ENGENDERING EQUALITY: DERIVATIVE CITIZENSHIP AND THE MORAL READING

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I. INTRODUCTION

Consider the following scenario: two unmarried immigrants, after going through the arduous immigration processes in the United States, are able to become lawful permanent residents and subsequently naturalize. They are similarly situated in almost all relevant aspects—same country of origin, same age, and same paths to citizenship. Both have sole physical and legal custody of their children, who are under sixteen and were living in the United States with the status of lawful permanent residents when their respective parent naturalized. The only meaningful difference between the two immigrants is that one is an unmarried mother, while the other is an unmarried father. Federal laws governing derivative citizenship automatically grant citizenship to the child of the mother; the father, in contrast, must jump through additional bureaucratic hoops in order for his child to become a U.S. citizen. If he does not do so before his child turns eighteen, that child misses this opportunity at U.S. citizenship and must pursue naturalization through other methods—a path that can take upwards of a decade.

The child of the mother is instantly granted the privileges and protections of U.S. citizenship. The other child hopes that their father will meet the additional requirements. The difference? Whether their mother or father was the one who naturalized. While this clearly results in disparate outcomes based on gender,[1] it is also allowed under 8 U.S.C. § 1432(a).

The traditional argument for the continued existence of facially discriminatory laws in immigration law typically cites Congress's expansive power over immigration under the plenary power doctrine. In the case of § 1432(a), the government typically advances its interest in ensuring that an actual relationship—both a biological and meaningful one—exists between a naturalized citizen parent and their noncitizen child.[2] However, despite the important government interests at stake, gender equality should not be forced to yield its important place in the American democracy in service of archaic generalizations about the gendered roles of parents, established in outdated laws governing the transmission of citizenship.

The consequences of this discrimination are severe; because § 1432 confers automatic citizenship when its requirements are met, the privileges

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[1] There are other layers of complexity surrounding the issue—such as treatment of unmarried individuals and illegitimate children—but this paper will focus on disparate treatment based on gender.

[2] *See infra* Section III.B.

and protections of U.S. citizenship are at stake for an entire class of minors, who may be unfairly burdened by current practices.[3] With the predominance of Congress's plenary power in discourse about § 1432 in mind, this Note argues that the nation's interest in furthering gender equality trumps its justifications for retaining § 1432's legitimation requirement based on a moral reading of the Fifth Amendment.

Part II of this Note discusses the historical context behind the Equal Protection Clause as applied to issues of gender equality, including a primer on the standard of review for laws that include gender-based classifications, as well as a survey of how equal protection jurisprudence has evolved in regard to gender discrimination in different bodies of law. Part III provides a brief overview of immigration law and 8 U.S.C. § 1432(a)—the statute governing derivation of citizenship—as well as how gender discrimination issues have been treated in the naturalization context. Part IV introduces the "moral reading" interpretation of the Constitution and argues that the legitimation requirement of § 1432 disrupts the integrity of the traditions established in gender equality jurisprudence, an impermissible affront to the promises of equality inherent in the moral principles of the Constitution.

II. OVERVIEW OF EQUAL PROTECTION PRINCIPLES IN GENDER DISCRIMINATION LAW

Although equal protection is only explicitly guaranteed through the Fourteenth Amendment's Equal Protection Clause, the Supreme Court has found the Fifth Amendment to implicitly provide a similar guarantee for federal laws.[4] Fifth Amendment equal protection claims are adjudicated on the same bases as claims brought under the Fourteenth Amendment's Equal Protection Clause.[5]

The Fourteenth Amendment provides that

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State** deprive any person of life, liberty or property, without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws**.[6] (emphasis added)

The Equal Protection Clause originated in the postbellum era, during the enactment of the Reconstruction Amendments.[7] With the ratification of the Fourteenth Amendment in 1868, the people of the United States gained a

[3] Commentators have noted that mistakes in derivative citizenship claims result in more severe harm than the usual mistake in adjudication. Eamonn Hart, *Citizens All Along: Derivative Citizenship, Unlawful Entry, and the Former Immigration and Nationality Act*, 82 U. CHI. L. REV. 2119, 2155 ("If the individual claimant is correct, he is a US citizen *by operation of law*. Removing this person effectively entails banishing a US citizen from his country. If one conceives of a state's role as protecting its citizens, this is one of the most egregious ways in which a state could fail.") (emphasis in original).

[4] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"); Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

[5] Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

[6] U.S. CONST. amend. XIV, § 1.

[7] *Id.*

new constitutional guarantee: *all* people—not just citizens—in similar circumstances would enjoy equal protection under state law.[8]

Despite its long history, implementation of the clause as known in its modern incarnation began in 1938 with a footnote in *United States v. Carolene Products* acknowledging that legislation with adverse effects for "discrete and insular minorities . . . may call for a correspondingly more searching judicial scrutiny."[9] The Supreme Court's modern equal protection jurisprudence, reflecting this sentiment, examines legislative classifications using three tiers of review (in order of decreasing strictness): strict scrutiny, intermediate scrutiny, and a rational basis test. Gender-based classifications are reviewed under intermediate scrutiny.

Unlike the strict scrutiny and rational basis standards, which have been clearly defined and consistently used, the parameters of the intermediate tier are more nebulous. Of the three, it was the latest standard to be adopted and implemented.[10] While the Court has adopted different names for the standard over the years[11]—with "intermediate scrutiny" being the most common—application of the standard remains consistent.

The Court first acknowledged that gender discrimination violates of the Equal Protection Clause in the 1971 case *Reed v. Reed* on the issue of whether an Idaho law was allowed to prefer males to females in designating administrators of estates.[12] After examining the law under rational basis review, it found the disparate treatment of similarly situated males and females to be unconstitutional.[13]

The application of intermediate scrutiny to gender-based classifications began five years after *Reed* with *Craig v. Boren*, in which the Court considered the issue of whether it was constitutional for a statute to deny the sale of alcohol to individuals of the same age based on their gender.[14] Although the Court declined to hold gender as a suspect class that required the application of strict scrutiny, they saw the need for a more rigorous test than the alternative—rational basis review—and created the standard of intermediate scrutiny.

Under intermediate scrutiny, challenged laws must further an important governmental interest through means that are substantially related to that interest to pass constitutional muster; the standard is invoked when an

[8] *Equal Protection*, in 4 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 188 (Shirelle Phelps & Jeffrey Lehman eds., 2d ed. 2005).

[9] United States v. Carolene Products, 305 U.S. 144, 152 n.4 (1938).

[10] Whereas the strict scrutiny and rational basis tests were acknowledged and used by the courts as early as 1944 in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), intermediate scrutiny was not adopted for gender-based classifications until *Craig v. Boren* in 1976. *See* Craig v. Boren, 429 U.S. 190, 218 (1976).

[11] "Heightened scrutiny" has also been used to describe the standard. Witt v. Dep't of the Air Force, 527 F.3d 806, 818–19 (9th Cir. 2008). Commentators on the subject have also described the standard as "rational basis with bite." *See, e.g.*, Gerald Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model of New Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972) ("[T]hese cases found bite in the equal protection clause after explicitly voicing the traditionally toothless minimum scrutiny standard."); *see generally* Gayle L. Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

[12] Reed v. Reed, 404 U.S. 71, 76–77 (1971).

[13] *Id.* at 77.

[14] *Craig*, 429 U.S. at 193.

enacted statute negatively affects certain protected classes,[15] as well as in certain First Amendment cases.[16] The standard was later described as requiring an "exceedingly persuasive justification" for gender-based classifications;[17] however, commentators are divided on whether the wording represents substantively the same test or a higher standard for the government to meet.[18]

In order to situate the discussion of gender equality in equal protection jurisprudence within immigration law, it is helpful to examine how the Supreme Court has addressed the issue of gender equality in other contexts such as property, family, and employment law. As discussed later in Part III, immigration law exists in a qualitatively different space due to Congress's plenary powers involving national security and the Court's special deference to Congress in that realm; however, the evolution of equal gender protections in other fields of law hints at a moral reshuffling that 8 U.S.C. 1432(a)(3) defies.

A. PROPERTY LAW

American property law is an offshoot of the Anglo-American property tradition, having adopted much of its substance from traditional English laws and procedures during the colonial era. Among these was the principle of coverture—the idea that, upon marriage, women become *feme-covert* such that "the very being or legal existence of the woman is suspended during the marriage."[19] While *femes sole* (single women) were able to possess property in their own name, the distinct legal presences of *femes-covert* were subsumed into those of their husbands; thus, "though the husband and wife are one, the one is the husband."[20] This persisted until the late nineteenth century; coverture as a legal doctrine was greatly weakened when states began enacting legislation that would enable married women to own property. By the turn of the twentieth century, almost every state had enacted some version of these "married women's property acts."[21]

Although the ability to own property separately (a separate legal existence, even) was a significant leap toward combating the antiquated practices of the English legal tradition, the influence of coverture encumbered the status of women as late as the 1960s. In *United States v. Yazell*, the Supreme Court prevented the government from seeking

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[15] *See generally* Mathews v. Lucas, 427 U.S. 495 (1976) (holding that statutes that discriminate based on illegitimacy are subject to intermediate scrutiny); Trimble v. Gordon, 430 U.S. 762 (1976).

[16] *See* US West, Inc. v. United States, 48 F.3d 1092, 1100 (9th Cir. 1994) (regulating mass media); Am. Libr. Ass'n v. Reno, 33 F.3d 78, 84 (D.C. Cir. 1994) (regulating adult entertainment); Rappa v. New Caste Cnty., 18 F.3d 1043, 1066 (3d Cir. 1994) (regulating highway signs).

[17] United States v. Virginia, 518 U.S. 515, 531 (1996).

[18] *Compare* Barry Sullivan, *Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens: Searching for the Golden Mean in US Constitutional Law*, 20 EUR. J. L. REFORM 181, 203 (2018), *with* LENORA M. LAPIDUS, NAMITA LUTHRA & EMILY J. MARTIN, THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN'S RIGHTS 7 (Eve Carey ed., 4th ed. 2009).

[19] WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 430 (Oxford Clarendon Press 1765).

[20] United States v. Yazell, 382 U.S. 341, 361 (1966).

[21] Forty-four out of forty-eight states had adopted such acts by 1920. Virginia Postrel, *Economic Scene; It Was Not So Long Ago That Married Women Had No Property Rights*, N.Y TIMES (Aug. 9, 2001), https://www.nytimes.com/2001/08/09/business/economic-scene-it-was-not-so-long-ago-that-married-women-had-no-property-rights.html.

deficiency for the balance due on a disaster loan because it had contracted with a married woman, who was still subject to the Texas law of coverture and did not have recognizable legal status to enter into a valid contract.[22]

The post-*Reed* era saw a series of Fourteenth Amendment cases that resulted in equal protection claims, and the sphere of property law was no exception. In 1981, an equal protection argument convinced the Supreme Court to invalidate a Louisiana statute that allowed husbands to unilaterally dispose of community property as the "head and master" of the property in *Kirchberg v. Feenstra*.[23] The Court noted that the state "had an interest in defining the manner in which community property was to be managed, but found that the State had failed to show why the mandatory designation of the husband as manager of the property was necessary to further that interest."[24] The weakening of coverture laws and the extension of property ownership and control to more classes of women is considered "one of the greatest extensions of property rights in human history," allowing capitalism to more efficiently allocate resources in the United States.[25]

B. EDUCATION LAW

Prior to the Revolutionary era, there were only a smattering of public schools that accepted female students.[26] Compared to men, women were only half as likely to be literate in the late eighteenth century.[27] Nevertheless, the introduction of girls into public education occurred in the first half of the nineteenth century without much pomp or circumstance, in a move described by prominent education reformer Horace Mann as the "smuggling in" of girls.[28] For such a radical move, the lack of controversy that accompanied the calm and quiet transition is considered by some to be "one of the mysteries of educational history."[29]

The newfound access to education led to spectacular outcomes. By the middle of the nineteenth century, there were almost as many girls as boys in elementary schools, and by the century's end, some girls began to surpass boys in rates of literacy and academic achievement.[30] However, the success of women drew vocal detractors who argued that the presence of girls and women in education (as peers and educators) produced a "boy problem" that encouraged the "feminization" of males.[31]

The issue of a woman's place in higher education was particularly contentious. Some believed that while women held the mental capacity to

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[22] *Yazell*, 382 U.S. 341 (1966).
[23] Kirchberg v. Feenstra, 450 U.S. 455, 459–61 (1981).
[24] *Id.* at 459.
[25] Moshe Hazan, David Weiss & Hosny Zoabi, *Women's Liberation as a Financial Innovation*, 74 J. FIN. 2915, 2915 (2019).
[26] David Tyack & Elisabeth Hansot, *Silence and Policy Talk: Historical Puzzles about Gender and Education*, 17 EDUC. RESEARCHER 33, 34 (1988).
[27] *Id.*
[28] HORACE MANN, A FEW THOUGHTS ON THE POWERS AND DUTIES OF WOMEN: TWO LECTURES 57 (Syracuse, Hall, Mills & Co. 1853).
[29] Tyack & Hansot, *supra* note 26.
[30] Tyack and Hansot note that by 1870, girls in the 10–14 year age group were surpassing their male counterparts in rates of literacy and academic achievement. *Id.*
[31] *See generally* EARL BARNES, WOMAN IN MODERN SOCIETY 85–106 (Project Gutenberg 2005) (ebook).

handle the material taught to their male counterparts, the process would impede their "complete development as women" and mothers, therefore causing a "neglect of the peculiarities of a woman's organization" and, by extension, "'the thousand ills' that beset American women."[32] Others perceived the practice of coeducation (i.e., education for men and women on equal terms) as a step toward social justice and regarded opponents of the move as "counterrevolutionary and bent on restoring a traditional gender order."[33]

The debate over the role of this traditional gender order in higher education persisted well past the ratification of the Fourteenth Amendment, as is evident from the discussion in cases after the Court declared that gender discrimination violates the Equal Protection Clause.[34] Six years after *Reed*, the Court affirmed without opinion a Third Circuit judgment that allowed a public high school to operate on a sex-segregated basis so long as all students had equal access to the same caliber of educational opportunities.[35]

Instead, the Court viewed policies that seemed to perpetuate entrenched gender stereotypes as more convincing violations of the Fourteenth Amendment's Equal Protection Clause to the Court. In a 1982 case, *Mississippi University for Women v. Hogan*, a male registered nurse applied for a baccalaureate nursing program and was rejected, even though he was otherwise qualified.[36] The Court noted that "[r]ather than compensate for discriminatory barriers faced by women, [the university's] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[37] While the State justified the practice with the rationale that the exclusion would compensate for discrimination against women nurses in the past, it did not provide evidence to show this; thus, the policy was struck down for failing to serve a governmental interest.[38]

Similarly, in *United States v. Virginia*, Virginia Military Institute's all-male admissions policy was found to violate the Equal Protection Clause; even though there were alternative institutions to which women could apply, the educational opportunities offered at these alternatives could not match the caliber of the all-male public school.[39] While Virginia argued that methodological differences between the institutions were "justified pedagogically" based on "real," not "stereotypical," differences in the

[32] Edward H. Clarke, a Harvard physiologist, believed that higher education would harm the female reproductive system, harming the "delicate bloom" of American girls. EDWARD H. CLARKE, SEX IN EDUCATION; OR, A FAIR CHANCE FOR THE GIRLS 20–24 (Project Gutenberg 2006) (ebook). Clarke's contemporaries agreed, noting instead that women should be on a distinct curriculum that would teach them the traits of wives and mothers. G. STANLEY HALL, 2 ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION, AND EDUCATION 609 (D. Appleton & Co. 1904) ("Excessive intellectualism insidiously instils the same aversion to 'brute maternity' as does luxury, overindulgence, or excessive devotion to society.").

[33] Tyack & Hansot, *supra* note 26, at 37.

[34] A significant portion of the discourse surrounding gender discrimination in education revolves around the protections of Title IX of the Education Amendments of 1972; however, as this falls outside the scope of this paper, it will not be addressed here.

[35] Vorchheimer v. Sch. Dist. of Philadelphia, 430 U.S. 703, 703 (1977).

[36] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720–21 (1982).

[37] *Id.* at 729–30.

[38] *Id.* at 728.

[39] United States v. Virginia, 518 U.S. 515, 534 (1996).

learning needs of men and women,[40] the Court disagreed. Justice Ruth Bader Ginsburg, writing for the majority, noted that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[41] Virginia Military Institute was the nation's last single-sex state-supported school, and it opened its doors to women in 1997.[42] Since then, the number of women pursuing postsecondary education has steadily increased; today, women in the United States are more likely to enroll in and complete college than their male counterparts.[43]

C. EMPLOYMENT LAW

Although the enactment of married women's property acts in the late nineteenth century expanded women's ability to own property, coverture laws continued to limit the ability of married women to contract. Because they were included in the unitary legal existence of their husbands, they suffered a common law disability and could not enter into valid contracts alone.[44] Therefore, although the Fourteenth Amendment offers equal protection for all persons, women lacked the ability to take full advantage of this protection; without their own separate legal existence, they could not enjoy privileges dependent on the ability to contract (e.g., owning and transferring property, employment, etc.). For this reason, in the late nineteenth century, the Court upheld decisions that denied women the right to practice law despite their qualifications.[45] It reasoned that "a married woman would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client."[46]

Legal status aside, the Court also turned to evaluating the physical traits of women's bodies when upholding statutes perpetuating the unequal treatment of women and men. This was particularly true in employment cases discussing physical labor, such as *Muller v. Oregon*, in which the Court addressed whether limitations on work hours for women violated the Equal Protection Clause when no such limitations were imposed on men.[47] Although the Court in *Muller* still perceived women as inferior to men from a biological standpoint, opining that a woman's "physical structure and performance of maternal functions place her at a disadvantage in the struggle

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[40] *Id.* at 549.

[41] *Id.* at 550.

[42] Mike Allen, *Defiant V.M.I. Refuses to Admit Women, but Will Not Ease Rules for Them*, N.Y. TIMES, (Sept. 22, 1996), https://www.nytimes.com/1996/09/22/us/defiant-vmi-to-admit-women-but-will-not-ease-rules-for-them.html.

[43] Seventy-two and one half percent of female high school graduates enrolled in college in 2015, compared to 65.8 percent of male graduates. In 2017, 56 percent of the students on college campuses were women. Suzanne Kahn, *Women With Access to Higher Education Changed America—But Now They're Bearing the Brunt of the Student Debt Crisis*, TIME (Mar. 6, 2020), https://ti.me/2TxJxX3.

[44] *See* BLACKSTONE, *supra* note 19, at 430–31.

[45] Both Myra Bradwell and Belva Lockwood passed their bar exams and met the character requirements for the state bar, only to be denied admission by their respective state courts. Although the gender equality argument for equal protection was first successful in *Reed*, it was present earlier in *Bradwell*. *See* Bradwell v. State, 83 U.S. 130 (1873); *Ex parte* Lockwood, 154 U.S. 116 (1894).

[46] *Bradwell*, 83. U.S. at 131.

[47] Muller v. Oregon, 208 U.S. 412 (1908).

for subsistence,"[48] it also represented a departure from antiquated coverture laws by recognizing the personal and contractual rights of women.[49]

After the decision in *Reed*, employment law similarly saw a marked increase in equal protection cases on the issue of gender discrimination. Notably, the focus of the Court's inquiry was not whether challenged laws benefited women; the Court was more concerned with whether laws were created with "archaic and overbroad generalizations" based on gender roles.[50] In a 1977 case regarding benefits for bereaved spouses, the Court held that requirements for widowers to show proof of dependency violated the equal protection guarantee of the Fifth Amendment when they were not similarly imposed on widows, as the lesser requirement was based on the assumption that wives were naturally dependent on their husbands.[51] The Court drew similar conclusions regarding the unequal benefits provided to unemployed parents based on sex,[52] as well as spouses who were bereaved as a result of workplace accidents.[53]

While the post-*Reed* era brought in a new influx of equal protection workplace claims under the Fourteenth and Fifth Amendment, the focus of litigation for these issues has since shifted to reflect new legislative action for gender equality. Plaintiffs began bringing suits under the Equal Pay Act (passed in 1963), Title VII of the Civil Rights Act (passed in 1964), and the Lilly Ledbetter Fair Pay Act (passed in 2009).[54]

III. GENDER DISCRIMINATION AND NATURALIZATION LAW

To fully appreciate the overlapping interests at play and the preeminence of combating gender discrimination, it is important to understand the context behind the derivation of citizenship in naturalization law and how equal protection principles have been applied in conjunction with deference to Congress's exclusive control over immigration issues.

The Constitution grants Congress the exclusive right to regulate immigration.[55] While the judiciary often defers to Congress's plenary power

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[48] *Muller*, 208 U.S. at 421.

[49] *Id.* at 418 ("It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men . . . . There is now no residuum of civil disability resting upon here which is not recognized as existing against the husband. The current runs steadily and strongly in the emancipation of the wife."). Later cases also acknowledged the separate legal existences of husband and wife. *See* Hoeper v. Tax Com. of Wis., 284 U.S. 206 (1931) (holding that a Wisconsin tax on husbands violated the Equal Protection Clause of the Fourteenth Amendment because they no longer had any legal interest or control over the income of their wives).

[50] Califano v. Goldfarb, 430 U.S. 199, 207 (1977); *cf* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (holding that a statute that had a disproportionate impact on women did not violate the Equal Protection Clause because the statute was gender neutral on its face, and was not enacted with gender-based discrimination in mind).

[51] *Califano*, 430 U.S. at 217.

[52] *See* Califano v. Westcott, 433 U.S. 76 (1979).

[53] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).

[54] The bulk of these claims were brought under Title VII of the Civil Rights Act. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Johnson v. Transp. Agency, 480 U.S. 616 (1987); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[55] Congress has the power to establish a "uniform Rule of Naturalization"; these rules are enshrined in the Fourteenth Amendment, which provided that all "persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *See* U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. amend. XIV, § 1.

on matters such as immigration,[56] it still retains the power to review Congressional action to ensure that the action accords with constitutional requirements.[57] The argument for deference is usually lack of expertise on the Court's part—as the regulation of immigration is closely tied to maintenance of national security, the Court has traditionally given extreme deference to the judgment of the legislative and executive branches, as can be seen in Justice Field's opinion in the seminal case *Chae Chan Ping v. United States*:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and **to attain these ends nearly all other considerations are to be subordinated** . . . . The government, possessing the powers which are to be exercised for protection and security, is clothed with authority . . . [if it] considers the presence of foreigners of a different race in this counter . . . to be dangerous to its peace and security, their exclusion is not to be stayed just because . . . there are no actual hostilities with the nation of which the foreigners are subjects. (emphasis added)[58]

Furthermore, noted Justice Field, the right to exclude exercised by Congress is incident to a nation's "right of self-preservation."[59] As these determinations were "conclusive upon the judiciary," dissatisfied foreigners were advised to seek remedy in other political branches.[60]

The nation's fluctuating immigration needs and changing social values led to immigration law becoming disjointed and disorganized. The Immigration and Nationality Act ("INA"), enacted in 1952, consolidated the basic immigration laws of 1917 and 1924, as well as over two hundred additional enactments and hundreds of Executive orders, proclamations, rules, and treatises into one organized space.[61]

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[56] The origins of the plenary power doctrine are traditionally traced back to the era of the Chinese Exclusion Acts and *Chae Chan Ping*, in which the Court found Congress's power to exclude inherent in its sovereignty powers granted by the Constitution. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30–31 (2015) (citing Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889)). In its early years, the Court practiced absolute deference and "disavowed . . . any judicial power to review the constitutionality of immigration legislation." Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 257 (1984); *see* Lees v. United States, 150 U.S. 476, 480 (1893) (noting that Congress has an "absolute" power to exclude that "is not open to challenge in the courts"). However, the Court has recently acknowledged its power to review such legislation in limited situations. *See* Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) (recognizing that there is a "limited" judicial responsibility to review the exclusion of foreigners).

[57] Congressional action must not infringe on constitutionally guaranteed rights. *See* Oregon v. Mitchell, 400 U.S. 112, 128 (1970) ("As broad as the congressional power is, it is not unlimited . . . . Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination.").

[58] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[59] *Id.* at 608.

[60] *Id.* at 606.

[61] Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 128 (1966).

A. NATURALIZATION: DERIVATION OF CITIZENSHIP

Traditionally, there are two ways to become a citizen of the United States: either an individual is born with birthright citizenship, or they become a citizen through the process of naturalization. Children may obtain U.S. citizenship if their parents are citizens—*jus sanguinis*, by "right of blood"[62]—or if they are born in the United States—*jus soli*, by "right of soil."[63] Citizenship may be transmitted to a foreign-born child even if their parent was not a citizen to begin with—even unwed parents who naturalize may transmit their newfound citizenship to their foreign-born children, subject to a certain set of requirements.[64] This is the process of "derivation" of citizenship.[65]

The First Congress provided for derivative citizenship in its earliest incarnation in 1790, when it passed a statute allowing foreign-born children to derive citizenship from citizen parents.[66] As immigration law evolved to meet the standards of the era, so, too, did naturalization law. For instance, a 1795 amendment provided that convicted British sympathizers during the American Revolution were prohibited from obtaining U.S. citizenship.[67] Laws surrounding derivative citizenship similarly evolved. An 1855 amendment to the statute unambiguously provided for derivative citizenship and limited beneficiaries—typically children—to those "whose fathers were or may be at the time of their birth citizens . . . of the United States."[68] Later changes around the mid-eighteenth century implemented additional requirements: children and their parents were now subject to a longer period of residency and an oath of loyalty in order to be eligible for citizenship.[69]

The passage of the INA in 1952 also came with a specific provision for derivation of citizenship, codified in § 1432(a). Under § 1432(a), a foreign-born child with noncitizen parents could obtain citizenship in the United States if they met the following requirements:

1) naturalization of both parents; or

2) naturalization of the surviving parent if one of the parents is deceased; or

3) naturalization of the parent with legal custody of the child when the parents are legally separated or the naturalization of the mother if

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[62] *Jus Soli*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[63] *Jus Sanguinis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[64] Children are eligible for "acquisition" of citizenship if their parents were U.S. citizens when they were born. By contrast, children of noncitizen parents at the time of birth are eligible for "derivation" of citizenship when their noncitizen parents naturalize. In both cases, the child automatically gains citizenship and can formalize their status by submitting an application with United States Citizenship and Immigration Services ("USCIS"). Scholarship on the topic has been somewhat inconsistent with regards to the terminology used—some conflate "acquisition" of citizenship with "derivative" citizenship—but this paper will treat the two concepts as distinct, as used by the Department of Justice. Katherine Leahy, *U.S. Citizenship Law and the Means for Becoming a Citizen*, IMMIGR. L. ADVISOR (Nov. 2008), https://www.justice.gov/sites/default/files/eoir/legacy/2009/07/24/vol2no11.pdf; *see also* 8 U.S.C. § 1431 (1994); 8 U.S.C. § 1432 (1994) (repealed 2000).

[65] *See id.*

[66] Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.

[67] Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415.

[68] Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

[69] *See* Act of May 24, 1934, Pub. L. No. 73-250, § 1994, 48 Stat. 797, 797; Nationality Act of 1940, ch. 876, § 201(g); 54 Stat. 1137, 1139.

> the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
>
> 4) naturalization of parent(s) occurs while the child is under the age of sixteen; and
>
> 5) such child resides in the United States pursuant to a lawful admission for permanent residence at the time of naturalization for the parent last naturalized under § 1432(a) or begins to permanently reside in the United States under the age of sixteen years.[70]

This framework for derivation of citizenship remained largely the same until 2000, with the most significant changes in the meantime being the added eligibility of adopted children, as well as an expanded age requirement—from sixteen to eighteen.[71]

The laws of derivation of citizenship experienced another qualitative change when Congress enacted the Child Citizenship Act of 2000 ("CCA")[72], which effectively repealed and replaced § 1432.[73] The requirements of 8 U.S.C. § 1431 were subsequently amended to include derivation of citizenship, providing that

> (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
>
> (2) The child is under the age of eighteen years.
>
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.[74]

The CCA, which took effect in February 2001, eliminated the legal separation requirements[75] and broadened the population of people who would be eligible for derivative citizenship by requiring only one naturalized parent for conveyance of citizenship across the board.[76] However, like most changes to the law governing derivative citizenship, the CCA does not confer citizenship retrospectively.[77] As the law in effect at the time the person in question is born governs their immigration proceeding, many individuals who are otherwise targeted by these reforms fall through the cracks due to their birth date.[78] Though the CCA amendments are unclear on the issue of derivation for illegitimate children of unwed parents, legitimation is likely

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[70] Immigration and Nationality Act § 321(a), 8 U.S.C. § 1432(a) (1994).
[71] Act of Oct. 5, 1978 § 5, Pub. L. No. 95-417, 92 Stat. 918, 918, codified at 8 U.S.C. 1432 (1994).
[72] Pub. L. No. 106-335, 114 Stat. 1631, codified as amended in various sections of Title 8.
[73] Child Citizenship Act of 2000 § 103(a), 114 Stat. at 1632–33, codified at 8 U.S.C. § 1432(a).
[74] Child Citizenship Act of 2000 § 101(a), 114 Stat. at 1631, codified at 8 U.S.C. § 1431(a).
[75] Drakes v. Ashcroft, 323 F.3d 189, 190 (2d Cir. 2003).
[76] Child Citizenship Act of 2000 § 101(a)(1), 114 Stat. at 1631, codified at 8 U.S.C. § 1431(a).
[77] *Drakes*, 323 F.3d at 191.
[78] Michelle L. Sudano, *Crossing the Final Border: Securing Equal Gender Protection in Immigration Cases*, 21 WM. & MARY BILL RTS. J. 957, 963 (2013).

still required for children seeking to derive citizenship from their unmarried fathers.[79]

B. GENDER DISCRIMINATION IN NATURALIZATION CASES

To date, there are no Supreme Court cases on the issue of gender discrimination as perpetuated by § 1432(a) and subsequent legitimation requirements in derivative citizenship. However, there are numerous challenges to the statute in lower federal courts; in examining this issue, courts typically look for guidance from analogous gender discrimination issues in acquisition of citizenship.[80]

Traditionally, cases involving gender discrimination are subject to a higher level of judicial scrutiny than the lowest rational basis test.[81] In immigration cases, the standard has historically been lowered to rational basis review due to judicial deference to Congress's plenary power.[82] However, the Supreme Court has seemed more willing to apply a heightened level of scrutiny to congressional immigration statutes in recent years.[83] In fact, the Court even struck down an immigration statute governing the acquisition of citizenship after applying a higher level of scrutiny in *Sessions v. Morales-Santana*, holding that the statute unconstitutionally imposed different physical presence requirements based on the parent's gender and therefore violated equal protection principles.[84]

Thus, while the legitimation requirement in § 1432 and in its successor statute[85] disparately impacts similarly situated parents based on their gender, it is difficult to reliably predict which standard a reviewing court would apply. Regardless, the requirement must at least be rationally related to a legitimate governmental interest to pass constitutional muster. In cases regarding derivative citizenship, two specific objectives are consistently advanced to justify these gender-based classifications:[86] the government's interests in (1) assuring the existence of a biological parent-child relationship

[79] Section 101(c)(1) of the Immigration and Nationality Act excludes illegitimate children from the definition of "child" unless they have been legitimated by the age of sixteen in the domicile of either the child or the father. A USCIS memorandum on the subject of unlegitimated children only confirms that naturalized mothers may confer citizenship to unlegitimated children, no more. *Eligibility of Unlegitimated Children for Derivative Citizenship*, Memorandum from the Acting Principal Legal Advisor to the Bureau of Citizenship & Immigr. Serv.'s 136 (July 24, 2003), https://www.justice.gov/file/18966/download; *Chart C: Derivative Citizenship—Lawful Permanent Resident Children Gaining Citizenship Through Parents' Citizenship*, IMMIGR. LEGAL RSCH. CTR. (July 2020), https://www.ilrc.org/sites/default/files/resources/natz_chart-c-09-2020.pdf.

[80] *See, e.g.*, Barthelemy v. Ashcroft, 329 F.3d 1062 (9th Cir. 2003); Grant v. U.S. Dep't of Homeland Sec. 534 F.3d 102 (2d Cir. 2008); Ayton v. Holder, 686 F.3d 331 (5th Cir. 2012); Pierre v. Holder, 738 F.3d 39 (2d Cir. 2013); United States v. Mayea-Pulido, 946 F.3d 1055 (9th Cir. 2020); Roy v. Barr, 960 F.3d 1175 (9th Cir. 2020); Dale v. Barr, 967 F.3d 133 (2d Cir. 2020).

[81] *See supra* Part II.

[82] Fiallo v. Bell, 430 U.S. 787, 792–96 (1977).

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

[84] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) ("Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*.").

[85] The requirement is not explicit in the text of the statute, but guidance from the Department of Justice suggests that the requirement is still in effect. Drakes v. Ashcroft, 323 F.3d 189, 191 (2d Cir. 2003).

[86] While statelessness is usually an interest cited in acquisition of citizenship cases, it is less of an issue in inquiries about derivative citizenship. The mechanics of derivative citizenship require that the beneficiary already be born to gain citizenship; thus, concerns about children being born stateless are less applicable.

and in (2) ensuring that the child and citizen parent have had the opportunity to develop a relationship that "consists of the real, everyday ties that provide a connection between child and citizen parent, and, in turn, the United States."[87]

In considering the weighty privileges of citizenship at stake, the Supreme Court has continually acknowledged Congress's desire to ensure that fathers and their children born out of wedlock actually share biological parent-child relationships—especially when issues involving transmission of citizenship arise.[88] The status of "citizen" comes with the full protection of the laws of the United States, ability to enter its borders, and freedom to participate in its political processes.[89] Thus, Congress has a vested interest in verifying the identities of those to whom it extends these benefits, and it should be able to do so. The difficulty comes from balancing this interest against the principles of equal gender protections. While Congress is rightfully able to determine and impose restrictions on citizenship qualifications, especially when conferred through "unwitting means,"[90] such restrictions must still accommodate constitutional rights.

Another consistently articulated justification of differential treatment for unwed mothers and fathers is the need for "real, everyday ties," described in *Nguyen v. INS* as a demonstrated "opportunity . . . to develop a real, meaningful relationship"—a connection between child and citizen parent that would translate to a connection between child and country.[91] Notably, this does not require the formation of an actual relationship between child and citizen parent—it just calls for the *opportunity* for such a relationship develop.[92] Unlike with children born to married couples, for whom a presumption of paternity provides assurance that a parent-child relationship will develop,[93] the Court in *Nguyen* opined that there was "no assurance that the father and his biological child will ever meet" in instances when children are born out of wedlock.[94]

Ultimately, lower courts usually adopt the Supreme Court's reasoning in *Nguyen v. INS* and accept these justifications for the discriminatory imposition of a legitimation requirement on only the father[95]—they suppose that the mother's presence at the birth of the child (a biological inevitability) provides verification for her biological relationship with the child, as a "mother's status is documented in most instances by the birth certificate or

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[87] Dale v. Barr, 967 F.3d 133, 140 (2d Cir. 2020) (quoting Nguyen v. INS, 533 U.S. 53, 62–65 (2001)); *see also* Pierre v. Holder, 738 F.3d 39 (2d Cir. 2013); Barthelemy v. Ashcroft, 329 F.3d 1062, 1068 (9th Cir. 2003).

[88] *See Nguyen*, 533 U.S. at 62–64; Miller v. Albright, 523 U.S. 420, 435 (1990).

[89] *Nguyen*, 533 U.S. at 67.

[90] *Id.*

[91] *Id.* at 65. It bears noting that this assumption of automatic loyalty by event of birth has been criticized as lacking in substance for establishing the "meaningful relationships" that concerns the federal government in *Nguyen*. *See* Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275, 310–11 (2002) ("It is absurd to believe that loyalty and allegiance to the United States passes in the very event of birth.").

[92] *See* Nguyen, 533 U.S. at 65–67.

[93] Victoria Degtyareva, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 893 (2011).

[94] *Nguyen*, 533 U.S. at 66.

[95] *See id.* at 62–66.

hospital records and the witnesses who attest to her having given birth," whereas unwed fathers cannot benefit from this instant authentication at the moment of birth.[96] Similarly, it is assumed that Congress's interest in "real, everyday ties" is automatically satisfied for the mother, as the "meaningful relationship between citizen parent and child inheres from the very event of birth."[97] It is unclear if these courts' determinations take into account the fact that approximately one-half of all child births in developing nations are not registered.[98] Commentators also criticize this approach for the normative assumptions embedded within, which fail to take variables such as surrogacy, alternative reproductive technologies, or clerical ambiguity into account[99] and perpetuate the stereotype of the "uncaring and uninterested" unwed father as a result.[100]

In any case, attitudes in at least some of the lower courts seem to be shifting, with one Second Circuit judge noting that

> Section 1423(a)(3)'s discrimination bears against both men and women. Not only does 1423(a)(3) posit that the unwed father has less interest in the child than the unwed mother, but also, by conferring "benefits" such as automatic citizenship to women alone, may "creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver."[101]

However, the Supreme Court has not definitively ruled on the issue; thus, the precedent of judicial deference to Congress's plenary power continue to dominate discussion of the discriminatory impact of § 1432.[102]

IV. DERIVATIVE CITIZENSHIP: THE CALL OF THE "MORAL READING"

While this deference to Congress's expansive powers to regulate immigration currently takes precedence in the conversation about derivative citizenship,[103] legal issues that are "settled" may not always be "settled right"[104]—especially when it comes to a topic such as constitutional interpretation. With hundreds of years of precedent in the background, it is sometimes necessary to recalibrate constitutional interpretation to escape the "dead hand problem."[105]

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[96] *Id.* at 62.

[97] *See id.* at 65.

[98] U.N. High Comm'r for Refugees, *Birth Registration: A Topic Proposed for an Executive Committee Conclusion on International Protection*, ¶ 5, U.N. Doc. EC/61/SC/CRP.5 (Feb. 9, 2010), https://www.unhcr.org/4b910bf19.pdf.

[99] Tomizuka, *supra* note 91, at 305.

[100] *Id.* at 310.

[101] Dale v. Barr, 967 F.3d 133, 149 (2d Cir. 2020) (Rakoff, J., dissenting) (quoting Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017)).

[102] *See, e.g.*, Sudano, *supra* note 78.

[103] Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 202 (2016) ("Each time that the Supreme Court reaffirms the constitutional exceptionalism of the federal immigration power, it dutifully recites the presumptive connection between immigration regulation and the conduct of foreign affairs and national security."); Legomsky, *supra* note 56, at 260 ("[I]mmigration is an area in which the normal rules of constitutional law simply do not apply.").

[104] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[105] Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127–28 (1998).

A. OVERVIEW OF THE "MORAL READING"

One such method of interpretation is the "moral reading" of the Constitution, a theory advanced by constitutional scholar Ronald Dworkin in 1996, which grounds the text of the Constitution in the weight of moral principles.[106] Dworkin, while noting the "irreducibly moralized character of legal interpretation,"[107] proposed that readers "interpret and apply [the Constitution's] abstract clauses on the understanding that they invoke moral principles about political decency and justice"[108] to better keep in line with the democratic traditions of the United States.

These abstract principles, in turn, are incorporated into the text as a way of limiting the government's power.[109] The theory keeps interpretation purposefully vague to maintain the malleability of the Constitution, allowing judges to decide as the principles of the Constitution require; their holdings must find the "best conception of constitutional moral principles . . . that fits the broad story of America's historical record."[110]

Notably, the moral reading is grounded in humanist principles. It suggests that the value of the individual comes not from their relationship to the state but, instead, from within. Equality is its most preeminent concern.[111] As such, the moral reading articulates the following ideal:

> [The] government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document.[112]

A theory of constitutional interpretation requiring only that judges find and apply moral principles within the law would be dangerously unfettered. Dworkin acknowledges this and expounds on two rules that constrain moral reading by "sharply limit[ing] the latitude the moral reading gives to individual judges"—adherence to constitutional text and integrity.[113]

Jurists applying the moral reading must take the text—"what the framers said"—and integrity—what "structural design" and "past constitutional interpretation" require—into account when making legal conclusions.[114] To satisfy the former, they must consider what the framers intended to say in the text rather than external factors such as the framers' expectations for or

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[106] *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (Harvard Univ. Press 1996).

[107] Richard H. Fallon, Jr., *In Memoriam: Ronald Dworkin*, 127 HARV. L. REV. 489, 490 (2013).

[108] DWORKIN, *supra* note 106, at 2.

[109] *Id.* at 7.

[110] *Id.* at 11.

[111] *Id.* at 7–8.

[112] *See id.* at 7–8, 24–26 ("[T]he political process of a genuine community must express some bona fide conception of equal concern for the interests of all members, which means that political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all.").

[113] *Id.* at 10, 11 ("I emphasize these constraints of history and integrity, because they show how exaggerated is the common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us.").

[114] *Id.* at 10.

actions regarding the text.[115] The latter requires jurists to "regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality."[116] New decisions, therefore, cannot compromise the integrity of the moral principles already established in the Constitution. The consequence of such a violation would cast doubt on the credibility of American democracy.[117]

B. THE MORAL READING, FIFTH AMENDMENT, AND LEGITIMATION REQUIREMENTS

An inquiry into the coexistence of the legitimation requirements of § 1432[118] with the application of the moral reading of the Constitution requires a two-part analysis. The first step is to determine which moral principle articulated in the Constitution should be applied to the issue at hand. After that determination, the next step is to evaluate if § 1432 violates that principle, which requires analyzing what the Constitution's structural design and past constitutional interpretation demands.[119] If § 1432 would disrupt a coherent Constitutional morality, it is unconstitutional under the moral reading.

1. Determining the Applicable Moral Principles

As noted earlier, the only explicit guarantee of equal protection exists in the Fourteenth Amendment, which governs state laws.[120] Federal practices, in contrast, are governed by the text of the Fifth Amendment.[121] While the text lacks an explicit equal protection guarantee, courts have historically read it in as part of the Due Process Clause.[122] Dworkin acknowledges this—in his explanation of the moral reading, the promise of "equal" protection comes from the text of the Fourteenth Amendment, whereas the Fifth Amendment refers to the "process that is 'due' to citizens."[123] However, the lack of an explicit clause guaranteeing equal protection does not defeat its inclusion in the Fifth Amendment's protections under the moral reading; given the lengthy legal tradition that recognizes such protections,[124]

[115] Dworkin distinguishes the analysis required of a moral reading from that of originalism, which begins with an inquiry into what the framers *intended to accomplish* with a specific provision or clause. The moral reading, in contrast, is more of an analysis of what the framers *intended to write*. *Cf.* DWORKIN, *supra* note 106, at 10; *see generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Commentators, however, often perceive this distinction as illusory and portray Dworkin as an originalist. *See* Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000).

[116] DWORKIN, *supra* note 106, at 10.

[117] *See id.* at 24–26.

[118] Discussion of § 1432 in this section will also implicitly refer to its successor statute for the sake of concision, as well as the fact that its successor statute does not explicitly incorporate a legitimation requirement in its text.

[119] DWORKIN, *supra* note 106.

[120] *See supra* Part II.

[121] *See supra* Part II.

[122] *See supra* Part II.

[123] It bears mentioning that the text of the Fifth Amendment actually extends its protections to "person[s]," not just citizens, as Dworkin writes. DWORKIN, *supra* note 106, at 7; *cf.* U.S. CONST. amend. V.

[124] *See supra* Part III.

integrity—fidelity to the Constitution—requires recognition of this feature.[125]

Even without these guarantees, Dworkin's "constitutional conception" of democracy requires certain conditions of equal status for all citizens such that they have "moral membership" in the political community.[126] According to Dworkin, these conditions are necessary to maintain a valid democracy.[127] They are threefold: (1) each person must have "an opportunity to make a difference in the collective decisions"; (2) the political process must express "some bona fide conception of equal concern for the interests of all members"; and (3) members of the political community must have the potential for "moral independence."[128]

Applied in this examination of § 1432, disproportionately affected naturalized fathers qualify as members of the American democracy and are entitled to all of its privileges and protections, having satisfied the entry requirement—as citizens, they have the right to vote and affect collective decisions. It follows, then, that the political process must express equal concern for their interests in order to be democratic, according to the moral reading.

2. Determining What Constitutional Tradition Requires

The next step in Dworkin's framework[129] is to evaluate gender equality in the Fifth Amendment's constitutional tradition of equal protection and to determine whether it is possible to reconcile this tradition with the discriminatory practices mandated by § 1432's legitimation requirement.

The first issue is determining whether such a tradition exists. One method for clearly establishing a tradition in any sphere of jurisprudence involves scrutinizing how courts have treated a specific issue over time. Here, the progression of decisions in gender discrimination across different bodies of law, heightening the standard of review for gender discrimination cases, as well as relevant legislation enacted by an active legislature point to the inclusion of gender equality as a cause protected under the principles of equal protection.

In property law, women were initially forbidden from personally owning property and were conceptualized as part of their husbands' legal existence. *Yazell* described the husband as "head and master" of marital property as recently as 1966.[130] However, just fifteen years later, the Supreme Court formally acknowledged that it was necessary for wives and husbands to have equivalent property rights when it decided that husbands could no longer unilaterally dispose of community property.[131]

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[125] DWORKIN, *supra* note 106, at 10.
[126] *Id.* at 24–25.
[127] *Id.*
[128] *See id.*
[129] *Id.* at 10.
[130] *See* US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994) (regulating mass media); Am. Libr. Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (regulating adult entertainment); Rappa v. New Caste Cnty., 18 F.3d 1043 (3d Cir. 1994) (regulating highway signs).
[131] Kirchberg v. Feenstra, 450 U.S. 455 (1981).

Education law saw similar developments, although constraints regarding the right to an education based on gender started as more of a societal imposition rather than a legal obligation. However, the developments in education law still corroborate the existence of a constitutional commitment toward equal gender treatment, as shown by the Court's denouncement of gender stereotypes and their negative effects for both males and females.[132] After the 1970s, both *Mississippi University for Women* and *United States v. Virginia* addressed the harmful effects of entrenched gender stereotypes by striking down discriminatory admissions policies. In the former, the Supreme Court supported the right of male nurses to seek higher education in nursing, acknowledging that the exclusion of males from these educational programs unconstitutionally perpetuated the antiquated notion that nursing was exclusively a profession for females.[133] In the latter, the Court rejected the notion that women could not be admitted to an exclusively male military academy due to their biological predispositions and perceptions about different learning needs based on "the way women are."[134]

Developments in employment law provide perhaps the most observable and repetitive indicators of the inclusion of gender equality in the equal protection tradition. As with the beginnings of property law in the United States, women's rights in employment law were greatly hampered by the English tradition of coverture, which effectively prevented them from entering into contracts that could secure employment. However, the state of employment law in the United States has since drastically changed.[135] The Supreme Court started out with the notion that women's inability to contract was effectively a "civil disability" that prevented them from working in the nineteenth century.[136] However, as the Court heard more cases on the subject, the Court acknowledged that these "archaic and overbroad generalizations"[137] violated the Constitution and began to rule in favor of men's and women's equal right to work, moving away from the stereotype that men worked and women depended on them.[138]

In addition to developments across different bodies of law, the heightened standard of review also established gender equality as a priority of equal protection jurisprudence. Notably, no challenges to laws that discriminated on the basis of gender succeeded until *Reed* was argued and decided in the early 1970s.[139] However, in the fifty years that have followed, the level of scrutiny applied to the issue has only increased—and in a linear fashion.

Reed established that gender discrimination challenges could succeed under rational basis review.[140] Just five years after issuing the *Reed* decision, the Court decided that it was necessary to apply a heightened level of scrutiny

[132] *See supra* Section II.B.
[133] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720–21 (1982).
[134] United States v. Virginia, 518 U.S. 515, 550 (1996).
[135] *See supra* Section II.C.
[136] *See* Bradwell v. State, 83 U.S. 130 (1873); *Ex parte* Lockwood, 154 U.S. 116 (1894); *cf.* Muller v. Oregon, 208 U.S. 412 (1908).
[137] Califano v. Goldfarb, 430 U.S. 199, 207 (1977).
[138] *See* Califano v. Westcott, 433 U.S. 76 (1979); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).
[139] *Reed*, 404 U.S. 71 (1971).
[140] *Id.*

in gender discrimination cases, and it raised the standard of review to intermediate scrutiny in *Craig*.[141] Twenty years after *Craig*, the Court's decision in *United States v. Virginia* utilized even stronger terminology, requiring an "extremely persuasive justification" for gender-based classifications to pass constitutional muster.[142] While critics have debated whether a substantial change in scrutiny followed *United States v. Virginia*,[143] the forceful vocabulary used cannot be denied and may be more evidence of the Court's shifting attitudes and priorities.

This change is somewhat observable in naturalization law as well, albeit on a much smaller scale. While the discussion of plenary power doctrine completely predominated earlier cases in which Congress's regulatory powers over immigration conflicted with other enacted legislation,[144] the Court has carved out a space for itself in the discussion of this plenary power. At least with regard to equal gender protections, the Court struck down an immigration statute for the first time in its 2017 decision in *Morales-Santana* for violating the plaintiff's right to equal treatment under the Fifth Amendment.[145] Although the Court continues to emphasize its deference to Congress in the realm of immigration law—especially with respect to the exclusion of foreigners—the discussion is no longer as brief as it used to be, perhap signaling that consideration of equal gender protections now holds more weight.[146]

The strongest indicator of the need to include gender equality in the constitutional tradition of equal protection is the wealth of legislation enacted to pursue such aims. This is observable in the spheres of both property and employment law. State legislatures expressed their disapproval of the coverture law tradition by enacting the married women's property acts; by the early 1900s, almost all states had enacted some form of legislation that allowed married women to personally own property.[147] Events proceeded in a similar fashion in employment law. The multitude of statutes enacted with the goal of leveling the playing field (e.g., the Equal Pay Act of 1963, the Civil Rights Act of 1964, and the Lilly Ledbetter Fair Pay Act of 2009) also reflects the American democracy's continuing commitment to and promotion of gender equality.[148]

Changes in naturalization laws also reflect this prioritization, albeit, again, on a smaller scale. In the earliest derivative citizenship statutes, only fathers were able to transmit their citizenship to their children; however, the latest Child Citizenship Act of 2000 allows noncitizen children to derive citizenship from both their naturalized mothers and fathers (though to different extents).[149]

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[141] Craig v. Boren, 429 U.S. 190 (1976).
[142] United States v. Virginia, 518 U.S. 515 (1996).
[143] *See supra* Part II.
[144] *See* Martin, *supra* note 56; Legomsky, *supra* note 56; Lees v. United States, 150 U.S. 476, 480 (1893); Fiallo v. Bell, 430 U.S. 787 (1977).
[145] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).
[146] *See id.*
[147] *See supra* Section II.A.
[148] *See supra* Section II.C.
[149] *See supra* Part IV.

3. Evaluating § 1432's Legitimation Requirement with Regards to the Moral Principle of Gender Equality Within the Equal Protection Tradition

This raises the question: given that the Fifth Amendment articulates the moral requirement of gender equality, does the legitimation requirement violate this tradition? The answer is an unequivocal "yes." The two are not reconcilable.

Fathers affected by § 1432's legitimation requirement, as individuals who have naturalized into citizenship, are now "subject to [the government's] dominion as having equal moral and political status."[150] With equality of the denizens in the American democracy being one of the fundamental assumptions that undergird the application of the moral reading, what matters is not the *extent* to which these individuals are overburdened by the mandates imposed by § 1432, but that they are overburdened *at all*.

Although the issue falls within a realm in which Congress may claim plenary power, the moral reading treats the status of its citizens as its foremost priority, as corroborated by the Court's increasing scrutiny of the topic. Notably, the issue at hand is also distinguishable from issues falling squarely within Congress's plenary power—the rights of two classes of citizens are at stake: the fathers, who have already naturalized, and their children, who would have automatically been conferred citizenship but for this legitimation requirement.[151] For them, this would be a non-issue had their mothers been the ones who naturalized into their citizen parents.

In addition to the Court's continual deference to Congress's claims of plenary power over immigration issues, the other obstacle that application of a moral reading must overcome is the dominance of the concept of "real differences" in the discussion of acquisition of citizenship and differential treatment based on gender. [152] Both of Congress's articulated justifications for this unequal treatment are anchored by the perceived implications of the event of birth.[153]

The prevailing assumption is that a mother's presence at birth automatically legitimates a newborn child. The same logic applies to the opportunity to develop a meaningful relationship with the child—in fact, the law assumes that this meaningful relationship automatically exists by virtue of the mere occurrence of birth. It follows that since only women are able to give birth, these assumptions cannot be extended for the benefit of unwed fathers. Under this line of reasoning, unwed fathers have not been robbed of their constitutional right to equal protection—they simply are not "similarly situated" when compared to unwed mothers. It would seem, then, that there

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[150] DWORKIN, *supra* note 106, at 7–8.

[151] *See supra* Section III.A.

[152] In the discourse surrounding the intersection of gender and principles of equal protection, "real differences" usually refers to the discussion of whether there are differences between the biological categories of men and women and the extent to which the legislature should take these differences into account when enacting laws. *See* Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 476 (1981) (upholding a statute that only held males liable for statutory rape; since males are less burdened by the result of rape, the criminal sanction equalizes the deterrents on the sexes). The term is sometimes used interchangeably with "biological differences" to the same effect. *See* Nguyen v. INS, 533 U.S. 53, 64 (2001).

[153] *See supra* Section III.B.

is still potential for the differential treatment in the requirements of § 1432 to be reconciled with the demands of Dworkin's moral reading.

However, the viability of this logic relies too much on the assumption that the women giving birth to children are actually their biological mothers. The advent of alternative paths to motherhood—surrogacy,[154] artificial insemination, in vitro fertilization, and embryo transfers—particularly complicates existing legal paradigms that take the stereotype of a typical nuclear family structure for granted.[155] The increasing number of mothers opting for these alternative options raises the question of whether § 1432 is actually able to provide for the "equal concern and respect" that are due to all participating constituents of the political community under Dworkin's moral reading.[156]

For instance, consider a situation in which a surrogate gives birth to a child for an unwed mother who later naturalizes into citizenship in the United States. In such a case, the surrogate—the birth mother—typically has no parental rights over the newborn child.[157] Even though the surrogate is the individual giving birth to the child, the biological relationship assumed by event of birth does not exist.[158] Even so, § 1432 does not provide that the legal mother in such a situation is required to legitimate her child in order to establish a biological relationship. However, the unwed father, who would be "similarly situated with regard to the proof of biological parenthood," would still need to act to establish his paternity.[159]

Along similar lines, the possibility that a surrogate mother may give birth without the knowledge of either legal parent complicates the issue of whether a demonstrated opportunity to develop a meaningful relationship with the child exists.[160] It would be terribly inequitable to consider the opportunity to be demonstrated just by virtue of the fact that the mother had the *potential* to give birth to the child, even if the birth occurred without her knowledge—especially as the similarly situated father, unaware of the birth, would not be considered to have demonstrated an opportunity for a meaningful relationship.

While such outcomes would impermissibly violate the promises of equal status and "equal concern for the interests of all members"[161] due to the differential treatment afforded to unwed fathers who naturalized into citizenship, they also are becoming increasingly likely as alternative

[154] Surrogacy adds a new layer of complexity onto the issue, as it requires consideration of the interests of both the legal mother and birth mother. Barbara Cohen, *Surrogate Mothers: Whose Baby is It?*, 10 AM. J. L. & MED. 243 (1984).

[155] *See generally* Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986); Michelle Pierce-Gealy, *"Are You My Mother?": Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother*," 28 AKRON L. REV. 535, 539 (1995) (noting that the rise in situations where women giving birth are not the legal mothers of the children calls for the establishment and recognition of a new "parentage paradigm").

[156] *See supra* Section IV.B.1.

[157] *See supra* note 154 and accompanying text.

[158] Nguyen v. INS, 533 U.S. 53, 64 (2000).

[159] *Id.* at 63.

[160] *Id.* at 65.

[161] DWORKIN, *supra* note 106, at 24–25.

reproductive technologies grow in popularity.[162] Thus, adherence to the principles behind the moral reading requires a shift in legal paradigms.

As Dworkin observes, the moral reading "asks [readers] to find the best conception of constitutional moral principles . . . that fit[] the broad story of America's historical record."[163] Here, the "broad story of America's historical record" reflects the changing priorities of the American democracy and its shifting paradigms from the "archaic and overbroad generalizations" of yesteryear toward legislation that reflects the equal capabilities of individuals, gender notwithstanding. It follows that the capabilities that are granted by democratically enacted legislation should also enable affected individuals equally, regardless of their gender.

Moreover, it bears noting that although this nation's highest court has not recently addressed the issue, lower courts opining on the topic have recognized the discriminatory impact of the statute and its outdated philosophy.[164] In particular, the Ninth Circuit recently observed that

> Section 1432(a)(3)'s second clause discriminates on the basis of gender. It grants citizenship upon the "naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation," but it does not grant citizenship in the converse scenario: upon the naturalization of the *father* if the child was born out of wedlock and the child's *maternity* has not been established by legitimation. Although that scenario is unlikely, it is not impossible.[165]

It went on to posit this illustrative hypothetical:

> For example, an unmarried mother could give birth at her home and then leave the baby on the father's doorstep. The father could get a DNA test to confirm his relationship to the baby, but if he had sex with more than one woman approximately nine months earlier, the child's maternity would remain unknown. And . . . the mother could legitimate her relationship to the child well after the child's birth.[166]

The antiquated nature of the stereotypes perpetuated by § 1432 was also observed in the Second Circuit, which remarked that the law "treat[ed] mothers and unwed fathers differently based on a 'biological inevitability' [that] may reflect outdated notions of gender and parenthood."[167] Concurring, Judge Rakoff also noted that the provision reflected "what were

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[162] *See supra* note 155 and accompanying text.

[163] *See* DWORKIN, *supra* note 106, at 11.

[164] Though the case addressed a naturalization issue of a different nature, the Supreme Court's sentiments in *Morales-Santana* on how the stereotype of the uncaring, unwed father exists more as a "second parent" to the unwed mother—the "only legally recognized parent" at childbirth—is no longer an appropriate assumption seems especially pertinent to this discussion. Sesssions v. Morales-Santana, 137 S. Ct. 1678, 1695 (2017) ("Hardly gender neutral . . . that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children . . . . Lump characterization of that kind, however, no longer passes equal protection inspection.") (citations omitted).

[165] Roy v. Barr, 960 F.3d 1175, 1181–82 (9th Cir. 2020).

[166] *Id.* at 1182.

[167] Dale v. Barr, 967 F.3d 133, 145 (2d Cir. 2020).

'once habitual, but now untenable, assumptions' about 'the way women and men are.'"[168]

V. CONCLUSION

Given that the legitimation requirement in § 1432 violates the moral principle of gender equality in the equal protection tradition of the Fifth Amendment, what happens next? In describing the consequences and process of the moral reading, Dworkin asserts that application of this mode of constitutional interpretation

> explains why fidelity to the Constitution and to law *demands* that judges make contemporary judgments of political morality, and . . . therefore encourages an open display of the true grounds of judgment, in the hopes that judges will construct franker arguments of principle that allow the public to join in on the argument. (emphasis in original)[169]

At least some of these contemporary judgments have been expressed up to the circuit court level;[170] under the moral reading, the pendulum now swings to other judges—and perhaps other appellate courts—to join in on the discourse, and to the public to react. It is also possible that the Supreme Court will impose a similar legitimacy requirement onto mothers—as it did for the physical presence requirements in *Morales-Santana*—or perhaps it will find the provision to be an violation of the equal protection guarantee implicit in the Fifth Amendment. Perhaps public discourse will inspire the cogs of the democratic process to turn, and the statute will be amended again, as it was with the Child Citizenship Act in 2000.

In any case, the moral reading provides a clear conclusion. If the law is to accord with the integrity of established constitutional tradition, the continued existence § 1432's legitimacy requirement is a dissonant note that must be corrected. For the government to fulfill its promises of "equal moral and political status" to its citizens, it must rectify disparate treatment of unwed fathers and mothers. As Dworkin notes, "The constitution is America's moral sail, and we must hold to the courage of the conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it."[171] With the tides changing on gender equality, this may very well be possible.

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[168] *Id.* at 146 (Rakoff, J., dissenting) (quoting Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690–91, 94 (2017)).
[169] DWORKIN, *supra* note 106, at 37.
[170] *See, e.g.*, Dale v. Barr, 967 F.3d 133 (2d Cir. 2020); Roy v. Barr, 960 F.3d 1175 (9th Cir. 2020).
[171] DWORKIN, *supra* note 106, at 38.