

CORRECTING ANOMALIES IN THE UNITED STATES LAW OF CITIZENSHIP BY DESCENT

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INTRODUCTION

Imagine two United States citizens, Joseph and Josephine. Joseph, who has lived in the United States his whole life, moves overseas at the age of thirty and has a child with a woman who is not a U.S. citizen. Although Joseph never marries the child's mother or thinks to do any paperwork related to the child's citizenship, the two parents live together with their child, and Joseph provides financial support for the family. Josephine, who was born in the United States but left with her parents when she was three years old and has never returned, decides to make some money as an egg donor for an infertile foreign couple; she never meets the child conceived from her egg. Under current law, Joseph's child will not be a U.S. citizen, but the child conceived from Josephine's egg almost certainly will be.¹

If a hypothetical based on egg donation seems too obscure, imagine that Josephine's twin sister Jane, who left the United States at the same time Josephine did, conceives a child with a foreign man and is contemplating getting married before the child's birth to make the child legally "legitimate." If she consults a lawyer, Jane may be shocked to find that her child will be a U.S. citizen if she remains unmarried, but will not be a citizen if she marries the child's father before the child is born.

If that result is not surprising enough, imagine a third U.S. citizen—call her Molly—who grew up in the overseas household of a member of the U.S. military or a civilian employee of the U.S. government, and has never returned to American soil for an unbroken year. While still overseas, she conceives children by a foreign father. Under current law, those children will be citizens if Molly marries their father, but will *not* be citizens if they are born out of wedlock. Even Molly's foreign-born out-of-wedlock children by a *U.S.-citizen* father may not be citizens if their father, like Joseph, lives with and supports the family but does not marry Molly or do any paperwork. These odd results may also occur if Molly grew up living in the United States but has spent every July since her birth on overseas vacations, or if she grew up in the U.S.-controlled Northern Mariana Islands.

Still more peculiarly, if Molly's twin sister Meryl (who grew up in the same overseas military household or went on the same annual vacations) has a foreign-born child whose father is from the U.S. possession of American Samoa, that child may not be a U.S. citizen, or even a "noncitizen national" like its father,

1. For a similar comparative-hypothetical structure, see Melissa Fernandez, Note, *Title 8 U.S.C. § 1409 of the United States Immigration and Nationality Act—Children Born Out of Wedlock: Undermining Fathers' Rights and Perpetuating Gendered Parenthood in Citizenship Law*, 54 FLA. L. REV. 949, 951–52 (2002). Ms. Fernandez's single hypothetical pair of citizen parents does not include an egg donor or persons previously physically present in the United States for varying lengths of time, but she does contrast a U.S.-citizen mother who leaves her foreign-born child in its foreign father's care and returns to the United States with a U.S.-citizen father who cares for and raises his foreign-born child (in the United States, after the foreign mother has abandoned the child) but is unaware of the law's requirements.

whether it is born in or out of wedlock. This is especially odd considering that if the child's American Samoan father had fathered a foreign-born child whose mother had no connection to the United States *at all*, that child *would* be a noncitizen national like its father—even if the child's father, like Meryl, had grown up in an overseas military household or gone on annual one-month foreign vacations, and apparently even if the child's father, like Joseph, failed to marry the child's mother or do any other paperwork.

In this Article, I explore the legal mechanisms underlying the above hypotheticals in order to argue that there are anomalies in the current United States law of citizenship by descent that should be corrected. Part I explains the basic structure of the current American law of citizenship by descent. Part II explores the different treatment of male and female unmarried parents as in the Joseph/Josephine hypothetical, and discusses how poorly the justifications offered for this treatment by the Supreme Court's 2001 decision in *Nguyen v. INS*² accord with the effect of the law as it is administratively interpreted in practice. Part III looks at the implications of marriage in situations like the Jane and Molly hypotheticals, and Part IV examines noncitizen nationality and the problems it creates both in the Meryl hypothetical and elsewhere. In Part V, I propose several adjustments to the law that would prevent most of the absurd results possible under the current system. I advocate replacing the different treatment of males and females with a series of formally gender-neutral criteria, revising other parts of the legal structure that now provide problematically different rules for similar cases, and essentially abolishing the status of noncitizen nationality.

Current U.S. citizenship-by-descent law is full of complications that act more as traps for the unwary than reasonable ways of accomplishing legitimate policy goals—complications so severe that counsel in *Nguyen*, the most famous citizenship-by-descent case of this decade, may have been led astray by them. For the more wary who do figure out the implications of its details, the law presents perverse incentives and peculiar windfalls. It needs to be changed.

I. THE STRUCTURE OF AMERICAN CITIZENSHIP-BY-DESCENT LAW

There are essentially two ways for a child to acquire citizenship in the United States, or any other nation, at birth. First, the child may be granted citizenship in the country where it is born, regardless of the citizenship status of its parents. This is known as *jus soli* citizenship³ and is mandated in the United States by the command of the Fourteenth Amendment that “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”⁴ Second, the child may be granted citizenship by the nation of which one

2. *Nguyen v. INS*, 533 U.S. 53 (2001).

3. STEPHEN H. LEGOMSKY, IMMIGRATION & REFUGEE LAW & POLICY 1193–94 (3d. ed. 2002). *Jus soli* literally means “right of the land.” *Id.* at 1193.

4. U.S. CONST. amend. XIV, § 1; *accord* Immigration and Nationality Act (INA) § 301(a), 8 U.S.C. 1401(a) (2004) (restating the rule that “a person born in the United States, and subject to the jurisdiction thereof” is a citizen of the United States at birth). As currently interpreted, the limitation that a person born in the United States must be “subject to the jurisdiction thereof” in order to acquire *jus soli* citizenship under the Fourteenth Amendment excludes only three classes of persons: members of Indian tribes (who are

or both of its parents are citizens, regardless of where it is born. This is known as *jus sanguinis* citizenship or citizenship by descent.⁵ A child who is born in a nation that awards *jus soli* citizenship, and whose parents are citizens of one that awards citizenship by descent, may become a citizen of both nations—a dual citizen.⁶

Under current U.S. law, citizenship by descent is provided for primarily in sections 301(c), 301(g), 309(a), and 309(c) of the Immigration and Nationality Act (the INA).⁷ Sections 301(c) and 301(g) of the INA appear to lay out

granted citizenship by statute in INA section 301(b), 8 U.S.C. § 1401(b)), “children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state.” *United States v. Wong Kim Ark*, 169 U.S. 649, 681–82 (1898). Peter Schuck and Rogers Smith have suggested that the “subject to the jurisdiction” clause should also exclude children of illegal and legal but nonimmigrant aliens, to whose residence the United States has never consented. PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 214–15 (1998).

5. LEGOMSKY, *supra* note 3, at 1193. *Jus sanguinis* literally means “right of the blood.” *Id.*

6. *Id.* at 1219–20.

7. INA §§ 301(c), 301(g), 309(a), 309(c), 8 U.S.C. §§ 1401(c), 1401(g), 1409(a), 1409(c). The current law generally applies only to persons born since its enactment, with previous citizenship-by-descent laws controlling the citizenship status of persons born while the laws were in effect. LEGOMSKY, *supra* note 3, at 1196; *see* INA § 405, codified at 8 U.S.C. § 1101 note (Savings Clause) (providing in subsection (a) that “Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . status . . . existing, at the time this Act shall take effect; but as to all such . . . rights . . . the statutes or parts of statutes repealed by this Act are . . . hereby continued in force” and in subsection (c) that “[e]xcept as otherwise specifically provided . . . the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired”). This Article focuses on current law because it is current law that we must decide whether to reform for children born in the future. There are, however, a few retroactive provisions in current law. *E.g.*, INA §§ 301(h), 309(b), 8 U.S.C. §§ 1401(h), 1409(a); 8 U.S.C. § 1401a.

Sections 301(d)–(f) of the INA (codified at 8 U.S.C. § 1401(d)–(f)) concern issues involving the interaction between citizenship and noncitizen nationality, and section 308 of the INA (codified at 8 U.S.C. § 1408) concerns the bestowal of noncitizen nationality on both *jus soli* and *jus sanguinis* bases. For discussion of these sections and of noncitizen nationality in general, *see infra* Part IV.

Section 301(h) of the INA provides for citizenship by descent, but does not relate to persons born at the present time or in the future. It bestows citizenship at birth on “a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who, prior to the birth of such person, had resided in the United States.” 8 U.S.C. § 1401(h). This provision, added in 1994 by the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 101, 108 Stat. 4305, 4306, is a retroactive correction of the sexually discriminatory law in place before May 24, 1934, which had permitted only the foreign-born children of American *fathers* to acquire citizenship by descent. *See* LEGOMSKY, *supra* note 3, at 1200–01.

Section 309(b) of the INA is another minor provision of citizenship-by-descent law applicable only to persons born in the past. It renders INA section 301(g) applicable to certain children born before the INA was enacted in 1952, specifically “a child born out of wedlock [between] January 13, 1941, and . . . December 24, 1952 . . . if the paternity of

universally applicable conditions for acquisition of citizenship by descent, but sections 309(a) and 309(c) then provide overriding rules for persons born out of wedlock.

This statutory scheme is administered by several different executive departments. The Attorney General's previous authority to administer the INA with respect to persons in the United States⁸ has been largely given over to the Secretary of Homeland Security,⁹ but the Attorney General retains the power to make rulings of law that control over those of other administrators;¹⁰ this power has been partially delegated to immigration judges and the Board of Immigration Appeals,¹¹ which review certain decisions of the subdivisions within the Department of Homeland Security (DHS) that have taken over the functions of the

such child is established at any time and while such child is under the age of twenty-one years by legitimation." 8 U.S.C. § 1409(b).

8 U.S.C. § 1401a, not enacted as part of the INA, 8 U.S.C. § 1401a note (Codification), and not to be confused with 8 U.S.C. § 1401(a), *see supra* note 4, is another minor provision of citizenship-by-descent law that, like INA section 309(b), renders INA section 301(g) applicable to certain persons born before the effective date of the INA. It applies section 301(g) to

a child born outside of the United States and its outlying possessions after January 12, 1941, and before December 24, 1952, of parents one of whom is a citizen of the United States who has served in the Armed Forces . . . after December 31, 1946, and before December 24, 1952, and whose case does not come within the provisions of section 201(g) or (i) of the Nationality Act of 1940.

8 U.S.C. § 1401a. Sections 201(g) and (i) of the Nationality Act of 1940 applied, as INA section 301(g) now does, to children born abroad of one citizen parent and one alien parent, but contained different residence requirements for parents and required that children of such parents had to reside in the United States for five years before the age of twenty-one in order to retain the citizenship they were granted. *See* 8 U.S.C. 1401a note. *See also infra* note 238 (discussing section 201(i) as applied to children born out of wedlock).

8. INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2002) (amended 2003); *see infra* note 13 and accompanying text.

9. *See* INA § 103(a)(1), 8 U.S.C.S. § 1103(a)(1) (LEXIS 2005) (stating that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] . . . except insofar as [it] . . . relate[s] to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers"); Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101–102, 451, 456, 471, 1102, 116 Stat. 2135, 2142–44, 2195–97, 2200-01, 2273.

10. INA § 103(a)(1), 8 U.S.C.S. § 1103(a)(1) (stating that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); *see* 8 U.S.C.S. § 1103(g)(1) ("The Attorney General shall have such authorities and functions . . . as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review . . . before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002."); *infra* notes 11–12.

11. *See* LEGOMSKY, *supra* note 3, at 2; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES DEPARTMENT OF JUSTICE, EOIR RESPONSIBILITIES, at <http://www.usdoj.gov/eoir/responsibilities.htm>. Both immigration judges and the BIA are part of the Executive Office of Immigration Review (EOIR) within the Department of Justice. *Id.*

former Immigration and Naturalization Service (INS).¹² The Secretary of State is charged with the administration of the INA as it relates to “the determination of nationality of a person not in the United States,”¹³ and must also determine nationality in the course of exercising her power to issue passports, since passports may only be issued to American nationals.¹⁴ As a practical matter, this division of

12. See 1-3 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE §§ 3.05[3], 3.06[1] (2004), LEXIS (describing BIA and immigration-judge jurisdiction over various sorts of removal cases). Under the special “expedited removal” procedure set forth in 8 C.F.R. § 235.3, see generally LEGOMSKY, *supra* note 3, at 458–61, there is no BIA review of a decision by an immigration judge rejecting an entrant’s claim to citizenship and ordering him not to be admitted to the United States. See 8 C.F.R. § 235.3(b)(5)(iv) (2005).

The functions of the former INS have been divided between several administrative subdivisions of DHS, including U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec., INS into DHS: Where Is It Now?, at <http://uscis.gov/graphics/othergov/roadmap.htm>. The subdivision with the most significant role in administering the law of citizenship by descent is USCIS, formerly known as the Bureau of Citizenship and Immigration Services, which “took over the service and benefit functions of the INS” when the INS was abolished in 2003, *Przhebelskaya v. U.S. Bureau of Citizenship and Immigration Services*, 338 F. Supp. 2d 399, 401 n.3 (E.D.N.Y. 2004), and handles all adjudications formerly performed by the INS, U.S. Citizenship and Immigration Services, Dep’t of Homeland Sec., About Us, at <http://uscis.gov/graphics/aboutus/index.htm>. Because CBP is responsible for inspecting individuals entering the United States in order to determine their admissibility, U.S. Customs and Border Protection, Dep’t of Homeland Sec., Immigration Inspection Program, at http://www.cbp.gov/xp/cgov/border_security/port_activities/overview.xml, it will also have a role in cases where a claim of citizenship by descent is made at the border by someone lacking a passport, see *infra* notes 19–20 and accompanying text. ICE’s function with respect to the detention and removal of aliens primarily involves the enforcement of decisions already made by USCIS and CBP, see U.S. Immigration and Customs Enforcement, Dep’t of Homeland Sec., Detention and Removal Operations, at <http://www.ice.gov/graphics/dro/index.htm> (referring to USCIS and CBP as ICE’s “primary customers”), so ICE is less likely to be involved in interpretation of the law of citizenship by descent.

13. INA § 104(a)(3), 8 U.S.C. § 1104(a)(3); see 22 U.S.C.S. § 2705 (stating that “a ‘Report of Birth Abroad of a Citizen of the United States’, issued by a consular officer . . . designated by the Secretary of State” is “proof of citizenship” that “ha[s] the same force . . . as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction”). Note that all United States citizens are United States nationals, though not all U.S. nationals are U.S. citizens, because INA section 101(a)(22) defines “national of the United States” to mean “(A) a citizen of the United States or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22) (2004). For discussion of U.S. noncitizen nationality, see *infra* Part IV.

14. 22 U.S.C. §§ 211a to 212. “A [valid] passport . . . issued by the Secretary of State to a citizen of the United States” has “the same force and effect as proof of United States citizenship” as a certificate of citizenship issued by the Attorney General, 22 U.S.C. § 2705, and “[b]y deeming passports conclusive evidence of citizenship, Congress has . . . also granted power to the Secretary of State to determine who is a citizen.” *Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir. 1990). See also 8 C.F.R. § 301.1(a)(1) (stating that “a person residing in the United States who desires to be documented as a United States citizen

authority gives primary responsibility for administering the law of citizenship by descent to the Department of State, because a person who claims such citizenship will necessarily begin his life “not in the United States,”¹⁵ and theoretically should have his citizenship administratively determined before coming to the United States, in order to obtain a passport or visa.¹⁶ Claims of citizenship by descent will only fall into the administrative bailiwick of United States Citizenship and Immigration Services (USCIS) and the other INS-successor subdivisions of DHS in particular limited circumstances: when someone who previously entered the United States as an alien seeks to acquire a certificate of citizenship (rather than

. . . may apply for a passport . . . or may submit an application on form N-600, Application for Certificate of Citizenship, to the Service”).

15. Anyone “born in the United States, and subject to the jurisdiction thereof,” U.S. CONST. amend. XIV, § 1; *see supra* note 4, would be a constitutional *jus soli* citizen and not need to concern himself with the law of citizenship by descent. As a statutory matter, moreover, the law of citizenship by descent will not apply to the child of a U.S. citizen who is born in the United States but not subject to the jurisdiction thereof (such as the child of a dual-national serving as a foreign nation’s ambassador to the U.S.), or a person born outside the “United States” referred to in the Constitution but within the “United States” as defined by statute, *see infra* notes 26–27 and accompanying text, because all the provisions of current U.S. citizenship-by-descent law refer to persons born outside the United States—either persons born “outside the United States and its outlying possessions,” *see* INA §§ 301(c)–(d), 301(g), 308(2), 308(4), 8 U.S.C. §§ 1401(c)–(d), 1401(g), 1408(2), 1408(4), or persons born “outside the United States” (but not necessarily outside its outlying possessions), *see* INA § 309(c), 8 U.S.C. § 1409(c), or persons born “in an outlying possession of the United States,” *see* INA § 301(e), 8 U.S.C. § 1401(e). *But cf. In re Thenault*, 47 F. Supp. 952, 953 (D.D.C. 1942) (permitting naturalization of U.S.-born children of a U.S. citizen and a French diplomat, under a provision of then-existing law applicable to “[a] child born outside of the United States, one of whose parents is at the time of petitioning for the naturalization of the child, a citizen of the United States,” on the grounds that they “may be said to have been ‘born outside of the United States’ within the meaning of the statute” because “[a]lthough the[y] in a geographical sense were born within the United States, by virtue of the status of their father . . . they became subject to the jurisdiction of the French Republic . . . as though they were born within its territorial limits and outside those of the United States”).

16. According to 22 C.F.R. § 40.2(a) (2005), “[a] national of the United States shall not be issued a visa or other documentation as an alien for entry into the United States”; thus, where travel documents are required, it should be impossible to come to the United States without first having one’s citizenship status adjudicated at least implicitly. *But see* 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 1133.5-20(b)(2) (1998), <http://foia.state.gov/masterdocs/07fam/07m1130.pdf> at 50 (stating that an applicant for a nonimmigrant visa who is discovered to have a possible claim to U.S. citizenship but is “unable or unwilling to delay travel until the citizenship claim is proven” may be “consider[ed] . . . an alien” and may proceed with the nonimmigrant visa application). Also, subject only to exceptions prescribed by the President, it is “unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.” INA § 215(b), 8 U.S.C. § 1185(b). Since passports may only be issued to American nationals, 22 U.S.C. §§ 211a to 212, and when issued to citizens serve as “conclusive evidence” of U.S. citizenship, *Magnuson*, 911 F.2d at 333, this is another reason why a foreign-born United States citizen should in most cases be identified as such by the State Department before entering the United States. (The exceptions to the passport requirement are enumerated in 22 C.F.R. § 53.2.)

choosing to apply for a passport);¹⁷ when someone who previously entered the United States as an alien raises a citizenship claim belatedly as a defense against removal;¹⁸ when a citizenship claimant makes his way to a U.S. port of entry without travel documents and seeks admission;¹⁹ or when either someone who previously entered the United States as an alien, or the less-than-sixteen-year-old foreign-born child of a U.S.-citizen parent, has a good-faith nationality claim denied by the Department of State while outside the United States and obtains a “certificate of identity” under section 360 of the INA in order to travel to a U.S. port of entry and apply for admission.²⁰ Whichever administrative body is responsible for a citizenship claim, some form of judicial review will be available,

17. See 8 C.F.R. §§ 341.1–341.7; 8 C.F.R. § 301.1(a)(1) (stating that “a person residing in the United States who desires to be documented as a United States citizen may apply for a passport . . . or may submit an application on form N-600, Application for Certificate of Citizenship, to the Service”); U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., APPLICATION FOR CERTIFICATE OF CITIZENSHIP, <http://uscis.gov/graphics/formsfee/forms/n-600.htm>; see also, e.g., *Breyer v. Meissner*, 214 F.3d 416 (3d Cir. 2000) (Commissioner of INS named in action seeking to overturn denial of certificate of citizenship to an accused war criminal who had entered as an alien, had been naturalized, and after he was denaturalized on grounds of original inadmissibility because of his war crimes and threatened with deportation, claimed citizenship by descent through his American-born mother). Unlike an administrative appeal of an admission or removal decision, see *supra* note 12, an appeal of the denial of an application for a certificate of citizenship does not go to EOIR but stays within USCIS, going to the Administrative Appeals Unit operated under the authority of the Associate Commissioner, Examinations. See 8 C.F.R. § 103.3(a)(1)(ii), (a)(2)(iv); *Allen v. Adams*, EP-03-CA-0383, 2004 U.S. Dist. LEXIS 6313 (W.D. Tex. Mar. 30, 2004), at *6–7. (The C.F.R. sections explaining the jurisdiction of the Administrative Appeals Unit were somewhat in flux at the time of this Article, with 8 C.F.R. § 103.3(a)(1)(ii) and (a)(2)(iv) defining the Unit’s jurisdiction by reference to a now-nonexistent 8 C.F.R. § 103.3(f)(2).)

18. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (on certiorari from an appeal to the Fifth Circuit of a determination, upheld by the Board of Immigration Appeals, that petitioner—who had entered as an alien—was deportable).

19. See 22 C.F.R. § 53.2(b) (listing exceptions to the requirement that an American citizen have a passport in order to enter the country); *supra* note 16. It is theoretically possible that someone might get to a port of entry on a nonimmigrant visa issued to them as a noncitizen, see *supra* note 16, and then attempt entry as a citizen; once a claimant had a valid nonimmigrant visa, however, the much simpler approach would be to enter on that visa as an alien and then apply for a certificate of citizenship or passport, see *supra* note 17, at one’s leisure.

20. 8 U.S.C. § 1503(b)–(c); 22 C.F.R. 50.11; see 8-104 CHARLES GORDON ET AL., *supra* note 12, at § 104.12[1][d]. A certificate of identity may be issued only to “a person who is not within the United States,” and “only to a person who at some time prior to his application . . . has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.” *Id.* In theory, it can be granted to such a person when he or she “claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, on the ground that he is not a national of the United States,” *id.* (emphasis added), but the State Department is by far the most likely agency to be responsible for such a denial, since it is in charge of determining the nationality of a person not in the United States, see *supra* note 13 and accompanying text.

whether by action for declaratory judgment,²¹ habeas corpus,²² or otherwise;²³ reviewing courts will give varying amounts of deference to the administrative determination.²⁴

A. Section 301(c)

Section 301(c) of the INA applies when both of the parents of a foreign-born child are American citizens. In that case, the person born to them will be a U.S. citizen at birth if either of the parents “has had a residence in the United States or one of its outlying possessions, prior to the birth of such person.”²⁵ The term “the United States” as used here also includes the U.S. territories of Puerto Rico, Guam, and the U.S. Virgin Islands,²⁶ as well as the Commonwealth of the

21. INA § 360(a), 8 U.S.C. § 1503(a) (allowing special type of declaratory judgment action to be brought by “any person who is within the United States” and is denied some right or privilege by a government agency or official “upon the ground that he is not a national of the United States,” as long as the question does not arise in the context of removal proceedings); *Rusk v. Cort*, 369 U.S. 367 (1962) (allowing citizenship claimant to bring ordinary suit for declaratory judgment that he was a citizen against the Secretary of State while still outside the country, rather than utilizing special procedure of INA § 360); 8-104 CHARLES GORDON ET AL., *supra* note 12, at § 104.12[2]; *see, e.g.*, *Miller v. Albright*, 523 U.S. 420 (1998) (suit against the Secretary of State by a putative U.S. citizen by descent, living abroad, who wanted a U.S. passport in order to enter the country); *Wauchope v. Dep’t of State*, 985 F.2d 1407 (9th Cir. 1993) (same).

22. *See, e.g.*, INA § 360(c), 8 U.S.C. § 1503(c) (stating that a final administrative determination that the holder of a certificate of identity is not entitled to admission “shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise”); *Rivera v. Ashcroft*, 387 F.3d 835 (9th Cir. 2004) (allowing habeas corpus action by citizenship claimant who had already been deported).

23. *See, e.g.*, INA § 242(b)(5), 8 U.S.C. § 1252(b)(5) (authorizing judicial review of nationality claims raised as a defense in removal proceedings); 8-104 CHARLES GORDON ET AL., *supra* note 12, at § 104.12[1][a–c]. Note that claims of citizenship may also be an issue in judicial proceedings uncoupled to any administrative determination, as when the putative citizen raises his claim in order to defend against a criminal charge of illegal reentry by an alien deported as a convicted felon. *See, e.g.*, *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999).

24. *Compare, e.g.*, *Hughes v. Ashcroft*, 255 F.3d 752, 757–58 (9th Cir. 2001) (BIA view on issues of law pertaining to U.S. nationality not entitled to any deference), *and* 8-104 CHARLES GORDON ET AL., *supra* note 12, at § 104.12[2] (*de novo* determination of citizenship in declaratory judgment action), *with, e.g.*, *Diallo v. INS*, 232 F.3d 279, 285 (2d Cir. 2000) (stating generally that “when reviewing a determination by the BIA, we ‘accord substantial deference to the [BIA]’s interpretations of the statutes and regulations that it administers” (quoting *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000)), *and* 8-104 CHARLES GORDON ET AL., *supra* note 12, at § 104.12[1][b] (judicial review of order excluding a putative citizen is not *de novo*); *see also* *Bagot v. Ashcroft*, 398 F.3d 252, 259 (3d Cir. 2005) (noting that the proposition that “the position of the agencies charged with interpreting the INA” is due deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), “is subject to some debate” where citizenship is concerned).

25. 8 U.S.C. § 1401(c).

26. INA § 101(a)(38), 8 U.S.C. § 1101(a)(38) (including Puerto Rico, Guam, and the U.S. Virgin Islands as part of the “United States” for INA purposes).

Northern Mariana Islands (CNMI);²⁷ “outlying possessions” refers to the U.S.

27. 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 1116.1-1 (1995) [hereinafter U.S. DEP’T OF STATE 1110], <http://foia.state.gov/masterdocs/07fam/07m1110.pdf>, at 5 (citing Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 506(c), 90 Stat. 263, 269 (1976) [sic], for the proposition that “the Northern Mariana Islands are treated as part of the United States for purposes of sections 301 and 308 of the INA”); 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.3-3(b)(4), at 22 (stating that “physical presence in the . . . Northern Mariana Islands constitutes physical presence in the United States for purposes of section 301(g)”). Though the State Department takes the position that the CNMI is part of the “United States” for all purposes under INA sections 301 and 308, and there does not appear to be any authority to the contrary, it is unclear from the text of the Covenant whether this is so. Section 506 of the Covenant declares that

the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act . . . for the following purposes only . . . and . . . to the extent indicated in each of the following Subsections . . . (b) With respect to children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands the provisions of Sections 301 and 308 of the said Act will apply.

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 506, 90 Stat. at 269. Read literally, this would include the CNMI within the United States for the purposes of INA sections 301 and 308 only when the U.S.-citizen or noncitizen-national parent or parents who seek to transmit citizenship or noncitizen nationality under 301 or 308 permanently reside in the CNMI. Previous physical presence in the CNMI not amounting to residence, or perhaps even previous residence that has clearly terminated by the time of the child’s birth, would not count as physical presence or residence in the “United States” for purposes of sections 301 and 308 if the Covenant were strictly construed.

The CNMI is an unusual entity, in that there is significant dispute over whether it is an Article IV “territory” of the United States, or a unique juridical object with its constitutional roots in the treaty power or elsewhere. *See, e.g., Saipan Stevedore Co. v. Office of Workers’ Comp. Programs*, 133 F.3d 717, 720 (9th Cir. 1998) (describing the Commonwealth as a “United States territory”); *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 753–55 (9th Cir. 1993) (stating that the Covenant rather than the Territorial Clause delineates the extent of Congressional power over the CNMI); *Wabol v. Villacrusis*, 908 F.2d 411, 421 n.18 (9th Cir. 1990) (stating that though “[i]t is undisputed that the Commonwealth is not an incorporated territory . . . the precise status of the Commonwealth is far from clear”); 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 1121.1 (1996) [hereinafter U.S. DEP’T OF STATE 1120], <http://foia.state.gov/masterdocs/07fam/07m1120.pdf> at 1 (saying of the Northern Marianas that “these islands . . . became a territory of the United States on November 3, 1986, when The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America . . . entered fully into force”); Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PACIFIC L. & POL’Y J. 180, 237 (2003) (arguing that “[t]he [Territorial] Clause has no application in or to the Northern Marianas”); Marie Rios-Martinez, Comment, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and its Covenant with the United States*, 3 SCHOLAR 41, 53 (2000) (noting that “[t]he extent of United States sovereignty to enact legislation over the CNMI has . . . caused confusion in the courts”); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and its Affiliated U.S.-Flag Islands*, 14 HAWAII L.

territory of American Samoa.²⁸ A “residence” is defined for INA purposes as “the place of general abode . . . mean[ing] [a] principal, actual dwelling place in fact, without regard to intent.”²⁹ No particular period of parental prior residence in the United States is necessary for transmission of citizenship under section 301(c)—where both parents are U.S. citizens, *any* prior residence by one of them will do, no matter how short in duration.³⁰

B. Section 301(g)

Section 301(g) of the INA, which unlike section 301(c) includes a durational requirement, governs acquisition of citizenship by children born outside U.S. territory to one U.S.-citizen parent and one alien parent. It declares that a person with such parentage is a U.S. citizen if the citizen parent, “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.”³¹

The physical presence requirement of section 301(g) may be satisfied either by actual physical presence in U.S. territory³² or by constructive physical

REV. 445, 482–88 (1992) (concluding that “the arguments made by both the CNMI and the United States have some plausibility”).

28. See INA § 101(a)(29), 8 U.S.C. § 1101(a)(29) (stating that “[t]he term ‘outlying possessions of the United States’ means American Samoa and Swains Island.”) As a practical matter, to say that “outlying possessions” means American Samoa and Swains Island is to say that “outlying possessions” means American Samoa, since Swains Island has approximately sixteen inhabitants (compared to the more than 44,000 inhabitants of American Samoa) and is administered as a part of American Samoa. See U.S. DEP’T OF THE INTERIOR, A BRIEF HISTORY OF SWAINS ISLAND IN AMERICAN SAMOA, at <http://www.doi.gov/oia/Islandpages/swainsis.htm>; WESTERN PACIFIC FISHERY INFORMATION CENTER, U.S. DEP’T OF COMMERCE, AMERICAN SAMOA—INTRODUCTION PAGE, at http://www.pifsc.noaa.gov/wpacfin/as/Pages/as_samoa_1.htm.

29. INA § 101(a)(33), 8 U.S.C. § 1101(a)(33).

30. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.3-1(a)(2), at 20.

31. 8 U.S.C. § 1401(g).

32. I use “U.S. territory” as a shorthand for the INA phrase “the United States or its outlying possessions.” Given how “the United States” and “its outlying possessions” are defined for purposes of INA sections 301 and 308, *see supra* notes 26–28 and accompanying text, this substitution is justifiable: there are very few pieces of territory under United States sovereignty that are not included for purposes of sections 301 and 308 in the phrase “the United States or its outlying possessions.” The only such areas are small islands that lack a permanent civilian population; anyone who spends a significant amount of time in places like Midway Island or Johnston Atoll is very likely to be a member of the armed forces or a civilian government employee, and thus would be considered constructively physically present in the United States for section 301(g) purposes, *see infra* text accompanying note 34, despite being outside “the United States or its outlying possessions” according to the INA definition, *see* 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.3-3(a)(3), at 21. Thus, the distinction would only matter where an unmarried mother, for whom constructive physical presence of the section-301(g) sort does not count, *see* INA § 309(c), 8 U.S.C. § 1409(c), and *infra* parts I.D and III.B, had spent an uninterrupted year on one of the noncovered islands but not elsewhere in U.S. territory. For information on the small U.S.-controlled islands not included in the INA definition of “the United States or its outlying possessions,” *see* generally OFFICE OF GEN. COUNSEL, GEN. ACCOUNTING OFFICE,

presence while abroad under certain circumstances. “[P]eriods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 [referring to presidentially-designated organizations in which the United States participates³³]” are included in the total, as are “periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter of a person . . . serving with the Armed Forces . . . or . . . employed by the United States Government or an [appropriate] international organization.”³⁴ Even when relying on actual presence in U.S. territory, a permanent residence in U.S. territory is unnecessary. In theory, temporary presences count toward the total no matter how short in duration,³⁵ and in close cases involving facts like a commuter who lived in Canada or Mexico but worked in the United States, the State Department will estimate total physical presence to the hour in order to evaluate whether it was sufficient.³⁶

The theory behind the physical presence requirement is that a citizen parent who spends enough time in the United States will absorb “American customs and values,”³⁷ which will then be transmitted to the child granted citizenship by section 301(g).³⁸ The idea of the constructive-physical-presence proviso must be that citizen parents who spend time in the U.S. military, or as employees of the U.S. government or certain international organizations in which the United States participates, will, even without physically being in the United States, absorb American customs and values that can be transmitted to their

U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION, Letter Report GAO/OGC-98-5, 39–63 (1997).

33. 22 U.S.C. § 288. For a list of international organizations designated as qualifying for section 301(g) constructive-physical-presence treatment, *see* 22 U.S.C. § 288 note. Some of the organizations on the list are well-known entities that one would expect to be on such a list, such as the United Nations, the Organization of American States, the International Monetary Fund, and the World Trade Organization. The list is quite extensive, however, encompassing a total of seventy-eight organizations, some of which are rather less-well-known: it includes, *inter alia*, the Great Lakes Fishery Commission, the Inter-American Statistical Institute, the Inter-American Tropical Tuna Commission, the International Coffee Organization, the International Cotton Advisory Committee, the International Cotton Institute, the International Fertilizer Development Center, the International Pacific Halibut Commission, the North Pacific Anadromus Fish Commission, and the World Tourism Organization. *See id.*

34. 8 U.S.C. § 1401(g).

35. 7 U.S. DEP’T OF STATE, *supra* note 16, §§ 1133.3-3(a)(1), 1133.3-3(a)(3), at 21. *But cf.* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 506(b), 90 Stat. 263, 269 (1976) (apparently including the Northern Marianas within the “United States” for INA purposes only in cases of “children born abroad to United States citizen or non-citizen national parents *permanently residing* in the Northern Mariana Islands” (emphasis added)).

36. 7 U.S. DEP’T OF STATE, *supra* note 16, §§ 1133.3-3(a)(3), 1133.3-4(c), at 21, 26–27. No affirmatively different policy for cases within the administrative jurisdiction of USCIS or the other DHS subdivisions that succeeded the INS is apparent from the C.F.R. or the INS/USCIS *Interpretations*.

37. *Id.* § 1133.3-2(b), at 21.

38. *Id.*

children.³⁹ Furthermore, the overseas household of such a citizen parent will be so “American” that a son or daughter living in it will be sufficiently influenced by American customs and values to pass them on to his or her children.⁴⁰

C. Section 309(a)

If a person is born out of wedlock to a U.S.-citizen father, INA section 309(a) commands that the provisions of section 301(c) and section 301(g)⁴¹ shall apply if and only if certain conditions are met.⁴² First, according to section 309(a)(1), “a blood relationship between the person and the father [must be] established by clear and convincing evidence.”⁴³ Second, according to section 309(a)(3), “the father (unless deceased) [must] agree[] in writing to provide financial support for the person until the person reaches the age of 18 years.”⁴⁴ Third, according to section 309(a)(4), one of three further conditions must be satisfied “while the person is under the age of 18 years”: either “the person [must be] legitimated under the law of the person’s residence or domicile,” “the father [must] acknowledge[] paternity of the person in writing under oath,” or “the paternity of the person [must be] established by adjudication of a competent court.”⁴⁵

39. Cf. Brief for the Respondent at 15 n.8, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (noting that under a predecessor statute to the INA, a residency requirement applicable to most foreign-born children of one citizen parent and one alien parent would not apply “if the citizen parent was working abroad for the United States government or certain American institutions, on the premise that such parents were likely to ‘retain their American sympathies and character’ and to ‘bring up their children as Americans’” (quoting *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 427 (1945))).

40. The proviso allowing time spent abroad as a civilian government official, or as a dependent of a parent abroad for an enumerated purpose, to count as constructive physical presence was added in 1966 at the urging of the State Department. Act of Nov. 6, 1966, Pub. L. No. 89-770, 80 Stat. 1322; S. REP. NO. 89-1495, at 2–3 (1966). The Department considered it particularly important to address the issue of the children of “the large number of American parents who, in recent years, have had protracted assignments abroad in conjunction with their official duties”; it was said to be “not uncommon for the children of a Foreign Service officer to spend most of their youthful years abroad accompanying the parents from one assignment to another.” S. REP. NO. 89-1495 at 2 (letter of Douglas MacArthur II, Assistant Secretary for Congressional Relations).

41. Section 309(a) also restricts the application of INA sections 301(d), 301(e), and 308(2), which are concerned with the transmission of noncitizen nationality and the implications of noncitizen nationality for the transmission of citizenship, and will be dealt with in Part IV *infra*.

42. 8 U.S.C. § 1409(a) (2004).

43. *Id.* § 1409(a)(1).

44. *Id.* § 1409(a)(3). Note that the reason section 309(a)(2) has been skipped over is because it concerns part of the initial scenario assumed in order for this analysis to take place: that “the father had the nationality of the United States at the time of the child’s birth.” *Id.* § 1409(a)(2).

45. *Id.* § 1409(a)(4)(A)–(a)(4)(C).

D. Section 309(c)

For children born out of wedlock to a U.S.-citizen mother, INA section 309(c) does not provide conditions for the application of sections 301(c) and 301(g), but rather supersedes them. According to section 309(c), “[n]otwithstanding the provision of subsection [309](a),” an out-of-wedlock child will be a citizen if its mother was a U.S. citizen at the time of its birth and “the mother had previously been physically present in the United States⁴⁶ or one of its outlying possessions for a continuous period of one year.”⁴⁷

II. THE DIFFERENT TREATMENT OF UNMARRIED FATHERS AND UNMARRIED MOTHERS**A. Joseph and Josephine Revisited**

The preceding description of U.S. citizenship-by-descent law should shed some light on the Joseph/Josephine hypothetical. Joseph’s case is the easier to explain. If unmarried father Joseph does not think to do any paperwork specifically geared towards satisfying the requirements of U.S. citizenship law, he is unlikely to promise in writing to support his child until age eighteen (even if he is in fact supporting his child), or to acknowledge paternity of his child under oath. Thus, the condition of section 309(a)(3) will not be met, and assuming that Joseph does not legitimate the child,⁴⁸ and there is no court adjudication of paternity, none of the alternative conditions of section 309(a)(4) will be met either. Regardless of how much time Joseph has spent in the United States, and regardless of how close a relationship actually exists between Joseph and his child, section 309(a) will prevent the application of section 301(g) to transmit citizenship to Joseph’s child.

To explain the outcome of the Josephine hypothetical, one must dig a bit deeper. If egg-donor Josephine qualifies as the “mother” of the child conceived from her donated egg, then that child will be a citizen under INA section 309(c), because Josephine is not married to the child’s father (so that the child is born out of wedlock if she is its mother), and Josephine has “previously been physically present in the United States . . . for a continuous period of one year.”⁴⁹ The only remaining question is whether an egg donor is a “mother.”

46. The term “United States” may have a slightly different meaning for purposes of section 309(c) than it does for purposes of sections 301(c) and 301(g): it appears from the text of the law that created the Commonwealth of the Northern Mariana Islands, *see* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 506(a), 90 Stat. 263, 269 (1976), that the Northern Mariana Islands are not included in the “United States” for purposes of section 309 of the INA, though they are included for purposes of sections 301 and 308. *See infra* Part III.B.3.

47. 8 U.S.C. § 1409(c). INA section 309(c) actually speaks in terms of the “nationality status” of the mother, so that its rule also applies to the transmission of noncitizen nationality. *See infra* Part IV.

48. Legitimation is usually accomplished by marriage to the child’s mother, though this is not the only possible mechanism. 7-93 CHARLES GORDON ET AL., *supra* note 12, at § 93.04; *see infra* notes 75–78 and accompanying text.

49. 8 U.S.C. § 1409(c).

The official policy of the Department of State tells us that Josephine is indeed the child's mother for citizenship-law purposes. The Department's *Foreign Affairs Manual* instructs that "[a] child born abroad to a foreign surrogate mother who was not the egg-donor and whose claimed mother (egg-donor) . . . was a U.S. citizen is treated for [U.S.] citizenship purposes . . . as a child born out of wedlock to a U.S. citizen mother."⁵⁰ According to the State Department rule, "[t]he status of the surrogate mother is immaterial to the issue of citizenship transmission."⁵¹ The logic underlying the rule appears to be that only the egg-donor, as the genetic mother, has the "blood relationship" which, according to the Department, is "essential" for the transmission of citizenship by descent.⁵² Thus, whether or not egg-donor Josephine intends any future relationship with the child conceived from her egg—whether or not she is the "intentional parent," as that term is used in the surrogacy literature⁵³—her child will likely be declared a citizen.⁵⁴

50. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1131.4-2(b), at 4.

51. *Id.* at § 1131.4-2(c). Although DHS has no similar explicit policy, it does not appear to have any contrary policy either, and as discussed earlier most citizenship-by-descent determinations will fall under the administrative jurisdiction of the Department of State. *See supra* notes 15–20 and accompanying text.

52. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1131.4-1(a), at 2. *But cf.* *Scales v. INS*, 232 F.3d 1159, 1165–66 (9th Cir. 2000) (rejecting requirement of blood relationship in the case of a child born in wedlock and legally presumed to be the son of a U.S.-citizen father, and refusing to defer to the *Foreign Affairs Manual's* statements about the importance of a blood relationship, both "[b]ecause Petitioner [wa]s not a person 'not in the United States,' [and therefore] the State Department [wa]s not the agency entrusted with the determination of [his] citizenship," and because a mere "agency manual[]" was not entitled to deference as an agency interpretation of a statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (quoting 8 U.S.C. § 1104(a)(3) and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000))).

53. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L. J. 597 (2002) (discussing the concepts of "intentional parenthood" and "intentional parents").

54. It is possible that DHS or EOIR could take a different view in one of the relatively few citizenship-by-descent cases that come within the administrative jurisdiction of DHS and its subdivisions, or that the Attorney General could issue a contrary ruling, *see supra* note 10 and accompanying text, or that the courts could decide the matter differently (although not in a case administratively before the State Department, since that Department would hardly appeal to the courts to dispute the validity of its own policy and a person found to be a citizen under the policy would not appeal either). If one assumes that either the egg-donor or the gestational mother is the true "mother" for purposes of section 309(c), however, then refusing to consider the egg-donor the mother would imply that the gestational mother is the true mother, leading to cases in which citizenship was transmitted despite a complete lack of blood relationship, and parentage could not be verified by a DNA test. Perhaps DHS or EOIR or a court could rely on the principle that "[l]egal relationships between parents and children are typically governed by state law" even in citizenship cases, *Fierro v. Reno*, 217 F.3d 1, 4 (1st Cir. 2000), and look to state law rather than a uniform biological definition of "mother," but an approach completely divorced from biological parenthood would seem to be in tension with the INA's explicit inclusion of special requirements for adopted children, *see, e.g.*, INA §§ 101(c)(1), 101(b)(1)(E)(ii), 101(b)(1)(F)(ii), 8 U.S.C. §§ 1101(c)(1), 1101(b)(1)(E)(ii), 1101(b)(1)(F)(2). And even if the *Foreign Affairs Manual* is not entitled to *Chevron* deference because it is a mere

B. Unconvincing Justifications for Section 309(a): Nguyen v. INS and Presence at Birth

With the Josephine hypothetical in mind, the policy justifications given by the U.S. government for the outcome of cases like the Joseph hypothetical become less convincing. These justifications were well explicated in *Nguyen v. INS*, where the Supreme Court upheld as constitutional the effect of section 309(a) on a father very similar to our hypothetical Joseph.⁵⁵

Joseph Boulais, a U.S. citizen who had “lived in the United States continuously through his early adulthood,”⁵⁶ was the father of petitioner Tuan Anh Nguyen, but had never married Nguyen’s Vietnamese-citizen mother. Nguyen’s mother abandoned him at birth;⁵⁷ Nguyen lived for some time with the family of another Vietnamese woman with whom Boulais had a romantic relationship, and when Nguyen was less than six years old, Boulais brought him to the United States and raised him in Texas.⁵⁸ When the INS obtained a deportation order against Nguyen based on his plea of guilty at age twenty-two to charges of sexual assault on a child, Nguyen appealed on the ground that he was actually a citizen.⁵⁹ The Board of Immigration Appeals rejected Nguyen’s claim because of his father’s failure to comply with the requirements of INA section 309(a)(4): before Nguyen reached the age of eighteen, Boulais had not legitimated Nguyen, acknowledged paternity of Nguyen in writing, or established Nguyen’s paternity in court.⁶⁰ Nguyen appealed to the Fifth Circuit and then to the Supreme Court, arguing that section 309 violated equal protection principles⁶¹ because it imposed stricter

“agency manual,” *Scales*, 232 F.3d at 1166 (quoting *Christensen*, 529 U.S. at 587), it is still “entitled to respect” to the extent that it has “the power to persuade.” *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

55. *Nguyen v. INS*, 533 U.S. 53 (2001).

56. Brief of Petitioners at 4, *Nguyen* (No. 99-2071) (citing Appellate Record at 84–86).

57. *Nguyen v. INS (Nguyen I)*, 208 F.3d 528, 530 (5th Cir. 2000), *aff’d*, 533 U.S. 53 (2001).

58. *Nguyen*, 533 U.S. at 57.

59. *Id.*

60. *Nguyen I*, 208 F.3d at 533. Nguyen’s father’s failure to fulfill the section 309(a)(3) requirement that he have promised in writing to support his son until the age of eighteen was not mentioned both because failure to fulfill section 309(a)(4) rendered section 309(a)(3) irrelevant, and because Nguyen’s birthdate entitled him, under a transitional provision of the statute, to elect application of an earlier version of section 309(a) that did not include the support-promise requirement, although it did require legitimation rather than either of the alternative ways of satisfying current section 309(a)(4). *Nguyen*, 533 U.S. at 60; Brief for the Respondent at 33 n.15, *Nguyen* (citing 8 U.S.C. § 1409(a) (1982) and Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, as added by Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609, 2618–19). *See also infra* Part II.C.3 (discussing Nguyen’s apparently overlooked claim to citizenship under the old version of section 309(a)).

61. Nguyen’s claim was not under the Equal Protection Clause of the Fourteenth Amendment, which only applies to the states, but rather under the “the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.” *Nguyen*, 533 U.S. at 57.

requirements when the U.S.-citizen parent of a citizenship claimant born out of wedlock was the father rather than the mother, but both courts rejected his claim.⁶²

The Supreme Court in *Nguyen* accepted the government's argument that the differences between mothers and fathers are sufficient to justify the INA's differing treatment of them under the equal protection standard for a gender-based classification. That is, the INA's differentiation between parental genders "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives."⁶³ The requirements of section 309(a)(4), the Court held, serve to ensure proof of a biological parent-child relationship and to "ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."⁶⁴ Formal requirements similar to those of section 309(a)(4) need not be imposed on a citizen mother of an out-of-wedlock child, Justice Kennedy wrote for the majority, because "[t]he mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth,"⁶⁵ and "[t]he mother knows that the child is in being and is hers and has an initial point of contact with him . . . [so that] [t]here is at least an opportunity for mother and child to develop a real, meaningful relationship."⁶⁶ The key reason that facial gender-neutrality was said not to be required, and would in fact allegedly be "hollow," is that "the mother is always present at birth, but . . . the father need not be."⁶⁷

The problem with this analysis is apparent from the Josephine hypothetical: the "mother," as defined by the Department of State, need not be present at a child's birth. Where the egg donor and gestational mother are different persons, the gestational mother is the one who will necessarily be present at the birth, but the egg donor is the one given the right to transmit citizenship. In the voluminous literature attacking *Nguyen* on various grounds,⁶⁸ this issue of egg

62. *Nguyen*, 533 U.S. at 58–59; *Nguyen I*, 208 F.3d at 535.

63. *Nguyen*, 533 U.S. at 60 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)) (further internal quotations omitted).

64. *Id.* at 64–65.

65. *Id.* at 62.

66. *Id.* at 65.

67. *Id.* at 64.

68. See, e.g., Rachel K. Alexander, Casenote, *Nguyen v. INS: The Supreme Court Rationalizes Gender-Based Distinctions in Upholding an Equal Protection Challenge*, 35 CREIGHTON L. REV. 789 (2002); Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93 (2000); Erin Chlopak, Comment, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U.L. REV. 967 (2002); Fernandez, *supra* note 1; Jung Kim, Case Comment, *Nguyen v. INS: The Weakening of Equal Protection in the Face of Plenary Power*, 24 WOMEN'S RIGHTS L. REP. 43 (2002); Manisha Lalwani, Comment, *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 (2002); Melanie L. Shender, Note, *Nguyen v. INS: No, Your Honor, Men Are Not From Mars*, 36 U.C. DAVIS L. REV. 1023 (2003); Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in*

donation and surrogate parenthood has not gone completely unnoticed: Lica Tomizuka pointed out that “[f]athers do not have to be at the birth of their child, but neither does the biological mother when a surrogate is carrying the biological mother’s baby to term.”⁶⁹ This sort of reasoning drove Laura Weinrib to conclude with respect to egg donors that “the Court would be analytically bound to exclude such mothers [who do not as a matter of biological necessity have to be present at birth], and their children, from the coverage of [8 U.S.C.] § 1409(c)—even if they were in fact present at birth.”⁷⁰ But we know from the *Foreign Affairs Manual* that far from excluding such mothers from the scope of section 309(c), the State Department has made an affirmative decision to administratively *include* them.⁷¹ This casts significant doubt on the logic supposedly underlying section 309(a)(4), whether or not it affects *Nguyen*’s holding that the statute is constitutional.⁷²

C. Section 309(a) as a Trap for the Unwary

Another problem with section 309(a) from a policy perspective is that it will tend disproportionately to penalize those who are not aware of its details. Fathers who act as one would expect concerned fathers to act, but do not know to do the proper paperwork before their children turn eighteen, will often fail to transmit citizenship to their children, while distant and uncaring fathers with little involvement in their children’s lives will often be able to transmit citizenship if they know the details of the law.⁷³

I. Section 309(a)(4)

The purpose of section 309(a)(4), according to the *Nguyen* majority, is to establish that the father had an opportunity to develop a “real, meaningful relationship” with his child, one involving “the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”⁷⁴

Upholding the Constitutionality of 8 U.S.C. 1409 in Nguyen v. INS, 20 LAW & INEQ. J. 275 (2002); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 245 n.107 (2003).

69. Tomizuka, *supra* note 68, at 310 (2002). See also Ashley Moore, Note, *The Child Citizenship Act: Too Little, Too Late for Tuan Nguyen*, 9 WM. & MARY J. OF WOMEN & L. 279, 282–83 (2003) (suggesting that the increasing availability of certain types of surrogacy implies that “the Court must look beyond the assumption that by bearing a child the woman is the genetic and legal mother”).

70. Weinrib, *supra* note 68, at 245 n.107.

71. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1131.4-2(b), at 4. See *supra* notes 50–54 and accompanying text.

72. Because the *Nguyen* Court found no equal protection violation under normal standards, it did not decide whether the plenary power doctrine, granting broader deference to Congress in the immigration context, extended from its original context of the admission and expulsion of conceded aliens to the context of citizenship transmission. *Nguyen*, 533 U.S. at 72–73; LEGOMSKY, *supra* note 3, at 92–93, 1202. The Court also did not decide whether it would have the power to confer citizenship on *Nguyen* as a remedy for any unconstitutionality. *Nguyen*, 533 U.S. at 72.

73. See *Miller v. Albright*, 523 U.S. 420, 485–86 (1998) (Breyer, J., dissenting) (“A father with strong ties to the child may, simply by lack of knowledge, fail to comply with the statute’s formal requirements. A father with weak ties might readily comply.”).

74. *Nguyen*, 533 U.S. at 64–65.

Thus, the test of section 309(a)(4) should pick out fathers who have had an opportunity to develop such a relationship with their children, especially those who have actually developed such a relationship.

Section 309(a)(4)(A), allowing satisfaction of 309(a)(4) by legitimation of the child under the laws of the child's residence or domicile, does make some progress towards this goal even where the father is unaware of its provisions.⁷⁵ Legitimation can often be accomplished by acts that a caring father who had a "meaningful relationship" with his child might perform without knowing the details of the law: in most if not all jurisdictions, marriage of the father to the child's mother will suffice,⁷⁶ and in some jurisdictions, legitimation can be accomplished without marriage if the father acknowledges the child as his own and receives it into his home.⁷⁷ (The laws of some jurisdictions do not even recognize "illegitimacy," but rather give marital and nonmarital children equal rights;⁷⁸ it has been held that such a law makes all children in such a jurisdiction legitimate as of the time it was passed.⁷⁹) But there are some factual scenarios, such as the

75. 8 U.S.C. § 1409(a)(4)(A) (2004).

76. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 84–88; 7-93 GORDON ET AL., *supra* note 12, at § 93.04.

77. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 91–95 (citing California, Colorado, Idaho, Maryland, Minnesota, Missouri, Nevada, Pennsylvania, Texas, Utah, Washington and Wyoming law as providing for legitimation by father holding out child as his own and/or receiving child into his home); *see, e.g.*, *Burgess v. Meese*, 802 F.2d 338, 340–41 (9th Cir. 1986) (finding legitimation to have occurred under Washington law by father receiving child into father's home and holding out child as father's own); U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., INTERPRETATIONS 309.1(b)(2)(ii) [hereinafter INTERPRETATIONS], *available at* <http://uscis.gov/graphics/lawsregs/interp.htm> (discussing legitimation by acknowledgment under section 230 of the California Civil Code).

78. *See Lau v. Kiley*, 563 F.2d 543, 548–51 (2d. Cir 1977) (discussing the law of the People's Republic of China); *O'Donovan-Conlin v. U.S. Dep't of State*, 255 F. Supp. 2d 1075, 1082 (N.D. Ca. 2003); 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 91–95 (citing Arizona, Illinois and Oklahoma statutes, and ambiguously citing Oregon statute); OR. REV. STAT. § 109.060 (2001).

79. *See Lau*, 561 F.2d at 551; *In re Sanchez*, 16 I. & N. Dec. 671, 672–73 (1979), 1979 BIA LEXIS 3, at *3–6; 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-2(b)(4)(a)(ii), 2(b)(4)(a)(vii), at 31. *Lau* speaks in terms of such a child having become "legitimate" rather than having been "legitimated," 561 F. 2d at 551, and *Sanchez* holds that such a child either becomes "legitimate" or is "legitimated," which of the two descriptions is appropriate not having mattered in the context at issue there, 16 I. & N. Dec. at 673, 1979 BIA LEXIS 3 at *6. The State Department states that "legitimation," by definition, is "the giving, to a child born out of wedlock, the legal status of a child born in wedlock, who traditionally has been called a 'legitimate' child." 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-2(b)(4)(a)(ii), 2(b)(4)(a)(vii), at 31. On that view, which seems the only reasonable interpretation of the word "legitimation," it is logically impossible to distinguish between "legitimation" and the process of becoming "legitimate"—the two are the same thing, and the only distinction between a "legitimate" child and a "legitimated" one is that the child whom we refer to simply as "legitimate" has ordinarily (in the absence of a change in the law during his or her lifetime) never *not* been legitimate, whereas the child whom we refer to as "legitimated" has acquired the rights of a legitimate child because of events after his or her birth.

maternal abandonment in *Nguyen*, where marriage to the child's mother is not a realistic option for the father; when facts like these arise in a jurisdiction where only marriage legitimates, the requirements of section 309(a)(4) can be met only if, while the child is under 18 years of age, "the father acknowledges paternity of the [child] in writing under oath,"⁸⁰ or "the paternity of the [child] is established by jurisdiction of a competent court."⁸¹ And even where a father has performed acts that legitimate his child under the law of the relevant jurisdiction, he may not know that law, and thus may not realize the legal significance of his legitimating acts and the importance of preserving and presenting evidence of them.⁸² In such cases, the likelihood that a father who has a "meaningful relationship" with his child will satisfy the requirements of section 309(a)(4) depends greatly on whether he is aware of that provision's existence.

While one might expect a father who had a close relationship with his children to acknowledge them publicly and take them into his home (which legitimates in some but not all jurisdictions), one would not necessarily expect him to acknowledge paternity in writing under oath, or go to court to get an official declaration that the children are his.⁸³ Only a father who knew of the requirements of section 309(a)(4) would be likely to make a declaration of paternity "in writing [and] under oath." Thus, where legitimation under the laws of the relevant jurisdiction is not a realistic option, section 309(a)(4) is very unlikely to be satisfied by a father who does not find out about its details until after his child turns eighteen.⁸⁴

2. Section 309(a)(3)

Section 309(a)(3) is also quite difficult for a father to satisfy incidentally without knowledge of the law. Recall that under section 309(a)(3), the father can transmit citizenship to a person only if "the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years."⁸⁵ That the father *actually provide* financial support is not enough; he

80. 8 U.S.C. § 1409(a)(4)(B).

81. *Id.* § 1409(a)(4)(C).

82. See *infra* Part II.C.3 (regarding Tuan Anh Nguyen's apparently overlooked claim to citizenship).

83. In fact, one would expect a judicial determination of paternity to be more likely where the father seeks to *avoid* responsibility for the child and someone else, such as the mother, seeks to force such responsibility on him. See *Miller v. Albright*, 523 U.S. 420, 486 (1998) (Breyer, J., dissenting) (noting that "a child might obtain an adjudication of paternity 'absent any affirmative act by the father, and perhaps even over his express objection'" (quoting *Miller*, 523 U.S. at 434 (Stevens, J.))); 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-2(b)(4)(c)(i), at 32 (stating that "[e]stablishment of legal relationship by . . . court adjudication of paternity . . . need not be pursued unless the father is unable or unwilling to acknowledge the child").

84. See *Fernandez*, *supra* note 1, at 952 (noting that a hypothetical U.S.-citizen father of a foreign-born child, whose mother abandoned the child after the child's birth, may "not [have been] aware that, pursuant to [section 309(a)(4)], he needed either to legitimate [his son], acknowledge that [his son] is his son in writing under oath, or seek adjudication to establish his paternity before [his son] turned eighteen").

85. 8 U.S.C. § 1409(a)(3).

must agree in writing to do so.⁸⁶ It seems obvious that many fathers who provide support for their out-of-wedlock children will not, independently of the citizenship laws, be moved to memorialize in writing the fact that they are doing this and intend to continue. Thus, fathers who provide financial support to their children, and even have or share physical custody of their children, may easily be prevented from passing citizenship to their children if they live to see their children reach the age of eighteen but do not find out about the details of section 309(a)(3) in time.

Fathers who know the details of the law, on the other hand, will often find section 309(a)(3) to be a trivial requirement. The purported purpose of section 309(a)(3) is “to facilitate the enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states.”⁸⁷ Although this rationale makes some sense with respect to children who travel to the United States before age eighteen and thus should have their citizenship status definitively adjudicated before that time,⁸⁸ it does not apply to children who do not enter the country before adulthood, and for the fathers of such children it is quite easy to get around section 309(a)(3) without incurring any real obligations. Section 309(a)(3) does not require that the support promise be made some particular length of time before the child turns eighteen.⁸⁹ A father fully aware of the legal regime could simply go to a U.S. consulate a few days before his child’s eighteenth birthday,⁹⁰ sign an about-to-expire 309(a)(3) promise of support and a 309(a)(4)(B)

86. *O’Donovan-Conlin v. U.S. Dep’t of State*, 255 F. Supp. 2d 1075, 1083–84 (N.D. Ca. 2003); 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.4-2(b)(3)(a)–(b), at 30 (stating that “[a] child who cannot present a written support agreement . . . cannot be documented as a U.S. citizen unless it is proven that the father is dead” and that “a local law obliging fathers to support children born out of wedlock is not sufficient”). The result in *O’Donovan-Conlin* arguably does not rule out transmission of citizenship by citizen fathers who support their children without promising to do so in writing, because the father in that case had proven only \$5,000 in total support, and even that had not been provided through checks written by him personally, but rather through checks sent by his parents at his request and drawn on a trust fund set up for him. 255 F. Supp. 2d at 1078, 1083, 1085. The *O’Donovan-Conlin* court, however, phrased its holding broadly, declaring that “the statute clearly requires that plaintiff Conlin had to agree in writing to support . . . O’Donovan-Co[n]lin until the age of 18” and that “[t]he statute is unambiguous and clearly states that the U.S.-citizen father must have made such a written promise of support.” 255 F. Supp. 2d at 1086.

87. *Miller*, 523 U.S. at 432 n.9 (quoting Brief for Respondent at 25–26 & n.13, *Miller* (No. 96-1060), quoting in turn *Hearings on H.R. 4823 et al. before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess., 150 (1986) (statement of Joan M. Clark, Assistant Secretary of State for Consular Affairs)).

88. *See supra* note 16 and accompanying text.

89. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.4-2(b)(3)(c)(v), at 30. In fact, the text of section 309(a)(3) does not explicitly require that the promise be made before the child turns eighteen at all, though the State Department’s *Foreign Affairs Manual* rules out the possibility of a father signing a meaningless lapsed promise after that time, *id.*, and what little case law there is on the subject implicitly agrees. *See O’Donovan-Conlin*, 255 F. Supp. 2d at 1085–86.

90. *Cf. Miller*, 523 U.S. at 434 (“If the citizen is the unmarried male . . . for at least 17 years [after [the birth] he need not provide any parental support, either moral or

acknowledgement of paternity, and apply for a Consular Report of Birth Abroad⁹¹ for his child. He would thus avoid incurring any meaningful financial obligation.

The only purpose section 309(a)(3) could really serve with regard to children who do not enter the United States before age eighteen is as a kind of backup legitimation requirement in cases where local law renders section 309(a)(4) essentially meaningless. Legitimation under 309(a)(4)(A) can occur automatically by operation of law for all children in a jurisdiction, if that jurisdiction abolishes all legal distinctions between children born in wedlock and children born out of wedlock.⁹² In such cases, where the father does not have to do anything to satisfy section 309(a)(4), requiring fulfillment of the section 309(a)(3) condition can accomplish what the *Nguyen* majority saw as the purpose of section 309(a)(4): establishing that there was an opportunity for the father and child to develop a relationship. If the father signs a promise of support, this at least proves that he knows his child exists—as fulfillment of 309(a)(4)(B) by signing a statement of paternity would prove, but automatic legitimation does not.

In cases where the father “legitimizes” his child in a more conventional sense by taking the child into his home and holding it out as his own or perhaps even by marrying the child’s mother, however, section 309(a)(3) will be little but a cruel trap for the legally ignorant. It is not entirely clear whether 309(a)(3) bars transmission of citizenship in cases of legitimation by marriage unaccompanied by a separate support statement, although that is certainly what its plain text suggests.⁹³ The INS brief in *Nguyen* claimed that “[w]here the father has legitimated the child, or been adjudicated as the father, a support obligation already exists (as it does from birth in the case of the mother), and Section [3]09(a)(3) imposes no additional obligation on the father.”⁹⁴ This seems to say that the statement of support is not required at all in such cases, but may just be suggesting that the statement requirement is not burdensome under those circumstances because signing the statement will impose no additional legal “obligation.” While there is little caselaw applying section 309(a)(3), in *O’Donovan-Conlin v. Department of State*, a district court did hold that section 309(a)(3) barred transmission of citizenship to a child whose parents were married after the child’s birth, albeit only for a few months, where the father did not sign a

financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child pursuant to [8 U.S.C.] § 1409(a).”).

91. See 22 U.S.C. § 2705 (2004); 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL §§ 1440 *et seq.* (1993), <http://foia.state.gov/masterdocs/07fam/07m1440.pdf>. The full title of the document is a “Consular Report of Birth Abroad of a Citizen of the United States of America.” 7 U.S. DEP’T OF STATE, *supra*, § 1441(a), at 1. It is “proof of citizenship” that “ha[s] the same force . . . as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction.” 22 U.S.C. § 2705.

92. See *supra* notes 78–79 and accompanying text.

93. See 8 U.S.C. § 1409(a)(3) (2004) (requiring that “the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years” and making no explicit exception for a persons legitimated by marriage subsequent to birth).

94. Brief for the Respondent at 33 n.16, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071).

separate promise to support.⁹⁵ The State Department interprets section 309(a)(3) as requiring a signed statement despite legitimation “unless such a statement was part of the legitimating act and evidence to that effect is submitted”⁹⁶—which would mean that marriage fails to obviate the necessity of a 309(a)(3) statement, unless one takes the position (apparently rejected by *O’Donovan-Conlin*) that signing a marriage license involves an implicit promise of support for pre-existing children of one’s spouse-to-be. In any case, whatever doubt may exist with respect to the application of section 309(a)(3) to cases of legitimation by marriage, there is little doubt of its detrimental effect in cases of informal legitimation through acknowledgement and custodial support. No matter how clearly the father has demonstrated a relationship with his child and a willingness to support his child, his child will be denied citizenship because of the father’s failure to sign a written statement that he likely never would have thought was necessary.

3. *Lawyers Caught in the Trap: Tuan Anh Nguyen’s Apparently Overlooked Claim to Citizenship*

The legal details that one needs to know in order to achieve the fairest possible outcome under section 309(a) are sometimes so obscure that even lawyers can be led astray. It appears, for example, that Tuan Anh Nguyen could probably have made a successful claim of U.S. citizenship, even assuming the constitutionality of section 309, if he or his lawyers had more effectively used the laws available to him.

As the Supreme Court acknowledged, Nguyen was subject to a transitional provision under which he could have elected application of current section 309(a) or the old, pre-1986 version of section 309(a).⁹⁷ This election was available to children who were between the ages of fifteen and eighteen when new section 309(a) was enacted in November 1986,⁹⁸ as Nguyen was.⁹⁹

Old section 309(a) contained no rule equivalent to current 309(a)(3). It required legitimation rather than either of the currently available alternative methods of satisfying 309(a)(4), but this legitimation could take place at any time before the citizenship claimant turned twenty-one; it did not have to occur before the claimant turned eighteen as under current section 309(a).¹⁰⁰ Therefore, if

95. *O’Donovan-Conlin*, 255 F. Supp. 2d at 1083–84.

96. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.4-2(b)(4)(a)(i), at 31.

97. *Nguyen*, 533 U.S. at 60; Brief for the Respondent at 33 n.15, *Nguyen* (citing 8 U.S.C. § 1409(a) (1982) and Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, as added by Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609, 2618–19, codified at note following 8 U.S.C. § 1409).

98. Immigration and Nationality Act Amendments of 1986 § 23(e)(3), as added by Immigration Technical Corrections Act, 102 Stat. at 2619.

99. See Brief of Petitioners at 4, *Nguyen* (No. 99-2071) (citing Joint Appendix at 20 and Appellate Record at 44) (“Tuan Anh Nguyen . . . was born in Vietnam on September 11, 1969.”).

100. Compare Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 309(a), 66 Stat. 163, 238 (1952) (stating that the provisions of the relevant parts of section 301, and of section 308(2), “shall apply as of the date of birth to a child born out

Nguyen had elected application of old section 309(a), it would have been sufficient for him to show that legitimation had occurred at any time before his twenty-first birthday: September 11, 1990.¹⁰¹

A Texas law that took effect September 1, 1989 appeared to provide—and is interpreted by the State Department as having provided—that a child is legitimated when, “before the child reaches the age of majority, [the father] receives the child into his home and openly holds out the child as his biological child.”¹⁰² The 1989 Texas law amended various sections of the Texas Family and Probate Codes, replacing all mention of “legitimate” and illegitimate children with a system of nomenclature based on presumption of paternity.¹⁰³ Although “the parent-child relationship” was declared to “extend[] equally to every child and parent regardless of the marital status of the parents,”¹⁰⁴ a man was only included within the law’s definition of a “parent” if he was “presumed to be the biological father” of a child, was judicially decreed to be the father, or was an adoptive father.¹⁰⁵ Presumption of paternity would result from, *inter alia*, being married to the child’s mother at the time of the child’s birth,¹⁰⁶ or receiving the minor child into his home and holding the child out as his own.¹⁰⁷ Thus, nonmarital children

of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation”), *with* INA § 309(a)(4), 8 U.S.C.S. § 1409(a)(4) (LEXIS 2005).

101. See Brief of Petitioners at 4, *Nguyen* (No. 99-2071) (citing Joint Appendix at 20 and Appellate Record at 44) (“Tuan Anh Nguyen . . . was born in Vietnam on September 11, 1969.”).

102. 1989 Tex. Gen. Laws 375, sec. 1, § 11.01(3), sec. 6, § 12.02(a)(5), sec. 35, § 42(b), sec. 38; 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 94. The State Department Appendix on legitimation laws that cites Texas law as allowing for legitimation without parental marriage if “before the child reaches the age of majority, the father receives the child into his home and openly holds out the child as his” was prepared in 1993, *see* 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 84, and presumably as a result lists 1992 as the “date of enactment” of the relevant provisions of the Texas Family Code (§§ 12.01–12.02), but the 1992 provision cited by the State Department appears to be identical to the provision that was originally enacted in June 1989 and took effect that September.

103. See 1-11 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 11.03 (2003), LEXIS (noting that “[t]he 1989 revisions eliminated all references to legitimacy” and that “the circumstances under which a child was considered legitimate under former law now give rise to a presumption that the child is the biological child of the father”). See *generally* 1989 Tex. Gen. Laws 375, secs. 1 to 26 (amending scattered sections of the Family Code); 1989 Tex. Gen. Laws 375, sec. 35 (amending Texas Probate Code § 42).

104. 1989 Tex. Gen. Laws 375, sec. 5, § 12.01(b).

105. 1989 Tex. Gen. Laws 375, sec. 1, § 11.01(3).

106. 1989 Tex. Gen. Laws 375, sec. 6, § 12.02(a)(1) (“A man is presumed to be the biological father of a child if . . . he and the child’s . . . mother are . . . married to each other and the child is born during the marriage . . .”).

107. 1989 Tex. Gen. Laws 375, sec. 6, § 12.02(a)(5) (“A man is presumed to be the biological father of a child if . . . (5) before the child reaches the age of majority, he receives the child into his home and openly holds out the child as his biological child.”). Presumption of paternity could be rebutted, but “only by clear and convincing evidence”; “a court decree establishing paternity of the child by another man” would qualify. 1989 Tex. Gen. Laws 375, sec. 6, § 12.02(b).

who were received into the father's home and held out as the father's own had, under the 1989 law, the same legal rights as marital children. For example, they could inherit from their fathers¹⁰⁸ without petitioning the probate court for a determination of right of inheritance as "[a] person claiming to be a biological child of the decedent [but] not otherwise presumed to be a child of the decedent" would have had to do.¹⁰⁹ Possession of legal rights equal to those of a child born in wedlock is precisely what renders a child legitimated for INA purposes.¹¹⁰

108. 1989 Tex. Gen. Laws 375, sec. 35, § 42(b) ("For the purpose of inheritance, a child is the . . . child of his biological father if the child is born under circumstances described by section 12.02, Family Code"). Despite the reference to a "child *born* under circumstances described by section 12.02" (emphasis added), which if read literally might not include a child subject to a section 12.02 presumption based on events occurring *after* birth, Texas courts have interpreted section 42(b) to extend equally to all section 12.02 presumptions, including the 12.02(a)(5) presumption based on post-birth receiving of a child into one's home and holding out of a child as one's own. *See* *York v. Flowers*, 872 S.W. 2d 13, 15 (Tex. App. 1994); *Matherson v. Pope*, 852 S.W. 2d 285, 290 (Tex. App. 1993).

109. *Matherson*, 852 S.W. 2d at 289 ("A person claiming to be a biological child of the decedent, who is not otherwise presumed to be a child of the decedent . . . may petition the probate court for a determination of right of inheritance."). Children of a presumed father were also entitled to support from that father during their minority. *See* *R.W. v. Texas Dep't of Protective & Regulatory Servs.*, 944 S.W.2d 437, 439-40 (Tex. App. 1997) (construing renumbered but substantially identical provisions of the Texas Family Code).

110. *De los Santos v. INS*, 525 F. Supp. 655, 660 n.5 (S.D.N.Y. 1981) ("a 'legitimated' child within the meaning of the United States immigration laws is a child having all the rights that legitimate children have under the law of either the child's or the father's domicile"), *aff'd*, 690 F.2d 56, 59 (2d Cir. 1982) ("We agree with the district court that INS's interpretation of 'legitimated' as requiring the acquisition of rights coextensive with those of a legitimate child is consistent with the language of the Act"); 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-2b(4)(a)(ii), at 31 ("Legitimation is the giving, to a child born out of wedlock, the legal status of a child born in wedlock . . . [t]hus, legitimacy is a legal status in which the rights and obligations of a child born out of wedlock are identical to those of a child born in wedlock."); LEGOMSKY, *supra* note 3, at 181 ("legitimation requires that the child be placed 'in all respects upon the same footing as if begotten and born in wedlock'" (quoting *In re Mourillon*, 18 I. & N. Dec. 122, 124 (B.I.A. 1981))); Sana Loue, *A Child Is a Child—Or Is It? Legitimation Under Foreign Law and Its Immigration Consequences*, 21 SAN DIEGO L. REV. 87, 93 (1983) (noting that "[t]estimony during the hearings on [the Nationality Act of 1940] indicates that Congress understood a legitimated child to be one whom the law treated 'as if it had been born legitimately,'" and that "[t]he Board of Immigration Appeals has generally construed section 101(b)(1)(C), the [sic] statutory provision governing legitimation, as requiring that an illegitimate child possess all the legal attributes of a legitimate child in order to be deemed legitimated" (quoting *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (1940), at 62, and citing, e.g., *In re Remy*, 14 I. & N. Dec. 183 (1972); *In re Greer*, 14 I. & N. Dec. 16 (1972); *In re Gouveia*, 13 I. & N. Dec. 604 (1970))); *see* *Lau v. Kiley*, 563 F.2d 543, 548 (2d Cir. 1977) ("There must be some purpose in the distinction the law makes between legitimate children and illegitimate children. The distinction must have some effect and must have been designed to distinguish between the two categories in order that they have different rights or obligations."); *Rios v.*

Tuan Nguyen had been received into Joseph Boulais's house and held out as Boulais's son during his childhood,¹¹¹ so the coming-into-effect of the 1989 statute appears to have rendered him a legitimated child.¹¹² When the statute came into effect in September 1989, Nguyen was less than twenty years old, so this legitimation would have occurred at a young enough age to satisfy old 309(a).¹¹³ Thus, Nguyen apparently could have been recognized as a citizen if he had elected application of old 309(a).¹¹⁴

Civiletti, 571 F. Supp. 218, 221 (D.P.R. 1983) ("The test to determine if a child has been 'legitimated' within the meaning and scope of the statute is not whether he is actually identified as legitimate but whether he enjoys for all relevant purposes the same conditions of so called legitimate children and that his direct descent from a citizen is sufficiently established.").

111. See *Nguyen v. INS*, 533 U.S. 53, 57 (2001) ("In June 1975, Nguyen, then almost six years of age, came to the United States. He became a lawful permanent resident and was raised in Texas by Boulais."); Brief of Petitioners at 5, *Nguyen* (No. 99-2071) ("Since 1975, Boulais, his wife and Nguyen have lived as a family in the United States . . . [and] Boulais provided financial support to Nguyen throughout his minority . . ."). While the court papers in *Nguyen* do not explicitly state that Boulais held Nguyen out as his own son during Nguyen's minority (rather than raising Nguyen but contending that he was someone else's son), this is fairly strongly implied, and Nguyen could presumably have proven it if he had wished to.

112. It has been held that the law of a state can recognize a child as legitimated, and that this recognition will be given effect under the INA, even where the father and child had had no contact with that state at the time of the legitimating act. *Burgess v. Meese*, 802 F.2d 338, 340 (9th Cir. 1986) (citing *Kaliski v. INS*, 620 F.2d 214, 216-17 (9th Cir. 1980)) (holding plaintiff to have been legitimated under the law of Washington State because of her father's having receiving her into his home and held her out as his own child, although these acts occurred in Mexico almost twenty years before plaintiff moved to Washington). That being so, there is no apparent reason why a state law cannot satisfy old 309(a) based on legitimating acts that occurred before the law's enactment—at a time, analogously, when father and child had no contact with a state that had any then-existing legitimation law describing the father's conduct. *But cf. In re Varian*, 15 I. & N. Dec. 341, 342-45 (1975), 1975 BIA LEXIS 106, at *3-9 (refusing to "extend the Attorney General's rulings on [pre-1934 law] to include a situation where the alleged legitimation was accomplished under the law of a jurisdiction, California, that had no connection whatsoever with either the father or the child at the time the alleged legitimating acts occurred" and thereby to find that respondent's father became legitimated, and thus retroactively became a citizen under pre-1934 law so as to enable him to transmit citizenship to respondent, where respondent's grandfather moved to California, which would allegedly have recognized his previous acts as legitimating, after respondent's father had died).

113. The fact that Nguyen's legitimation occurred only after new 309(a) was enacted in 1986 cannot have deprived him of the right to elect to proceed under old 309(a), because the transitional statute granted the right to election after stating that "any individual with respect to whom paternity was established by legitimation before [1986]" would *automatically* be considered under old 309(a). Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, §§ 23(e)(2)(B), 23(e)(2)(C), 100 Stat. 3655, as added by Immigration Technical Corrections Act, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609, 2619. If pre-1986 legitimation were also required when one had *elected* application of old 309(a), then the election provision would be utterly meaningless.

114. If Nguyen had successfully met the requirements of section 309(a) by electing application of the old version of that section, the remaining section 301(g)

Although a few arguments could have been made against Nguyen's potential claim to citizenship under old 309(a), it appears that none of them should have succeeded. One might argue, for example, that the 1989 Texas statute did not apply to Nguyen because he was over the age of eighteen at the time it was enacted, and was thus no longer a "child" under Texas law.¹¹⁵ The statute explicitly applied to "a presumption or determination of paternity on or after [its effective] date in relation to a child who is born *before*, on, or after that date" [emphasis added],¹¹⁶ however, and one of the areas in which it had the biggest impact was inheritance—a context in which legitimacy or presumed parenthood is still legally relevant after a child reaches the age of majority. Inheritance rights are one of the established factors looked at to determine whether a child has truly been "legitimated" for INA purposes,¹¹⁷ and the 1989 law gave Nguyen the inheritance rights of a child born in wedlock.

To clarify the point, imagine that Boulais had died suddenly in December of 1989. Because of the 1989 Texas law, Nguyen would have been entitled to inherit from Boulais under section 42(b) of the amended Probate Code, based on the rule of section 12.02(a)(5) of the amended Family Code that a man is the presumed father of a child if "before the child reaches the age of majority, he receives the child into his home and openly holds out the child as his biological child."¹¹⁸ Boulais had received Nguyen into his home, and had held out Nguyen as his own, long before Nguyen reached the age of eighteen, so under section 12.02(a)(5) he was Nguyen's presumed father. The fact that Nguyen was over eighteen by the time the 1989 law establishing section 12.02(a)(5) took effect would have been irrelevant: one Texas Court of Appeals decision applied the 12.02(a)(5) presumption to determine the paternity of a man who was born more

requirement for transmission of citizenship would not have posed a problem. Joseph Boulais had "lived in the United States continuously through his early adulthood," and then enlisted in the Army at the age of twenty-three in 1960 and served until January 1963. Brief of Petitioners at 4 (No. 99-2071) (citing Appellate Record at 84–86 and Joint Appendix at 9–10). Thus, Boulais met the physical-presence requirement for transmission of citizenship even under the more stringent original version of section 301(g) (then called section 301(a)(7), *see* Act of October 10, 1978, Pub. L. No. 95-432, sec. 3, 92 Stat. 1046, 1046) that was in effect at the time of Nguyen's birth, which required ten years of physical presence, five of which had to be after the age of fourteen, and included periods of honorable service in the Armed Forces of the United States for constructive-physical-presence purposes. *See* Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 301(a)(7), 66 Stat. 163, 236 (1952).

115. *See* TEX. FAM. CODE ANN. § 11.01 (Vernon 1992) ("'Child' or 'minor' means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed . . .").

116. 1989 Tex. Gen. Laws 375, sec. 38.

117. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-2(b)(4)(a)(ii), at 31.

118. *See* York v. Flowers, 872 S.W. 2d 13, 15 (Tex. App. 1994); Matherson v. Pope, 852 S.W. 2d 285, 290 (Tex. App. 1993); 1989 Tex. Gen. Laws 375, secs. 6, 35, § 12.02(a)(5), 42(b); *supra* note 108.

than sixty-eight years before the 1989 law was enacted, and in fact had *died* shortly before the 1989 law took effect.¹¹⁹

In December 1989, therefore, Nguyen would have had the same inheritance rights (and other legal rights) as if he had originally been born in wedlock. Paternity of a child born in wedlock would have been presumed under Texas Family Code section 12.02(a)(1);¹²⁰ Nguyen's paternity would have been presumed, with the same legal consequences, under Family Code section 12.02(a)(5).¹²¹ This identity of rights is what makes a child legitimate for INA purposes.¹²² Thus, by December 1989, Nguyen had been legitimated by the combination of his father's previous acts and the enactment of the 1989 Texas statute.¹²³ Since Nguyen was under twenty-one years of age in December 1989, this legitimation came early enough to satisfy old 309(a).

Another possible argument against Nguyen's potential claim under old 309(a) would be that he was not a "child" as that term is defined for purposes of Title III of the INA (containing section 309(a) as well as the rest of citizenship-by-

119. *Matherson*, 852 S.W. 2d at 287 & n.1, 290–91. The issue in *Matherson* was the paternity of Lee Jess Davis, who was born in either 1914 or 1920 (there were two birth certificates) and died single, childless and intestate in July of 1989. *Id.* at 287 & n.1. Which set of collateral relatives would inherit from Lee Jess depended on who was determined to have been his father. The Court of Appeals held that Thomas Luke Pope was presumed to be Lee Jess's father under Texas Family Code § 12.02(a)(5) because "Thomas Luke Pope openly held out Lee Jess as his biological child before Lee Jess reached the age of majority," 852 S.W. 2d at 290, and "[the] evidence supports a presumed finding that Thomas Luke Pope received Lee Jess into his home before Lee Jess reached the age of majority," *id.* at 291. (The second finding only had to be "presumed" and supported by evidence, rather than an actual finding, because appellants had neither objected to the probate court's failure to find that fact nor requested an additional finding. *Id.* at 290–91.)

While the *Matherson* court referred to Lee Jess as an "illegitimate" child, albeit one "legitimated for inheritance purposes," 852 S.W. 2d at 289–90, this may just have been a shorthand for the fact that he was born out of wedlock. Since it does not mean that he would not have been able to inherit from his paternal relatives if he had been alive when the 1989 amendments to section 12.02 took effect, and seemingly does not mean that he would have lacked any other rights of a legitimate child if he had still been alive when the 1989 law amending section 12.02 took effect, it does not imply that he would not have been considered legitimated for INA purposes if he (like Nguyen) had been alive when the 1989 law amending section 12.02 took effect. *See supra* note 110 and accompanying text (regarding the definition of a legitimate or legitimated child as one having the same legal rights as a child born in wedlock).

120. 1989 Tex. Gen. Laws 375, sec. 6, § 12.02(a)(1) ("A man is presumed to be the biological father of a child if . . . (1) he and the child's biological mother are . . . married to each other and the child is born during the marriage . . .").

121. 1989 Tex. Gen. Laws 375, sec. 6, § 12.02(a)(5) ("A man is presumed to be the biological father of a child if . . . (5) before the child reaches the age of majority, he receives the child into his home and openly holds out the child as his biological child.").

122. *See supra* note 110 and accompanying text.

123. *Cf.* INTERPRETATIONS, *supra* note 77, at 309.1(b)(2)(ii) (stating that legitimation by Acknowledgment under section 230 of the California Civil Code, where based on acts of acknowledgement occurring before father or child were resident in California, is completed for INA purposes when father or child takes up residence in California and California law becomes applicable).

descent law), and thus he was not covered by old 309(a), which used the term “child” in describing those to whom it applied.¹²⁴ Although old section 309(a) declared, seemingly straightforwardly, that the provisions of the relevant parts of section 301 “shall apply as of the date of birth to a child born out of wedlock . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation,”¹²⁵ the term “child” was and still is specifically defined for purposes of Title III of the INA by INA section 101(c)(1), which provides that

[t]he term “child” means an unmarried person under twenty-one years of age and includes 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 the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation.¹²⁶

At the time Nguyen’s legitimation was completed by passage of the 1989 Texas law, he was not under the age of sixteen, as section 101(c)(1) appears to require.¹²⁷ Nor was he “in the legal custody of the legitimating . . . parent,” as section 101(c)(1) also appears to require:¹²⁸ since Nguyen, being over the age of eighteen by September 1989, was no longer a minor under Texas law,¹²⁹ he was not then in anyone’s legal custody. It would seem at first glance, therefore, that he was not a “child” to whom old 309(a) could apply.

It has long been recognized, however, that there is an inconsistency between the requirement of old 309(a) that a child be legitimated by age twenty-one if the relevant parts of section 301 are to apply, and the apparent requirement of section 101(c)(1) that a child be legitimated by age sixteen in order to count as a “child” at all.¹³⁰ Since 1973, the INS (and USCIS as its successor) has resolved this inconsistency by concluding that “the provisions of [old section 309(a)],

124. See Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 309(a), 66 Stat. 163, 238 (1952) (stating that the provisions of the relevant part of section 301, and of section 308(2), “shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation”).

125. *Id.*

126. 8 U.S.C. § 1101(c)(1) (2004). The definition of “child” also includes language, not relevant here, regarding the inclusion and exclusion of certain adopted children.

127. *Id.* (“The term “child” means an unmarried person under twenty-one years of age and includes a child legitimated under [applicable] law . . . if such legitimation . . . takes place before the child reaches the age of 16 years”).

128. *Id.* (“The term “child” means an unmarried person under twenty-one years of age and includes a child legitimated under [applicable] law . . . if . . . the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation”).

129. See TEX. FAM. CODE ANN. § 11.01 (Vernon 1992) (“‘Child’ or ‘minor’ means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed . . .”).

130. New 309(a) avoids this problem by referring to a “person” with particular parentage, rather than using the word “child.” See 8 U.S.C. § 1409(a).

providing that legitimation occur [while the child is under the age of twenty-one years], operate independently of the definition of legitimated child in section 101(c).”¹³¹ Therefore, while the section 101(c)(1) requirement that a “child” be unmarried, which comes before what the relevant INS/USCIS *Interpretation* refers to as the section 101(c) “definition of legitimated child,” does apply in the context of old section 309(a),¹³² the subsequent section 101(c)(1) requirements do not, and old 309(a) is “satisfied by mere legitimation during minority [i.e., under age 21] notwithstanding that it occurred after age 16 years, or that the legitimation parent did no[t] then have legal custody of the child.”¹³³ The State Department, too, has

131. INTERPRETATIONS, *supra* note 77, at 309.1(b)(2)(i) (citing Op. Gen. Counsel, Nov. 27, 1973, CO 309-P). The part of the quote replaced by “[old 309(a)]” is, in the original, a reference to “the current statute,” with a footnote citation to INA sections 309(a) and 309(b) that must refer to the old section 309(a) rather than the new section 309(a), because new 309(a) did not exist in 1973 when the cited opinion was issued, and because the entire discussion would be inapplicable to new 309(a) since new 309(a) does not use the word “child” and thus the section 101(c) definition of that word is not relevant in the context of new 309(a). INTERPRETATIONS, *supra* note 77, at 309.1 n.23a. The part of the quote replaced by “[while the child is under the age of twenty-one years]” is, in the original, “during minority”; from the paraphrase of old 309(a), *see* Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 309(a), 66 Stat. 163, 238 (1952) (stating that the relevant parts of section 301 “shall apply as of the date of birth to a child born out of wedlock . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation”), one can conclude that “during minority” is used as an abbreviation of “while the child is under the age of twenty-one years,” which is what “during minority” would have meant in 1973.

132. INTERPRETATIONS, *supra* note 77, at 309.1(b)(2)(i). Tuan Nguyen does not appear to have been married at any time before he turned twenty-one: he, Joseph Boulais, and Boulais’s wife “lived as a family” from 1975 until Nguyen’s brief was filed in the Supreme Court in 2000, Brief of Petitioners at 4, *Nguyen* (No. 99-2071), and none of the opinions or briefs in his case mention his having married.

133. INTERPRETATIONS, *supra* note 77, at 309.1(b)(2)(i). *But see* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 17, at 3 (stating in instructions to Form N-600 that “[l]egitimation for INA benefits requires that the child be in the legal custody of the legitimating parent(s) at the time of legitimation”). The blanket statement in the Form N-600 instructions erroneously conflates the rule for Child Citizenship Act and derivative-naturalization claims—which are subject to all of section 101(c)(1) and would more frequently come within the administrative jurisdiction of INS/USCIS and be processed on Form N-600, *see, e.g.*, 8 C.F.R. § 320.3(a) (2005) (“An application for a certificate of citizenship under [section 101 of the Child Citizenship Act] on behalf of a minor biological child shall be submitted on Form N-600, Application for Certificate of Citizenship”), because they generally involve persons within the United States, *see supra* notes 8–9, 17–18 and accompanying text—with the rule for section 309(a) claims, which would rarely be processed on Form N-600 because they tend to involve persons outside the United States and thus fall under the administrative jurisdiction of the State Department, *see supra* notes 13–16 and accompanying text. That this conflation is a mere error, rather than an attempt to overrule *Interpretation* 309.1(b)(2)(i) *sub silentio* as to old 309(a), is apparent from the fact that it extends to determinations under new 309(a) as well: since new 309(a) has replaced the word “child,” defined in section 101(c)(1), with the word “person,” there is no textual basis for importing the section 101(c)(1) requirement of legal custody during legitimation into new 309(a). (The *title* of section 309 as a whole does still refer to “Children born out of wedlock,” 8 U.S.C. § 1409, but it is a “long-standing principle of statutory construction that

operated on the assumption that the age-twenty-one legitimation requirement was the relevant one in the context of old 309(a).¹³⁴

Thus, the consensus of the relevant administrative agencies is that the general age-sixteen legitimation requirement of section 101(c)(1) was overridden in the case of children subject to the specific age-twenty-one requirement of old 309(a), as Nguyen could have chosen to be.¹³⁵ Since the section 101(c)(1) requirements that a “child” be legitimated while under the age of sixteen and while in the legitimating parent’s legal custody, by long-standing administrative

the title of a statute cannot control the plain language of the statute,” *United States v. Sabri*, 326 F.3d 937, 941–42 (8th Cir. 2003), *aff’d*, 541 U.S. 600 (2004); the title of a statute or statutory section can be used to resolve ambiguity in the text, but not to alter the meaning of unambiguous text. *Accord* *United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir. 1994); *Oregon Pub. Util. Comm’n v. Interstate Commerce Comm’n*, 979 F.2d 778, 780 (9th Cir. 1992); *United States v. Brunson*, 882 F.2d 151, 154 (5th Cir. 1989).

134. 7 U.S. DEP’T OF STATE, *supra* note 16, §§ 1133.4-2c(3)(c)(ii), 1133.4-2c(4)(a), at 34–35 (noting that enactment of a law granting in-wedlock and out-of-wedlock children equal rights, or a father’s adoption of his biological child, will both qualify as legitimation satisfying old 309(a) if and only if they occur before the child turns twenty-one). It is following the example of the *Foreign Affairs Manual* that this Article often, for brevity’s sake, refers to “old 309(a)” and “new 309(a)” rather than including the word “section.”

135. *But see* *Burgess v. Meese*, 802 F.2d 338, 340–41 (9th Cir. 1986). Though *Burgess* is somewhat confusing on this point, it can be read as suggesting that the age-twenty-one requirement of old 309(a) is not the controlling one. The majority opinion in *Burgess* first stated, citing old 309(a), that “to obtain citizenship Mary [Burgess] must prove legitimation took place while she was under twenty-one years of age,” but went on to cite 8 U.S.C. § 1101(b)(1)(C) for the proposition that a child can be legitimated “under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile . . . 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.” 802 F.2d at 340. The definition of “child” contained in 8 U.S.C. § 1101(b)(1)(C) does not apply to Title III of the INA, in which section 309(a) is contained, as the concurrence in *Burgess* pointed out, 802 F.2d at 342. The definition of “child” in section 101(b)(1)(C) of the INA, 8 U.S.C. § 1101(b)(1)(C), applies to Titles I and II of the INA; “child” is defined for Title III purposes by INA section 101(c)(1), 8 U.S.C. § 1101(c)(1), *see supra* note 126 and accompanying text. Since *Burgess* was not applying the correct definitional provision, any suggestion in it that the definitional provision controls over the specific requirements of section 309(a) would seem not to be entitled to great weight.

The mistaken citation of 8 U.S.C. § 1101(b)(1)(C) in *Burgess* was repeated in a non-outcome-determinative portion of the analysis in *O’Donovan-Conlin v. U.S. Dep’t of State*, 255 F. Supp. 2d 1075, 1082 (N.D.Ca. 2003) (citing *Burgess*, 802 F.2d at 340). The reappearance of 8 U.S.C. § 1101(b)(1)(C) in *O’Donovan-Conlin* is more erroneous than its appearance in *Burgess*: at issue in *O’Donovan-Conlin* was not old section 309(a), as in *Burgess*, but new section 309(a), which besides being located in Title III of the INA does not use the word “child,” defined by both 8 U.S.C. § 1101(b)(1)(C) and 8 U.S.C. § 1101(c)(1).

interpretation, simply do not apply to old 309(a),¹³⁶ Nguyen's failure to meet those requirements should not have affected his potential claim under old 309(a).¹³⁷

There is one other argument against Nguyen's potential citizenship claim under old 309(a) that is worth considering, but it too seemingly should have failed. Old 309(a) rendered the relevant parts of section 301 applicable to a child only "if the paternity of such child is established while such child is under the age of twenty-one years by legitimation,"¹³⁸ rather than merely requiring that the child be "legitimated" while under age twenty-one.¹³⁹ Because of this language, the State

136. If one were to read the INS's longstanding conclusion that old 309(a) is "satisfied by mere legitimation during minority notwithstanding that it occurred after age 16 years, or that the legitimation parent did no[t] then have legal custody of the child," INTERPRETATIONS, *supra* note 77, at 309.1(b)(2)(i), as referring with the words "during minority" to minority under state law rather than as using "during minority" to paraphrase old 309(a)'s age-twenty-one requirement, *see supra* note 131, then one could argue that Nguyen's case would not be covered by this statement, since when he was legitimated he was no longer a minor under state law, *see supra* note 115 and accompanying text. This argument would necessitate a rather odd theory of the interaction between old 309(a) and section 101(c)(1), however, as it would imply that the age-twenty-one requirement of old 309(a) displaced the age-sixteen requirement of section 101(c)(1) as to *some* legitimated children (those who were minors under state law when legitimated and to whom the INS's historic interpretation concededly applied), but not as to others. Such a distinction, besides lacking support in the statutory text, would be in tension with the logic of the INS's broader conclusion that "the provisions of [old section 309(a)], providing that legitimation occur during minority, operate independently of the definition of legitimated child in section 101(c)." INTERPRETATIONS, *supra* note 77, at 309.1(b)(2)(i).

137. One could perhaps argue that, independent of INA section 101(c)(1), the requirement that a child be a minor under state law at the time of legitimation is implicit in the concept of legitimation. This contention, however, is inconsistent with the way in which old 309(a) is interpreted in situations more usual than Nguyen's. A valid marriage between a child's father and the child's mother legitimates that child under old 309(a) as long as it occurs before the child reaches the age of twenty-one. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-2(c)(3)(a), at 33. Where legitimation by some mechanism other than marriage gives the child the same rights under state law that marriage of the parents would give, as in Nguyen's case, *see supra* notes 116-123 and accompanying text, the required timeframe for such legitimation should not be any different, since the text of old 309(a) does not distinguish between legitimation by marriage and other forms of legitimation. *See also* 7 U.S. DEP'T OF STATE, *supra* note 16, § 1135.3-1(b), at 64 (holding that children born out of wedlock to citizen parents, whose citizenship status was dependent on a pre-1934 law that the Attorney General had interpreted as requiring legitimation, "acquired U.S. citizenship . . . upon legitimation under the laws of the father's domicile even when the legitimation occurred after the person's majority . . . as long as the state law set no age limits on legitimation").

138. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 309(a), 66 Stat. 163, 238 (1952).

139. *Cf. Gorsira v. Loy*, 357 F. Supp. 2d 453, 458-64 (D. Conn. 2005) (distinguishing between a "legitimate" child and one whose paternity has been established by legitimation, and holding that while Guyanese statutes may have made all children born in Guyana legitimate, they did not cause the petitioner's paternity to be established by legitimation so as to preclude him from acquiring derivative citizenship under former 8 U.S.C. § 1432 upon the naturalization of his mother), *reconsidered in part on other grounds*

Department holds that laws equalizing the status of all in-wedlock and out-of-wedlock children, even if in effect before a child's twenty-first birthday, do not satisfy old 309(a) unless the blood relationship between the father and the child is also established before the child's twenty-first birthday.¹⁴⁰ A law that gives all children rights equal to those of a child born in wedlock may make all children "legitimate,"¹⁴¹ but this legitimacy does not tend to establish the paternity of those legitimated children in the same way as legitimation based on the marriage of a child's father to the child's mother. Rather, it is a legitimacy independent of the child's ties to a particular putative father. If the 1989 Texas law were to be construed as legitimating all children regardless of their ties to a particular father, Boulais's failure to independently establish his paternity before Nguyen turned twenty-one¹⁴² could have been fatal to Nguyen's potential claim under old 309(a).

The 1989 amendments to the Texas Family and Probate Codes that rendered Nguyen legitimate, however, did not truly equalize the status of all marital and out-of-wedlock children, and did not bestow legitimacy uncoupled to status as the child of a particular father. Recall that although "the parent-child relationship" was declared by the 1989 law to "extend[] equally to every child and parent regardless of the marital status of the parents,"¹⁴³ a man was only included within the law's definition of a "parent" if he was "presumed to be the biological father" of a child, was judicially decreed to be the father, or was an adoptive father;¹⁴⁴ presumption of paternity would result, *inter alia*, from the man being married to the child's mother at the time of the child's birth, or from the man receiving the minor child into his home and holding the child out as his own.¹⁴⁵

and adhered to sub nom. Gorsira v. Chertoff, No. 3:03cv1184, 2005 U.S. Dist. LEXIS 6199 (D. Conn. April 11, 2005).

140. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1134.2(c)(3)(c)(ii), at 34.

141. See *Lau v. Kiley*, 563 F.2d 543, 548–51 (2d. Cir. 1977) (discussing the law of the People's Republic of China); *In re Sanchez*, 16 I. & N. Dec. 671, 672–73 (1979), 1979 BIA LEXIS 3, at *3–6; 7 U.S. DEP'T OF STATE, *supra* note 16, §§ 1133.4-2(b)(4)(a)(ii), 2(b)(4)(a)(vii), at 31.

142. In 1998, Boulais obtained an "Order of Parentage" declaring that he was Nguyen's father from a Texas district court, based on DNA testing. *Nguyen v. INS (Nguyen I)*, 208 F.3d 528, 531 (5th Cir. 2000). (The order does not appear to have been issued in a reported decision: a LEXIS search for appearances of "Boulais" in Texas cases during the relevant time period did not produce any results.) This was too late to count as an establishment of paternity for purposes of old 309(a), however, since it occurred when Nguyen was more than twenty-eight years old. In fact, one could argue that the 1998 order *weakened* Nguyen's claim to citizenship, by implying that Boulais had not been legally recognized as Nguyen's father before 1998. This would, however, be a rather large inference to draw from a court's simple recognition of a DNA test as proving that Boulais was Nguyen's biological father, especially since it appears that no party to the proceeding is likely to have raised the issue of the legal significance of Boulais having previously taken Nguyen into his home and held him out as his own.

143. 1989 Tex. Gen. Laws 375, sec. 5, § 12.01(b).

144. *Id.* at sec. 1, § 11.01(3).

145. *Id.* at sec. 6, § 12.02(a) ("A man is presumed to be the biological father of a child if . . . (1) he and the child's biological mother are . . . married to each other and the child is born during the marriage . . . or (5) before the child reaches the age of majority, he receives the child into his home and openly holds out the child as his biological child.").

One who benefited from a presumption of paternity could inherit from his father without petitioning the probate court for a determination of right of inheritance and proving paternity by clear and convincing evidence, while “[a] person claiming to be a biological child of the decedent [but] not otherwise presumed to be a child of the decedent” would have to take that extra step.¹⁴⁶ The rights of marital children and children otherwise subject to a presumption of paternity were made equal by the 1989 Texas law, but the rights of marital children and out-of-wedlock children not subject to a presumption of paternity were not.¹⁴⁷

Thus, Nguyen acquired the same rights as a marital child under the 1989 Texas law only because he had been received into Boulais’s home and held out as Boulais’s son during his minority, and was therefore presumed under the law to *be* Boulais’s son. His legitimation was of the sort that “establishe[s] paternity”: just as a putative father’s marriage to the child’s mother is considered strong evidence that he is the actual father, a putative father’s reception of the child into his home and holding out of the child as his own is considered under laws like the 1989 Texas law to be strong evidence that he is the actual father. This is why, when legitimation occurs without marriage under a statute prescribing conditions such as acknowledgement and acceptance into the father’s household, the State Department’s *Foreign Affairs Manual* does not provide that paternity must be separately established before the child turns twenty-one in order for a claim under old 309(a) to succeed.¹⁴⁸ The text of old 309(a), after all, speaks of establishment of paternity *by* legitimation, not legitimation *plus* some other establishment of paternity.¹⁴⁹ Nguyen’s potential claim under old 309(a) should not have failed for

146. *Id.* at sec. 35, § 42(b). If the probate court found “by clear and convincing evidence that the purported father was the biological father of the child, then the child [would be] treated as any other child of the decedent for the purpose of inheritance,” *id.*, so the difference in rights was admittedly not a large one, but it did exist: children who benefited from a presumption of paternity, be it one based on marriage or one based on taking in and holding out, did not have to satisfy the clear and convincing evidence standard as to their actual biological paternity.

147. *But see* 1-11 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 11.03, *supra* note 103 (stating that “[a] distinction between legitimate and illegitimate children no longer exists under Texas law, except to the extent that it may be more difficult to legally establish the existence of a parent-child relationship between a father and a child born to a woman to whom the father is not married.”) The greater difficulty that the child of an unmarried father has in legally establishing a relationship is ameliorated when the child is subject to a statutory presumption of paternity, *see supra* notes 104–110, 144–146, and accompanying text, which is what makes out-of-wedlock children subject to a statutory presumption of paternity different from other out-of-wedlock children.

148. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1134.2c(3)(c)(i), at 34. As previously noted, *see supra* note 54, even if the State Department’s *Foreign Affairs Manual* is not entitled to *Chevron* deference because of its status as a mere “agency manual,” *see Scales v. INS*, 232 F.3d 1159, 1165–66 (9th Cir. 2000) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)), it is still “entitled to respect” to the extent that it has “the power to persuade,” *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), and the distinction that it draws here is a persuasive one.

149. *Cf., e.g.,* *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1067–68 & nn.5–6 (9th Cir. 2003) (noting, in the course of rejecting equal protection challenge to former section 321(a)(3) of the INA, that petitioner would not fall within provision providing for

lack of establishment of paternity before his twenty-first birthday, because the legitimating acts done by Boulais during Nguyen's childhood and the coming into effect of the 1989 Texas law combined to establish Nguyen's paternity by legitimation.

Whether or not this claim under old 309(a) would ultimately have succeeded for Nguyen, it at least would have been worth making. If Nguyen had elected to have old 309(a) apply to him, then only a finding that the 1989 Texas law was inapplicable to persons over eighteen or did not have the legitimating and paternity-establishing effect that its text and the State Department's interpretation suggest, or that the historic INS and State Department resolution of the tension between 101(c) and old 309(a) was incorrect, could have kept Nguyen from being recognized as a citizen.

That the possibility of a successful claim under old 309(a) appears to have gone unnoticed¹⁵⁰ is a powerful illustration of the pitfalls created by section 309(a) and its interaction with legitimation laws that differ from state to state and can vary over time. The provision of the 1989 Texas law that presumed paternity from taking a child into one's home and holding it out as one's own was repealed in 1999,¹⁵¹ which may help explain how its previous existence was overlooked while Nguyen's case was pending.¹⁵² If highly skilled lawyers encounter such difficulties

acquisition of citizenship by a child upon "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation," because petitioner's father had legitimated him for purposes of that provision under California law "by receiving that child into his home and by holding out that child as his natural child").

150. Nguyen's brief in the Supreme Court noted that "[b]efore 1986, the pertinent portions of Section 1409(a) required only that paternity be 'established by legitimation' before the child's 21st birthday" and that "Nguyen belongs to a class of children who may elect whether to have the 'old' or 'new' Section 1409 govern their cases," but went on to state that "[b]ecause Nguyen has not made such an election, and because he does not meet the requirements of either the pre-1986 law or the current Sections 1409(a)(3) and (4), he challenges both versions of the statute." Brief of Petitioners at 6 n.1, *Nguyen* (No. 99-2071). The brief also noted that "Boulais . . . did not legitimate [Nguyen] or otherwise formally establish his paternity prior to Nguyen's 18th birthday," Brief of Petitioners at 4-5, *Nguyen* (No. 99-2071); the focus on Nguyen's eighteenth birthday rather than his twenty-first birthday suggests that the possibility of a successful claim under old 309(a) based on legitimation between the ages of eighteen and twenty-one may have been overlooked.

151. 1999 Tex. Gen. Laws 556, sec. 7, § 151.002(a)(5) (approved by governor June 18, 1999). The statute was later partially reenacted in 2003. 2003 Tex. Gen. Laws 1248, sec. 1, § 160.204(a)(5) ("A man is presumed to be the father of a child if: . . . during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.").

152. The Court of Appeals for the Fifth Circuit decided Nguyen's case in April of 2000, *Nguyen v. INS (Nguyen I)*, 208 F.3d 528; certiorari was granted on September 26, 2000, 530 U.S. 1305 (2000). The 1999 repeal of the Texas statute on which Nguyen's potential claim rested does not help explain how it was overlooked *before* 1999, but this may simply have been due to lack of counsel, as "[Nguyen's] attorney withdrew" in January 1997 shortly after Nguyen initially broached the idea of proving himself to be a citizen, 208 F.3d at 530.

in dealing with section 309(a), it is hardly surprising that legally naïve fathers might have problems conforming their conduct to its mandate.

D. The Child Citizenship Act of 2000: An Incomplete Solution

The Child Citizenship Act of 2000 (CCA), enacted outside the basic citizenship-by-descent structure in what may in part have been an attempt to deal with some of the worst problems discussed above, will change the result on future facts like those of *O'Donovan-Conlin* (when a child at some point lives in the United States with briefly-married citizen parents).¹⁵³ The CCA does not, however, solve all of the problems facing unwed fathers under current citizenship-by-descent law. It would not significantly improve the position of our hypothetical Joseph, who lived with and supported his children overseas while failing to satisfy the technical requirements of section 309(a), and it would not have helped Joseph Boulais and Tuan Nguyen. The CCA was not primarily intended as a solution to those sorts of problems (it was originally entitled the “Adopted Orphans Citizenship Act”¹⁵⁴ and focused on the issue suggested by that title), and it is a rather incomplete one.

The Child Citizenship Act has two main, citizenship-granting sections.¹⁵⁵ Section 101 of the CCA, enacted as section 320 of the INA, states that “[a] child born outside of the United States automatically becomes a citizen of the United States” when three conditions are met: “[a]t least one parent of the child is a citizen of the United States . . . the child is under the age of eighteen . . . [and] the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.”¹⁵⁶ Section 102 of the CCA, enacted as INA section 322, permits a U.S.-citizen parent to apply for naturalization of a child “residing outside of the United States in the legal and physical custody of” the citizen parent,¹⁵⁷ provided the citizen parent either “has

153. See *supra* notes 86, 95 and accompanying text.

154. Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child As Well As the Citizen Parent*, 55 FLA. L. REV. 489, 494 (2003).

155. In addition to the citizenship-granting provisions, which are located in Title I of the CCA, the CCA also contains a Title II providing that the act of voting unlawfully or otherwise falsely claiming citizenship, when committed by aliens who reasonably believed that they were citizens because they permanently resided in the U.S. prior to the age of sixteen and had citizen parents, will not be grounds for inadmissibility, deportability, criminal prosecution, or a finding of lack of good moral character. Child Citizenship Act of 2000, Pub. L. No. 106-395, § 201, 114 Stat. 1631, 1633–36 (codified as amendments to scattered sections of 8 and 18 U.S.C.).

156. Child Citizenship Act of 2000 § 101(a), 8 U.S.C.S. § 1431(a) (LEXIS 2005).

157. If (and only if) the child’s citizen parent has died during the previous five years, a November 2002 amendment to section 102 of the CCA allows the child’s citizen grandparent or citizen legal guardian to apply in the citizen parent’s stead, whether or not this citizen grandparent or legal guardian resides outside the United States, so long as the child is residing outside the United States and the person in whose custody the child is residing does not object. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, sec. 11030B, 116 Stat. 1758, 1837 (2002) (amending INA § 322(a)); Memorandum from William R. Yates, Deputy Executive

. . . been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years,” or himself has a citizen parent who satisfies this physical-presence requirement.¹⁵⁸ The naturalization under CCA section 102 cannot occur abroad; rather, the child must be “temporarily present in the United States pursuant to a lawful admission, and . . . maintaining such lawful status.”¹⁵⁹

For several reasons, the CCA’s legal consequences are not as simple and helpful as they might at first appear. First, neither section 101 nor section 102 of the CCA is retroactive; both apply only to children who were under the age of eighteen when the CCA took effect on February 27, 2000.¹⁶⁰ Second, both sections apply to adopted children only when such children meet the complex requirements of INA section 101(b)(1),¹⁶¹ the details of which are (since adoption cases do not

Associate Commissioner, U.S. Department of Homeland Security, to Regional Directors, District Directors, Officers-in-Charge, and Service Center Directors, regarding Addition of Citizen Grandparents and Citizen Legal Guardians as Eligible Applicants Pursuant to INA 322 (Jan. 21, 2003), <http://uscis.gov/graphics/lawsregs/handbook/PolMemo91.pdf>.

158. 8 U.S.C.S. § 1433. Note that the physical-presence requirement applied to the child’s citizen parent or citizen grandparent by CCA section 102 is slightly different from the requirement imposed by INA section 301(g) for transmission of citizenship at birth by one citizen parent. It demands the same total amount of presence, but does not include time spent abroad in the service of the U.S. government or an international organization, or time spent abroad as the dependent child of another abroad for those reasons. (*Cf.* notes 33–34 *supra* and accompanying text.) Also, the CCA section 102 requirement can be satisfied after the child’s birth, as long as it is satisfied before the child turns eighteen (and before the naturalization application is filed). LEGOMSKY, *supra* note 3, at 1218.

USCIS has interpreted CCA section 102 as allowing the physical presence of a child-applicant’s citizen grandparent to enable naturalization of the child even if the citizen grandparent is no longer alive at the time that the child’s parent (or the child’s legal guardian, or another grandparent of the child) applies for the child to be naturalized. Memorandum from William R. Yates, Deputy Executive Associate Commissioner, U.S. Department of Homeland Security, to Regional Directors, District Directors, Officers-in-Charge, and Service Center Directors, regarding Effects of Grandparent’s Death on Naturalization Under INA Section 322 (Apr. 17, 2003), <http://uscis.gov/graphics/lawsregs/handbook/PolMemo94Pub.pdf>.

159. 8 U.S.C.S. § 1433(a)(5). Because acquisition of citizenship under the CCA must occur within the United States, *see also supra* note 156 and accompanying text, USCIS rather than the Department of State will have primary responsibility for administering it, *see supra* notes 8–9 and accompanying text—although it is possible that whether or not someone previously became a citizen under the CCA while in the United States might become an issue while that person was outside the United States, and thus subject to the administrative jurisdiction of the Department of State, *see supra* note 13.

160. *Gomez-Diaz v. Ashcroft*, 324 F.3d 913, 916 (7th Cir. 2003); *Drakes v. Ashcroft*, 323 F.3d 189, 190–91 (2d Cir. 2003); *United States v. Arbelo*, 288 F.3d 1262, 1263 (11th Cir. 2002); *Hughes v. Ashcroft*, 255 F.3d 752, 759 (9th Cir. 2001); *Nehme v. INS*, 252 F.3d 415, 431–32 (5th Cir. 2001); 8 C.F.R. §§ 320.2(a)(2), 322.2(a)(3). This is why the CCA did not apply (and was not even mentioned) in *O’Donovan-Conlin* despite the fact that that case was decided in 2003: the plaintiff had been born in 1980, 255 F. Supp. 2d at 1078, and thus was over eighteen by the time of the CCA’s enactment in 2000.

161. INA §§ 320(b), 322(c), 8 U.S.C.S. §§ 1431(b), 1433(c). This needed to be specified in the CCA because INA section 101(b)(1) normally only applies to Titles I and II

relate to citizenship by descent) outside the scope of this Article. Third, and most important, the word “child” is an explicitly defined term in the INA, so that the citizenship-granting provisions of the CCA will only apply to a child if that child meets the definitional requirements.¹⁶²

Recall that according to INA section 101(c)(1), “child” as used in Title III of the INA, where the CCA citizenship provisions and sections 301–309 appear,

means an unmarried person under twenty-one years of age and includes 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 the United States or elsewhere . . . if such legitimation . . . takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation

and also includes certain adopted children.¹⁶³ While the specific language of the CCA replaces the age-twenty-one threshold with a stricter age-eighteen one, the legitimation requirement still stands¹⁶⁴—at least for children whose mothers have not become naturalized citizens.¹⁶⁵ Legitimation has also been incorporated into

of the INA; for Title III of the INA, which contains the CCA, whether an adopted child is included in the term “child” is usually decided by INA section 101(c)(1).

162. See 8 C.F.R. § 320.1 (in regulations under CCA § 101, INA § 320, 8 U.S.C. § 1431, “Child means a person who meets the requirements of section 101(c)(1) of the [INA].”); 8 C.F.R. § 322.1 (same for regulations under CCA § 102, INA § 322, 8 U.S.C. § 1433); 8 C.F.R. §§ 320.2(a), 322.2(a) (using word “child” to describe “[w]ho is eligible for citizenship” under CCA sections 101–102).

163. 8 U.S.C. 1101(c)(1) (2004).

164. See 8 C.F.R. §§ 320.3(b)(1)(v), 322.3(b)(1)(v) (stating that “[i]f the child was born out of wedlock, documents verifying legitimation according to the laws of the child’s residence or domicile or father’s residence or domicile (if applicable)” are included among the “required documents” that “an applicant must submit” to support a claim under either section 101 or section 102 of the CCA); U.S. Citizenship and Immigration Servs., Frequently Asked Questions About Naturalization, at no. 24, at <http://uscis.gov/graphics/services/natz/faq.htm> (last modified Apr. 8, 2004) (listing, among the “requirements” in order for “a child . . . born to a U.S. citizen who did not live in (or come to) the United States for a period of time prior to the child’s birth” to “become a U.S. citizen by action of law,” not only that the child be “lawfully admitted for permanent residence” and residing in the United States in the legal and physical custody of the citizen parent, but also that “[t]he child was the parent’s legitimate child or was legitimated by the parent before the child’s 16th birthday,” and stating that “[s]tepchildren or children born out of wedlock who were not legitimated before their 16th birthday do not derive United States citizenship through their parents”).

165. Based on an opinion from the Office of Legal Counsel within the Department of Justice, USCIS has instructed its officers that the definition of “child” should be interpreted for CCA purposes such that “[a]ssuming an alien child meets all other requirements of Section 320 and [sic] 322, an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen.” Memorandum from William R. Yates, Acting Associate Director, U.S. Department of Homeland Security, to Regional Directors, District Directors, Officers-in-Charge, and Service Center Directors, regarding Eligibility of

the regulations for determining whether a child is “in the legal . . . custody of the citizen parent” for CCA purposes: this is “presume[d] . . . [i]n the case of a biological child born out of wedlock who has been legitimated and currently resides with the natural parent.”¹⁶⁶

If the CCA had been in effect, therefore, Neal O’Donovan-Conlin would automatically have become a citizen when he lived in Arizona with his (briefly) married parents.¹⁶⁷ Tuan Anh Nguyen, however, would not automatically have become a citizen when he lived in Texas with his father, because Texas law only started providing for legitimation by receiving one’s child into one’s home and holding it out as one’s own in September 1989—by which time Nguyen was almost twenty years old.¹⁶⁸ If Joseph Boulais and an under-sixteen-year-old Nguyen lived across the state line in Arkansas even today, Nguyen would not be “legitimated” under state law, and thus would not become a citizen under the CCA, because Arkansas law still does not provide for legitimation without marriage.¹⁶⁹ The CCA ameliorates the effect of INA sections 309(a)(3) and 309(a)(4) for children living in states that have laxer legitimation requirements, but the trap for the unwary remains for citizen fathers living with their children in states that happen to have stricter legitimation requirements.

The CCA also does not eliminate the section 309(a) pitfall for children living abroad with their citizen fathers. Section 102 of the CCA requires not only legitimation under the relevant foreign law, but formal naturalization during a trip to the United States before age eighteen;¹⁷⁰ any father who does not know to do the paperwork to qualify his child for citizenship under INA section 309(a) will also likely be unaware that he has to organize this naturalization. Section 102 is aimed not at the trap-for-the-unwary issue, but at different problems: it helps an adopted

Children Born out of Wedlock for Derivative Citizenship (Sept. 26, 2003), <http://uscis.gov/graphics/lawsregs/handbook/PolMemo98pub.pdf>.

166. 8 C.F.R. §§ 320.1(1)(iii), 322.1(1)(iii). The regulations state, somewhat vaguely, that “[t]here may be other factual circumstances under which the Service will find the U.S. citizen parent to have legal custody for purposes of the CCA.” 8 C.F.R. §§ 320.1(2), 322.1(2). This is likely a reference to the rule that “in the absence of judicial determination or judicial or statutory grant of custody in the case of legal separation of the parent of a person claiming citizenship . . . the parent having actual uncontested custody is to be regarded as having ‘legal custody’ of the person concerned,” *In re M*, 3 I. & N. Dec. 850, 955 (1950), 1950 BIA LEXIS 4, *quoted in* Bagot v. Ashcroft, 398 F.3d 252, 259, 270 (3d Cir. 2005) (stating that *In re M* “has been the subject of approval by the federal courts”).

167. See *O’Donovan-Conlin*, 255 F. Supp. 2d at 1082. O’Donovan-Conlin was found by the court to have been legitimated; the problem in his case was not section 309(a)(4) but section 309(a)(3). *Id.* at 1081–83.

168. See 1989 Tex. Gen. Laws 375; Brief of Petitioners at 4, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (“Tuan Anh Nguyen . . . was born in Vietnam on September 11, 1969.”). See also 2003 Tex. Gen. Laws 1248 (reinstating possibility of informal legitimation that had been eliminated in 1999, though limiting it to cases where the father resides in the same household with the child and holds out the child as his own during the first two years of the child’s life); 1999 Tex. Gen. Laws 556; 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 94.

169. See ARK. CODE ANN. § 28-9-209 (Michie 2003); 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 91.

170. See 8 U.S.C. § 1433(a)(3)–(5) (2004).

child, a child whose citizen grandparent meets the physical-presence requirement for citizenship transmission but whose citizen parent does not, and a child whose citizen parent or citizen grandparent finishes meeting the physical-presence requirement after the child's birth but before the child turns eighteen.¹⁷¹

For children living abroad or in U.S. states with strict legitimation requirements, therefore, the Joseph/Josephine problem still exists. As we will see, it is far from the only bizarre result that can be produced by current citizenship-by-descent law.

III. THE PECULIAR CONSEQUENCES OF MARRIAGE FOR CITIZEN MOTHERS

The strange outcome of the Jane and Molly hypotheticals is relatively easy to explain in terms of current citizenship-by-descent law, though difficult to justify. Recall that the hypotheticals in question involve the children of a citizen mother (Jane) who left the United States on her third birthday, and the children of a citizen mother (Molly) who either grew up in the overseas household of a member of the U.S. military or civilian government employee, grew up in the Northern Mariana Islands, or grew up in the United States but has spent every July since her birth on foreign vacations.

A. *The Marriage Penalty for Mothers Who Leave the United States During Childhood*

An unmarried citizen mother can transmit citizenship under section 309(c) of the INA as long as she has been physically present in the United States continuously for at least one year. A child born to a married citizen mother, on the other hand, will not fall within the special provision of section 309(c) for children born out of wedlock to citizen mothers, and thus will only be a citizen if the mother qualifies to transmit citizenship under the general rule of section 301(g). That section requires a total of five years physical presence in the United States and specifies that two of those years must be after the age of fourteen—ordinarily a significantly stricter requirement.

Any citizen mother who meets the section 309(c) one-year requirement but not the section 301(g) five-and-two-year requirements, therefore, will transmit citizenship if she remains unmarried to the foreign father of her child, but not if she marries him before the child is born.¹⁷² The class of mothers exposed to this “marriage penalty” is not insignificant. It includes, for example, any woman who was born in the United States and stayed here until leaving some time after her first birthday and before her sixteenth birthday¹⁷³—like our hypothetical Jane, who left at age three.

171. See LEGOMSKY, *supra* note 3, at 1218; *supra* note 158.

172. If the citizen mother marries the child's father *after* the child's birth, the child will not lose citizenship that it has already acquired. See *In re Villanueva*, 16 I. & N. Dec. 84 (1976), 1976 BIA LEXIS 81.

173. *Cf.*, e.g., *In re C*, 1 I. & N. Dec. 301 (1942), 1942 BIA LEXIS 25 (holding that under analogous rule of Nationality Act of 1940, requiring five years of United States residence after the age of sixteen for married women to transmit citizenship but making any

The point of section 309(c)'s laxer requirement for citizenship transmission by unmarried mothers, according to the legislative history, was that it "insures that the child shall have a nationality at birth."¹⁷⁴ The concern was that, assuming many nations have citizenship laws similar to those of the United States under which unmarried fathers cannot transmit citizenship without going through certain formalities,¹⁷⁵ children of unmarried mothers might not acquire the nationality of their fathers. Thus, to avoid statelessness, the requirement for transmission of citizenship by unmarried mothers had to be made laxer than the requirement for transmission by married mothers, whose children would acquire the nationality of their fathers.

Presumably, however, the difference between sections 309(c) and 301(g) was not meant to act as a disincentive to marriage—as it could in our Jane hypothetical. It could even be an incentive to divorce, though this is slightly less clear. From the statutory text, certainly, it would appear that a woman who left the United States between her first and sixteenth birthdays, who is pregnant and married to a foreign citizen, and who wishes to transmit citizenship to her child, should divorce her husband before the child is born, if she is unable or unwilling to travel back to the United States to give birth.¹⁷⁶ If the divorce is considered to be a "sham," however, such a citizen mother might be denied the benefit of section 309(c) under the logic of *In re Aldecoaotalora*, which refused to grant immigration benefits to the unmarried daughter of a lawful permanent resident because the daughter, although divorced, "nevertheless continued to live with her former husband in what to all appearances [wa]s a marital relationship."¹⁷⁷ Following *Aldecoaotalora* might produce an even more perverse result: a married and pregnant citizen mother who wanted to transmit citizenship to her child under these circumstances would have to not only formally divorce her husband before the birth of her child, but actually leave him as well.

previous residence sufficient for unmarried women, a child was not a citizen where the child's citizen mother had left United States at age of twenty and was in a valid common-law marriage at the time of the child's birth).

174. S. REP. NO. 82-1137, reprinted in 3 OSCAR M. TRELLES & JAMES F. BAILEY, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 39 (1979).

175. Brief for the Respondent at 36 & n.18, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (citing § 1 para. 4 Staatsangehoerigkeitsgesetz (German citizenship statute); British Nationality Act, 1981, §§ 47, 50(9); PHILIPPINE CONST. Art. IV, §§ 1-4 (1987) (citizenship) and Philippine Family Code tit. VI (effective Aug. 3, 1998) (establishment of paternity and filiation); New Nationality Law, July 1998, art. 4531 (effective June 14, 1998) (South Korea); Thai Nationality Act of 1992 (as amended), §§ 7(1), 10; Nationality Law of Vietnam, May 20, 1998, art. 17 and 83/1998/ND-CP Decree of the Government on Civil Registration arts. 19, 47 (Oct. 10, 1998)).

176. Bestowing *jus soli* citizenship on one's child by returning to American soil before giving birth, see *supra* notes 3-4 and accompanying text, is one way for a citizen mother to get around any citizenship-by-descent problem. It is not an option that will be financially or practically available to all mothers, however, and in any event it seems unfair to require a citizen mother to give birth far away from the place that has become her home simply because she is married.

177. *In re Aldecoaotalora*, 18 I. & N. Dec. 430, 431-32 (1983), 1983 BIA LEXIS 15.

B. Penalizing Unmarried Mothers: The Problems of Government Service Abroad, Yearly Foreign Vacations, and Residence in the Northern Mariana Islands

Though the section 309(c) physical-presence requirement for transmission of citizenship by an unmarried citizen mother is meant to be easier to satisfy than the general section 301(g) requirements, not all mothers who satisfy the latter will satisfy the former. As our hypothetical Molly would find out, there are three sorts of circumstances under which citizen mothers who can easily satisfy the requirements of section 301(g), and thereby transmit their citizenship to children born in wedlock, may be unable to transmit citizenship to children born out of wedlock. Though one of these sets of circumstances will lead to a more certain bar on transmission of citizenship by an out-of-wedlock mother than the other two, all three are potentially problematic.

1. Constructive Physical Presence

The physical-presence requirement of section 309(c) lacks the proviso of section 301(g) that counts time spent abroad by a citizen parent as constructive physical presence if the citizen parent is serving honorably in the Armed Forces, is employed by the U.S. government or a qualified international organization, or is living as a dependent in the household of someone falling into one of the aforementioned categories.¹⁷⁸ Only actual physical presence on United States soil can satisfy section 309(c),¹⁷⁹ except perhaps under unusual circumstances involving a citizen mother kept out of the United States by official error.¹⁸⁰

Thus, a citizen mother who grew up in the household of a U.S. Armed Forces member or government employee stationed abroad, and has never returned to U.S. soil for an unbroken year, cannot transmit citizenship to an out-of-wedlock child,¹⁸¹ although she could transmit citizenship to a marital one.¹⁸² In light of the

178. See 8 U.S.C. §§ 1401(g), 1409(c) (2004); 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-3(a), at 35.

179. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-3(a), at 35 (noting that “the mother of a child born out of wedlock cannot use time spent abroad as a military dependent, for example, to satisfy all or part of the requirement of continuous physical presence in the United States for 1 year”).

180. Where an error by a United States official prevented the citizen mother from entering the country, the Board of Immigration Appeals has held that she will be credited with presence here for section 309(c) purposes, at least where constructive physical presence due to the error has already been found for another purpose under the immigration and nationality laws. *In re Navarrete*, 12 I. & N. Dec. 138 (1967), 1967 BIA LEXIS 27. *But cf.* *Tullius v. Albright*, 240 F.3d 1317 (11th Cir. 2001) (refusing to apply an analogous doctrine where a citizen claimed to have been kept out of the country by circumstances that were not the fault of the U.S. government).

181. Under the pre-1986 version of section 309, a woman who met the section 301(g) requirement but not the section 309(c) requirement could at least transmit citizenship to her out-of-wedlock child by a foreign father through section 301(g) if that child was legitimated after birth. This is now impossible, however, as current section 309(a) requires that the *father* have been a U.S. citizen at the time of the child's birth in order for section 301(g) to apply to a child born out of wedlock. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-3(b), at 35–36.

legislative intent to make transmission of citizenship *easier* for unmarried citizen mothers in order to ensure that their children acquire some nationality,¹⁸³ this sort of outcome is highly illogical. And in light of the State Department's view, expressed at the time of enactment of the constructive-physical-presence proviso, that "[i]t is not uncommon for the children of a Foreign Service officer to spend most of their youthful years abroad accompanying the parents from one assignment to another,"¹⁸⁴ such an outcome would appear to be more than a mere theoretical possibility.

2. *Discontinuous Physical Presence*

Section 301(c)'s disregard of constructive physical presence abroad in a military or civilian-government-employee household is not the only reason that an unmarried citizen mother may sometimes find herself unable to transmit citizenship when a married mother could. Unlike the physical-presence requirement in section 301(g), which can be met by summing up multiple different time periods,¹⁸⁵ section 309(c)'s requirement looks to *continuous* physical presence. It is possible to accumulate a total of more than five years of actual physical presence in the United States, two of which are after the age of fourteen, without ever being continuously physically present in the United States for a year. A woman who grows up in the United States, but is taken on foreign vacations by her parents at identical times every year, will be in this position. Thus, she will be able to transmit citizenship to marital children under section 301(g), but apparently unable to transmit citizenship to out-of-wedlock children under section 309(c).

There is a possible escape from the apparent result that a woman who has taken too-regular foreign vacations does not meet the requirement of section 309(c), but it is not agreed upon by all relevant administrative agencies and may not help someone whose annual vacations were longer than a couple of weeks. According to the INS/USCIS *Interpretations*, "[w]hether [an] absence will be regarded as having broken the required continuity of a mother's physical presence in the United States or an outlying possession, thereby precluding her . . . child from acquiring citizenship at birth under . . . section 309(c), shall be determined in accordance with INTERP 316.1(c)(3)."¹⁸⁶ The referenced *Interpretation*, which deals with a continuous-physical-presence requirement applicable to naturalization, holds that the deciding factor is whether an absence is "meaningfully interruptive" of physical presence.¹⁸⁷ This is to be determined by looking to "the length of the absence, its purpose (lawful or otherwise), as well as the extent to which travel documents were needed to accomplish the trip."¹⁸⁸ The allowable length of an absence will be short, however, when (as with section 309(c)) it is interrupting a required period of presence only one year in length:

182. See 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.4-3(a), at 35.

183. See *supra* note 174 and accompanying text.

184. S. REP. NO. 89-1495, at 2 (1966) (letter of Douglas MacArthur II, Assistant Secretary for Congressional Relations); see *supra* note 40.

185. See *supra* notes 35–36 and accompanying text.

186. INTERPRETATIONS, *supra* note 77, at 309.1(a)(3).

187. *Id.* at 316.1(c)(3).

188. *Id.* (citing *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963)).

“Since . . . absence of but a few days or weeks out of a required seven- or ten-year period of physical presence raises a substantial question as to . . . the requisite continuity[,] . . . absence of the same duration in relationship to a required one-year period . . . will [raise] a far more substantial question”¹⁸⁹ Accordingly, a six-week absence has been held meaningfully interruptive of a required one-year period of physical presence,¹⁹⁰ though this leaves open the possibility that vacations of a month or less would not be meaningfully interruptive.

The State Department has no policy equivalent to *Interpretation* 309.1(a)(3). Rather, its *Foreign Affairs Manual* states that “a woman who had spent . . . a very short time every year outside the United States would be unable to transmit citizenship under section 309(c) INA even though she might have qualified to transmit . . . citizenship under section 301(g) INA if she had been married to the father of the child.”¹⁹¹ Thus, the *Interpretations* escape hatch is seemingly unavailable to a child whose citizenship is determined outside the United States, although if under sixteen years of age such a child could perhaps obtain a certificate of identity under section 360 of the INA and come to a United States port of entry to be adjudicated a citizen under USCIS rules.¹⁹² The Attorney General could in theory resolve the interpretive conflict between the State Department and USCIS,¹⁹³ but it appears that this has not occurred.¹⁹⁴

3. *Physical Presence in the Northern Mariana Islands*

The INA definition of the “United States” does not itself include the Commonwealth of the Northern Mariana Islands (CNMI),¹⁹⁵ a U.S.-controlled¹⁹⁶ group of islands located north of Guam that have a population of more than 75,000.¹⁹⁷ The Covenant establishing the CNMI declares that the Northern Mariana Islands shall be considered part of the “United States” under the INA only

189. *Id.*

190. *Id.* (citing Khalil George Deeik, A-19084441, CO 316-P).

191. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.4-3(a), at 35.

192. *See supra* note 20 and accompanying text. While the fragmentation of INS functions between multiple subdivisions of DHS, *see supra* note 12 and accompanying text, means that it is not entirely clear whether the border inspectors of CBP would follow the *Interpretations* inherited from INS by USCIS, there is no apparent alternative body of administrative precedent to which it would make sense for CBP to refer.

193. *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2004); *supra* note 10 and accompanying text.

194. There does not appear to be any Board of Immigration Appeals opinion on the topic. *See supra* text accompanying note 11.

195. INA § 101(a)(38), 8 U.S.C. § 1101(a)(38) (stating that “[t]he term ‘United States’, except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.”).

196. *See supra* note 27 (regarding dispute over whether CNMI is Article IV territory or something else).

197. *See* Cent. Intelligence Agency, *Northern Mariana Islands*, in THE WORLD FACTBOOK (2004) (giving the July 2004 estimated population of the Northern Mariana Islands as 78,252), <http://www.cia.gov/cia/publications/factbook/geos/cq.html> (last updated Feb. 10, 2005).

for limited purposes.¹⁹⁸ One exception to the exclusion of the Northern Marianas from the INA's "United States," according to the Covenant, is that "[w]ith respect to children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands the provisions of Sections 301 and 308 of the [INA] will apply."¹⁹⁹ The omission of any reference to section 309 appears to imply that the Northern Marianas are not part of the "United States" for purposes of section 309(c), the only portion of section 309 that uses that term.

The State Department's *Foreign Affairs Manual* states that "the Northern Mariana Islands are treated as part of the United States for purposes of sections 301 and 308 of the INA"²⁰⁰ and that "physical presence in the . . . Northern Mariana Islands constitutes physical presence in the United States for purposes of section 301(g)."²⁰¹ The *Foreign Affairs Manual* does not say anything about physical presence in the Northern Mariana Islands constituting physical presence for purposes of section 309(c),²⁰² which tends to support the implication that physical presence in the Northern Marianas indeed does not constitute physical presence for 309(c) purposes. If this is the case, then a citizen mother who grew up in the Northern Marianas, and had not spent a continuous year in the INA-defined "United States," could transmit her citizenship to a foreign-born marital child but not to a foreign-born out-of-wedlock child.

As with the problem of too-regular foreign vacations, there is a possible escape from the apparent result that a woman who has grown up in the Northern Mariana Islands cannot transmit citizenship to an out-of-wedlock child. Since section 309 of the INA operates as an adjunct to sections 301 and 308, declaring when various parts of those sections shall and shall not apply, one could argue that the CNMI Covenant's reference to sections 301 and 308 implicitly includes the related section 309. It is not clear whether such an argument would succeed, however.

4. *Molly and Joseph: How a Child Whose Parents Are Both U.S. Citizens Can Fail to Acquire U.S. Citizenship*

The inability of our hypothetical Molly to transmit citizenship to an out-of-wedlock child can be a problem even if the child's father is also an American citizen. If the father of Molly's foreign-born out-of-wedlock child was a U.S.

198. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 506(a), 90 Stat. 263, 269 (1976) (stating that "the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act . . . for the following purposes only . . . and . . . to the extent indicated in . . . the following Subsections").

199. *Id.* at § 506(b). *See supra* note 27 (regarding whether the CNMI is included within the "United States" for purposes of section 301(g) physical presence by persons who do not permanently reside in it).

200. 7 U.S. DEP'T OF STATE 1110, *supra* note 27, § 1116.1-1 at 5 (citing Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 506(c) [sic]).

201. 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.3-3(b)(4), at 22.

202. *Id.* § 1133.4-3(a), at 35 (discussing physical presence for purposes of claims under section 309(c) and not mentioning the Northern Marianas).

citizen like Joseph, who lived with and supported the family but did not marry Molly or do any citizenship-related paperwork, the child would not acquire U.S. citizenship. Section 301(c), which normally provides a very lax any-parental-residence requirement for transmission of citizenship where both parents of a child are citizens,²⁰³ would not operate to bestow citizenship on the child, because section 309(a) restricts 301(c)'s application to out-of-wedlock children to cases in which the father satisfies 309(a)'s requirements²⁰⁴—a precondition Joseph would fail to meet.²⁰⁵ Section 309(c) would not bestow citizenship on the child because Molly would fail to meet 309(c)'s requirement of a continuous year of actual physical presence in the United States. Thus, the child would end up without U.S. citizenship despite having two citizen parents, both of whom had close ties to the United States and to their child. This is obviously not an outcome that makes much sense as a matter of policy.

Marriage-related anomalies are not the only context in which current law produces outcomes that are illogical from a policy perspective. This also occurs in a different, archaic but still-present context: the law of noncitizen nationality.

IV. THE PROBLEMS OF NONCITIZEN NATIONALITY

Though all U.S. citizens are by definition U.S. nationals, not all U.S. nationals are U.S. citizens. A U.S. national is defined in the INA as either a U.S. citizen or “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”²⁰⁶ The status of noncitizen nationality described by the second prong of that definition originated as a way of categorizing inhabitants of the overseas possessions acquired by the United States beginning in the late nineteenth century.²⁰⁷ The inhabitants of most such territories are now full citizens,²⁰⁸ however, with American Samoa essentially the only remaining overseas possession in which birth bestows noncitizen nationality rather than citizenship.²⁰⁹ Inhabitants of the Northern Mariana Islands had the option at

203. See 8 U.S.C. § 1401(c) (2004); *supra* notes 25–30 and accompanying text.

204. See *id.* § 1409(a).

205. See *supra* Part II.A.

206. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22).

207. *Rabang v. INS*, 35 F.3d 1449, 1452 n.5 (9th Cir. 1994).

208. See INA §§ 302, 306–307, 8 U.S.C. §§ 1402, 1406–1407 (bestowing citizenship on persons born in Puerto Rico, the U.S. Virgin Islands, and Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America §§ 301, 303, 90 Stat. at 265–66.

209. See INA §§ 308(1), 308(3), 8 U.S.C. §§ 1408(1), 1408(3) (bestowing nationality on a person born in, or found in while under five years of age and not proven before the age of twenty-one not to have been born in, “an outlying possession of the United States”); INA § 101(a)(29), 8 U.S.C. § 1101(a)(29) (stating that “[t]he term ‘outlying possessions of the United States’ means American Samoa and Swains Island”); *supra* note 28 (explaining that Swains Island is effectively part of American Samoa). As the State Department notes, there are a few U.S. territories not included under either the INA definition of “outlying possessions of the United States” or the INA definition of “United States,” such as Midway and Wake Islands and Johnston Atoll. 7 U.S. DEP’T OF STATE 1120, *supra* note 27, § 1121.4-3, at 5; see *In re Li*, 71 F. Supp. 2d 1052, 1055 (D. Haw. 1999) (noting that Midway Island is not part of “the United States” under the INA); *United States v. Paquet*, 131 F. Supp. 32, 34 (D. Haw. 1955) (noting that Wake Island is not an “outlying

the time of formation of the CNMI to elect noncitizen nationality rather than citizenship,²¹⁰ but it is not clear whether anyone did²¹¹—or why anyone would have wanted to—and a person born in the CNMI since its formation is a citizen at birth.²¹²

Historically, noncitizen nationals had significantly fewer rights than citizens. Noncitizen nationals from the Philippines when it was an American colony, for example, did not have any more right to come to and remain in the United States than an alien would have had.²¹³ Under current law, noncitizen nationals have most of the rights of citizens, and cannot be excluded or deported from the United States,²¹⁴ but there are still some differences between the rights of a noncitizen national and the rights of a citizen.

A noncitizen national, upon coming to a State, will lack political rights such as the right to vote, hold office, or serve on juries, because the relevant laws almost invariably restrict these privileges to citizens.²¹⁵ (After establishing residence in a State, however, a noncitizen national may apply for naturalization as a citizen, subject to essentially the same conditions imposed on aliens.²¹⁶) A noncitizen national does not have the same rights as a citizen to petition for the admission of relatives to the United States under the immigration laws, because the

possession of the United States as that term is defined by law”). Though “inhabitants of these territories would be considered noncitizen U.S. nationals” according to “international law and Supreme Court dicta,” as a statutory matter “there is no current law relating to the nationality of the inhabitants of those territories or persons born there who have not acquired U.S. nationality by other means.” 7 U.S. DEP’T OF STATE 1120, *supra* note 27, § 1121.4-3, at 5. Fortunately, this is largely a moot point, as the various small U.S.-controlled islands that under the INA are part of neither the “United States” nor the “outlying possessions of the United States” have no permanent civilian populations. *See* OFFICE OF GEN. COUNSEL, *supra* note 32, at 39–63.

210. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 302, 90 Stat. at 266.

211. *See* OFFICE OF GEN. COUNSEL, *supra* note 32, at 9 n.10 (stating that “authority exists for certain CNMI residents to have elected to become nationals but not citizens of the United States,” but not specifying whether any actually did, and perhaps implying by the circuitous grammar that no one was known by the Office of General Counsel to have made that election).

212. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 303.

213. *See* Rabang v. Boyd, 353 U.S. 427, 432–33 & n.12 (1957).

214. LEGOMSKY, *supra* note 3, at 1170 (citing INA §§ 212(a), 237(a)).

215. *See, e.g.*, CAL. ELEC. CODE § 2101 (Deering 2005) (voters); CAL. PENAL CODE § 893 (2005) (grand jurors); FLA. STAT. § 40.01 (2004) (jurors); IOWA CODE § 48A.5 (2004) (voters); MICH. COMP. LAWS § 168.492 (2005) (voters); MO. REV. STAT. § 115.133 (2004) (voters); TENN. CODE ANN. § 8-18-101 (2004) (officeholders). Note that in American Samoa, noncitizen nationals do have the right to vote for, and serve in the offices of, the territorial government and the territorial delegate to Congress. AM. SAMOA CONST. art. II §§ 3, 7, <http://www.asbar.org/asconst.htm>; 48 U.S.C. §§ 1732, 1733(b) (2004).

216. INA § 325, 8 U.S.C. § 1436 (2004). The one difference between the naturalization requirements for an alien and for a noncitizen national is that residence and physical presence within an “outlying possession” (American Samoa) can count towards the requirements for naturalization of a noncitizen national, but not an alien. *See id.*

relevant provisions also speak in terms of “citizen[s].”²¹⁷ Noncitizen nationality may, as a constitutional matter, be less securely held than citizenship: it can be withdrawn from inhabitants of a territory when that territory leaves U.S. sovereignty, as happened to Filipino U.S. nationals upon Philippines’ independence,²¹⁸ whereas U.S.-citizen inhabitants of a territory have never been expatriated under analogous circumstances²¹⁹ and perhaps could not be.²²⁰ Finally—and most germanely to the topic of this Article—noncitizen nationals operate under different rules in transmitting their nationality to children born outside U.S. territory than citizens do in transmitting citizenship by descent.²²¹

217. See, e.g., INA §§ 201(b)(2)(A)(i), 203(a)(1), 203(a)(3), 203(a)(4), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(1), 1153(a)(3), 1153(a)(4). It has been held, however, that a noncitizen national does have the lesser rights to confer visa preferences that are enjoyed by a lawful permanent resident alien under the immigration laws. See *In re Ah San*, 15 I. & N. Dec. 315 (B.I.A. 1975), 1975 WL 31508.

218. *Rabang*, 353 U.S. at 430–31; *Valmonte v. INS*, 136 F.3d 914, 920–21 (2d Cir. 1998).

219. Compare 7 U.S. DEP’T OF STATE 1120, *supra* note 27, § 1127.1-1(c) (1996), at 23 (“Individuals who acquired U.S. citizenship by birth in the [Panama] Canal Zone, acquired citizenship unconditionally and maintained their citizenship after enactment of the Panama Canal Treaty”), with *id.* § 1127.1-1(d) (“All individuals who possessed non-citizen U.S. nationality by virtue of their birth in the Canal Zone, ceased to hold that status on October 1, 1979 [when Panama reacquired the Canal Zone pursuant to the Panama Canal Treaty]”).

220. See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that “the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship . . . [and a] citizen . . . [has] a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship”). It is not entirely clear that to withdraw citizenship in such a case would be unconstitutional: persons who acquire statutorily-granted citizenship through birth in a territory, or by descent, are not literally “born or naturalized in the United States,” and under the rule of *Rogers v. Bellei*, 401 U.S. 815 (1971), which may still be good law, such non-“Fourteenth-Amendment-first-sentence” citizens lack the absolute protection against involuntary expatriation possessed by Fourteenth Amendment citizens. 401 U.S. at 827 (holding that plaintiff, a foreign-born son of a U.S.-citizen mother, who challenged the constitutionality of a requirement that he reside in the United States for a certain period or lose his citizenship, “simply [wa]s not a Fourteenth-Amendment-first-sentence citizen” because he was neither born in the United States, nor naturalized in the United States, nor subject to the jurisdiction of the United States, and that as a result he did not fall under the *Afroyim* rule forbidding expatriation of a citizen who did not voluntarily relinquish citizenship). In *Vance v. Terrazas*, 444 U.S. 252 (1980), the Court reaffirmed the holding of *Afroyim* without mentioning the *Bellei* limitation either to uphold it or to overrule it. (Plaintiff Laurence Terrazas was born in the United States, 444 U.S. at 255, and was thus a Fourteenth-Amendment-first-sentence citizen, so the Court did not have to confront the issue.) The retention requirements at issue in *Bellei* were eliminated in 1978 by Immigration and Nationality Act, Amendment, Pub. L. No. 95-432, 92 Stat. 1046 (1978), so in the absence of any other Congressional attempt to distinguish between expatriation of native-born or naturalized citizens and expatriation of other statutory citizens, the issue of the *Bellei* rule’s continued vitality has not arisen.

221. LEGOMSKY, *supra* note 3, at 1170.

A. *The Statutory Structure of American Noncitizen-Nationality Law*

The statutory definition of a noncitizen national may leave open the possibility that a person could somehow come to “owe[] permanent allegiance to the United States” in a manner not specified by law, and one or two courts have concluded that an alien legal permanent resident of the United States who applies for naturalization demonstrates sufficient allegiance to the United States to be considered a United States national.²²² The more conventional majority view, however, is that noncitizen nationality is exclusively acquired through birth in a U.S. territory or otherwise by statute.²²³ It is to those statutes that I now turn.

1. *Section 308*

The main statutory provision controlling the acquisition of noncitizen nationality is section 308 of the INA.²²⁴ Paragraphs (1) and (3) of section 308 are the *jus soli* noncitizen nationality provisions, analogous to INA sections 301(a) and 301(f): they bestow noncitizen nationality on “[a] person born in an outlying possession of the United States [i.e., American Samoa] on or after the date of formal acquisition of such possession,”²²⁵ and on “[a] person of unknown parentage found in an outlying possession of the United States while under the age of five years” and not shown before he reaches age twenty-one to have been born

222. See *United States v. Morin*, 80 F.3d 124, 126–27 (4th Cir. 1996); *Lee v. Ashcroft*, 216 F. Supp. 2d 51, 57–59 (E.D.N.Y. 2002), *transferred by Lee v. Ashcroft*, 268 F. Supp. 2d 150 (E.D.N.Y. 2003), *reinstated by Lee v. Ashcroft*, 01 CV 0997 (SJ), 2003 U.S. Dist. LEXIS 17585 (E.D.N.Y. May 27, 2003). *Lee* appears to be the only case ever to hold a noncitizen permanent resident nondeportable on the ground that he was a “national” because his naturalization application (and Selective Service registration) demonstrated allegiance to the United States. *Morin* held a naturalization applicant to be a national in a different context, where the question was whether his planned murder by the defendant was covered by a federal law prohibiting the murder of an American national outside the United States.

Allowing someone to obtain noncitizen national status based on a naturalization application seems odd given that noncitizen nationality confers immunity from deportation: if merely applying for naturalization can earn one such immunity, then what is the point of establishing conditions under which naturalization can be denied? See *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 969 (9th Cir. 2003).

223. *E.g.*, *United States v. Jiminez-Alcala*, 353 F.3d 858 (10th Cir. 2003); *Perdomo-Padilla*, 333 F. 3d at 972; *Oliver v. INS*, 517 F.2d 426, 427–28 (2d Cir. 1975); *In re Navas-Acosta*, 23 I. & N. Dec. 586, 2003 BIA LEXIS 4 (April 29, 2003). See also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 n.1 (1976) (stating that “[a]pparently, the only persons other than citizens who owe permanent allegiance to the United States are noncitizen ‘nationals’ . . . [and] [t]he Solicitor General has advised us that the Commission construes the phrase as covering only natives of American Samoa.”); *Salim v. Ashcroft*, 350 F.3d 307 (3d Cir. 2003) (not stating its holding in as broad terms as *Perdomo-Padilla*, but “join[ing] the Court of Appeals for the Ninth Circuit in holding that simply filing an application for naturalization does not prove that one “owes a permanent allegiance to the United States” and “conclud[ing] that for . . . a citizen of another country, nothing less than citizenship will show “permanent allegiance to the United States.”).

224. 8 U.S.C. § 1408 (2004).

225. *Id.* § 1408(1).

elsewhere.²²⁶ Transmission of noncitizen nationality by descent is provided for in paragraphs (2) and (4).

a. Section 308(2)

Paragraph (2) of section 308 is the noncitizen-nationality analogue of section 301(c). It bestows noncitizen nationality on “[a] person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person.”²²⁷ Note that the requirement of section 308(2) is stricter than the requirement that section 301(c) provides for transmission of citizenship: when noncitizen nationality is being transmitted under section 308(2), *both* parents—not just one parent, as under section 301(c)²²⁸—must “have had a residence in the United States or one of its outlying possessions.”

b. Section 308(4)

Paragraph (4) of section 308 is the noncitizen-nationality analogue of section 301(g), but the conditions it provides are again different. Section 308(4) instructs that included in the class of persons who “shall be nationals, but not citizens, of the United States at birth” is:

A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not 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 seven years in any continuous period of ten years—

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B) at least five years of which were after attaining the age of fourteen years.²²⁹

The constructive-physical-presence proviso of section 301(g) applies to section 308(4),²³⁰ but section 308(4) is nevertheless significantly more difficult to satisfy

226. *Id.* § 1408(3). *Cf.* INA § 301(f), 8 U.S.C. § 1401(f) (bestowing citizenship on “a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States”).

227. 8 U.S.C. § 1408(2).

228. *See* INA § 301(c), 8 U.S.C. § 1401(c) (bestowing citizenship on “a person born . . . of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person”).

229. INA § 1408(4), 8 U.S.C. § 1408(4).

230. *Id.* (stating that “[t]he proviso of [section 301(g)/section 1401(g) of this title] shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section”).

because its physical-presence requirements are not only greater in magnitude but more mathematically multifaceted. While section 301(g) physical presence can be accumulated over any number of periods of any length dispersed any distance apart in time, and need add up to only five years, section 308(4) physical presence must add up to seven years and must be accumulated within a ten-year period during which there is no continuous one-year absence. Also, the requirement that five years of the physical presence, rather than two as under section 301(g), be after the age of fourteen means that a legal adult (old enough to serve in the military) can be incapable of satisfying the section 308(4) requirement simply because he has not been alive long enough: eighteen-year-old fathers are necessarily disqualified, though a nineteen-year-old father could meet the requirement if he had never left U.S. territory except to serve in the military, and a twenty-one-year-old father could qualify even with annual one-month foreign vacations.²³¹

2. Section 309

Just as section 309 of the INA modifies the apparently complete citizenship-granting provisions contained in INA sections 301(c) and 301(g), it modifies the apparently complete nationality-granting provisions of section 308. Section 309(c)'s blanket rule allowing the mother of an out-of-wedlock child to transmit citizenship to her child if she has one year of continuous physical presence in U.S. territory applies to noncitizen nationality as well, since it is phrased in terms of the child "acquir[ing] at birth the nationality status of his mother" if its preconditions are met.²³² Section 309(a)'s restrictions on transmission of citizenship by unmarried fathers also apply to transmission of noncitizen nationality under section 308(2).²³³ At least by the literal terms of section 309(a), however, its restrictions do not apply to the transmission of noncitizen nationality under section 308(4).

Section 309(a) begins by stating that "[t]he provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, shall apply . . . to a person born out of wedlock if—[the conditions of sections 309(a)(1)–309(a)(4) are met]."²³⁴ The reason section 309(a) does not mention paragraph (4) of section 308 may be that section 308(4) was added in August 1986,²³⁵ while a previous version of section 309(a) and the current version of section 308(2) were

231. Another difference between section 308(4) and section 301(g), which makes transmission easier rather than harder for noncitizen nationals, is that section 308(4) applies to persons born even long before its enactment, though it does not confer nationality on them retroactively but only as of the time that the Secretary of State finds that they meet its requirements. Act of Aug. 27, 1986, Pub. L. No. 99-396, § 15(b), 100 Stat. 837, 843 (codified at 8 U.S.C. § 1408 note) (Effective Date of 1986 Amendment). Unlike section 308(4), section 301(g) only applies to persons born before its enactment in the special case covered by 8 U.S.C. § 1401a, when a child born to a military parent between 1941 and 1952 failed to obtain citizenship from the then-applicable provisions of the Nationality Act of 1940. *See supra* note 7.

232. 8 U.S.C. § 1409(c).

233. *Id.* § 1409(a).

234. *Id.*

235. Act of Aug. 27, 1986 § 15, 100 Stat. at 842–43.

part of the original 1952 Immigration and Nationality Act.²³⁶ However, Congress revised section 309(a) in November 1986, and even amended section 309(a)'s references to section 301 to conform to a renumbering that had occurred in that section;²³⁷ the fact that no reference to section 308(4) was then added implies that section 309(a) is simply not applicable to section 308(4). This implication is strengthened by the fact that when an analogous legitimation-requiring provision in the INA's predecessor statute was similarly not amended to reference a later-added subpart of that statute's analogue to section 301, the two courts to confront the issue held that the legitimation requirement did not apply.²³⁸

236. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, §§ 308(2), 309(a), 66 Stat. 163, 238 (1952).

237. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, sec. 13, 100 Stat. 3655, 3657 (enacting new section 309(a), and providing that the reference in section 309(a) to "paragraphs (3), (4), (5), and (7) of section 301(a)" be stricken and replaced with "paragraphs (c), (d), (e), and (g) of section 301"). But cf. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, sec. 18(l)(1), 95 Stat. 1611, 1620 (providing for the identical striking of references to paragraphs (3), (4), (5), and (7) of 301(a) and their replacement by references to paragraphs (c), (d), (e) and (g) of section 301, so that the 1986 renumbering was redundant and arguably had no force).

238. *Y.T. v. Bell*, 478 F. Supp. 828, 831 (W.D. Pa. 1979) (construing Nationality Act of 1940, ch. 876, 54 Stat. 1138, and 1946 amendments thereto, ch. 708, 60 Stat. 721); *C.M.K. v. Richardson*, 371 F. Supp. 183, 187 (E.D. Mich. 1974) (same). At issue in *Y.T.* and *C.M.K.* was section 201(i) of the Nationality Act of 1940 (NA), enacted in 1946, which provided a laxer physical-presence requirement for transmission of citizenship by a citizen parent who served honorably in the military during the Second World War. (Such citizen parents only had to have been present in the United States for ten years, five of which were after the age of twelve, rather than meeting the then otherwise-applicable requirement of ten years, five of which were after the age of sixteen; retention requirements also existed in both cases.) NA section 205, the analogue to INA section 309(a), provided that subsections (c), (d), (e), and (g) of NA section 201 (the predecessor to INA section 301), and subsections (a) and (b) of NA section 204 (the predecessor to INA section 308), "apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. at 1139. It was not amended in 1946 or thereafter to include a reference to NA section 201(i). The INS construed this omission to mean that NA section 201(i) could not apply to a child born out of wedlock whether or not the child was legitimated, *In re G.*, 3 I. & N. Dec. 794 (1949), 1949 BIA LEXIS 68, but the *Y.T.* and *C.M.K.* courts disagreed and held that section 201(i) applied to out-of-wedlock children even if they were not legitimated. *Y.T.*, 478 F. Supp. at 832; *C.M.K.*, 371 F. Supp. at 187.

Admittedly, it is easier to conceive of a potential policy reason for exempting NA section 201(i) from a legitimation requirement than to conceive of a reason for exempting INA section 308(4) from such a requirement: servicemen's children may be a special case. The *Y.T.* and *C.M.K.* courts, however, relied primarily on textual arguments rather than policy-related speculation. NA section 205, the *C.M.K.* court observed, "is by its terms quite inapplicable to Section 201(i)." *C.M.K.*, 371 F. Supp. at 186. The *Y.T.* court made a related, though subtler, point: since section 205 "does not apply to all the subsections under § 201 [but] expressly applies to only subsections (c), (d), (e), and (g)," we should not "presume a Congressional omission or mistake in the scheme . . . where Congress has carefully classified and cross-referenced numerous groups," especially when Congress has revised the statute since the purported omission occurred and has had time to correct the omission if one existed. *Y.T.*, 478 F. Supp. at 831. (The *Y.T.* court did mention that "§ 201(i) was

Thus, under the plain language of section 308(4), which does not by its terms restrict itself to persons born in wedlock, there is no requirement that an unmarried father legitimate, acknowledge, or support his son or daughter in order to transmit noncitizen nationality.²³⁹ The legislative history of section 308(4) contains no specific statement of intent to impose a legitimation requirement or restrict application of the provision to children born in wedlock. A general comment was made that “the intent of these provisions is to conform treatment of U.S. nationals to the treatment of U.S. citizens,”²⁴⁰ but this comment cannot have been meant literally given that the provisions of section 308(4) are significantly different from those of section 301(g), and it seems insufficient to override the statutory text (if legislative history is ever sufficient to do this²⁴¹).²⁴² The State Department asserts in its *Foreign Affairs Manual* that “[t]he parents’ marriage

obviously intended to extend the benefits of citizenship to children born of American servicemen abroad,” but this was part of the third of three reasons and was followed immediately by the textual observation that section 201(i) “is facially complete . . . [and] contains two express provisos which are carefully detailed.” Id.) These textual arguments would apply with nearly equal force to INA sections 309(a) and 308(4): section 309(a) applies to specific listed subsections and was revised following the enactment of section 308(4), *see supra* note 237 and accompanying text, though Congress has not had quite as much time to correct any mistake as the “thirty-three years” it had had in *Y.T.*, 478 F. Supp. at 831.

239. Note that section 308(4) does not use the word “child,” so that it does not invoke the section 101(c)(1) definition of that term that requires legitimation. *See supra* notes 126 and 163 and accompanying text.

240. 132 CONG. REC. H5274-01 (1986) (statement of Rep. Udall). The latest committee report on the 1986 law that added section 308(4) to the INA, *see* S. REP. 99-236 (1986), reprinted in 1986 U.S.C.C.A.N. 1843, has nothing to say on the matter, as section 308(4) was not yet part of the statutory text when that report was issued; it was added later, at the time of Representative Udall’s colloquy. The President’s message upon signing the law also does not refer to section 308(4); it is concerned only with the law’s effect on certain applications of the Gramm-Rudman-Hollings deficit-reduction sequestration procedure. Statement on Signing H.R. 2478 Into Law, 22 WEEKLY COMP. PRES. DOC. 1125 (Aug. 27, 1986).

241. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (stating that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

242. The actual intent of the amendment that added section 308(4) appears to have been to enfranchise approximately 400 known inhabitants of American Samoa who under previous law were not U.S. nationals and therefore could not vote in territorial elections; one of those 400 individuals was the mother of the then-Delegate from American Samoa, Fofo Sunia, the lead sponsor of the original bill upon which section 308(4) was based. 132 CONG. REC. H5274-01 (statements of Reps. Udall and Sensenbrenner). This purpose of the provision does not shed much light on whether either birth in wedlock or subsequent legitimation was meant to be required under section 308(4)—unless perhaps one could ascertain the marital status of Delegate Sunia’s maternal grandparents. Delegate Sunia’s comments regarding the need for administrative leniency for older applicants in light of the difficulty of establishing parental residence “in an area that in the first decades of this century was unaccustomed to detailed records of civil administration,” 132 CONG. REC. H5274-01 (statement of Del. Sunia), might conceivably be taken to imply that he did not expect some persons covered by section 308(4) to be able to establish a recorded marriage of their parents, but such an inference would be fairly tenuous.

certificate” is required evidence for a section 308(4) claim,²⁴³ but this interpretation is not supported by any citation or reasoning.²⁴⁴ The USCIS/INS *Interpretations* appear at first glance to make a similar assertion, stating that the requirements of section 309(a) must be followed to “confer noncitizen nationality upon the illegitimate child of established paternity born to United States noncitizen national parents”;²⁴⁵ the plural “parents” may mean that this is only a reference to section 308(2), however, and if it is meant to go further then it too appears to be an unreasonable interpretation of the statute.

B. The Statutory Relationship Between Noncitizen Nationality and Citizenship by Descent

The child of a noncitizen national will not always be either a noncitizen national or an alien, and a child born in American Samoa will not always be a noncitizen national. Sections 301(d) and 301(e) of the INA provide that under certain circumstances, such children will be full U.S. citizens. As might be expected, section 309 also has something to say about the circumstances under which this will happen when such children are born to unmarried parents.

1. Section 301(d)

Section 301(d) provides that a person born outside U.S. territory will be a U.S. citizen when “one [parent] is a citizen of the United States who has been physically present in the United States or [American Samoa] for a continuous period of one year prior to the birth of such person, and the other . . . is a national, but not a citizen of the United States.”²⁴⁶ Section 301(d) is explicitly referenced in the preamble to section 309(a),²⁴⁷ so it applies to an out-of-wedlock child only where that child’s father meets the requirements of sections 309(a)(3) and 309(a)(4). However, such an application of section 301(d) is largely rendered moot by section 309(c)’s declaration that “[n]otwithstanding the provisions of

243. 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 1145(b)(3) (1996), <http://foia.state.gov/masterdocs/07fam/07m1140.pdf> at 3.

244. The implicit reasoning behind the State Department’s position may be similar to the logic followed by the INS in *In re G*: that the existence of a provision such as section 205 of the NA or section 309(a) of the INA, providing for application of other parts of the act to out-of-wedlock children legitimated after birth if their fathers meet certain conditions, implies that the other parts of the act would not have applied to any out-of-wedlock children if the legitimation-regarding provision had not been enacted, because if the legitimacy-regarding section were not necessary to authorize application of other parts of the act to out-of-wedlock children, then Congress would not have passed it. *In re G*, 3 I. & N. Dec. at 796, 1949 BIA LEXIS 68, at *6–7. While this argument could draw some support from the fact that pre-1940 U.S. citizenship laws that did not make any mention of children born out of wedlock were interpreted to apply to out-of-wedlock children of American fathers only if they were later legitimated, see 7 U.S. DEP’T OF STATE, *supra* note 16, § 1135.3-1(a)(2) (citing 32 Op. Atty. Gen. 162), it seems to contradict the plain text of both the NA and the INA and was rejected by the *C.M.K.* court, 371 F. Supp. 183, 187 n.2 (E.D. Mich. 1974).

245. INTERPRETATIONS, *supra* note 77, at 309.1(b)(4).

246. 8 U.S.C. § 1401(d) (2004).

247. *Id.* § 1409(a).

subsection [309](a),” an out-of-wedlock child whose mother is a U.S. national “shall be held to have acquired at birth the nationality status of his mother . . . if the mother . . . had previously been physically present in the United States or [American Samoa] for a continuous period of one year.”²⁴⁸ Logically, it appears that almost the only time that section 301(d) will apply through section 309(a) to an out-of-wedlock child is where the father is a U.S. citizen who meets the one-year continuous-physical-presence requirement, and the mother is a noncitizen national who does not.²⁴⁹ If the mother meets the one-year continuous-physical-presence requirement of section 309(c), then that section will seemingly control and make the child a citizen if its mother is a citizen, and a noncitizen national if its mother is a noncitizen national.

2. Section 301(e)

Section 301(e) is a mixed *jus soli* citizenship and citizenship-by-descent provision. It provides that “a person born in an outlying possession of the United States” (that is, in American Samoa) is a citizen when “one [parent] is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person.”²⁵⁰

In the case of an unmarried U.S.-citizen father, section 309(a)’s provisions restrict the conditions under which he can transmit citizenship via section 309(e).²⁵¹ In the case of an unmarried U.S.-citizen mother, section 309(c) theoretically applies (since it provides for transmission of nationality to “a person born . . . outside the United States,” not necessarily outside both the United States and its outlying possessions), but its application will almost never change the result reached, since the physical-presence requirements of section 301(e) and section 309(c) are nearly identical.²⁵² The primary practical effect of section 309(c) in the 301(e) context would be on a child born in American Samoa to an unmarried U.S.-citizen father and *noncitizen-national* mother, both of whom met the one-year continuous-physical-presence requirement. In such a case, section 309(c), with its

248. *Id.* § 1409(c).

249. If the *father* of the out-of-wedlock child is the noncitizen national, then the citizen mother usually cannot satisfy the one-year continuous-physical-presence condition of section 301(d) without also satisfying the identical condition of section 309(c), and thus bestowing citizenship on her child without regard to the father. The one potential exception is when the citizen mother has spent a continuous year in the Northern Mariana Islands but not elsewhere in the United States, and thus appears to satisfy the one-year continuous-physical-presence requirement of section 301(d) but not the seemingly identical requirement of section 309(c), because the Northern Marianas are counted as part of the “United States” for purposes of section 301 but apparently not for purposes of section 309(c), *see supra* Part III.B.3. In this case, the child of such a citizen mother and a noncitizen national father would acquire citizenship under section 301(d), but not under section 309(c).

250. 8 U.S.C. § 1401(e).

251. *Id.* § 1409(a).

252. *See id.* §§ 1401(e), 1409(c) (both requiring a year of continuous physical presence in “the United States or one of its outlying possessions”). *But see supra* Part III.B.3 (discussing how physical presence in the Northern Mariana Islands may count as presence in the United States for purposes of INA section 301 but not INA section 309).

“notwithstanding” provision and direction that an out-of-wedlock child “shall be held to have acquired at birth the nationality status of his mother” if the mother meets the physical-presence requirement, would apparently override section 309(a) and make the child a noncitizen national rather than a citizen.²⁵³

C. The Anomalies of Noncitizen-Nationality Law

One anomaly produced by this legal scheme is thus already apparent: under section 301(e) as modified by section 309, the properly legitimated out-of-wedlock child of a U.S.-citizen father and a noncitizen national mother, born in American Samoa, apparently is not a full U.S. citizen even when a legitimated out-of-wedlock child of the same father with an *alien* mother would be. This sort of outcome is, in fact, not unique to the section 301(e) context of birth in American Samoa. Where a nonmarital child is born outside U.S. territory to a U.S.-citizen father who meets the physical-presence requirements of section 301(g), and the child is properly legitimated under section 309(a), that child will be a U.S. citizen if its mother is an alien—in which case section 301(g) applies—but will apparently only be a noncitizen national if its mother is a noncitizen national who meets the one-year continuous-physical-presence requirement of section 309(c), because in that case section 309(c)’s “notwithstanding” clause appears to override section 309(a) (preventing section 301(d) from applying) and direct that the child acquire the nationality status of its mother.

Looking at the interaction between the various subparts of INA sections 301, 308, and 309 also helps to untangle the twisted legal logic behind the apparent outcome of the even more anomalous Meryl hypothetical. In that scenario, a U.S.-citizen mother who had grown up in the overseas household of a member of the U.S. military or civilian government employee, or had spent every July since her birth on foreign vacations,²⁵⁴ had a child, born outside U.S. territory, whose father was a noncitizen national. On a literal reading of all applicable laws, it appears that the unfortunate child will be neither a U.S. citizen nor a noncitizen national, whether or not Meryl and the child’s father got married before the child was born.

The first section to which one might turn in search of citizenship for such a child is section 309(c), which often bestows citizenship on children born to unmarried U.S.-citizen mothers. That section, however, does not apply even if Meryl remains unmarried, because she fails to meet the 309(c) requirement of one

253. See 8 U.S.C. § 1409(c).

254. Our hypothetical Meryl, unlike our hypothetical Molly, will not necessarily face a problem if she grew up in the Northern Mariana Islands, *see supra* Part III.B.3, because one of the provisions involved in her case is INA section 301(d). While section 301(d) requires a full year of continuous physical presence in the United States, *see infra* note 255, just as section 309(c) does, section 301(d)’s location within section 301 causes presence in the Northern Marianas to be helpful to Meryl where it would not be helpful to Molly, because the Northern Marianas are included within the definition of “United States” for purposes of INA sections 301 and 308 as applied to U.S.-citizen (or noncitizen national) parents permanently residing in the Northern Marianas, *see supra* notes 199–202 and accompanying text. *But cf. supra* note 27 (noting the uncertainty regarding whether the CNMI is included within the “United States” for purposes of section 301(g) physical presence in the case of parents who do not permanently reside in it).

year of continuous actual physical presence in U.S. territory. Likewise, section 301(d)'s bestowal of citizenship on the foreign-born child of one U.S. citizen and one U.S. noncitizen-national is of no help, as 301(d) also requires one year of continuous actual physical presence by the U.S.-citizen parent.²⁵⁵ Section 301(c), with its laxer requirement that one parent of a child have had *some* residence in United States territory, does not apply (even if Meryl and the child's father get married) because it is not the case that both of the child's parents are U.S. citizens. And although Meryl meets the total physical presence requirement of section 301(g), that section appears to be inapplicable even if she marries the child's father before the child's birth, because 301(g) applies to "a person born . . . of parents *one of whom is an alien*, and the other a citizen of the United States."²⁵⁶

Turning to provisions bestowing only noncitizen nationality, one finds that section 308(2) does not help Meryl's child either. Even assuming that 308(2)'s requirement that both parents have had some residence in U.S. territory is met, and that either the parents marry before the child's birth or the father properly legitimates the child under section 309(a), section 308(2) applies only to "[a] person born . . . of parents *both of whom are nationals, but not citizens*, of the United States."²⁵⁷ Section 308(4) also apparently fails to bestow noncitizen nationality on Meryl's child, even if the father meets 308(4)'s stringent physical-presence requirements, because it applies only to "[a] person born . . . of parents *one of whom is an alien*, and the other a national, but not a citizen, of the United States."²⁵⁸ One would hope that an administrative agency or judge would rebel against the absurdity of treating the child of a citizen and a noncitizen national worse than the child of an alien and a noncitizen national or the child of two noncitizen nationals, but in the field of citizenship law, hoping for the plain text of the governing statute to be ignored is a dangerous position to be in.²⁵⁹

The outcome is not necessarily the same if the citizen parent of this unfortunate foreign-born child of a citizen and a noncitizen national is the father, and it is he who has spent his life in an overseas military household or taken too-regular annual foreign vacations—though the potential for trouble remains. The child will still apparently be neither a citizen nor a noncitizen national if the parents marry before the child's birth, because sections 301(c), 301(d), 301(g),

255. See 7 U.S. DEP'T OF STATE, *supra* note 16, § 1133.3-1(b)(2), at 20 (noting that "any absence, even for U.S. military service, breaks the continuity of the period of physical presence" required by section 301(d)).

256. 8 U.S.C. § 1401(g) (emphasis added).

257. *Id.* § 1408(2) (emphasis added).

258. *Id.* § 1408(4) (emphasis added).

259. See, e.g., *Tullius v. Albright*, 240 F.3d 1317, 1320–21 (11th Cir. 2001) (refusing to deviate from the "plain meaning" of the predecessor to section 301(g)); *United States v. Ramirez-Garcia*, M0-00-CR-138, 2001 U.S. Dist. LEXIS 6929, at *4 (W.D. Tex. May 22, 2001) (noting BIA conclusion that since "[former 8 U.S.C. §] 1432(a) pertained to children born outside of the United States to alien parents, or to an alien parent and former United States citizen," a citizenship claimant whose "father was a United States citizen at the time of [the claimant's] birth and never lost his citizenship . . . was *prima facie* ineligible for relief under Section 1432(a)."); *Charles v. Reno*, 117 F. Supp. 2d 412, 418–19 (D.N.J. 2000) (refusing to deviate from the "plain meaning" of the phrase "legal separation" in the derivative-naturalization rule of former section 321(a)(3) of the INA).

308(2), and 308(4) will all be seemingly inapplicable for the same reasons as in the Meryl hypothetical. If the parents are unmarried at the child's birth, however, the child will at least acquire its mother's noncitizen nationality under section 309(c), as long as the mother (unlike the father) meets the requirement of one year of continuous actual physical presence in the United States or its outlying possessions. If the mother were an alien rather than a noncitizen national, however, the child could be a citizen under section 301(g) if the father married the mother before the child's birth, or if the father fulfilled the requirements of section 309(a), so even acquisition of mere noncitizen nationality by the child is highly anomalous.

These scenarios may be the worst possible malfunctions of the law of noncitizen nationality, but they do not exhaust the set of anomalies it can produce. If egg-donor Josephine transmitting citizenship under section 309(c) to children she had never met seemed problematic from a policy perspective, think of the possibilities for an American Samoan sperm donor—since section 308(4), as applied to unmarried fathers, is apparently not subject to any of the section 309(a) legitimation or support requirements. And just as the disincentive for marriage in the Jane hypothetical was disturbing, note the similar problem facing any noncitizen-national mother who meets a one-year continuous-physical-presence requirement and finds herself pregnant with the child of a noncitizen-national father who has never resided in U.S. territory: her foreign-born child can gain noncitizen nationality under section 309(c) if she remains unmarried, but apparently will not get it under section 308(2) or section 308(4) if she marries, because the father does not meet the U.S. residence requirement of 308(2) and is not an alien as required by 308(4). The law of transmission of noncitizen nationality by descent, and the interaction of noncitizen-nationality law with the law of citizenship by descent, are full of potential anomalous results.

Admittedly, in the absence of case law or administrative interpretation regarding most of these potential anomalies of noncitizen-nationality law—without cases analogous to *Nguyen* and *O'Donovan-Conlin*, or much relevant discussion in the INS/USCIS *Interpretations* or the State Department's *Foreign Affairs Manual*—it is unclear whether these anomalous results would occur in practice or would be avoided. Although some courts have tended to follow the plain text of the statute in interpreting citizenship law,²⁶⁰ the Supreme Court did recognize in another context that the literal terms of a statutory provision may sometimes be ignored when the provision as written would lead to “unfathomable” results and simply “can't mean what it says.”²⁶¹ That canon of interpretation might well apply here, since there is an even clearer absence of plausible justifications for the anomalies that would deprive Meryl's child and others like it of citizenship than there is for the anomalies produced by the main law of citizenship by descent. An

260. See *supra* note 259.

261. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989) (interpreting Fed. R. Evid. 609(a)(1)). *But see* *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) (“If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.” (internal quotation omitted)).

equal protection challenge might also be available to such a child on the theory that the anomalies have no rational basis,²⁶² although after *Nguyen*, it is not clear whether one can ever be granted citizenship or nationality in a manner not provided for by the governing statutes, even to remedy a constitutional violation.²⁶³ Even given these possibilities, however, it seems unwise to leave in place provisions that if read literally could produce absurd results, in reliance on the chance that judges or administrators might reinterpret or nullify the literal text of the law in order to avoid those results.

V. RECOMMENDED SOLUTIONS: CORRECTING THE ANOMALIES

All of the anomalous outcomes identified in this Article result either from the application of INA section 309 or from the law regarding noncitizen nationality and its interactions with citizenship. Therefore, I advocate heavily modifying section 309 and essentially abolishing the status of noncitizen nationality. The revisions that I propose should not have a significant adverse impact on any policy goal that existing law is reasonably designed to serve.

A. Recommended Revisions to Section 309

As explained in Part II, current section 309(a) places a large burden on unmarried fathers who do not know of its existence, even if they have a close relationship with their children, while egg donors are allowed to transmit citizenship whether or not they even know of the existence of their children. Section 309(c), in addition to contributing to the Joseph/Josephine problem in combination with section 309(a), is involved in several peculiar and unjustifiable results regarding the implications of the marital status of a citizen mother.

The proposed new section 309(a) contains a series of gender-neutral rules that would produce the proper results in situations like the Joseph and Josephine hypotheticals. The proposed replacement for section 309(c) is more narrowly

262. Cf., e.g., *Francis v. INS*, 532 F.2d 268, 270–73 (2d Cir. 1976) (finding that literal interpretation of former INA § 212(c), which allowed resident aliens to be considered for a certain sort of discretionary relief from deportation only if they had departed from and returned to the country since they became deportable, was unconstitutional under equal protection component of Fifth Amendment’s Due Process Clause, because the distinction it drew was so irrational as not to survive “minimal scrutiny”).

263. *Nguyen v. INS*, 533 U.S. 53, 71–72 (2001) (noting INS argument that “the Court cannot grant the relief petitioners request: the conferral of citizenship on terms other than those specified by Congress” and responding not with any refutation but with the observation that “[t]here may well be ‘potential problems with fashioning a remedy’ were we to find the statute unconstitutional.” (quoting *Miller v. Albright*, 523 U.S. 420, 451 (1998) (O’Connor, J., concurring in judgment)). *But see Nguyen*, 533 U.S. at 73–74 (Scalia, J., concurring) (stating that “a majority of the Court [was] proceeding on the . . . assumption” that the Court did not “lack[] power to provide relief of the sort requested in this suit—namely, conferral of citizenship on a basis other than that prescribed by Congress”); *Breyer v. Ashcroft*, 350 F.3d 327, 331–32 & nn.4–5 (3d Cir. 2003) (reaffirming pre-*Nguyen* holding in *Breyer v. Meissner*, 214 F.3d 416, 429 (3d Cir. 2000), that provision placing heavier burden on citizen mothers to transmit citizenship than on citizen fathers violated equal protection component of Fifth Amendment due process clause, and should be considered to transmit citizenship to children of citizen mothers on same terms).

tailored to perform section 309(c)'s ostensible purpose—preventing statelessness²⁶⁴—while avoiding unnecessary absurdities. Finally, a proposed addition would prevent the other suggested reforms from creating new potential anomalies.

I. Proposed Section 309(a)

The proposed new section 309(a) combines a requirement that a blood relationship between child and citizen parent be shown by clear and convincing evidence²⁶⁵ with a series of parallel conditions, any of which, if satisfied, would be sufficient to render the relevant citizenship-granting provisions of section 301 applicable to an out-of-wedlock child. This is different from current 309(a), which requires the conditions of *both* sections 309(a)(3) and 309(a)(4) to be satisfied, although it does provide multiple ways of satisfying 309(a)(4). Allowing multiple methods of satisfaction under proposed 309(a) reduces the chance that an innocent oversight—like the failure to sign a 309(a)(3) written support-promise when one is nevertheless providing support—will prevent transmission of citizenship.

a. Proposed Section 309(a)(1)

The proposed new section 309(a)(1) states that a U.S.-citizen parent can transmit citizenship to an out-of-wedlock child if it is proven by clear and convincing evidence that the U.S.-citizen parent was present at the child's birth. This provision, which tracks a possibility mentioned by Justice O'Connor in her *Nguyen* dissent,²⁶⁶ establishes parity between fathers and mothers who have identical opportunity to develop a relationship with the child. As applied to citizen mothers who did not use assisted reproductive technologies, proposed new 309(a)(1) would essentially impose no greater burden than current law, since proof that a U.S.-citizen mother had given birth to her own genetic child would satisfy it.²⁶⁷ It would eliminate the automatic treatment of egg donors as able to transmit citizenship, without creating a similarly problematic right of gestational surrogate

264. See *supra* notes 174–175 and accompanying text.

265. This requirement is taken from current section 309(a)(1), 8 U.S.C. § 1409(a)(1) (requiring that “a blood relationship between the person and the father [be] established by clear and convincing evidence”).

266. *Nguyen*, 533 U.S. at 86 (O'Connor, J., dissenting) (stating that “Congress could simply substitute for § 1409(a)(4) a requirement that the parent be present at birth or have knowledge of birth”). The goals that Justice O'Connor presumably wanted to serve with the “knowledge of birth” prong of her test are, under the statute proposed in this Article, served by the other subsections of proposed new 309(a), which should be easier to administer than a knowledge test.

267. There would be a theoretical increase in the standard of proof facing an unmarried mother, because current State Department policy holds that unmarried mothers, like married parents of either sex, only need to prove parentage by a preponderance of the evidence, not by the clear and convincing evidence that unmarried fathers must provide under current section 309(a)(1). 7 U.S. DEP'T OF STATE, *supra* note 16, § 1131.4-1(b), at 2–3. In the age of DNA testing, however, this should mean only that a State Department official who for some reason distrusted a birth certificate would have more ability to demand a DNA test; the final outcome should not change.

mothers (who would not have blood relationships to the children at whose births they were present²⁶⁸).

There is admittedly some risk that this provision, as applied to unmarried fathers, would lead to administrative difficulties: one can imagine parents agreeing to swear falsely that the father was present at birth. However, the clear and convincing evidence standard should render mere self-serving testimony insufficient without more. If testimony from witnesses present at the birth was not available, the administering agency could require proof (such as passport stamps or employment records) that the father was at least in the appropriate area at the time of birth, and could look at evidence such as whether the father was listed on the birth certificate (as a present father presumably would have been).

b. Proposed Section 309(a)(2)

The second prong of proposed new section 309(a) would allow transmission of citizenship by any U.S.-citizen parent who, while his or her child was under the age of 18, married the child's other parent or legitimated the child under applicable local law by some other affirmative act. Taken nearly unchanged from the pre-1986 version of section 309(a)²⁶⁹ and current section 309(a)(4)(A),²⁷⁰ this rule should not be controversial. There would only be two differences between legitimation under current 309(a)(4)(A) and legitimation under proposed new 309(a)(2). First, proposed 309(a)(2) would apply to citizen mothers as well as citizen fathers; it would be relied upon by a citizen mother primarily in a surrogacy situation where the genetic mother was not present at the child's birth, but married the sperm-donor father and raised the child as hers. Second, proposed 309(a)(2) would remove the automatic-legitimation loophole under which legitimation is held to occur simply because a state or foreign government eliminates all distinctions between marital and out-of-wedlock children.²⁷¹ To retain that loophole, while eliminating the current 309(a)(3) requirement of a signed promise of support, would disserve the legitimate goals outlined in *Nguyen* by enabling

268. See text accompanying note 265 (regarding requirement that blood relationship between child and citizen parent be proven under proposed 309(a)). See also *supra* notes 51–52 and accompanying text (regarding the State Department's view that a blood relationship is essential for maternal transmission of citizenship even under current law).

269. See Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 309(a), 66 Stat. 163, 238 (1952) (stating that the provisions which became INA §§ 301(c), 301(d), 301(e), and 301(g), as well as 308(2), "shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation").

270. 8 U.S.C. § 1409(a)(4)(A).

271. See *supra* notes 78–79 and accompanying text. Where automatic legitimation by operation of local law could imply that a subsequent marriage of the child's parents was not "legitimizing" because the child was already legally legitimate, however, proposed 309(a)(2) would still be satisfied by marriage of the child's parents. That is, either marriage of the child's parents *or* legitimation of the child by some affirmative act of a parent would be sufficient.

transmission of citizenship to children whose citizen parents never knew of their existence.²⁷²

c. Proposed Section 309(a)(3)

The third prong of proposed new section 309(a) would allow transmission of citizenship to a child by a U.S.-citizen parent who acknowledges parenthood in writing and under oath before the child turns eighteen, and who agrees in writing to provide financial support for the child until the child reaches the age of eighteen years. Essentially, proposed 309(a)(3) would retain for an unmarried father the option of proceeding under current 309(a)(4)(B), and would extend that option to the few mothers who (in surrogacy contexts) might need it. The problem with current 309(a)(3) and 309(a)(4) is primarily that as an exclusive mechanism, they penalize those who are unaware of their existence. Retaining them as an *option* eliminates this effect, and because they require only written statements, having them available as an option should streamline the functioning of the citizenship bureaucracy.

d. Proposed Section 309(a)(4)

Proposed new section 309(a)(4) is designed to enable citizenship transmission by some parents who have what the *Nguyen* majority referred to as a “real, meaningful relationship” with their children,²⁷³ but who would otherwise fall through the legal cracks. The *Nguyen* majority raised the specter of administrative difficulty if administrators are asked to determine whether such a meaningful relationship actually exists,²⁷⁴ but there are standards that are already relied upon in the administration of citizenship law that could select out many cases in which such a relationship existed. Two standards which we know are apparently considered administrable in the citizenship-law context are the local-law informal-legitimation standard of taking a child into one’s home and holding the child out as one’s own, and the standard used to decide whether a citizen parent is credited with constructive physical presence under section 301(g) as the “dependent” of an American citizen abroad for an enumerated purpose.

To decide a citizenship claim under current section 309(a)(4)(A), an administrative agency or court must determine whether a person claiming citizenship has been “legitimated under the law of the person’s residence or domicile.”²⁷⁵ In making this determination, the decisionmaker will necessarily have to decide whether the standards of the applicable state or foreign law have been met; this is why the State Department’s *Foreign Affairs Manual* contains an

272. See *supra* text accompanying note 92 (explaining how the current 309(a)(3) requirement can serve the purpose of requiring some contact between father and child even in automatic-legitimation jurisdictions).

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

274. *Id.* at 69 (stating that Congress could insist upon “an actual, meaningful relationship in every case before citizenship is conferred,” or could “excuse compliance with the formal requirements when an actual father-child relationship is proved,” but “did neither . . . , perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie”).

275. 8 U.S.C. § 1409(a)(4)(A).

appendix setting out how children can be legitimated under the laws of the various states.²⁷⁶ In many states, legitimation is accomplished—as the State Department recognizes—when the father openly acknowledges the child as his own and receives the child into his home.²⁷⁷ To adjudicate the claim under current 309(a)(4)(A) of a child domiciled in such a state, the Department necessarily has to determine whether, as a factual matter, the father actually so acknowledged and received his child. This same factual determination could be made in the cases of children domiciled in places that do not consider those acts to be legitimating.

Similarly, consider what happens when a citizenship claim is made under INA section 301(g), and the citizen parent of the claimant allegedly satisfies the 301(g) physical-presence requirement only by virtue of constructive physical presence while “physically present abroad as the dependent unmarried son or daughter and a member of the household of a person . . . honorably serving with the Armed Forces of the United States, or . . . employed by the United States or a[] [qualified] international organization.”²⁷⁸ In order to adjudicate such a claim, it is necessary to determine whether the citizen parent, while abroad, was actually “the dependent unmarried son or daughter and a member of the household of” the 301(g)-qualifying member of the Armed Forces or governmental/organizational employee.²⁷⁹ The State Department has a detailed set of rules for making this determination, which state inter alia that “‘dependent’ means relying on one’s parents for more than half of one’s support,” that “son or daughter” includes both a “legitimate son or daughter” and the “biological son or daughter of a man who has acknowledged paternity of the son or daughter,” and that a “member of the household” of a 301(g)-qualifying citizen will generally live with that person but under certain circumstances such as being away at school need not.²⁸⁰ The same rules could be used to determine whether a person claiming citizenship under proposed 309(a)(4) was “the dependent unmarried son or daughter and a member of the household” of a U.S.-citizen parent for some suitable period of time before the claimant reached the age of eighteen.

The section-301(g)-based standard has some advantages over the informal-legitimation-based standard. For one thing, Congress may reasonably be uncomfortable instructing federal officials to adjudicate a standard that is drawn from state law, but stripped of the body of precedent that would guide its application in any particular state. Another possible objection to the quasi-legitimation standard that would not apply as strongly to the 301(g)-based standard is the argument, put forward by the government in *Nguyen*, that requiring an actual legitimation under local law is necessary to ensure that an unmarried father incurs an obligation to support his child and thus will be less tempted to defraud.²⁸¹ Under

276. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133 Exhibit 1133.4-2a, at 84–95.

277. *Id.* at 91–95 (citing California, Colorado, Idaho, Maryland, Minnesota, Missouri, Nevada, Pennsylvania, Texas, Utah, Washington and Wyoming law as providing for legitimation by father holding out child as his own and/or receiving child into his home).

278. 8 U.S.C. § 1401(g).

279. *See id.*

280. 7 U.S. DEP’T OF STATE, *supra* note 16, § 1133.3-3(g), at 25–26.

281. Brief for the Respondent at 20–21, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071).

the 301(g)-based test, the parents must actually be supporting the child for the child to qualify as a “dependent,” so whether the father has a legal obligation to do what the father is helping to do anyway is less relevant.

Therefore, proposed new section 309(a)(4) would allow citizenship transmission to an out-of-wedlock child when the child was “the dependent unmarried son or daughter and a member of the household” of the citizen parent for a suitable period of time before reaching the age of eighteen. Drawing inspiration from current section 301(g), five years would appear to be an appropriate minimum period of time, but the precise length of time is not crucial. Cases arising under the 301(g)-based version of proposed 309(a)(4) would admittedly be more complicated to adjudicate than most cases arising under the other prongs of either current or proposed section 309(a), but there would be relatively few of them because many claimants would take the easier routes of other subsections of proposed 309(a). Those cases that did arise would be no more impossible to adjudicate than cases that arise under the dependent constructive-physical-presence proviso of current section 301(g).

2. Replacing Section 309(c)

Insofar as the policy justification for section 309(c) is to ensure a citizenship for children who would otherwise be stateless, current section 309(c) suffers from a number of defects. It is significantly overinclusive, since it provides a different standard for transmission of citizenship to the children of unmarried mothers whether or not those children would otherwise be stateless.²⁸² It is also underinclusive, in that it does not provide a laxer standard for transmission of citizenship by *fathers* when their children would otherwise be stateless—a real danger when the child’s alien mother is from a country that only recognizes patrilineal transmission of citizenship.²⁸³ Finally, current 309(c) is defective in that

282. Reply Brief for Petitioners at 8, *Nguyen* (No. 99-2071). If the physical-presence requirement contained in current section 301(g) is excessive—a question on which I take no position here—then rather than section 309(c) being retained in its current form as a partial remediation of that problem, the physical-presence requirement should be reduced for all citizen parents, not just unmarried mothers. Cf. Joy Pepi Wiesenfeld, Note, *The Conditional Nature of Derivative Citizenship*, 8 U.C. DAVIS L. REV. 345, 357–58 (1975) (recommending replacement of all other citizenship-by-descent rules with a simple retroactive rule that a citizen parent with one year of physical presence, including constructive physical presence, could transmit citizenship, on the condition that the child wishing to claim citizenship, within a specified time period, took an oath of allegiance to the United States and recorded at an American consulate his intention to at some future time become a resident of the United States).

283. Reply Brief for Petitioners at 8–9, *Nguyen* (No. 99-2071); see, e.g., KENYA CONST. ch. 6 § 90 (“A person born outside Kenya after 11th December, 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya.”), available at <http://kenyan.8m.com/kenconstitution6.htm>; MALAYSIA CONST. sched. 2, Part II, ¶ 1(c) (granting citizenship to “every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered [with the government]”), available at http://confinder.richmond.edu/local_malaysia.html; NEPAL CONST., art. 9 § 1 (“A person who is born after the

its one-year continuous-physical-presence requirement, although meant to be easier to satisfy than the physical-presence requirement of section 301(g), will, for some people (like our hypothetical Molly), actually be more difficult.

My proposed replacement for section 309(c) would apply to children who at birth would possess no nationality other than that of the United States. It would provide that such otherwise-stateless children would be citizens of the United States if their citizen parent had previously been physically present in the United States or its outlying possessions for a period or periods totaling not less than one year, with constructive physical presence as under section 301(g) included in this total. Current 309(c)'s requirement that the year of physical presence be continuous would be eliminated, as would its disregard of constructive physical presence while abroad in the service of the United States or while abroad in the household of someone serving the United States.

Since the proposed replacement for section 309(c) would no longer apply only to out-of-wedlock children, who are the subject of section 309, it would be moved to section 301. I propose to insert it into the slot in section 301 that will be vacated by the abolition of noncitizen nationality²⁸⁴ and designate it section 301(d), but it could be designated as new section 301(i) if Congress preferred. Like the other citizenship-by-descent provisions of section 301, the replacement for section 309(c) would be subject to the restrictions of proposed new section 309(a). Even in cases where a child would otherwise be stateless, it remains a legitimate policy goal of the law to prevent a parent with no connection to his or her child from transmitting U.S. citizenship to a child who will have no connection, through the parent, with the United States.²⁸⁵ Also like the other citizenship-by-descent provisions of section 301, the replacement for current section 309(c) would (unlike current 309(c)) definitely apply to residents of the Northern Mariana Islands.²⁸⁶

Replacing section 309(c) in this way would correct many of the anomalies caused by current section 309(c), and it should not cause any serious new problems. The government's brief in *Nguyen* suggested that making conferral of citizenship dependent on a child's otherwise being stateless would "create problems of proof" and "would discourage non-citizen fathers in *jus sanguinis* nations from legitimating their children at birth, because the act of legitimation would trigger a grant of foreign citizenship to the child, thus precluding United

commencement of this Constitution and whose father is a citizen of Nepal at the birth of the child shall be a citizen of Nepal by descent."), available at http://www.oefre.unibe.ch/law/icl/np00000_.html.

284. See *infra* Part V.B.3.

285. Cf. *Nguyen*, 533 U.S. at 64–65 (stating that an objective of current section 309(a) is to "ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States").

286. See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 506(b), 90 Stat. 263, 269 (1976) (applying "Sections 301 and 308 of the [INA]" to "children born abroad to United States citizen or noncitizen national parents permanently residing in the Northern Mariana Islands"); *supra* Part III.B.3.

States citizenship.²⁸⁷ But there is no apparent reason why the “problems of proof” in determining whether a child became a citizen under foreign law should necessarily be more severe than the “problems of proof” in determining whether a child was legitimated under foreign law—a determination that is already necessary under current 309(a)(4)(A) for a foreign-domiciled child.²⁸⁸ And current section 309(c) *already* discourages citizen mothers who cannot transmit citizenship under section 301(g), like our hypothetical Jane, from marrying the noncitizen fathers of their children before the children are born; my proposed replacement is not going to make that problem any worse. If the government was suggesting in its *Nguyen* brief that a statelessness-dependent replacement for section 309(c) would discourage paternal legitimation *after* birth, this criticism does not apply to my proposal, because proposed 301(d) would apply to a child who, *at the time of birth* and without regard to events taking place thereafter, would be stateless if not granted U.S. citizenship. The government’s arguments against replacing section 309(c) with a statelessness-dependent provision, to the extent that they apply to my proposal, condemn the current system as much as they do the proposed replacement.

One possible problematic consequence of a statelessness-dependent replacement for section 309(c) that the government did not mention in its *Nguyen* brief is nevertheless worth guarding against. U.S. citizenship is sufficiently valuable that we might be concerned that foreign states would be willing to change their laws to aid their citizens’ children in acquiring it.²⁸⁹ If proposed new section 301(d) applied in absolutely all cases where a child would otherwise be stateless at birth, there is a risk—although perhaps not a large one—that some foreign nations

287. Brief for the Respondent at 42–43 & n.22, *Nguyen* (No. 99-2071).

288. Bestowal of citizenship contingent on a child otherwise being stateless is not uncommon in the laws of other nations, which suggests that it does not create insuperable administrative difficulties. *See, e.g.*, MALAYSIA CONST. sched. 2, part II, ¶ 1(e) (declaring that “every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph” is a citizen), http://confinder.richmond.edu/local_malaysia.html; AUSWÄRTIGES AMT [FOREIGN MINISTRY] OF GERMANY, REFORM OF THE LAW ON NATIONALITY (2002) (stating that foreign-born children of German citizens who themselves acquired citizenship as foreign-born children of German citizens after 1999 will not be German citizens, unless “the child would otherwise be stateless or if a notice of the birth is submitted by the German parents or parent to the competent mission of the Federal Republic of Germany within a year”), *at* <http://www.auswaertiges-amt.de/www/en/willkommen/staatsangehoerigkeitsrecht/>; Constitution Amendment Act, 1997, ch. 3, § 20 (Fiji) (“Despite anything in Chapter IV of the Constitution of 1990 . . . a person born in Fiji in the period [between] 25 July 1990 and . . . the date . . . of this Constitution is taken to have become a citizen on the date of birth if he or she would otherwise be stateless.”), <http://www.appf.org.pe/countries/fiji/constitu/chap03.htm>; EMBASSY OF CROATIA, THE LAW ON CROATIAN CITIZENSHIP (1991), art. 5 (“A child born abroad whose one parent was, at the time of his or her birth a Croatian citizen, but he or she does not meet one of the prerequisites from Paragraph 1 of this Article, shall acquire Croatian citizenship if he or she would otherwise be left stateless.”), *at* http://www.croatiaemb.org/consular/english/The_Law_on_Croatian_Citizenship.htm.

289. *Cf.* *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (“By many [American citizenship] is regarded as the highest hope of civilized men.”), *quoted in* Brief for the Respondent at 42, *Nguyen* (No. 99-2071).

might change their laws to specifically refrain from bestowing citizenship on certain children born to an American parent, in order to increase the chance that proposed 301(d) would grant those children U.S. citizenship. Or, even if they are not willing to refrain indefinitely from bestowing their citizenship on children of Americans, some foreign nations might attempt to manipulate proposed 301(d) by bestowing citizenship on children of Americans only after they had been alive for a certain period of time, so that they would be stateless at birth for purposes of proposed 301(d). To protect against these possibilities, proposed new section 301(d) would contain anti-manipulation language. Any foreign nationality that would necessarily be acquired by operation of law at some time after birth, or that would have been acquired if not for a foreign law that discriminated against the children of Americans or otherwise tried to manipulate proposed 301(d) and similar statelessness-dependent laws, would count as a nationality acquired at birth for purposes of proposed 301(d).

3. Proposed Section 309(d)

One addition to proposed new section 309 would be necessary to prevent the other reforms from creating the possibility of new anomalies. If a child is born out of wedlock to two U.S.-citizen parents, but only one parent has a connection to the child that is sufficient under proposed 309(a) to transmit citizenship, the “missing” U.S.-citizen parent should not pose a greater obstacle to transmission of citizenship than an alien parent would. That is, while the laxer any-parental-residence rule of section 301(c) is only available to children whose citizen parents are both sufficiently involved in their lives to qualify to transmit citizenship, transmission of citizenship by a single citizen parent who satisfies the stricter physical-presence requirement of section 301(g) should be possible whether the other parent is an alien or a U.S. citizen who does not qualify to transmit citizenship. The new subsection of section 309 would establish this rule.²⁹⁰

With current 309(c) gone (replaced by proposed 301(d)), the new subsection could simply fill the vacant slot at section 309(c), but it would likely create confusion to have a new provision with the same designation as a former provision cited so frequently as current 309(c) now is. Thus, I propose designating the new subsection as section 309(d), with section 309(c) left as a blank, repealed section.²⁹¹

290. Though the primary application of new section 309(d) would be to out-of-wedlock children—hence its placement in section 309—its rule that a citizen parent could be considered as an alien parent if this were necessary to grant citizenship would not be strictly limited to out-of-wedlock children. That rule would also apply, for example, in the unlikely event that a citizen mother like our hypothetical Molly managed to accumulate constructive physical presence meeting the requirements of section 301(g) without ever being resident in the United States even for a brief period, and then married another American citizen who had never been resident in the United States; their child could acquire citizenship from Molly, under section 301(g) and new section 309(d), despite their failure to meet the any-parental-residence precondition prescribed by section 301(c) for acquisition of citizenship by a child of two U.S. citizens.

291. *C.f.*, *e.g.*, INA §§ 101(d), 321, 323, 8 U.S.C. §§ 1101(d), 1432, 1434 (2004) (all listed as “stricken” or “repealed”).

B. The Abolition of Noncitizen Nationality

It would be possible to eliminate the anomalies produced by the current law of noncitizen nationality without eliminating the status itself. The INA could, for example, be revised so that the rules for transmitting noncitizen nationality were precisely the same as the rules for transmitting citizenship, and noncitizen nationals were treated as aliens for purposes of citizenship transmission—so that citizenship and noncitizen nationality would be transmitted by identical, parallel but completely separate systems.²⁹² This would rectify the anomalous outcomes of the hypotheticals discussed in Part IV. Such a revision would not necessarily be worthwhile, however, because the status of noncitizen nationality is itself an anomaly, and one for which there is little apparent justification.

If the differences in transmission rules for citizenship and noncitizen nationality were removed, the remaining differences would be that noncitizen nationals have fewer political rights if they move to a State, have fewer rights under the immigration laws to help their relatives immigrate, and may be able to have their nationality stripped from them when they could not similarly be deprived of citizenship.²⁹³ There does not seem to be any good reason why inhabitants of American Samoa should suffer from these disabilities, when inhabitants of all other U.S. territories no longer do. Therefore, I propose that statutory bestowal of noncitizen nationality should simply be abolished,²⁹⁴ and INA sections 301, 308, and 309 revised accordingly.

1. Proposed Section 308

The proposed new section 308 would declare that all noncitizen nationals of the United States as of the effective date of the new statute, who had acquired their nationality by birth in an outlying possession or by some other specific statutory mechanism, rather than by exhibiting “allegiance to the United States” in some miscellaneous fashion, were collectively naturalized as citizens of the United

292. In theory, it would also be possible to eliminate the anomalies caused by the current law of noncitizen nationality while retaining an entirely distinct statutory structure for transmission of such nationality by descent, such as exists today, rather than an identical but separate structure. However, retaining a distinct statutory scheme that affects relatively few people and is amended for reasons such as allowing the mother of a Congressional delegate to vote for him, *see supra* note 242, creates an unnecessarily high risk of anomalies in that system, which is likely to be even less carefully screened for potential problems than the main law of citizenship by descent appears to have been.

293. *See supra* notes 218–221 and accompanying text.

294. To completely abolish even the concept of noncitizen nationality, by changing the definition of “national” in INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) to refer to citizens only, would render proposed new section 308 difficult to understand, and would remove the possibility that the status of noncitizen nationality could be revived to describe persons who are born in or inhabit miscellaneous territories that the United States may own now or may acquire in the future, but which are not part of the statutorily defined “United States” or its “outlying possessions,” *see supra* note 208. Thus, while I recognize that one could reasonably suggest such a definitional change to be advisable, I do not propose it here.

States.²⁹⁵ The purpose of refraining from naturalizing all noncitizen nationals without qualification would be to avoid even arguably naturalizing those persons declared by one or two courts to be “nationals” based on the allegiance displayed by their naturalization applications.²⁹⁶

2. Proposed Changes to Section 301 and 309

Proposed new section 301(e) would declare that all persons born in an outlying possession of the United States, and subject to the jurisdiction of the United States, were citizens of the United States. Section 301(e) would be an appropriate location for the outlying-possession *jus soli* citizenship provision because, in its current form, section 301(e) is a mixed *jus soli* and citizenship-by-descent provision that grants citizenship to children born in outlying possessions if and only if one of their parents is a citizen who meets a physical-presence requirement;²⁹⁷ the proposed change would simply expand the class of persons born in an outlying possession to whom section 301(e) grants citizenship. Section 301(f), which currently bestows citizenship on “a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States,”²⁹⁸ would be amended so that it also granted such citizenship to infants of unknown parentage, found in an outlying possession, who were not discovered before reaching age five to have been born elsewhere.²⁹⁹

With statutorily-granted noncitizen nationality abolished, current INA section 301(d) would be obsolete and could be deleted. The vacancy at section 301(d) would be filled by the replacement for section 309(c) discussed earlier.³⁰⁰ Because current section 301(d) is relatively obscure and infrequently cited, this redesignation should not result in too much confusion—unlike any plan of reorganization of section 301 that altered the designation of the very-frequently-cited section 301(g).

The references to section 301(e) and to “paragraph (2) of section 308” would be removed from the preamble to section 309(a).³⁰¹ Paragraph (2) of section 308 would no longer exist, and new section 301(e), a pure *jus soli* citizenship provision, would not be a logical subject of the requirements of section 309(a). The reference to proposed new section 301(d), on the other hand, would remain in

295. Collective naturalization of the inhabitants of territories is not uncommon. See INA §§ 302–307, 8 U.S.C. §§ 1402–1407.

296. See *supra* note 222 and accompanying text. Refraining from naturalizing absolutely all nationals would also avoid naturalizing anyone born in a U.S.-controlled island like Wake or Midway Island who might be a national under current law even though not designated as such by statute, see *supra* note 209.

297. 8 U.S.C. 1401(e); see *supra* Part V.B.2.

298. 8 U.S.C. § 1401(f)

299. Cf. INA § 308(3), 8 U.S.C. § 1408(3) (granting noncitizen nationality to “[a] person of unknown parentage found in an outlying possession . . . while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession”).

300. See *supra* Part V.A.2.

301. 8 U.S.C. § 1409(a).

section 309(a), since new section 301(d) would be a citizenship-by-descent provision to which section 309(a) could appropriately apply.³⁰²

C. The Solutions Applied

Returning to the hypotheticals discussed at the beginning of this Article and the fact patterns of some of the cases described within it, we can see how these proposed changes would produce more rational results. Our hypothetical Joseph, who lived with and supported his child but did not marry the child's mother or do any paperwork, would transmit citizenship under section 301(g) combined with proposed 309(a)(1) if he was present at his child's birth, and under section 301(g) combined with proposed 309(a)(4) if he was not. Joseph Boulais would similarly have been able to transmit his citizenship to Tuan Nguyen under 301(g) and proposed 309(a)(1) or 309(a)(4), without having to resort to a complex and easily overlooked argument based on an obscure transitional provision. Neal O'Donovan-Conlin would have acquired citizenship under section 301(g) and proposed 309(a)(2) when his parents married.³⁰³

Our hypothetical Josephine, who spent so much less time in the U.S. than either Joseph and never met the child conceived from her egg, would no longer transmit citizenship to that child, because proposed new section 309 would not give absentee egg donors the "free pass" that current section 309(c) does. Josephine would fail to meet the requirement of proposed new 309(a) that she show some connection to her child: since she was not present at the child's birth, proposed new 309(a)(1) would not apply, and she took no steps to establish a connection thereafter that would qualify her under other subsections of proposed new 309(a). She would also fail to meet the physical-presence requirement of section 301(g). The only potential exception would be if the child needed Josephine's citizenship to avoid being stateless, and if Josephine, rather than being a true absentee egg donor, attended the child's birth to invoke proposed new section 309(a)(1) or filed a promise of support and a sworn acknowledgement of parenthood under proposed new section 309(a)(3). In that case, proposed new section 301(d) would apply, and Josephine's three years of physical presence in the United States would be sufficient to transmit citizenship.

Josephine's twin sister Jane, with an equally tenuous connection to the United States but a closer connection to her child, would be able to transmit citizenship if her child needed it to avoid being born stateless, but not otherwise. Proposed section 309(a)(1) would render section 301(g) and proposed section 301(d) applicable because of Jane's presence when she gave birth to her own child.

302. See *supra* note 285 and accompanying text; *supra* Part V.A.2.

303. It would be irrelevant that the marriage of O'Donovan-Conlin's parents could be considered not to have legitimated him, on the theory that he had already been legitimated automatically by operation of Arizona law—in a manner that would not satisfy proposed section 309(a)(2)—because Arizona law provided that "every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock." A.R.S. § 8-601, *quoted in* O'Donovan-Conlin v. Dep't of State, 255 F. Supp. 2d 1075, 1082 (N.D. Ca. 2003). Proposed 309(a)(2) would be satisfied by the marriage of the citizenship claimant's parents even if this marriage did not technically constitute legitimation of the citizenship claimant. See *supra* note 271.

She would be unable to transmit citizenship under section 301(g) because of her failure to meet its five-and-two-year physical-presence requirement, but could do so under proposed section 301(d), with its laxer one-year physical-presence requirement, if her child would otherwise be stateless at birth. Unlike current law, proposed sections 301 and 309 would not pressure Jane to divorce and leave her husband in order to transmit her citizenship, unless this divorce would leave her child without any non-American nationality at birth and thus render new section 301(d) applicable. (The possibility of divorce aimed at achieving statelessness is admittedly an irritating loophole, though one likely to be less frequently relevant than the divorce loophole that already exists under current law; it is difficult to eliminate without creating the possibility that innocent children of Americans will suffer the harsh fate of statelessness³⁰⁴ simply because their parents happened to divorce shortly before their births for reasons unrelated to citizenship law.)

Our hypothetical Molly, who spent her childhood in the overseas household of a member of the Armed Forces or civilian government employee, or in the Northern Mariana Islands, or in the United States but with her presence interrupted by annual foreign vacations, would not face the same peculiar problems in transmitting citizenship that she does under current law. Molly's foreign-born out-of-wedlock child by an alien father would be a citizen under proposed 309(a)(1) and section 301(g): her presence when she gave birth to her own child would suffice, under proposed 309(a)(1), to render section 301(g) applicable, and section 301(g) would take her constructive or discontinuous physical presence or her physical presence in the Northern Mariana Islands into account to find that she met the five-and-two-year requirement for transmission of citizenship. Molly's foreign-born out-of-wedlock child by U.S.-citizen father Joseph would also be a citizen, under section 301(c), made applicable by proposed section 309(a)(1) as to her and either proposed 309(a)(1) or proposed 309(a)(4) as to Joseph. Even if the American father of Molly's foreign-born out-of-wedlock child failed to qualify to transmit citizenship under proposed 309(a), the child would still be a citizen: under proposed section 309(d), the nonqualifying father would be ignored as if he were an alien, and Molly could then transmit citizenship just as she did to her child by a foreign father.

Meryl, who grew up in the same overseas U.S.-government-employee household as Molly or went on the same annual vacations, would also not face the same peculiar problems that she does under current law. Her child's American Samoan father would be a citizen under proposed section 308 or proposed section 301(e). Thus, if the father married Meryl before the child's birth or qualified to transmit citizenship under proposed section 309(a), the child would acquire citizenship under section 301(c) as the child of two American-citizen parents, at least one of whom had had some past residence in the United States or its outlying possessions. Even if the father of Meryl's child did not marry Meryl and failed to qualify under proposed section 309(a), the child would still become a citizen: under proposed section 309(d), the father would be ignored as if he were an alien,

304. The Supreme Court has described statelessness as loss of "the right to have rights." *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

and Meryl could transmit citizenship under section 301(g), with her constructive or discontinuous physical presence taken into account just as Molly's was.

Under more usual and mundane circumstances, proposed sections 301 and 309 would operate essentially as current sections 301 and 309 do. Married U.S. citizens would transmit citizenship to their marital children under section 301(c) or section 301(g), with no changes except in cases involving parents who under current law are noncitizen nationals or children who under current law would be stateless. Unmarried women who had been present in the United States for a significant portion of their lives, and gave birth to their own children, would transmit their citizenship under section 301(g) and proposed 309(a)(1) without having to do anything extra. Unmarried men who had been present in the United States for a significant portion of their lives, and knew about the details of the law, could transmit citizenship by filing papers under proposed section 309(a)(3) that would be almost identical to the papers they can now file under 309(a)(3) and 309(a)(4)(B). Thus, the proposed changes would not lead to significantly increased complications under normal circumstances, only to greater rationality of results in certain unusual circumstances.

CONCLUSION

As currently written and administered, U.S. citizenship-by-descent law produces unnecessarily bizarre outcomes when applied to unusual but plausible sets of circumstances. Some of these peculiar outcomes, like Tuan Nguyen's failure to become a citizen despite the fact that he was raised by an American citizen parent, have attracted public and scholarly attention. Other peculiar potential outcomes have not yet become publicly known, either because people have not found themselves in the situations that would trigger these outcomes, or because the people who would be affected by the anomalous outcomes do not know the details of the relevant law. But just because some of the metaphorical landmines have not yet been set off is no reason to leave them buried in the statute books. We should not wait until the apparently stateless child of someone like our hypothetical Meryl is born, or until someone like our hypothetical Jane feels pressured to divorce and leave her husband in order to transmit U.S. citizenship to her soon-to-be-born child, or until some ambitious sperm donor from American Samoa figures out that current law appears to give him the power to create nondeportable American nationals in quantity without any consequences. And as for the problems that *are* known, there is even less reason to leave them in place. There ought not be any more deported Tuan Nguyens, even if the fathers who raise them happen to live in states with strict legitimation requirements (and thus render the CCA unhelpful³⁰⁵). The American law of citizenship by descent should be fixed, and fixed soon.

305. See *supra* notes 168–169 and accompanying text.

APPENDIX***A. Text of Proposed Revised Sections of the Immigration and Nationality Act***

After the revisions recommended in this Article, Immigration and Nationality Act sections 301, 308, and 309 would read as follows:

§ 301. Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person who would not otherwise acquire any nationality at birth (including any nationality which as of the time of birth is certain later to be acquired by operation of foreign law, or any nationality that would be acquired if not for operation of foreign law discriminating against persons whose parents are citizens of the United States or otherwise inducing statelessness for the purpose of manipulation of this subsection or similar laws, but without regard to any nationality that may be acquired as a result of any events not mandated by law that may take place after birth), born outside the United States and its outlying possessions of parents one of whom is 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 one year: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included to satisfy the physical-presence requirement of this paragraph;

(e) a person born in an outlying possession of the United States, and subject to the jurisdiction of the United States;

(f) a person of unknown parentage found in the United States or an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States or such outlying possession; and

(g) 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: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

....

§ 308. Persons formerly nationals but not citizens of the United States

All persons who were nationals but not citizens of the United States on [the effective date of this statute], and who had acquired their nationality by birth in an outlying possession of the United States, by operation of former section 308 of this Act, or by operation of section 302 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, are hereby declared to be citizens of the United States as of [the effective date of this statute].

....

§ 309. Children born out of wedlock

(a) The provisions of paragraphs (c), (d) and (g) of section 301 shall apply as of the date of birth to a person born out of

wedlock if a blood relationship between the person and the citizen parent(s) is established by clear and convincing evidence, and as to each citizen parent one of the following four conditions is met—

(1) The presence of the citizen parent at the birth of the person is established by clear and convincing evidence, or

(2) while the person is under the age of 18 years, the person's parents marry one another, or the person is legitimated under the law of the person's residence or domicile, other than by operation of law bestowing rights equal to those of persons born in wedlock on all persons born out of wedlock without regard to any action taken by their parents, or

(3) while the person is under the age of 18 years, the citizen parent—

(A) acknowledges parenthood of the person in writing under oath, and

(B) agrees in writing to provide financial support for the person until the person reaches the age of 18 years, or

(4) the person is the dependent unmarried son or daughter and a member of the household of the citizen parent for a period or periods totaling not less than five years, before attaining the age of 18 years.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 301(g) shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, if the parenthood of the citizen parent is established at any time and while such child is under the age of twenty-one years by legitimation.

(c) (Repealed)

(d) Notwithstanding the provision of subsection (a) of this section as it applies to paragraph (c) of section 301, a person born outside the United States of parents both of whom are citizens of the United States, who would be a citizen of the United States by operation of subsection (a) of this section and/or paragraph (d) or (g) of section 301 if one parent were considered to be an alien rather than a citizen of the United States, shall be held to have acquired United States citizenship at birth.

B. Proposed Changes to the Immigration and Nationality Act

With deleted matter represented by ~~strikethroughs~~, and added matter underlined, the changes to INA sections 301, 308, and 309 that are proposed by this Article are as follows:

§ 301. Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

~~(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States~~ a person who would not otherwise acquire any nationality at birth (including any nationality which as of the time of birth is certain later to be acquired by operation of foreign law, or any nationality that would be acquired if not for operation of foreign law discriminating against persons whose parents are citizens of the United States or otherwise inducing statelessness for the purpose of manipulation of this subsection or similar laws, but without regard to any nationality that may be acquired as a result of any events not mandated by law that may take place after birth), born outside the United States of parents one of whom who is 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 one year, and had previously been physically present in the United States or its outlying possessions for a period or periods totaling not less than one year: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international

organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included to satisfy the physical-presence requirement of this paragraph;

(e) a person born in an outlying possession of the United States, ~~and subject to the jurisdiction of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;~~

(f) a person of unknown parentage found in the United States or an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States or such outlying possession;

(g) 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: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

....

§ 308. ~~Persons formerly n~~Nationals but not citizens of the United States at birth

~~Unless otherwise provided in section 301, the following shall be nationals, but not citizens, of the United States at birth:~~

~~(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;~~

~~(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;~~

~~(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty one years, not to have been born in such outlying possession; and~~

~~(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not 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 seven years in any continuous period of ten years—~~

~~(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and~~

~~(B) at least five years of which were after attaining the age of fourteen years.~~

~~The proviso of section 301(g) of this Act shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.~~

All persons who were nationals but not citizens of the United States on [the effective date of this statute], and who had acquired their nationality by birth in an outlying possession of the United States, by operation of former section 308 of this Act, or by operation of section 302 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, are hereby declared to be citizens of the United States as of [the effective date of this statute].

....

§ 309. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), ~~(e)~~, and (g) of section 301 ~~and of paragraph (2) of section 308~~ shall apply as of the date of birth to a person born out of wedlock if a blood relationship between the person and the citizen parent(s) is established by clear and convincing evidence, and as to each citizen parent one of the following four conditions is met—

(1) The presence of the citizen parent at the birth of the person is established by clear and convincing evidence, or

(2) while the person is under the age of 18 years, the person's parents marry one another, or the person is legitimated under the law of the person's residence or domicile, other than by operation of law bestowing rights equal to those of persons born in wedlock on all persons born out of wedlock without regard to any action taken by their parents, or

(3) while the person is under the age of 18 years, the citizen parent—

(A) acknowledges parenthood of the person in writing under oath, and

(B) agrees in writing to provide financial support for the person until the person reaches the age of 18 years, or

(4) the person is the dependent unmarried son or daughter and a member of the household of the citizen parent for a period or periods totaling not less than five years, before attaining the age of 18 years.

~~(1) a blood relationship between the person and the father is established by clear and convincing evidence,~~

~~(2) the father had the nationality of the United States at the time of the person's birth,~~

~~(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and~~

~~(4) while the person is under the age of 18 years—~~

~~(A) the person is legitimated under the law of the person's residence or domicile,~~

~~(B) the father acknowledges paternity of the person in writing under oath, or~~

~~(C) the paternity of the person is established by adjudication of a competent court.~~

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 301(g) shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, if the parenthood of the citizen parent is established at any time and while such child is under the age of twenty-one years by legitimation.

(c) ~~Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock, shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of~~

~~the United States at the time of such person's birth, and the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year. (Repealed)~~

(d) Notwithstanding the provision of subsection (a) of this section as it applies to paragraph (c) of section 301, a person born outside the United States of parents both of whom are citizens of the United States, who would be a citizen of the United States by operation of subsection (a) of this section and/or paragraph (d) or (g) of section 301 if one parent were considered to be an alien rather than a citizen of the United States, shall be held to have acquired United States citizenship at birth.