

No. 09-5801

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IN THE  
*Supreme Court of the United States*

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RUBEN FLORES-VILLAR,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF *AMICI CURIAE* OF PROFESSORS OF  
HISTORY, POLITICAL SCIENCE, AND LAW IN  
SUPPORT OF PETITIONER**

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

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of the law of citizenship and the manner in which that law has been shaped and animated by sex-based stereotypes and outdated gender norms.

**SUMMARY OF ARGUMENT**

Sex-based laws premised on outdated or archaic presumptions about the proper roles of men and women run afoul of well-established constitutional principles, especially when such laws enforce gender-differentiated parental roles. *Amici* write to elaborate on the history of Congress's use of sex-based classifications in the regulation of citizenship. *Amici* demonstrate that, in its regulation of intergenerational and interspousal citizenship transmission, Congress has consistently relied on

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

and perpetuated sex-based norms concerning proper parental roles, even when those norms have changed in other contexts and in social practice. As this brief shows, Congress's tendency to regulate citizenship law using anachronistic gender stereotypes is readily apparent in the statutes that govern the citizenship rights of parents of nonmarital foreign-born children.

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

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

limitations persist today. At the same time, Congress was—and continues to be—solicitous of the citizenship claims of nonmarital foreign-born children of citizen mothers.

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

### ARGUMENT

This Court has recognized time and again that laws that distinguish between men and women based on outdated understandings of their “respective roles” or “separate spheres” are contrary to constitutional gender-equality principles. *See United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). To be sure, this Court has by no means foreclosed the ability of legislatures to draw sex-based distinctions. *See, e.g., Nguyen v. INS*, 533 U.S. 53 (2001). But one undeniable theme of these decisions is that such distinctions are suspect

whenever they presume distinctive societal roles for the sexes, both vis-à-vis each other and vis-à-vis their children. *See, e.g., id.* at 73; *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

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

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

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

Historically, the husband's position as "head of the household" enhanced men's cultural, political, and legal authority in myriad contexts beyond the household itself.<sup>2</sup> Citizenship law was no exception. See Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 *Am. Hist. Rev.* 1440, 1452 (1998); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration*

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

*and Naturalization Policies in the United States*, 13 *Pol. & Soc’y* 1, 11 (1984). Accordingly, the laws governing *jus sanguinis* citizenship privileged the father as the source of citizenship for foreign-born children from 1790, when the first citizenship statute was enacted, until 1934. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 (“Act of 1855”); Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104. The male headship principle was so powerful that even ambiguous statutory language in the citizenship statutes of 1790, 1795, and 1802—which referred only to transmission of citizenship to “children of citizens” or “persons”—was generally understood to mean the children of citizen fathers. *See* 2 James Kent, *Commentaries on American Law* \*53 (8th ed. 1854).<sup>3</sup>

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

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

In keeping with social and legal norms privileging the father as the source of citizenship for dependents in the marital household, Congress also pronounced in 1855 that a non-citizen woman would become an American citizen simply by marrying an American man. Act of 1855, § 2, 10 Stat. at 604. A primary advocate of this change, Representative Cutting of New York, justified it in terms of the “merger” doctrine: “[B]y the act of marriage itself the political character of the wife shall at once conform to the political character of the husband.” Cong. Globe, 33d

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the point. See 2 Kent, *supra*, \*51 (citing 4 Geo. 2, ch. 21 (1731)).

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

Congress continued to shape the laws governing intergenerational and interspousal citizenship transmission according to the principle of male headship even as the social and legal foundations of that principle began to erode.<sup>4</sup> Thus, when Congress enacted the Cable Act of 1922, eliminating the American man’s absolute privilege to endow his foreign wife with citizenship simply by marrying her, it continued to reify the male headship principle in citizenship law in other ways. Congress expedited the naturalization process for foreign wives of

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

American citizens, Act of Sept. 22, 1922 (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022, exempted men's foreign wives from racial quotas, and otherwise gave them preferential immigration status. Act of May 26, 1924, ch. 190, §§ 4(a), 4(d), 13(c), 43 Stat. 153, 155, 162. As discussed below, the American woman who married a foreign husband never received such preferential treatment; instead, for many decades she would be expatriated for marrying a foreigner. *See infra* at 10-13.

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

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

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

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

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

*First*, the principle of male headship was integrated into American citizenship law through the expatriation of American women who married non-citizen husbands. This had not been the common law practice. *See Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) (Story, J.) (“[M]arriage with an alien,

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

whether a friend or an enemy, produces no dissolution of the native allegiance of the wife.”); Candice Lewis Bredbenner, *A Nationality of her Own: Women, Marriage, and the Law of Citizenship* 59 (1998). In the late nineteenth century, however, some courts began expatriating American women who married non-citizens. Thus, in 1883 a federal court held that an American woman lost her citizenship upon marriage to a non-citizen, declaring that “legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative.” *Pequignot v. City of Detroit*, 16 F. 211, 216 (C.C.E.D. Mich. 1883).

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

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

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

In 1922, Congress enacted the Cable Act, which ended the automatic expatriation of some, but not all, American women who married non-citizens. Cable Act, ch. 411, § 3, 42 Stat. at 1022. Congress’s equalization of women’s citizenship through the Cable Act was equivocal. The law continued to expatriate any American woman who married a non-citizen and resided in her husband’s country for two years, or abroad in any other country for five years. *Id.* No such limitation has ever applied to an American man who opted to live abroad with his non-citizen wife. Moreover, the Cable Act’s sex-equality principle did not extend to those women

whose foreign husbands were themselves “ineligible to citizenship” under our naturalization laws. *Id.* §§ 3, 5, 42 Stat. at 1022; *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 662, 694 n.335 (2005). Thus, under the Cable Act the American woman who married a racially ineligible non-citizen was still expatriated. *See* Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 42-43 (1998). No such draconian penalty was visited upon an American man who did the same. *See* Act of May 26, 1924, ch. 190, §§ 4(a), 4(d), 13(c), 43 Stat. 153, 155, 162.

*Second*, until 1934 the male headship principle also prevented recognition of married American women’s capacity to transmit citizenship to their foreign-born children. *See* Bredbenner, *supra*, 84. As discussed above, prior to 1855, the citizenship statutes were interpreted to preclude transmission of citizenship from the married American mother to her foreign-born children. *See* Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104; *see also supra* at 6. Congress affirmed and codified that interpretation in the citizenship statute enacted in 1855. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

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

the political and cultural character of the family. See *Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the H. Comm. on Immigration and Naturalization*, 72d Cong. 18 (1932) [hereinafter Hearings on H.R. 5489] (Statement of Sen. Green) (“I am still constrained to believe that the man is the head of the family.”); *Relating to the Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality, Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization*, 73d Cong. 29 (1933) [hereinafter Hearings on H.R. 3673] (statement of Lieut. Col. Fred B. Ryons) (objecting to citizenship transmission by married mothers on the ground that “[t]he head of the family . . . has a perfect right and has an obligation as the head of the family to rule his family”). It was not until 1934 that Congress finally recognized the right of American wives to transmit citizenship to their foreign-born children. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797.

*Third*, even after Congress introduced formal statutory equality with respect to wives’ ability to transmit citizenship to their foreign-born children, beliefs about married women’s lack of authority and individual identity within marriage continued to shape the citizenship laws in significant ways. Indeed, the equalization of the law regarding

married mothers' and fathers' right to transmit citizenship in 1934 prompted Congress to introduce a child U.S. residency requirement, *see* Act of May 24, 1934, ch. 344, § 1, 48 Stat. at 797, and a lengthy age-delimited parental U.S. residency requirement for children of mixed-nationality couples, *see* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1138-40; *see also supra* note 3 (noting minimal U.S. residency requirement for fathers prior to 1934).

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

The belief that the wife and children conformed to the foreign husband's cultural practices and political

views first led to the inclusion of a five-year age-delimited child U.S. residency requirement in the 1934 Act. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. at 797. A 1938 letter by a cabinet-level committee appointed by President Roosevelt explained this series of events:

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

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

After the 1934 Act went into effect, however, there was concern that the child residency requirement improperly limited transmission of citizenship to the foreign-born children of American citizen fathers who were married to non-citizens. Such children were believed to conform to the cultural and political character of the American “head of the family”—a legal term of art that, in this period, referred to the husband/father.<sup>6</sup> The same

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6. *See, e.g., Cyclopedic Law Dictionary* 522 (3d ed. 1940) (defining “head of a family” in terms of the

cabinet-level committee explained that “these [child] residence requirements will impose great hardship in some cases,” especially where the “head of the family” worked abroad for the American government or an American enterprise of some sort. *Id.* Thus, it recommended an exemption from the child residency requirement in such cases. The committee also recommended the imposition of a new requirement that the citizen parent in a mixed-nationality marriage “should have resided at least 10 years in the United States prior to the birth of the child,” which, again, would not apply to those foreign-born children of families where the “head of the family” was an American citizen employed by an American enterprise. *Id.*

As a consequence of these sex-based assumptions about parental roles in marriage, in 1940 Congress re-configured the citizenship transmission statute in a manner that would help preserve husbands’ power and privilege while disproportionately constraining married women’s ability to transmit citizenship to their foreign-born children. The resulting exception to the residency requirements was phrased to relieve the children of citizen *fathers* from the onerous child and parental residency requirements, while severely diminishing the likelihood that the children of citizen *mothers* would benefit from it. The exception was triggered only when the citizen parent “*at the time of the child’s birth* [was] residing abroad *solely or principally in the employment* of the Government of

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relationship between “father and child” or “husband and wife”).

the United States or a bona fide American . . . organization . . . for which *he* receives substantial compensation.” Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. at 1139 (emphasis added). In the 1940s, married women with children were rarely engaged in such employment, especially not “at the time of [her] child’s birth,” and hence the exception was of little use to citizen mothers.<sup>7</sup> Even the details of the parental residency requirement thus evince the imprint of the male headship principle and the corresponding belief that the wife and children conformed to the cultural and political character of the husband.

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

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

similar sex-based distinctions were eroding in other contexts.

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

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

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

Through its regulation of *jus sanguinis* citizenship, Congress reinforced and perpetuated these gendered norms regarding men's and women's

respective roles and responsibilities as parents outside marriage. By codifying a system of citizenship laws that enforced sex-differentiated family roles, Congress constrained individual mothers' and fathers' ability to decide how to perform their roles as parents. The statutory provision at issue in this case continues this transparently sex-discriminatory means of regulating citizenship transmission, even as the social and legal norms regarding nonmarital parenthood have evolved.

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

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

For much of the nineteenth and early twentieth centuries, domestic relations laws generally insulated men from their nonmarital children by disfavoring those children's claims to property and status, even when the children had been legitimated. See Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 221-22, 232-33 (1985).<sup>8</sup> Well into the early twentieth

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8. Under the common law, a nonmarital child was *nullius filius*. The law did not recognize a legal relationship between the child and either of his parents. See 2 Kent, *supra*, \*212; see also Wilfrid Hooper, *The Law of Illegitimacy* 25, 122, 135 (1911) (the nonmarital child

century, domestic relations laws in most states resisted recognition of the father-child relationship outside of marriage and demonstrated solicitousness for putative fathers who wished to avoid their parental responsibilities. *See id.* at 199, 217, 231-32. These laws both evinced and perpetuated powerful cultural resistance to men's responsibility for—and relationships with—their nonmarital children.

Such resistance also shaped the regulation of *jus sanguinis* citizenship, even before Congress first addressed the citizenship status of foreign-born nonmarital children in 1940. From 1790 until 1940, the citizenship statutes were silent as to the marital status of the citizen parent. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104. Nevertheless, these statutes were interpreted to allow transmission of citizenship to the marital children of citizen fathers, but not to their illegitimate children. The lead nineteenth-century case in this area, *Guyer v. Smith*, 22 Md. 239 (1864), demonstrates just how rigid this limitation was. In *Guyer*, the father had recognized his children, given them his name, and named them in his will. Yet the court refused to recognize their claims to legitimacy, and thus to citizenship. *See Guyer*, 22 Md. at 249 (finding that the citizen father's children were “illegitimate; under our law *nullius*

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had no right to inherit, no right to the surname of either parent, and no claim on them for support or education).

*fili*, and clearly therefore not within the provisions of the [1802] Act”).

Courts and administrators gradually recognized the citizenship claims of at least some nonmarital foreign-born children who had been legitimated by the citizen father. *See* 32 Op. Att’y Gen. 162, 164-65 (1920); House Comm. on Immigration & Naturalization, 76th Cong., Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments 17 (Comm. Print 1939) [hereinafter Proposed Code]. But the legitimation exception was narrow and uncertain, with courts and administrators erecting a high bar when assessing citizenship claims asserted by or on behalf of the nonmarital children of citizen fathers. *See, e.g., Mason ex rel Chen Suey v. Tillinghast*, 26 F.2d 588 (1st Cir. 1928) (affirming rejection of evidence of legitimation for purposes of determining citizenship of foreign-born nonmarital child of American father); *Ng Suey Hi v. Weedin*, 21 F.2d 801, 802 (9th Cir. 1927) (holding that “illegitimate children, born abroad of citizens, being nullius filii” are not citizens under the citizenship statute, and rejecting evidence of legitimation by American father); Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612 (1915) (“[I]t seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.”).

In 1934, Congress had the opportunity to introduce sex equality into the laws governing *jus sanguinis* citizenship for nonmarital children, but it

refused to do so. The sex-based understanding that that men played an attenuated and discretionary role in the lives of their nonmarital children provided crucial context for the legislative debates over citizenship transmission to such children. Bills introduced in the early 1930s would have secured parental sex equality with respect to transmission of citizenship to foreign-born children of citizen parents, regardless of the parents' marital status:

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

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

Supporters of this bill urged that equal treatment of the citizen mothers and fathers of nonmarital foreign-born children was warranted pursuant to the sex-equality principles that informed the 1922 Cable Act. This included the principle that mothers and fathers should have equal rights to confer citizenship to their nonmarital children, and equal responsibility for such children. *See* Hearings on H.R. 5489 at 3-5. (Statement of Burnita Shelton Matthews); *id.* at 17-19 (Statement of Laura Berrien); *see also* Kristin

Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 Yale L.J. 1669, 1693-98 (2000).

Importantly, the proponents of sex equality in citizenship laws were aware that, in the context of the nonmarital child, proof of paternity would be required. They stressed that procedures would have to be adopted in order to ensure that the child was, indeed, the child of the citizen father. See Hearings on H.R. 5489 at 6 (Statement of Burnita Shelton Matthews) (“We may rest assured, it seems to me, that adequate proof is required before the right to the protection of the country is afforded. It is unlikely that any person entitled to protection under this bill would get it unless proof were conclusive.”). But, beyond that, they sought equal treatment of mothers and fathers in the transmission of citizenship to nonmarital foreign-born children. *Id.* at 3-5, 17-18.

Nevertheless, opponents resisted sex-equality in the regulation of *jus sanguinis* citizenship of nonmarital foreign-born children not primarily because they were worried about fraud, but because it offended the deeply-held view that the law did not—and should not—recognize the relationship of the father and his nonmarital child. As one congressman explained in an exchange with a proponent of the bill: “The child cannot inherit. It would not do, if he could. You are trying to undo what practically all of the big States in the country have held to be the proper procedure (to give to this child consideration) but you are giving an illegitimate child consideration.” Hearings on H.R.

5489 at 5 (statement of Rep. Jenkins). These concerns, as well as stubborn resistance to full gender equality in matters relating to citizenship, were fatal to the inclusion of “illegitimate” in the bill. *See* Bredbenner, *supra*, 230-31; Collins, 109 Yale L.J. at 1697. As a consequence, when Congress in 1934 passed a statute enabling married mothers to transmit citizenship to their foreign-born children, the final version of the bill said nothing concerning parental marital status, but was understood to apply to the foreign-born children of married citizen parents only. *See* 78 Cong. Rec. 7357 (1934) (“[This bill] applies to the children of wives and the children of husbands.”) (statement of Rep. Jenkins); 39 Op. Att’y Gen. 290, 291 (1939) (recognizing “that the applicable statutory provisions [in the citizenship laws] apply only to legitimate children”).<sup>9</sup>

Six years later, Congress finally addressed the citizenship status of foreign-born nonmarital children, making explicit what had been understood for decades: American citizenship law would continue to distance fathers from their nonmarital children. *See* Nationality Act of 1940, ch. 876, §§ 201(g) & 205, 54 Stat. 1137, 1138-40. The Nationality Act of 1940 codified and carried forward many of the pre-existing practices of courts and administrators. But it also extended the law’s sex-

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

based differential treatment of citizen parents by imposing new limitations on transmission of citizenship from citizen fathers to nonmarital foreign-born children through a host of requirements that did not apply to citizen mothers: mandatory legitimation during the child's minority; a ten-year, age-delimited U.S. residency requirement for the father; and a five-year, age-delimited U.S. residency requirement for the child. *Id.*

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

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

significantly longer residency requirement on citizen fathers of nonmarital children—even where, as here, the father has legitimated the child and has raised him in his American home. *See* 8 U.S.C. §§ 1401(g) & 1409(a) (requiring that fathers of nonmarital foreign-born children satisfy a five-year age-delimited U.S. residency requirement).

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

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

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

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mothers and fathers solely on the basis of sex where the father maintains a parent-child relationship).

bears the rights and responsibility of unwed parenthood.<sup>11</sup>

Officials administering the citizenship laws generally recognized the citizenship claims of foreign-born nonmarital children of citizen mothers long before Congress regulated the subject. *See, e.g.*, Proposed Code at 18 (noting that “the Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother”); Frederick Van Dyne, *Citizenship of the United States* 49 (1904); Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934) (citing a State Department memo of October 27, 1932).<sup>12</sup> A 1939

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11. In a departure from the strict common law principle of *nullius filius*, judges and legislators in both England and America gradually began to acknowledge the mother-child relationship outside marriage so as to ensure a responsible care provider and source of material support. *See Wright v. Wright*, 2 Mass. 109, 111 (1806) (Parsons, C.J.) (“[T]o provide for [the bastard’s] support and education, the mother has a right to the custody and control of him, and is bound to maintain him, as his natural guardian.”). As a consequence, by the early twentieth-century, many of the limitations on the legal relationship between the nonmarital child and his mother had been repealed. Grossberg, *supra*, 224-25. These changes corresponded with a growing consensus that the mother was the natural and presumed caretaker of her children—a cultural norm that strengthened mothers’ legal custodial rights both in and out of marriage. *Id.* at 209, 225, 234-35.

12. *But see* 39 Op. Att’y Gen. 290, 290-91 (1939) (acknowledging that nonmarital children of citizen

House Committee report acknowledged this practice and explained that it made sense in a social and legal environment in which, outside marriage, the mother “stands in the place of the father.” Proposed Code at 18. That often-used phrase functioned as a reference to the mother’s superior parental rights and responsibilities with respect to her nonmarital children, and also reflected a social and cultural belief that mothers, not fathers, sustained relationships with nonmarital children. Hence, a 1939 Attorney General Opinion notes that the exclusion of such children from the United States would be “not only harsh, but largely impractical.” 39 Op. Att’y Gen. at 291.

In 1940, Congress codified the administrative practice of maternal transmission of citizenship to nonmarital foreign-born children. Section 205 of the Nationality Act of 1940 provided that if the “mother had the nationality of the United States at the time of the child’s birth, and had previously resided in the United States or one of its outlying possessions,” the child “shall be held to have acquired at birth her nationality status.” *See* Nationality Act of 1940, ch. 876, § 205, 54 Stat. at 1139-40. Thus, unlike the transmission of citizenship to the nonmarital foreign-born children of citizen fathers, citizenship transmission between the citizen mother and

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mothers have been recognized as citizens, but finding that such children do not fall within the text of existing legislation and that “resort to the Congress for additional legislation is desirable”).

nonmarital child was largely unencumbered.<sup>13</sup> Citizen mothers who wished—or wish—to secure citizenship for their nonmarital foreign-born children have never been required to provide proof of maternity, pledge support for their minor children, satisfy a child residency requirement, or satisfy a lengthy age-delimited parental U.S. residency requirement of the sort at issue in this case.<sup>14</sup>

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

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

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

thus codified this long-standing, sex-based, extra-statutory practice.

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

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

children, that such a rule follows Roman law and American domestic law, and that “the laws of some thirty countries” recognize the citizenship status of nonmarital children of citizen mothers).

In the case before the Court, the United States has argued that in 1940 Congress eased the conditions under which mothers transmit citizenship to their foreign-born nonmarital children—and, in particular, exemption from the ten-year age-delimited parental residency requirement—out of concern for the risk of statelessness for that class of children. *See* Brief of United States, *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (No. 07-50445), 2008 WL 1848810. Based on the historical sources, this assertion is overstated and incomplete. For example, the primary legislative report on the 1940 Act refers to the risk of statelessness with respect to “foundlings,” but not with respect to the nonmarital foreign-born children of citizen mothers. Proposed Code at 17-18. Proposed Section 203(c), codified in the 1940 Act as Section 204(c), provided that a “child of unknown parentage found in an outlying possession of the United States” would have U.S. nationality until proven otherwise. *Id.* The purpose of that provision, according to the report, was to “prevent unfortunate persons of the class mentioned from being stateless.” Proposed Code at 17. By contrast, the report’s remarks on proposed Section 204, which was to govern the transmission of citizenship from citizen parents to their nonmarital

foreign-born children, does not identify statelessness as a concern.<sup>15</sup>

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

Nationality and statelessness were subjects of intense study and international concern in the 1930s.<sup>16</sup> The most important American work on the subject was written by Catheryn Seckler-Hudson, a professor and the head of the department of government at American University. *See* Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934).<sup>17</sup> Seckler-

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

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

17. Seckler-Hudson's work was well known at the time of its publication and remained a prominently cited source on statelessness. *See, e.g.*, Ellery C. Stowell, Book Review, 30 Am. J. Int'l L. 170 (1936) (reviewing William O'Sullivan Molony, *Nationality and the Peace Treaties* (1934)); Maximilian Koessler, "Subject," "Citizen,"

Hudson wrote about the risk of statelessness facing the foreign-born nonmarital children of U.S. citizen mothers *and* fathers. *See id.* at 224-25.

As an initial matter, Seckler-Hudson was skeptical that, in 1934, the United States would recognize foreign-born nonmarital children of citizen fathers as American citizens, whether legitimated or not. *See id.* at 224 (“Legitimation does not necessarily offer a remedy [for statelessness] for these children.”); *id.* at 220-21 (citing *Guyer v. Smith*, 22 Md. 239 (1864)). Accordingly, she observed that when such children were born in *jus sanguinis* countries in which they did not acquire nationality through the mother, they “had no effective citizenship.” *Id.* at 221. *Cf.* William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, 45 Am. J. Int’l L. 476, 479 (1951) (“[T]he unacknowledged child of an American father born of an alien woman abroad would be stateless, providing the woman’s state does not extend its nationality to the child.”).

In addition—and of particular significance in this case—Seckler-Hudson noted the risk of statelessness for nonmarital children born to American fathers who did not satisfy the parental residency requirement. *See* Seckler-Hudson, *supra*, 220, 225 (“[T]he illegitimate child of a foreign-born father, the

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“National,” and “Permanent Allegiance”, 56 Yale L.J. 58, 69 n.67 (1946); Comment, *The Expatriation Act of 1954*, 64 Yale L.J. 1164, 1196 n.161 (1955); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.15 (1963); *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958).

father being an American citizen but never having resided in the United States, would not be an American citizen” and “unless the country of his birth gave him its nationality, he would be stateless”).<sup>18</sup> The risks of statelessness for foreign-born nonmarital children of citizen fathers were thus well known when Congress was considering the question of how to regulate citizenship transmission to nonmarital foreign-born children.

Congress was presented with, but chose not to enact, a legislative proposal that would have remedied the various risks of statelessness confronting foreign-born children of American citizen mothers *and* fathers. In her treatise, Seckler-Hudson described a sex-neutral and marriage-neutral citizenship transmission bill that had been introduced in Congress. It was the very same bill, described *supra* at 23, introduced in the early 1930s that provided that “[a]ny child, legitimate or illegitimate” born abroad of a citizen mother or

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

father was to be an American citizen, subject to a simple (and gender-neutral) parental residency requirement. See Seckler-Hudson, *supra*, 222 (quoting H.R. 5489, 72d Cong. (1931)). Despite the fact that the leading authority on statelessness endorsed such legislation, in 1940 and again in 1952 Congress enacted legislation that perpetuated and even intensified the sex inequalities in our *jus sanguinis* citizenship statutes by shoring up substantial barriers to citizenship transmission between a citizen father and his nonmarital foreign-born child.

In sum, it is possible that Congress was concerned about statelessness when it exempted unwed mothers from the lengthy parental residency requirement that applied to unwed fathers. But if this was so, Congress acted on its concern in a sex-discriminatory manner. Congress opted to ignore the acknowledged risk of statelessness that confronted nonmarital foreign-born children of citizen fathers. It also opted to ignore a proposed legislative solution that would have addressed any concern about statelessness in a more thorough, sex-neutral manner. Thus, to the extent that Congress's legislation in this area was prompted by a concern about statelessness, that concern was filtered through and premised on the same constellation of sex-based presumptions regarding how men and women behave as parents that has characterized the United States' approach to citizenship transmission since 1790.

Laws premised on historically rooted sex-based assumptions concerning how men and women behave

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

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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## **APPENDIX**

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