Same-Sex Equality in Immigration Law: The Case for Birthright Citizenship for Foreign-Born Children of U.S. Citizens in Same-Sex Binational Unions

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I. Introduction

Andrew Dvash-Banks was born and raised in Santa Monica, California and, accordingly, has been a U.S. citizen since birth.[1] After completing his undergraduate degree, Andrew decided to pursue a master's degree in Middle Eastern studies at Tel Aviv University in Israel.[2] While in Tel Aviv, Andrew met and fell in love with Elad—a man who was born and raised in Israel—at a university holiday party in 2008.[3] Two years later, the two were married in Canada.[4] Although the couple had intended to settle in California,[5] the United States Federal Government had not yet recognized same-sex marriage, and Andrew and Elad could not legally marry in California under Proposition 8. So, the couple instead settled and started a family together in Canada, where their union was legally recognized.[6] The married couple soon had twin boys—Ethan and Aiden—born in Canada, minutes apart.[7] Ethan and Aiden were conceived using the sperm of their two fathers and an anonymous donor's eggs.[8] The twins were carried and delivered by a surrogate.[9] Each child was conceived using sperm from one of their two fathers—Andrew's sperm was used to conceive Aiden, and Elad's sperm was used to conceive

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1. Alene Tchekmedyian, *These Twins Were Born 4 Minutes Apart. But Only One Is a U.S. Citizen*, L.A. TIMES (Jan. 27, 2018), http://www.latimes.com/local/lanow/la-me-ln-twins-citizenship-20180127-story.html [https://perma.cc/95QJ-YVNA].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

Ethan.[10] After the Supreme Court struck down the Defense of Marriage Act in 2013,[11] the couple excitedly made plans to move to California, as originally intended.[12] However, when Andrew and Elad attempted to acquire U.S. passports for their children at the U.S. Consulate in Canada, the officials informed them that Andrew would have to "undergo a DNA test to prove a biological link to each twin," after asking them a series of invasive questions about the conception of their children.[13] Although the couple intended to keep the information regarding which child was genetically related to which father entirely private, even from the children themselves, they consented to the testing.[14] After receiving the results of the DNA tests, the U.S. Consulate informed Andrew and Elad by letter that only one of their twin sons, Aiden, was a U.S. citizen at birth.[15] Aiden was awarded birthright citizenship because of his genetic connection to Andrew (a U.S. citizen), but because Ethan's genetic connection was to Elad (an Israeli citizen), rather than Andrew, Ethan was not considered a U.S. citizen at birth.[16]

Allison Blixt and Stefania Zaccari, a married lesbian couple, have endured a similar struggle regarding the citizenship of their children.[17] Allison, a U.S. citizen from New York, fell in love with Stefania, an Italian citizen who was visiting the United States.[18] Because American federal law still had not recognized same-sex marriage at the time the couple decided to marry, they moved to London in order to be able to marry and start their family.[19] The couple has since had two boys—Lucas and Massi—who were conceived using an anonymous donor's sperm.[20] Stefania gave birth to Lucas using her own egg, and Allison gave birth to Massi using her own egg.[21] Both children were born in England.[22] At the United States Embassy in England,

10. Leila Fadel, *Same-Sex Couples Sue U.S. Government for Kids' Citizenship*, NATIONAL PUBLIC RADIO (Jan. 26, 2018), https://www.npr.org/2018/01/26/580918004/same-sex-couples-sue-u-s-government-for-kids-citizenship [https://perma.cc/WQ6G-L8LR].

11. United States v. Windsor, 570 U.S. 744, 775 (2013).

12. Tchekmedyian, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Fadel, *supra* note 10.

18. *Id.*

19. Associated Press & Brooke Sopelsa, *Gay Couple Sues U.S. After Twin Son's Citizenship Is Denied*, NBC NEWS (Jan. 24, 2018), https://www.nbcnews.com/feature/nbc-out/gay-couple-sues-state-dept-after-one-twin-s-u-n840661 [https://perma.cc/Z2AG-DCT5].

20. Maria Sacchetti, *In Lawsuits, Same-Sex Couples Say U.S. Wrongly Denied Their Children Citizenship*, WASH. POST (Jan. 22, 2018), https://www.washingtonpost.com/local/immigration/in-lawsuits-same-sex-couples-say-us-wrongly-denied-their-children-citizenship/2018/01/22/1c83c98a-fd34-11e7-8f66-2df0b94bb98a_story.html [https://perma.cc/79XY-Z2ZN].

21. Fadel, *supra* note 10.

22. *Id.*

the couple was informed of the same fact that the Dvash-Banks couple was informed of in Canada: only one of their children was a United States citizen.[23] Massi was awarded birthright citizenship because he was born from the egg of a U.S. citizen, while his brother Lucas was denied birthright citizenship because he was born from the egg of a foreign national.

Both families have suffered from the unequal denial of their children's citizenship. All members of the Dvash-Banks family are living in California with legally recognized status, with the exception of Ethan, whose status has expired.[24] The family cannot leave the country to visit Elad's family in Israel because of their son's expired status.[25] The Zaccari-Blixt family has to consider how long they can visit Allison's family in the United States, because of Lucas's limited ability to stay in the United States.[26] In January of 2018, each couple filed a complaint in federal court, asking for the U.S. citizenship of their children to be recognized by the government.[27]

The situation of these families, coupled with the recent federal recognition of same-sex marriage,[28] has presented a novel question in the intersection between immigration law and same-sex equality. Are the foreign-born children of U.S. citizens in a same-sex binational marriage entitled to U.S. citizenship at birth when born during the marriage, even when there is no biological relation between the child and the U.S.-citizen parent? In this Note, I will argue that these foreign-born children *are* entitled to birthright citizenship, regardless of biological connection. First, I will argue that the State Department's application of federal law improperly classifies children of legally married same-sex parents as born "out of wedlock." Second, I will establish that all children born abroad within a legal marriage between a U.S. citizen and a foreign national qualify for birthright citizenship under the plain language of the Immigration and Nationality Act (INA), regardless of the sexual orientation of their parents. Third, I will argue that the State Department's interpretation of the INA statutes constitutes a failure to recognize the legal union between married same-sex couples, and is consequently an unconstitutional violation of equal protection, due process, and the right to privacy. Last, I will propose that, in order to bring immigration regulations into compliance with constitutional mandates set out in recent Supreme Court decisions, the State Department must adopt new definitions of "parenthood" that are inclusive of same-sex family structures.

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23. *Id.*

24. Tchekmedyian, *supra* note 1.

25. *Id.*

26. Fadel, *supra* note 10.

27. Complaint for Declaratory and Injunctive Relief at 5, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018); Preliminary Statement at 1, Blixt v. U.S. Dep't of State, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018).

28. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

II. The Pathway to Citizenship at Birth: The Current Application of the Immigration and Nationality Act

Any person born in the United States is a U.S. citizen at birth, according to the Citizenship Clause of the Constitution.[29] The question of citizenship is more complicated for children who are born outside of the United States to a parent who is a U.S. citizen. Analysis of the question of citizenship at birth for children who are born abroad within a legal same-sex marriage between a U.S. citizen and a foreign national requires an examination of the statutory pathways for citizenship at birth for children born outside of the United States.

Two statutes within the INA—§ 301 and § 309—specifically govern the question posed by this Note.[30] Section 301, codified at 8 U.S.C. § 1401, is titled "Nationals and Citizens of United States at Birth" and sets out categories of people that are entitled to U.S. citizenship at birth.[31] Provision (g) of § 301 states,

> [A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.[32]

Section 309, codified at 8 U.S.C. § 1409, is titled "Children Born Out of Wedlock" and sets out when children who are born to parents who are *not married* can acquire citizenship at birth.[33] The statute first addresses the requirements that must be met for a U.S. citizen *father* to confer citizenship at birth to a child born out of wedlock, stating that provision (g) of § 301 applies to any person born out of wedlock if "a blood relationship between the person and the [U.S. citizen] father is established by clear and convincing evidence."[34] The statute also sets out other requirements, such as a written paternal acknowledgment and an 18-year time constraint for legitimization.[35] The statute goes on to address the requirements that must be met for a U.S. citizen *mother* to confer citizenship at birth to a child born out of wedlock. The statute states,

> [A] person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if

29. U.S. CONST. amend. XIV, § 1.
30. 8 U.S.C. § 1401(g) (2012); 8 U.S.C. § 1409 (2012).
31. 8 U.S.C. § 1401(g) (2012).
32. *Id.*
33. 8 U.S.C. § 1409 (2012).
34. *Id.* at (a)(1).
35. *Id.* at (a)(3)–(4).

> the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.[36]

Despite evidence that children born to legally wed same-sex couples should be treated as children born "in wedlock" for purposes of § 301(g),[37] the State Department classifies children born to parents in legally recognized same-sex marriages as children born "out of wedlock" when determining their eligibility for birthright citizenship.[38] In both the Dvash-Banks and the Zaccari-Blixt cases, the State Department applied § 309—rather than § 301(g)—in discerning whether the children of those couples were entitled to birthright citizenship, despite the fact that all the children were born within legally recognized marriages.[39] Application of § 309, as is the State Department's policy for children of same-sex couples, requires that a U.S.-national father have a genetic relationship to the child born abroad, or that a U.S.-national mother have a genetic relationship to *or* have birthed the child born abroad in order to confer birthright citizenship.[40]

The State Department relies on a set of definitions entirely independent from the INA itself and implemented by its own Department in its conclusion that foreign-born children of same-sex couples cannot be entitled to birthright citizenship under § 301(g).[41] The INA does not include a definition of the terms "in wedlock" and "out of wedlock."[42] The State Department, however, inserted a definition of those terms into an Appendix to the Foreign Affairs Manual in 2014 and has relied upon those definitions in its application of §§ 301 and 309.[43] According to the Appendix, "To say a child was born 'in wedlock' means that the child's biological parents were married to each other at the time of the birth of the child."[44] The Appendix goes on to state that "[i]f a married woman and someone other than her spouse have a biological child together, that child is considered to have been born out of wedlock. The

36. *Id.* at (c).

37. *See infra* subpart III(A).

38. Complaint for Declaratory and Injunctive Relief at 3, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018); Preliminary Statement at 2, Blixt v. U.S. Dep't of State, No. 1:18-CV-00124 (D.D.C. Jan. 22, 2018).

39. Complaint for Declaratory and Injunctive Relief at 3, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018); Preliminary Statement at 2, Blixt v. U.S. Dep't of State, No. 1:18-CV-00124 (D.D.C. Jan. 22, 2018).

40. 8 U.S.C. § 1409 (2012); U.S. CITIZENSHIP & IMMIGRATION SERVICES, POLICY ALERT (Oct. 28, 2014), https://www.uscis.gov/policymanual/Updates/20141028-ART.pdf [https://perma.cc/8BVL-EJPS].

41. Complaint for Declaratory and Injunctive Relief at 10, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

42. 8 U.S.C. § 1101 (2012).

43. U.S. DEP'T OF STATE, 7 FAM 1140 APPENDIX E, BIRTH IN WEDLOCK, OF WEDLOCK, VOID AND VOIDABLE MARRIAGES: "IN WEDLOCK" AND "OF WEDLOCK" (2014).

44. *Id.* at (c).

same is true for a child born to a married man and a person other than his spouse."[45] This construction of the terms "in" and "out of wedlock" effectively keeps U.S. citizens who are legally married to a same-sex partner from *ever* conferring birthright citizenship onto their children under § 301(g), since the parties to a same-sex marriage cannot *both* be the biological parents of a child.[46] Thus, the State Department's application of its own definitions of these terms permanently places children born in same-sex marriages into the "out of wedlock" section of the INA.[47] Because these definitions were added to the Foreign Affairs Manual in 2014, before the Supreme Court's decision in *Obergefell v. Hodges*[48] instituted new constitutional mandates regarding the recognition of same-sex marriage, the State Department's application of these terms now presents constitutionality concerns perhaps not apparent at the time of their addition (this point is discussed in detail in subpart III(B) of this Note).

III. The State Department's Classification of Children Born to Parents in Legally Recognized Same-Sex Marriages as Children Born "Out of Wedlock" Is an Unconstitutional Misapplication of the INA

Sections 301 and 309 of the INA plainly allow American citizens in binational same-sex unions to confer birthright citizenship to children born within their marriages. The statutes do not permit the interpretation embodied in the State Department's policy. Even if the statutes were ambiguous, the State Department's current interpretation would be unconstitutional.

A. The INA Statutes Do Not Permit the State Department's Interpretation: A Statutory Analysis

Under the structure and plain language of §§ 301 and 309 of the INA, children—like those in the Dvash-Banks and Zaccari-Blixt cases—who are born abroad within a legal marriage between a U.S. citizen and a foreign national are entitled to citizenship at birth, as long as the U.S.-citizen parent satisfies the "statutorily prescribed periods of residency in the U.S."[49] In addition to structure and language, the legislative intent of the INA, as well as common-law presumptions at the time of its enactment point to this conclusion.[50]

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45. *Id.* at (e).

46. Complaint for Declaratory and Injunctive Relief at 10, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

47. *Id.*

48. 135 S. Ct. 2584 (2015).

49. Complaint for Declaratory and Injunctive Relief at 2–3, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

50. *Id.* at 8.

First, the textual structure of §§ 301 and 309 indicates that these foreign-born children are entitled to citizenship at birth by virtue of their parents being legally married. Section 309 effectively extends a statutory right conferred in § 301(g) to people born out of wedlock, if the additional statutory requirements that § 309 sets out are also met. Thus, the textual structure of these statutes shows that the inclusion of the "out of wedlock" language in § 309 impliedly requires legal marriage between the "parents" of a person who is a U.S. citizen at birth under § 301(g).[51] Otherwise, it would be redundant to include an additional section that imposes added requirements for parents who have a child under the same circumstances set out in a preceding section, but out of wedlock, if the definition of "parents" in the preceding section did not require legal marriage between them.

Second, there is no requirement of biological relation for conferring citizenship at birth present in the language of § 301(g). According to the doctrine of *expressio unius*,[52] the explicit inclusion of a biological-relation requirement in § 309 implies that Congress did not intend to include such a requirement in § 301(g). Instead, § 301(g) requires only "parenthood" (along with physical-presence requirements), which is a less stringent requirement than biology. As explained above, that requirement of parenthood, for purposes of this statute, demands wedlock. It does not demand, however, that the child be born to biological parents who are married to *each other*; it only requires that the child *not* be born out of wedlock.[53] The United States Court of Appeals for the Ninth Circuit has repeatedly upheld this statutory interpretation, finding that "a blood relationship between a child and a U.S. citizen [is] not required to establish citizenship under [§ 301(g)], if the child in question was not born out of wedlock."[54] The Ninth Circuit first addressed this issue in 2000, in *Scales v. I.N.S.*[55] The petitioner in that case was born in the Philippines to a non-citizen woman who was married to an American-citizen man at the time of the child's birth.[56] Petitioner's mother was pregnant when she met petitioner's father, and the couple married before petitioner was born.[57] Thus, petitioner was born and raised during the couple's marriage, but had no biological connection to his U.S.-citizen father.[58] The Court held that a "straightforward" reading of § 301(g) "indicates . . . that

51. 8 U.S.C. § 1401(g) (2012); 8 U.S.C. § 1409 (2012).

52. United States v. Barnes, 222 U.S. 513, 518 (1912).

53. Complaint for Declaratory and Injunctive Relief at 7, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

54. Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1091 (9th Cir. 2005) (discussing its holding in Scales v. I.N.S., 232 F.3d 1159, 1166 (9th Cir. 2000)).

55. *Scales*, 232 F.3d at 1161.

56. *Id.* at 1161–62.

57. *Id.* at 1162.

58. *Id.*

there is no requirement of a blood relationship."[59] The court acknowledged the Supreme Court's recognition that § 309 was clearly 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,"[60] and found that "[i]f Congress had wanted to ensure the same about a person born in wedlock, 'it knew how to do so.'"[61] The Ninth Circuit again upheld this statutory interpretation in 2005, in *Solis-Espinoza v. Gonzales*,[62] when it held that the petitioner—who was born in Mexico during the marriage of his Mexican father and his U.S.-citizen stepmother—was a U.S. citizen at birth under § 301(g).[63] Despite the lack of a biological connection between the petitioner and his American stepmother, the Court found him to be born in wedlock since the two were mother and son "in every practical sense."[64]

In effect, the structure of the INA codifies the common-law presumption that "every child born in wedlock is the legitimate offspring of the child's married parents" through its inclusion of an additional section that only applies to children born out of wedlock.[65] This "presumption of parenthood" is firmly established in American common law, and its historical framework can be traced back to the "bastardy laws" of England and early America.[66] According to English legal canon, children born within a legal marriage were to be granted privileges that children born of "illicit unions" would be denied, in order to discourage actions that would lead to the birth of children at risk of being left unsupported (and, thus, a liability to the government).[67] This stigmatization of illicit children gave rise to the presumption "that a child born in wedlock was legitimate, which 'elevated child welfare above adult interests' by making it almost impossible for a husband to refute his parental status."[68] Child welfare was understood to be the principal rationale of the presumption, since it was based in the idea that "parenthood within marriage best protects children."[69] The gradual repeal of bastardy laws did not remove

59. *Id.* at 1164.

60. Miller v. Albright, 523 U.S. 420, 435 (2000).

61. *Scales*, 232 F.3d at 1164 (quoting Custis v. United States, 511 U.S. 485, 492 (1994)).

62. 401 F.3d 1090 (9th Cir. 2005).

63. *Id.* at 1091, 1094.

64. *Id.* at 1094.

65. Complaint for Declaratory and Injunctive Relief at 8, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018); *see also* William M. Lopez, Note, *Artificial Insemination and the Presumption of Parenthood: Traditional Foundations and Modern Applications for Lesbian Mothers*, 86 CHI. KENT L. REV. 897, 901 (2011) (explaining that the common law developed the presumption that "a child born in wedlock was legitimate").

66. Lopez, *supra* note 65, at 900.

67. *Id.* (quoting Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 37 (1902)).

68. *Id.* at 901 (quoting Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 243 (2006)).

69. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption*

the presumption of parenthood from American law; courts continued to uphold and apply the common-law presumption to protect children born within marriage—even in cases where the child was not biologically related to the parent under the presumption.[70] In one such case, the Supreme Court affirmed the paternity of a child's father (Gerald D.), even against evidence that another man (Michael H.) was the child's biological father.[71] At the child's birth, the presumption of parenthood was applied to Gerald D., since he was married to the child's mother at the time of birth, and his name was placed on the child's birth certificate.[72] The Court upheld that presumption and affirmed Gerald D.'s legal parenthood—even though Michael H. had conclusively established that he was the child's biological father—citing the presumption, as well as the strong parental connection between Gerald D. and the child, as its reasoning.[73] The strength of the common-law presumption of parenthood, and its apparent codification into the INA, points to the conclusion that children born abroad within a legal same-sex marriage between a U.S. citizen and a foreign national are entitled to citizenship at birth, regardless of biology.

Third, the clear legislative intent of the INA supports a statutory interpretation of § 301(g) that includes foreign-born children of same-sex married couples, where one of the spouses is a U.S. citizen.[74] Congress has made the legislative purpose of the INA clear: "The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united."[75] Federal courts have repeatedly looked to Congress's legislative intent in interpreting the INA and construed its statutes liberally to preserve the family unit.[76] Strict interpretation of INA statutes like § 301(g) would essentially lead to "arbitrary distinctions" between children born to heterosexual couples and children born to homosexual couples that would "detract from[] the purpose of the Act which is to prevent continued separation of families."[77]

Since foreign-born children of same-sex married couples are born into

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of Paternity, 102 W. VA. L. REV. 547, 590–91 (2000).

70. Lopez, *supra* note 66, at 901–02.

71. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

72. *Id.* at 113–14.

73. *Id.* at 124–26.

74. Complaint for Declaratory and Injunctive Relief at 8, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

75. H.R. REP. NO. 85-1199, at 7 (1957).

76. *See, e.g.*, Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005) ("[The INA] should be construed in favor of family units and the acceptance of responsibility by family members."); Kaliski v. Dist. Dir. of I.N.S., 620 F.2d 214, 217 (9th Cir. 1980) ("[T]he purpose of the Act . . . is to prevent continued separation of families.").

77. *Kaliski*, 620 F.2d at 217.

a legal marriage, and § 301(g) itself does not require biological connection to the U.S.-citizen spouse, these children should be entitled to citizenship at birth under the plain language and structure of the INA, especially in light of its clear legislative intent to preserve the family unit.

The State Department should utilize relevant definitions from the INA itself in its application of § 301(g), rather than look to self-created definitions in the Foreign Affairs Manual. Although the INA does not individually define the terms "parent," "mother," or "father," the INA relies upon the relationship described under its definition of "child" for the definitions of those three terms.[78] The INA defines a "child" as:

> (1) . . . an unmarried person under twenty-one years of age who is— . . .
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.[79]

Further, the INA states, "The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection . . . [which defines the term 'child']."[80] The Ninth Circuit has analyzed whether a child born within the marriage of two people who were not both the biological parents of that child was born "out of wedlock" by looking to the definition of "child" as it is presented in the INS.[81] The Ninth Circuit found—and has repeatedly held—that a child can still be born "in wedlock," even if both parties to the marriage are not biologically related to the child, by reasoning that the INA's definition of "child" (and accordingly its definition of "parent") calls for an examination of the local laws of legitimization of the child's or father's residence or domicile.[82] Accordingly, the court considers a child to be born "in wedlock" for the purposes of § 301(g) if the child was born during a legal marriage and the child is considered to be the "legitimate" child of both spouses under the state law of the child's or father's residence or domicile.[83] Many state laws recognize the legal spouse of a biological parent to be the "natural parent" of children born during the marriage.[84] Thus,

78. 8 U.S.C. § 1101(b)(2) (2012).

79. 8 U.S.C. § 1101(b)(1) (2012).

80. 8 U.S.C. § 1101(b)(2).

81. *Solis-Espinoza*, 401 F.3d at 1093.

82. *Id.* at 1093–94; Scales v. I.N.S., 232 F.3d 1159, 1164–66 (9th Cir. 2000).

83. *Solis-Espinosa*, 401 F.3d at 1093–94.

84. *See, e.g.*, CAL. FAM. CODE § 7611(a) (2013) (presuming a person to be a natural parent if that person meets certain requirements).

in many jurisdictions, the Ninth Circuit's interpretation of the INA allows children who are "born to parents who were married at the time of [the child's] birth" to acquire birthright citizenship under § 301(g), even where there is no genetic relationship between the U.S.-citizen parent and the child born in wedlock.[85]

There is an argument, however, that the Ninth Circuit's statutory interpretation undermines important governmental interests articulated by the Supreme Court in *Miller v. Albright*.[86] In that case, the Court justified one of the requirements § 309 imposes on children born out of wedlock by pointing to three governmental interests that the statute protects:

> [1] ensuring reliable proof that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen; [2] encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and [3] fostering ties between the child and the United States.[87]

Here, the Supreme Court does actually articulate a governmental interest in ensuring that a blood relationship exists between a child claiming birthright citizenship and her U.S.-citizen parent. The Supreme Court's articulation of this interest may support the State Department's policy and undermine the Ninth Circuit's interpretation of the term "in wedlock," which does not require a genetic tie between parent and child to confer citizenship. This Supreme Court-articulated governmental interest may be important enough to create an implied requirement of biological relation in all portions of the INA that confer citizenship at birth (which the Department has effectively ensured by inserting and utilizing its own definitions requiring biological connection between parent and child). This argument fails for various reasons.

First, the Supreme Court's articulation of the governmental interest regarding biological connection is specific to people born *out of wedlock*.[88] The Supreme Court specifies that the application of the government's "blood relation" interest is aimed at persons born out of wedlock, while no mention of persons born out of wedlock is made by the Court in terms of the other two governmental interests it articulates.[89] The inclusion of the phrase "out of wedlock" in the "blood relation" government interest—and its exclusion from the other two articulated interests—is significant, because it suggests that the former interest is narrowly applicable only to children born outside the context of a marriage, while the latter interests are broadly applicable to

85. *Solis-Espinosa*, 401 F.3d at 1093.
86. 523 U.S. 420, 421 (1998).
87. *Id.*
88. *Id.*
89. *Id.*

all situations where citizenship is conferred at birth, both in and out of wedlock. The marriage requirement in § 301(g) protects the applicable governmental interest of encouraging a "healthy relationship" between the citizen parent and the child by ensuring to some degree that the child and citizen parent have a close relationship; the physical presence requirement in § 301(g) protects the applicable governmental interest of "fostering ties" between the child and the United States by ensuring the child has some exposure to the United States, even if only through her parent.

Second, the government's "blood relation" interest is *already* undermined when it comes to children born out of wedlock, since the updated definition of "mother" as it is used in § 309 does not necessarily require a biological link between mother and child.[90] In 2014, U.S. Citizenship and Immigration Services (USCIS) issued a new policy clarifying that the definition of "mother" under the INA includes "non-genetic gestational legal mother[s]."[91] This federal-agency policy allows a woman to transmit U.S. birthright citizenship to her child if she gave birth to the child (in or out of wedlock) and if she was the child's legal parent at the time of birth, *regardless of whether she has any genetic relationship to the child*.[92] The blood of a surrogate mother does not pass through the body of a child she carries, and only a few cells of DNA—if any—out of trillions are exchanged between a surrogate mother and child.[93] Accordingly, the governmental interest in having a "blood relation" between a citizen parent and a child born out of wedlock is seriously undermined by the USCIS policy, since the gestational mother of a child born out of wedlock can transfer U.S. citizenship without actually transferring blood or any significant amount of DNA to her child.[94] The federal government cannot logically use the "blood relation" governmental interest to support its policy of classifying children born to married same-sex couples as born "out of wedlock" while *simultaneously* compromising that interest in its other policies. Attorney Manisha Lalwani astutely points out that "mothers and fathers create citizens through their children because [the INA] instills parents with that power, 'not because biology requires or justifies any particular rule.'"[95]

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90. U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY ALERT (2014), https://www.uscis.gov/policymanual/Updates/20141028-ART.pdf [https://perma.cc/A58B-KNZT].

91. *Id.*

92. *Id.*

93. Julie Granka, *Chimeras, Mosaics, and Other Fun Stuff*, TECH (July 13, 2011), http://genetics.thetech.org/ask/ask420 [https://perma.cc/4MKT-NGB9].

94. *Id.*

95. Manisha Lalwani, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707, 713 n.14 (2002) (footnote omitted) (quoting Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93, 94 (2000)).

The doctrine of constitutional avoidance dictates that, in conducting statutory interpretation, a federal court shall "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[96] Here, the federal court is faced with two plausible statutory interpretations of § 301(g) of the INA: the State Department's interpretation as embodied in its policy (which presents constitutional problems[97]) and the Ninth Circuit's interpretation in *Scales* and *Solis-Espinoza*, which relies on definitions internal to the INA. The court can avoid deciding whether the State Department's interpretation is constitutional simply by adopting the Ninth Circuit's plainly constitutional statutory interpretation of § 301(g), and the doctrine of constitutional avoidance requires as much.

The degree of deference that a court must accord to the State Department's interpretation—a federal agency's statutory interpretation—is an important consideration in the analysis of whether the court can exercise constitutional avoidance here. The Foreign Affairs Manual and its accompanying Appendices have never been submitted to notice-and-comment rulemaking, thus they are not afforded the deference that usually accompanies agency regulations.[98] The Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[99] held that "considerable weight should be accorded to an executive department's [reasonable] construction of a statutory scheme it is entrusted to administer," and established the "principle of deference to administrative interpretations."[100] The scope of *Chevron* deference was narrowed, however, in *United States v. Mead Corp.*[101] to apply only to agency interpretations made in notice-and-comment rulemakings.[102] When an agency interpretation is not made in notice-and-comment rulemaking, it is subject to the less-demanding *Skidmore* deference, which requires the court to defer to the agency's statutory interpretation *only if* the court finds that the agency has demonstrated persuasive reasoning for its interpretation.[103] Because the State Department's interpretation of § 301(g) is based on definitions from the Foreign Affairs Manual, the agency's interpretation is not afforded the weightier *Chevron* deference: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, *agency manuals*,

96. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

97. *See infra* subpart III(B).

98. Complaint for Declaratory and Injunctive Relief at 10, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

99. 467 U.S. 837 (1984).

100. *Chevron*, 467 U.S. at 844.

101. 533 U.S. 218 (2003).

102. *See id.* at 226–27 (2003) (holding that notice-and-comment procedures can demonstrate congressional intent for *Chevron* deference in federal agency statutory interpretations).

103. Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[104] Accordingly, the State Department must provide persuasive justification for its interpretation. This subpart of this Note has analyzed potential arguments justifying the State Department's policy, such as a governmental interest in a "blood relation" between a U.S.-citizen parent and their foreign-born child, and examined reasons those justifications are unpersuasive. Lastly, even if a court would give deference to the State Department's interpretation, a constitutional evaluation of the State Department's policy reveals that it unconstitutionally denies same-sex couples one of the "constellation of benefits" linked to marriage,[105] and an unconstitutional interpretation by an agency is not awarded deference.

By consistently applying § 309 rather than § 301(g) to foreign-born children of married same-sex couples, the State Department incorrectly classifies those children as "born out of wedlock." The next subpart of this Note examines how this classification is not only erroneous, but also unconstitutional.

B. The Current Application of the INA Statutes to Same-Sex Parents Is Unconstitutional: Equal Protection, Due Process, and Privacy

Children born to legally wed same-sex couples must be treated the same as children born to legally wed opposite-sex couples for the purposes of their ability to acquire citizenship at birth under § 301(g). The State Department's refusal to apply § 301, rather than § 309, is an unconstitutional refusal to recognize that a child born to a same-sex couple during their marriage is a child of that marriage. In doing so, the State Department fails to recognize the "validity of [same-sex] marriage[s]."[106] This subpart will examine how the State Department's policy is an unconstitutional violation of equal protection, due process, and the right to privacy.

1. Violation of Equal Protection and Due Process.—The Supreme Court has made clear that same-sex couples are entitled to the constitutional guarantees of equal protection and due process in the recognition of their marriages.[107] Thus, any law or regulation "that discriminate[s] on the basis of gender or sexual orientation may be constitutionally suspect."[108] As this Note has already established, the State Department's policy results in disparate

104. *Id.* (emphasis added).

105. *See infra* subpart III(B).

106. Complaint for Declaratory and Injunctive Relief at 3, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

107. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); United States v. Windsor, 570 U.S. 744, 774–75 (2013).

108. *See* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. FORUM 589, 592 (2018) (referring to family law provisions).

treatment between same-sex and opposite-sex married couples in their ability to transfer birthright citizenship to children of their marriages. This section examines Supreme Court precedent that has established same-sex couples' rights to the "constellation of benefits"[109] that accompany marriage, and how the State Department's policy denies them one of those benefits both through its application and enforcement. I also consider how the State Department's policy may be discriminatory on the basis of sex, and thus subject to heightened review under the Equal Protection Clause.

a. The State Department's Failure to Extend the Benefits Linked to Marriage to Same-Sex Couples.—In *United States v. Windsor*,[110] the Court held that the Defense of Marriage Act (DOMA), which defined the term "marriage" under federal law as a "legal union between one man and one woman," deprived legally married same-sex couples (under state law) of their Fifth Amendment rights to equal protection under federal law.[111] The Court stated that "to impose a disadvantage, a separate status, and so a stigma upon all who enter into [lawful] same-sex marriages" under the authority of the States "operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages" and accordingly does not survive constitutional challenge.[112] The plaintiff in *Windsor*—a lesbian widower who sought a marital tax exemption for the inheritance she received from her deceased wife—was denied a benefit that stemmed from a federal recognition of her marriage by DOMA.[113] The situation of the Dvash-Banks and Zaccari-Blixt couples is comparable. While the INA itself does not necessarily deny same-sex married couples the federally recognized ability to transfer birthright citizenship to children of the marriage, the State Department's policy (which is derived from its interpretation of the INA) clearly does. By using a definition of birth "in wedlock" that requires *both* parties of a marriage to have a biological relation to their child, the State Department effectively narrows the definition of "wedlock" to a union between two people of the opposite sex, since same-sex couples *cannot* create a child this way. Consequently, the State Department's policy, *through its narrow and discriminatory definition of "in wedlock,"* effectively denies married same-sex couples the same federally based right that opposite-sex couples enjoy, much like DOMA denied same-sex widowers the federally based right to a tax exemption for inheritances from their spouses.

The most important Supreme Court precedent in the analysis of the

109. *Obergefell*, 135 S. Ct. at 2590.
110. 570 U.S. 744 (2013).
111. *Id.* at 752, 775.
112. *Id.* at 770.
113. *Id.* at 750–51.

constitutionality of the State Department's policy, however, is the Court's recent decision in *Obergefell*. In *Obergefell*, the Court "overturned state laws that barred same-sex couples from marrying as inconsistent with the Constitution's guarantees of due process and equal protection."[114] In its reasoning, the Court asserted that one's choice of life partner is one of the "personal choices central to individual dignity and autonomy" and a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment.[115] In holding that same-sex couples must be allowed to marry, the Supreme Court also held that they must be extended the rights of marriage equally.[116] In the language of the Court, "the constellation of benefits" that have been "linked to marriage" must also be extended to same-sex couples.[117]

The ability of a U.S. citizen to transfer citizenship at birth to a child born abroad within the citizen's legal marriage to a non-citizen is an important "benefit[] . . . linked to marriage"[118] in the United States. A child born abroad to a married couple, where one party is a U.S. citizen, is granted the invaluable benefit of American citizenship at birth *as a direct result of the legal marriage of that child's parents*. This birthright benefit clearly stems from marriage, because if the child's parents were *not* married, birthright citizenship would depend entirely on other factors, laid out in § 309. It follows from *Obergefell* that to allow opposite-sex couples to enjoy this important and tangible benefit while denying the same benefit to same-sex couples is a violation of equal protection and due process. Under the State Department's policy, same-sex married couples are "barred from exercising a fundamental right," which *Obergefell* proscribes.[119]

As the various cases that brought *Obergefell* to the Supreme Court make apparent, the Court's decision aimed to protect same-sex married couples from losing the benefits attached to their legal marriages while they lived or spent time in states that had not recognized same-sex marriage. Although the Court accordingly focused on discrimination against same-sex couples by state law, its holding and analysis does not require such a narrow characterization. This notion is supported by the fact that the Court repeatedly references, and seems to build its analysis off of, its decision in *Windsor*.[120] As already discussed, *Windsor* dealt with the denial of a *congressionally* created right to a woman in a same-sex marriage because of the federal law's

114. Complaint for Declaratory and Injunctive Relief at 9, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018); *see also Obergefell*, 135 S. Ct. at 2608 (holding that the Constitution grants same-sex couples the right to enjoy the privileges of marriage).

115. *Obergefell*, 135 S. Ct. at 2597.

116. *Id.* at 2584, 2601, 2604–05.

117. *Id.* at 2601.

118. *Id.* at 2590.

119. *Id.*

120. *Id.* at 2597, 2599, 2600, 2601.

failure to recognize her marriage. This argument ultimately fails because the Court in *Obergefell* merely extends the *Windsor* mandate—for the federal government to recognize legal same-sex marriage—to the states themselves.[121]

One of the Court's bases for establishing same-sex couples' right to marry in *Obergefell* was to protect and create stability for children, both from stigma and from the instability created by lack of marriage recognition.[122] The State Department's policy runs counter to both concerns. First, treating children of same-sex marriages differently for citizenship purposes is blatantly stigmatizing. The Court in *Obergefell* states that the failure to recognize same-sex marriage "harm[s] and humiliate[s] the children of same-sex couples"[123] and that "without the recognition, stability, and predictability marriage offers, . . . children suffer the stigma of knowing their families are somehow lesser."[124] A powerful demonstration of the policy's effect of treating same-sex marriages as "lesser" is the fact that the Dvash-Banks *twin* boys, who are being raised by married parents, are treated differently in terms of their citizenship solely because of their parents' same-sex union.[125] When the Zaccari-Blixt family visits the United States, the children must separate in the airport because of their parents' same-sex union: Massi waits in the line for Americans, while Lucas must wait in the line for foreigners.[126] As the children grow older, they will certainly realize as much and feel the "harm and humiliation" the Court sought to prevent. This policy strips the protection the Court intended to ensure children of same-sex couples "by giving recognition and legal structure to their parents' relationship,"[127] and denies those children the opportunity to "understand the integrity and closeness of their own family and its concord with other families in their community."[128] Accordingly, the State Department's policy is incompatible with one of the primary rationales behind the Court's decision in *Obergefell*.

Second, failing to recognize the citizenship of some foreign-born children of same-sex marriages can have profoundly destabilizing effects on the family. Preventing the instability to children and families created by the failure to recognize same-sex marriage was another important rationale in the *Obergefell* decision: "Marriage . . . affords the permanency and stability important to children's best interests."[129] The State Department's failure to

121. *Id.* at 2607–08.

122. *Id.* at 2600–01, 2607.

123. *Id.* at 2601.

124. *Id.* at 2600.

125. Complaint for Declaratory and Injunctive Relief at 3, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

126. Fadel, *supra* note 10.

127. *Obergefell*, 135 S. Ct. at 2600.

128. *Id.*

129. *Id.*

recognize same-sex marriage—and thus birthright citizenship—in the context of § 301(g) contravenes this objective because its effect is significant instability for both children of same-sex unions and their families as a unit. This is vividly illustrated by the situation of the Dvash-Banks family, who are living in the United States, yet are unsure of how long they will be able to remain in the country because of Ethan's lack of legal status.[130] Their inability to leave the country to visit the twins' great-grandparents in Israel because of the risk that they will be unable to return home with Ethan is further evidence of instability.[131] The fact that the Zaccari-Blixt family has felt compelled to live outside the United States because of Lucas's lack of status demonstrates how the State Department's policy may even function to effectively strip a U.S. citizen (and therefore her entire family) of the full benefits of her citizenship.[132] Allison feels she has been "kicked out of her own country," because she "wanted to be with the person she loved."[133] In this way, the State Department's policy conflicts with the purpose of the INA and the protections for children of same-sex couples established by the Supreme Court.

In *Pavan v. Smith*,[134] the Court struck down a state law that failed to extend one of the benefits linked to marriage to same-sex couples with regard to parentage rules.[135] The Court in *Pavan* held that "Arkansas's refusal to list a woman on the birth certificate of a child born to her same-sex spouse was inconsistent with its prior declaration in *Obergefell*,"[136] because Arkansas state law generally requires the name of a married woman's male spouse to appear on a child's birth certificate when she gives birth, "regardless of his biological relationship to the child."[137] The State Department policy is similarly inconsistent with *Obergefell*. It denies same-sex couples the same benefits linked to marriage that opposite-sex couples receive by denying the "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."[138]

130. Tchekmedyian, *supra* note 1.

131. *Id.*

132. Fadel, *supra* note 10.

133. *Id.*

134. 137 S. Ct. 2075 (2017).

135. *Id.* at 2079.

136. Joslin, *supra* note 109, at 595.

137. *Pavan*, 137 S. Ct. at 2077.

138. Complaint for Declaratory and Injunctive Relief at 9, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018).

b. The State Department's Policy Discriminates Against Same-Sex Couples Based on Sex.—Even more recently, courts have upheld constitutional challenges of sexual-orientation discrimination outside of family law, in light of the constitutional shift created by *Obergefell*.[139] The recognition of sexuality-based discrimination reveals the "sea change in the constitutional framework governing same-sex marriage" that undoubtedly also affects immigration law.[140] In *Zarda v. Altitude Express, Inc.*,[141] the U.S. Court of Appeals for the Second Circuit held that "sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account."[142] By formally characterizing sexual-orientation discrimination as a form of sex discrimination, the Second Circuit creates another path for striking down the State Department's policy on the basis of discrimination, as it inappropriately considers the sex of a child's parents in its analysis of whether the child was born "in wedlock." While the actual language of § 301(g) is completely devoid of any mention of sex or gender,[143] the State Department's application of the statute considers the sex of a foreign-born child's parents through utilization of its definition of "in wedlock." By requiring a foreign-born child's biological parents to be married to one another to qualify under § 301(g), the State Department looks at the comparative sex of the child's married parents to determine whether that is a scientific possibility.[144] If the child's parents belong to the same sex, the State Department refuses to apply § 301(g) and instead applies the more stringent § 309 to the child.[145]

There is a fairly strong argument that the State Department's practice is not sex discrimination because the Department has discretion to require DNA testing to determine the biological parents of any foreign-born child seeking citizenship through § 301(g), including those with opposite-sex parents, and can accordingly deny birthright citizenship through this statutory pathway if the child is not the biological offspring of both parties to a heterosexual marriage. Accordingly, the policy does not discriminate *solely* based on sexual orientation. However, this argument is undermined by the fact that the policy's effect is to bar *all* same-sex married parents from ever transferring citizenship through § 301(g), while barring only *some* opposite-sex married parents from doing so (for example, when a couple uses assisted reproductive

139. *E.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d Cir. 2018) (en banc), *petition for cert. filed*, No. 17-1623 (June 1, 2018).

140. *Id.* at 131 n.33.

141. 883 F.3d 100 (2d Cir. 2018) (en banc), *petition for cert. filed*, No. 17-1623 (June 1, 2018).

142. *Id.* at 131.

143. 8 U.S.C. § 1401(g) (2012).

144. Sopelsa, *supra* note 19.

145. *Id.*

technology because one or both parties to the marriage suffer from fertility problems). It is significant that same-sex couples who choose to conceive their own children virtually *always* use assisted reproductive technology, while opposite-sex couples who choose to conceive their own children rarely use assisted reproductive technology.[146] Same-sex married couples can never have a child "in wedlock" under the State Department's policy, while opposite-sex married couples generally can. In addition, the effect of the State Department's statutory interpretation is to hurt both same-sex married couples and opposite-sex couples that suffer from infertility, which has negative public-policy consequences and ultimately goes against the legislative intent of the INA to preserve the family unit.

Another consideration is the fact that the Supreme Court has struck down portions of § 309 itself—the statute to which the State Department's policy automatically sends same-sex parents—as violations of the Equal Protection Clause. In *Sessions v. Morales-Santana*,[147] the Supreme Court held that the different lengths in the physical-presence requirements for men (five years pre-birth) and women (one year pre-birth) for purposes of transferring citizenship under § 309 violated equal protection.[148] The Court's analysis in denouncing the sex-based distinctions in § 309 sheds some light on the unconstitutionality of the State Department's interpretation of § 301(g). The Court maintained that rules about children, that "grant[] or deny[] benefits 'on the basis of the sex of the qualifying parent,' . . . differentiate on the basis of gender[] and therefore attract heightened review under the Constitution's equal protection guarantee."[149] Although § 301(g) itself does not explicitly differentiate based on the sex of the parents involved, the State Department's interpretation of the statute necessarily excludes American citizens that are party to a binational same-sex marriage from transferring birthright citizenship through § 301(g) based on the nature of their sex *in relation to* the sex of their partner.[150] The State Department's policy, therefore, triggers heightened review under equal protection.

Under a heightened-review standard, the State Department must show that its policy "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement

146. One in eight married, heterosexual couples suffer from infertility and seek out assisted reproductive techniques (ARTs). John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 324 (2004).

147. 137 S. Ct. 1678 (2017).

148. *Id.* at 1686, 1700–01.

149. *Id.* at 1689.

150. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 131 (2d Cir. 2018) (en banc), *petition for cert. filed*, No. 17-1623 (June 4, 2018) ("[S]exual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.").

of those objectives."[151] The State Department will not be able to satisfy this standard. Its policy furthers no rational, compelling state interest. As this Note has discussed, any articulated interest that the government has in the genetic relationships between U.S.-citizen parents and their foreign-born children for purposes of transferring citizenship is limited to circumstances where a child is born outside of a legal marriage.[152] Even within that context, the government's interest in a genetic relationship is not an "exceedingly persuasive justification"[153] because that interest is undermined by a gestational mother's ability to transfer U.S. citizenship at birth without having any genetic relationship with her child.[154] In circumstances where a child is born within a marriage, there is no rational reason for the U.S. government to require a biological relationship between a U.S.-citizen parent and that child in order to transfer citizenship, unless the State Department is prepared to put forth an argument that there is something inherently "superior" about American DNA that entitles children who possess it at birth to citizenship. This argument would be absurd, considering that the Constitution entitles any child born *within* the United States to citizenship at birth, even if neither biological parent is an American citizen.[155] The fact that a child was born within the sanctity and intimacy of a legally recognized marriage, where one party is a U.S. citizen (and has satisfied the physical-presence requirements), surely satisfies the legitimate governmental interests in fostering ties between the citizen parent and child, and between the child and the United States.[156]

Another argument supporting the State Department's policy is that the biological-relationship requirement protects against fraudulent pathways to U.S. citizenship at birth. For example, a pregnant foreign national may solicit a U.S. citizen to marry her before the birth of the child for the purpose of acquiring U.S. citizenship for the child. Importantly, though, the U.S. government already has established procedures to protect against the use of fraudulent marriages for the purpose of gaining status or citizenship in the United States.[157] Section 275(c) of the INA sets out criminal penalties of

151. United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (internal quotations omitted)).

152. *See supra* subpart III(A).

153. *See Virginia*, 518 U.S. at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

154. *See supra* subpart III(A).

155. U.S. CONST. amend. XIV, § 1.

156. *See* Miller v. Albright, 523 U.S. 420, 484 (2000) (describing government interests in establishing a child's U.S. citizenship).

157. *See* U.S. IMMIGRATION AND CUSTOMS ENF'T, MARRIAGE FRAUD IS A FEDERAL CRIME (2016), https://www.ice.gov/sites/default/files/documents/Document/2016 /marriageFraudBrochure.pdf [https://perma.cc/7Q83-7RHA] ("To combat marriage fraud and other similar crimes, HSI created the Document and Benefit Fraud Task Forces . . . in 2006. Led by HSI, the DBFTFs build upon existing partnerships with other federal and state law enforcement

imprisonment up to five years and a fine up to $250,000 for any "individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws."[158] Additionally, any U.S. citizen suspected of participating in marriage fraud could face criminal prosecution, including fines or imprisonment.[159] In 1986, Congress passed the Immigration Marriage Fraud Amendments in order to deter immigration-related marriage fraud.[160] These laws and practices serve as strong and sufficient deterrents against the commission of marriage fraud. The argument that the State Department's interpretation of § 301 serves as a protective measure against fraud is unconvincing, primarily because there are already-existing and more effective procedures to detect and protect against fraudulent marriage in the immigration context. The State Department's policy, then, only harms genuine families who are trying to stay together. Ultimately, the government interest in ensuring a biological relationship between a married U.S.-citizen parent and a child born within that parent's marriage is not compelling enough to justify the State Department's discriminatory policy.

In sum, children born to legally wed same-sex couples should be treated the same as children born to legally wed opposite-sex couples for the purposes of § 301(g). Wedlock is presumptively required under the statute, but the statute's text makes no mention of sex or gender, so the State Department's policy creates a discriminatory distinction that is not present in § 301(g) itself. This distinction serves to discriminate on the basis of sex and fails to extend to same-sex couples one part of the "constellation of benefits" linked to marriage. Any argument that LGBT citizen parents can easily facilitate the citizenship of their foreign-born children simply by adopting them misses the point. The State Department's policy fails to extend the right to transfer *birthright* citizenship equally—a status which carries its own significant benefits.[161]

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investigators with document and benefit fraud expertise. The Task Forces also ally themselves with U.S. Attorneys, to use a comprehensive approach against the criminal organizations and beneficiaries behind these fraudulent schemes.").

158. 8 U.S.C. § 1325(c) (2012).

159. *See* 8 U.S.C. § 1325(d) (2012) (setting out criminal penalties of fines and/or imprisonment for establishing a "commercial enterprise" to fraudulently acquire green cards for immigrants); United States v. Vickerage, 921 F.2d 143, 147 (8th Cir. 1990) (affirming a U.S. citizen's criminal conspiracy conviction for participating in marriage fraud).

160. Pub. L. No. 99-639, 100 Stat. 3537 (stipulating that foreign nationals deriving their immigrant status based on a marriage of less than two years are "conditional immigrants," and that they must apply at a USCIS office during the 90-day period before two years of having received conditional status in order to remove it; if the aliens cannot show that the marriage through which the status was obtained was and is a valid one, their conditional immigrant status may be terminated and they may become deportable).

161. Benefits include the ability to run for the office of President and foregoing the cost and process of adoption.

2. Violation of the Right to Privacy.—In addition to its equal protection and due process issues, the State Department's policy seriously undermines U.S. citizens' constitutionally recognized right to privacy. Because of its effect, the State Department's policy is very likely to play a role in the private procreative decisions of LGBT citizens who are married to foreign nationals. Supreme Court precedent protects against intrusive governmental invasions of privacy, *especially marital privacy*.[162] The State Department's policy creates a type of intrusion on marital privacy similar to those that the Supreme Court has restrained in the past, and does so without the justification of a strong governmental interest.

In *Griswold v. Connecticut*,[163] the Supreme Court first recognized that the Bill of Rights creates zones of privacy protected by the Constitution.[164] The First, Third, Fourth, and Ninth Amendments, together, create the constitutional right to privacy in marital relations.[165] The Court accordingly found that the Connecticut law at issue, which forbade the use of contraceptives, "unduly invaded a zone of marital privacy protected by the Bill of Rights."[166] The privacy right established in *Griswold* was the basis for the Court's subsequent decisions in *Eisenstadt v. Baird*[167] and *Roe v. Wade*[168]—decisions that further secured the right to privacy in procreative decisions.[169] In *Eisenstadt*, the Court struck down a Massachusetts law that permitted only married couples to obtain contraceptives.[170] In doing so, it declared that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[171] In *Roe*, the Court held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[172] Thus, the Court has consistently used the constitutional right to privacy to protect individual's autonomy to make decisions regarding procreation.

The decision of *how* to bear or beget a child fundamentally affects a person in the same way that the decision of *whether* to bear or beget a child affects a person, because the decision of how to beget a child is encompassed

162. Griswold v. Connecticut, 381 U.S. 479, 486–87 (1965) (Goldberg, J., concurring).

163. 381 U.S. 479 (1965).

164. *Id.* at 484.

165. *Id.* at 484–85.

166. Eisenstadt v. Baird, 405 U.S. 438, 461 (1972) (White, J., concurring).

167. 405 U.S. 438 (1972).

168. 410 U.S. 113 (1973).

169. *See generally Roe*, 410 U.S. 113 (holding Texas statutes criminalizing abortion in violation of a woman's constitutional right to privacy); *Eisenstadt*, 405 U.S. 438 (establishing the right of unmarried people to possess contraception on the same basis as married couples).

170. *Eisenstadt*, 405 U.S. at 454–55.

171. *Id.* at 453.

172. *Roe*, 410 U.S. at 153.

in the broader decision of whether to do so. A person's decision to use assisted reproductive technology in family planning is a personal and intimate choice that should not be intruded upon by the government. The fact that these family planning decisions are being made by *married* couples—in the context of the citizenship issue herein examined—further supports the notion that the State Department's policy "operates directly on an intimate relation of [a married couple],"[173] and thus infringes on the marital right to privacy. In light of its effects, the State Department's policy is very likely to hinder and control the private procreative decisions of LGBT citizens who are married to foreign nationals. For example, the citizen-wife in a binational lesbian marriage may feel compelled to bear all of the couple's children, or the citizen-husband in a binational gay marriage may feel compelled to use only his sperm in the procreation of his and his husband's children. Same-sex couples may feel compelled to ensure that their children are actually born within the United States, despite compelling reasons to have their children abroad.[174] Another illustrative example is the fact that the Dvash-Banks parents hoped to never disclose to their children, or to anyone, which son was biologically related to which father. The effect of the State Department's policy makes this hope virtually impossible for their family.[175] For the government to require invasive DNA testing of children born during same-sex marriages in order to grant birthright citizenship is to intrude into the private marital lives of U.S. citizens and potentially reveal information that the marital couple intended to keep secret or never even learn themselves.

In conclusion, the State Department's policy unconstitutionally violates the rights to equal protection, due process, and privacy by refusing to recognize children born to legally married same-sex couples as "born in wedlock." In light of new constitutional mandates regarding same-sex marriage and LGBT rights, the Court's statement in *Obergefell* is particularly applicable to the State Department's policy—"new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[176]

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173. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

174. For example, family who could provide support during childbirth or early infancy may not be present in the United States.

175. Even if the district court grants the requests for injunctive and declaratory relief in the Dvash-Banks complaint, the Dvash-Banks family has been irreversibly injured by the State Department's policy. The Dvash-Banks' sons will inevitably learn of their biological relations to their respective fathers because of the litigation their parents have undertaken to fight the policy.

176. Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

IV. A Call for Federal Action: Bringing Immigration Regulations into Compliance with Revised Constitutional Mandates

As this Note has argued, the State Department's policy denies birthright citizenship to some foreign-born children of same-sex married couples. The State Department's interpretation of § 301(g) of the INA raises serious constitutional concerns and has now been challenged in federal court.[177] Upon a determination that the State Department's interpretation does not get deference, the Court should adopt the Ninth Circuit's interpretation of § 301(g).

A potential problem in adopting the Ninth Circuit's interpretation, however, is the fact that its application requires—and, correspondingly, transmission of birthright citizenship depends on—the application of state family law.[178] This may create a fractured and non-uniform application of § 301(g), as some state laws still do not apply the presumption of parenthood to the same-sex spouses of a child's biological parent.[179] While this non-uniform application may be permissible in the family law context, uniformity has been considered essential to the integrity of the U.S. immigration system.[180] Uniformity in immigration law "serve[s] systemic and expressive interests by conveying a unified sense of how the United States will interact with the people of the world" and "provides a foundation for the protection of immigrants' rights by advancing a clear conception of how the country conceptualizes the value of immigration and the status of immigrants within the polity."[181] Given the need for uniformity in immigration law and the constitutional problems with the State Department's current policy, the State Department should replace its current definitions of "in wedlock" and "out of wedlock" in the Foreign Affairs Manual with definitions that are inclusive of same-sex family structures. The State Department should rely on the Uniform Parentage Act of 2017 (UPA) in crafting new definitions.

Given the plain text of § 301(g), the family-law doctrine of presumption of parenthood should play a role in the State Department's development of

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177. *See generally* Complaint for Declaratory and Injunctive Relief, Dvash-Banks v. U.S. Dep't of State, No. 2:18-CV-00523-JFW-JC (C.D. Cal. Jan. 22, 2018); Preliminary Statement, Blixt v. U.S. Dep't of State, No. 1:18-CV-00124 (D.D.C. Jan. 22, 2018).

178. *See supra* subpart III(A).

179. Twenty-nine states do not have statutes that create a presumption of parenthood. Twenty-one states apply some sort of presumption of parenthood: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, and Washington. U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Rights of Presumed (Putative) Fathers: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY 1, 2 (Oct. 2007), https://www.childwelfare.gov/pubPDFs/putativeall.pdf [https://perma.cc/FKH6-ZJAR].

180. *See generally* Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. FORUM 499 (2014) (recognizing Justice Sotomayor for the emphasis she placed on uniformity as a means of promoting fairness and justice).

181. *Id.* at 501.

new definitions of "in wedlock" and "out of wedlock," because the most significant term in the statute's language is the word "parent." As discussed, § 301(g) makes no mention of sex or gender, but rather simply states that a foreign-born child "of *parents* one of whom is an alien, and the other a citizen of the United States" is a U.S. citizen at birth.[182] While the structure of the INA makes marriage a requirement under § 301(g), the statute itself only requires "parenthood" under its plain text. The UPA is a "comprehensive statutory scheme for determining a child's legal parentage" that seeks to "help states address newly emerging legal issues or to respond to developments in an area of law."[183] By using gender-neutral guidance from the UPA to structure definitions that dictate whether a child is born in or out of wedlock, the State Department can ensure that its application of § 301(g) will not unfairly deny same-sex couples the ability to transmit birthright citizenship to their foreign-born children. In the same way that the UPA is a "concrete way for states to reform their parentage laws to correct . . . inadequacies," the UPA's definitions and policies can be used for the purpose of reforming the federal government's immigration policies to correct inadequacies with regard to same-sex couples that have become apparent in light of Supreme Court decisions.[184]

For example, the UPA states that an individual is presumed to be a parent of a child if "the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage" or "the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child."[185] In specifically addressing assisted reproduction, the UPA states, "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."[186] By using these definitions and standards in the creation of new definitions, the State Department would make a necessary adaptation to its policy and bring its policy into compliance with the decisions of *Windsor* and *Obergefell*. We have already seen a concerted effort from the federal government to change definitions in other areas of immigration law to include LGBT marriages after the Court's decision in *Windsor*.[187]

The presumption of parenthood, as articulated by the UPA and the states

182. 8 U.S.C. § 1401(g) (2012) (emphasis added).

183. Joslin, *supra* note 109, at 597.

184. *Id.* at 592–93.

185. UNIF. PARENTAGE ACT § 204(a)(1)–(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2017).

186. *Id.* § 703.

187. U.S. CITIZENSHIP & IMMIGR. SERVS., *Same-Sex Marriages*, DEP'T OF HOMELAND SEC. (July 1, 2013), https://www.uscis.gov/family/same-sex-marriages [https://perma.cc/97SR-KQEB].

that have adopted it, should apply in the context of § 301(g) of the INA, in light of recent Supreme Court decisions that have altered the "constitutional framework governing same-sex marriage."[188] The State Department can ensure compliance with this new constitutional framework by adopting this presumption into its policy.

V. Conclusion

U.S. citizens in binational same-sex unions are entitled to be able to transfer birthright citizenship to their foreign-born children in the same way U.S. citizens in binational opposite-sex unions are able to. A plain-view reading and structural analysis of the INA points to the conclusion that these children should be entitled to citizenship at birth under the statute as it stands, especially in light of its clear legislative intent to preserve the family unit. The State Department, however, in applying its own definitions of "in wedlock" and "out of wedlock" in interpreting the INA, prevents U.S. citizens in same-sex marriages from ever being able to transfer citizenship to their children though § 301(g). The State Department's definitions make it impossible for a child born during a same-sex marriage to be considered born "in wedlock." The State Department's interpretation and policy results in an unconstitutional violation of equal protection, due process, and the right to privacy. Federal Courts should strike down the policy, and the State Department should look to the UPA in crafting new definitions of "in wedlock" and "out of wedlock" that are inclusive of same-sex family structures. Just as the LGBT litigants who brought about the decisions of *Windsor*, *Obergefell*, and *Pavan* did, the same-sex couples affected by the State Department's unfair policy merely "ask for equal dignity in the eyes of the law."[189] Once again, it seems clear that "[t]he Constitution grants them that right."[190]

188. Zarda v. Altitude Express, Inc., 883 F.3d 100, 131 n.33 (2d Cir. 2018) (en banc).
189. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).
190. *Id.*