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Recommended Citation

[Scott Titshaw](#), *Throwing the Baby Out with the Patriarchy*, 33 Berkeley J. Gender L. & Just. 179 (2018).

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Throwing the Baby Out with the Patriarchy

Scott Titshaw[†]

Throughout the history of Europe and its former new world colonies, families have been a central unit for defining legal rights and duties, including those related to citizenship and immigration. Less than a century ago, a woman and her children automatically gained or lost citizenship in the U.S. and many other countries upon her marriage to a citizen or noncitizen. The family was treated as one unit reflecting the legal identity of the father-husband as “head of family.”

Fortunately, the United States and other governments have increasingly recognized women – and, to a lesser extent, children – as independent persons with separate identities under the law. Women no longer lose their U.S. citizenship when they marry foreign men, and children born out of wedlock now may inherit their parents’ citizenship. However, the move away from a patriarchal legal definition of family has coincided with decreasing respect for marital and family unity as a basis for citizenship and immigration rights. While family unification remains a loadstar for immigration law, it already has been limited in numerous ways. The President of the United States and many members of Congress currently propose to limit it further.

State legal definitions of family have become more liberal and egalitarian over time.¹ In general, the formal rules regulating marriage are now gender neutral, and states now recognize biracial spouses, same-sex spouses, and, increasingly, *de facto* family relationships. While moving more slowly than state family law, federal birthright citizenship law also has liberalized its recognition of family status. But it has continued to limit family recognition to legal relationships, such as marriage and presumed parentage, and to biological parent-child relationships. *De facto* “parents” or “spouses” are not recognized. At the same time, it has begun focusing much more on biology, and family unity has been eroded as an inviolable principle.

Three important forces have contributed to the trend deemphasizing family

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1. The United States is one of very few countries in the world that define family status differently for state and family law purposes and for federal citizenship and immigration law purposes. This increases the level of complexity and the number of potential problems families may encounter.

unity in the context of immigration and citizenship: (1) popular immigration restrictionism with significant racist and xenophobic elements; (2) the administrative desire for clear and simple definitions; and (3) the continuing popular desire for family unity. These forces help explain the trends introduced above.

Decreasing racial obstacles to the use of family-based citizenship and immigration has changed the complexion of families being united, which may partially explain current proposals to dramatically cut family-based immigration. In light of the administrative interest in certainty and simplicity, technological developments such as genetic testing explain the shift from a traditional focus on legal and presumed paternity to the new focus on biological parentage, particularly in cases stemming from the use of assisted reproductive technology (ART). Finally, the history summarized below demonstrates a paradigm shift from a view of immigrant families as a single unit legally reflecting the husband-father who heads it, to a view of immigrants as sometimes-related individuals, each of whose immigration and citizenship status will be assessed independently.

There is a great deal worth discussing about the liberalization of the definition of family membership and the coinciding de-emphasis on family-based immigration. But I will focus today on family-based citizenship acquisition, particularly on *jus sanguinis* automatic citizenship transmission from U.S. citizen parents to their children born abroad. (The Fourteenth Amendment clarifies the citizenship of almost everyone born on U.S. soil, so *jus sanguinis* citizenship is limited to children born abroad.) I will illustrate changes in this area, with three simplified snapshots in time: 1865, 1920, and today.²

SNAPSHOT 1: 1865

In 1865, the U.S. Civil War ended, terminating the legal institution of slavery and legal prohibitions on marriage for formerly enslaved people. Yet anti-miscegenation laws would last another century, and it would be even longer before same-sex couples could marry. This means that many families were not legally recognized and, therefore, not covered by immigration and citizenship laws related to marital and family unity.

Although not available to all families, legal familial status, when recognized, was generally inviolable as it centered on a man's marriage and his legal dependents. Under the "headship" principle, the family unit centered on the husband-father as the "head of family." Domestic laws reflected the prevalent

2. Several excellent sources recount the historical developments sketched out below in much greater detail. Brief for Professors of History, et al. as Amici Curiae in Support of Respondent, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (No. 15-1191); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); Peter Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 709-16 (2011); *American Citizenship: Hearing Before a Subcomm. of the S. Comm. on Immigr.*, 72d Cong. (1933); E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 (1981).

doctrine of “coverture” under which the legal identity and property of the wife “merged” into the legal identity of her husband. It was said “a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.”³ The husband-father was also considered the principle legal guardian of children born into his marriage.

Jus sanguinis citizenship law in the Nineteenth Century also reflected this principle. The statutory language proscribing citizenship transmission between 1790 and 1855 referred merely to the children “of citizens,” but the “headship” principle was so pervasive that this neutral language generally was interpreted to apply only to children born in wedlock to a U.S. citizen father. Congress eventually codified this interpretation in 1855.⁴ In the same Act, it also clarified that a noncitizen woman automatically acquired U.S. citizenship when she married a U.S. citizen man.⁵ The husbands of U.S. citizen women, on the other hand, did not gain citizenship in this manner.

In the era of coverture and the “headship” principle, it is not surprising that a family’s citizenship status would be one and the same, and that it would be determined by the citizenship of the husband-father, the only family member legally recognized as a full citizen for many purposes, such as voting, jury service, and military service. The family’s citizenship status logically reflected his.

The laws of an era in which children’s status hinged on that of their “legitimate” father was equally unkind to children born out-of-wedlock. Such a child was legally considered *filius nullius* or a “child of no one,” neither their biological father or mother, under both domestic and citizenship laws.

SNAPSHOT 2: 1920

By 1920, there had been some major changes in both citizenship and domestic law, but much remained the same. This was the age of a general bar on Asian immigration, and anti-miscegenation laws were still prevalent. Yet there had been significant progress for many women. The Nineteenth Amendment was adopted, providing women the right to vote. “Coverture” had been fading in importance for a generation, and women were gaining recognition as separate legal individuals. There had been movement to recognize children born out of wedlock so they were legally recognized as their mother’s children even in the citizenship context, where the Department of State had begun recognizing citizenship transmission from single U.S. citizen mothers to their children born abroad. Yet, U.S. citizen fathers still could only transmit citizenship to children born out of wedlock through legitimation, which generally required marriage to the child’s mother.

3. *Bradwell v. Illinois*, 83 U.S. 130, 14 (1873) (Brandley, J., concurring) (describing this historic common law maxim in explaining that a woman was legally incapable of making a binding legal contract and, thus, “incompetent” to practice law).

4. Act of Feb. 10, 1855, ch. 71, § 1.

5. *Id.* at § 2.

Coverture lived on in citizenship law, however, and married women could not transmit U.S. citizenship to their children as single mothers could. In fact, a U.S. citizen woman automatically lost her citizenship if she married a foreign man in 1920.

One woman, who lost her citizenship upon marrying a British citizen in the U.S., challenged this law, but the Supreme Court rejected her Fourteenth Amendment argument in *MacKenzie v. Hare* relying, in part, on the “ancient principle” of “unity of interests” of husband and wife which “may make it of public concern in many instances to merge their identity, and give dominance to the husband.”⁶ In 1922, Congress would step in to rescind this involuntary expatriation rule, but only for citizen women marrying foreign nationals, who were eligible to naturalize and become U.S. citizens. Of course, this excluded Asian husbands at the time.

SNAPSHOT 3: 2018

Things have changed considerably since 1920 for women and for children born out of wedlock. Racial inadmissibility and quotas were repealed in 1965. Coverture is generally a thing of the past in the United States. Following the U.S. Supreme Court decision in *Obergefell v. Hodges*, all U.S. states and federal immigration authorities recognize marriage equality for same-sex couples.⁷ In *Sessions v. Morales-Sanatana*, the Court struck down a shorter physical presence requirement for women than for men transmitting citizenship to children born out-of-wedlock abroad.⁸ Citizenship laws discriminating on the basis of sex seem to be slowly disappearing.⁹

ADMINISTRATIVE DECONSTRUCTION OF LEGAL FAMILIES: BIOLOGY AND GENETIC TESTING

The decline in citizenship laws that discriminate based on sex is a positive change, but new issues of inequality have arisen. Modern technology and the certainty of genetic testing is probably one reason courts and government officials are more willing to treat fathers and mothers similarly regarding their children born out-of-wedlock. Yet that same technology now undermines marital presumptions regarding parentage of children born in-wedlock. Bureaucrats prefer this sort of certainty, and the U.S. State Department adopted a genetic essentialist approach to parentage for citizenship purposes in recent decades. This initially meant a U.S. citizen woman would not transmit her citizenship if she gave birth

6. *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915).

7. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

8. *Sessions v. Morales-Sanatana*, 137 S. Ct. 1678 (2017).

9. Of course, some gender-based distinctions have been upheld by the Supreme Court. *See* *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding paternal acknowledgment requirement on fathers, but not mothers, in order to ensure the existence of a biological parent-child relationship in the case of citizenship transmission).

to a child conceived through assisted reproductive technology (ART) using another woman's genetic material.¹⁰ Although the State Department modified this rule in 2014, it still requires a "biological" (gestational or genetic) relationship between a U.S. citizen and her child in order to recognize citizenship transmission upon birth abroad. Any child born to a surrogate is still a non-citizen at birth unless the child is genetically related to a U.S. citizen. This demonstrates a substantial shift from the focus on legal and marital family unity to a focus on biological parent-child relationships.

In addition to the willingness to ignore "marriage" and legal parentage at birth of children conceived through ART, the Supreme Court's remedy in *Morales-Santana* actually increased the physical presence requirement for single mothers to transmit citizenship to children born abroad from one year to five years. In each case, fewer children will inherit citizenship from their legal parents.

POLITICAL DECONSTRUCTION OF FAMILIES

Immigration restrictionists have been around as long as there has been immigration. However, they seem to be on the ascent since the election of President Trump. They have proposed laws that would keep U.S. citizen parents and their children apart or force them to live in *de facto* exile abroad in order to remain together as a family. For example, President Trump officially supports the RAISE Act of Senators Cotton and Perdue, which would separate families by eliminating permanent resident eligibility for parents of adult U.S. citizen children, by lowering the maximum age to apply for permanent residence for children of lawful permanent residents and citizens from twenty-one to eighteen, by implementing a quota on the number of new permanent resident spouses and minor children, and by eliminating other family-based immigration categories (e.g., brothers and sisters).¹¹

CONCLUSION

There have been two prominent bases for defining family for citizenship and immigration purposes: legal relationships such as marriage and parentage (or principle legal guardianship in the case of married men and their children); and biological (so called "natural") parent-child relationships. Over time, legal definitions of family have become more liberal and more egalitarian. While lagging behind changes in family law, U.S. citizenship law has adjusted to these expanded definitions, but it also has begun focusing much more on biology at the expense of marital presumptions and other bases for recognizing parental relationships. At the same time, family unity has been eroded as an inviolable

10. See 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, 482-83 (2011).

11. S. 354, 115th Cong. (2017); *President Donald J. Trump Backs RAISE Act*, Aug. 2, 2017, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>.

principle of U.S. immigration and citizenship law by laws like those insisting on biological parent-child links or longer physical presence requirements as prerequisites for citizenship transmission.

As Professor Kristin Collins has persuasively argued, family and citizenship law rules have interacted throughout most of American history to limit recognition of nonwhite children of U.S. citizens.¹² These, often indirect, racial obstacles to the use of family-based citizenship and immigration have largely vanished, changing the complexion of families now being united. The subset of restrictionists motivated by racism and xenophobia are likely more willing to limit family unity now that the families being united are less likely to be white. This may partially explain current proposals to dramatically cut family-based immigration.

The desire for easy and certain answers in the name of administrative efficiency also helps explain the trends noted above. Until recently, the best way to prove paternity of a child born out of wedlock was through witness testimony with some limited support from blood-type tests. Now modern DNA tests can provide bright-line answers to many questions of biological parentage, and some lawmakers and bureaucrats may be willing to separate legally recognized, cohabiting families in order to avoid complex analysis, ambiguity and the dangers of fraud and arbitrary decisions. This is exemplified by recent efforts to define parent-child relationships stemming from assisted reproductive technology (ART) by focusing solely on genetic and biological links at the expense of legal family relationships.

Unlike most other countries, the United States determines family status independently at the federal level for purposes like citizenship and immigration and at the state level for most other purposes. State laws are moving from relatively uniform formal legal indicators of family formation such as marriage and presumed parentage, which also are fairly easily to demonstrate, to concepts like *de facto* parentage or intended parentage in the context of ART, which require more judgment and broader evidence to determine and which are regulated differently from state to state. An emphasis on federal uniformity and administrative simplicity may be particularly compelling to lawmakers and administrators in this context.

Finally, the history summarized above demonstrates a paradigm shift from a single-family unit, legally reflecting the husband-father who heads it, to a group of related individuals, each of whose immigration and citizenship status will be assessed in a largely independent manner. Separating a family unit at the border might have once seemed like allowing a person's head and feet to immigrate while barring her torso and arms at the border.¹³ But now, the family curtain has been

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

13. See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 9-10 (1985) (describing how the nineteenth century family household presented a "façade of organic unity" that masked specialized individual roles

pulled back, and the focus is on individual immigrants and prospective citizens, each of whom authorities are willing to include or exclude for any number of reasons. Proposed point systems like that proposed in the RAISE Act are examples of an increasing willingness to favor economic interests in possible employees and entrepreneurs with advanced skills, education, and financial resources over the interests of aspiring immigrants and their U.S. citizen relatives in family unity.

I would not like to see us close the curtain again and ignore individual distinctions among immigrants in favor of an overriding focus on the family unit. But I do believe we should reemphasize the importance of family relationships and unity to individual immigrants and prospective citizens.

within the group); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865-1896* 136-37 (2017) (“The production of homes was the ultimate rationale for the economy, for the nation itself, and for the public policies and activist government embraced by Republicans” in the period following the Civil War.) This focus on a unified family-unit was reflected in “coverture” laws and in laws described above, which automatically granted and removed citizenship of wives and children to reflect the citizenship of the adult male “head of family.”

