Fraudulent Families

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The Supreme Court has repeatedly upheld distinctions between unwed mothers and unwed fathers on the basis of sex. Unwed women are recognized as mothers automatically upon birth, while unwed men must undertake a series of affirmative steps before being recognized as fathers. One of the central rationales for this differential treatment is the Court's concern with problems of proof and potential for fraud that plague paternity, but not maternity, determinations. Legal scholarship has been rightly critical of these enduring sex-based distinctions, but it has largely ignored the role that fraud plays in these cases and in the broader regulation of nonmarriage. That is the task of this Article.

This Article engages in a close reading of the Supreme Court's use of fraud across a range of opinions—from addressing state law rules setting out property rights at death to federal laws dictating the transmission of citizenship at birth. The presence of fraud in the Court's reasoning is significant, but the way it functions is neither obvious nor straightforward. The Court claims to be concerned with "paternity fraud," which takes place when there is no biological connection between alleged father and child. Yet not a single decision involves a missing genetic link, and the Court's accepted response to the fraud routinely fails to require proof of one. This Article argues that the concern articulated in the language of paternity is, in fact, a concern over the lack of marriage between the father and mother. As such, what the Court presents as an objective rationale based on biology is, in fact, a subjective and value-laden determination about what kinds of relationships the law should recognize.

Exposing the work of fraud matters. At a minimum, it shows that the purported governmental interest in fraud prevention is not legitimate and should no longer count as an uncontroversial reason to support the constitutionality of distinguishing between men and women in their roles as fathers and mothers. Paying attention to how fraud functions demonstrates that such distinctions are based on the legacy of contestable legal rules rather than, as the Court claims, any inherent biological difference. More broadly, this Article exposes how appeals to fraud transform what are disputable normative judgments into empirical-sounding evidentiary concerns. Fraud, however, is anything but neutral. It

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perpetuates a gendered state of affairs that casts women as mothers always and men as fathers only within marriage. It also functions in racist ways and has long been leveled against non-white families. With this critique of fraud in hand, we can better evaluate how fraud is regularly raised in the regulation of nonmarriage, where it works to limit access to material goods in both gendered and race-salient ways.

"We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

Gomez v. Perez, 409 U.S. 535, 538 (1973).

INTRODUCTION

Problems of proof and concerns over fraud figure prominently in the Supreme Court's jurisprudence on sex equality. Together, they provide one of the central rationales for continuing to uphold distinctions between unwed mothers and unwed fathers on the basis of sex. Consider a few examples. In *Lalli v. Lalli*, the Supreme Court addressed an equal protection challenge to a New York law that prevented children born out of wedlock from inheriting intestate from their fathers, but not their mothers, unless the father had obtained an order of paternity within two years of the child's birth.[1] The Court upheld the provision.[2] It relied on the state's interest in providing for the orderly disposition of property, which "is directly implicated in

1. Lalli v. Lalli, 439 U.S. 259, 262, 264 (1978). The equal protection challenge the Court addressed was based on the differential treatment of the children—legitimate and illegitimate—not of the unwed parents. *Id.* at 261. Its reasoning nonetheless relied on identifying distinctions between the unwed mother and father. *Id.* at 268.

2. *Id.* at 276.

paternal inheritance by illegitimate children because of the *peculiar problems of proof* that are involved."[3] "[E]stablishing maternity," on the other hand, "is seldom difficult."[4] The following year, in *Parham v. Hughes*, the Court found a Georgia law constitutional that excluded unwed fathers from bringing wrongful death suits on behalf of their children: "Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."[5] The state could therefore legislate to confront the specific "problem of *identity* or of *fraudulent claims*."[6] More recently, in *Nguyen v. INS*, the Court concluded that the Immigration and Nationality Act could impose a series of affirmative steps on unwed fathers but not unwed mothers prior to transmitting citizenship to their children born abroad because "[f]athers and mothers are not similarly situated with regard to *proof* of biological parenthood."[7]

In each of these cases, problems of proof and attendant concerns over fraud justify imposing a different set of requirements on fathers than on mothers.[8] In each of these cases, the justifications appeal to biological distinctions between the sexes. These different standards do not, however, apply to men and women generally by virtue of their physiology; instead, they apply only to men and women *who are not married*.

While legal scholarship has critiqued different aspects of these constitutional cases,[9] there has yet to be any direct consideration of the role that fraud and problems of proof play throughout the Court's opinions. That is the task of this

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3. *Id.* at 268 (emphasis added).

4. *Id.*

5. Parham v. Hughes, 441 U.S. 347, 355 (1979) (plurality opinion). Because the cases and legal materials use the term "illegitimacy" or "illegitimate," this Article does as well, at times even outside of direct quotations. The decision to do so is based on concerns over clarity and precision, and to intentionally reference a status that was once recognized by law. By no means does it reflect an endorsement of the network of legal rules that enforced distinctions between children based on their parents' marital status, which this Article ultimately critiques.

6. *Id.* at 355 n.7 (emphasis added).

7. Nguyen v. INS, 533 U.S. 53, 63 (2001) (emphasis added).

8. *See* case discussion *infra* Part I. While not every opinion considers the constitutionality of differentiating between the mother and the father head-on, they all rely on an analysis of the distinctions made between the parents in addressing the equal protection claim. *See, e.g.*, *supra* note 1.

9. There is much, and varied, legal scholarship analyzing the "illegitimacy" or "unwed father" cases, which comprise a set of overlapping but, depending on the piece, slightly different, Supreme Court opinions; none, however, focuses on the presence of fraud, or explores the role it plays in the Court's constitutional reasoning. *See, e.g.*, JENNIFER HENDRICKS, ESSENTIALLY A MOTHER: A FEMINIST APPROACH TO THE LAW OF PREGNANCY AND MOTHERHOOD (2023) (focusing on the "Unwed Father Cases" and justifying the "biology-plus-relationship" the Court established for unwed fathers); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2267 (2017) (analyzing how the unwed father cases set up an approach to parentage that "situate[es] women, but not men, as naturally responsible for nonmarital children"); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279 (2015) (addressing "the surprisingly neglected story of constitutional challenges to 'illegitimacy'-based classifications, and to other 'illegitimacy penalties'"); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U.J. GENDER SOC. POL'Y & L. 387, 389–90 (2012) (arguing "the Court's decision to credit—or discredit—the rights claims of unmarried fathers is largely contingent on whether or not the petitioner functioned in the manner of a father and husband (rather than just as a father)").

Article, which examines how fraud helps set the bounds of nonmarital parentage across various doctrinal settings, ranging from inheritance to wrongful death to citizenship transmission.[10] Importantly, this Article does not claim to identify every instance where fraud is raised. Instead, it follows the logic of fraud across various constitutional contexts to evaluate its merits as a justification for continuing to enforce sex-based distinctions. The conclusion that emerges from this analysis is that concerns over fraud, which sound in an objective and empirical register, are in fact masking contestable judgments about who is a family and who can access material benefits as a result.

The way that fraud operates to regulate *marriage* has been more thoroughly addressed. In the aptly titled piece *Marriage Fraud*, Kerry Abrams surveys the proliferation of marital fraud doctrines in order to better "approach[] the issues of how to define marriage and its proper place in our legal landscape."[11] Abrams takes up the question of "what marriage is *not*" to determine what marriage *is*, which she answers by looking at "when and why the law determines that a particular marriage is a 'sham' or a 'fraud.'"[12] Beyond fraud's appearance in doctrine, Courtney Cahill has examined how it has been wielded as a rhetorical tool in arguments marshalled against same-sex marriage.[13] Cahill explores denunciations of same-sex marriage that position it as "a species of public fraud" and considers how its critics employ the language of counterfeit to impugn the institution along with "its imitative approximations, civil unions and domestic partnerships, as well as the so-called artificial reproduction that occurs in the context of a same-sex relationship."[14]

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10. The Article focuses on Supreme Court decisions that explicitly rely on fraud as a rationale in enforcing distinctions between unwed mothers and fathers. This means both that they involve considerations of fraud and assess, in some form, the differential treatment of parents on the basis of sex. This means also that *Stanley v. Illinois*, 405 U.S. 654 (1972), one of the canonical unwed father cases, will not be discussed at great length given that fraud does not appear in its reasoning. This Article nonetheless understands *Stanley* to fit into the larger conceptual rubric set forth by the Court's decisions that rely on fraud in that it embraces similar assumptions about paternal absence and maternal presence based on the lack of marriage between the parents. *See infra* note 241.

11. Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 4 (2012). As Abrams has shown, "[m]arriage fraud doctrines . . . vary considerably depending on the goals of the benefit a person is attempting to use marriage to obtain. The fraud doctrines, in other words, tell us what work the law is asking marriage to do." *Id.* at 5.

12. Abrams explains that until her piece, "no one ha[d] observed that marriage fraud doctrines exist across doctrinal boundaries, attempted to make sense of these doctrines as a whole, or developed a coherent explanation of why marriage fraud doctrines have proliferated so extensively in recent years." *Id.* at 5. This Article has a similar goal—it considers the way that fraud functions across different fields, except in constitutional analyses *outside* of marriage. It does not, however, propose an explanation for *why* fraud is the rationale of choice—instead, it describes how it has developed and towards what ends it is used.

13. *See* Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 397 (2007) (addressing the rhetoric of counterfeiting and deception in arguments against same-sex marriage, revealing that "while on its face illogical, [it] is intimately tied to concerns about sodomy and same-sex procreation—each of which, this Article maintains, is viewed as a fraudulent imitation that not only threatens the currency of marriage but also represents a kind of economic fraud").

14. *Id.* at 395. Cahill argues against adopting this language of counterfeit for placing sexual

Finally, in considering the history of common law marriage, Ariela Dubler has shown how concerns over dissembling female behavior instilled doubts in the law's ability to sort valid marriages from invalid ones where no formalities have been followed.[15] Dubler specifically identifies "legislative fears of feminine fraudulence" as a motivating factor in the move to abolish common law marriage during the early twentieth century.[16] Fraud, albeit with a different legal purchase in each context, has consistently been used to police the bounds of who gets to marry and what counts as a valid marriage.[17]

The Court's use of fraud outside of marriage works in similar norm-enforcing ways. Its opinions voice concerns over fraud in the language of paternity; paternity fraud occurs when a man has no genetic link to his alleged child.[18] Initially, the Court had considered, and dismissed, the question of fraudulent *maternity*. In *Glona v. American Guarantee & Liability Insurance Co.*, the Court reasoned that any concerns over women "asserting motherhood fraudulently" would be adequately addressed by setting the "burden of proof" appropriately, and that equal protection "necessarily limits the authority of a State to draw such 'legal' lines as it chooses."[19] As the Court's opinions turned to fathers, fraudulent maternity disappeared, and fraudulent paternity materialized as a principal justification for differentiating between unwed parents. Fraud plagues the father and not the mother, according to the Court, based on what biology dictates: the father, unlike the mother, does not give birth, and so his identity can never be certain.[20] The inferior proof available to the man means that claims of fatherhood are more susceptible to fraud.[21] Biology, broadly defined to encompass both birth and genetics, emerges as a central reason for differentiating between unwed parents without running afoul of the Constitution.[22]

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minorities in a familiar double-bind "that casts sexual minorities as both fraudulent (attempting to pass) and not fraudulent enough (refusing or being unable to pass)." *Id.* at 463–64.

15. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 964 (2000) ("With the rise of the conniving adventuress as the prototypical female in the minds of lawmakers came the fall of common law marriage.").

16. *Id.* at 967.

17. Relatedly, Jill Hasday has considered in great depth when and how deception fails to be actionable in the context of intimate relationships. In *Intimate Lies and the Law*, Hasday details how legal doctrines across different fields "regularly block[] deceived intimates from accessing the remedies that are available for deception in other contexts." JILL ELAINE HASDAY, INTIMATE LIES AND THE LAW 2 (2019).

18. The classic formulation of paternity fraud entails a mother making the erroneous allegation. *See, e.g.*, Dier v. Peters, 815 N.W.2d 1, 4 (Iowa 2012) ("'Paternity fraud,' also known as 'misrepresentation of biological fatherhood' or 'misrepresentation of paternity,' 'occurs when a mother makes a representation to a man that the child is genetically his own even though she is aware that he is not, or may not be, the father of the child.'"). While the Supreme Court cases that follow appeal to this structure, they also identify individuals beyond the mother as potentially responsible for the fraud, including children and other direct lineal descendants.

19. *See* Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968).

20. *See id.* at 268–69; *Parham*, 441 U.S. at 355.

21. *See Lalli*, 439 U.S. at 271 ("Because of the particular problems of proof, spurious claims may be difficult to expose."). The Court does not acknowledge any daylight between problems of proof and the commission of fraud, and generally treats them as inseparable.

22. *See* Douglas NeJaime, *Biology and Illegitimacy*, 74 SMU L. REV. 259, 266 (2021) ("[B]iological

But neither birth, nor the proof it furnishes, is doing the work of justifying the sex-based distinctions made by the cases or the underlying laws. Although the Court claims to care about paternity fraud, it routinely ignores evidence of a biological link where it exists and rejects it when it is offered as a relevant consideration. The only proof the law ever requires is *legal* proof of paternity—as in a court order of paternity—which does not necessarily turn on the existence of a biological tie, or on a relationship between father and child. It is also the exact same proof the Court rejects in the context of fraudulent maternity, given how tangential it found it to be to the existence of the mother-child relationship.[23]

Paternity fraud thus works to obscure the Court's actual concern, which is the absence of a formal relationship between the father and mother. The laws all assume, and the Court affirms, that the father's lack of marriage to the mother will result in the lack of a relationship with his child. This definition of paternity harkens back to an older view, whereby fatherhood was established exclusively by marriage to the mother.[24] Understanding that marriage is still the only relevant metric for fatherhood clarifies why the requirements are imposed only on men. It also explains why the sole way to establish paternity is through a formality, akin to the formality of marriage, thereby ignoring proof of any genetic or actual relationship between father and child. And it shows why "modern developments of science," already recognized in addressing questions of paternity since the 1950s, make no inroads in changing the laws regulating unwed fathers, or in assuaging concerns over proof.[25]

The Court is, however, still worried about fraud, even if it is not the fraud of biological fatherhood. The fraud at stake is that of nonmarriage—of seeking benefits outside of marriage, benefits that should be exclusive *to* marriage. Here lies the force of fraud, and the hold it has over our laws. The Court's reliance on fraud

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connection was constructed as a potent remedy—both in constitutional law and family law—for the nonrecognition of nonmarital parent-child relations.").

23. *Glona*, 391 U.S. at 75–76.

24. To the point where the law preferred marriage over biology in determining who was the father of a child. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 201–02 (1988) ("In the agonizing conflict between a man's right to limit his paternity only to his actual offspring and the right of a child born to a married woman to claim family membership, the common law, first in England and then in America, generally made paternal rights defer to the larger goal of preserving family integrity.").

25. The Uniform Act of 1952 shows how blood tests were already a known and widely discussed consideration in determinations of paternity. *See, e.g.*, *Uniform Act on Blood Tests to Determine Paternity*, 61 HANDBOOK OF THE NATI'L CONF. OF COMM'RS ON UNIF. STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 434, 434 (1952) ("In paternity proceedings, divorce actions and other types of cases in which the legitimacy of a child is in issue, the modern developments of science have made it possible to determine with certainty in a large number of cases that one charged with being the father of the child could not be."). To be clear, blood tests at this point in time were more useful in establishing who the father was *not* rather than who he was. *Id.* at 434–35. The Prefatory Notes to the Act do indicate, however, that it "has [] been drawn to permit the admissibility of such evidence proving the possibility of paternity, subject to the discretion of the court, depending on the infrequency of the blood type disclosed." *Id.* at 436. It also recognizes that "the advancement of science" would eventually make such evidence more valuable. *Id.*

protects the primacy marriage, yet without doing so overtly. Concerns over paternity fraud are routinely invoked by courts and legislatures, and they register as innocuous, scientific, even self-evident, concerns.[26] But the way fraud is instrumentalized reveals that it is neither an empirical, nor an inevitable, justification. Addressing how fraud is constructed outside of marriage lays bare the value judgments that legal actors are making about the relationships that come before them. Considering side-by-side the different contexts in which fraud is invoked reveals that what is presented as an objective concern over a genetic connection is, ultimately, a value-laden determination about what kinds of relationships the law should, and eventually does, recognize.

This Article proceeds in three parts. Part I identifies how fraud makes its way into the Court's opinions considering state laws that impose different requirements on unwed fathers and unwed mothers in setting out rights to property. While this Part focuses on the Supreme Court, whose jurisprudence lays the scaffolding for constitutional interpretation writ large, its reasoning appears in arguments the parties present to the Court, as well as in lower state court opinions that generally uphold laws making it more difficult for rights to follow from paternal, than maternal, relationships. The Court's initial cases are explicit in their reasoning: Fraud is raised concurrently with the state interest in promoting legitimate relationships (i.e., marriage). Eventually, however, marriage promotion appears more selectively, and not always as openly, and so fraud becomes its complete proxy in the Court's reasoning. The fact that the only legally acceptable solution throughout these decisions is for the father to formally acknowledge his child renders clear that marriage—or its formal imitation—remains the motivating element behind the charge of fraud. It also solves the puzzle of why concubines appear periodically in these cases that are purportedly about the parent-child relationship—because the concern is, fundamentally, with the fact that the father did not marry the mother.[27]

Part II then turns to the cases that distinguish between unwed parents for purposes of transmitting citizenship to their children born abroad, which rely almost entirely on the reasoning the Court adopts in the state law opinions considered in Part I. These citizenship decisions move even further away from the governmental interest in promoting a legitimate relationship that was a more visible rationale in the illegitimacy cases and instead make proof of a biological relationship between father and child the central justification for imposing more onerous requirements

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26. *See, e.g.*, 8 FOREIGN AFFAIRS MANUAL § 301.4-1(E)(2) Paternity Issues ("Paternity fraud is most commonly found in cases where the claimed biological mother is an alien."); In re Karas' Estate, 329 N.E.2d 234, 240 (Ill. 1975) ("While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances.").

27. In a case upholding a statute excluding a child born out of wedlock from taking under intestacy from her decedent father, the Supreme Court appeals to the difference between "a wife and a concubine." *See* Labine v. Vincent, 401 U.S. 532, 538 (1971) ("There is no biological difference between a wife and a concubine nor does the Constitution require there to be such a difference before the State may assert its power to protect the wife and her children against the claims of a concubine and her children."); *see also* discussion *infra* Part I.B.

on the unwed father. Still, understanding that marriage remains the central concern clarifies the Court's reasoning. While the cases once again frame the problem in terms of proving the identity of the father, the sole relationship that matters is the one he has to the mother. If he is not married to her, the law presumes he will have no relationship to his child—even if there is evidence of a genetic connection or of an actual relationship. Because marriage provides the exclusive paradigm for fatherhood, the law recognizes only a stand-in for that formal relationship, which is *legal* proof of paternity. These cases also disclose an important dimension of paternity fraud—namely, that the mother participates in facilitating its commission. The Court endorses the government's anxieties over activities that take place in a foreign country, which are really anxieties over a foreign woman's veracity.[28] This Part ends by contextualizing the Court's opinions within the larger racialized history of American law and policy that refused to recognize certain marriages entered into by servicemen stationed abroad.[29]

Finally, Part III considers why exposing the work of fraud matters. Identifying fraud's underpinnings weakens the rationale's ability to prop up the constitutionality of laws that rely on sex-based distinctions outside of marriage. As Parts I and II show, the fraud of paternity, which is the fraud these cases claim to be concerned with, is immaterial to the Court's analysis. Concerns over fraud and problems of proof should not be considered legitimate state interests that justify distinguishing between unwed parents on the basis of sex.[30] By relying on the objective-sounding reason of paternity fraud, these opinions avoid contending with the legacy of a legal regime that once recognized fatherhood only within marriage.[31] "Fraud," moreover, is not a neutral rationale. The use of fraud reinforces gendered stereotypes that would otherwise be unconstitutional, assuming women will always be mothers while men are only sometimes fathers. Paying attention to the context in which the cases arise shows that fraud also works in race-salient ways. Fraud impugns nonmarriage in terms commonly leveled against Black women in particular and continues to prevent the children of mostly non-white mothers from attaining American citizenship.[32]

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28. The Court voices doubts that she "will be sure of the father's identity." *Nguyen*, 533 U.S. at 65. These arguments rely on the same gendered dynamics that define paternity fraud. *See, e.g.*, Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1307–08 (describing statutes that "privilege men's choices about whether to remain a legal father over women's preferences" and "which were enacted at the behest of men who learn that they are not biological fathers of children born to their wives or girlfriends and who have banded together to fight 'paternity fraud'").

29. *See generally* SUSAN ZEIGER, ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY (2010).

30. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 799 (1977) ("Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.").

31. *See* discussion *infra* Part III.A.

32. *See* discussion *infra* Part III.B.

The stakes of the debate over what rights unwed mothers and fathers ought to have therefore must include the ways that marriage—propped up by claims of fraud—is promoted to the detriment of those living outside of it.[33] Denying unwed fathers and their children recognition has the effect of preventing them and, often, the unwed mothers, from accessing material benefits—which is *the* key issue presented by these cases.[34] Now that we understand how fraud works, we can better critique arguments that reflexively rely on it.

I. PATERNITY FRAUD

In a series of cases beginning in the late 1960s, the Supreme Court began striking down laws that discriminated against unwed parents and their children.[35] This period is understood to have ushered in "a paradigm shift in the jurisprudence regarding the rights of nonmarital children" by finding that laws penalizing illegitimacy were unconstitutional.[36] The shift, however, was incomplete, as the Court continued to uphold distinctions where the unwed father was concerned.[37] This Part examines the cases from that period that specifically raise fraud as a consideration in deciding the constitutionality of laws differentiating between mothers and fathers.[38] It traces how the possibility of fraudulent claims, which first emerged in opinions addressing unwed mothers, gained traction in opinions addressing unwed fathers, where casual references to "lurking problems with respect to proof of paternity"[39] became an accepted governmental rationale, and "avoiding fraudulent claims of paternity" was deemed "a permissible state objective."[40]

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33. *See also* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2301 (2016) (addressing how "the unwed fathers cases helped to enshrine marital supremacy in constitutional law").

34. The cases in Part I all involve claims that lead to property—including intestacy, workers' compensation, wrongful death claims, and requests for support. *See* discussion *infra* Part I. The cases in Part II all involve claims to American citizenship. *See* discussion *infra* Part II.

35. *See, e.g.*, Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

36. Leticia Saucedo & Rose Cuison Villazor, *Illegitimate Citizenship Rules*, 97 WASH. U.L. REV. 1179, 1190 (2020).

37. *See id.* at 1192 ("[T]he Supreme Court's jurisprudence on the rights of nonmarital children is far from consistent.").

38. There is considerable legal scholarship addressing other aspects of Supreme Court cases on the rights of unwed parents and their children. *See, e.g.*, Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2224–29 (2020) (addressing these decisions, among others, in arguing that the constitutional law of maternity asserts that "maternity is certain, obvious, monolithic" and should be reformed to take into account the "new maternity" that has been "made possible by alternative reproduction and new forms of family and parenthood"); Mayeri, *supra* note 33, at 2300 (addressing these decisions, among others, in considering "the history of nonmarital fathers' constitutional equality claims"); Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and At Home*, 36 HARV. J. L. & GENDER 405, 410 (2013) (addressing these decisions, among others, to argue that "the Court's equal protection cases addressing unwed parents across borders, both geographical and doctrinal, show[] that its decisions consistently reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child's life thereafter"); Murray, *supra* note 9, at 389 (addressing these decisions, among others, in arguing "that constitutional protections for unmarried fathers and their children have been contingent on adhering to norms forged in the marital family").

39. Gomez v. Perez, 409 U.S. 535, 538 (1973).

40. Parham v. Hughes, 441 U.S. 347, 357 (1979) (plurality opinion).

This Part begins by analyzing the initial cases that arose in the context of unwed mothers. There, concerns over fraud are raised but rather easily brushed aside. What matters, the Court explains, is "the intimate, familial relationship between a child and his own mother."[41] This Part then turns to the cases that address unwed fathers. While they vary in their conclusions of whether treating unwed fathers and their children differently is constitutional, they are uniform in raising problems of proof that plague the paternal relationship. These problems of proof and corresponding potential for fraud implicate the question of whether the father has a genetic connection to his child.[42] But, the only evidence the Court considers is *legal* proof of paternity, and the distinction the laws make between unwed fathers and unwed mothers turns on a legal, rather than a biological, basis. The Court's final pronouncement on the question, in *Parham v. Hughes*, makes this clear: it relies on the fact that only fathers must legitimate their children born outside of marriage—a requirement imposed by *law*, not biology—to justify the dissimilar treatment they receive from unwed mothers.[43]

By addressing these decisions chronologically, along with the lower state court opinions they cite, this Part shows how the Court introduces concerns over problems of proof and efforts to discourage fraud as important state interests *together with* the promotion of legitimate relationships. Once marriage falls out of the analysis, concerns over fraud continue the work of promoting it by ensuring that fatherhood is only recognized within marriage, or its formal proxy. While the state interest in fraud prevention provides a veneer of biological inevitability to the assumption that women are always mothers and men are only sometimes fathers, it is marriage, not biology, that explains why fathers are only recognized when they have taken steps to formalize their relationship—if not by marrying the mother, then by legitimating their child.

A. Fraudulent Mothers: Levy v. Louisiana & Glona v. American Guarantee & Liability Ins. Co.

The first set of Supreme Court opinions to consider illegitimacy classifications found them unconstitutional. In two consolidated cases from Louisiana—*Levy v. Louisiana* and *Glona v. American Guarantee & Liability Ins. Co.*—the Court addressed whether excluding unwed mothers and their children from bringing wrongful death suits violated equal protection.[44] The plaintiffs in *Levy* were Louise Levy's five minor children, who were seeking to sue on behalf of the death of their mother.[45] The plaintiff in *Glona* was Minnie Brade Glona; she was bringing suit on

41. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

42. These cases arise in the context of inheritance or wrongful death, where either a child or a parent has died. *See, e.g.*, *Parham*, 441 U.S. 347; *Lalli*, 439 U.S. 259.

43. 441 U.S. 347.

44. *Levy*, 391 U.S. 68; *Glona*, 391 U.S. 73.

45. Louise Levy died as a result of being repeatedly denied treatment at the Charity Hospital in New Orleans. Brief for Appellant, Levy v. Louisiana, 1967 WL 113865, at *4–5. Levy sought treatment

behalf of her son, who was killed in a car accident in Louisiana,[46] at the age of nineteen.[47] In both cases, Justice Douglas wrote opinions siding with the plaintiffs, concluding that the state of Louisiana's decision to exclude unwed mothers and their children was unconstitutional.[48]

Justice Douglas's opinions were brief and rather cryptic.[49] What clearly emerged in each, however, was the importance of the relationship between mother and child. In *Levy*, the Court relied on the "intimate, familial relationship between a child and his own mother," reasoning that the harm the children felt from their mother's death was wholly unrelated to their legal status as "illegitimates."[50] The Court noted that Louise Levy had "cared for" her children "and nurtured them; they were indeed hers in the biological and in the spiritual sense."[51] Just as "she treated them as a parent would any other child,"[52] so too her children "suffered . . . in the sense that any dependent would," irrespective of whether they were born within or outside of wedlock.[53] The Court in *Glona* also relied on the "biological relationship" between mother and child.[54] Justice Douglas observed that the cases differed in that Minnie Glona, unlike the "innocent, although illegitimate" children in *Levy*, had some agency in deciding to have children outside of marriage.[55] Nevertheless, the Court concluded that where the plaintiff is "plainly the mother," it would be irrational to prevent her from bringing a wrongful death suit on behalf of her child.[56]

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at the Charity Hospital for "symptoms of tiredness, dizziness, weakness, chest pain and slowness of breath." *Id.* She was sent home. *Id.* She returned with more severe symptoms a few days later. *Id.* Again, she was sent home. *Id.* at *5. A few days later, "she was brought to the hospital in a comatose condition." *Id.* She was finally, and correctly, diagnosed with hypertension uremia. *Id.* She died a week later. *Id.*

46. 391 U.S. at 73–74.

47. Oral Argument, March 27, Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) available at https://www.oyez.org/cases/1967/639 [https://perma.cc/ZW2N-2TMK].

48. *Levy*, 391 U.S. at 71; *Glona*, 391 U.S. at 75.

49. *See* Mayeri, *supra* note 9, at 1293–94 (2015) (noting that the opinions "drew criticism for their enigmatic treatment of the constitutional issues at stake"); *see also* Harry D. Krause, *Legitimate and Illegitimate Offspring of* Levy v. Louisiana: *First Decisions on Equal Protection and Paternity*, 36 U. CHICAGO L. REV. 338, 342 (1969) ("Justice Douglas' inexact analysis, compounded by his irrelevant references to incorporated bastards, Shakespeare, and 'nonpersons' provided an easy mark for Justice Harlan's biting dissent . . . .").

50. *Levy*, 391 U.S. at 72.

51. *Id.* at 72. Louise Levy was a single, Black mother who, according to the brief filed on behalf of her children, "worked as a domestic servant to support them and either took them or had them taken to Mass every Sunday." Brief for Appellant, Levy v. Louisiana, 1967 WL 113865, at *4. For a discussion of the different arguments raised in *Levy* and the background strategy of the case, see Mayeri, *supra* note 9, at 1290–97.

52. *Levy*, 391 U.S. at 70.

53. *Id.* at 72.

54. *Glona*, 391 U.S. at 75–76.

55. *Id.* at 75. The plaintiffs' brief in *Levy* distinguished their situation from that of *Glona* given that the children had "no control" over the acts of their mother. *See* Mayeri, *supra* note 9, at 1293.

56. *See Glona*, 391 U.S. at 75 ("It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. . . . [And] it hardly has a causal connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability.").

The opinion in *Glona* ends by declaring that "suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently."[57] The Court's assertion of fraudulent motherhood appears without any further citation or elaboration; it is not featured in the arguments submitted to the Court in writing or at oral argument.[58] The nature of the fraud the Court is referring to is, however, clear from the surrounding circumstances: the fraud is that of a claimant asserting she is the mother of a child when she is not. Justice Douglas easily dismisses this concern, explaining that the appropriate response to the possibility of maternity fraud is to set the burden of proof appropriately rather than to prevent such suits entirely.[59]

In rejecting the concern over fraudulent maternity, the Court defines motherhood by referencing both a genetic connection and a caretaking relationship.[60] As the Court explains, the unwed mother not only shared a biological relationship with her children, but she also took responsibility over them: "[S]he cared for them and nurtured them; they were indeed hers."[61] The crux of the maternal relationship is therefore "biological"[62] and "spiritual,"[63] rather than legal.

Louisiana law, unlike other jurisdictions, allowed both parents, not just unwed fathers, to legitimate a child by law, a point raised more than once at oral argument.[64] In particular, Louisiana authorized unwed mothers to legitimate a child by marrying the father, adopting, or appearing before a notary and two witnesses.[65] It was this last option that the Justices pursued at some length, noting that the mother could have legitimated her child simply by visiting a notary.[66] Yet the Court in *Glona* did not consider this legal avenue dispositive, given its understanding of motherhood as a relationship rooted in biology and caretaking. The unwed mother's failure to legitimate her child did not negate the law's ability to recognize the existence of a

57. *Id.* at 76.

58. It is difficult to provide support for a negative, but neither the briefs nor the oral arguments raise false claims of maternity.

59. *Id.*

60. The cases do not separate establishing a genetic relationship from a caretaking one for an unwed mother, as they do for an unwed father, so it is difficult to break the two apart. *See* Albertina Antognini, *Unwed Parents: The Limits of the Constitution*, 35 J. AM. ACAD. MATRIM. LAW. 425, 434–39 (2023) (arguing that for women, birth functions "as both proof of a genetic connection and evidence of the parental relationship that will ensue" while for men "biology determines neither poof of a genetic connection nor . . . evidence of a parental relationship"); *see also* Cahill, *supra* note 34, 2263 (describing "constitutional law's paradigmatic mother: a singular and obvious woman in whom biological, social, and legal motherhood converge").

61. *Levy*, 391 U.S. at 72.

62. *Id.* at 75.

63. *Id.* at 72.

64. Oral Argument, March 27–28, Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) available at https://www.oyez.org/cases/1967/639 [https://perma.cc/ZW2N-2TMK].

65. Brief on Behalf of Respondents, Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), 1968 WL 112853, at *10. The mother had acknowledged, but not legitimated, her child. *Id.* at *21–22.

66. *See* Oral Argument, March 27–28, OYEZ, Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) available at https://www.oyez.org/cases/1967/639 [https://perma.cc/ZW2N-2TMK] (exchange between Justice Stewart and attorney David R. Normann and exchange between Justice Marshall and attorney William F. Wessel).

relationship with her child. Nor did the possibility of fraudulent motherhood render distinctions made on the basis of illegitimacy constitutional.[67]

Justice Harlan's dissent makes clear that the Court's focus on the "biological" and "spiritual" relationship between mother and child was not inevitable. Justice Harlan describes Louisiana's statutory scheme as engaging in acceptable, even if arbitrary, legal line-drawing and concludes that it could reasonably exclude considerations of dependency, biology, or affection.[68] He explains that Louisiana chose "to define these classes of proper plaintiffs in terms of their legal rather than their biological relation to the deceased."[69] Because of this, "the whole scheme of the Louisiana wrongful death statute . . . makes everything the Court says about affection and nurture and dependence altogether irrelevant."[70]

The dissent understands the relationship between mother and child to be, fundamentally, a legal one. As such, the state had permissibly decided to recognize some—formalized—relationships and not others. Moreover, the state is amply within its powers "to simplify a particular proceeding by reliance on formal papers rather than a contest of proof."[71] In fact, the dissent described the Court's decisions in *Levy* and *Glona* as "exceedingly odd" in that they now meant that such suits "must as a constitutional matter deal with every claim of biological paternity or maternity on its merits."[72]

Justice Harlan's reasoning draws strength from the state's asserted interests in promoting marital relationships. The briefs submitted in favor of upholding the statute explain that "[t]he policy of the state is to encourage and preserve . . . legitimate familial relationships"[73] and that distinctions based on status promote "the preservation of the integrity and the rights flowing from legal relationships and the discouraging of promiscuity, bigamy, adultery, illegitimacy and other undesirable consequences of uncontrolled sexual conduct."[74] This interest in promoting marriage explains why Justice Harlan relies on the relationship between "paramour" and "wife" in a case addressing the relationship between mother and child.[75] Justice Harlan supports his view of the law's constitutionality with the following example: "A man may recover for the wrongful death of his wife, whether he loved her or

67. *Glona*, 391 U.S. at 76. The legal distinction the Court ignored in *Glona* would become insurmountable in *Parham v. Hughes*, which upheld a Texas statute excluding unwed fathers from bringing a wrongful death statute unless they legitimated their children. *See* Parham v. Hughes, 441 U.S. 347 (1979); *see also* discussion *infra* Part I.B.

68. *Levy*, 391 U.S. at 76–77 (Harlan, J., dissenting).

69. *Id.* at 79 (Harlan, J., dissenting).

70. *Id.* at 78 (Harlan, J., dissenting).

71. *Id.* at 80 (Harlan, J., dissenting).

72. *Id.* at 81 (Harlan, J., dissenting).

73. Brief of Appellee, Levy v. Louisiana, 391 U.S. 68 (1968), 1968 WL 112826, at *29.

74. Brief on Behalf of Respondents, Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), 1968 WL 112853, at *23. *See also* Brief of Appellee, Levy v. Louisiana, 391 U.S. 68 (1968), 1968 WL 112826, at *7 ("In matters of family law, status is the starting point.").

75. *Levy*, 391 U.S. at 79 (Harlan, J., dissenting).

not, but may not recover for the death of his paramour."[76] The distinction between wife and paramour is *the* paradigmatic illustration to support the proposition that family rights ought to follow from family status, and not from the mere existence of an intimate relationship.[77] The dissent would have upheld the state's decision to recognize only legitimate family relations—which means recognizing wives, not paramours. Derivative of this cardinal preference is that the state may differentiate between mothers—married and unmarried.

Importantly, the majority nowhere rejects these state interests; it merely prevents them from justifying the constitutionality of the exclusions before it. In *Levy*, the status of illegitimacy is secondary to the harm inflicted on the unwed mother's dependent children, whom the Court reasons should be able to bring wrongful death claims on her behalf: "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."[78] In *Glona*, where the unwed mother is the plaintiff, the Court concludes that it would "be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death."[79] Rather than critique the state interest in promoting "legitimate familial relationships," the Court only finds that those interests would not be served here, where there was an actual, if not formal, relationship between unwed mother and child.[80] Assertions of fraud are less material where the Court presumes that a caretaking and a biological relationship exist.

B. Fraudulent Fathers

Unwed fathers soon made their way into Supreme Court decisions addressing the constitutionality of classifications based on illegitimacy.[81] Unwed mothers were only ever considered in these cases due to a quirk of Louisiana law; every other jurisdiction provided unwed mothers and their children with rights they mostly denied to unwed fathers.[82] The opinions addressing unwed fathers—in contexts ranging from wrongful death, to workers' compensation, to intestacy—took up and

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76. *Id.* at 79 (Harlan, J., dissenting).

77. *Cf.* Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family"*, 4 THEORETICAL INQUIRIES L. 797, 799 (2003) (describing how legal and social texts at the turn of the century and into the 1940s "sought to minimize the potential threat that single women posed to marriage's role as both the primary structure for male-female relations, as well as the public locus of for women's citizenship within a democratic polity").

78. *Levy*, 391 U.S. at 72.

79. *Glona*, 391 U.S. at 75. As the Court notes, "[i]n this sense the present case is different from the *Levy* case." *Id.*

80. *See* Cahill, *supra* note 38, at 2234–35 ("*Levy* and *Glona* signaled that it was particularly unsavory for the law to punish a biological mother-child relationship.").

81. Labine v. Vincent, 401 U.S. 532 (1971).

82. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 95 (2003) ("In 1968, Louisiana was the only state that did not allow a suit for wrongful death of a mother by a non-marital child, because it placed men and women in the same position, allowing neither parent to sue for wrongful death. In every other state, children were allowed to sue for a mother's death but were precluded to various degrees from suing for a non-marital father's death.") (footnotes omitted).

expanded the concerns over fraud raised in *Glona*, which were articulated as problems of proof that pertained specifically, and eventually exclusively, to paternity. While the Court found that these problems were "not to be lightly brushed aside," it was careful to note that "neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."[83] Soon, however, concerns over proof became an important enough state interest to uphold the constitutionality of distinctions made between unwed mothers and fathers.[84]

Strikingly, the concern in these cases over fraud and the problems of proof that enable it, do not turn on the biological, or actual, relationship between father and child. Instead, the Court's inquiry is singularly focused on whether there is a *legal* tie between them. Holding that proof of a genetic connection is not enough to overcome a concern over inferior proof of a genetic connection makes little sense—unless the concern is not really about the father-*child* relationship. Indeed, the problems of proof that go to the question of paternal identification only arise where there has been no formal recognition of the father-*mother* relationship. The real concern is with the lack of a formal relationship between father and mother. This explains why the cure can only be formal recognition—of the father-child relationship, in lieu of the father-mother one.[85]

This formal requirement was rejected outright in the cases addressing maternity, given the Court's acknowledgment of the biological and caretaking ties that plainly existed between mother and child. The Court does not, however, acknowledge the same in the context of the father-child relationship. Instead, fatherhood is defined by law, which the Court discarded as relevant in the context of motherhood. The result is that unwed mothers and unwed fathers are treated differently not on account of biology, as the Court claims, but on account of marriage.

1. *Labine v. Vincent*

The problems of proof with paternity the Court identifies do not materialize out of thin air; they were very much in the legal consciousness at the time of the Court's decisions. In the immediate wake of *Levy* and *Glona*, commentators and lower courts wondered how the decisions would apply to illegitimacy classifications beyond wrongful death claims.[86] They also questioned whether those same rights would

83. Gomez v. Perez, 409 U.S. 535, 538 (1973).

84. Parham v. Hughes, 441 U.S. 347 (1979) (plurality opinion).

85. *See* Murray, *supra* note 9, at 400 ("[T]he law's concern with illegitimacy is as much about the horizontal relationship between two adults who choose to live their intimate lives outside of marriage, as it is about the vertical relationship between a parent and a child born outside of marriage.").

86. *See, e.g.*, John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. PA. L. REV. 1, 2 (1969) (noting that "*Levy* and *Glona* require a reexamination of the constitutional limitations on discrimination against illegitimates" and arguing that the two opinions "provide a basis from which all the major legal disadvantages suffered by reason of illegitimacy can be challenged successfully"). The co-authors were attorneys who had participated in the brief for the appellants in *Levy*. *Id.* at 1, n. dd1.

be extended where the paternal, rather than the maternal, relationship was at issue.[87]

One of the central differences commentators brought to the fore in discussing unwed fathers was the potential for fraud that plagues paternity determinations and the proffers of proof that ought to be required as a result. A law review article written by two attorneys who had helped prepare the brief on behalf of the appellants in *Levy*, and who had argued in favor of finding the illegitimacy classifications unconstitutional, surmised that the concern over fraud the Court raised with respect to the mother was "more serious . . . with respect to the father."[88] They pointed to "the development of increasingly sophisticated blood tests" but concluded that "proof of paternity still involves considerable danger of fraud and inconclusiveness of evidence."[89] For the mother, proof a genetic relation was less of a concern "because the same records normally exist whether or not the mother is married."[90] The records the authors consider are those related to birth—because a mother gives birth regardless of her marital status, the evidence is presumably the same. Along similar lines, Professor Harry Krause, the architect of much of the litigation aimed at eliminating illegitimacy classifications, noted in the *Chicago Law Review* that a higher standard of proof "is especially necessary in paternity matters," given that "proof tends to disappear more quickly than in many other areas and in which the potential for fraud and blackmail abounds."[91]

The fraud these commentators raise—a fraud that can be detected by more advanced blood tests—goes to the question of whether a genetic relationship exists between parent and child.[92] The literature critical of illegitimacy classifications identifies this difference in proving a genetic connection as the only basis for differentiating between unwed mothers and fathers.[93] As such, the response the

87. *Id.* at 39 ("Although the new attitudes of these courts are a welcome change, the refusal of at least one court to extend the principles of *Levy* to the paternal relationship indicates that a more thorough analysis of the issues will be necessary before illegitimates are everywhere guaranteed the 'correlative rights which other citizens enjoy.'") (citation omitted).

88. *Id.* at 20.

89. *Id.* at 20–21.

90. *Id.* at 19.

91. Krause, *supra* note 49, 344 n.27.

92. *See id.* at 344 ("In view of the ease with which maternity may be established in most cases and in view of great scientific progress made in ascertaining paternity, it hardly is rational to consider satisfactory only one type of proof (marriage) and summarily exclude all other proof of parentage."). The consideration of blood tests in determining questions of paternity had already been addressed by the Uniform Law Commission, which made such evidence powerful enough to overcome the presumption of legitimacy. *See Uniform Act on Blood Tests to Determine Paternity* § 5, 61 HANDBOOK OF THE NATI'L CONF. OF COMM'RS ON UNIF. STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 434, 445 (1952) ("The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child."). The Act was enacted in nine states, *Prefatory Note*, UNIFORM PARENTAGE ACT, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 335–38 (1973), and is indicative of the considerations relevant to determining paternity at the time.

93. *See, e.g.*, Krause, *supra* note 49, at 348–49 ("There is no reason to think the proper legislative purpose of encouraging marriage any more valid when it is related to legal discrimination in the illegitimate child's relation with his father than when related to the mother. . . . There would seem to

literature recommends is to set the burden of proof appropriately.[94] To be clear, these concerns over paternity fraud are not themselves free from gendered stereotypes. In fact, many of the arguments assume the illegitimate child will be part of the mother's family, and not the father's, even as they do not make that assumption determinative.[95] They also presume that fraud is less likely where the unwed mother is concerned.[96] The conclusion that fraud is more common in the paternity rather than the maternity context implies, and at times explicitly states, that the unwed mother, or the illegitimate child, will lie about the father's paternity.[97] The authors do not find it necessary to articulate a reason why the illegitimate children, or the unwed fathers, would not lie where the unwed mother was concerned.[98]

Despite these discussions over the inferior nature of the proof available to fathers, the only state court to refuse to apply *Levy* to a claim for paternal support did so not based on problems of proof or fear of a missing genetic link.[99] Rather, the Supreme Court of Ohio in *Baston v. Sears* reasoned that *Levy* was inapplicable to an unwed father because *Levy* was "based on the intimate, familial relationship which exists between a mother and her child, whether the child is legitimate or

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be only one factor that seriously distinguishes the relation to the father. This is the problem of ascertaining paternity, which will remain the irreducible minimum relevance of birth out of wedlock.").

94. Gray & Rudovsky, *supra* note 86, at 21 ("Here, the least drastic way of preventing fraudulent claims is reliance on an appropriate burden of proof.").

95. Separate from concerns over proof, the authors make assumptions throughout the article about the relative closeness shared by an unwed mother and her illegitimate children, as opposed to by an unwed father and his. *See, e.g.*, *id.* at 38 ("Although most illegitimates live with their mothers and might prefer to use her name . . . ."). While this might be correct as a matter of fact, especially given a legal system that recognizes and provides rights to unwed mothers and not unwed fathers, it is not free from gendered generalizations about women and men and their dispositions towards parenting. Importantly, however, the authors do not believe such a distinction should lead to providing lesser rights to the children of unwed fathers. *See, e.g.*, *id.* at 13 ("Even if most illegitimate children were not members of their parents' family circles (as may be true with their fathers), the 'family unity' argument would still fail. . . . Accordingly, if a state wants to make rights dependent on family intimacy, it must measure that quality directly.").

96. Regardless, Gray and Rudovsky understood the Court in *Levy* and *Glona* to have "considered and rejected the claims that an illegitimate parent's problem of proving [a] relationship justified a denial of substantive rights." *Id.* at 39.

97. The Gray and Rudovsky article discusses fraud committed by the "'wronged woman,'" *id.* at 21 n.124, and the "illegitimate child." *id.* at 22.

98. A version of this argument was critiqued by Justice O'Connor's dissent in *Nguyen v. INS*: not only is it the case that "a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost" but also "a mother's birth relation" might not be "verifiable *by the INS*." 533 U.S. 53, 81–82 (2001) (O'Connor, J., dissenting). One might point to the existence and frequency of paternity suits, as opposed to maternity suits, as proof of the discrepancy. But these suits are a direct result of the social and legal status of women that dictate that she has responsibility for children born out of wedlock, combined with her limited options to secure financial stability. Given that the concern articulated is strictly over the possibility of fraud in each context, rather than with any benefits associated with bringing suit against unwed fathers vis-à-vis unwed mothers, then there is no reason why such fraud would not affect the mother, and her children, equally.

99. Most courts applied *Levy* to unwed fathers. *See* Gray & Rudovsky, *supra* note 86, at 22 ("Since the *Levy* decision, courts in four states have considered the question of the illegitimate child's right to paternal support. Three courts have held that *Levy* requires the full equality of illegitimates; one decision is to the contrary.").

illegitimate."[100] The point was raised only in a footnote, without elaboration. But the reasoning is clear: the mother would develop an "intimate, familial relationship" with her children regardless of marriage while the father, outside of marriage, would not. Having brushed aside the relevance of *Levy*, the Ohio court concluded that denying an illegitimate child's right to support from the father was a proper exercise of the state's decision to promote marriage, a "relationship which is favored by the law and public policy."[101] The court in *Baston* thus differentiates between mothers and fathers because of who it assumes would engage in an "intimate, familial relationship" outside of marriage, and expressly relies on the promotion of marriage as a legitimate reason to prevent children from receiving support from their unwed fathers.

The first Supreme Court opinion to consider unwed fathers, *Labine v. Vincent*, reasoned in similar strokes. It concluded that excluding an unwed father's illegitimate child from inheriting under intestacy was constitutional.[102] Initially understood as an outlier to *Glona* and *Levy*, *Labine* contained the seeds of logic that would justify the more global distinctions between unwed fathers and mothers that remain ensconced in law. The case was brought by Rita Vincent, the illegitimate child of Ezra Vincent and Lou Bertha Patterson. A few months after Rita was born, Ezra and Lou had gone to a notary to execute a Louisiana State Board of Health form acknowledging that Ezra was Rita's "natural father."[103] Ezra and Lou were not married, but they were in a relationship until Ezra died six years later.[104] Ezra did not have a will.[105] Because he had never properly legitimated Rita, he had only publicly acknowledged her, Louisiana law barred Rita from taking any share of her father's inheritance.[106]

Labine could have been resolved by a relatively straightforward application of *Levy* and *Glona* to find that discrimination against illegitimate children was a violation of equal protection. In rejecting the relevance of those decisions, the Court, in an opinion authored by Justice Black, held that "the choices reflected by the intestate succession statute are choices which it is within the power of the State to make."[107] Justice Black explained that the Constitution does not prohibit all forms of discrimination, and relied on the twin figures of the wife and concubine that had appeared in dissent in *Levy* and *Glona* to make his point.[108] In particular, he reasoned that the Constitution has nothing to say about distinctions the law makes between a concubine and a wife; there, "the State may assert its power to protect the

100. Baston v. Sears, 239 N.E.2d 62, 63 (Ohio 1968) (overruled by Franklin v. Julian, 283 N.E.2d 813 (Ohio 1972)); *see also* Gray & Rudovsky, *supra* note 86, at 23–24 (discussing case).

101. *Baston*, 239 N.E.2d at 64.

102. Labine v. Vincent, 401 U.S. 532, 539 (1971).

103. *Id.* at 533.

104. *Id.* at 542 (Brennan, J., dissenting).

105. *Id.* at 533.

106. *Id.*

107. *Id.* at 537.

108. *See* discussion *supra* notes 76–78.

wife and her children against the claims of a concubine and her children."[109]

The protection of the wife vis-à-vis the concubine comes up in *Labine*, a decision that has no wife, only an unwed father and his child. The reason is that the relationship the Court is ultimately considering, and disfavoring, is that of a "concubine."[110] The Court defines the difference between a wife and a concubine in entirely legal, not to mention tautological, terms: the concubine's relationship is "illicit and beyond the recognition of the law" whereas the wife's relationship "is socially sanctioned, legally recognized, and gives rise to various rights and duties."[111] The Court comfortably rests its decision that the State can distinguish between children—legitimate and illegitimate—on the State's unobjectionable preference for formal marriage. The Court could not be more transparent about the legal basis of the distinction; in case there was any doubt, it also expressly dismisses the relevance of biology to the question before it.[112]

The appeal to formalities runs deep throughout *Labine* and the Court lists the many options that were available to Ezra, including executing a will or formally legitimating his child, which would have allowed Rita to inherit.[113] The formalities it catalogs are similar to those *Glona* considered and rejected as a means of curing the equal protection violation.[114] While the majority does not surface concerns over fraud or problems of proof, Justice Brennan notes in dissent that requiring formalities is just that—a response to "complicated questions of proof and the opportunity for both error and fraud in determining paternity after the death of the father."[115] Justice Brennan explains he would not have considered the potential for fraud determinative, given that Ezra is "plainly"[116] Rita's father and the "intimate, familial relation" that was present in *Levy* was also present here.[117] As such, Justice Brennan critiques the majority for relying on marriage, given "that the formality of marriage primarily signifies a relationship between husband and wife, not between

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109. *Labine*, 401 U.S. at 538.

110. *Id.* Moreover, not recognizing Rita's right to inherit means that Rita, and her mother, are unable to access any support from Ezra.

111. *Id.*

112. *Id.* ("There is no biological difference between a wife and a concubine nor does the Constitution require that there be such a difference before the State may assert its power to protect the wife and her children against the claims of a concubine and her children.").

113. *Id.* at 539 (reasoning that unlike *Levy*, "[t]here is not the slightest suggestion in this case that Louisiana has barred this illegitimate child from inheriting from her father").

114. *See* discussion *supra* notes 65–68. Moreover, if there had been two witnesses, the actions Ezra undertook would have been enough to formalize his relationship to Rita under the Louisiana law at issue in *Glona*. *Id.*; *see also Labine*, 401 U.S. at 552 (Brennan, J., dissenting) (noting that a state's interest in formalizing the relationship "is fully satisfied by a formal public acknowledgment").

115. *Labine*, 401 U.S. at 552 (Brennan, J., dissent).

116. *See Glona*, 391 U.S. at 76 (describing the unwed mother).

117. *Labine*, 401 U.S. at 552 (Brennan, J., dissenting) ("Mr. Vincent's illegitimate daughter is related to him biologically in exactly the same way as a legitimate child would have been. Indeed, it is the identity of interest 'in the biological and in the spiritual sense,' and the identical 'intimate, familial relationship,' between both legitimate and illegitimate child, and their father, which is the very basis for appellant's contention that the two must be treated alike.") (internal citations omitted).

parent and child."[118] Justice Brennan, however, misunderstands the nature of the majority's concern, which is precisely with the lack of marriage between father and mother. This overriding consideration explains why the formalities *Labine* upholds have nothing to do with the father-child relationship, which existed, and everything to do with the legal tie of marriage, which did not.

2. *Weber v. Aetna Casualty and Surety Co. & Gomez v. Perez*

In the two years following *Labine*, the Court appeared to retreat from its reasoning, finding that excluding unwed fathers' children from receiving workers' compensation and child support, respectively, was unconstitutional.[119] The Court in these cases raised problems of proof but did not allow them to justify the differential treatment of unwed fathers and their children.

In *Weber v. Aetna Casualty and Surety Co.*, the Court held that excluding illegitimate children from recovering under a Louisiana workmen's compensation law was unconstitutional.[120] When Henry Stokes died because of injuries sustained during the course of his employment, he had four "legitimate" children born to his marriage with Adlay Jones Stokes and two "illegitimate" children born to him and Willie Mae Weber, with whom he was living in a nonmarital relationship.[121] The Court, in a majority opinion written by Justice Powell, did not have much to say about unwed fathers in general, and admitted that "the illegitimate is more often not under care in the home of the father nor even supported by him."[122] In this case, however, the Court noted that both "[t]he legitimate and the illegitimate children . . . lived in the home of the deceased and were equally dependent upon him for maintenance and support."[123] It relied on *Levy* to reason that an "illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate child later acknowledged."[124] The Court addressed the state's interests in promoting legitimate relationships and minimizing problems of proof in the same breadth.[125] Justice Powell relied on *Glona* to explain that the former state interest "is not served by the statute,"[126] and concluded that the latter "is not significantly disturbed" by its decision.[127]

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118. *Id.* at 552-53 (Brennan, J., dissenting).

119. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Gomez v. Perez, 409 U.S. 535 (1973).

120. *Weber*, 406 U.S. at 165.

121. *Id.* Henry Stokes remained married to Adlay Jones Stokes, so he could not have married Willie Mae Weber. *See id.* at 176 (Blackmun, J., concurring).

122. *Id.* at 173. He ultimately dismissed that observation as irrelevant to the analysis, given that the statute required proof of dependency. *Id.*

123. *Id.* at 169–70.

124. *Id.* at 169.

125. *Id.* at 175.

126. *Id.*

127. *Id.* at 174–75 ("[T]he state interest in minimizing problems of proof is not significantly disturbed by our decision."). The dissent by Justice Rehnquist, disagrees: "[U]nder its decision additional and sometimes more difficult problems of proof of paternity and dependency may be raised." *Id.* at 183–84 (Rehnquist, J., dissenting).

Problems of proof were similarly raised and set aside in *Gomez v. Perez*, where the Supreme Court addressed a Texas law denying illegitimate children the right to support from their fathers.[128] Following *Levy* and *Weber*, the Court held in a per curiam opinion that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[129] A father's failure to marry the child's mother did not justify denying his children "needed support from their natural fathers."[130] The per curiam opinion acknowledged "the lurking problems with respect to proof of paternity."[131] But it reasoned that while they "are not to be lightly brushed aside, . . . neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."[132]

The opinion in *Gomez* does not elaborate on what exactly those problems might be, but the briefs submitted to the Court provide more detail. In an invited Amicus Brief written in support of the Texas law and of the lower court judgment, Houston attorney Joseph Jaworski argued that preventing illegitimate children from accessing support from their fathers advanced the state interest in avoiding paternity litigation.[133] His brief recites a veritable parade of horribles associated with paternity suits, including "the coercion, corruption, perjury and personal humiliation which are unavoidable aspects" of such litigation.[134] Paternity suits, according to Jaworski, are demeaning to all parties involved. The woman, responsible for bringing such suits in the first instance, would suffer a "degrading and humiliating ordeal"[135] given the intrusive questions she would be asked about her sexual activities.[136] The man, in turn, would be made vulnerable to "blackmail, extortion and 'shakedown' on the part of an unscrupulous woman.'"[137]

Men, however, were the real victims according to Jaworski: Not only were they stigmatized by the very bringing of these suits, but they were also likely "not in fact the fathers of the children in question."[138] The crux of the brief's complaints was that men would be mistakenly identified as the biological father of a child by a woman motivated by a "desire for retribution and pressure from her vindictive

128. *Gomez v. Perez*, 409 U.S. 535 (1973).

129. *Id.* at 538.

130. *Id.*

131. *Id.*

132. *Id.*

133. Brief of Amicus Curiae in Support of the Judgment Below, Gomez v. Perez, 409 U.S. 535 (1973) (No. 71-575), 1972 WL 136249, at *3.

134. Brief of Amicus Curiae, Gomez v. Perez, 409 U.S. 535 (1973) (No. 71-575), at *9.

135. *Id.* at *11.

136. *Id.* at *12 ("A 27-year-old [sic] complainant, attended in court by her 4-year old [sic] child, is asked: 'How old were you when you first had intercourse with the defendant?' She lowers her head and mumbles a response. A judge complains that he cannot understand her answer. 'It was when I was thirteen,' she then bellows, mindful of the necessity of 'speaking so the judges can hear you.' And so it goes. The wretched chronicles that unfold before the Court are likely to thrill none but the depraved.").

137. *Id.* at *10 (quoting Schatkin, *Should Paternity Cases be Tried in a Civil or Criminal Court?*, 1 CRIM. L. REV. (N.Y.) 18, 22 (1954)).

138. *Id.* at *14–15.

parents."[139] The brief supported its gendered assumptions about a woman's veracity and her sexual proclivities, alongside a man's presumed "innocence," by appealing to the underlying biological distinction between men and women: "[S]ince maternity is undisputed in most instances, requiring support from the mother does not entail the myriad of evils inescapable in imposing that obligation upon the father."[140]

The brief for the State of Texas also emphasized the differences between motherhood and fatherhood in terms of proof, with fatherhood being an "area where parenthood is not so readily proved or disproved."[141] This was, in fact, its main argument for why *Glona*—a case in which "claimant is plainly the mother"—did not apply to fathers.[142] Unlike Jaworski's Amicus Brief, its concern with proof was less explicitly linked to protecting men as "innocent victims,"[143] and more about streamlining the state's docket: Finding Texas's law unconstitutional would "trigger a potential torrent of litigation to establish paternity where matters of proof or disproof are significantly difficult and uncertain."[144] The underlying concern, however, remains the same—that of women claiming biological paternity where none existed and courts having to engage in lengthy litigation as a result.

These concerns over problems of proof are of a part with the common law rule that placed sole responsibility on the mother for any child born out of wedlock. The lower court opinion explicitly relied on this rule, explaining that "the father is under no legal obligation for the support and maintenance of his illegitimate children."[145] Jaworski's Amicus Brief similarly reasoned that differentiating between mothers and fathers is constitutional because "the mother, to the exclusion of the father, is the natural guardian of an illegitimate child."[146] The brief filed on behalf of the child in *Gomez* identifies the link between the two.[147] Appellants' brief explains that the concern over "opportunistic women" is an offshoot of the older view, popular "in the days of antiquity," which dictated that "men were 'free to sow their wild oats' while society endowed women, the weaker sex with the duty to remain chaste, or at least guard against the 'accidents of love.'"[148] The effect is to

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139. *Id.* at *12.

140. *Id.* at *21 (arguing that any "discriminat[ion] against women as well as illegitimate children" is therefore "not arbitrary").

141. Memorandum for the State of Texas as Amicus Curiae, Gomez v. Perez, 409 U.S. 535 (1973) (No. 71-575), 1972 WL 136248, at *4.

142. *Id.* at *4 (quoting *Glona*, 391 U.S. at 76).

143. 1972 WL 136249, at *15.

144. *Id.* at *10.

145. L—-G—- v. F—- O.P—-, 466 S.W.2d 41, 41 (1971). While it declined to consider "the various sociological reasons for or against such legislation" it did note "that a dominant feature of any type of legitimation statutes is the provision for proper standards and safeguards for determining the paternity of an illegitimate child." *Id.* at 42.

146. This argument based on the "common law duty" of mothers was raised in addition to problems of proof. Brief of Amicus Curiae, Gomez v. Perez, 409 U.S. 535 (1973) (No. 71-575), at *21.

147. Appellants' Brief on the Merits, Gomez v. Perez, 409 U.S. 535 (1973) (No. 71-575), 1972 WL 136247, at *20–21.

148. *Id.* at *21. The brief also criticized "the farfetched argument that if a paternal obligation to support was enforceable then, perchance, some opportunistic women might entrap the 'innocent' male

enshrine a distinctly gendered status quo that discriminates against the mother and the child by insulating the unwed father from having to provide any material support.[149] That is, "the mother of an illegitimate child bears the entire legal burden of supporting and maintaining such child."[150] In this way, contemporary arguments articulated in terms of proof carry forward rules of law that used to explicitly penalize women, while absolving men, from extramarital affairs and their consequences.[151]

While concerns over proof are raised side-by-side with the common law rule that placed sole responsibility for a child on the unwed mother, the opinions' focus on proving paternity works to obscure the effects of a legal regime that continues to impose burdens on the mother while sparing the father—a sex-based distinction about which equal protection might have something to say. The obfuscation is rather thinly veiled, however, given the stereotypical figures populating these arguments—unscrupulous women trapping unsuspecting men in their lies about paternity. In *Weber* and *Gomez*, at least, the Court rejects these problems as paramount.[152]

3. *Trimble v. Gordon*

Paternity fraud continues to be a focal point of the illegitimacy litigation when the Supreme Court ultimately declares such laws unconstitutional. In the case that would become *Trimble v. Gordon*,[153] the Supreme Court of Illinois in *In re Estate of Karas*, upheld an intestacy statute that excluded illegitimate children from inheriting from their fathers.[154] Its reasoning was premised centrally on problems of proof.[155]

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for pecuniary purposes." *Id.* at *20.

149. *Id.* at *20 ("Equally as onerous as the State's discrimination against the illegitimate child is its invidious scheme to place the entire burden of supporting such a child on the female parent.").

150. *Id.*

151. *Id.* at *20–21. The brief understands *Glona* and *Weber* to implicitly reject the argument that opportunistic women would entrap unsuspecting men, which also means that these cases do not impose sole responsibility on an unwed mother for a child born out of wedlock.

152. The requirement that a father pay child support now routinely trumps concerns over problems of proof. *See* Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 978 (2016) ("Constitutional protection of the relationship between nonmarital fathers and their children, once vulnerable (or even unacknowledged) under the 'old illegitimacy,' shows how such expansion can occur and how such developments can facilitate neoliberal objectives."). *See also* discussion *infra* notes 253-259. The cursory dismissal of the possibility of fraud in the cases addressing child support exposes how malleable of a concept it is, and how variable the extent of its influence can be. While these cases are intent on privatizing support, this impetus has less force in other contexts, as when the Court decides whether to grant rights under intestacy; in these cases, which are the focus of this Article, fraud becomes paramount, and privatizing support takes a backseat to narrowing the set of relationships the law recognizes based on the sex of the parent.

153. Trimble v. Gordon, 430 U.S. 762 (1977).

154. In re Estate of Karas, 329 N.E.2d 234 (Ill. 1975).

155. The Illinois court dismissed arguments based on racial discrimination and sex discrimination, noting that the former was not implicated and that the latter did not merit heightened scrutiny. *Karas*, 329 N.E.2d at 239. The court eventually dismissed the equal protection claim based on sex discrimination because it could only "be raised by individuals who are thereby affected as a result of their own sex." *Id.* at 241–42. Furthermore, the court did not understand the statute to discriminate against the surviving mother—by preventing her from receiving financial support from the unwed father in order to raise their child—while the surviving father in the same situation would be able to

The court laid out the numerous paths the unwed father could have taken to ensure that his child inherited, and honed in on the state's interest in "prohibiting spurious claims against an estate."[156] Such spurious claims were made possible by the vexing problems of proof. The court explained there was consensus on this simple point: "[P]roof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors," but "situations may arise which are fraught with fraudulent circumstances" when establishing paternity.[157] Even though the state interest in "promoting family life" that was central to *Labine*[158] was also present in *In re Karas*,[159] the Illinois court mentioned it only in passing, choosing instead to focus on the problems of proof inherent in paternity determinations.[160]

The distinction that *In re Karas* makes is not, however, based on who is genetically related to the child. It is based on who the court presumes will take care of the child, which for the father, follows directly from whether he is married to the mother. Unlike the typical case of paternity fraud, which was generally understood to result from the *mother's* false allegations, the examples the court provides consist entirely of fraud committed by *children*, along with other lineal descendants, against their father.[161] The "situations" the court lists include where "an illegitimate 'grandson' may seek to inherit from his 'grandfather'" or where "a 'father's' testamentary disposition is challenged on behalf of an illegitimate child who was born after the will was executed."[162] According to this logic, paternity fraud is more rampant than maternity fraud due to the accusations not of unscrupulous women but of unscrupulous children. The court does not explain why an unwed father would more likely be the target of a lie than an unwed mother—why, that is, the children of unwed fathers are more likely to lie than those of unwed mothers. But the unstated assumptions fill in the blank—a woman would take care of her child and they would each know of the other's existence, whereas a man would likely be unaware of any child born outside of marriage.[163] This distinction is based not on biology but on who presumably functioned as the caretaker to a child born out of wedlock.

The Supreme Court eventually found the Illinois statute unconstitutional in *Trimble v. Gordon*.[164] The facts underlying *Trimble*, which was one of two consolidated cases addressed in *In re Karas*, are undisputed. The father, Sherman

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receive support from the unwed mother. *Id.* at 242.

156. *Id.* at 240.

157. *Id.*

158. *Labine*, 401 U.S. at 536 n.6.

159. *Karas*, 329 N.E.2d at 238.

160. *Id.* at 238-39; *see also* Trimble v. Gordon, 430 U.S. 762, 768 (1977) (describing the Illinois Supreme Court's consideration of this state interest in "the most perfunctory" manner and hypothesizing that "[t]his inattention may not have been an oversight, for [the statute] bears only the most attenuated relationship to the asserted goal").

161. *See* discussion *supra* notes 133–145.

162. *Karas*, 329 N.E.2d at 240.

163. The moment of birth allows the woman to claim both a genetic relationship and a caretaking one, while the man can make no similar claim as the father. *See* discussion *supra* note 56.

164. *Trimble*, 430 U.S. at 766.

Gordon, had been living with Jessie Trimble, his unwed partner, and their daughter, Deta Mona Trimble, who was "illegitimate" but whom Sherman had acknowledged through a paternity order, and had been supporting in the amount of fifteen dollars per week.[165] His total estate comprised $2,500 and a 1974 Plymouth.[166] Deta, his daughter, could not take as his heir.[167] The provision that *In re Karas* had upheld allowed the children of unwed mothers to inherit under intestacy, but prevented the children of unwed fathers from doing so, unless they had married the mother *and* acknowledged their child.[168]

The Supreme Court in *Trimble* was presented with the argument that "[t]he statute . . . discriminates against women by failing to provide for their illegitimate children a legal right of inheritance equivalent to that granted to the illegitimate children of surviving male parents" in violation of equal protection.[169] The Court, however, declined to consider the sex-based discrimination and focused only on the discrimination against illegitimate children.[170] Nonetheless, the Supreme Court's opinion, as the Illinois Supreme Court decision below, discussed at length problems with proving paternity. Justice Powell, again writing for the majority, affirmed the propriety of the Illinois Supreme Court's concern with paternity as distinct from maternity and agreed with the proposition that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates."[171] The Court also reaffirmed "the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."[172] The problem with the Illinois statute, however, was that it failed to consider any "middle ground"—it had taken the all-too-absolute path of preventing inheritance entirely.[173]

The Court in *Trimble* thus held that the illegitimacy classifications violated equal protection because of the distinctions they drew between classes of children, rather than between unwed parents.[174] Along the way, Justice Powell took the opportunity to collect the Court's prior statements on "lurking problems of proof," and peppered them throughout the opinion.[175] In so doing, *Trimble* helped set the

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165. *Id.* at 764.

166. He was the victim of a homicide. *Id.*

167. *Id.*

168. *Id.* at 764–65.

169. Brief of the Appellants, Trimble v. Gordon, 430 U.S. 762 (1977) (No. 75-5952), 1976 WL 181301, at *57.

170. *Trimble*, 430 U.S. at 766 ("As we conclude that the statutory discrimination against illegitimate children is unconstitutional, we do not reach the sex discrimination argument.").

171. *Id.* at 770.

172. *Id.* at 769.

173. *Id.* at 771.

174. The decision to focus on the children instead of the parents was instrumental to the Court finding the law unconstituional. *See* Mayeri, *supra* note 9, at 1325 ("Court victories for illegitimacy plaintiffs relied on *Weber*'s child-focused rationale."). Although doing so was not always successful. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978).

175. *See Trimble*, 430 U.S. at 770-72.

stage for *Lalli v. Lalli* and *Parham v. Hughes*, both of which upheld the differential treatment of unwed mothers and fathers, with problems of proof emerging as a central rationale.

4. *Lalli v. Lalli*

Just over a year later, in *Lalli v. Lalli*, the Court had occasion to consider another intestacy statute.[176] This time, it upheld the New York law that required the children of unwed fathers, but not of unwed mothers, to provide "during the lifetime of the father, . . . an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child."[177] Mario Lalli, the unwed father, had not conformed to the specific requirements laid out in the statute, and so his son, Robert Lalli, could not take under intestacy. Like the unwed father in *Trimble*, Mario had openly acknowledged Robert as his son,[178] and "[a]ll interested parties concede[d] that Robert Lalli is the son of Mario Lalli."[179] The Court nonetheless found the requirements of the New York statute constitutional, based primarily on the state's interest "to provide for the just and orderly disposition of property at death."[180] Such an interest was implicated "because of peculiar problems of proof that are involved" in determining paternity.[181] For mothers, the Court asserted, "[e]stablishing maternity is seldom difficult."[182]

In upholding the constitutionality of the statute, the Supreme Court in *Lalli* largely followed the reasoning already set out by the state court below, which had also heeded questions of proof.[183] The Court of Appeals of New York relied on the "present knowledge in the field of genetics" to conclude "that the identification of a natural mother is both easier and far more conclusive than the identification of a natural father."[184] When the Court of Appeals was asked to revisit its decision following the Supreme Court's opinion in *Trimble*, it distinguished that case by

176. *Lalli*, 439 U.S. 259.

177. *Id.* at 261-62 (internal quotation marks and citation omitted). Robert Lalli, his "illegitimate son" was the appellant in the case, claiming that he and his sister ought to inherit as children; Rosamund Lalli, Mario's wife when he died, opposed their petition. *Id.* at 261.

178. *Id.* at 262-63. Mario Lalli was found dead, his body "riddled with bullets and wrapped in an awning in the Pelham Bay section of the Bronx." Mayeri, *supra* note 9, at 1331.

179. *Lalli*, 439 U.S. at 277 (Brennan, J., dissenting) ("Mario Lalli supported Robert during his son's youth. Mario Lalli formally acknowledged Robert Lalli as his son.").

180. *Id.* at 268.

181. *Id.*

182. *Id.*

183. *Id.* at 267-68 (relying on the lower court's reasoning that the statute disclaimed any interest to "discourage illegitimacy" or "to mold human conduct or to set societal norms") (internal quotation marks omitted) (citing Estate of Lalli, 371 N.E.2d 481, 483 (1977)).

184. Matter of Lalli's Estate, 340 N.E.2d 721, 724 (1975). The original opinion in *Matter of Lalli's Estate* relied almost exclusively on the differences in proof available between maternity and paternity. It did leave open the possibility that "one day . . . , notwithstanding the nonparticipating role of the father at birth, scientific tests will nonetheless be available by means of which the fact of fatherhood can be demonstrated as compellingly as is presently true with respect to the fact of motherhood." *Id.* It noted, however, that "such proof is not available today." *Id.*

relying on "the inherently more difficult problems of proof of paternity than of maternity."[185] Upon reconsideration, it continued to uphold the statute, insisting on the constitutionality of the state's interest in requiring "proof of paternity [in] a judicial determination made during the lifetime of the father."[186]

What appear to be blanket distinctions between fathers and mothers based on differences in available proof actually only affect *some* fathers. That is, problems with proving paternity are not applicable to all fathers—as the Court explains, they are only "difficult when the father is *not part of a formal family unit*."[187] By the Court's own reasoning then, the problems arise not because of any biological difference between men and women, nor because of the different proffers of proof their respective biologies might enable. Instead, they arise because of the difference between fathers, married and unmarried.[188] Specifically, these problems of proof hold constitutional weight only when the father is not part of a formal family unit, that is, when he is not married to the mother, even though the Court disclaims that the statute serves any interest in "encouraging legitimate family relationships."[189]

This underlying distinction between wed and unwed fathers was baked into the other state court cases Justice Powell relies on. In *In re Ortiz's Estate*, one of the New York cases the *Lalli* opinion approvingly cites, the court justifies the different treatment afforded to unwed mothers and fathers by appealing to the standard differences in proof available to each.[190] It explains that birth for the mother "is a recorded or registered event usually taking place in the presence of others."[191] The proof the court finds most convincing, however, is that "[i]n most cases the child remains with the mother and for a time is necessarily reared by her."[192] It is this ensuing relationship that explains why "the child of a particular woman is rarely difficult to prove."[193] Reasoning in this vein, the court clarifies that the unwed father is different from the mother not because he does not give birth but because he "is often totally unconcerned [with the birth] because of the absence of any ties to the mother."[194] This "absence of any ties to the mother" is what leads to the insurmountable problems of proof for the father: He lacks the record created by

185. Estate of Lalli, 371 N.E.2d 481, 482–83 (1977).

186. *Id.* at 483.

187. *Lalli*, 439 U.S. at 269.

188. Justice Brennan explains that if fraud in the case of fathers were the real concern, then "[i]n addition to formal acknowledgments of paternity [which was present in the case of *Lalli*], New York might require illegitimates to prove paternity by an elevated standard of proof." *Id.* at 279 (Brennan, J., dissenting).

189. *Id.* at 267–68. Unlike the law at issue in *Trimble*, the Court notes that the New York provision does not require the marriage of the parents—instead, "[t]he single requirement at issue here is an evidentiary one," and demands only "that the paternity of the father be declared in a judicial proceeding sometime before his death." *Id.* at 267. In lieu of requiring that the parents marry, the Court demands its formal approximation.

190. *Id.* at 268–69.

191. In re Ortiz's Estate, 303 N.Y.S.2d 806, 812 (1969).

192. *Id.*

193. *Id.*

194. *Id.*

marriage, rather than the record created by *birth*. Because he is not married to the mother, the court conclusively assumes that he will fail to know his child and will not be involved in its upbringing.[195]

The surrogate court in *In re Flemm*, another New York opinion *Lalli* relies on, explains the statutory distinction in similar terms.[196] In *In re Flemm*, problems of proof justify excluding even those fathers who have acknowledged their children and developed relationships with them; the reason given is that evidence offered after a father's death always means "he is not available to counter such proof."[197] The court relies on the unobjectionable aim of preventing the "falsification of evidence," alongside the more obviously gender-coded reason that the statute was reasonably intended "to protect innocent men from unjust accusation in paternity claims."[198] While both reasons articulate a problem with the ability to adequately prove a genetic link between father and child, the court's opinion ultimately turns on the lack of a relationship between father and mother.[199] As in *In re Ortiz's Estate*, the court explains that even if the father were somehow apprised of the birth, "he may be totally unconcerned because of the absence of any ties of affection with the mother or familial relationship with the child."[200] For the mother, not only will her birth be a "registered event usually taking place in the presence of others," but the child will also "remain with and be reared by [her]."[201] The relationship that matters is the one the law presumes each parent will have with the child; the one that is missing insofar as the father is implicated is marriage to the mother, which incontrovertibly determines the relationship he will have with his child.

The father's lack of a paternal relationship, derivative of his lack of a marital one, explains why, once again, the perpetrators of the fraud are not only mothers but also children. The Bennett Commission, constituted in 1961 by the New York legislature to make recommendations on specific areas of state law that might need reform,[202] proposed the passage of the statutory provision at issue in *Lalli* in part to protect "innocent adults" (i.e., men) "from fraudulent claims of heirship and

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195. The court in *In re Ortiz* still appeals to the standard definition of paternity fraud by faulting the woman who alleges paternity outside of marriage for she "may not know *who* is responsible for her pregnancy." *Id.* In criticizing the unwed mother for being both promiscuous and unscrupulous, the court is expressing concern over the lack of a genetic connection between the father and child. Yet, as we have seen, it cares mostly about the lack of a relationship between the father and mother, which conclusively signals the lack of relationship between father and child. *See id.*

196. *See Lalli*, 439 U.S. at 269–70.

197. Flemm's Will, 381 N.Y.S.2d 573, 578 (1975). The court notes the "anomalous" outcome of the statute, which "permits inheritance from the 'unwilling' father but not from the 'willing' father" but justifies the distinction passed on the interest in limiting "post-mortem litigation." *Id.* at 579.

198. *Id.* (internal quotation marks omitted).

199. *Cf.* Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637, 649 (1993) (explaining that other Supreme Court cases addressing unwed fathers "suggest[] that legal paternity depends on the father's development of a relationship, not with his children, but with their mother").

200. *Flemm's Will*, 381 N.Y.S.2d at 576.

201. *Id.*

202. One such area included descent and distribution. *See Lalli*, 439 U.S. at 269 n.7.

harassing litigation" by their "illegitimate heirs."[203] Absent from this account is why or how the gender of the parent would increase the likelihood that their child would fabricate proof or lie—unless we understand that the unwed father would not have known of, or had any relationship with, his child.[204] Indeed, such fraud would be less feasible by a mother's heir because "her family and the personal representative of her estate will be aware of the existence of the illegitimate child."[205]

Yet the cases in which there was an actual relationship between father and child are exactly those that will most likely fail to follow the procedure the statute proscribes.[206] As the dissent by Justice Brennan explains, there is little need for a paternity proceeding where the father is already providing the child with the necessary support.[207] But the majority ignores any relationship that might exist between father and child because it is ultimately concerned with the lack of a formal relationship between father and mother, which is, by definition, absent in all these cases.

Problems of proof allow the Supreme Court to uphold a requirement that prevents the law from recognizing instances where the father might not only have a genetic connection but also an actual relationship with his child.[208] *Lalli* further shows how an interest in preventing fraud can replace an interest in promoting legitimate relationships, with similar results. Marriage still functions as the marker of fatherhood, although less explicitly; this latent state interest helps to explain why the Court allows only one specific legal requirement—a proceeding brought against a father during his lifetime—to function as exclusive proof of paternity.

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203. *Lalli*, 439 U.S. at 270. The Commission also noted the importance of finality in estate decisions and raised the problem of finding and notifying "unknown illegitimates." *Id.* (internal quotation marks omitted).

204. The lack of a relationship means that the father would not have intended for his child to take, which matters to intestacy schemes. *Id.* at 576–77 ("[N]either the Commission nor the Legislature could rationally presume (as in the case of the mother-child relationship) that any substantial number of putative fathers desired that their illegitimate children should inherit from them to the same extent as legitimate children.").

205. *See Flemm's Will*, 381 N.Y.S.2d at 576.

206. In dissent, Justice Brennan presents a different account of why mothers would hesitate to bring paternity proceedings during the life of the father. He explains it would be complicated precisely in those instances where the unwed father acknowledges the child: "Indeed, it is difficult to imagine an instance in which an illegitimate child acknowledged and voluntarily supported by his father, would ever inherit intestate under the New York scheme. Social welfare agencies, busy as they are with errant fathers, are unlikely to bring paternity proceedings against fathers who support their children. Similarly, children who are acknowledged and supported by their fathers are unlikely to bring paternity proceedings against them. . . . For the same reasons mothers of such illegitimates are unlikely to bring proceedings against the fathers." *Lalli*, 439 U.S. at 278 (Brennan, J., dissenting).

207. *Id.* (Brennan, J., dissenting).

208. Justice Powell brushed off this concern by admitting the law is overinclusive and "there will be some illegitimate children who would be able to establish their relationship to their deceased fathers without serious disruption of the administration of estates." *Id.* at 272–73.

5. *Parham v. Hughes*

The Supreme Court finally considered the sex-based distinctions at the root of these laws head-on in *Parham v. Hughes*.[209] In the process, it revived the state's interest in promoting legitimate family relationships. The law at issue in *Parham*, as in *Glona*, was a wrongful death statute that excluded from the class of possible plaintiffs an unwed father who had failed to legitimate his child.[210] Curtis Parham, "the biological father of Lemuel Parham," sought to bring a wrongful death suit on behalf of his son, who had died in a car accident along with his mother, Cassandra Moreen.[211] Although Curtis "had executed the child's birth certificate acknowledging paternity of the child, had paid the birth expenses for the child, had regularly supported the child from its birth until its death, had at all times acknowledged the child as his own, and had visited the child daily," the Georgia statute prevented him from asserting a wrongful death claim because he had failed to legitimate his child according to the procedures it specified.[212]

The Court upheld the statute.[213] Justice Stewart, writing for a plurality, explained that the "natural father" was "responsible for conceiving an illegitimate child"; it was he who "had the opportunity to legitimate the child but failed to do so."[214] It was therefore perfectly reasonable—or rather, "neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage'" by preventing the father from suing on behalf of his child.[215] This was, of course, the exact reasoning rejected by the Court in *Glona*, which had stated in no uncertain terms that there was "no possible rational basis for assuming that if a natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy would be served."[216] In fact, such a law "hardly has a causal connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability."[217]

Despite the obvious relevance of *Glona* to *Parham*, the plurality cites to *Glona* only once, in a footnote. That footnote—footnote 7—differentiates *Parham* from *Glona* based on the sex of the parents and the problems of proof each raises. The Court explains that the discrimination in *Glona* was between mothers, married and unmarried,[218] and unlike unwed fathers, "[t]here . . . existed no real problem of

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209. Parham v. Hughes, 441 U.S. 347 (1979).

210. *Id.* at 349.

211. *Id.*

212. Hughes v. Parham, 243 S.E.2d 867, 869 (Ga. 1978). The Georgia statute set out that legitimation had to take place by petitioning the superior court located in the unwed father's county of residence. *Parham*, 441 U.S. at 349, n.2.

213. *Parham*, 441 U.S. at 358–59.

214. *Id.* at 353.

215. *Id.*

216. Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968).

217. *Id.* The unwed mother in *Glona*, like the unwed father in *Parham*, could have legitimated her child, which she did not do. *See Parham*, 441 U.S. at 363 (White, J., dissenting).

218. *Parham*, 441 U.S. at 355 n.7.

identity or of fraudulent claims."[219]

The potential for fraud supports *Parham*'s conclusion that unwed fathers and unwed mothers can be treated differently without running afoul of equal protection.[220] The Court explains that the equal protection clause prevents discrimination only in instances where men and women are similarly situated; but, "where men and women are not similarly situated," and "a statutory classification is realistically based upon differences in their situations," then that classification is constitutional.[221] Men and women are not similarly situated in *Parham* because of a legal distinction—"only a father can by voluntary action make an illegitimate child legitimate,"[222] which the Court roots in a biological one—the problems of proof that plague the father and spare the mother.[223]

Yet to support its characterization of this basic difference between mothers and fathers, the Court cites to *Lalli*,[224] which turns on the assumption that the father will not parent the child because he is not married to the mother. Marriage underwrites the Court's reasoning. The equivalency that *Parham* cares about is not only between unwed parents, but between fathers, married and unmarried—"fathers who do legitimate their children can sue for wrongful death in precisely the same circumstance as married fathers whose children were legitimate *ab initio*."[225] It is law, not biology, all the way down.

The Supreme Court of Georgia's decision in *Hughes v. Parham* showcases how discussions of fraud and problems of proof segue seamlessly into the promotion of legitimate relationships. In setting out the state's interests, the *Hughes* decision lists "promoting a legitimate family unit and . . . forestalling potential problems of proof of paternity."[226] These two interests are indelibly linked insofar as the father is concerned. The Georgia court, like the Supreme Court, distinguished *Glona* on the basis that any problem with proving maternity is "insignificant in comparison to the problems of proving paternity in the usual case."[227] But the reason the government has an interest in requiring fathers, and not mothers, to legitimate their children "by

219. *Id.*

220. The Court first attempts to recast the statute as differentiating between fathers, and not between classes of children, the latter of which would be unconstitutional. *Parham*, 441 U.S. at 353. It further distinguishes *Glona* on the basis that all unwed mothers were excluded in *Glona*, while here "only [unwed fathers] who have not legitimated their children" are excluded. *Id.* at 355 n.7. This distinction mischaracterizes the law at issue in *Glona*, which also set out ways for the mother to legitimate her child, and which she did not do. *See* discussion *supra* notes 60–62.

221. *Parham*, 441 U.S. at 354.

222. *Id.* at 355.

223. *Id.* ("Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."). The concurrence by Justice Powell, which turned *Parham* into a plurality by casting the fifth vote in favor of finding that equal protection was not violated, focuses entirely on "the important state objective of avoiding difficult problems of proving paternity after the death of an illegitimate child." *Id.* at 359–60 (Powell, J., concurring).

224. *Id.* at 355.

225. *Parham*, 441 U.S. at 356.

226. Hughes v. Parham, 243 S.E.2d 867, 869 (Ga. 1978).

227. *Id.* at 871.

petition or by marrying the mother" is "that in most circumstances it is the mother, not the father, who raises and cares for the illegitimate child."[228] The court transitions from discussions of proof to considerations of who will perform the childrearing, to finally rest upon marriage, specifically, on the father's decision not to marry—and "the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist."[229] As such, "the state interest in promoting the family . . . is arguably furthered by denying the wrongful death action to fathers . . ., although granting it to mothers."[230]

The different treatment afforded to mothers and fathers is not based on proof of a genetic connection but rather on who is presumed to have functioned as a parent to the child. For the father, the Court only looks to whether there has been a marriage or its close copy—a formal process of legitimation—to make that determination.[231]

C. Paternity Fraud as Marriage Fraud

The Court's plurality decision in *Parham v. Hughes* continues to represent how unwed fathers are treated vis-à-vis unwed mothers, even though genetic testing has advanced considerably since the 1970s.[232] The reason these advances have made little inroads is that despite the Court's persistent appeals to paternity fraud, the concern is not, ultimately, genetic. The Court enshrines distinctions between unwed parents because the law assumes that responsibility over the child will be undertaken by the woman and not the man outside of marriage. This social distinction was once underwritten by a legal one—the common law placed sole responsibility on the woman for the care of any child born out of wedlock,[233] and defined paternity

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228. *Id.*

229. *Id.*

230. *Id.*

231. *Caban v. Mohammed*, decided on the same day as *Parham*, held that distinguishing between unwed mothers and fathers for purposes of placing a child for adoption was unconstitutional. 441 U.S. 380, 389 (1979). Hailed as a victory for unwed fathers, the Court nonetheless did not do much to change the modal unwed father as one who is not involved in his child's life. *See id.* ("The present case demonstrates that an unwed father *may* have a relationship with his children fully comparable to that of the mother.") (emphasis added). Moreover, the Court in *Caban* does not rely on fraud as a rationale, which leaves it intact as a basis for continuing to distinguish between unwed mothers and fathers. *See* Mayeri, *supra* note 33, at 2348 (noting that Justice Stevens's dissent in *Caban* "articulated the view of 'natural differences' between mothers and fathers that would animate his—and ultimately a majority of the Court's—treatment of nonmarital fathers' equal protection claims" based on reasoning that "[u]nlike many if not most nonmarital fathers, a mother was identifiable, present at her child's birth, and would have 'virtually inevitable responsibility for decisions made about an infant'").

232. *See* Sean Hannon Williams, *DNA Dilemmas*, 40 YALE L. & POL'Y REV. 536, 543 (2022) ("Now, for as little as $99, genetic fathers can be positively identified, rather than just ruled out.").

233. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 216 (Oliver W. Holmes, Jr., ed. 1896) (noting that outside of marriage, it was the mother who was "bound to maintain [the child] as its natural guardian"). The result was that the man and his marital family were protected. *See* JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 14–16 (2023) (discussing Roman law, "which shaped the Western legal tradition," and describing how it enshrined patriarchy, including "[e]xclusive male entitlement to the control of marital property and undivided male legal authority over children of a marriage").

exclusively through marriage to the mother.[234] Unpacking contemporary arguments that rely on difficulties of proof and possibility of fraud reveals that marriage—not biology—still explains the Court's decisions establishing who gets to be a parent.[235]

Fraud helps to sustain the gendered state of affairs that laws regulating marriage once explicitly sanctioned.[236] Indeed, fraud has successfully repackaged antiquated concerns over "sinful" behavior into more modern concerns over scientific proof of paternity[237] and currently provides an acceptable rationale for placing responsibility over children solely on the unwed mother, rather than on the unwed father.[238] Initially appearing in a Supreme Court opinion as a throwaway statement about fraudulent motherhood, the concern over fraud attached itself exclusively to the father and blossomed into a full-throated justification for treating men and women differently on the basis of sex. Fraud's associations with concerns over "proof" and its basis in supposedly "real" biological differences between men and women means it has comfortably survived equal protection review,[239] even as it directly feeds into the dynamic of elective fatherhood and predetermined motherhood that generally runs afoul of principles of equality.[240] The Supreme Court's decisions thus continue to ensure that only husbands, or men who hew to the exact formalities set out by statute, are recognized as fathers.

The opinions that do not mention fraud in addressing the rights of unwed fathers buttress this conclusion by identifying what matters most—marriage. Consider the adoption cases, which routinely uphold laws giving unwed fathers secondary rights to unwed mothers.[241] In *Quilloin v. Walcott*, the Supreme Court

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234. NeJaime, *supra* note 22, at 261–62.

235. Marriage makes a man into a father; a woman is assumed to be a mother regardless of her status as a wife. This is an extension of "the common-law tradition that developed in America," which "established default rules that enabled patrilineal status transmission in marriage and matrilineal status transmission outside of marriage." *See* Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1683 (2000).

236. It was the woman's sole responsibility to care for any child born outside of marriage, which meant that men were protected from parental responsibility until they affirmatively chose to assume husbandhood and thereby fatherhood. *See id.* at 1700 ("Paternal 'choice'—and the limitations placed on that discretion—have, in turn, been informed by a desire to maintain 'legitimate' lines of inheritance and to protect men from unwanted paternal responsibilities.").

237. *See* Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968). (holding that discriminating against illegitimate children or their mothers "hardly has a causal connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability").

238. *See* Davis, *supra* note 82, at 74 (identifying a "legacy of male coverture" outside of marriage, and arguing that it "reflects the common law tradition that mothers have primary or even sole legal responsibility for their out-of-wedlock children").

239. *See* Reva B. Siegel, *The Pregnant Citizen, From Suffrage to the Present*, 19TH AMEND. ED. GEO. L.J. 167, 172 (2019) ("When we locate equal protection cases in the history of restrictions on women's citizenship, we see how an appeal to biology can enforce traditional sex roles.").

240. *See* U.S. v. Virginia, 518 U.S. 515, 533 (1996) (holding that justifications for sex-based distinctions "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

241. The critique I raise focuses on the rationales the Supreme Court has used to justify the constitutionality of these distinctions. Jennifer Hendricks has warned in this context that "feminists should be skeptical of proposals claiming to fix deeply entrenched and complicated social problems

upheld a Georgia law establishing that "the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives" outside of wedlock, unless the father legitimates the child.[242] The Court reasoned that such a law did not violate equal protection because the father had never married the mother.[243]

The facts of *Quilloin* presented the Court with a conflict between a wed father and an unwed father, as the biological father sought to block the mother's new husband from adopting the child.[244] This meant that instead of considering the distinctions the statute makes between unwed fathers and mothers, the Court compared only fathers—wed and unwed.[245] While the Court's reasoning might appear wholly tautological in that the unmarried father is treated differently because he is not married, it accurately illustrates what the Court actually cares about: Marriage. That the man has not married the mother serves as a perfect proxy for whether he will assume the responsibilities of a father.[246]

The Court in *Quilloin* concludes that the unwed father before it had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[247] But it was not his lack of doing so that sealed his constitutional fate. It was the reverse—that the wed father, by virtue of his marriage to the mother, would.[248] Indeed, the Court's finding that the biological father "had provided support only on an irregular basis"[249] does not really matter to the statute the Court upholds, which denies *all* unwed fathers the right to veto an adoption, whether they have provided support or not, unless they have undertaken the legal process of legitimating the child.[250] It is also irrelevant that the

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with a simple rule change that transfers constitutional rights from women to men, especially when that rule change has deep roots in sexist, patriarchal theories of reproduction." Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 476–77 (2017). I would argue that feminists should be skeptical of reasoning that purports merely to reflect biological distinctions between the sexes when such distinctions take place outside of marriage only, and the rules upheld serve to reinscribe archaic and sexist views in constitutional law about who is, and should be, a parent.

242. Quilloin v. Walcott, 434 U.S. 246, 249 (1978).

243. *Id.* at 256.

244. *Id.* at 247.

245. *Id.* ("[A]ppellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.").

246. *Stanley v. Illinois* is often considered an outlier in the unwed father cases, in that the unwed father received a degree of parental recognition. 405 U.S. 645 (1972). This case, however, does not contest the image of unwed fathers as generally unfit, *see* Antognini, *supra* note 38, at 419–20, and has been described as "oddly schizophrenic in that its nominal protection for non-marital families is embedded in its implicit veneration of marital family norms," *see* Murray, *supra* note 9, at 402.

247. *Quilloin*, 434 U.S. at 256.

248. As the Court explained, "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage." *Id.*

249. *Id.* at 251.

250. "To acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marring the mother and acknowledging the child as his own, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father." *Id.* at 248–49 (internal citations omitted).

unwed father might have engaged in any caretaking, given that marriage or its legal approximation, functions as the only path towards recognition.[251]

The lack of a marital relationship between father and mother is the death knell for finding a constitutionally protected family relationship between father and child. The Court's decisions make little sense otherwise, given that in every case where the possibility of fraud is raised the unwed father was genetically related to his child and, more often than not, also involved in his child's life. Yet proof of a genetic relationship, or of an actual one, is either irrelevant or insufficient. The reason is that the Court's ultimate—and sole—concern is with marriage. To state the obvious, the problems of proof that occur for the father, occur only where the father has not married the mother. The initial questions articulated in the wake of *Glona* and *Levy*, while riddled with gendered notions of unscrupulous, desperate, and lying women, were nevertheless fundamentally about the problem of identifying a genetic connection between alleged father and child. The problem the Court becomes most concerned with, however, is identifying a marital relation between father and mother. This explains why its accepted response to the fraud, the way it manages the fraud, is not to require blood tests that would prove a genetic connection,[252] or to consider evidence that would prove an actual relationship; it is, instead, to demand strict adherence to a legal procedure that simulates the formality of marriage.

The one salient exception to the Supreme Court's deference to fraud further underscores this point. We saw how easily *Gomez v. Perez* dismissed fraud as a concern that justified a state's decision to deny illegitimate, but not legitimate, children the right to receive support from their fathers. A series of cases following *Gomez* affirmed its central holding by striking down progressively longer statutes of limitations for when a suit to establish paternity must be brought. The first case to follow *Gomez*, *Mills v. Habluetzel*, found that Texas's "less than generous" one-year limit on bringing paternity actions violated equal protection.[253] The Court reasoned that the "unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims."[254] In a footnote, it also rejected the statute's furtherance of the "[i]mportant" state interest in promoting "the institutions of family and marriage," based on *Weber*'s reasoning that the child should not suffer as a result.[255] The subsequent year, in *Pickett v. Brown*, the Court struck down as unconstitutional a two-year statute of limitations

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251. The pinnacle of prioritizing marriage over proof of a genetic connection, or evidence of any actual relationship, is captured in the Supreme Court's plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion). Justice Scalia, writing for a plurality, declared that "nature itself . . . makes no provision for dual fatherhood" and relied on the legal status of marriage to identify who that one father would be. *Michael H.*, 491 U.S. at 118. Although *Michael H.* was not decided as an equal protection case, 491 U.S. at 116–17, it supports the point that in a contest between men vying to be fathers, the husband, based purely on his status, will win.

252. *See* Williams, *supra* note 232, at 543.

253. 456 U.S. 91, 94, 100 (1982).

254. *Mills*, 456 U.S. 91 at 101.

255. *Id.* at 101 n.8.

that Tennessee had imposed on paternity actions.[256] The Court held that the state's interest in preventing fraudulent claims was not substantially related to the two-year time limit for many reasons, including the fact that "scientific advances in blood testing have alleviated the problems surrounding paternity actions."[257] While the Court noted that the mere existence of DNA evidence does not negate the state's interest, it does "render more attenuated the relationship between a statute of limitations and . . . preventing the prosecution of stale or fraudulent paternity claims."[258] Finally, in *Clark v. Jeter*, even a six-year statute of limitations set by Pennsylvania was deemed unconstitutional. The Court held, once and for all, that such a limit "is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims."[259]

To date then, problems of proof in determining paternity have not justified upholding differences between legitimate and illegitimate children, and so wed and unwed fathers, in establishing a duty to provide support. The Court's reasoning is based squarely on scientific advances in that realm.[260] Yet these same concerns over fraud remain constitutionally relevant when maintaining differences between fathers and mothers is at stake. This is because the fraud underlying the unwed father cases is not the fraud of biological paternity. Such a constitutional rationale should therefore not be confused for reflecting discrete, objective facts about men and women. Fraud is, instead, raised in service of prioritizing marriage, even where that state interest is not explicitly articulated. The fear of fraudulent paternity occurs exclusively outside of marriage because it is, ultimately, a fear of fraudulent marriage—of treating unmarried men as though they were married, with all the attendant rights and responsibilities that follow.[261] By refusing to recognize this "fraud," the law maintains and narrowly defines appropriate gender roles: Women are always mothers, while men are only sometimes fathers.[262]

As with most consequences of not recognizing rights in the context of nonmarriage, the harm of not acknowledging the unwed father falls primarily on the mother and her child.[263] Although marriage is more legally salient for men in

256. 462 U.S. 1, 3 (1983).

257. *Id.* at 17.

258. *Id.*

259. 486 U.S. 456, 464 (1988).

260. Statutes of limitations are "imposed by States" precisely "to control problems of proof." *Mills*, 456 U.S. at 101 n.9. As such, "scientific advances in blood testing . . . alleviated some problems of proof in paternity actions." *Clark*, 486 U.S. at 463. They can also be explained by the impetus to privatize support. *See supra* note 154.

261. In explaining the threat posed by common law marriage, Dubler explores the dangers of copy, and performance, more generally: "Performing marriage, thus, functions simultaneously as a form of subversion and as a form of homage; likewise, the judicial recognition of legal rights based on performance constitutes, at once, marked progressivism and conservatism." Dubler, *supra* note 15, at 1018.

262. It is not just the Supreme Court enforcing these distinctions but also state courts and state legislatures, with the Supreme Court endorsing and extending their reasoning.

263. *See* Mayeri, *supra* note 9, at 1310–11 ("Whether or not limiting sources of support for nonmarital children effectively deterred illicit sexual relationships—the focus of inquiry in the early illegitimacy cases—denials of benefits or inheritance on the basis of illegitimacy burdened their mothers

these cases, in that it confers fatherhood upon them, its absence still tends to disadvantage women. Women and their children are the ones who suffer the consequences—social, legal, and financial—of not having the father recognized as such. Where the child is unable to inherit,[264] or to receive workmen's compensation,[265] then the harm is to the surviving child and, if a minor, to the mother who must provide for the child without any assistance from the father. In this way, marriage remains a status that women, in particular, should seek out. The unwed father is, of course, also disadvantaged, as when he is prevented from bringing a wrongful death suit on behalf of his child. In these moments, he experiences a financial harm, along with the harm of nonrecognition.[266] But the allegations of fraudulent paternity in these cases generally inure to the detriment of the child and mother. In other words, the Court consistently decides to protect the "wife" and her children, at the expense of the "concubine" and hers, despite the absence of any actual conflict, or of any actual wife.[267]

II. CITIZENSHIP FRAUD

The cases that address unwed fathers for purposes of immigration and citizenship rely on the state law illegitimacy cases in the vein of *Parham v. Hughes*, to set the bounds of whether it is constitutional to distinguish between men and women. Despite the many differences between the two—including that Congress is the law-making body for the former and state legislatures for the latter—they are both plagued by the self-same concern over paternity fraud. This concern functions in similar ways across the different sets of laws: as a judgment that there is no relationship between father and child because there is no marriage between father and mother.

In the immigration and citizenship context, this concern is raised in considering the principle of family reunification. The reason unwed fathers and their children are excluded from statutes recognizing family relationships is that they do not constitute a family unit for the immigration laws to reunify.[268] The lack of a

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at least as much as the children themselves."); *see also* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 8 (2017) (canvassing the cases addressing property distribution at the end of a nonmarital relationships and concluding that "the individual seeking property—which in nearly all cases is a woman—has a difficult time receiving anything outside of marriage").

264. Lalli v. Lalli, 439 U.S. 259 (1978).

265. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

266. *See* Parham v. Hughes, 441 U.S. 347 (1979).

267. Meaning the cases involve only an unwed mother and father, without a conflict between different women. *See* discussion *supra* Parts I.A–B. The posture of these cases also means that they generally do not present a conflict between the interests of the unwed mother and father, although the lessons we learn apply to analyzing those cases that do. *See* discussion *infra* Part III.B.

268. *See, e.g.*, Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *17 ("Congress also had an ample basis for refusing to accord special immigration preferences to the fathers of children who are neither legitimate nor legitimated. Because such persons are unlikely to have maintained a close personal relationship with their offspring in the foreign country, their admission to the United States would not further the goal of promoting family *reunification* and would not alleviate an unusual hardship suffered as a result of this nation's restrictive immigration laws.").

relationship between father and child follows directly from the lack of a marriage between mother and father. The primacy of the mother-father relationship is underscored by the only proof Congress and the Court deem acceptable—a formal acknowledgment of the father-child relationship.[269] Proof of a genetic connection, or of an actual relationship with the child are both insufficient as a matter of law; fatherhood is established solely by a procedure whose formality approximates the legal tie of marriage.

The immigration and citizenship context also raises paternity fraud in its more classic form, as a lie perpetrated by the foreign mother. Her presence becomes an explicit part of the arguments raised and considered by the Court. Yet, like with the American mother, the laws presume that she will be the only parent to her child born out of wedlock. These presumptions about maternal presence and paternal absence further implicate a lack of Americanness: Because the American father is not involved in his child's life, the child will have at most an attenuated connection to the United States. Even if the unwed father were to exert some American influence by virtue of his relationship, it would be inevitably counteracted by the mother's superior foreign influence on the child, who will be in her care. These presumptions make it so—individuals seeking access the United States or to American status on the basis of a relationship to their unwed father are denied that request.

Here, paternity fraud forms the basis for an additional fraud—that of immigration fraud. The government and the Court invoke both types of fraud generally and indiscriminately, supporting empirical claims about one with reference to the other.[270] In fact, fraud's capaciousness explains what would otherwise be anomalous—the wholesale application of a state's interests in regulating matters like inheritance and tort law to Congress's interests in regulating immigration and citizenship transmission.

A. Family Reunification: Fiallo v. Bell

The Supreme Court issued its opinion in *Fiallo v. Bell* on the same day as *Trimble v. Gordon*. Both decisions addressed the constitutionality of excluding unwed fathers and their children from immigration and intestacy statutes, respectively. Unlike the unwed fathers in *Trimble*, however, the unwed fathers in *Fiallo* were unsuccessful.[271] In *Fiallo*, the Court upheld Section 101(b) of the Immigration and

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269. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 62 (2001) (justifying the three procedures the government uses to establish paternity for purposes of citizenship transmission through "legitimation; a declaration of paternity under oath by the father; or a court order of paternity").

270. For example, the government supports a statement about paternity fraud with reference to immigration fraud, which does not have anything to say about paternity fraud in particular. *See* discussion *infra* note 278.

271. The Court set out the deferential standard of review that it applies to immigration-related decisions issued by Congress. *Fiallo*, 430 U.S. at 792–96. This deference is not the sole reason for the different outcomes. *See* Antognini, *supra* note 38, at 428 (arguing that "[t]he principal effect of the Court's immigration deference was that it enabled the [assumption that the unwed father and child would have no relationship] to go unanalyzed" given that the reasoning was consistent with the Court's

Nationality Act (INA), which omitted unwed fathers and their children from the list of family relationships eligible for preferential immigration status.[272] Justice Powell, author of both opinions, cited to *Trimble* in a crucial passage in *Fiallo* setting forth the interests Congress might have had in excluding paternal relationships from the immigration statute.[273] *Trimble* does not mention *Fiallo* once.[274]

Appellants in *Fiallo*—three pairs of fathers and their children—presented the Court with the argument that the INA statute was unconstitutional because it worked "to deny . . . illegitimate children and fathers of illegitimate children any opportunity to establish their family relationships . . . solely because of the gender of the parent and the illegitimate status of the child."[275] The Court rejected outright this charge of "'double-barreled' discrimination based on sex and illegitimacy."[276] Instead, it characterized the statute's father-child exclusion as "just one of many [lines] drawn by Congress pursuant to its determination to provide some but not all families with relief."[277] In addressing the INA's less favorable treatment of unwed fathers vis-à-vis unwed mothers, the opinion only restated the fact of such differential treatment, explaining that Congress was especially concerned with the relationship between unwed mother and child.[278] It did not, however, provide any reason why Congress would have wanted to exclude unwed fathers, other than to identify possible governmental interests. These interests the Court attributes to Congress are the same interests it attributed to the state of Illinois in *Trimble*. That is, Justice Powell ascribes Illinois's rationale in regulating intestacy wholesale to Congress's interest in regulating immigration: relying on *Trimble*, the Court explains Congress's reasons for excluding unwed fathers from the INA was "perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations."[279] This is so despite having described those interests in *Trimble* as "particularly within the competence of individual States," and not ultimately saving the Illinois statute at issue.[280]

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domestic unwed father decisions). Subsequent cases decided in the citizenship transmission context, and outside of immigration's plenary power doctrine, follow *Fiallo*'s reasoning. *See infra* Part II.B.

272. Fiallo v. Bell, 430 U.S. 787, 788–89 (1977).

273. *Id.* at 799.

274. Trimble v. Gordon, 430 U.S. 762 (1977).

275. Brief for the Appellants, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181344, at *30.

276. *Fiallo*, 430 U.S. at 794.

277. *Id.* at 797.

278. *Id.* ("Congress was specifically concerned with the relationship between a child born out of wedlock and his or her natural mother, and the legislative history of the 1957 amendment reflects an intentional choice not to provide preferential immigration status by virtue of the relationship between an illegitimate child and his or her natural father.").

279. *Id.* at 799. Federal immigration law and state property law are similar insofar as the federal court system expresses great deference to each—to Congress and to the states, respectively. *See id.* at 792 ("At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation."); *Trimble*, 430 U.S. at 771 ("Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.").

280. Trimble v. Gordon, 430 U.S. 762, 771 (1977).

Importantly, while the Court in *Trimble* repeatedly discusses problems of proof, it does not explicitly mention the perceived absence of family ties.[281] The reason *Trimble* does not do so is that it does not need to—the Court already understands these two interests to be linked. The concern over problems of proof is fundamentally a concern over the lack of a relationship between the unwed father and child. *Fiallo* makes this clear by identifying the two interests and citing to *Trimble* as sole support.[282]

The perception that the unwed father and child lack "close family ties" has special purchase in immigration law. One of the core, if vague, purposes of immigration law post-1965 is family reunification.[283] It is so central to the regime that *Fiallo*, and similar cases, have been criticized for undermining that goal and for ignoring broader principles of family law in favor of enforcing more restrictive immigration rules.[284] This critique, however, gets it backwards insofar as these opinions are concerned. The Supreme Court in *Fiallo* expressly relies on principles undergirding family law to identify which relationships count as part of the family unit. It concludes—in a manner consistent with the Court's other decisions—that unwed fathers and their children are not included.

Justice Powell's opinion in *Fiallo* addresses the government's interests only peremptorily, but the arguments he raises were topical and widely discussed at the time. The brief the government submitted to the Court, and the Congressional Hearing to consider a bill submitted by Representative Elizabeth Holtzman in 1976, the year before *Fiallo* was decided, expound on these questions at greater length.[285] Together, they provide insights into the government's reasons for excluding unwed fathers and their children from the statute and reveal how fraud was raised in support of limiting immigration to the United States.

The brief submitted by the government in *Fiallo* relies on the supposed lack of a family relationship between unwed father and child to support their exclusion

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281. *See* discussion *supra* notes 152–162. The perceived absence of ties rationale has roots in other unwed father decisions. *See* Antognini, *supra* note 38, at 416–19 (arguing that this concern is present in *Stanley v. Illinois*, with which *Fiallo* shares its "conceptual underpinnings"). Moreover, this reasoning appears to have been specifically considered and ultimately chosen. Serena Mayeri explains that Justice Powell "apparently rejected clerk Gene Comey's advice that he not refer to 'the perceived absence in most cases of close family ties' between fathers and their nonmarital children as a rationale for the law." Mayeri, *supra* note 9, at 1330.

282. *Fiallo*, 430 U.S. at 799.

283. *See* Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 10 (2013) ("The preference for family members of US citizens and permanent residents was not a carefully thought-out decision on Congress's part.").

284. *See* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 686 (2014) (arguing that courts are much more deferential in the immigration law context such that "even if there is a constitutional right to live with one's family, courts under-enforce this right by refusing to second-guess the federal government's aims when its immigration policy results in curtailment of this right").

285. *Immigration Benefits to Illegitimate Children: Hearing on H.R. 10993 Before the H.R. Subcomm. on Immigr., Citizenship and Int'l L. of the Comm. on the Judiciary*, 94th Cong. 132–33 (July 26, 1976).

from the statute. It explains that the purpose of the INA is to "advance the goal of *reuniting* family members who would be living together but for the restrictions of the Act."[286] Refusing to include unwed fathers and their children does not run afoul of this purpose, given that they have no existing relationship to reunify: While an unwed mother is "united with her illegitimate child, and both reason and common experience suggest that that close relationship has continued in the vast majority of cases,"[287] there is "[n]o such intimacy . . . between natural fathers and their illegitimate children."[288]

This same point was raised repeatedly during the course of the Congressional Hearing called by Representative Holtzman, who sought to remedy the "discrimination between fathers and mothers of illegitimate children" contained in section 101(b) of the INA, and to reconcile that provision "with our constitutional prohibitions against discrimination."[289] Leonard Walentynowicz, Administrator of the Bureau of Security and Consular Affairs and tasked with setting forth the views of the Department of State, noted that all the relationships identified in the statute "contemplate the existence of a family unity between the child and the parent."[290] He distinguished unwed mothers from unwed fathers on that score: "[I]n the case of a child born out of wedlock, a family unity is normally maintained between the child and its natural mother but not necessarily between the child and its natural father."[291] Because family reunification is the underlying principle of the statute, "the separation of the child from its natural father would not [] violat[]e" it.[292]

The government consistently defines the family it seeks to unify as social, not biological.[293] The Department of State's testimony during the Hearing repeatedly dismisses the relevance of a genetic connection, and instead discusses the significance of an actual relationship between father and child: "The Department sees insufficient reason why immigration benefits should be conferred simply because of a biological relationship between an illegitimate child and its father, particularly since experience has shown us that many fathers either abandon or show little interest in such child."[294] Similarly, the arguments the government advances in

286. Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *38.

287. *Id.* at *39.

288. *Id.*

289. *Immigration Benefits to Illegitimate Children: Hearing on H.R. 10993 Before the H.R. Subcomm. on Immigr., Citizenship and Int'l L. of the Comm. on the Judiciary*, *supra* note 284, at 133.

290. *Id.* at 134.

291. *Id.*

292. *Id.* The Department was not entirely opposed to recognizing unwed fathers and their children, but it was concerned that doing so in the way Holtzman proposed would "provide open invitation to fraudulent claims." *Id.* To safeguard against such fraud, the Department would require an adjudication of paternity by a competent court. *Id.* at 147.

293. *Cf.* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 271 (2020) (examining Supreme Court decisions addressing unmarried fathers and nonparental caregivers, and arguing that "by valuing established relationships between parents and children, they affirm the continuing importance of social criteria to constitutional assessments of the family relationships that deserve protection" under due process).

294. *See Review of Immigration Problems: Hearings before the Subcomm. on Immigr., Citizenship,*

its brief in *Fiallo* show that the crux of its concern is with the lack of a developed relationship, not with the lack of a genetic link. The government explains that Congress could have "open[ed] the doors of this country to everyone who claims a biological relationship . . . regardless of the strength of the bonds that previously existed between them."[295] Instead, it decided to limit "special immigration status to those persons whose admission is most likely to further the goal of family reunification."[296] In support of its reasoning, the brief cites to studies addressing childbearing and childrearing patterns in foreign countries showing that unwed mothers often end up living with their child.[297] Such data do not, of course, address the presence or absence of a biological connection; they address the question of who will act as a parent to a child outside of marriage.

Despite the government's concern over the existence of a social relationship, paternity fraud still features prominently in the congressional discussions. This is because "the proliferation of spurious and fraudulent claims"[298] is, once again, not about genetics. The lack of any data on paternity fraud,[299] combined with the

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and the Int'l Law of the Comm. on the Judiciary, H.R., 94th Cong. 151 (1976) (Statement of Hon. Joshua Eilberg). Accordingly, the Department would be open to recognizing a relationship where "it is established that the father and child is a family unit." *Id.*

295. Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *40–41.

296. *Id.*

297. *Id.* at *39 n.29. These data do not necessarily prove that unwed fathers have no relationship with their child, only that many children live with their mothers. Nonetheless, the concern being raised is with the lack of an intimate relationship between father and child, which exists between mother and child. *Id.* These studies were also presented during the Hearing. *See, e.g.*, *Review of Immigration Problems: Hearings before the Subcomm. on Immigr., Citizenship, and the Int'l Law of the Comm. on the Judiciary*, H.R., 94th Cong. 150–51 (1976) (Statement of Hon. Joshua Eilberg).

298. *Review of Immigration Problems: Hearings before the Subcomm. on Immigr., Citizenship, and the Int'l Law of the Comm. on the Judiciary*, H.R., 94th Cong. 134 (1976).

299. Statements made during the Hearing invoke fraud repeatedly, with paternity fraud being included into the mix seamlessly and indefinitely. When asked specifically about the data the Department maintains on fraud involving false claims of paternity, Walentynowicz admitted that it does not keep such "selective" statistics. Instead, the Department only has information on "document fraud" generally. *Id.* at 144 ("[D]ocument fraud will become just as prevalent in this situation once we create an opportunity and the people get to know that this is their way of coming into the United States."). The government's brief to the Supreme Court provides another example of how proof of fraud in immigration generally supports claims of proof of fraud in paternity determinations specifically. The brief cites to a law review article in support of the following assertion: "The principal methods of immigration fraud include the use of false or altered documents and sham marriages, and the major sources of the illegal alien flow are underdeveloped countries with high- and largely illegitimate-birth rates." Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *44 n.32 (citing Leonard F. Chapman, Jr., *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 SAN DIEGO L. REV. 34, 35–36 (1975)). The article cited by the brief, written by Leonard Chapman who was a Commissioner of the Immigration and Naturalization Service at the time, discusses "fraud marriage schemes" and goes on to discuss immigration from "underdeveloped nations which are the source of most of the world's economic refugees." The article does not mention rates of nonmarriage or illegitimate births—it describes immigration fraud in general and discusses the economic conditions that lead to illegal immigration and what the United States can do to control it. *See* Leonard F. Chapman, Jr., *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 SAN DIEGO L. REV. 34, 35-36 (1975). This is yet another example of the capaciousness of the concept of fraud—immigration fraud morphs imperceptibly into paternity fraud, which is then presented as the cause of immigration fraud in the first place.

government's insistence on its occurrence, makes sense only if the concern lies elsewhere. In this context, it provides a way for the government to articulate anxiety over the number of immigrants who might access the United States.[300] The government's specific worry is over "the person who has been a sailor all his life" who could "be in a position to claim parentage of any number of illegitimate children not having a common mother."[301] The wayfaring sailor is a problem not because his children cannot be accurately identified, but because of the number of children he will have.[302] The reason to exclude unwed fathers and their children is therefore not because they might not be related, nor even because they might have committed fraud, but because including them would increase the number of immigrants admitted.[303] Without the limiting principle provided by marriage to the mother, the American immigration system would be overwhelmed by unwed men and their children.

Yet paternity fraud's link to genetics allows the government to justify the sex-based distinction made between mothers and fathers in objective-sounding terms. In arguing in favor of retaining an adjudication of paternity for the unwed father, the Department of State explains that the unwed mother requires no similar process due to the observability of birth and the record it creates, which includes witnesses like "a doctor or midwife."[304] Because the father does not give birth, there is always the possibility that "[t]wo or more persons can logically claim paternity of an illegitimate child."[305]

This problem voiced in the terminology of paternity fraud is still fundamentally a problem with how many individuals might gain access to the United States were the statute to recognize unwed fathers and their offspring. Indeed, when discussing the fraudulent paternity claims that would result from including unwed fathers and their children, the Department of State identifies the "pyramiding effect"[306] it would create. The government's brief in *Fiallo* spells out what this process entails: "[A]n unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological

300. The government's overarching problem is with the "great demands of people coming in here," which means that immigration offices "are constantly besieged by problems of fraud." *Review of Immigration Problems: Hearings before the Subcomm. on Immigr., Citizenship, and the Int'l Law of the Comm. on the Judiciary*, H.R., 94th Cong. 142 (1976).

301. *Id.*

302. Walentynowicz explains: "[T]he reports I get show that it is not unusual in certain countries for the male person to be the father of a number of different illegitimate children through various spouses. It is a real thing. It is not imagination." *Id.* at 143.

303. The potential increase in the number of immigrants is, of course, a different phenomenon than the commission of fraud. Representative Fish presses Walentynowicz on this precise point: "We are talking about an accepted practice of the culture of a particular community where you don't get married apparently. You just sire children. That is not a question of fraud." *Id.* at 143. Walentynowicz responds by "imagin[ing]" that recognizing this paternal relationship *could* lead to fraud, although the Department has no data on the matter. *Id.* at 143–44.

304. *Id.* at 147 (Statement of Leonard Walentynowicz). Birth provides proof not only of a genetic connection but also of the existence of "the relationship of the child to its mother." *Id.* at 135.

305. *Id.* at 147 (Statement of Leonard Walentynowicz).

306. *Id.*

father; each father could then bring all of the children he has ever fathered."[307] The issue is the extended chain of immigration such recognition would generate, not the missing genetic link between father and child. Moreover, the list of countries the Department identifies as troublesome given the high rates of unwed partnerships are composed largely of non-white populations.[308]

As the government's quotation above in *Fiallo* indicates, the counterpart to the American wayfaring sailor is the foreign mother, whose sexual licentiousness further contributes to the birth of numerous children, from various fathers. The government cites to *Gomez v. Perez* to argue that paternity determinations, already besot with problems, will be even more uncertain "when the child has been born, perhaps many years earlier, in a foreign country."[309] The concern, however, lies not with the foreign country as much as it does with the foreign *mother*, and her ability to identify the father: "[T]he sole evidence that a man has fathered a particular child is often the testimony of the mother, and she may not know."[310] Indeed, the government expresses no similar concerns with that same country where proffers of proof are made in determining whether a birth took place to an American mother.[311] This is because the problem is one of quantity in addition to identity—the foreign mother's many sexual relations lead to the recurring issue where "two or more men may claim paternity of the child."[312]

None of this is to imply that immigration fraud does not take place. It does.[313] Instead, the point is to uncover the work that fraud is doing in

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307. Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *39, n.29 (alterations omitted). This same concern, in almost identical language, was raised below by the district court of New York, which also upheld the constitutionality of the statutory exclusion. *See* Fiallo v. Levi, 406 F. SUPP. 162, 167 n.15 (1975) ("[A]n unwed mother living here could bring to the United States all of her legitimate children, each of whom could bring over his or her biological father; each father could then bring over all of the children he has ever fathered, and thereafter each of those children could bring over his or her mother . . . etc., etc., etc.").

308. *See, e.g.*, *Review of Immigration Problems: Hearings before the Subcomm. on Immigr., Citizenship, and the Int'l Law of the Comm. on the Judiciary*, H.R., 94th Cong. 151 (1976) (mentioning embassies located in Jamaica, Trinidad, Honduras, Ecuador, Guyana, the Dominican Republic, and El Salvador as places that have an especially high number of family-based immigration requests).

309. Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *44.

310. *Id.* at *45.

311. Once again, the argument relies on the evidence provided by the birth certificate, which "frequently can be corroborated by the testimony of relatives, midwives, or medical personnel." *Id.* at *44–45.

312. *Id.*

313. Although how frequently and in what context is up for debate. *See* Abrams & Piacenti, *supra* note 284, at 679–81 (noting that "[r]eports by former consular officers and immigration officers [] opine that there are high levels of fraud in the immigration system" while "critics of the government—civil rights lawyers, legal scholars, and immigration practitioners—often claim very low rates of fraud"). One of the most widely known instances of immigration fraud took place in the early twentieth century, in response to the racially restrictive rules intended to severely curtail the entry of Chinese workers into the United States. *Id.* at 681–82. In these cases, minor children claimed to be the sons of immigrants who were exempt from the exclusionary rules; these children were called "paper sons" given that the documents they used to gain entry falsified their filial relationship. ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 84–85 (2010). As Erika Lee and Judy Yung explain in their book on the history of the Angel Island Immigration Station, "[t]he most

maintaining distinctions between unwed parents in deciding who can access the United States. Raising paternity fraud in a context where biological connection is explicitly dismissed as relevant must serve a purpose other than paternal identification. Here, it provides a seemingly value-neutral vehicle through which to express anxiety over the number of individuals who might seek admission to the United States.[314] It allows distinctions to stand between mothers and fathers on the basis of supposedly observable characteristics and permits immigration laws to require the unwed father to legitimate his child as a way of limiting who counts as a family to reunify. The concern over paternity fraud has nothing to do with a missing genetic link and all to do with identifying which families merit recognition for purposes of controlling immigration.[315]

B. Biology as Proof

The biological link between unwed father and child that was initially—and explicitly—discounted by the government emerges as *the* central constitutional justification for maintaining sex-based distinctions. In *Miller v. Albright* and *Nguyen v. INS*, the Court relies on biology to uphold the INA's different treatment of unwed mothers and fathers in establishing who can transmit American citizenship to children born abroad.[316] Biology in these cases functions as proof; because proof of fatherhood is inferior to proof of motherhood, and therefore more susceptible to fraud, fathers can be treated differently than mothers.

But this reasoning based on biology applies only to parents who are not married. The real concern, then, is not about proof of a genetic connection—instead, by the Court's own admissions, the concern is with the relationship that unwed fathers will have, or rather fail to have, with their children given the lack of marriage to their foreign mothers. Fraud also continues to provide a way of

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common strategy that immigrants used was to falsely claim membership in one of the classes that were exempt from the exclusion laws, such as Chinese merchants or native-born citizens of the United States." *Id.* at 84. These cases of fraud were gendered in that they skewed male—they were, after all, paper sons and not paper daughters. Tellingly, this did not result in any change in the standard of proof applied to sons as opposed to daughters. Instead, immigration officials "particularly scrutinized cases involving families." *Id.* at 85. This approach imposed severe costs on the families who experienced it, as "long and detailed interrogations became commonplace" and "[s]ome inspectors used intimidation and even threats to test applicants." *Id.* at 85–86.

314. *See* Brief for the Appellees, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181347, at *39, n.29 (identifying "the havoc that could be played with our immigration laws" if the relationship between unwed fathers and their children were recognized).

315. This further explains why fraud is such an important concern even though the larger statutory scheme already addresses its commission, *see* Brief for the Appellants, Fiallo v. Bell, 430 U.S. 787 (1977), 1976 WL 181344, at *49, and the problems of proof that are fatal to unwed fathers and their children are ignored in proving that a father-child relationship has been legitimated, *see id.* at *46–47 (explaining that the diversity of approaches to legitimation in different countries means "that the proof required to establish the family relationship of parent to legitimate or legitimated child is often no different than the proof which would be offered to establish the family relationship of father to his illegitimate child").

316. Miller v. Albright, 523 U.S. 420 (1998) (plurality opinion); Nguyen v. INS, 533 U.S. 53 (2001).

expressing unease over the number of American citizens who would be recognized if the unwed father were treated on par with the unwed mother.

1. Miller v. Albright

In *Miller v. Albright*, a plurality of the Court upheld the constitutionality of a provision of the INA that requires unwed fathers, but not unwed mothers, to undertake a series of steps prior to transmitting citizenship to their children born abroad.[317] Section 309(a)(4) gives an unwed father a choice between legitimating his child, acknowledging paternity in writing under oath, or having paternity adjudicated in court, all while the child is under eighteen years of age.[318] The requirement for an unwed mother is that she give birth.[319] In an opinion written by Justice Stevens, the Court finds that the unwed father's requirements are akin to the unwed mother's, given her decision to "choose to carry the pregnancy to term and reject the alternative of abortion" and, eventually, "give birth to the child."[320] If anything, the plurality reasons, "the burdens imposed on the female citizen are more severe than those imposed on the male citizen."[321] The Court concludes that the INA rightly "rewards" the American mother for giving birth by providing her child with American citizenship.[322]

In reaching its decision, the Court directly contends with the argument that the statute stereotypes the relationships unwed mothers and unwed fathers will have with their children. In particular, the Court considers whether "the statute assume[s] that all mothers of illegitimate children will necessarily have a closer relationship with their children than will their fathers."[323] It concedes that if "the classification in § [3]09 were merely a product of an outmoded stereotype, it would be invalid."[324] The Court decides, however, that it is not by characterizing the requirements imposed on the father as the inevitable result of the types of proof available to each unwed parent in establishing a connection to their offspring. Specifically, the father lacks the event of birth that creates said proof for the mother.[325]

The Court effectively reframes the distinction based on sex into a distinction based on proof, which flows from what biology dictates: "[I]t is not merely the sex

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317. *Id.* at 424.

318. *Id.* at 431.

319. *Id.*; 8 U.S.C. § 1409(c) (1986).

320. *Miller*, 523 U.S. at 433–34.

321. *Id.* at 434.

322. *Id.* at 433–34. The Court uses the language of "reward" reflexively—with American citizenship being the prize for carrying the child to term. *Id.* How that choice, and the relevant comparison with the father, is now affected by *Dobbs v. Jackson Women's Health Organization*'s elimination of the constitutional right to abortion merits sustained attention. In any event, the law is unlikely to conscript men into fatherhood in the way that it conscripts women into motherhood.

323. *Id.* at 444.

324. *Id.* at 443.

325. *Id.* at 444 (asserting that what the statute assumes is that unwed mothers "will be present at the event that transmits their citizenship to the child, [and] that hospital records and birth certificates will normally make a further acknowledgment and formal proof of parentage unnecessary").

of the citizen parent that determines whether the child is a citizen" but rather "the birth itself for citizen mothers" and "postbirth conduct for citizen fathers and their offspring."[326] The genetic connection with the mother "is immediately obvious and is typically established by hospital records and birth certificates," while the child's "relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record."[327] Because birth is a "biological difference[] between single men and single women," differentiating on that basis is not "an accidental byproduct of a traditional way of thinking about the members of either sex."[328] Relying on birth as the paradigmatic proof of a genetic relationship supplies the statute with a "separate, nonstereotypical purpose" that survives intermediate scrutiny.[329]

But, curiously, despite the emphasis on biology, the problems of proof that plague the father cannot be resolved through mere genetic testing.[330] In fact, Section 309(a)(1) already requires "clear and convincing evidence" of "a blood relationship between the person and the father."[331] Meaning, this earlier provision singlehandedly satisfies the objective of "ensuring reliable proof of a biological relationship."[332] Yet the Court dismisses the relevance of Section 309(a)(1) to evaluating the constitutionality of the requirements imposed by Section 309(a)(4). It reasons that Congress might have concluded that, "despite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity" in order "to deter fraud."[333] According to the Court, Section 309(a)(4) ensures "reliable evidence" by imposing an eighteen-year time limit.[334] And, the Court intimates in a footnote that the responsibilities of being formally recognized as a father before the child turns eighteen—which include child support—further discourage the bringing of fraudulent claims.[335]

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326. *Id.* at 443.

327. *Id.* at 436.

328. *Id.* It is also, presumably, a difference that exists between married women and married men but does not have any constitutional purchase in that context.

329. *Id.* at 443–45.

330. Instead, these concerns justify imposing a set of formal procedures that the father must comply with. The Court in *Miller* cites to *Trimble v. Gordon* in support of the proposition that proving paternity is more difficult than proving maternity. *Id.* at 436. The Court in *Trimble*, of course, did not find that such problems justified the categorical distinctions made between unwed mothers and fathers. Trimble v. Gordon, 430 U.S. 762, 770 (1977).

331. *Miller*, 523 U.S. at 431.

332. *Id.* at 436.

333. *Id.* at 438.

334. *Id.* at 437–38.

335. *Id.* at 437–38. The Court explains that without the time limitation of eighteen years, "a male citizen of could make a fraudulent claim of paternity on the person's behalf without any risk of liability for child support." *Id.* at 438 n.15. This reason is not based on a genetic connection and begins to do something like require the existence of a financial relationship between unwed father and child for their relationship to be recognized. *See* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 211 (2015) (noting that a "problem with the child support laws is that they reinforce the notion that men add value to the family primarily through their economic contributions, not their caregiving" and that "the only thing the legal system demands of them is money"). Moreover, the Court's child support jurisprudence makes clear that scientific advances in DNA testing do

Given the weak work Section 309(a)(4) is doing to promote the state's interest in establishing proof of a biological relationship, the Court identifies two additional governmental objectives: "[T]he 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."[336] Because these interests come very near stereotyping women into mothers and men into absent fathers, the Court relies again on the biological fact of birth to explain why "a healthy relationship" will only occur with the mother. The Court explains: "When a child is born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child immediately after the birth."[337] Meanwhile, "due to the normal interval of nine months between conception and birth, the unwed father may not even know that his child exists, and the child may not know the father's identity."[338] The Court relies on birth to support the distinctions the statute makes between fathers and mothers, but its conclusion follows from the law's presumption that he will not have a relationship with his child; unlike the mother, he will not retain custody, which for both parents takes place *after* birth.[339]

The law presumes there will be no relationship between father and child not because he does not give birth, but because he is not married to the foreign mother. To illustrate the difficulties an unwed father will encounter in maintaining a relationship with his child, the Court in *Miller* turns to "the size of the American military establishment that has been stationed in various parts of the world for the past half century."[340] The temporary nature of these posts supports the conclusion that there will be little relation between the American father and his foreign-born child[341]: Children born abroad "to alien mothers and to American servicemen . . . would not necessarily know about, or be known by, their children."[342] The temporary nature of the post is also a commentary on the fleeting nature of the

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minimize concerns over the possibility of fraud. *See* discussion *infra* notes 274–280.

336. *Miller*, 523 U.S. at 438.

337. *Id.*

338. *Id.* In discussing the unwed mother, the Court addresses *her* knowledge of the child's existence; in discussing the unwed father, the Court addresses the *child's* knowledge of the identity of the father. This subtle shift in perspective allows the Court to invoke paternity fraud and confusion over the father's identity. *See id.*

339 *See* Antognini, *supra* note 38, at 454 ("The provisions of the INA dictate the transmission of citizenship based on the assumption that the unwed mother, whether she be American or foreign, abroad or in the United States, will retain custody over her child. . . . The Court reaches these decisions, however, without ever openly addressing the question of custody.")

340. *Miller*, 523 U.S. at 439.

341. The Court's statements in *Miller* about the size of the American military presence abroad indicate that the sheer number of potential citizens is cause for concern. *Id.* The opinion in *Nguyen v. INS* also has an entire paragraph listing how many military personnel are stationed abroad to underscore the "concern in this context," which "has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries." 533 U.S. 53, 65 (2001).

342. *Miller*, 523 U.S. at 439.

relationship between the parents, another—quite literal—iteration of *Fiallo*'s American sailor and indiscriminate foreign mother. It is, fundamentally, the lack of a relationship between unwed mother and father that explains why the father would not know about or be known by any children born to the mother.

Understanding the father-mother relationship as paramount clarifies why the acts outlined in Section 309(a)(4) fail to ensure any genetic or actual relationship. Instead, what they do is supply the father with a formality, akin to the formal act of marriage, that would bind the father to his child. Because marriage provides the prototype for fatherhood, the unwed man must undertake a series of formalities that approximate that status in its absence.

The Court's references to the military further outline a very specific vision of who deserves the mantle of American citizenship. The opinion considers "service personnel . . . stationed in the Far East, 24,000 of whom were in the Philippines"[343] and cites to the number of service*men* deployed abroad.[344] It is the children of these American men and foreign women who have a lesser claim to being American.

This is no accident—it is a direct extension of governmental law and policy that once excluded some women, on the basis of race, from obtaining citizenship. Until the late-nineteenth century, immigration laws gave women married to American men citizenship by virtue of their marriage, unless the wives would have been unable to naturalize under the law at the time, given their race.[345] In addition, the military had its own requirements for servicemen who wanted to marry while stationed abroad.[346] The totalizing effect of these regulations was to "severely restrict[] binational marriages and, particularly, interracial marriages."[347] Such restrictions on interracial marriages directly affected children born to American soldiers, who were considered born out of wedlock and denied citizenship or the ability to naturalize on that basis.[348] Even once the explicitly racially restrictive rules were softened, military policy continued to discourage marriages depending on where the soldiers were stationed—depending, that is, on the race of their potential

343. *Id.* at 439.

344. *Id.* at 439 n.17 (discussing data showing that in the 1970s, American military stationed in Asia were "only one percent female" eventually increasing to thirteen percent).

345. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 422 (2005) (detailing the ways marriage was used as a tool to divest citizenship from individuals based on gender and race, focusing on the exclusion of Asian women from the American polity). Until 1870, Volpp explains, "the only wives welcomed into the American polity were free white wives." *Id.* At this time, immigration law provided American citizenship to children born abroad to American fathers and not American mothers. *Id.* at 420.

346. Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1397–1402 (2011).

347. *Id.* at 1413–14.

348. *Id.* at 1433–35 (explaining that "children born in Japan whose fathers were American soldiers were not automatically deemed to be U.S. citizens at birth" and many American fathers "chose not to declare their parental relationship, which further exacerbated their children's vulnerable position in post-Occupied Japanese society").

wives—as well as on the race of the American soldiers themselves.[349] The limits imposed on American fathers' ability to transmit citizenship outside of marriage thus excluded foreign-born, non-white children, a practice that extended well into the twentieth century.[350]

Miller's concerns with the American military and its failure to recognize the children of unwed American men stationed in the "Far East" extends the legacy of these policies into contemporary constitutional law. The Court's generalized concerns over fraud, along with the trope of the promiscuous foreign woman[351] and the peripatetic serviceman, reinstate the limits legal rules have historically placed on who should be recognized as an American citizen. [352]

Lorelyn Penero Miller, the petitioner in *Miller*, was born in the Philippines in 1970.[353] Her mother was a Filipino national, her father a Texas resident stationed in the Philippines while serving in the United States Air Force.[354] Military policy actively suppressed marriages in the Philippines.[355] The result was a relatively low number of marriages between American soldiers and Filipina women.[356] Lorelyn's

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349. As historian Susan Zeiger explains, in World War I, "U.S. military and civilian authorities took a paternalistic stance toward white soldiers, determined to 'protect' them from sexually promiscuous foreign women." However, for "'colored troops,' . . . military officials warned of the sexual danger that African American servicemen allegedly posed to the white women of other nations." ZEIGER, *supra* note 29, at 6. *See also* Nancy K. Ota, *Flying Buttresses*, 49 DEPAUL L. REV. 693, 726–27 (2000) (discussing the military's control over marriage and commercial sex in ways that "produce[] a particular standard for citizenship that relies on sexism, racism, heterosexism, classism, and nationality"); Villazor, *supra* note 346, at 1415–16 (noting the different rules that applied when the soldiers who were marrying Japanese women were Japanese-American themselves, which meant that such marriages were allowed, in contrast to "Black soldiers stationed in Europe" who "faced problems obtaining marriage approvals when their girlfriends were White").

350. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2198 (2014). As Kristin Collins has shown in her historical study of derivative citizenship law, "the limitations on father-child jus sanguinis citizenship for nonmarital children [were] used to exclude nonwhite children from citizenship and thus served a racially nativist nation-building project." *Id.* at 2207–08.

351. The military establishment had a hand in constructing who was considered a "promiscuous" woman. As Zeiger explains, "prostitution, legal or not, existed in every country where U.S. troops were posted." Yet, while "area commanders tolerated and sometimes even abetted the establishment of military-regulated brothels for U.S. troops in nonwhite, colonial societies like Hawaii, . . . in white, advanced-industrial, and Allied countries, they committed resources and personnel to the suppression of brothels and the elimination of commercialized sex between U.S. servicemen and local women." ZEIGER, *supra* note 29, at 77.

352. *See* Collins, *supra* note 350, at 2228 (addressing *Miller*, *Nguyen*, and *Fiallo*, noting that "[t]he juridical records produced in these cases mention the petitioners' country of birth only in passing, and the histories of America's exclusionary immigration policies toward their birth countries—the Philippines, Vietnam, and Mexico—are absent").

353. *Miller*, 523 U.S. at 424.

354. *Id.* at 425.

355. The military viewed Filipina women to be better suited as "sexual partners rather than marital ones." ZEIGER, *supra* note 29, at 81.

356. This is not to imply that there were no Filipina war brides—there were, and they were crucial to the creation of Filipino immigrant communities in the United States. *See* ZEIGER, *supra* note 29, at 108. Nonetheless, "[i]n the broader spectrum of overseas marriage during World War II . . . it is important to note what a relatively small community of brides this was and how embattled was their experience." *Id.* at 109.

parents never married.[357] And the Court in *Miller* declined to recognize Lorelyn as an American citizen.[358]

2. Nguyen v. INS

Because the decision in *Miller* mustered only a plurality of votes, the Court revisited the constitutionality of Section 309(a)(4) in *Nguyen v. INS*. Tuan Anh Nguyen, the son of an American citizen father and a Vietnamese citizen mother was born in Saigon one year before Lorelyn.[359] As with Lorelyn, the Court affirmed Tuan's denial of American citizenship. In an opinion by Justice Kennedy, the Court adopted most of the reasoning articulated in *Miller*, and cemented biology as central to the constitutionality of INA's sex-based distinctions.[360] In particular, the Court held that the statute could differentiate between unwed mothers and fathers without violating equal protection because "the use of gender specific terms takes into account a biological difference between the parents."[361]

That "biological difference"[362] is the event of birth. Birth, however, is meaningful only to the extent that it is capable of providing reliable proof. As in *Miller*, the first governmental interest the Court identifies is "assuring that a biological parent-child relationship exists."[363] Birth matters to this interest because "proof of motherhood . . . is inherent in birth itself."[364] Fathers lack such irrefutable evidence. Following the Court's reasoning reveals, however, that birth only facilitates the provision of what is ultimately the requisite proof, which is "the birth certificate or hospital records and the witnesses who attest to her having given birth."[365] That is, the moment of birth matters because it leads to the production of documents and testimony. These can, of course, all be fabricated. But fraudulent motherhood, once conceivable,[366] no longer has any place in the Court's reasoning.

Fraudulent fatherhood, on the other hand, abounds. The Court finds even DNA testing insufficient to satisfy the state's interest in ensuring the existence of a biological parent-child relationship. This is so despite "[t]he virtual certainty of a biological link that modern DNA testing affords,"[367] not to mention Section 309(a)(1)'s separate requirement that fathers provide "clear and convincing evidence" of parentage. Although the Court notes that the statute "does not . . . mandate a DNA

357. *Id.*
358. *Id.* at 445.
359. *Nguyen v. INS*, 533 U.S. 53, 57 (2001).
360. *Id.* at 64.
361. *Id.*
362. *Id.*
363. *Id.* at 62.
364. *Id.* at 64.
365. *Id.* at 62. The dissent by Justice O'Connor reveals the space that separates the moment of birth from its proof—"a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may be subsequently lost." *Id.* at 81–82 (O'Connor, J., dissenting).
366. *See* Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968).
367. *Nguyen*, 533 U.S. at 80 (O'Connor, J., dissenting).

test,"[368] it takes the opportunity to list the numerous problems with DNA testing to support the additional requirements contained in Section 309(a)(4): "[T]he expense, reliability, and availability of [DNA] testing in various parts of the world may have been a particular concern to Congress."[369] These "various parts of the world" somehow spare the production of hospital records and birth certificates, which do not lead to similar concerns over fraud for the unwed mother.

The Court also raises and dismisses the relevance of DNA testing in discussing the second, and final, governmental interest in ensuring the opportunity to develop a relationship—"one that consists of the real, everyday ties that provide a connection between child and citizen parent, and in turn, the United States."[370] Insofar as this second governmental interest goes, "scientific proof of biological paternity does nothing."[371] This is because, the Court admits, "paternity can be established even without the father's knowledge, not to say his presence" merely "by taking DNA samples even from a few strands of hair, years after the birth."[372] Here then, the Court critiques DNA testing for doing the very thing it had previously stated it could not reliably do. The problem is no longer with defects in testing, but rather with defects in what such testing shows—a biological connection, and nothing more.[373]

For the mother, birth supplies both proof of a genetic connection and the opportunity to develop "real, everyday ties" with her child. To be clear, the Court is not recognizing the caretaking that took place or any relationship that might have developed by the time the woman gives birth; birth matters only insofar as "[t]he mother knows that the child is in being and is hers and has an initial point of contact with him."[374] Without this initial point of contact, the father might not "know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity."[375] These latter two considerations hinge, however, on the father's relationship with the mother, not his relationship with the child. The Court once again discusses the American military's presence abroad, despite Nguyen's father not being in the military, and raises the point that "the average American overseas traveler spent 15.1 nights out of the United States in 1999."[376] These data are relevant because they go to the fleeting nature of the relationship between the man

368. *Id.* at 63.

369. *Id.*

370. The *Nguyen* Court condenses the final two interests stated in *Miller* into one. *Id.* at 64–65.

371. *Id.* at 67.

372. *Id.*

373. None of this is to argue that DNA testing should be required. There are concerns with mandating DNA testing separate from fraud, like "prevent[ing] the reunification of some families and cause significant harms to their welfare." *See* Llilda P. Barata, Helene Starks, Maureen Kelley, Patricia Kuszler & Wylie Burke, *What DNA Can and Cannot Say: Perspectives of Immigrant Families about the Use of Genetic Testing in Immigration*, 26 STAN. L. & POL'Y REV. 597, 601 (2015).

374. *Nguyen*, 533 U.S. at 65.

375. *Id.* at 65.

376. *Id.* at 66.

and the foreign woman, which is why "merely . . . conducting a DNA test"[377] cannot establish fatherhood for purposes of the second governmental interest: It does nothing to address the lack of a formal relationship with the mother.

The opinion in *Nguyen* characterizes birth as a purely biological event that furnishes women, and not men, proof of a genetic connection and an ensuing relationship with the child.[378] Yet looking more closely at *Nguyen*'s reasoning reveals that birth is important only because it leads to documentation for the first state interest, and to an initial point of contact for the second. As such, the distinctions the Court enshrines are anything but biological, and the father's inability to give birth is not determinative. Indeed, the formal steps laid out in Section 309(a)(4) do very little to make up for the lack of birth, even by the terms set forth by the Court: They do not provide confirmation of a genetic tie, which is already required by the statute, nor do they demand proof of an actual relationship or point of contact, to be satisfied.[379] The real function they perform is to mimic the formal requirements that establish a marriage.[380]

C. Fraudulent Citizenship

Nguyen v. INS represents the current state of the law concerning the constitutionality of sex-based distinctions.[381] Problems of proof precipitated by biological difference lend the appearance of objectivity to what are ultimately contestable judgments about who will be a parent and who is deserving of American citizenship. Congress and the Court assume that the mother—whether American or foreign—will have sole parental responsibility outside of marriage. The result is twofold: Men are recognized as fathers only within marriage or its formal approximation, and the children of unwed foreign women have a more difficult time being recognized as American citizens.

This outcome follows directly from the Court's standard mode of reasoning about problems of proof that lurk in paternity determinations. As in the domestic

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377. *Id.* at 67.

378. "There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype." *Id.* at 68.

379. *See* Miller v. Albright, 523 U.S. 420, 486 (1998) (plurality opinion); 523 U.S. at 486 (Breyer, J., dissenting) ("[T]he statute does little to assure any for, as Justice Stevens acknowledges, a child might obtain an adjudication of paternity 'absent any affirmative act by the father, and perhaps even over his express objection.'").

380. The brief submitted by the government in *Nguyen* makes exactly this point in explaining how the statute actually liberalized the requirements for the unwed father: "Fathers who could not legitimate their child due to the death or marriage of the mother gained the opportunity to have the child become a United States citizen through a process that approximated legitimation." *See* Brief for the Respondent at 20, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1868100, at *20.

381. *See* Sessions v. Morales-Santana, 582 U.S. 47, 65–66 (2017) (distinguishing *Nguyen* and *Miller* from the residency requirement the Court found unconstitutional). For an argument that *Morales-Santana* provides the basis for overturning *Nguyen* and finding that provision of the INA unconstitutional, see Antognini, *supra* note 60, at 443–46.

context, ensuring a genetic link is not the real concern. References to a genetic connection nonetheless remain because they furnish the Court with the terminology of proof and biological difference that portrays sex-based distinctions as objective and unavoidable. To substantiate this point, let us consider the opinion in *Nguyen* if the Court were no longer to include the important governmental objective of proving a genetic connection.[382] The sole remaining state interest would be furthering an opportunity for the unwed father to develop a relationship with his child. Without problems of proof or concerns over paternity fraud looming over the analysis, it becomes much harder to dispute that the requirements of Section 309(a)(4) are prefaced on an "outmoded stereotype"[383]—namely, that unwed men will have no relationship with their children. Although the Court attempts to link this consideration to the "fact" of biological difference, such a connection is more immediately tenuous. The "initial point of contact" that birth supplies for women and not men in this context could be remedied by a number of different requirements mandating such contact, including that men be present at birth in order to be recognized as fathers.[384] But the Court does not consider any such alternatives because they are, ultimately, irrelevant—the assumption that the man will not be present in the child's life flows conclusively from the fact that he did not marry the mother, which, depending on the race of the woman, formal legal rules once explicitly prevented. It is this lack of marriage between the father and mother that explains why the only steps he can take to prove a relationship to his child are by engaging in one of several formalities, and why only a father who has not married must undertake them.

Miller and *Nguyen* make clear that the existence of a paternal relationship is entirely derivative of whether there is a marital one, and so the law attempts to set out requirements to satisfy it by proxy. The facts of the cases speak for themselves—they repeatedly ignore any genetic or actual ties between unwed fathers and their children, and deny immigration and citizenship status exclusively to the children of American men who have not married the foreign mother.[385] Taking seriously the governmental interest in proving a genetic connection would mean either allowing Section 309(a)(1) to do that work, or conceding that fraud can

382. Let us say that the Court adopted the dissent's approach that acknowledging that Section 309(a)(1) already does as much. *See Nguyen*, 533 U.S. at 81 (O'Connor, J., dissenting) ("Because § [3]09(a)(4) adds little to the work that § [3]09(a)(1) does on its own, it is difficult to say that § 1409(a)(4) 'substantially furthers' an important governmental interest.").

383. *Miller*, 523 U.S. at 443.

384. For the first state interest in proving a biological connection, the Court specifically states the father's presence at birth is insufficient. *Nguyen*, 533 U.S. at 62. It does not, however, articulate a reason for why it would be insufficient to establish the necessary point of contact for the second.

385. *See* Collins, *supra* note 350, at 2233 ("[A]t key junctures, judges, administrators, and legislators enlisted gender- and marriage-based citizenship laws in an effort to limit recognition of nonwhite children as citizens."); Antognini, *supra* note 60, at 458 (arguing that the citizenship transmission cases are concerned "not only, or not really, with the absence of the unwed American father" but "above all, with the presence of the foreign mother" given that "it is specifically the children of foreign mothers that the law declines to recognize as American citizens").

affect both mothers' and fathers' claims.[386] Taking seriously the governmental interest in fostering a connection to the American parent, and thereby the United States, would place an emphasis on the relationship that in fact developed between parent and child. Neither depends on who gives birth, or on the sex of the American parent.

But the gender of the parent continues to figure prominently in these cases because of how law, not biology, allocates parental responsibility.[387] Women—American or foreign, married or unmarried—will always be mothers, with varying consequences for their children. Men, however, will only be fathers when they have married the mother. Concerns over proof and paternity fraud that appear rooted in biology are, at bottom, rooted in law, in that they arise only when the father has not married the mother. This explains why the proof the INA mandates for the father is exclusively formal—because it responds to the lack of a formal relationship between the parents.

Appeals to fraud should thus not render sex-based distinctions between parents constitutional, as they mask debatable judgments about who is a parent and who should be recognized as an American citizen. For men, marriage functions as the dividing line: It is the man's decision to marry that makes him a father.[388] This choice, once directly inhibited by law and policy in the immigration and citizenship context, determines a man's relationship to his child and, in turn, whether his child is admitted into the American polity.

III. IMPLICATIONS OF SURFACING NONMARITAL FRAUD

With little fanfare, fraud helps to cement the outer bounds of the Court's stilted interpretation of equality. As a pillar of constitutional reasoning, concerns over fraud preserve law's unequal treatment of men and women. Yet what fraud refers to in this context is a moving target. While the specific reference is to paternity fraud—defined as a missing biological connection between alleged father and child—the cases consistently discount or entirely disregard proof of a genetic connection. Marriage continues to be what matters most in turning men into fathers, which the Court's reliance on fraud works to obscure. Indeed, these sex-based distinctions follow not from any inherent biological difference, but from the lack of marriage:

386. *See Nguyen*, 533 U.S. at 81–82 (O'Connor, J., dissenting) (explaining that "a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost" and while "a mother's blood relation to a child is uniquely 'verifiable from the birth itself' to those present at birth, the majority has not shown that a mother's birth relation is uniquely verifiable *by the INS*") (internal citation omitted).

387. *See* Suzanne A. Kim, *Commentary on Michael H. v. Gerald D.*, *in* FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN 187, 201 (Rachel Rebouché ed., Cambridge Univ. Press 2020) ("Turning to the history of how our legal rules allocate parentage uncovers the importance not of biology, but of *marriage*, to that determination. In particular, it discloses the importance of preserving the ability of children born to a marriage to receive recognition and support from their father.").

388. *See* Murray, *supra* note 38, at 404–05 (describing the Supreme Court's jurisprudence on unwed fathers as willing to protect him when the father communicated commitment to the mother).

They are imposed and justified only in the context of nonmarital families.[389]

This Part brings together and bolsters the arguments developed in Parts I and II for why fraud should not be considered a legitimate state interest that justifies sex-based distinctions between unwed mothers and fathers. While fraud provides an objective-sounding, non-stereotypical-seeming reason for differentiating between men and women, this Part shows how fraud is anything but neutral. Concerns over fraud lead to the contestable conclusion that men will be fathers only within marriage, while women will be mothers always. The origins of these distinctions lie not in biology, as the Court asserts, but in a historical regime that protected men's property within marriage—by limiting the rights of women and children outside of it. Buoyed by fraud, the effects of this regime continue mostly intact.[390] Fraud further functions in racist ways, supporting the primacy of marriage in race-salient terms and contributing to the continued marginalization of nonmarital families. As such, allegations of fraud impugn nonmarriage as a general matter.

A. Law not Biology

Fraud supports the constitutionality of distinguishing between men and women as fathers and mothers. In the aftermath of *Glona* and *Levy*, legal commentators questioned whether the Court would extend its reasoning to unwed fathers, based principally on the possibility of paternity fraud. Soon, concerns over fraud and problems of proof emerged in the Court's opinions addressing the exclusion of unwed men and their children from various statutory schemes. Such concerns would eventually come to justify the differential treatment of unwed fathers and unwed mothers.

The paternity fraud raised initially by commentators was, however, distinct from the paternity fraud ultimately articulated by the Court. No fact pattern presented a dispute over whether the unwed father and child had a genetic connection, no statute at issue required proof of one, and paternal identity was wholly tangential to the legal questions presented, which involved whether nonmarital children should be able inherit from their fathers or whether unwed fathers should be able to transmit citizenship to their children born abroad in a manner consistent with unwed mothers.[391] Constitutional law nevertheless chose to

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389. They work in concert with marital norms to enforce a narrow, biologically determined definition of parentage. *See* NeJaime, *supra* note 9, at 2268 ("With biological connection continuing to anchor nonmarital parenthood, unmarried gays and lesbians struggle for parental recognition. With the gender-differentiated, heterosexual family continuing to structure marital parenthood, the law assumes the presence of a biological mother in ways that burden nonbiological mothers in different-sex couples, as well as nonbiological fathers in same-sex couples.").

390. Under modern equality norms, this state of affairs should neither be acceptable, nor constitutional. *See* Siegel, *supra* note 239, at 227 ("By the turn of the century, the Supreme Court was emphasizing that women deserve equal protection of the law even when they differ from men, and extending the prohibition on sex-stereotyping to laws governing pregnancy.").

391. Where administrative convenience and problems of proof are concerned, the Court has asserted that the appropriate response is to set standards of proof, rather than to enforce a blanket

answer such open propositions by asserting that proof of genetic fatherhood is weaker than proof of genetic motherhood.[392]

The constitutional arguments that rely on paternity fraud differ from actual claims of paternity fraud in a more fundamental way—by inverting the purpose the doctrine is meant to serve. Assertions of paternity fraud are generally raised in order to reject the status of fatherhood, whereas the claims at the heart of the unwed father cases are the opposite, in that they are requesting legal recognition of the paternal relationship.[393] All the same, the Court relies on the assumptions underlying paternity fraud that the mother does not know who the father is[394] and instills doubts over paternal identity generally to support its refusal to acknowledge unmarried men as fathers. By entrenching the narrative that the law must step in to shield innocent men, paternity fraud confuses the basic fact that these cases involve men and their children who are actively seeking recognition of their relationship, and which the cases mostly refuse to give.[395]

Paternity fraud remains a cornerstone of the Court's constitutional reasoning because it lends the appearance of biological inevitability to what is, in fact, the product of an outdated legal regime. Appealing to a verifiable definition of fatherhood—genetics—and relying on observable physiological differences between men and women—birth—allows the Court to avoid contending with whether men and women *should* be treated differently outside of marriage in determining who is a parent. Instead, the legacy of longstanding legal rules that once explicitly protected marriage as the sole locus of benefits, fills in the gaps. Under this since defunct regime, the husband, as the head of the family, exerted exclusive control over his wife, children, and marital property.[396] In order to protect his

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exclusion. *See, e.g.,* Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) ("Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof.").

392. Such assertions were always questionable but are especially so now, where genetic, gestational, and functional motherhood can be so obviously separated. *See* Cahill, *supra* note 38, at 2264 ("[C]ontested, disputed, complicated or unknown maternity is not just the stuff of religion, myth, and fiction.").

393. *See* Melanie B. Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 199 (2004) (discussing the different contexts in which paternity fraud cases arise and explaining that "their concerns over paternity fraud are similar: they have no genetic relationship to the child they believed was their biological offspring and thus they no longer wish to be legally obligated to pay child support"). Successful claims of paternity fraud lead to the same result in actual paternity fraud cases as they do in these constitutional cases, in that the man is not recognized as the father.

394. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 65 (2001) ("Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child is conceived, nor is it always clear that even the mother will be sure of the father's identity.").

395. To further spell it out: paternity fraud calls on the narrative of the promiscuous woman who will have sex outside of marriage and lie about who is the father of the resulting child, defined exclusively by an objectively verifiable genetic connection. Paternity fraud further obscures the role of the state in pushing women to name fathers as a precondition of receiving state benefits. *See* Jacobs, *supra* note 393, at 199–200 (describing state and federal child support programs that require paternal identification and involvement).

396. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 90

position, as well as to safeguard the marital household, the law recognized the mother as the sole parent of a child born out of wedlock.[397] She was also more severely punished by laws that criminalized sex outside of marriage.[398] The culmination of these laws was to absolve the man—when he was not the woman's husband—of any responsibility.[399] The Court's decisions refusing to recognize the non-husband as a father continue the effects of a legal system that recognized fatherhood only within marriage and placed full responsibility for parentage outside of marriage on the mother. Law, not biology, was and still is responsible for creating this asymmetrical state of affairs.[400]

Indeed, the Court's own reasoning discloses just how immaterial biology is in differentiating between the sexes. Looking at how the opinions raise the possibility of paternity fraud shows that they do so in a way that strikes at the "real" differences the legal rules are supposedly reflecting. Fraud follows from paternity and not maternity because of the difference in proof available to unwed mothers and fathers. That is, biology is important to these opinions not in and of itself, but insofar as it provides relevant documentation. As such, the event of birth that supplies the basis for distinguishing between men and women, on the grounds of real biological difference, matters principally for the production of evidence; birth matters because it leads to a birth certificate, or witnesses.[401] The significance of birth is reduced to the record that it creates. Biology, it turns out, is paper thin. And yet it provides the justification upon which equal protection rests.

B. Fraud's Consequences

Legal rules that used to deny unwed men the mantle of fatherhood to explicitly

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(2021) ("In supporting male power, both marital and child coverture assumed that husbands represented the interests of their wives and children, yet law did nothing to mandate that husbands actually represented their wives' and children's interests."); Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2156–59 (2019) ("The way that coverture allotted property rights was to give the husband control or outright title to property brought into the marriage and to prevent the wife from controlling any real property she owned or from gaining title to any property acquired during the marriage.").

397. *See* Jacobus TenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 314 (1964) ("Since the obligation to support was dependent on the right to custody and since the mother had the right to custody of her illegitimate children, she had the responsibility for their support. Moreover, she had it entirely and alone.").

398. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 960 (1984) ("Sex outside of marriage was condemned, by society and the law, much more harshly and consistently for women than for men.").

399. Within marriage, the father might be at times responsible for any offspring resulting from his wife's extramarital affairs. *See* GROSSBERG, *supra* note 24, at 200–01. While this might be considered burdensome, it further underscores the variability of when "fraud" matters.

400. *See* Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1147 (2023) ("The argument that sex stereotypes will proliferate without real differences—and that real differences *advances* equality for women—has never been coherent, especially given that real differences is the reason for not applying the sort of judicial scrutiny necessary to expose sex stereotypes.").

401. *Cf.* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1853–54 (2022) (addressing the role of the birth certificate in identifying an individual's "biological sex" and challenging its authority to do so).

privilege marriage now do so under the guise of protecting against paternity fraud. To be fair, the Court has indicated just how intimately fraud is linked with the promotion of the marital family. Its opinions have uniformly articulated concerns over paternity fraud in conjunction with advancing legitimate family relationships and even where incentivizing legitimate families is no longer raised as a rationale, fraud steps in to limit benefits to marriage where unwed men are concerned. Yet because of fraud's links to physiology, there is little opportunity to account for how marriage is promoted to the detriment of nonmarriage, and to take stock of its effects.

These effects, however, matter. They matter because of the context in which these rules arise, and the families to which they are applied. Once we understand the distinctions between unwed parents to be the product of legal rules, that is, of a specific ideology rather than of a universal biology,[402] then we can better engage in a critique of the consequences that follow from continuing to enforce these differences.

Unwed men and their children are obviously harmed by not having their relationship recognized and not receiving the benefits that would have followed.[403] Understanding that law assigned motherhood to the exclusion of fatherhood with the express aim of protecting the husband's marital property, and his legitimate children, underscores how maternal recognition is also not purely a boon.[404] These decisions harm women, in manifold ways.[405] The woman is inexorably cast as a mother, without any acknowledgment of the ways in which "the laws may generate a self-fulfilling expectation" and not merely reflect reality.[406] In her assigned role, moreover, she is denied the support that laws provide a marital family: Because her children cannot access property, or citizenship, from their father, she is limited in her ability to provide for them.

This history of how and why men were excluded from fatherhood helps to

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402. The Court in *Sessions v. Morales-Santana* unearthed the "now untenable" rules that held that "[i]n marriage, husband is dominant, wife subordinate" while an "unwed mother is the natural and sole guardian of a nonmarital child" as the real reason behind the INA's differential treatment of unwed mothers and unwed fathers. 582 U.S. 47, 59 (2017). The opinion, however, limited its reasoning to finding the residency requirements imposed on unwed parents unconstitutional and preserved the distinctions it made in *Miller* and *Nguyen*. *Id.* at 65.

403. Not every case harms the interests of men and their children in the same way. Refusing to recognize the existence of a paternal relationship for purposes of intestacy, for example, does not financially harm the father in the way it does the child. And, of course, the Court characterizes such cases as protecting the interests of the deceased father from the fraudulent claims of illegitimate heirs. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); discussion *supra* Part I.B.4.

404. Serena Mayeri details the history and contours of the Supreme Court's failure "to accept feminist arguments that challenged assumptions about women's primary responsibility for nonmarital children, and about privatized dependency, sexual morality, and marital supremacy itself." Mayeri, *supra* note 9, at 1282.

405. *See, e.g.*, *id.* at 1346 (identifying the sex equality arguments at the heart of the illegitimacy cases that were accessible as legal arguments even before the Supreme Court saw them as such, and describing Judge Carlos Cadena's dissent in *Gomez* critiquing the notion that "'family unity' [could be] served by a law that exempted not only men with legitimate spouses and children from support liability, but also unattached men").

406. Law, *supra* note 398, at 1008. Law continues: "as when the fact that women bear children is used to justify an assumption that women have greater responsibility to nurture them after birth." *Id.*

clarify the stakes of maintaining that exclusion, in any context. In most of the unwed father cases, Serena Mayeri has observed that "fathers' rights served mothers' rights."[407] Feminists disagree, however, on what should happen when the interests of the unwed mother and unwed father conflict.[408] Being attentive to the links between fraud and marriage promotion helps reframe the debate about whether unwed fathers *ought* to have rights vis-à-vis unwed mothers, in all situations. If appeals to biology and physiology are largely in service of normative judgments about who *should* be a parent, then any assertion about what follows from the sex of each parent is suspect.[409] This is especially true when such assertions take place outside of marriage only. In this context, any argument couched in the language of biology, even when it might appear to benefit the mother, is doing more than merely communicating facts about what nature dictates.[410]

Today, nonmarriage is common, and nonmarital families are on the rise.[411]

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407. *See* Mayeri, *supra* note 33, at 2330.

408. *See id.* at 2333 (raising numerous unresolved questions, like "[w]as unmarried mothers' primary responsibility for the care of their children inevitable, or malleable?" and "[w]hat role should individual mothers' preferences about paternal involvement play in decisions about a father's rights and responsibilities?"). Some feminists are especially critical of attempts to attain sex equality through sex neutrality, based on the concern over erasing the process of gestation and pregnancy that should, they argue, have some constitutional purchase. *See, e.g.*, HENDRICKS, *supra* note 9, at 41 ("The courts should either let the birth mother choose the baby's family or, at least, give great weight to her preference."); Katharine K. Baker, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood*, 35 J. AM. ACAD. MATRIM. LAW. 1, 8–9 (2022) (criticizing scholars who advance equal rights at birth and arguing in favor of "[v]esting gestators with greater rights at birth" as a reflection of "gestators' wildly disproportionate investment in pregnancy").

409. Jennifer Hendricks has lauded the Supreme Court's decisions in the "Unwed Father Cases" for "recogniz[ing] the importance of gestation and birth." *See, e.g.*, HENDRICKS, *supra* note 9, at 47-48 (defending the Court's different treatment of unwed mothers and fathers as contained in its biology-plus test, explaining that "the test is satisfied by ordinary parental caretaking of the sort that is compatible with men's biology" given that "[a] person can acquire parental rights through giving birth to her child, or by caring for his child" in a way that is "tailored to the biological conditions of the sexes"). Hendricks is careful to rely on gestation rather than sex or gender as the relevant proxy. *Id.* ("[A] transgender man who gives birth is just as much a 'birth mother' as any other formerly pregnant person."). Hendricks's argument is premised on a description of the Unwed Father Cases as "accommodating men based on caretaking rather than marriage." *See id.* at 44. The unwed father cases this Article considers, which rely specifically on fraud as a rationale, provide a critique of the opinions Hendricks focuses on in that they present the view that the Court's decisions might not, as Hendricks argues, be defining unwed fathers' rights based on the process of gestation and birth, but instead relying on the assumption, rooted in law and social norms, that the woman will be the only parent to a child born outside of marriage.

410. *Cf.* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 345 (1996) (discussing, in the context of race, how "[r]ights discourse was inherently linked with systemic exclusion that was purportedly mandated by 'natural' differences"); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992) (critiquing the Court's opinions addressing reproduction for adopting a "physiological framework . . . that obscures the gender-based judgments that may animate such regulations and the gender-based injuries they can inflict on women").

411. Although as these discussions have shown, nonmarriage is not a new occurrence. *See, e.g.*, Dubler, *supra* note 15, at 960–61 ("We tend today to think of nonmarital cohabitation as a peculiarly modern phenomenon.").

Such families tend to be less economically privileged than their married counterparts.[412] Nonmarriage rates are also higher among Black communities,[413] and as Robin Lenhardt has observed, "nonmarriage in the United States has long been raced, and generally not in a good way."[414] This background underscores how raising fraud in the unwed father cases is a value-laden charge—a way of indicting nonmarriage, which can be understood in race-salient terms.

General concerns over fraud have been consistently leveled in discussions addressing low-income Black communities seeking any form of governmental support.[415] Allegations of fraud are especially pronounced in conversations surrounding poor, unmarried Black women, who have been treated as undeserving of government aid.[416] The pejorative myth of the "welfare queen" portrays just that, conjuring "the image of an unmarried Black mother who had no intention of

412. Richard Fry & D'Vera Cohn, *Living Together: The Economics of Cohabitation*, Executive Summary (June 27, 2011), available at https://www.pewresearch.org/social-trends/2011/06/27/living-together-the-economics-of-cohabitation/ [https://perma.cc/Y9FN-SUH9] (showing that cohabitation is generally higher among adults without college degrees and "greater economic well-being is associated with cohabitation for adults with college degrees, but not for those without college degrees"); Benjamin Gurrentz, *Cohabiting Partners Older, More Racial Diverse, More Educated, Higher Earners*, United States Census Bureau (Sept. 23, 2019), available at https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html [https://perma.cc/8BAQ-EHJ2] (showing an increase in the earnings of unmarried partners, although they are still comparatively low, with "[t]he proportion making less than $30,000 annual (in 2017 dollars) dipped from 64% in 1996 to 53% in 2017).

413. *See* Deirdre Bloome & Shannon Ang, *Marriage and Union Formation in the United States: Recent Trends Across Racial Groups and Economic Backgrounds*, 57 DEMOGRAPHY 1753, 1771 (2020) (describing that "marital declines progressed faster among both White and Black people from lower-income backgrounds than among their peers from higher-income backgrounds" and that "[w]ithin economic backgrounds, marital declines were larger among Black people than White people").

414. R.A. Lenhardt, *Race Matters in Research on Nonmarital Unions: A Response to Amanda Jayne Miller's and Shannon Sassler's* "Don't Force My Hand": Gender and Social Class Variation in Relationship Negotiation, 51 ARIZ. ST. L.J. 1317, 1322 (2019).

415. *See, e.g.*, Dorothy A. Brown, *Race and Class Matter in Tax Policy*, 107 COLUM. L. REV. 790, 793–96 (2007) (arguing that "whenever there is an error found in low-income taxpayer's return, politicians only suspect fraud and not complexity" because of "the political rhetoric surrounding the low-income tax credit" and the view that low-income taxpayers are "lazy former welfare recipients who work because they have to and will lie and cheat in order to line their pockets with government money" which tracks the belief that most of these recipients are Black).

416. *See, e.g.*, Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1, 17 (2007) (identifying the varying "deservingness" of recipients of government assistance and noting that "by the 1960s, the line of demarcation within the moral economy of deservingness had shifted, and unemployed mothers without husbands, who were once the apotheosis of deservingness, became positioned within the category of the undeserving poor," largely because "most women who were making claims . . . by the 1960s were Black"); Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 284 (2016) ("[Poor mothers] are not characterized as good mothers when they aggressively seek state resources to improve their children's lives; instead, poor women are regarded as entitled and potentially at high risk for committing theft of services and fraud."). Immigrant women are included in this same political economy and were given assistance in order "to conform to 'American' family standards." *See also* Dorothy E. Roberts, Book Review, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1569–70 (1996) ("[R]eformers incorrectly believed [immigrant women] made up a disproportionate share of deserted wives and illegitimate mothers.").

pursuing employment when she could rely on public funds and who, acting on an outsized sexual appetite, produced child after child for purposes of increasing her monthly support."[417] Integral to this depiction is that she was also "probably practicing fraud against a beneficent government."[418]

Race was central to, if mostly absent from,[419] the Court's unwed father decisions. The plaintiffs in the initial illegitimacy cases like *Glona* and *Levy* were Black women and their children.[420] This is no coincidence, given that illegitimacy penalties were understood as part of a larger project to reverse the recently won civil rights victories.[421] Political discourse during this time deliberately linked illegitimacy to claims of fraud in order to limit government support for unwed Black mothers.[422] The immigration and citizenship context further shows how law itself was involved in perpetuating the status of illegitimacy. Because law and policy actively prevented marriages between American soldiers and local women on the basis of race, any children born to those relationships would by definition be born out of wedlock, with negative consequences for their citizenship status. Now, concerns over fraud continue to enable the selective promotion of legitimate relationships, to the abiding disadvantage of mostly non-white families.

Subjecting fraud to some scrutiny reveals that it is anything but an empirically verifiable charge. Instead, raising fraud in these cases redirects the constitutional analysis to consider proof of fatherhood rather than contend with the residue of a legal regime that recognized only one parent—the mother—outside of marriage.[423] Fraud is working to even more pernicious effects. The cases that rely on fraud prevent unwed women and their children from accessing material resources on par

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417. Susan Frelich Appleton & Laura A. Rosenbury, *Reflections on "Personal Responsibility" after COVID and* Dobbs*: Doubling Down on Privacy*, 72 WASH. U. J.L & POL'Y 129, 136 (2023).

418. *Id.*

419. The closest the decisions come to mentioning race is in their discussions of the "alien mother," or in referencing the number of servicemen stationed in the Far East. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 439 (1998).

420. *See* Mayeri, *supra* note 9, at 1281 (explaining the possibility offered by the cases to challenge legal understandings of sexual privacy and liberty, but which were eventually narrowed to "a child-focused approach [that] dominated illegitimacy doctrine").

421. *See id.* at 1285–86. *See also* ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL THE CIVIL RIGHTS MOVEMENT 69–70 (2009) (describing the numerous ways in which "illegitimacy became a type of code for punishing blacks," including the introduction of a bill recommending "that women with two or more illegitimate children be declared feebleminded and then sterilized").

422. WALKER, *supra* note 421, at 67 (discussing one example in North Carolina Governor Luther Hodges's attempts to "link[] black illegitimacy rates to larger claims of black irresponsibility, immorality, and even fraud"). While "white women also bore children out of wedlock," they had "many more opportunities" than Black women to, for instance, access maternity homes or place their children for adoption. *See id.* at 79-80.

423. Raising fraud in the context of poverty similarly redirects the dialogue to focus on the commission of fraud and its causes as opposed to the existence of poverty and its causes. *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297, 343 (2013) ("We come to understand welfare use and welfare fraud—rather than poverty, need, and inequality—as social problems.").

with those of a marital family, thereby participating in creating the very conditions that fraud is used to impugn. Refusing to provide these nonmarital families with support, even through entirely private means, entrenches their lack of access to resources and solidifies their marginalized status.[424]

C. Illegitimate Fraud

Fraud functions as a powerful, law-sanctioned tool for marking certain family formations as nonnormative.[425] It serves to identify which relationships are worthy of recognition and which are not, in gendered and racialized ways. The fraud at issue is not, ultimately, that of paternity; nor is the harm to the man who is shown not to be the father.[426] The fraud at the heart of these cases concerns the nature of the relationship at stake; and the harm is to marriage.

The fraud the Court seeks to address is that of requesting legal recognition and material support on the basis of a relationship that is not marital. This fear of nonmarriage is not new: Anxieties over approximating marriage where none formally exists abound in law.[427] But it is an observation that is important to make at this specific time, in this specific context, because it explains what is otherwise aberrant. Conceptualizing the fraud as concerning marriage clarifies why only formal acts can establish fatherhood—as a proxy for husbandhood—and why evidence of a genetic link or of an actual relationship with the child has no legal purchase. The only relationship that matters to the Court, as it does to the

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424. *See* Bloome & Ang, *supra* note 413, at 1780 (arguing that because "Black men and women are much less likely to marry or form unions than their White peers," it might "lead more Black men and women to fall down the income ladder across generations, which would slow the pace of progress toward racial equality in incomes," and urging researchers to consider "racist structures rather than long-standing differences in access to socioeconomic sources"). In the nonmarital sphere, promoting marriage or marital norms often takes precedence over privatizing support. *See* Antognini, *supra* note 396, at 2194 (arguing that "where privatizing support conflicts with finding that work done in the home is provided gratuitously or at a discount, court nearly always hold in favor of the latter" in nonmarital property disputes); Mayeri, *supra* note 9, at 1348 ("Privileging marriage, in other words, did not always serve the cause of privatizing dependency.").

425. Courtney Cahill has explored at length the ways in which counterfeiting analogies were raised in debates over same-sex marriage. *See* Cahill, *supra* note 13, at 461 (noting that use of counterfeiting in discussing same-sex marriage "perpetuates the discourse or rhetoric of fraud that has surrounded the legal construction of sexual minorities for centuries"). Cahill shows how concerns over fraud reform what are really concerns over morality: "Casting same-sex relationships and same-sex procreation as a kind of fraud, then, attempts to transform disgust over private acts into something that is legally defensible." *See id.* at 452.

426. The definition of fraud—lying "to induce another to act to his or her detriment"—contains not only the requirement of a falsehood, but, essentially, of a harm to someone as a result. *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019).

427. *See, e.g.*, Dubler, *supra* note 15, at 1009 ("As courts labeled relationships common law marriages based simply on patterns of conduct that copied so-called marital behavior, they slowly began to reveal, albeit inadvertently, that marriage itself—exalted as it was in dominant forms of legal and cultural discourse—was, in fact, no more than a sustained pattern of conduct."); Clare Huntington, *Staging the Family*, 88 NYU L. REV. 589, 622 (2013) ("The law also helps alter categories and here, too, performance is central. The ongoing debate over marriage equality, for example, is fundamentally about controlling the meaning (the social front) of marriage.").

underlying regulations, is the one between adults, which conclusively defines the relationship that men have with their children. This too explains why concubines figure so prominently in the Court's opinions focusing on the relationship between father and child: Her presence reveals the importance of the relationship between parents, which in all cases is nonmarital. The fact that the man had sex outside of marriage, with a so-called concubine, supplies *the* reason for why he is not recognized as a father. Although these cases address unmarried men, it is she who quite literally embodies the threat of nonmarriage—the unwed woman who would receive material benefits without having to enter an institution that the state seeks to protect and promote,[428] even as the law allows only certain women to assume the status of wife.[429]

The Court's reliance on fraud articulates what is, at base, an existential concern. Refusing to recognize unwed fathers exposes marriage's central paradox—strong enough to order all of society,[430] and yet so frail that it is threatened by any acknowledgment of relationships beyond its borders.[431] Indeed, the Court's worry that providing inheritance rights, or citizenship, to children whose fathers are unwed would imperil the institution of marriage reveals just how weak it is understood to be.[432] The Court thus chooses to preserve its position by designating all other relationships as fraudulent, as illicit attempts to access benefits that should be reserved for those who have formalized their relationship.

Marriage, not biology, explains why the Court cannot acknowledge parentage on equal terms outside of its remit: Doing otherwise, and recognizing nonmarital sexual relationships, along with the attendant benefits, would lessen marriage's pull. In more ways than one, fraud reveals the empty center at the core of these cases.

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428. *See* Dubler, *supra* note 15, at 1007 (explaining the fears in recognizing the doctrine of common law marriage given that it "remained vulnerable to the deception of a woman who could convincingly act like a wife and present herself in a wifely manner when she was not, in fact, a wife"); *see also* Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U.L. REV. 1807, 1851–52 (2022) (discussing the origins of the term concubine and the associations between concubinage and prostitution).

429. *See* discussion *supra* Part II.B.

430. *See* Obergefell v. Hodges, 576 U.S. 644, 669 (2015) ("[F]inally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

431. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 782 (2006) (describing "marriage as at once powerful and fragile" in the legal imagination).

432. *See id.* at 812 ("Marriage can only defend if it is defended. Legal constructions of its power, therefore, only make marriage's persistent weakness as a sociolegal institution capable of proving order for all intimate relations."). Frances Olsen has made a similar point in discussing arguments against "interference" in the family, which characterize the family as both too fragile and too durable. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1506–07 (1983) ("One attack on ad hoc adjustments made by the state is based on the delicate quality of family relations. Adherents of this position argue that what might seem to be a minor change in the law could have disastrous unforeseen consequences. . . . In a quite different argument . . . it is claimed that state intervention to protect the weaker family member from abuse from the stronger is ineffective because powerful, underlying, 'real' relations between family members will inevitably reassert themselves.").

CONCLUSION

This Article has focused on the Supreme Court, which, as a rule, is not transparent in its reasoning or motivations.[433] Yet relying on paternity fraud as a justification for sex-based distinctions outside of marriage requires an especially strained analysis. The Court's discussions of proof available to mothers and not fathers obscures questions of *why* such proof matters in the first instance and ignores the legal basis for maintaining these distinctions—namely, that the law attaches a series of presumptions and benefits to marriage, and only marriage.

Whether and how the Court's opinions would change if it were no longer to rely on fraud is rank speculation, especially given the Court's recent jurisprudence and current composition.[434] There is, however, at least one example, set forth in *Sessions v. Morales-Santana*, where the Court refused to reason from biology. In an opinion authored by Justice Ginsburg, the Court confronted the assumptions embedded in a legal regime that held that "[i]n marriage, husband is dominant," while outside of marriage the "mother is the natural and sole guardian" of the child.[435] Although the Court's remedy in *Morales-Santana* left much to be desired in terms of the very equality it was considering, its reasoning provides a clear example of how the Court identified, and repudiated, stereotypes that resulted from a set of archaic legal rules privileging marriage.[436]

Regardless of how the Court decides to proceed, the goal of this Article has been to spotlight fraud as an underappreciated rationale in upholding sex-based distinctions in the regulation of nonmarital families.[437] Fraud is used instrumentally,

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433. *See* Mayeri, *supra* note 9, at 1351 ("The more expansive arguments advocates made, in and out of court, about the relationship between illegitimacy penalties and other forms of inequality remind us that judicial opinions often mask the real stakes of legal and constitutional questions."); *see also generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (describing the Court's expansion of its "shadow docket," which allows it to issue decisions of consequence without providing a public hearing or explanation).

434. *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 804 (2023) (arguing that the Supreme Court in recent years "not only privileges rights that are 'coded' male but that in doing so, prioritizes the exercise of constitutional rights *by men*").

435. Sessions v. Morales-Santana, 582 U.S. 47, 59 (2017).

436. Antognini, *supra* note 60, at 442 (arguing that *Morales-Santana* declines to "adhere to a line of reasoning that makes claims about the inevitability of motherhood and the revocability of fatherhood based on the facts of biology" and instead "identifies these rules as the legacy of a regime that allowed the husband to control his wife and children in marriage, and absolved him of any responsibility outside of it").

437. These cases are only one example of a much larger phenomenon. Fraud is used to powerful ends in the welfare context, as it is in the same-sex marriage context, both of which have been more thoroughly discussed in legal scholarship. *See, e.g.*, Brown, *supra* note 415, at 792–95 (identifying fraud as a politically expedient accusation in discussing low-income tax payer credit and welfare); Bridges, *supra* note 416, at 14 (2007) (discussing "the figure of the welfare queen" whose "lack of education and lack of intelligence compel her, in the face of certain death/poverty, to shrewdly capitalize upon her childbearing capabilities; or rather, she shrewdly produces children as commodities for which the government compensates her"); Cahill, *supra* note 13, at 394 (discussing the "counterfeiting rhetoric" that rose to prominence in the legal discussions over same-sex marriage, which for those against its recognition was meant "to convey what in their view is a species of public fraud").

to render sexist and racist decisions constitutional.[438] Revealing the work of fraud shows that differences allegedly based on fact are actually differences based on opinion, the latter of which is contestable, mutable, and open to change. Now that we understand how fraud functions, we can engage in a more informed discussion—of whether, and why, and to what effects, the law denies rights on the basis of sex to individuals outside of marriage.

438. Fraud has a deep hold over nonmarriage, well beyond Supreme Court decisions. How fraud comes up outside of constitutional reasoning is the topic of another piece, on file with the author. Fraud arises in property disputes between unmarried couples; it arises in guidance published by the Department of State to help consular offices determine the citizenship of children born abroad to unwed parents. Being attentive to when fraud is raised, and towards what ends, matters.