# WEDLOCK, BLOOD RELATIONSHIP, AND CITIZENSHIP

LOGAN BOBO*

## INTRODUCTION

United States nationality law is often a topic of significant controversy. Statutory provisions and judicial decisions concerning the acquisition of citizenship implicate not only immigration law, but also constitutional and family law.[1] Sometimes, cases involve all three. It is perhaps inevitable in such decisions, then, given the array of issues at stake, that the Supreme Court will sometimes arouse controversy. In *Miller v. Albright* and *Nguyen v. INS*, for example, the Supreme Court upheld disparate statutory requirements for fathers and mothers in transmitting citizenship to children born out of wedlock.[2] Both decisions engendered vigorous dissents,[3] and the Court also received considerable criticism from legal commentators for upholding the separate requirements, largely on grounds of discrimination based on gender and legitimacy.[4]

---

* J.D. Candidate 2008, Benjamin N. Cardozo School of Law.

[1] Regarding constitutional law, *see generally*, Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373 (2004) (argues that plenary power doctrine over immigration does not adequately take into account the rights and interests of citizens); for family law, *see generally*, Katharine B. Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999) (using an immigration case as an example, the author discusses the Supreme Court's historical tendency to address family law issues as ancillary to other issues and therefore often inadequately).

[2] Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. INS, 533 U.S. 53 (2001).

[3] *Miller*, 523 U.S. at 469 (Ginsburg, J., dissenting) ("Even if one accepts at face value the Government's current rationale, it is surely based on generalizations (stereotypes) about the way women (or men) are. These generalizations pervade the opinion."); *Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting:

> The Court . . . departs from the guidance of our precedents concerning such classifications in several ways. . . . [T]he majority glosses over the crucial matter of the burden of justification. In other circumstances, the Court's use of an impersonal construction might represent a mere elision of what we have stated expressly in our prior cases. Here, however, the elision presages some of the larger failings of the opinion.)

[4] *See, e.g.*, Erin Chlopak, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967, 970 (2002). *See also* Manisha Lalwani, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock*, 47 VILL. L. REV. 707, 726-727 (2002); Rachel Baskin, Note,, *Citizenship Theories, Immigration and Nationality Act Section 309 &* Nguyen v. INS*: How the Supreme Court Got it Wrong*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 869, 870 (2006).

This Note focuses on a related issue arising in the context of citizenship requirements that has similarly important consequences in the fields of immigration, constitutional, and family law: the extent to which a blood relationship is required for a parent to transmit citizenship to a child. The Immigration and Nationality Act—"INA"—allows the passing of citizenship to a child "born of" at least one citizen parent.[5] Two additional important factors in the law allowing the transmission of nationality to a child born outside the U.S. with only one citizen parent are whether the child's parents are married and whether the child is related by blood to the citizen parent.[6] Often, being born in wedlock and having a blood relationship with a citizen parent go together, and such a child would acquire citizenship at birth. Much less clear is the situation where a child is born in wedlock but is not the biological offspring of the citizen parent. The INA also divides jurisdiction over the adjudication of its citizenship provisions between the State Department and the federal courts, depending on whether the person is claiming citizenship inside or outside the U.S.[7] The combination of vague language and a split jurisdiction has had two important consequences.

First, it has led to differing interpretations of the requirements for derivative citizenship under the INA. The State Department has interpreted the INA to require a blood relationship between the citizen parent and the child in all cases.[8] The Ninth Circuit has held that a blood relationship is required only when the child is born out of wedlock.[9] This difference in statutory interpretations leads to more questions. Is one interpretation better substantively? Is one of the interpretations made with authority delegated by Congress? Does the Constitution require one substantive interpretation or procedural approach? This Note will attempt to answer these questions by examining State Department interpretations of the INA, Supreme Court decisions on the constitutionality of relevant portions of the statute, the aims of Congress in passing it, and other policy considerations. Based on this analysis, this Note will argue that the Ninth Circuit interpretation of the requirements for citizenship is the better approach and that it should be adopted uniformly, including in cases falling under the jurisdiction of the State Department.

The second important aspect of this jurisdictional split is that there are no provisions under the INA for reconciling it. This presents an unusual problem: how, then, can the agency and judiciary interpretations be reconciled? The INA itself limits judicial review of nationality claims arising inside the U.S. to removal

---

[5] Immigration and Nationality Act (INA) § 301(g), 8 U.S.C. § 1401(g) (2006).

[6] *See id. See also* INA § 309(a)(1), 8 U.S.C.S. § 1409(a)(1) (2006).

[7] *See* INA § 104(a)(3), 8 U.S.C. § 1104(a)(3) (2006) (Secretary of State charged with determining the citizenship of people outside the U.S.); INA § 242(b)(5)(A), 8 U.S.C. § 1252(b)(5)(A) (2006) (granting jurisdiction to federal courts over nationality claims raised as a defense in removal proceedings).

[8] *See* 7 Foreign Affairs Manual 1131.4-1(a) (1998) (hereinafter FAM).

[9] Scales v. INS., 232 F.3d 1159, 1165 (9th Cir. 2000).

proceedings.[10] The State Department is charged with deciding the nationality only of people outside the U.S.[11] Due to the statutory split of jurisdiction, ultimate reconciliation may require congressional action. This Note will explore this and other possible options.

Part I of this Note lays out the statutory provisions relevant to the problem of citizenship transmitted from married citizen parents to their non-biological children, including the requirements for citizenship and the provisions splitting jurisdiction over citizenship claims. Part I goes on to describe the different interpretations of the blood relationship requirement by the State Department and the Ninth Circuit and some of the consequences of having different interpretations. Part II discusses in some depth the consequences of citizenship on entry to the U.S. Part III examines the history and constitutionality of U.S. nationality law generally. Part IV explores the express and implicit intent of Congress in enacting the citizenship provisions of the INA. The Note concludes with a discussion of the possible remedies available to harmonize the two interpretations.

## I. DIFFERING REQUIREMENTS FOR CITIZENSHIP BASED PARTLY ON LOCATION

This Part identifies the problem of different interpretations of the requirements for citizenship through descent. Section A examines the INA's citizenship requirements. Section B describes the State Department's interpretation of the INA found in the Foreign Affairs Manual and the Ninth Circuit's interpretation expressed in *Scales v. INS*.[12] Section C discusses some of the practical consequences of the differing interpretations. Finally, Section D examines in greater depth the effect of the different standards on the immigration process.

### *A. Parentage Requirements for U.S. Citizenship*

Section 301 of the INA lays out the requirements for obtaining U.S. Citizenship at birth.[13] Among the provisions for passing citizenship from parent to child is that "a person [is a U.S. Citizen if he or she is] 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."[14] Most of the time, a child born of a citizen parent will have a blood relationship with that parent. The text of the INA is silent in instances where a child's parents are married but

---

[10] INA § 242(b)(5)(A), 8 U.S.C.S. § 1252(b)(5)(A) (2006).

[11] INA § 104(a)(3), 8 U.S.C.S. § 1104(a)(3) (2006).

[12] *Scales*, 232 F.3d 1159.

[13] INA § 301, 8 U.S.C.S. § 1401 (2006).

[14] INA § 301(g). This subsection also requires a period of U.S. residency of five years before the age of twenty-one. For simplicity's sake, I am confining the scope of this Note to the "born of parents" clause.

there is no blood relationship with the citizen parent. This has led to disagreement in the statute's interpretation.

Adding to the confusion in interpreting the requirements for citizenship is the split jurisdiction over citizenship determinations. The INA grants to the Secretary of State authority over "the determination of nationality of a person not in the United States."[15] If a person is in removal proceedings inside the U.S., however, and "the petitioner claims to be a national of the United States... the court shall decide the nationality claim."[16] The INA splits jurisdiction, in other words, based on where the person making the claim is located, not on where the claimant was born.

*B. Scales v. INS and Differing Interpretations of the INA Citizenship Requirements*

The State Department and the judicial system have come to different conclusions in interpreting the requirements for citizenship. The State Department observes that section 309(a)(1) of the INA, which applies to children born "out of wedlock," expressly requires a blood relationship in order to transmit citizenship.[17] The U.S. Department of State Foreign Affairs Manual—"FAM"—extends the requirement to apply to children in a position like Scales, where a child does not have a biological relationship to both parents:

> It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. *Absent a blood relationship* between the child and the parent on whose citizenship the child's own claim is based, *U.S. citizenship is not acquired.*[18]

By contrast, the Ninth Circuit, in its 2000 decision *Scales v. INS*, interprets the INA differently, highlighting the division between the State Department and the judiciary.[19] *Scales* involved the appeal of an order for the removal of Stanley Scales, Jr., on the grounds of committing an aggravated felony as a noncitizen.[20] Scales' mother was a Filipina who was probably pregnant when she met a U.S.

---

[15] INA § 104(a)(3), 8 U.S.C.S. § 1104(a)(3) (2006).

[16] INA § 242(b)(5)(A), 8 U.S.C.S. § 1252(b)(5)(A) (2006).

[17] 8 U.S.C.S. § 1409(a)(1) (2006).

[18] 7 FAM 1131.4-1(a) (1998) (emphasis added).

[19] *Scales*, 232 F.3d 1159.

[20] *Id.* at 1162. "Removal" was once called "deportation." The Illegal Immigration Reform and Immigrant Responsibility Act of 1996—IIRIRA—largely consolidated the processes of deportation and exclusion under the single concept of removal. *See* IIRIRA § 304(a)(3), 8 U.S.C.S. 1229-1229a (2006). A concise definition of "aggravated felony" in immigration law is difficult, but it is a ground for deportability based on the commission of felonies and certain felony-like crimes. INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2006). For more on aggravated felonies in immigration law, *see generally* Joseph Justin Rollin, *Humpty Dumpty Logic: Arguing Against the "Aggravated Misdemeanor" in Immigration Law*, 6 BENDER'S IMMIGR. BULL. 445 (2001) (overview and history of aggravated felony deportability ground); *see also* Nancy Morawetz, Symposium, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000) ("As the term is defined, a crime need not be either aggravated or a felony.").

citizen member of the armed services whom she married before Scales was born.[21] The family moved to Texas, and later to Washington State, where Scales was convicted of a violation of Washington's Uniform Controlled Substances Act and was subsequently placed in removal proceedings by the Immigration and Naturalization Service (INS) because of his conviction for an aggravated felony as grounds for deportation.[22] On appeal of his removal order to the Board of Immigration Appeals (BIA), Scales claimed as a defense U.S. citizenship at birth by virtue of his parents' being married at the time. The BIA rejected this argument, citing the FAM's blood relationship requirement in support.[23]

The Ninth Circuit reversed the BIA's decision and rejected the FAM interpretation of the requirements for citizenship. The issue, noted the Court, was whether a person in Scales' situation could be considered to have been born "in wedlock."[24] If not, section 309 of the INA would apply and he would not be a citizen because of the absence of a blood relationship with his citizen parent. If so, the requirement would not apply and Scales would be a citizen.[25] The INA expressly requires "a blood relationship between the person and the father" when the person claiming citizenship is born *out of wedlock*.[26] Citizenship provisions applicable to children born out of wedlock contemplate a specific family situation; the requirement that there be a blood relationship is not found among the other sections of the INA dealing with the passing of citizenship.[27] The Court held that the natural reading of the provision in section 301(g) of the INA, that a child be "born of parents one of whom is a... citizen of the United States," does not require a blood relationship between the child and the citizen parent.[28] Noting that the INA does not define the terms "wedlock" or "legitimate," the Court turned to the dictionary and determined that a "'legitimate' child is one 'born of legally married parents,' or 'born or begotten in lawful wedlock or legitimized by the parents' later marriage.'"[29] Therefore, as long as a child is born to parents who are legally married and meets the other requirements for citizenship, a blood relationship is not necessary for the child to acquire citizenship at birth. More precisely, a blood relationship to a citizen parent is not required for a legitimate child to raise citizenship as a defense in removal proceedings.[30]

---

[21] *Scales*, 232 F.3d at 1162-63.

[22] *Id.* at 1163. *See* INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2006).

[23] *Scales*, 232 F.3d at 1163. Scales also argued that it was possible he was the natural child of his father, but the FAM places the burden of proving a blood relationship on the person making the claim by a preponderance of the evidence standard, which is not met by raising a mere possibility. *See* 7 FAM 1131.4-1(b)(1) (1998).

[24] *Scales*, 232 F.3d at 1165.

[25] *Id.*

[26] INA § 309(a)(1), 8 U.S.C. § 1409(a)(1) (2006).

[27] *Scales*, 232 F.3d at 1165. *See generally*, INA §§ 301-09, 8 U.S.C. §§ 1401-1409 (2006).

[28] *Scales*, 232 F.3d at 1165.

[29] *Id.* at 1164 n8 (quoting BLACK'S LAW DICTIONARY, 912, 232 (7th ed. 1999)).

[30] The standard of review in *Scales* and the scope of jurisdiction granted by section 242(b)(5)(A) of the INA limit the holding to the question of law in removal proceedings where the petitioner claims to

A few years later the Ninth Circuit reaffirmed and broadened its interpretation in *Scales* of the statutory requirements for citizenship. In *Solis-Espinoza v. Gonzales*, a convicted aggravated felon raised citizenship as a defense to removal on grounds similar to those in *Scales*.[31] Solis-Espinoza's case was different, however, because it was his biological mother who had abandoned him at birth, and he claimed citizenship derived from the citizen wife of his biological father.[32] Looking to the California statute establishing legitimacy, the court held that Solis-Espinoza was legitimate because he "was acknowledged by [his non-citizen father] and was accepted into and raised as a member of the Solis family, with the consent of [his father's citizen wife]," and therefore had acquired citizenship at birth.[33]

*Solis-Espinoza* solidified the Ninth Circuit's position that what is important is the relationship of a child's parents to each other, not a blood relationship between child and citizen parent, in meeting the statutory "born of parents" requirement. The court also affirmed that a child may derive citizenship from a parent of either sex as long as the parents are legally married. In *Scales*, the child acquired citizenship from the citizen husband of his mother; in *Solis-Espinoza*, the child acquired citizenship through the citizen wife of his father. This is significant because not all derivative citizenship provisions allow children to derive citizenship from male and female parents equally.[34]

### *C. Significance and Consequences of Differing Interpretations*

The difference in standards creates an inconsistency in the law of citizenship. A child outside the U.S. seeking a declaration of citizenship could receive a different answer than a similarly situated child inside the U.S. in deportation proceedings. Had the family in *Scales*, for example, gone to the U.S. Consulate in the Philippines and applied for a declaration of citizenship, the consular official—following the instructions in the FAM—would have denied the application because of the weak evidence in favor of Scales being the natural child of his citizen father. In contrast, once in the United States, the court declared that basis for denial invalid and ruled in favor of citizenship. The *Scales* ruling did not, however, prohibit the State Department's continued use of the FAM's blood relationship requirement in deciding citizenship claims outside the U.S. As a federal agency with Congressional authority independent of the federal courts, the State Department is

be a U.S. citizen. *Scales*, 232 F.3d at 1162. As such, the court merely answered the narrow legal question of whether a blood relationship is required for citizenship, and then remanded the case for further proceedings. *Id.* at 1167.

[31] Solis-Espinoza v. Gonzales, 401 F.3d 1090 (9th Cir. 2005).

[32] *Id.* at 1091.

[33] *Id.* at 1094.

[34] The Supreme Court has twice upheld the differing requirements for illegitimate children to acquire citizenship from male and female parents. *See Miller*, 523 U.S. 420, and *Nguyen*, 533 U.S. 53. These cases will be discussed at greater length. *See infra* pp. 19-23.

free to continue using the standard. The law is still being applied unevenly and future cases, like *Scales* and *Solis-Espinoza,* are likely to have inconsistent outcomes. The agency/judiciary relationship will be discussed in greater depth below.

*Scales* was decided in 2000, and, as the court noted, "whether [section 301 of the INA] requires a blood relationship between a person born outside the United States and his U.S. citizen parent [was] a question of first impression."[35] The Supreme Court has yet to hear the issue. Because of the relatively small number of claims that will arise under this question due to the federal courts' limited jurisdiction,[36] the Ninth Circuit is so far the only federal circuit court to rule on the issue, but it has done so twice. The *Scales* interpretation of the definition of wedlock was raised and considered by the Fifth Circuit in *Marquez-Marquez v. Gonzales*, but that court ultimately declined to rule on the question and decided the case on other grounds.[37] Because this issue has not yet been raised in any other circuit, the *Scales* interpretation has the formal weight of law only in the Ninth Circuit.

The Ninth Circuit's refusal to defer to the State Department's view of the INA and subsequent contrary interpretation has important implications for a crucial determination: whether or not a person is a U.S. citizen. Citizenship offers many profound advantages over noncitizenship concerning immigration. Among them are: freedom from immigration laws; the right to pass citizenship to children born outside the United States;[38] the right to petition for the admission of family members as immigrants;[39] and freedom from certain discriminations.[40]

The divide between the Ninth Circuit and the State Department means that the important determination of a person's citizenship depends arbitrarily, in part, on *where* the determination is made. Two different standards exist—one for those who apply for a declaration of citizenship at a U.S. Consulate abroad, and one for those applying inside the U.S. This creates a problem for at least two reasons. First, it seems highly unlikely that Congress intended different standards based on where a person seeks declaration of citizenship; the interpretation of the INA by either the State Department or the Ninth Circuit must be incorrect. Second, the

---

[35] *Scales*, 232 F.3d at 1161.

[36] Section 242(b)(5)(A) of the INA only permits judicial review of citizenship claims that arise as a defense to removal. 8 U.S.C. § 1252(b)(5)(A) (2006).

[37] Marquez-Marquez v. Gonzales, 455 F.3d 548, 558-559 (5th Cir. 2006). Because petitioner's parents were not married at the time of his birth, the court found petitioner born "out of wedlock" and subject to section 309(a)(1) of the INA.

[38] *See* INA §§ 301-09, 8 U.S.C. §§ 1401-1409 (2006).

[39] INA § 203(a)(1), 8 U.S.C. § 1153(a)(1) (2006). *Cf.* INA § 203(a)(2) (permanent residents may petition for alien relatives, but the numerical restriction is greater than for citizens). Aliens who are not permanent residents may not petition for alien relatives. *See generally* INA §§ 201, 203.

[40] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 80 (1976) ("Congress regularly makes rules that would be unacceptable if applied to citizens.").

inconsistency provides an incentive for people to enter the United States without being admitted through the proper procedures.

## II. ENTRY INTO THE UNITED STATES

This Part discusses the consequences of noncitizenship in applying for admission into the U.S. Section A describes the admission process for a noncitizen child of a citizen parent. Section B observes a particularly undesirable feature of the existence of different standards for citizenship: encouraging unlawful border crossings.

### *A. Entry as a Noncitizen*

Beyond the advantages of citizenship over noncitizenship discussed in the previous Part, that status has profound effects on how easily a person can enter the country, even with a citizen parent as a sponsor. For a family in the same circumstances as the one in *Scales*, where the citizen parent wanted to come to the United States with his or her child, whether the child is a citizen would be of great significance.

The first step for such a family would be to seek documentation of U.S. citizenship for the child at a U.S. Consulate.[41] As noted previously, the INA gives authority to the State Department to determine the nationality of people outside the United States. A declaration of citizenship allows the child to apply for and obtain a U.S. passport and travel freely to the United States. The consular officer assigned the case, consulting the FAM, would find the instructions, "[i]f doubt arises that the citizen 'parent' is related by blood to the child, the consular officer is expected to investigate carefully," and, "because an actual blood relationship to a U.S. citizen parent is required," the officer would deny the child a declaration of citizenship.[42]

In order to enter the United States without the advantage of citizenship, the child's father would need to submit a Petition for Alien Relative to the United States Customs and Immigration Service—USCIS—.[43] Fortunately, as an immediate relative of a U.S. citizen,[44] the child would not be subject to numerical limitations and a visa would be available as soon as the petition was processed.[45] The child would then need to apply for a visa at the local U.S. Consulate.[46] The

---

[41] *See* 7 FAM 1440 (2007).

[42] 7 FAM 1131.4-1(c) (1998).

[43] In 2003, the duties of the INS were divided among two agencies in the Department of Homeland Security and one in the Department of Justice. The USCIS, part of DHS, is now responsible for immigrant processing functions.

[44] Although the State Department interprets the INA to require a blood relationship in order for a U.S. citizen parent to confer citizenship to a child, the INA is unambiguously much broader in allowing parents to petition for stepchildren, children born out of wedlock, and adopted children. *See* INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2006).

[45] INA § 201(b)(A)(2), 8 U.S.C. § 1151(b) (2006).

[46] INA § 211(a), 8 U.S.C. § 1181(a) (2006).

application would require photographs and records of a physical and mental examination.[47] Assuming the child and parent meet all the eligibility requirements, the child would then be issued an immigrant visa and the ensuing lawful permanent resident status—sometimes called a "green card." Upon entry into the U.S., the child would also need to present a passport from his or her country of nationality.[48] If all goes well and the parent and child meet all the eligibility requirements, the noncitizen child would be able to enter the United States with minimal effort and paperwork.

There are, however, considerable potential obstacles to a smooth path to entry for the noncitizen child of a U.S. citizen. One such obstacle is the list of grounds for exclusion in section 212 of the INA, to which a noncitizen is subject and a citizen is not.[49] Some of the exclusion grounds with a significant chance of presenting a problem for people in this situation are: health-related problems, including communicable diseases and certain mental or physical disorders considered dangerous in the INA;[50] certain criminal convictions within five years of application for entry;[51] and the requirement that the petitioner or other sponsor provide for the child so that he or she does not become a "public charge."[52] A child could easily be subject to exclusion on any of these grounds—none of which is applicable to citizens.

A particularly problematic ground for exclusion could arise under section 212(a)(6)(C)(ii) of the INA if the child applied for a U.S. passport, claiming to be a U.S. citizen, without having received documentation of citizenship from the consulate.[53] That section imposes a ban on "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this act."[54] Because visa applications are made at U.S. Consulates, the consular official would presumably rely on the standard of citizenship found in the FAM and deny the declaration, considering even a prior good faith representation false under the INA.[55] Such a denial would be permanent.[56]

---

[47] INA § 221(a), (b), (d), 8 U.S.C. § 1201(a), (b), (d) (2006).

[48] INA § 211(a).

[49] INA § 212, 8 U.S.C. 1182 (2006).

[50] INA § 212(a)(1).

[51] INA § 212(a)(2).

[52] INA § 212(a)(4).

[53] 8 U.S.C. § 1182(a)(6)(C)(ii) (2006).

[54] *Id.* The FAM specifies that the misrepresentation must be made to a State Department officer. 9 FAM 40.63 N13 (2003).

[55] Although section 212(a)(6)(C)(i) of the INA uses the terms "by fraud or willful misrepresentation" in describing statements that render applicants excludable, section 212(a)(6)(C)(ii), describing false claims of citizenship, does not. 8 U.S.C. § 1182(a)(6)(C)(i)-(ii) (2006). The FAM seems to make the same distinction, requiring fraudulent or willful intent for excludability under 212(a)(6)(C)(i), but not for false citizenship claims under 212(a)(6)(C)(ii). *See generally* 9 FAM 40.63.

[56] 9 FAM 40.63 N11 (2003). *See also* INA § 212(i) (allows the Attorney General to issue discretionary waivers of excludability based on fraudulent or willful misrepresentation under §

If the obstacles to obtaining entry as an immigrant prove too great, the child could apply for entry as a nonimmigrant.[57] If granted entry, even as a nonimmigrant, the child could then take advantage of provisions in the INA as amended by the Child Citizenship Act, whereby parents of children who did not qualify for citizenship at birth may petition on their behalf for naturalization if the child is either: (a) in the United States as an immigrant (that is, the child has a green card),[58] or (b) in the United States on a temporary basis while maintaining a permanent residence in the custody of a citizen parent abroad who meets certain conditions.[59]

In addition to the potential difficulties in obtaining an immigrant visa discussed above, even obtaining a nonimmigrant visa could present obstacles. To obtain a nonimmigrant visa, an applicant must show that he or she fits into one of the nonimmigrant categories.[60] Normally, the only nonimmigrant visa for which a child is eligible is the B2 Temporary Visitor visa, which requires the applicant to "hav[e] a residence in a foreign country which he has *no intention of abandoning* and [be] visiting the United States *temporarily*..."[61] Because of the child's situation—having a citizen parent and being eligible for statutes that make naturalization easy—the child would have a difficult time demonstrating a lack of immigrant intent, particularly since the child would probably *have* the intent to immigrate. This difficulty is compounded by the dual nature of the admission process. In addition to the visa application, pending which an applicant must convince the consular official of nonimmigrant intent, the Customs and Border Patrol immigration inspector may reexamine the entrant for any grounds of excludability, including nonimmigrant intent, and deny the applicant entry.

One more disadvantage to immigration as a noncitizen is the heavy dependence on having a citizen parent. Without someone to petition for the child as an immediate relative, immigration becomes immeasurably more difficult. Among the hurdles to entry in this case are the necessity of fitting into one of three immigrant categories—family-sponsored, employment-based, or diversity[62]—or

---

212(a)(6)(C)(i), but *not* of excludability based on § 212(a)(6)(C)(ii) misrepresentations of U.S. citizenship). 8 U.S.C. § 1182(i) (2006). *See also* 9 FAM 40.63 N12 (2003).

[57] *See* CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, 1 IMMIGRATION LAW & PROCEDURE § 8.04 (Matthew Bender & Co., Inc., 1997) (a discussion of the importance and difficulty of obtaining immigrant visas versus nonimmigrant visas).

[58] Section 320(a) of the INA allows the naturalization of children under 18 years old who have a citizen parent and who are "residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." 8 U.S.C. § 1431(a) (2006).

[59] INA § 322(a), 8 U.S.C. § 1433(a) (2006).

[60] INA § 214(b), 8 U.S.C. § 1184(b) (2006). Certain exceptions not relevant to the present discussion, such as those for employees of international organizations, are outlined. *Id.*

[61] INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (2006) (emphasis added).

[62] *See* INA § 201(a), 8 U.S.C. § 1151(a) (2006). There are various exceptions to the general requirement of fitting into one of the three categories—notably, one for immediate relatives—but none that would apply to the present scenario. INA § 201(b), 8 U.S.C. § 1151(b) (2006).

qualifying for asylum,[63] and being subject to numerical limitations.[64] According to the State Department Visa Bulletin for December 2006, waiting times for priority dates for family-based immigration subject to numerical limitations ranged from four and a half years for some second preference categories to more than ten years for all fourth preference applicants.[65] Incidentally, fourth preference applicants from the Philippines—the nation of a *Scales*-like family—currently face priority date wait times of over twenty-two years.[66] If, for some reason, the child's citizen parent became unable or unwilling to petition for the child, there may be no practical possibility for entry into the United States.

Clearly, receiving U.S. citizenship at birth offers a child numerous advantages over even a noncitizen child with a citizen parent. At a minimum, a noncitizen will be required to submit considerable extra paperwork; more severely, the consequences might easily lead to long delays or even complete inadmissibility.

### *B. Entry Without Admission Encouraged*

Because of differences in jurisdiction and the interpretation of the requirements for citizenship, however, a *Scales*-like child that has been denied admission into the United States would have another option: undocumented entry without inspection by a Customs and Border Patrol officer. Though counterintuitive, this immigration method could lead to citizenship for the child.

If apprehended after an undocumented entry, the child would be put into removal proceedings.[67] Unlike consular decisions, most removal orders are subject to judicial review.[68] In the Ninth Circuit, this judicial review includes being subject to the *Scales* interpretation of citizenship; meaning that the child would be found to have acquired citizenship at birth, which is, of course, a complete defense to removal.[69] Although there are penalties for citizens entering the United States without presenting themselves at a border crossing point, including fines and the possibility of imprisonment for up to one year, that may well be a price many noncitizens would be willing to pay for the prospect of U.S. citizenship.[70]

Less dramatically, simply presenting himself or herself at a border crossing point may invoke the jurisdiction of the judiciary. Removal proceedings are held in front of Immigration Judges, who are subject to the review of the BIA and local

---

[63] *See generally* INA § 208, 8 U.S.C. § 1158 (2006).

[64] INA § 201(c), 8 U.S.C. § 1151(c) (2006) (statutory numerical limitations system).

[65] Visa Bulletin for December 2006, http://travel.state.gov/visa/frvi/bulletin/bulletin_3086.html (last visited Sept. 26 2007). Fourth preference applicants are brothers and sisters of citizens. INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (2006).

[66] *Visa Bulletin, supra note 65.*

[67] *See* INA § 275, 8 U.S.C. § 1325 (2006).

[68] INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2006).

[69] Deportation grounds apply only to aliens. INA § 241, 8 U.S.C. § 1227 (2006).

[70] 19 U.S.C.S. § 1459(g) (2006).

federal circuit courts; therefore, in the Ninth Circuit at least, citizenship claims are bound by *Scales*.[71]

Attempting to invoke Ninth Circuit jurisdiction by appearing at a border crossing may be quite risky, however, because entrants without proper documentation are often subject to expedited removal and may find it extremely difficult to find legal representation, without which a person would have difficulty making the complex legal arguments a *Scales* claim would require.[72] Furthermore, the idea of trying to get caught by a border patrol officer in order to obtain citizenship is somewhat perverse, regardless of the likelihood of success.

## III. CITIZENSHIP AND THE CONSTITUTION

Having examined the importance of a determination of citizenship, a discussion of the proper interpretation of the INA follows. Does the Constitution require a particular interpretation on the question of the acquisition of citizenship by children born in wedlock? Section A analyzes recent Supreme Court decisions relating to both citizenship and the Constitution. Section B discusses the role of the Ninth Circuit in the development of immigration law.

### *A. The Constutionality of Gender-Based Distinctions*

The definition of "wedlock" and its consequences in the INA can be viewed as a question that implicates gender-based preferences. This issue will be discussed more fully in the next section. One area in which the definition may arouse constitutional concerns is in the INA's gender-based distinctions, a topic that has been controversial since at least the 1970s and remains so today.

In 1973, the Fifth Circuit ruled in *Villanueva-Jurado v. INS* that the gender distinction in the ability of parents of children born prior to 1934 to transmit citizenship to their children was constitutionally permissible. [73] The provision granted citizenship to children with only one citizen parent when the parent was the father, but not the mother.[74] The court upheld the provision because "[a]n alien has

---

[71] INA § 242(b)(5), 8 U.S.C. § 1252(b)(5) (2006).

[72] Unlike the constitutional right to counsel guaranteed to citizens by the Constitution, aliens in removal proceedings merely have "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006). Such counsel can be extremely difficult to obtain. *See, e.g.*, Harvard Law Review, Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2005-06 (1987).

[73] Villanueva-Jurado v. INS, 482 F.2d 886, 887 (5th Cir. 1973). Highlighting the unsettled nature of the issue, the court refused to apply the "unreasonable, arbitrary, or unlawful" standard laid down in Rogers v. Bellei, 401 U.S. 815 (1971),limiting that case to conditions subsequently applied to citizenship, whereas *Villanueva-Jurado* dealt with the Congress's power to set the requirements for the transmission of citizenship. The distinction is that aliens who have not been granted citizenship have no standing to assert a constitutional challenge. *Id.* at 887-88. *See also* Elias v. U.S. Dep't of State, 721 F. Supp. 243, 245 (N.D.Cal. 1989) (explanation of *Villanueva-Jurado*).

[74] *Villanueva-Jurado*, 482 F.2d at 887.

no constitutional right to citizenship which is a privilege conferred as a matter of grace by Congress."[75]

A circuit split began to develop when a California Federal District Court interpreted Congress's power to legislate immigration differently in *Elias v. Dept. of State*.[76] Elias, the daughter of a U.S. citizen mother born before 1934, had applied for and been denied a passport because she was not entitled to citizenship under the then-applicable law.[77] She was granted standing in place of her citizen mother to assert an Equal Protection violation in the statute allowing fathers but not mothers to transmit citizenship to their children.[78] The court held that although Congress is not constitutionally required to allow citizenship by descent, if it chooses to do so it must enact legislation that is constitutionally sound.[79] Allowing citizen fathers but not citizen mothers to pass citizenship to children was clearly discriminatory in violation of the equal protection clause, and the court ordered the State Department to issue Elias a U.S. passport.[80]

Displeased at the encroachment on what it considered a Department prerogative, the State Department announced its intention to relitigate the issue and not to issue passports in situations like *Elias* in the meantime.[81] A few years later, in *Wauchope v. U.S. Dept. of State*, the same district court used similar reasoning and again granted passports to two foreign-born children of citizen mothers born before 1934.[82] This time, the Ninth Circuit took up the case and affirmed the unconstitutionality of the pre-1934 gender-based distinction.[83] In 1994, one year after the Ninth Circuit decided *Wauchope*, Congress added a provision to the INA extending citizenship to the children born before 1934 to citizen mothers, before the Supreme Court had a chance to rule on this issue.[84] In the Ninth Circuit, at least, the granting of citizenship based solely and determinatively on gender is unconstitutional.

### *B. Recent Supreme Court Decisions: Miller and Nguyen*

In *Miller v. Albright* and *Nguyen v. INS*, the Court held that disparate requirements making it harder for fathers than mothers to pass citizenship to children were valid under the Equal Protection Clause because the distinction serves important governmental interests and the classification is substantially

---

[75] *Id.*

[76] *Elias*, 721 F. Supp. at 245.

[77] *Id.* at 243.

[78] *Id.* at 248.

[79] *Id.* at 250.

[80] *Id.*

[81] *See* Gary Endelman, *Mother Knows Best: A New Look at an Old Law*, 13 IMMIGR. J.. 29, 30.

[82] Wauchope v. U.S. Dep't of State, 756 F. Supp. 1277, 1287 (N.D.Cal. 1991) (the "differential treatment of male and female citizens [is] wholly without a rational basis and thus unconstitutional.").

[83] Wauchope v. U.S. Dep't of State, 985 F.2d 1407 (9th Cir. 1993).

[84] Pub. L. 103-416, 108 Stat. 4305 (1994). The provision was added as INA § 301(h), 8 U.S.C.S. § 1401(h) (2006).

related to those interests.[85] Both decisions have been sharply criticized in law review articles, largely on gender equality grounds.[86] For purposes of this Note, however, it is not the Court's rulings that apply specifically to this issue so much as its reasoning.

*Nguyen* specified two governmental objectives that justify the requirement of legitimization for fathers, but not mothers, to transmit citizenship. First, the Court held that establishing a blood relationship was a valid objective in *out-of-wedlock* births and that the goal was furthered by the required legitimization and necessary because of biological differences between fathers and mothers.[87] Second, and more relevant here, the government has an interest in encouraging a stable family for the children to whom it grants citizenship.[88] If a child is born to married parents, this opportunity is provided; the blood relationship between the child and his or her citizen parent is irrelevant to the family situation. This conclusion is further supported by the definition of "child" in the INA, which refers both to a child born in wedlock and to "a stepchild, whether or not born out of wedlock."[89] It appears that requiring a blood relationship for transmission of citizenship is not *per se* unconstitutional, but when a child is born in wedlock—and where there is no explicit statutory support for the blood-relationship requirement—neither of the *Nguyen* governmental interests seems to apply.

Returning to the question that opened this section, then, does the Constitution require one of our two competing interpretations of the extent of the blood relationship requirement? Unfortunately, the Supreme Court has not issued a definitive ruling on the issue. However, there are several clues from the preceding discussion. First, gender discrimination has been held unconstitutional by the Ninth Circuit when used as the sole determinative reason for different standards. Second, although the Supreme Court has upheld provisions that treat fathers and mothers differently when establishing parentage for the purposes of transmitting citizenship, an important factor in the justification—ensuring a family relationship between citizen parent and child—is much less relevant. The strong dissents in *Miller* and *Nguyen* suggest that a statute with even marginally weaker

---

[85] *Nguyen*, 533 U.S. at 60-61.

[86] *See, e.g.*, Manisha Lalwani, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock*, 47 VILL. L. REV. 707, 713 (2002) (challenging the distinction on gender discrimination grounds: "practically speaking, the Court formulated motherhood to be biological and fatherhood to be legal."). *See also* David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 329-331(2005). The Ninth Circuit decisions in *Scales* and *Solis-Espinoza*, especially when taken together, much better satisfy gender discrimination considerations. In *Scales*, the child claimed citizenship through the citizen non blood-related father. *Scales*, *supra* note 12, at 1163. In *Solis-Espinoza*, the claim was through the citizen non-biological mother. *Solis-Espinoza*, *supra* note 31 at 1091.

[87] *Nguyen*, 533 U.S. at 61-62. Note that the Court was examining section 309 of the INA, which deals with children born out of wedlock and expressly requires the establishment of a blood relationship. Nothing in the opinion indicates that such a requirement extends to children born in wedlock. *Id.*

[88] *Nguyen*, 533 U.S. at 64-65.

[89] INA § 301(b)(1)(A)-(B), 8 U.S.C. § 1101(b)(1)(A)-(B) (2006).

constitutional support is likely to be struck down. Therefore, in the absence of an explicit decision by the Supreme Court, there is considerable reason to doubt the constitutionality of a blood relationship requirement for children born in wedlock .

### *C. The Ninth Circuit and Immigration Law*

As previously mentioned, a possible weakness in the argument for the *Scales* interpretation of the INA is that, so far, only the Ninth Circuit has ruled on this issue. The Fifth Circuit has cited *Scales*, but declined to approve or disapprove the decision, making its decision on other grounds.[90] No other circuit has encountered the issue. The Supreme Court has not reviewed the issue yet either; for now *Scales* only carries the full force of law in the Ninth Circuit.

Two factors suggest the Ninth Circuit decision may carry substantial persuasive weight, however. First, the Ninth Circuit has substantial experience with immigration cases. Approximately fifty percent of all immigration cases are brought in the Ninth Circuit.[91] Second, Ninth Circuit decisions have proven influential in immigration lawmaking in the past. As discussed above, shortly after the Ninth Circuit held unconstitutional the pre-1934 difference in the rights of men and women to transmit citizenship Congress amended the INA to incorporate matching provisions.[92]

The Ninth Circuit is not the final word on immigration or any other issue. The Supreme Court and other circuit courts are, of course, free not to follow its decisions. But Ninth Circuit immigration decisions reflect the judgment and expertise of the federal circuit most familiar with immigration issues and have anticipated statutory changes. The court's *Scales* holding that a blood relationship is not required to transmit citizenship to a child born in wedlock therefore, while not universally binding, carries some persuasive weight.[93]

To summarize, the interpretation of the INA found in *Scales*, that no blood relationship is required to transmit citizenship from parents to children born in wedlock, is superior to the alternative for several reasons. It is a more natural reading of the statute, it is more in line with the goals of the INA, and the procedure by which the judicial interpretation is made protects the Due Process rights better than the State Department's view. The reasoning the Supreme Court used in upholding the proof of paternity requirement in *Miller* and *Nguyen* is neutral towards—or perhaps even supportive of—not extending the blood relationship requirement to the case of a child born in wedlock. The Ninth Circuit decision also

---

[90] *Marquez-Marquez*, 455 F.3d at 559.

[91] In fiscal year 2005, fifty-three percent of all appeals of BIA decisions were brought in the Ninth Circuit. The second leading circuit was the Second, with twenty-one percent. Press Release, Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005 , http://www.uscourts.gov/Press_Releases/judbus031406.html (last visited Sept 26, 2007).

[92] Pub. L. 103-416, 108 Stat. 4305 (1994). The provision was added as INA § 301(h), 8 U.S.C.S. § 1401(h) (2006).

[93] *Scales*, 232 F.3d at 1164.

deserves a measure of respect based on its history and position in interpreting immigration law. All these factors favor the *Scales* interpretation of the INA requiring no blood relationship for citizen parents to transmit citizenship to children born in wedlock.

## IV. CONGRESSIONAL INTENT

What did Congress intend in situations where a child is born to married parents but may not be the biological child of the citizen parent? This Part explores this question. Section A summarizes the analysis in *Scales*. Section B looks at judicial interpretations and administrative interpretations. Section C discusses agency interpretations and the deference owed them. Section D examines other articulated aims of the INA.

### *A. Scales' Analysis*

In *Scales*, the Ninth Circuit read the INA as clearly distinguishing between children born in wedlock and children born out of wedlock.[94] There are provisions that expressly contemplate children fathered by a U.S. Citizen born to single mothers and require a blood relationship between the father and child for citizenship to be acquired.[95] The court also noted that the INA contemplates the case of a child born to married parents one of whom is a citizen, and in that case requires no blood relationship.[96] Less clear is what Congress intended for a child born to married parents only one of whom is a citizen in the case where the *citizen parent is not related by blood to the child.*[97]

The question is, then, does the term "born in wedlock" suggest Congress's intention to require a blood relationship between the citizen parent and the child? *Scales* found that a straightforward reading of the INA indicates that the answer is no. In the general provisions of the INA, no definition is found for the term "wedlock."[98] In the definition of the word "child," however, the Act applies the term to

> (A) a child born in wedlock; [or]... (D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person.[99]

The inquiry into whether a parent is "natural" is only encountered where a child is born out of wedlock. To expand briefly on the *Scales* analysis, had

---

[94] *Id. See also* INA § 309, 8 U.S.C. § 1409 (2006).

[95] *See* INA § 309.

[96] *Scales*, 232 F.3d at 1164. *See* INA § 301(g), 8 U.S.C. § 1401(g) (2006).

[97] *Scales*, 232 F.3d at 1164. *See* INA § 301(g).

[98] *Scales*, 232 F.3d at 1164. *See* INA § 301(g);.*see also* INA § 101, 8 U.S.C. § 1101 (2006).

[99] INA § 101(b)(1),.

Congress intended to require this test for children born in wedlock, it would have been a simple matter to include it expressly. Furthermore, if the requirement of natural parentage is present in both cases, it would seem to rob the in-wedlock/out-of-wedlock distinction of any meaning at all. Though this is not conclusive, such a reading runs contrary to the canon that a statute should be interpreted so as not to render any part of it meaningless,[100] and further supports the *Scales* decision.

### *B. Judicial Rulings*

The *Scales* court ruled that a plain reading of the relevant INA sections leads to the conclusion that there is no blood relationship requirement in cases where the child is born in wedlock.[101] However, the FAM asserts, without citing support, the contrary, that "[t]he laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed."[102] A look at some important judicial rulings concerning citizenship and blood relationships will therefore be instructive.

In two landmark cases, the Supreme Court, while not ruling specifically on this question, has made some statements that seem to support the underlying logic of the Ninth Circuit decision in *Scales*. In *Miller v. Albright*, the Court held constitutional the declaration of paternity requirement, largely to mitigate the fact that an unwed father "need not be present at the birth[,] and... he need not provide any parental support, either moral or financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child"—something that is much less likely to be a concern in the case of married parents.[103]

The *Miller* Court did acknowledge governmental interests in establishing laws that would ensure the blood relationship between an unwed citizen father and his child: "the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States."[104] To meet these objectives, the Court approved the statutory requirement for unwed fathers to declare their paternity in order to confer citizenship on their children.[105] However, in acknowledging this interest, the Court cites these objectives as justification for the idea that the married familial relationship the child is born into is just as important as the child's conception—if not more so—in bestowing citizenship: "conception is not sufficient to produce an American citizen, regardless of whether the citizen parent is the male or the female partner. If the two parties

---

100 *See, e.g.*, United States v. Nordic Village, 503 U.S. 30, 36 (1992).

101 *Scales*, 232 F.3d at 1165.

102 7 FAM 1131.4-1(a) (1998)

103 *Miller*, 523 U.S. at 433.

104 *Id.* at 458.

105 *Id.* at 444-45.

engage in a second joint act—if they agree to marry one another—citizenship will follow."[106] That is, the interest in determining a blood relationship between child and citizen parent is a kind of proxy for a family relationship including married parents. The reasoning on which the Supreme Court held constitutional the paternity requirement is that the family relationship is a better measure of how well the legitimate government interests of ties to the parent and the country are satisfied than the biological relationship. If a child's parents are married, these concerns about bestowing citizenship are satisfied.[107]

In *Nguyen v. INS*, before ruling on the constitutionality of the different standards for mothers and fathers to pass citizenship to their children, the Court makes clear that the blood relationship requirement only applies to children born out of wedlock.[108] Both these cases support the general principle that a blood relationship is not required to transmit citizenship to children born in wedlock.

### *C. Administrative Decisions and Judicial Deference*

In *Scales*, the INS urged the court to defer to the State Department's interpretation of the INA requiring a blood relationship for a child to derive citizenship from a parent, but the court declined to do so.[109] When deciding what weight to place on agency interpretations of a statute, courts normally apply the analysis articulated in *Chevron v. NRDC*.[110] If an agency interpretation is not entitled to *Chevron* deference, courts may still decide to follow the interpretation using the analysis in *Skidmore v. Swift*.[111] The *Scales* court rejected the FAM interpretation under both approaches.

The first question in a *Chevron* analysis is whether Congress has specifically addressed the issue in the statute.[112] If so, Congress's intention must be followed and the analysis is over. The second step, in circumstances where a statute is imprecise, is whether the interpretation of the agency charged with administering the statute "is based on a permissible construction of the statute."[113] If so, the court must defer to the agency as having the authority delegated to it by Congress and follow the agency interpretation.[114] In *Scales* the INS argued that the statute was unclear and that the Department was the agency entrusted by Congress to interpret the citizenship provisions of the INA and that the court should give *Chevron* deference to its interpretation as found in the FAM.[115] The *Scales* court

---

106 *Id.* at 433.
107 *See Scales*, 232 F.3d at 1164.
108 *Nguyen*, 533 U.S. at 58.
109 *Scales*, 232 F.3d at 1165.
110 *See generally*, Chevron v. NRDC, 467 U.S. 837 (1984).
111 *See generally*, Skidmore v. Swift, 323 U.S. 134 (1944).
112 *Chevron*, 467 U.S. at 842.
113 *Id.* at 842-43.
114 *Id.*
115 *Scales*, 232 F.3d at 1165.

rejected the Department's claim to authorization by Congress to interpret the Statute, reasoning that the State Department's authority did not extend to *Scales* because section104 of the INA gives the Secretary of State authority to determine the nationality of people outside the United States only.[116] The Attorney General's interpretation—if there were one, which there is not—not that of the Secretary of State, might be entitled to *Chevron* deference in this situation.[117]

Furthermore, *Scales* found that, even if the Secretary of State had been authorized by Congress to interpret the INA in this case, the FAM itself was not the kind of material entitled to *Chevron* deference.[118] *Chevron* contemplates formal regulations promulgated by a federal agency under the explicit or implicit delegation of Congress.[119] Citing *Christensen v. Harris County*, the *Scales* court noted that agency manuals and other materials that do not undergo a formal adjudication and lack the force of law are not entitled to interpretive deference.[120]

In *Skidmore*, the Supreme Court faced similar informal administrative rulings that did not carry the force of law.[121] It held that such agency interpretations were entitled to deference to the extent that they came from agencies with expertise in the field and have the "power to persuade" the court.[122] In *Scales*, the INS argued that under this analysis the FAM should be followed as a persuasive interpretation made by an expert agency. *Scales* rejected this argument too, observing that the State Department's area of expertise is international affairs, not the determination of citizenship in cases like this.[123]

In addition to the finding in *Scales* that this was not the State Department's area of expertise, the court did not find the FAM reasoning persuasive. The FAM gives no reasoning to support its interpretation beyond a bare assertion. Looking at the statute itself, the *Scales* court comes to a conclusion different from the FAM's: that "[section 301 of the INA] requires only that Petitioner be 'born... of parents,' one of whom is a U.S. citizen, in order to acquire citizenship."[124] Therefore, the FAM is neither entitled to deference or persuasive under either *Chevron* or *Skidmore*.

---

116 *Scales*, 232 F.3d at 1165. INA § 104(a)(3), 8 U.S.C. § 1104(a)(3) (2006).

117 The Attorney General is charged with determining the nationality of people inside the U.S. *Scales*, 232 F.3d at 1165 ("Determination of Petitioner's citizenship is not a duty of the State Department . . . but of the Attorney General. *See* 8 U.S.C. § 1103.").

118 *Scales*, 232 F.3d at 1166.

119 *Chevron*, 467 U.S. at 844-45.

120 *Scales*, 232 F.3d at 1166 (quoting Christensen v. Harris, 529 U.S. 576, 587 (2000)). *See also* Int'l Union of Bricklayers v. Meese, 616 F. Supp. 1387 (N.D.Cal. 1985) (INS Operations Manual, the administrative equivalent of the FAM, was not given *Chevron* deference, but scrutinized for compatibility with the Congress's aims in enacting the INA).

121 *Skidmore*, 323 U.S. at 139.

122 *Id.* at 140.

123 *Scales*, 232 F.3d at 1165-66 (quoting Kaczmarczyk v. INS, 933 F.2d 588, 594 (7th Cir. 1991)).

124 *Scales*, 232 F.3d at 1166.

As a brief due process note, *Scales* also provided a forum for the FAM position to be raised and argued by an interested party. In that process the agency standard was not shown to be based on strong legal precedent or policy analysis.

Thus, as an indication of congressional intent, the FAM does not prove authoritative. It is an informal ruling lacking the force of law or express or implied authority from Congress to interpret this provision. Under judicial analysis, the FAM view has been found neither to be entitled to deference nor to be persuasive.

### *D. Aims of the INA*

The previous section analyzed the congressional intent behind the specific citizenship requirements in section 309 of the INA. This section will examine some of the INA's overall foundational goals in order to develop a contextual framework in which to address individual provisions.

One important underlying aim of Congress in enacting the INA was to promote family unity. Provisions in furtherance of this goal pervade the Act: section 201(b)(2) exempts immediate relatives of citizens and permanent residents from the numerical limits on immigration;[125] section 203(a) gives preference to other family members seeking immigrant visas;[126] section 203(d) entitles accompanying family members of immigrants to the same status as the primary immigrant;[127] as recently as 2000, the Child Citizenship Act, consistent with the aim of promoting family unity, made it much easier for children of U.S. Citizens to obtain citizenship.[128]. Courts have also recognized the aim of family unification found in the INA. In upholding the *Scales* decision, the Ninth Circuit said, in *Solis-Espinoza v. Gonzales*, "The Immigration and Nationality Act... was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."[129] In an earlier decision, the same court spoke of "the purpose of the Act which is to prevent continued separation of families" in allowing a citizen father to legitimate his son under California law when the son had had no contact with the state.[130]

Important to note, however, is that the goal of family unity is not supreme; the INA does sometimes break up families. *Miller* and *Nguyen* are two immediate examples of this.[131] Still, as a lens through which vague provisions of the INA

---

[125] 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

[126] 8 U.S.C. § 1153(a) (2006).

[127] 8 U.S.C. § 1153(d).

[128] *See* INA § 320. 8 U.S.C. § 1431 (2000).

[129] *Solis-Espinoza* , 401 F.3d at 1094.

[130] Kaliski v. Dist. Dir. of INS, 620 F.2d 214, 217 (9th Cir. 1980).

[131] *See also* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Versus Aliens' Rights*, 41 VILL. L. REV. 725, 727-29 (1996) (discussing proposed Congressional attempts to minimize the policy commitment to family unity).

should be interpreted, the preceding analysis supports using the promotion of family unity to shed light on the proper interpretation of the INA.

The *Scales* interpretation of a vague provision in the INA in light of an overarching aim of the statute is consistent with decisions in other areas of immigration law. In *International Union of Bricklayers v. Meese*, a federal court facing the similar choice whether to defer to the internal agency materials in the interpretation of the INA said its "task is to interpret the Act in light of the purposes Congress sought to achieve in enacting it."[132] In that case one basis for refusing to follow the INS Operations Instruction was that it "contravene[d] the [Immigration and Nationality] Act."[133] German workers had been granted B-1 Temporary Worker visas under an INS Operating Instruction that allowed foreign workers to receive visas without obtaining labor certifications if their duties were to install industrial machinery purchased abroad.[134] The court held that because "one of Congress' central purposes in the Act was the protection of American labor," and the Operating Instruction was inconsistent with that purpose and allowed aliens to circumvent the laws enacting in furtherance of that goal, the Instruction was not to be given deference.[135]

The holding in *Scales* requiring no blood relationship to confer citizenship from married parent to child is more consistent with both the fundamental goal in the INA of preserving family unity than the FAM. Just as *Meese* refused to follow the agency guidelines, *Scales* refusal to follow the FAM pursues the same principle by not following an agency interpretation that contravenes the INA.

In support of its interpretation of the INA, the FAM does assert as an aim of the INA a long history of requiring a blood relationship in the descent of citizenship. However, this claim is problematic for two reasons. First, the claim is made without citing any statutory or judicial support. Second, as discussed above, a substantial line of cases—from *Nguyen* and *Miller* through *Scales* and *Solis-Espinoza*—has clearly distinguished the tradition requiring a blood relationship for children born out of wedlock from the case of a child born in wedlock. The government interest in allowing citizenship to be conferred to children with strong ties to their parents and to the United States is furthered in cases where children are born into families with married parents.

An interpretation of section 301 of the INA that does not require a blood relationship for citizenship to descend to children of a married U.S. Citizen parent appears more consistent with the intent of Congress. This view, represented by the

---

[132] *Int'l Union of Bricklayers*, 616 F. Supp. at 1397. Though *Meese* is a federal district court decision, Supreme Court authority for the standard is expressed in Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1978) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."),.

[133] *Meese*, 616 F. Supp. at 1403.

[134] *Id.* at 1392. Instruction was INS Operations Instruction (OI) § 214.2(b)(5) (Mathew Bender & Co., Inc., 2007).

[135] *Meese*, 616 F. Supp. at 1401.

judicial interpretation, is the product of analysis that includes policy goals, the scope of administrative authority, and is subject to appeal. By contrast, the internal State Department interpretation found in the FAM has not been formalized through an adjudicative process—i.e., no formal regulations have been issued—nor does it cite policy support or other persuasive reasoning.

## CONCLUSION

### *A. Possible Remedies*

If the argument in favor of the *Scales* view is ultimately persuasive, what can be done to bring the State Department's interpretation in line with the judicial one? At first glance, the problem seems difficult, if not insoluble. Even the Supreme Court may not be able to directly resolve the split adequately, having been stripped of jurisdiction over the determination of citizenship of people outside the U.S.[136] The Supreme Court could, of course, bring the interpretations into harmony with one another by adopting the State Department view. This would at least have the virtue of causing uniformity in the interpretation of the INA. If, however, an interpretation founded on superior substantive reasoning and procedural processes is preferable, endorsing the FAM requirement of a blood relationship for all transmissions of citizenship is unacceptable. Alternately, of course, the State Department on its own initiative could be persuaded by the Ninth Circuit's decisions and change its own policy. Though possible, the latter option does not seem likely.

Looking more deeply at the problem, however, two other possible solutions present themselves. First, the Supreme Court could strike down the constitutionality of inquiries into blood relationships entirely in citizenship cases. Such a ruling would be extremely broad if used to decide a case like *Scales*. Holding unconstitutional the requirement of a blood relationship to transmit citizenship could occur in another context. As discussed above, the different requirements for fathers and mothers to confer citizenship on children born out of wedlock, though upheld in *Miller* and *Nguyen*, may be held unconstitutional in the future. The narrow majorities, vigorous dissents, and suspect class involved suggest that under different circumstances a similar case could be decided differently. If *Miller* and *Nguyen* are overturned, it could be through several holdings, including a rejection of the blood relationship requirements in general or of the disparate treatment of children based on whether or not they are born in wedlock.[137]

---

[136] 8 U.S.C.S. § 1104(a)(3)(2007).

[137] Some legal scholars have questioned genetic parentage requirements in general. *See, e.g.*, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006) (examining traditional parentage laws and arguing for a functional approach to parentage, especially for same-sex male parents). *See also, e.g.*, Elizabeth

The other possibility is that Congress could amend the INA to be more specific in its requirements and intentions. This method would have the advantages of providing a definitive statement of Congress's intention without resorting to judicial or administrative interpretation and of being authoritative in all jurisdictions. As discussed above, at least one time Congress has amended the INA following a Ninth Circuit decision.

The eagerness of the Supreme Court or Congress to resolve the disparity in citizenship requirements based on where a claim is brought is uncertain, however, due to the highly political nature of immigration policy and legislation.

### *B. Summary*

The INA sets forth the requirements for citizenship acquired by children born outside the U.S. As demonstrated by the agency/judiciary split, the requirements are vague. The State Department Foreign Affairs Manual interprets the INA to require a blood relationship for any parent to transmit citizenship to a child. The Ninth Circuit interprets the blood relationship requirement to extend only to children born out of wedlock.

Enabling the division is the split of jurisdiction and the limitation on judicial review in the enforcement and interpretation of the Act. A difference in the application of the law is antithetical to the principal of the rule of law, and in this case the divide provides an incentive for those seeking citizenship to enter the country without presenting themselves for inspection. In addition, differing interpretations means that one view is incorrect. The interests of uniformity and accuracy require one interpretation to be chosen over the other and implemented universally.

The Ninth Circuit interpretation is superior to that of the State Department for several reasons. The State Department's process is a mere agency interpretation based on a bald assertion that has not been promulgated as a regulation carrying the force of law. The process by which the Ninth Circuit decision was made allows for the parties to advance their claims and for judicial review on the important issue of the acquisition of citizenship. The State Department claims its expertise in foreign affairs entitles its interpretation to deference. The acquisition of citizenship is not, however, foreign affairs; if anything, between the two, the Ninth Circuit is the institution with greater experience and expertise in the area of immigration. Furthermore, the Ninth Circuit interpretation reflects a more natural reading of the INA. It is more in line with the its underlying aims of promoting family unity and extending citizenship to children in stable families.

---

Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 324 (2004) ("Once a child-parent relationship has been created, we should not let it be destroyed simply because there is no DNA match.").

Implementing the interpretation advanced by the Ninth Circuit presents some hurdles, however, because of the limited jurisdiction afforded the federal courts over the INA. A Supreme Court decision upholding *Scales* would, therefore, not be legally binding on the State Department. The uncertain prospect of the Supreme Court reversing its decisions in *Miller* and *Nguyen* upholding the constitutionality of gender-based citizenship provisions might extend far enough to bring the State Department in line or declare invalid the provisions of the INA treating children differently on the basis of the status of their parents. Much more effective and practical would be Congress amending the INA on its own, perhaps having been alerted to the discrepancy by *Scales*, *Solis-Espinoza*, and any future cases.