (DOMA), which, for federal purposes, restricted marriage to "a legal union between one man and one woman."¹³⁹ The petitioners, Edith Windsor and Thea Spyer, were a same-sex couple whose marriage was recognized in New York, where they resided.¹⁴⁰ When Spyer died, she left her entire estate to Windsor, who then attempted to claim the federal estate tax exemption for surviving spouses.¹⁴¹ Section 3 of DOMA barred Windsor from benefitting from this exemption and she was instead subjected to \$363,053 in estate taxes.¹⁴² The Court struck down section 3 as unconstitutional under the Due Process Clause of the Fifth Amendment.¹⁴³

Two years later, in *Obergefell v. Hodges*,¹⁴⁴ the Court expanded *Windsor* by striking down state bans on same-sex marriage.¹⁴⁵ In *Obergefell*, the petitioners consisted of fourteen same-sex couples and two men whose same-sex partners were deceased.¹⁴⁶ Together, they claimed that the laws of Kentucky, Michigan, Ohio, and Tennessee violated the Fourteenth Amendment by restricting marriage to a union between one man and one woman.¹⁴⁷ They argued that these laws denied them the right to marry or

134. See Abrams & Piacenti, *supra* note 52, at 706.

135. *Id.*

136. Prior to these cases, the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that laws criminalizing sodomy were constitutional, in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), which recognized that it is not the job of the state to "define the meaning of the relationship or to set its boundaries." In *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that an amendment to the Colorado state constitution preventing protected status based on homosexuality or bisexuality violated the Equal Protection Clause of the Fourteenth Amendment.

137. 133 S. Ct. 2675 (2013).

138. See *id.* at 2695.

139. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

140. *Windsor*, 133 S. Ct. at 2683.

141. *Id.*

142. *Id.*

143. *Id.* at 2695.

144. 135 S. Ct. 2584 (2015).

145. *Id.* at 2607 (concluding that "[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex").

146. *Id.* at 2593.

147. *Id.*

have their marriages, which were lawfully performed in another state, be fully recognized in their respective states.¹⁴⁸ Ultimately, the Court found that, under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, same-sex couples cannot be denied their fundamental right to marry.¹⁴⁹

In 2017, *Pavan v. Smith*¹⁵⁰ became the first Supreme Court case to address issues that arose regarding the application and scope of *Obergefell*. The petitioners were two married same-sex couples who conceived children through anonymous sperm donation.¹⁵¹ They sued when the Arkansas Department of Health refused to include the name of each birth mother's wife on the child's birth certificate.¹⁵² The petitioners challenged the constitutionality of an Arkansas statute that required the name of the mother's husband to appear on the birth certificate regardless of his biological relationship to the child but permitted the omission of the mother's wife's name.¹⁵³ The Arkansas Supreme Court found that the statute "does not run afoul of *Obergefell*" since it "centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife."¹⁵⁴ In a per curiam opinion, the Supreme Court reversed, finding that the differential treatment violates *Obergefell*'s goal of providing same-sex couples "the constellation of benefits that the States have linked to marriage."¹⁵⁵

Pavan is important for clarifying that the right of same-sex couples to marry includes protection from differential treatment in terms of the benefits associated with marriage. At the same time, *Pavan* also demonstrates that the seemingly straightforward application of the universal right to marry is nevertheless open to a certain degree of interpretation.¹⁵⁶ This adds a dose of unpredictability to the manner in which *Windsor* and *Obergefell* apply to the treatment of same-sex ART parents in the context of citizenship law. Ultimately, however, there is little doubt that the DOS's interpretation raises serious constitutional questions since, by virtue of categorically considering ART children of married same-sex couples as born out of wedlock, it fails to give full recognition to same-sex marriages.¹⁵⁷

148. *Id.*

149. *Id.* at 2604–05.

150. 137 S. Ct. 2075 (2017).

151. *Id.* at 2077.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

156. See G. M. Filisko, *After Obergefell: The Supreme Court Ruling Settled the Issue of Marriage Equality—While Unsettling Other Legal Matters*, A.B.A. J., June 2016, at 56, 58 (sharing a discussion with Douglas NeJaime where NeJaime points out "a lot of states were going to, of course, allow same-sex couples to get married, but that there would be issues that would follow from that about what their marriage would mean for other laws").

157. Importantly, opposite-sex couples may also use ART to conceive children and confront similar problems. However, that does not change the constitutionally suspect effect that the DOS's interpretation has on essentially all same-sex couples, which is the focus of this Note.

Pavan supports the constitutionally suspect nature of the DOS's interpretation. In *Pavan*, the Court found that birth certificates "give married parents a form of legal recognition that is not available to unmarried parents" and that, accordingly, Arkansas may not "deny married same-sex couples that recognition."¹⁵⁸ Ability to transmit citizenship under section 301 is a similar "form of legal recognition that is not available to unmarried parents" and the DOS may similarly not "deny married same-sex couples that recognition."¹⁵⁹

Further, the DOS's interpretation also disregards the reasoning of the Court in both *Windsor* and *Obergefell*. In both cases, the Court gave great weight to the harm that children would suffer if the marriage of their same-sex parents was either not allowed or not recognized. In *Windsor*, the Court found that when same-sex marriage is recognized at the state level but denied at the federal level, it becomes a "second-tier" marriage that "humiliates tens of thousands of children now being raised by same-sex couples."¹⁶⁰ Similarly, in *Obergefell*, the Court partly justified its decision by emphasizing how, "[w]ithout the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser."¹⁶¹ Notably, two petitioners in *Obergefell*, April DeBoer and Jayne Rowse, brought their initial suit because, under Michigan adoption laws, only one could be recognized as the legal parent of their children.¹⁶² The Court acknowledged that not recognizing DeBoer's and Rowse's equal claim to parenthood denied "them the certainty and stability all mothers desire to protect their children."¹⁶³

The Court's reasoning in both cases is applicable to the predicament of same-sex parents of ART children. The similarity of DeBoer and Rowse's complaint to that of the Dvash-Bankses or Zaccari-Blixts is especially relevant. By considering the ART children of essentially all same-sex parents as born out of wedlock and thereby denying them a more lenient path to citizenship,¹⁶⁴ the DOS's interpretation undermines the importance the Court places on protecting children.

158. *Pavan*, 137 S. Ct. at 2078–79.

159. *Id.*; see also Dvash-Banks Complaint, *supra* note 1, at 9 (similarly arguing that the "constellation of benefits . . . linked to marriage" includes "legal recognition that same-sex spouses may *both* be the parents of a child born during their marriage, even if only one spouse is the child's biological parent" (emphasis added)). The DOS is likely to hold that, since it modified its policy in 2014 to include gestational mothers in its definition of biological parents, same-sex parents can benefit from section 301. However, as Part I.B.2.b discussed, this is a very narrow exception that only benefits a small fraction of lesbian parents—making the modification superficial. In effect, the DOS's interpretation still causes categorically differential treatment of same-sex parents.

160. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (finding that not giving full recognition to same-sex marriages makes it "more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives").

161. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

162. *Id.* at 2595.

163. *Id.* at 2606.

164. See *supra* Part I.B.2.b.

“The government should be concerned not only about making sure that its citizens are allowed to live full family lives, but that its citizens are not deprived of lawful status and that they can exercise that citizenship effectively.”¹⁶⁵ By denying married same-sex parents of ART children the right to transmit citizenship, the DOS deprives them of both a full family life and the ability to exercise their citizenship effectively.¹⁶⁶ It also violates their constitutional rights recognized in the holdings and reasoning of both *Windsor* and *Obergefell*.

B. The DOS’s Interpretation and Intent-Based Parentage

The underlying problem of the DOS’s interpretation is that it is based purely on biology and places no weight on intention.¹⁶⁷ While the DOS may have narrowly expanded its definition of “biological” to include gestational mothers, the Zaccari-Blixt case illustrates that this expansion is a feeble attempt to cover a deeper problem.¹⁶⁸ That the DOS now considers both gestation and “the nationality of the sperm and egg” in determining parentage does not change the reality that it still does not consider the intention of a person to become a parent.¹⁶⁹

1. Incompatibility of Biology-Based Parentage with the INA’s Purpose

“Family reunification has been the centerpiece of our legal immigration system for decades, and it should remain so.”¹⁷⁰ Doris Meissner, former commissioner of the Immigration and Naturalization Service (INS),¹⁷¹ made this statement before Congress in 1995.¹⁷² Family unity has rightfully been recognized as a staple of the U.S. immigration system because “[f]amilies are the backbone of our country and their unity promotes the stability, health, and productivity of family members contributing to the economic and social welfare of the United States.”¹⁷³ Without this emphasis on unity, families would be “fractured along citizenship lines,” thereby dismantling the very

165. Abrams & Piacenti, *supra* note 52, at 707.

166. *See id.*

167. *See supra* Part I.B.2.

168. *See supra* text accompanying notes 122–32.

169. Titshaw, *supra* note 14, at 422.

170. *Reform of Legal Immigration: Hearing Before the Subcomm. on Immigration of the Comm. on the Judiciary*, 104th Cong. 13 (1995) [hereinafter *Reform Hearings*] (statement of Doris Meissner, Commissioner, Immigration and Naturalization Service) (testifying that “the reunification of U.S. citizens with their spouses and minor children [should remain] as the Nation’s top priority for legal immigration”).

171. In 2003, “[t]he INS was abolished and its functions placed under three agencies—U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP)—within the newly created Department of Homeland Security.” *Organizational Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/history-and-genealogy/our-history/organizational-timeline> [https://perma.cc/53JL-Q682] (last visited Nov. 12, 2019).

172. *See Reform Hearings, supra* note 170, at 13.

173. *Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the Comm. on the Judiciary*, 107th Cong. 55 (2001) (statement of Karen K. Narasaki, President and Executive Director, National Asian Pacific American Legal Consortium).

core of American society.¹⁷⁴ Family unification has been the focus of not only congressional testimony but also of U.S. attorneys general,¹⁷⁵ federal courts,¹⁷⁶ and the Board of Immigration Appeals.¹⁷⁷

In enacting the INA, Congress prioritized family unity. Congress designed the INA to make it easier, not harder, for families to stay together.¹⁷⁸ This is evidenced in a House report commenting on the bill that later became the original INA.¹⁷⁹ In the report, the House Judiciary Committee found that the proposed legislation “implements the underlying intention of our immigration laws regarding the preservation of the family unit.”¹⁸⁰

When Congress amended the INA for the first time in 1957, the House Judiciary Committee produced a new report, reaffirming that the INA’s language makes Congress’s intention to “preserve the family unit upon immigration to the United States” clear.¹⁸¹ The 1957 House report also echoed the language of a Senate Judiciary Committee report from 1952 in finding that Congress “intended to provide for a liberal treatment of children.”¹⁸²

The 1957 House report further emphasized that, given “the clearly expressed legislative intention to keep together the family unit wherever possible,” it is “a desirable result . . . to adopt a liberal construction. No harm could possibly result from such a construction, and the consequences would fulfill the humane considerations involved in keeping intact the family unit.”¹⁸³ The current DOS interpretation is incompatible with Congress’s clear legislative intent in enacting the INA.

2. Arbitrariness of Biology-Based Parentage in Citizenship Transmission

Massi Zaccari-Blixt was ultimately granted citizenship following an arduous process.¹⁸⁴ To transmit citizenship to her son, Allison had to first

174. See Dvash-Banks Complaint, *supra* note 1, at 8.

175. See, e.g., *In re K-W-S-*, 9 I. & N. Dec. 396, 407 (Att’y Gen. 1961) (Robert F. Kennedy stated, “our only concern is that a *bona fide* family unit, recognized as such under the immigration laws, shall not be separated by strained and artificial reasoning.”).

176. See, e.g., *Bastidas v. INS*, 609 F.2d 101, 105 (3d Cir. 1979) (finding “the separation of family members from one another . . . [to be] a serious matter requiring close and careful scrutiny”); *Nation v. Esperdy*, 239 F. Supp. 531, 539 (S.D.N.Y. 1965) (defining “stepchild” liberally based, in part, on the “expressed congressional policy of keeping family units together”).

177. The Board of Immigration Appeals “is the highest administrative body for interpreting and applying immigration laws.” *Board of Immigration Appeals*, DEP’T JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/Z7DZ-LW3V>] (last updated Oct. 15, 2018); see, e.g., *In re G-*, 8 I. & N. Dec. 355, 359 (B.I.A. 1959) (finding that it is “apparent from the legislative history that Congress had in mind the *family unit*”).

178. H.R. REP. NO. 85-1199, at 2026 (1957) (stating that “it has been the policy of the Congress to approve legislation designed to facilitate the reunification of families”).

179. H.R. REP. NO. 82-1365 (1952).

180. *Id.* at 1680.

181. H.R. REP. NO. 85-1199, at 2021.

182. *Id.* at 2020.

183. *Id.* at 2021.

184. See Zaccari-Blixt Complaint, *supra* note 123, at 2.

establish herself as Massi's parent by satisfying the DOS's requirement for a biological relationship between parent and child.¹⁸⁵ She then had to meet the requisite criteria to transmit citizenship to children born out of wedlock under section 309, which the DOS chose to apply because, even though Allison was married to Stefania at the time of Massi's birth, Stefania was not Massi's biological parent.¹⁸⁶ Lucas Zaccari-Blixt, however, was immediately denied birthright citizenship because Allison did not have a biological relationship with her firstborn son.¹⁸⁷

These nonsensical effects of the DOS's policy are perhaps even more evident in the two newest lawsuits to join those of the Dvash-Banks and Zaccari-Blixt families. First is the case of the Mize-Gregg family, where the daughter of James Derek Mize and Jonathan Gregg, Simone, was denied citizenship even though *both* parents are American citizens.¹⁸⁸ Second is the case of the Kiviti family, where the daughter of Roe and Adiel Kiviti, Kessem, was also denied citizenship even though, again, *both* parents are American citizens.¹⁸⁹

Both Simone and Kessem were conceived using an anonymous donor egg and one father's sperm, and both were born via a gestational surrogate abroad.¹⁹⁰ Both sets of parents were married at the time of birth.¹⁹¹ Yet, in determining their citizenship status, DOS officials held that both Simone and Kessem were born out of wedlock and accordingly applied the harsher requirements of section 309.¹⁹² In both cases, the intended father who does not share a biological relationship with his respective child was deemed unable to transmit citizenship under section 309.¹⁹³ So, the focus was shifted to the fathers who could prove a biological connection—Simone's dad, Jonathan, and Kessem's dad, Adiel.¹⁹⁴

Jonathan and Adiel satisfied the criteria under section 309.¹⁹⁵ However, this only redirected the officials to section 301 to confirm that they also met the physical presence requirements.¹⁹⁶ For unclear reasons, however, the officials applied section 301(g) in both cases, which controls when one parent

185. *Id.* at 13–14.

186. *See id.* at 14–15.

187. *Id.* at 3.

188. Complaint for Declaratory & Injunctive Relief at 5, 20, *Mize v. Pompeo*, No. 1:19-cv-3331-MLB (N.D. Ga. July 29, 2019) [hereinafter *Mize-Gregg Complaint*].

189. Complaint for Declaratory & Injunctive Relief at 4, 13, *Kiviti v. Pompeo*, Civil Action No. 19-2665 (D. Md. Sept. 12, 2019) [hereinafter *Kiviti Complaint*].

190. *Id.* at 11–12; *Mize-Gregg Complaint*, *supra* note 188, at 16.

191. *Kiviti Complaint*, *supra* note 189, at 11; *Mize-Gregg Complaint*, *supra* note 188, at 15.

192. *Kiviti Complaint*, *supra* note 189, at 13; *Mize-Gregg Complaint*, *supra* note 188, at 20.

193. *Kiviti Complaint*, *supra* note 189, at 13; *Mize-Gregg Complaint*, *supra* note 188, at 20.

194. *Kiviti Complaint*, *supra* note 189, at 13; *Mize-Gregg Complaint*, *supra* note 188, at 20.

195. *See Kiviti Complaint*, *supra* note 189, at 13; *Mize-Gregg Complaint*, *supra* note 188, at 20.

196. *See supra* Part I.A.2.

is an alien, instead of 301(c), which applies when both parents are citizens.¹⁹⁷ Pursuant to section 301(g), they found that neither Jonathan nor Adiel had satisfied the minimum five-year presence requirement that would allow them to transmit citizenship to their daughters.¹⁹⁸ Simone and Kessem were, therefore, denied citizenship.¹⁹⁹

Interestingly, Kessem was Adiel and his husband Roe's only child to face these hurdles.²⁰⁰ The couple had previously relied on a donor egg, one father's sperm, and a gestational surrogate to conceive their first child, Lev.²⁰¹ When they applied for Lev's citizenship, however, the DOS official at the time chose not to ask for biological proof between Lev and either of his fathers and simply issued the American passport.²⁰² Since neither the law nor the conception method changed since Lev's birth, it can be assumed that the difference in treatment stems from the DOS's unfortunate prerogative to arbitrarily and selectively apply its policy.

The stories of the four families exemplify how, in the age of ART, a biology-based definition of parentage leads to senseless citizenship results. Blind reliance on biology in determining parentage leads to situations where the person who has been raising a child with her wife for four years is not recognized as the child's parent;²⁰³ where one twin is granted citizenship while the other is denied it;²⁰⁴ and where children are considered born out of wedlock even though their parents are married.²⁰⁵

In other words, biology-based parentage prompts recognition or denial of citizenship under the INA based on arbitrary technicalities.²⁰⁶ Yet, "ART is not used accidentally."²⁰⁷ These technicalities do not reflect the deliberate efforts of intended parents who invest time, money, and emotions into ART to have a child.²⁰⁸ Biology-based parentage unjustifiably ignores the fact that "[p]arents who utilize ART do so for the singular purpose of producing a child."²⁰⁹

197. Kiviti Complaint, *supra* note 189, at 13; Mize-Gregg Complaint, *supra* note 188, at 25.

198. Kiviti Complaint, *supra* note 189, at 13; Mize-Gregg Complaint, *supra* note 188, at 20.

199. Kiviti Complaint, *supra* note 189, at 13; Mize-Gregg Complaint, *supra* note 188, at 20.

200. *See* Kiviti Complaint, *supra* note 189, at 11.

201. *Id.*

202. *Id.*

203. *See* Zaccari-Blixt Complaint, *supra* note 123, at 12, 15–16.

204. *See* Dvash-Banks Complaint, *supra* note 1, at 3.

205. *See* Mize-Gregg Complaint, *supra* note 188, at 20; Dvash-Banks Complaint, *supra* note 1, at 3; Zaccari-Blixt Complaint, *supra* note 123, at 16–17.

206. *See* Craythorne, *supra* note 38, at 653.

207. ABA RESOLUTION 113, *supra* note 29, at 8.

208. *See* Hill, *supra* note 10, at 414–15 (making a "but for" causation argument by stating that the "one essential fact favoring the moral and legal priority of the intended parents" is that by "engineer[ing] the birth of the child," the intended parents become the "first cause of the procreative relationship").

209. ABA RESOLUTION 113, *supra* note 29, at 8.

3. Movement Toward Intent-Based Parentage

Acknowledging the arbitrary and discriminatory effects of the DOS's biology-based policy, many authorities are driving a movement toward the acceptance of intent-based parentage in interpreting the INA's citizenship transmission provisions.

a. Judicial Rejection of the DOS's Interpretation

In February 2019, the District Court for the Central District of California found that Ethan had derived American citizenship from Andrew at birth, even though the two do not share a biological connection.²¹⁰ The court held that Andrew and Elad are indisputably Ethan's parents and, as such, "the only issue is whether section 301 requires [Ethan] . . . to demonstrate a biological relationship with both of his married parents."²¹¹ The court proceeded to find that section 301 does not impose such a requirement and that the DOS's reading to the contrary is a "strained" interpretation of the INA.²¹² The DOS appealed the decision to the Ninth Circuit.²¹³ However, the ruling will almost certainly be affirmed, given that the Ninth Circuit has, in the past, explicitly rejected the DOS's interpretation of the INA and is spearheading the movement for recognizing intent-based parentage.²¹⁴

Indeed, the Ninth Circuit's interpretation of the INA's citizenship transmission provisions is based on the assumption that biology is not necessary to establish a parent-child relationship. This is evidenced in its two leading cases, *Scales v. INS*²¹⁵ and *Solis-Espinoza v. Gonzales*,²¹⁶ where the Ninth Circuit found that the nonbiological parents transmitted citizenship to their respective children.²¹⁷ In August 2018, the Second Circuit, in *Jaen v. Sessions*,²¹⁸ also adopted the Ninth Circuit's approach.²¹⁹ Together, the three cases present alternative methods to reach the same conclusion that intent is key in determining parentage.²²⁰

Stanley Russell Scales, Jr. was born in the Philippines to his biological Filipino mother.²²¹ At the time of birth, his mother was married to an

210. *Dvash-Banks v. Pompeo*, No. 2:18-cv-00523, 2019 U.S. Dist. LEXIS 30525, at *17, *23 (C.D. Cal. Feb. 21, 2019), *appeal docketed*, No. 19-55517 (9th Cir. May 6, 2019).

211. *Id.* at *18.

212. *Id.* at *11, *18.

213. *See generally* Notice of Appeal, *Dvash-Banks v. Pompeo*, No. 2:18-cv-00523, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal. Feb. 21, 2019).

214. *See infra* text accompanying notes 221–32.

215. 232 F.3d 1159 (9th Cir. 2000).

216. 401 F.3d 1090 (9th Cir. 2005).

217. *See id.* at 1094; *Scales*, 232 F.3d at 1164.

218. 899 F.3d 182 (2d Cir. 2018).

219. *Id.* at 190.

220. While all three cases deal with opposite-sex marriages, they stand more broadly for the Ninth and Second Circuits' rejection of the DOS's interpretation requiring a blood relationship for the transmission of U.S. citizenship. The courts' logic applies also to cases involving same-sex marriages and ART. *Titshaw*, *supra* note 66, at 107.

221. *Scales*, 232 F.3d at 1161–62.

American man who raised Scales as his own son.²²² The court held that Scales's nonbiological American father should be considered a "parent" under section 301 and be able to transmit citizenship to Scales.²²³ In reaching its conclusion, the Ninth Circuit conducted a "straightforward reading" of section 301 and found that "there is no requirement of a blood relationship" to establish parentage.²²⁴ It then emphasized the difference between sections 301 and 309 by stating that section 309 "clearly was enacted, 'at least in part, to ensure that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen'"²²⁵ and that "[i]f Congress had wanted to ensure the same about a person born in wedlock, 'it knew how to do so.'"²²⁶

Eduardo Solis-Espinoza was born in Mexico to his biological Mexican mother.²²⁷ However, at the time of his birth, Solis-Espinoza's biological Mexican father was married to Stella Cruz-Dominguez, a U.S. citizen who raised Solis-Espinoza as her own son.²²⁸ The Ninth Circuit held that, even though she is not biologically related to Solis-Espinoza, Cruz-Dominguez should be considered his parent under section 301 and accordingly transmit citizenship to Solis-Espinoza.²²⁹ The court found the result "logical" since Cruz-Dominguez was Solis-Espinoza's parent "[i]n every practical sense."²³⁰ Unlike in *Scales*, however, the court based its decision on California law, the state where the family was domiciled.²³¹ The court found that the requirements of California law were satisfied and established Cruz-Dominguez as Solis-Espinoza's parent since birth under section 301.²³²

Finally, Levy Alberto Jaen was born in Panama to a foreign mother who was married to Jorge Boreland, a U.S. citizen, at the time of birth.²³³ Although Boreland is not Jaen's biological father, he raised Jaen as his own son.²³⁴ The court found that Boreland was a parent under section 301 and accordingly transmitted citizenship to Jaen.²³⁵ The court provided three alternative ways to reach the same conclusion. First, given the INA's silence

222. *Id.* at 1162.

223. *Id.* at 1166.

224. *Id.* at 1164.

225. *Id.* (quoting *Miller v. Albright*, 523 U.S. 420, 435 (1998)).

226. *Id.* (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)). In a different instance of statutory construction, the Supreme Court also found that, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

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

228. *Id.* at 1091–92.

229. *Id.* at 1094.

230. *Id.*

231. *See id.*

232. *Id.* At the time of the case, a child was "legitimate" under California law as long as the father acknowledged the child as his own and, with the consent of his wife, received the child into his family. *Id.* at 1093–94.

233. *Jaen v. Sessions*, 899 F.3d 182, 184 (2d Cir. 2018).

234. *Id.* at 184–85.

235. *Id.* at 190.

as to the definition of “parent,” the court turned to the common law’s “presumption of parentage based on marriage.”²³⁶ Consequently, it concluded that, since Jaen was born during Boreland’s marriage to Jaen’s mother, Boreland was presumed to be Jaen’s parent.²³⁷ Second, the Second Circuit echoed the Ninth Circuit’s statutory analysis in *Scales* by reiterating that “Congress clearly specified enhanced requirements [in the form of a biological relationship] for proof of parentage in the case of children born *out of wedlock*,” not for children born in wedlock.²³⁸ Finally, the court held that Boreland would be Jaen’s parent even under relevant New York law.²³⁹

b. Rejection of the DOS’s Interpretation by Supporting Authorities

State courts and legislatures, members of Congress and the Senate, the American Bar Association (ABA), and the Uniform Law Commission (ULC) have also endorsed the Ninth and Second Circuits’ interpretations of parentage.

Surrogacy laws of Connecticut,²⁴⁰ Maine,²⁴¹ Nevada,²⁴² and New Hampshire²⁴³ for example, recognize the legal parentage of intended parents even when the parents do not have a genetic connection to the child. California,²⁴⁴ Connecticut,²⁴⁵ and Vermont²⁴⁶ state courts, among others, have also recognized intention as a determinative factor in parentage.

In a similar vein, nineteen Democratic senators and eighty members of the House of Representatives have signed sharply worded letters to Secretary of State Mike Pompeo, demanding changes to the DOS’s “discriminatory”²⁴⁷ and “cruel”²⁴⁸ interpretation of the INA. Although the letters refrain from explicitly calling for intent-based parentage, they clearly reject the DOS’s biology-focused approach by pointing out that “every federal court that has

236. *Id.* at 188.

237. *See id.* at 188–89. In making this analysis, the court also cited Supreme Court precedent, which “considered ‘the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.’” *Id.* at 188 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989)).

238. *Id.* at 189 (emphasis added).

239. *Id.*

240. *See* CONN. GEN. STAT. § 7-48a(b) (2019).

241. *See* ME. STAT. tit. 19–A, §§ 1931(2), 1933 (2019).

242. *See* NEV. REV. STAT. §§ 126.710, 126.720 (2019).

243. *See* N.H. REV. STAT. ANN. § 168-B:1(XIII) (2019).

244. *See* *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

245. *See* *Raftopol v. Ramey*, 12 A.3d 783, 796–97 (Conn. 2011).

246. *See* *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970–71 (Vt. 2006) (collecting cases).

247. Letter from Members of Congress to Michael Pompeo, Sec’y of State (June 6, 2019), <https://int.nyt.com/data/documenthelper/1099-house-democrats-letter-to-stat/ff1f3d7b524337e92253/optimized/full.pdf#page=1> [https://perma.cc/WJ4N-M2AT]; Letter from Members of the Senate to Mike Pompeo, Sec’y of State (June 6, 2019), <https://www.merkley.senate.gov/imo/media/doc/Final%20letter%20LGBT%20State%20Dept.pdf> [https://perma.cc/DBQ8-5Z58].

248. Letter from Members of Congress to Michael Pompeo, *supra* note 247.

addressed this issue has found that no biological requirement exists”²⁴⁹ and that “Section 301 of the INA makes no requirement that either parent of a U.S. married couple . . . must prove biological relation to their child.”²⁵⁰

Similarly, the ABA has issued both a resolution and position paper to elucidate its support of intent-based parentage.²⁵¹ The position paper concludes that requiring a biological link between parent and child “is inappropriate and violative of the privacy of intended parents.”²⁵² The ABA urges the DOS to interpret section 301 to recognize children born to intended parents even in the absence of a biological relationship, as long as the parent-child relationship is recognized by the child’s country of birth.²⁵³ It further counsels that this expanded interpretation apply retroactively.²⁵⁴ In the position paper, the ABA also conducts an analysis similar to the *Scales* and *Jaen* courts by emphasizing the silence of section 301 as to the requirement of a biological connection.²⁵⁵

The ABA has codified its suggestions in two model acts—the Model Act Governing Assisted Reproduction²⁵⁶ (adopted January 2019) and the supplemental Model Act Governing Assisted Reproductive Technology Agencies²⁵⁷ (adopted February 2016). Both acts rely on “intended parentage” as a basis for establishing the parent-child relationship.²⁵⁸

Finally, through its newest version of the Uniform Parentage Act²⁵⁹ (UPA), the ULC has also rejected the DOS’s policy.²⁶⁰ The ULC aims to provide “states with non-partisan, well-conceived and well-drafted

249. *Id.*

250. Letter from Members of the Senate to Mike Pompeo, *supra* note 247.

251. *See generally* ABA RESOLUTION 113, *supra* note 29; AM. BAR ASS’N, RESOLUTION WITH REPORT NO. 112B (2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_midyear_meeting_electronic_report_book.pdf [<https://perma.cc/HT8W-KLAN>] [hereinafter ABA RESOLUTION 112B]. While ABA Resolution 112B focuses more specifically on surrogacy, its conclusions are applicable to ART generally since the ABA recognizes that “international regulation focused solely on surrogacy arrangements may be under-inclusive.” ABA RESOLUTION 112B, *supra*, at 9. Instead of “focus[ing] on the regulation of the international surrogacy market itself,” it suggests reaching “international agreement on the status of children and on the assignment of parentage and citizenship to them would be more helpful in mitigating the issues in this market.” *Id.*

252. ABA RESOLUTION 112B, *supra* note 251, at 17.

253. ABA RESOLUTION 113, *supra* note 29, at 9.

254. *Id.* at 10.

255. *Id.* at 3.

256. MODEL ACT GOVERNING ASSISTED REPRODUCTION (AM. BAR ASS’N 2019) [hereinafter MODEL ACT].

257. MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY AGENCIES (AM. BAR ASS’N 2016) [hereinafter AGENCY MODEL ACT].

258. The Model Act defines “intended parent” as “an individual who intends to be legally bound as a Parent of the Child.” MODEL ACT § 102(26). The Agency Model Act defines it as “an individual, married or unmarried, who manifests the intent as provided in this Act to be legally bound as the parent of a child resulting from assisted or [c]ollaborative [r]eproduction.” AGENCY MODEL ACT § 102(13).

259. UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017) [hereinafter UPA 2017].

260. *See infra* text accompanying notes 265–71.

legislation.”²⁶¹ It first presented the UPA, a uniform statutory scheme, in 1973 to offer comprehensive guidance in determining a child’s legal parentage.²⁶² A central reason behind the UPA’s 2017 revision was “to update the Act to ensure that it applies equally to children born to same-sex couples”²⁶³ in a way that is reflective of recently recognized constitutional rights.²⁶⁴ Unlike the DOS’s policy, the UPA “has and continues to take the position that actual parent-child bonds are important to children and that these relationships are worthy of protection, even if the parent and the child are not also connected by biology.”²⁶⁵

The 2017 UPA expands recognition of nonbiological parentage in two ways that are particularly relevant to this Note. First, in articles 7 and 8, it recognizes that same-sex couples, not just opposite-sex couples, can become parents through ART.²⁶⁶ In fact, the 2017 UPA makes clear that its ART provisions apply to everyone, regardless of sex, sexual orientation, or marital status.²⁶⁷ It then confirms that children born through ART do not need to have a genetic or gestational connection with their parents.²⁶⁸ Indeed, articles 7 and 8 focus entirely on the parent’s conduct in establishing parentage.²⁶⁹ Second, the 2017 UPA requires courts to consider a range of factors in deciding who, of multiple claimants, should be considered a child’s parent when genetics and conduct lead to differing results.²⁷⁰ In doing so, the revised act reinforces the notion that biology does not automatically trump intent.²⁷¹

III. A DUAL APPROACH: COUNTERACTING THE EFFECTS OF THE DOS’S POLICY ON SAME-SEX PARENTS

The current DOS practice of arbitrarily denying citizenship to the ART children of same-sex parents is almost certainly unconstitutional under *Windsor* and *Obergefell*.²⁷² The policy’s fixation on biology in determining parentage undermines the congressionally established, legitimate, and

261. *Overview*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/X6Y7-VV4J>] (last visited Nov. 12, 2019).

262. Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, YALE L.J. FORUM 589, 597 (2018).

263. SECTION OF FAMILY LAW, AM. BAR ASS’N, UNIFORM PARENTAGE ACT (2017): AN OVERVIEW 1 (2018), https://www.americanbar.org/content/dam/aba/events/family_law/2018/16uniformparentage.pdf [<https://perma.cc/YE4F-8PER>].

264. Joslin, *supra* note 262, at 599.

265. *Id.* at 600.

266. UPA 2017 arts. 7–8 (UNIF. LAW COMM’N 2017); Joslin, *supra* note 262, at 607–08.

267. Joslin, *supra* note 262, at 592.

268. *See* UPA 2017 § 703 (“An individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”).

269. *See, e.g., id.; id.* § 809(a) (affirming that “on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child”).

270. *Id.* § 613.

271. Joslin, *supra* note 262, at 605.

272. *See supra* Part II.A.

important purpose that underlies the INA.²⁷³ The DOS harms family unity by making it harder, not easier, for families like the Dvash-Bankses, Zaccari-Blixts, Mize-Greggs, and Kivitis to stay together.²⁷⁴ In fact, the DOS “fails spectacularly” at achieving even the government’s own goals in regulating immigration.²⁷⁵

The most straightforward way of initiating change and protecting families like the Dvash-Bankses and the Zaccari-Blixts would be for the DOS to change its own policy. However, this seems unlikely given that the only noteworthy change the DOS has granted was the minimal “gestation modification” in 2014.²⁷⁶ The DOS is seemingly impervious to the resistance that is building against its policy, including consequential court decisions.

Part III accordingly presents a dual approach to counteract the effects of the DOS’s interpretation. First, Part III.A proposes congressional amendment to the INA as the most efficient resolution. Second, Part III.B suggests a collaborative approach whereby parents utilize federal courts to assert their claims and state legislators proactively reform their parentage laws to strengthen those claims.

A. Congressional Amendment of the INA

The DOS’s policy was born out of the lack of clarity in the INA as to what constitutes a parent-child relationship.²⁷⁷ The ambiguity allowed the DOS to intervene and interpret parent-child relationships in a “genetic-essentialist”²⁷⁸ manner.²⁷⁹ The most efficient solution to the problems caused by the DOS’s interpretation is simple: Congress must amend the INA to provide a clear definition of “parent.” In doing so, Congress would clarify who constitutes the parent in the parent-child relationship and, consequently, render the DOS’s interpretation irrelevant. Simultaneously, Congress should also consider replacing the term “blood relationship” in INA section 309 with “parent-child relationship” to reiterate its support of intent-based parentage.

Given the increasing reliance on ART to have children,²⁸⁰ Congress must make these amendments rapidly. Failure to do so will inevitably lead to an exponential increase in same-sex couples who suffer from the effects of the DOS’s policy.²⁸¹ Congress should turn to its own history for guidance in enacting the amendment swiftly. As originally enacted, section 1993 of the

273. *See supra* Part II.B.1.

274. *See supra* Part I.B.2.

275. Abrams & Piacenti, *supra* note 52, at 701.

276. *See supra* text accompanying notes 111–13.

277. *See supra* Part I.B.1.

278. Titshaw, *supra* note 66, at 122.

279. *See supra* Part I.B.2.

280. *See* Titshaw, *supra* note 66, at 56 n.20.

281. *See id.* at 56.

Revised Statutes of 1878²⁸² only allowed fathers to transmit citizenship.²⁸³ Recognizing the unequal treatment faced by women, Congress amended section 1993 to also allow mothers to transmit citizenship.²⁸⁴ In making the amendment, Congress aimed to reflect the changing standards of the time. The same reasoning applies for amending the INA to reflect the previously unanticipated right of ART parents to transmit citizenship. Just as today it would be unacceptable to deny women the right to transmit citizenship based on sex, it is also unacceptable that ART parents are denied the same right due to sexual orientation.

This impetus of Congress should be further strengthened by the fact that Congress itself enacted the INA in a manner specifically cognizant and protective of family unity.²⁸⁵ Recognizing intent-based parentage is a straightforward solution to protecting the rights of ART families.²⁸⁶ It is therefore not only in harmony with but also in furtherance of congressional intent.

1. Requisite Amendment: Defining “Parent”

To address the underlying problem with the DOS’s interpretation, Congress must provide a clear definition of “parent” that reflects the nonbiological ways in which an individual can become a parent in the age of ART. In other words, Congress must explicitly recognize intent-based parentage. Recognition of intent-based parentage would first require the DOS to accept the existence of a parent-child relationship between an intended parent and their child, such as between Andrew and Ethan. Second, it would allow a child to be considered born in wedlock as long as the child’s intended parents were married at the time of birth, like Andrew and Elad were. This, in turn, would require the DOS to subject same-sex parents and their ART children to the rightful and more lenient citizenship requirements of INA section 301, like the Dvash-Banks family *should* have been.

282. The Revised Statutes of the United States was a codified collection of federal laws. It acted as the predecessor to the United States Code. Section 1993 covered citizenship and naturalization. Andrew Winston, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, LIBR. CONGRESS BLOGS (July 2, 2015), <https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/> [https://perma.cc/MT4B-E3HE].

283. It stated:

All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Montana v. Kennedy, 366 U.S. 308, 310 (1961) (applying section 1993 to find the citizen-mother married to the noncitizen could not transmit citizenship to their foreign-born child).

284. H.R. REP. NO. 3673, at 797 (1934). Today, this amendment is reflected in INA section 301(h), which recognizes that mothers, not just fathers, can transmit citizenship to children who were born abroad prior to the congressional amendment in 1934. INA § 301(h), 8 U.S.C. § 1401(h) (2012).

285. *See supra* Part II.B.1.

286. *See supra* Part II.B.3.

To codify these changes, it is sufficient for Congress to make a minor addition to INA section 101(c), which provides definitions for the relevant subchapter III of the statute.²⁸⁷ Currently, the only definition of “parent” under section 101(c) is: “[t]he terms ‘parent’, ‘father’, and ‘mother’ include in the case of a posthumous child a deceased parent, father, and mother.”²⁸⁸ This definition does not answer the question of *how* a parent is identified. Using the 2017 UPA definition of “intended parent”²⁸⁹ as guidance, Congress must add to this subsection by defining “parent” in a manner similar to the following: “the terms ‘parent’, ‘mother’, and ‘father’ refer to individuals who, at the time of birth, demonstrate an intent to be legally bound as a parent of the child born naturally or through assisted reproductive technology.”

By clarifying that the determinative factor to become a legal parent is intent, this expanded definition of “parent” ensures that the lack of biological connection does not destroy a parent-child relationship. Since section 301 falls under subchapter III of the INA, the DOS will be bound by this amended definition. The new definition will have an immediate impact on section 301 since, of the section’s eight subsections, four include the term “parents”²⁹⁰ and one refers to both “mother” and “father.”²⁹¹

2. Discretionary Amendment: Replacing the Term “Blood Relationship”

Currently, INA section 309(a)(1) requires that “a blood relationship between the person and the father is established by clear and convincing evidence” as the first step for fathers to transmit citizenship to their children born out of wedlock.²⁹² The requirement of a “blood relationship” supports the DOS’s biology-based interpretation, although only within the context of section 309.

To ensure sweeping application of intent-based parentage, Congress must consider a second amendment in the form of replacing the term “blood relationship” with “parent-child relationship.” Expanding the definition of “parent” under section 101(c) is mandatory to eliminate ambiguity as to how *jus sanguinis* citizenship is transmitted to ART children born in wedlock.²⁹³ Further amendment is not strictly necessary to protect the rights of *married* same-sex parents to transmit citizenship to their children, which is the primary focus of this Note. Nevertheless, the second discretionary amendment is strongly encouraged for two reasons. First, it protects the rights of same-sex parents who have chosen to have children through ART without getting married. Second, it confirms and universalizes Congress’s

287. 8 U.S.C. § 1101(c).

288. *Id.* § 1101(c)(2).

289. The 2017 UPA defines “intended parent” as “an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.” UPA 2017 § 102(13) (UNIF. LAW COMM’N 2017).

290. 8 U.S.C. § 1401(c)–(e), (g).

291. *Id.* § 1401(h).

292. *Id.* § 1409(a)(1).

293. *See supra* Part III.A.1.

stance regarding parentage by deliberately removing the only reference to “blood” made in the context of *jus sanguinis* citizenship transmission.

If Congress chooses to enact the second amendment, it will first need to define “parent-child relationship” under section 101(c), which currently does not do so.²⁹⁴ Drawing once again from the 2017 UPA, the definition should read similar to the following: “the term ‘parent-child relationship’ means the legal relationship that is formed when a child is born, naturally or through assisted reproductive technology, to an individual who, at the time of birth, demonstrates an intent to be legally bound as a parent of the child.”

B. Collaborative Judicial Action and State Law Reform

Until Congress amends the INA, the DOS will almost certainly continue to reject the parent-child relationship between children and their intended same-sex parents. The parents, in turn, will have to find an alternative way to circumvent the effects of the DOS’s policy. This alternative is available in the form of judicial action. Courts are key players²⁹⁵ in counteracting the DOS’s policy since, upon entering a courtroom, the authority to interpret the INA shifts from the executive to the judiciary.²⁹⁶ As such, parents must seek redress in courtrooms, following a trajectory similar to the four families referenced in this Note.

In doing so, parents must rely on a twofold argument: (1) the *Manual* is not a binding authority and (2) courts should abandon DOS’s biology-based interpretation of the INA. While the first argument is based on Supreme Court precedent, the strength of the second argument lies heavily in the proactive reform of parentage laws by state legislatures.

1. Nonbinding Nature of the *Manual*

Despite the DOS’s seemingly dominating authority to interpret the INA, the DOS’s interpretation is not, in fact, binding.²⁹⁷ The DOS’s policy is codified in the *Manual*, which is an agency manual that was neither subjected to notice-and-comment rulemaking nor created following formal

294. 8 U.S.C. § 1101(c).

295. The role of courts in counteracting the effects of the DOS’s interpretation cannot be understated. The *Scales* court, for example, opined that the government relies on the *Manual* as a defense strategy because it had very few alternatives. *Scales v. INS*, 232 F.3d 1159, 1165 (9th Cir. 2000). An increased volume of judicial opinions on the subject would provide both parties with more authority to rely on in arguing their cases. *See id.* The Ninth and Second Circuit precedents are particularly significant because, by opposing the norm, they are drawing attention to discrepancies in practice. In *Obergefell*, the Supreme Court granted certiorari in part because there was a disagreement among courts that caused “impermissible geographic variation in the meaning of federal law.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015).

296. *See supra* Part II.B.3.a.

297. *Jaen v. Sessions*, 899 F.3d 182, 187 n.4 (2d Cir. 2018); *Scales*, 232 F.3d at 1166; Cyrus D. Mehta & Sophia Genovese, *The Effects of ‘America First Foreign Policy’ and ‘Buy American Hire American’ on the Foreign Affairs Manual*, 22 BENDER’S IMMIGR. BULL. 1247, 1256 (2017) (“FAM does not have the force of a statute or a regulation. It is sub-regulatory guidance and is not binding.”).

adjudication.²⁹⁸ The interpretation found in the *Manual* therefore lacks the force of law²⁹⁹ and is not entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.*,³⁰⁰ which would have required a court to give effect to what it found to be a *reasonable* interpretation of an ambiguous statute.³⁰¹

Instead, the *Manual* is subject to the weaker deference³⁰² recognized in *Skidmore v. Swift & Co.*³⁰³ Under *Skidmore*, the *Manual* is not “controlling upon the courts by reason of [its] authority.”³⁰⁴ Instead, the *Manual* is “entitled to respect” only if it has the “power to persuade.”³⁰⁵ Based on the discussion in Part II, parents have a very strong argument that the *Manual* is not persuasive and therefore does not have a binding effect.³⁰⁶ That being the case, reliance on the judiciary is critical for parents because it provides them with an opportunity to argue their case before an authority that is not bound by the DOS’s interpretation.

2. State Parentage Law as a Guide to Alternative Interpretation of the INA

Federal courts often rely on state laws in interpreting ambiguous federal statutory language.³⁰⁷ In the context of the INA, this often includes interpreting ambiguous domestic relations terms, as illustrated by the courts

298. *Scales*, 232 F.3d at 1166; Titshaw, *supra* note 66, at 102–03.

299. *See* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that the interpretation found in an agency opinion letter issued without formal adjudication or notice-and-comment rulemaking lacks the force of law, much like interpretations contained in similar policy statements, agency manuals, and enforcement guidelines); *see also* *Moore v. Apfel*, 216 F.3d 864, 869 n.2 (9th Cir. 2000) (refusing to give *Chevron* deference to the Social Security Administration’s internal agency manual).

300. 467 U.S. 837 (1984).

301. *See id.* at 842–44. This Note holds that even if *Chevron* were applicable, *Chevron* deference would still not be granted since the DOS’s interpretation of the INA is not reasonable, as argued in Part II.

302. *See Christensen*, 529 U.S. at 587 (holding that the interpretation found in an agency opinion letter issued without formal adjudication or notice-and-comment is entitled to only *Skidmore* deference).

303. 323 U.S. 134 (1944).

304. *See id.* at 140.

305. *Id.*

306. *See supra* Part II; *see also* Higdon, *supra* note 42, at 155 (arguing that “[g]iven then the way in which Congress crafted the statutes at issue, for the State Department to define ‘out of wedlock’ in a way that contravenes the ordinary meaning of the phrase is both unreasonable and impermissible”).

307. *See, e.g.*, *Huyen V. Nguyen v. Holder*, 743 F.3d 311, 314 (2d Cir. 2014) (relying on New York law to define incest); *Garcia v. USICE (Dep’t of Homeland Sec.)*, 669 F.3d 91, 95 (2d Cir. 2011) (relying on New York law to define legal custody); *Nehme v. INS*, 252 F.3d 415, 423–24, 426 (5th Cir. 2001) (relying on Alabama, Delaware, Minnesota, and Nebraska state laws to define legal separation); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (holding that while terms in a federal statute must take their meaning from federal law, federal law can look to state law, or even foreign law, for a rule of decision); *Nemetz v. INS*, 647 F.2d 432, 436 (4th Cir. 1981) (finding that federal courts can turn to state law in defining good moral character for naturalization purposes).

of *Scales*,³⁰⁸ *Solis-Espinoza*,³⁰⁹ and *Jaen*.³¹⁰ For this reason, state legislatures play a crucial role in strengthening parents' second argument that courts should abandon the DOS's biology-based interpretation of parentage in favor of an intent-based reading. By proactively adopting laws that recognize intent-based parentage, state legislatures can provide courts with guidance as to an alternative way to interpret the INA.³¹¹

Efforts are already underway to help state legislatures achieve this goal.³¹² The 2017 UPA is a prime example. As discussed in Part II.B, the 2017 UPA definition of parentage stands in stark contrast to the DOS's interpretation. Unlike the DOS, the 2017 UPA considers intent, not biology, to be determinative in establishing a parent-child relationship.³¹³ Courts interpreting the ambiguous parentage requirements of INA sections 301 and 309 pursuant to the 2017 UPA will inevitably find that a parent-child relationship exists between same-sex parents and their foreign-born ART children, even if they lack a biological connection.³¹⁴

To enable courts to reach this conclusion, state legislatures must adopt the 2017 UPA, or a version of it.³¹⁵ Parents, in turn, must rely on the UPA-inspired state parentage laws while constructing their arguments. In doing so, they should rely not only on UPA articles 7 and 8, which directly address intended ART parents,³¹⁶ but also on UPA section 613, which provides specific factors to consider in determining parentage.³¹⁷ These factors include "the length of time during which each individual assumed the role of

308. *Scales v. INS*, 232 F.3d 1159, 1163–64 (9th Cir. 2000) (referring to Washington state law's presumption of parentage based on marriage).

309. *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (relying on California state law to determine whether a parent-child relationship exists).

310. *Jaen v. Sessions*, 899 F.3d 182, 189–90 (2d Cir. 2018) (finding that New York state law could be considered in determining parentage).

311. See *Joslin*, *supra* note 262, at 591 (arguing that "legislatures are well situated to proactively reform their parentage statutes to address these sex- and sexual-orientation-based distinctions").

312. *Id.*

313. See *supra* notes 262–71 and accompanying text.

314. See *supra* text accompanying note 268.

315. Currently, the 2017 UPA has been enacted by three states: California, Vermont, and Washington. *Parentage Act*, UNIFORM L. COMMISSION, <https://my.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> [<https://perma.cc/NC42-RJ2W>] (last visited Nov. 12, 2019). It is not a coincidence that either the Ninth or the Second Circuit has jurisdiction over these states. See *About U.S. Federal Courts*, FED. B. ASS'N, http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx [<https://perma.cc/P2BJ-8WTV>] (last visited Nov. 12, 2019). History indicates that states will continue to adopt at least a version of the 2017 UPA. When the first version of the UPA was presented in 1973, its provisions seeking to eliminate the status of "illegitimate" children seemed a drastic change. UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2002). However, the 1973 UPA was nevertheless promulgated, in part due to recent Supreme Court decisions of the time, which invalidated laws disadvantaging illegitimate children. *Id.* Today, *Windsor*, *Obergefell*, and *Pavan* provide the same impetus to states who may find intent-based parentage to be a substantial amendment to their laws.

316. UPA 2017 arts. 7–8 (UNIF. LAW COMM'N 2017).

317. *Id.* § 613.

parent of the child,”³¹⁸ “the nature of the relationship between the child and each individual,”³¹⁹ and “the harm to the child if the relationship between the child and each individual is not recognized.”³²⁰

Such collaboration between plaintiffs, federal courts, and state legislatures may protect same-sex families and their ART children by allowing courts to circumvent the effects of the DOS’s interpretation.

CONCLUSION

Developments in ART have shattered preconceptions of what an “average” American family looks like. ART has also given same-sex couples an alternative to adoption in expanding their families. Indeed, today many same-sex parents like the Dvash-Bankses, Zaccari-Blixits, Mize-Greggs, and Kivitis are the proud parents of ART children. However, the same families are suffering due to the DOS’s interpretation of the INA.

Pursuant to the DOS’s interpretation, U.S. citizen parents can convey citizenship to their ART child only if they can establish a biological connection with the child. This is often difficult for same-sex ART parents, at least one of whom will always lack a biological connection with their child. Further, even if the U.S. citizen parent can accomplish this first step, they must additionally satisfy the strict citizenship requirements of INA section 309, which governs children born out of wedlock. This is because, with one narrow exception, the DOS considers ART children of all married same-sex couples as categorically born out of wedlock.

The DOS’s biology-based interpretation of parentage is constitutionally suspect under the recent Supreme Court decisions of *Obergefell*, *Windsor*, and *Pavan*. The manner in which the DOS utterly disregards intent to become a parent in its interpretation is also unjustifiable. In order to protect same-sex parents and their ART children, change is necessary. While the most efficient solution is for Congress to amend the INA in recognition of intent-based parentage, it is also crucial for federal courts and state legislatures to collaborate to strengthen the claims of parents. It is only by doing so that the “new average” American family can be protected.

318. *Id.* § 613(a)(2).

319. *Id.* § 613(a)(3).

320. *Id.* § 613(a)(4).