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Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent

ABSTRACT. Most immigrants who gain permanent residence or citizenship in the United States do so through familial relations. As a result, immigration authorities must constantly decide what constitutes a family. Unfortunately, the Immigration and Nationality Act (INA) provides little guidance. While the INA provides some definitions of what constitutes a family, the definitions generally assume a traditional view of the family in which all parental roles lie with only two individuals. This assumption creates substantial problems when applying the INA's provisions to nontraditional families in which parental roles may be split between three or more people. Because the INA does not account for such families, it is often unclear whether the families are entitled to the plethora of immigration and citizenship benefits available to those with familial relations in the United States. In response to the lack of clarity, this Note proposes the adoption of a unified definition of family that is based on interpersonal, rather than biological, relationships. The proposed solution is consistent with existing provisions of the INA, finds support in state family law, and provides an effective way of dealing with nontraditional families.

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At most stages of the immigration process, immigration officers must make important decisions about what constitutes a family and which families are most deserving of reunification. When someone born abroad claims U.S. citizenship, immigration authorities must determine whether that individual is the child of a U.S. citizen.¹ When determining who should be admitted into the country, most spots are allocated to those with familial relations in the United States.² When deciding whether someone should be deported, immigration authorities must account for family ties and hardships.³ In making these determinations, the authorities theoretically strive to promote family unity⁴ and give individuals the opportunity to form and sustain their families. Unfortunately, they must inevitably deny these benefits to some. The consequences of these denials are enormous: not only do the denied individuals lose the right to reside with those whom they consider family, but they also lose official recognition of their family identity.

Despite the substantial effects that immigration law can have on the family, the Immigration and Nationality Act (INA)⁵ fails adequately to define family, especially the parent-child relationship. Thus, the INA fails to give authorities clear guidance on who deserves reunification. While the INA does provide definitions of “parent” and “child,”⁶ these definitions do not address the issues posed by the emergence and growth of nontraditional families—including those in which children are raised by nonbiological parents and those in which children are born through assisted reproductive technologies (ART).⁷

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1. See 8 U.S.C. §§ 1401-1409 (2006).
 2. In 2009, of the 1,130,818 immigrants who entered the United States as permanent residents, 211,859 did so through the family-sponsored preference categories, and 535,554 entered as immediate relatives of U.S. citizens. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6 (2010) [hereinafter 2009 YEARBOOK].
 3. A familial relationship to a U.S. citizen or permanent resident awards immigrants certain privileges, such as an exemption from certain categories of deportation and the availability of discretionary waivers from deportation. See, e.g., 8 U.S.C. §§ 1227(a)(1)(E)(ii), (a)(1)(H)(i)(I).
 4. See, e.g., H.R. REP. NO. 85-1199, pt. 2 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020-21 (explaining that the Immigration and Nationality Act “implements the underlying intentions of our immigration laws regarding the preservation of the family unit”).
 5. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537) [hereinafter INA].
 6. See 8 U.S.C. §§ 1101(b), (c).
 7. ART refers to fertility treatments in which both eggs and sperm are handled, such as in vitro fertilization (IVF). See DIV. OF REPROD. HEALTH, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, ASSISTED REPRODUCTIVE TECHNOLOGY (ART),

The INA assumes a traditional two-parent view of the family. In nontraditional families, however, parental roles may be split between three or more parties, creating the possibility of a biological mother and father, an intended mother and father, and a gestational mother. “Biological parents” refers to those individuals who are biologically related to the child; “intended parents” to those who intend to care for and raise the child; “gestational mother” to the woman who carries the child to term and physically gives birth to the child; and “legal parents” to those individuals who have legal parental rights and responsibilities with respect to the child.⁸ By failing to address the possibility of split parental roles, the INA creates substantive ambiguities in many of its provisions and risks denying immigration and citizenship benefits to those who are, in other contexts, considered to be children of U.S. citizens and permanent residents.

In a 1997 article, Bernard Friedland and Valerie Epps first considered this problem and proposed three possible solutions: (1) Congress can specify how immigration law should treat each type of nontraditional family; (2) Congress can reconceptualize its definition of family by allowing more than one mother and father; or (3) Congress can deal with nontraditional families by incorporating state and foreign law by reference instead of adopting a unified definition of family.⁹ Friedland and Epps argued that the incorporation-by-reference solution would be most appropriate because state and foreign governments are experienced in family law.¹⁰ Since then, however, there have been major legal developments concerning nontraditional families. In 1997, state law on ART was poorly developed and widely varied. Now, state family law is beginning to converge on many issues relating to ART. Furthermore, several entities have addressed these issues in the immigration context and have reached different conclusions, highlighting the need for the prompt resolution of the ambiguities in a unified manner.

Based on these developments, this Note argues that none of the solutions proposed by Friedland and Epps is adequate. Instead, the Note proposes that

<http://www.cdc.gov/ART/> (last updated Feb. 18, 2010) [hereinafter ART REPORT]. However, fertility treatments—such as artificial insemination—raise identical issues in immigration law. For ease of reference, I refer to all fertility treatments in this Note as ART.

8. Some states refer to legal parents as “natural parents.” See, e.g., CAL. FAM. CODE § 7611 (West 2009); NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010). These terms are interchangeable.
9. See Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act’s Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 441-43 (1997).
10. *Id.* at 443.

immigration law should adopt a unified definition of family that is based on interpersonal, rather than biological, relationships. These interpersonal relationships should be based on factors such as one's intention to enter into familial relations and the provision of care and support. This definition is consistent with the INA and the family law of a majority of states, and it resolves the issues that nontraditional families pose for many sections of the INA.

This Note proceeds in four parts. Part I describes types of nontraditional families and their increasing prevalence in society. This Part focuses on families formed through ART because, unlike other nontraditional families, such families almost always contain clearly defined parental roles.

Part II discusses the problems that immigration law poses for these nontraditional families by failing to define adequately the notion of family. Although this lack of definition affects many areas of immigration law, this Note focuses primarily on the regulation of citizenship by descent because both the Ninth Circuit and the Department of State have addressed the definition of family within these provisions. These two entities have adopted conflicting interpretations, underscoring the need for clarification in this area. This Part concludes with a brief discussion of how the lack of definition affects other sections of the INA, such as provisions dealing with immediate relatives and family-preference migration.

Part III argues that defining family based on interpersonal relationships can solve these substantial problems. Section A examines provisions of the INA to show that this definition of family is consistent with current immigration law. Then, Section B examines state family law, which also defines family based on interpersonal relationships. Section C argues that defining family based on interpersonal relationships solves the problems in citizenship by descent identified in Part II. This Section also argues that the interpersonal definition is applicable to other problematic sections of the INA that require determining who qualifies as a child.

Finally, Part IV compares the interpersonal definition proposal to those presented by Friedland and Epps, arguing that defining family by interpersonal relationships is a more effective solution.

I. NONTRADITIONAL FAMILIES AND ARTIFICIAL REPRODUCTIVE TECHNOLOGIES

There are many different types of nontraditional families, most of which are not addressed by current immigration law. In some, children are raised by family members other than the biological parents; in others, children are raised

by one biological parent and the parent's spouse; in still others, children are born through artificial reproductive technologies. The last group, children born through ART, can be further subdivided into two broad categories: children whose intended mother is also the gestational mother and children born to a surrogate mother. Births through the first category of ART can be accomplished either through artificial insemination or through in vitro fertilization (IVF). In cases of artificial insemination, a physician artificially inseminates the intended mother with sperm donated either by the intended father or by a donor.¹¹ In this procedure, the intended mother is always the biological and gestational mother, as well. If the sperm is donated by a donor, however, then the intended father is not the biological father.

IVF can be accomplished in two ways. In the first scenario, the intended mother's eggs are surgically removed and fertilized with sperm from either the intended father or a donor. The fertilized eggs are then returned to the intended mother's body. The intended mother is thus both the biological and gestational mother, but the intended father is not necessarily the biological father. In the second scenario, eggs are removed from a female donor and fertilized with sperm from either the intended father or another donor. The eggs are then donated to the intended mother.¹² Here, the intended mother is the gestational mother but not the biological mother. Likewise, the intended father may not be the biological father. Thus, the intended mother is always the gestational mother in all cases under the first category of ART, even though the intended parents are not always the biological parents.

Surrogacy agreements comprise the second category of ART. There are two types of surrogacy agreements: traditional and gestational. In traditional surrogacy, the surrogate mother is artificially inseminated with sperm from either the intended father or a donor. The surrogate mother is thus both the gestational and biological mother—although she is not the intended mother.¹³ In gestational surrogacy, eggs from the intended mother or a female donor are inseminated with sperm from the intended father or a male donor using IVF and then inserted into the surrogate mother.¹⁴ The surrogate mother is thus only the gestational mother, and the intended and biological mothers are not necessarily the same. In surrogacy agreements, all three parental roles—intended, biological, and gestational—may be split. Table 1 summarizes the

11. See ART REPORT, *supra* note 7.

12. See *id.*

13. See Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 451 (2009).

14. See *id.*

different types of nontraditional families made possible through both categories.

A common thread connecting these diverse types of families—including those formed through ART and those formed through traditional reproduction—is that children in these families may have parental relationships with someone other than their biological parents. In other words, these children may have separate intended parents, biological parents, and, in cases of surrogacy, a gestational mother. The potential split of parental roles creates difficulties in interpreting many provisions of the INA, which bestow immigration and citizenship benefits on children of U.S. citizens and permanent residents. These provisions require determining who qualifies as a “child” for immigration purposes but do not specify whether that determination should be made in relation to the child’s intended, biological, or gestational parents. As a result, children from nontraditional families may encounter problems when applying for immigration or citizenship because it is unclear whether an individual should be considered a child of his nonbiological parent(s) for immigration purposes.¹⁵

15. Although adopted children also have nonbiological parents, they do not encounter the same difficulties in immigration and citizenship regulation. Adoption is better established and more accepted than other nontraditional familial practices, and it fits more easily into the traditional two-parent model of the family. Unlike laws concerning other types of nontraditional families, which have only recently begun to develop, *see infra* Sections III.B-C, the first modern adoption law in the United States was passed in 1851, *see* Ellen Herman, *Timeline of Adoption History*, THE ADOPTION HIST. PROJECT, <http://www.uoregon.edu/~adoption/timeline.html> (last updated July 11, 2007). Furthermore, unlike other nontraditional families, all states recognize at least some form of adoption. *See, e.g., Adoption Laws by State*, ADOPTIVE FAMILIES MAG., 2004, available at <http://www.theadoptionguide.com/files/StateAdoptionLaws.pdf>. Immigration law has also developed a comprehensive scheme addressing adopted children. Adopted children are included in the definition of “child” used in the INA, meaning that they receive priority status when applying for permanent residence. 8 U.S.C. §§ 1101(b)(1)(E)(i), (c)(1) (2006). The Child Citizenship Act of 2000 allows adopted children to acquire citizenship automatically upon becoming permanent residents. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified at 8 U.S.C. §§ 1431-1433). Immigration law thus directly addresses how adopted children fit into the notion of family.

Table 1.
TYPES OF NONTRADITIONAL FAMILIES FORMED THROUGH ART¹⁶

	GESTATIONAL PARENT	EGG DONOR	SPERM DONOR	PARENTAL ROLES
FIRST CATEGORY OF ART	Intended Mother	Intended Mother	Intended Father	Intended mother is gestational and biological; intended father is biological.
			Alternative Donor	Intended mother is gestational and biological; intended father is intended only.
		Alternative Donor	Intended Father	Intended mother is gestational; intended father is biological.
			Alternative Donor	Intended mother is gestational; intended father is intended only.
SECOND CATEGORY OF ART	Surrogate Mother	Intended Mother (Gestational Surrogacy)	Intended Father	Intended mother is biological; intended father is biological.
			Alternative Donor	Intended mother is biological; intended father is intended only.
		Alternative Donor (Gestational Surrogacy)	Intended Father	Intended mother is intended only; intended father is biological.
			Alternative Donor	Intended mother is intended only; intended father is intended only.
		Surrogate Mother (Traditional Surrogacy)	Intended Father	Intended mother is intended only; intended father is biological; surrogate mother is biological.
			Alternative Donor	Intended mother is intended only; intended father is intended only; surrogate mother is biological.

16. This table does not take into account the marital status of the parties, which many state laws consider when determining paternity. See *infra* Section III.B, Subsection III.C.2.

The number of children who fall into the nontraditional families category is substantial. Over 30% of American children under the age of eighteen lived in nontraditional families in 2008: 5.8% lived with one biological or adoptive parent and a legal stepparent, 22.8% lived only with their biological mother, 3.5% lived only with their biological father, and 3.8% lived with other relatives or nonrelatives.¹⁷ These numbers do not take into account children born through artificial reproductive technologies, the use of which has steadily increased since 1989. Indeed, in 2002, there were estimated to be between 911,000 and 1,025,000 ART procedures performed worldwide.¹⁸ Among these ART procedures, between 219,000 and 246,000 successfully resulted in the birth of a child¹⁹—an increase of 12% from 2000.²⁰ In fact, it is estimated that currently over one percent of all infants born in the United States are conceived through some form of ART.²¹ The Centers for Disease Control and Prevention (CDC) suggest that potential demand for these procedures is much higher than current use.²² Furthermore, considering that use of ART has doubled within the last decade,²³ it is likely that it will continue to grow. Thus, many children—from families formed through ART, as well as many from families formed through traditional reproduction—are affected by the ambiguous definition of family in the INA because their families do not fit the traditional two-parent model.

This Note, however, focuses on how ambiguities in the INA affect families formed through ART, rather than nontraditional families more generally, because the line between intended and biological parents is often difficult to draw for children born through traditional reproduction. Because a nonbiological parent is usually not part of the decisionmaking process before conception, nontraditional families formed through traditional reproduction present many problems in determining when the nonbiologically related adult

17. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2009, at 93-95 tbl.FAM 1.B (2009), available at http://www.childstats.gov/pdf/ac2009/ac_09.pdf.

18. Jacques De Mouzon et al., INT'L COMM. FOR MONITORING ASSISTED REPROD. TECH., *World Collaborative Report on Assisted Reproductive Technology*, 2002, 24 HUM. REPROD. 2310, 2316 (2009), available at <http://humrep.oxfordjournals.org/cgi/reprint/24/9/2310>. The 2002 data are the most recent statistics available.

19. *Id.*

20. *Id.*

21. ART REPORT, *supra* note 7.

22. *Id.*

23. *Id.*

becomes an intended parent.²⁴ In many cases, it is difficult to determine at what point the nonbiological parent must form an intention to treat the child as his or her own for that child to benefit from the parent's nationality or residence. Situations involving ART present the distinction between intended and biological parents much more clearly. In all types of ART, there is generally a clearly defined—often contractually defined—intended parent or parents. This clarity allows for a simplified discussion of how the interpersonal definition of family affects immigration law. Despite the focus on families formed through ART, this Note's solution is applicable to all types of nontraditional families.²⁵

The following Part considers examples of the problems created by the INA's ambiguous definition of family. While nontraditional families pose definitional problems for many areas of immigration regulation, this Note focuses on citizenship by descent because nontraditional families have been directly addressed in this context.

II. PROBLEMS OF DEFINITION IN CITIZENSHIP BY DESCENT

A. *The Regulation of Citizenship by Descent*

Before exploring the interpretive problems that nontraditional families pose for citizenship by descent, it is necessary to explain how citizenship by descent is regulated. If a child is born abroad to a U.S. citizen, then that child has two avenues of acquiring citizenship under the INA: (1) apply while abroad or (2) raise citizenship as a defense in removal proceedings. Both avenues are governed by the substantive provisions of the INA, but jurisdiction over the claims is split between two independent bodies. The Secretary of State is charged with determining the citizenship of people outside of the United States,²⁶ while federal courts have jurisdiction over citizenship claims raised as a defense in removal proceedings.²⁷ The Department of State and federal courts can independently interpret the relevant INA provisions without reference to the other body's interpretation. Because, as is discussed later, the two entities have adopted conflicting interpretations of the INA, applicants' citizenship claims are treated differently depending on which avenue they pursue.

24. See *infra* Section III.C.

25. See *infra* Section III.C.

26. 8 U.S.C. § 1104(a)(3) (2006).

27. *Id.* § 1252(b)(5)(A).

If the applicant chooses the first avenue and applies for citizenship while still abroad, his citizenship claim is regulated by the Department of State. The Department of State interprets the INA citizenship provisions through its Foreign Affairs Manual (FAM),²⁸ which represents the official policies of the Department of State. The FAM is binding authority on consulates, as well as on all other agencies within the Department of State.²⁹ To acquire U.S. citizenship while abroad, the alleged citizen must apply to his local consular officer for a Form FS-240—a formal document “establish[ing] a ‘prima facie case’ of U.S. citizenship.”³⁰ Consular officers have exclusive authority to adjudicate citizenship claims,³¹ applying the relevant INA provisions based on directives provided by the FAM. If the consular officer denies citizenship, the claimant may submit additional evidence to the Department of State Office of Policy Review and Inter-Agency Liaison (PRI) for reconsideration.³² If additional evidence is submitted, the consulate will forward the evidence to the PRI with a memorandum summarizing the case. After reviewing the file, the PRI will advise the consulate on how to adjudicate the claim.³³ There are no provisions for additional administrative review or any judicial review of consular decisions.³⁴ Thus, citizenship claims of children who apply while

28. U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, available at <http://www.state.gov/m/a/dir/regs/fam/>.

29. See 2 *id.* § 1111.1(a) (2007) (“These directives derive their authority from statutes, Executive orders, other legal authorities, and Presidential directives, such as OMB circulars, and Department policies.”).

30. 7 *id.* § 1441.1(a) (2007).

31. See 7 *id.* § 1131.1 (2009). This section also gives “[d]esignated nationality examiners” the authority to judge citizenship claims, but only “in connection with providing passports and related services.” 7 *id.* § 1131.1-3 (1998).

32. See 7 *id.* § 1445.9(b) (2007).

33. *Id.*

34. There is a long-standing doctrine that prohibits federal courts from reviewing consular decisions, at least with respect to admission of aliens into the United States. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“[T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign The action of the executive officer under such authority is final and conclusive. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”); *Romero v. Consulate of U.S., Barranquilla, Colom.*, 860 F. Supp. 319, 322 (E.D. Va. 1994) (“[T]he doctrine of nonreviewability of consular officers’ visa determinations is essentially without exception.”). Courts disagree on whether this doctrine extends beyond the granting of visas. Compare *Dong v. Ridge*, No. 02 Civ. 7178(HB), 2005 WL 1994090 (S.D.N.Y. Aug. 18, 2005) (declining to review consular’s determination that petitioner was not a child for

abroad are determined solely by the Department of State through consulates and the directives of the FAM. These applicants have no right to have their claims adjudicated by an immigration judge, the Board of Immigration Appeals (BIA), or any federal court.

The second avenue of acquiring citizenship by descent is available only to individuals who are already in the United States. If the alleged citizen enters the United States through other means—either illegally or on a visa—and then becomes the subject of removal proceedings, he may claim U.S. citizenship as a defense. These citizenship claims—while also governed by the INA—are adjudicated through an entirely different process from the process for claims made while abroad. The alleged citizen may first raise his citizenship defense in front of an immigration judge;³⁵ if the immigration judge denies citizenship and issues an order of removal, the individual may appeal the decision to the BIA.³⁶ Both the immigration judge and the BIA are part of the Department of Justice’s Executive Office for Immigration Review.³⁷ If the BIA enters a final order of removal, the alleged citizen may petition for review to a federal court of appeals,³⁸ which—with the exception of the Supreme Court—has final jurisdiction over citizenship claims raised as defenses in removal proceedings.³⁹ The Department of State plays no role in adjudicating such claims.

B. Conflicting Interpretations

These two entities—the Department of State and the federal courts—are thus independently charged with interpreting and implementing U.S.

immigration purposes under the consular nonreviewability doctrine), *with Fiallo v. Levi*, 406 F. Supp. 162, 165 (E.D.N.Y. 1975) (“We will not extend consular nonreviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa.”). The INA and the FAM do not contain any provision for review of citizenship determinations made while abroad. *Cf.* 8 U.S.C. § 1252(b)(5) (2006) (permitting judicial review of citizenship claims raised in removal proceedings only); 7 FOREIGN AFFAIRS MANUAL § 1445.9(b) (2007) (permitting administrative review of consular decisions without any mention of judicial review).

35. *See* 8 U.S.C. § 1229a(a)(1).

36. *See id.* §§ 1229a(c)(6)-(7).

37. *See About the Office*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/orginfo.htm> (last visited Sept. 6, 2010).

38. *See* 8 U.S.C. § 1252(b)(5). If the court of appeals finds no “genuine issue of material fact about the petitioner’s nationality,” it can adjudicate the nationality claim itself. *Id.* § 1252(b)(5)(A). If, on the other hand, it determines that an issue of material fact does exist, the court must transfer the claim to a district court. *Id.* § 1252(b)(5)(B).

39. *See id.* § 1252(a)(5).

citizenship policy as laid out in the INA. The INA provisions that govern citizenship by descent, however, contain several critical ambiguities with regard to nontraditional families. When applying these provisions, the Department of State and federal courts have adopted conflicting interpretations.

To understand this conflict, it is necessary to understand the substantive rules of citizenship by descent. The INA makes a distinction between children born in and out of wedlock. Citizenship by descent for children born out of wedlock is governed by 8 U.S.C. § 1409. This section states that a child born abroad out of wedlock to a U.S. citizen mother will automatically receive U.S. citizenship.⁴⁰ A child born abroad out of wedlock to a U.S. citizen father will receive citizenship only if certain conditions are met, one of which requires that “a blood relationship between the person and the father is established by clear and convincing evidence.”⁴¹ Section 1401, which governs citizenship by descent for children born in wedlock, makes no mention of a blood relationship requirement.⁴² These sections contain two substantial ambiguities. First, it is unclear whether a blood relationship requirement exists in § 1401; second, the INA does not explain what conditions must be met for a child to be considered born in wedlock.

Under a traditional concept of family, these ambiguities create few problems: it is generally clear when a child is born in wedlock and being born in wedlock generally implies being biologically related to both parents. For nontraditional families, however, these ambiguities pose serious problems of interpretation. It is unclear whether “born in wedlock” should be interpreted in relation to the biological, intended, or gestational parents. Furthermore, if a child born to married intended parents is considered a child born in wedlock, it is unclear whether a blood relationship is necessary between the child and the intended parents.

In addressing these ambiguities, the Ninth Circuit and the Department of State have reached directly conflicting interpretations.⁴³ Other federal courts of

40. *Id.* § 1409(c).

41. *Id.* § 1409(a)(1).

42. *Id.* § 1401.

43. The Ninth Circuit addressed and rejected the possibility of giving *Chevron* deference to the Department of State in its interpretation of the INA. In *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), the respondent argued that Congress has implicitly given the Department of State authority to fill in the statutory gap and that, based on the Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must defer to the agency interpretation provided that it is reasonable. Brief for Respondent

appeals have not addressed this question.⁴⁴ The BIA, which adjudicates many citizenship claims in removal proceedings that are never appealed to federal court,⁴⁵ has also failed to clarify the issue. While the BIA originally followed the guidelines of the FAM,⁴⁶ the BIA has not taken an affirmative stance on the issue after the Ninth Circuit overruled its decisions. Instead, when faced with similar fact patterns, it has found ways to distinguish cases from the Ninth Circuit decisions and has avoided answering these questions.⁴⁷ Consequently, the Ninth Circuit is currently the only entity to have addressed the issue of nontraditional families in citizenship claims raised in removal proceedings, and its interpretation conflicts with the Department of State's interpretation of

at 16, *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (No. 97-70915). The Court rejected this argument because the Department of State is charged only with determining the citizenship of persons outside the United States, while the petitioner was inside the United States. *Scales*, 232 F.3d at 1165. The Court also noted that the *Foreign Affairs Manual*, in which the Department interprets these provisions, is not the type of document that warrants *Chevron* deference: “[I]nterpretations contained in policy statements, *agency manuals*, and enforcement guidelines . . . do not warrant *Chevron*-style deference.” *Id.* at 1166 (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000)).

44. The Fifth Circuit considered a similar factual scenario but did not reach the question of whether the Ninth Circuit's interpretation was correct because it found that, unlike in the Ninth Circuit case, the petitioner was born out of wedlock. *Marquez-Marquez v. Gonzales*, 455 F.3d 548, 559 (5th Cir. 2006).
45. As discussed in Section II.A, removal proceedings and citizenship claims raised during those proceedings are adjudicated first in front of an immigration judge. An applicant may appeal an unfavorable decision by the immigration judge to the BIA. If the BIA enters a final order of removal, the applicant may in turn appeal that decision to a federal circuit court. *See supra* notes 36-39 and accompanying text. In 2008, only approximately one-third of BIA decisions were appealed to the federal courts. *See* COMM'N ON IMMIGRATION, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES ES-5 (2010), available at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf [hereinafter REFORMING THE IMMIGRATION SYSTEM].
46. *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1092 (9th Cir. 2005) (overruling a BIA decision that held a child is born in wedlock only if his biological parents are married); *Scales*, 232 F.3d at 1165 (overruling a BIA decision that relied on the FAM and held that a blood relationship is always necessary for children born in wedlock).
47. *See, e.g., In re Guzman-Gomez*, 24 I. & N. Dec. 824, 826 n.3 (B.I.A. May 8, 2009) (“We have no occasion to opine as to the merits of [*Scales* and *Solis-Espinoza*], which arose in the context of ‘acquired citizenship,’ rather than ‘derivative citizenship,’ at issue here.”); *In re Anderson*, No. A035 189 461, 2009 WL 263034, at *2 (B.I.A. Jan. 21, 2009) (distinguishing the case from Ninth Circuit precedent because the respondent's alien mother and purported U.S. citizen father were not married at the time of his birth); *In re Martinez-Madera*, No. A14 647 093, 2006 WL 2008286, at *2 (B.I.A. May 30, 2006) (same); *In re Siman*, No. A41 169 426, 2006 WL 901338, at *2 (B.I.A. Mar. 3, 2006) (same).

citizenship claims raised by individuals while abroad. Even though other federal courts have not addressed this question, the fact that the Ninth Circuit's interpretation conflicts with that of the Department of State is significant because the Ninth Circuit hears a substantial number of immigration cases.⁴⁸

Instead of speaking with a unified voice, the United States has thus adopted two conflicting citizenship policies that apply depending on the circumstances under which a citizenship claim is raised. This conflict comes clearly into focus when considering whether a blood relationship is required for children born in wedlock and when a child should be considered born in wedlock.

1. *Blood Relationship*

Turning first to the question of whether a blood relationship is required for children born in wedlock, the Ninth Circuit held, in *Scales v. INS*, that 8 U.S.C. § 1401 does not require a blood relationship between a person born in wedlock and his parent who is a U.S. citizen.⁴⁹ The court based its holding on the fact that, had Congress intended to require a blood relationship for children born in wedlock, it would have explicitly included it in the statute as it did in the provision concerning children born out of wedlock.⁵⁰

The Department of State has reached the opposite conclusion. In the FAM, the Department of State interprets § 1401 always to require a blood relationship for the transmission of citizenship by descent.⁵¹ Furthermore, according to the Department of State, the presumption that children born in wedlock are the product of that marriage is not determinative in citizenship cases because "an actual blood relationship to a U.S. citizen parent is required."⁵²

48. While removal proceedings represent only about seventeen percent of the cases handled by all federal courts of appeals combined, these cases make up between thirty-five to forty percent of the Ninth Circuit's docket. See REFORMING THE IMMIGRATION SYSTEM, *supra* note 45, at ES-5. In fact, the Ninth Circuit and the Second Circuit have the largest immigration dockets of any federal circuit. *Id.*

49. See *Scales*, 232 F.3d at 1166.

50. See *id.* at 1164.

51. See 7 FOREIGN AFFAIRS MANUAL § 1131.4-1(a) (1998).

52. 7 *id.* § 1131.4-1(c) (1998).

2. *Born in Wedlock*

The second question—when a child should be considered born in wedlock—has been explicitly addressed by the Ninth Circuit but not by the Department of State. However, examining the decisions of the Ninth Circuit and the provisions of the FAM makes evident that the two bodies similarly disagree on this question.

In *Scales*, the petitioner was born abroad to Aily Topaz, a citizen of the Philippines. Topaz met Stanley Scales, Sr., a U.S. citizen, while she was pregnant with the petitioner and married Scales before the petitioner's birth. The Ninth Circuit found that, even though the petitioner's biological mother was not married to his biological father, he was nevertheless "born to parents who were married at the time of his birth."⁵³ The court thus considered the petitioner to be born in wedlock and held that his citizenship claim was governed by § 1401.⁵⁴

Five years later, the Ninth Circuit considered a similar question in *Solis-Espinoza v. Gonzales*.⁵⁵ The petitioner was born in Mexico, and his biological parents were both Mexican citizens. However, at the time of the petitioner's birth, his biological father was married to a U.S. citizen. The petitioner had been abandoned by his biological mother, and he was raised by his biological father and his father's wife.⁵⁶ Based on California family law, which states that a child is legitimate if he is acknowledged by his biological father and accepted into the family by the father's wife, the court held that the petitioner was born in wedlock: "In every practical sense, Cruz-Dominguez [the U.S. citizen wife] was petitioner's mother and he was her son. There is no good reason to treat petitioner otherwise."⁵⁷ The court concluded that the holding was supported by the public policy of recognizing and maintaining family unity, which is central to the INA.⁵⁸

According to the Ninth Circuit, therefore, being born in wedlock does not require that a child's biological parents be married to each other; instead, the court places emphasis on intent, provision of care, and an interpersonal parent-child relationship. As long as one of the child's biological parents is married at

53. *Scales*, 232 F.3d at 1164.

54. *See id.*

55. 401 F.3d 1090 (9th Cir. 2005).

56. *See id.* at 1091-92.

57. *Id.* at 1094.

58. *See id.*

the time of the child's birth, and that parent and the parent's spouse accept the child, the child is born in wedlock. The Ninth Circuit has not addressed the status of children born through ART for citizenship purposes. But, based on the analysis in the cases above, it can be inferred that, as long as the child's intended parents are married, the child will be considered born in wedlock.⁵⁹

The Department of State, however, has arrived at a different conclusion. While the Department of State does not address the definition of "born in wedlock" generally, it addresses whether children born through surrogacy agreements are born in or out of wedlock and, consequently, whether their citizenship claims should be governed by § 1401 or § 1409. Regarding children born abroad, the FAM states that (1) a child born to a foreign surrogate mother who is also the biological mother and to a biological father who is a U.S. citizen is a child born out of wedlock to the U.S. citizen father (the identity of the intended, nonbiological mother is irrelevant);⁶⁰ (2) a child born to a foreign surrogate mother who is not the biological mother and whose biological mother is a U.S. citizen and biological father is foreign is a child born out of wedlock to the U.S. citizen mother, even if the biological mother and father are married;⁶¹ and (3) a child born to a foreign surrogate mother who is not the biological mother and whose biological mother and father are both U.S. citizens is the child of two U.S. citizens.⁶²

These regulations suggest an internally inconsistent approach to the definition of "born in wedlock." In Situation (1), it appears that the Department of State considers the child to be born out of wedlock because the child's biological parents (the surrogate mother and the biological father) are not married. However, in Situation (2), even if the child's biological parents (the intended mother and father) are married, the Department of State still considers the child born out of wedlock. The Department of State does not consider other forms of ART, and, because its guidelines for determining "born in wedlock" are undefined, it is unclear how the Department of State would handle many other situations.

Nevertheless, the State Department's approach in cases of surrogacy is at odds with the Ninth Circuit's approach. Because the Ninth Circuit considers a child to be born in wedlock whenever one of the biological parents is married

59. Other federal courts have not addressed this question.

60. 7 FOREIGN AFFAIRS MANUAL § 1131.4-2(a) (1998).

61. 7 *id.* § 1131.4-2(b) (1998).

62. *Id.*

and that parent and parent's spouse accept the child, it would likely consider children in Situations (1) and (2) as born in wedlock.

C. The Impact of the Conflict

Applying these interpretations to the two categories of ART presented in Part I leads to conflicting results. In a situation falling within the first category of ART, unless the sperm and egg donor are married to each other, it is likely that the Department of State will not consider the child born through this procedure as born in wedlock and will adjudicate his claim under 8 U.S.C. § 1409.⁶³ Even if the donors are married, the Department of State may still refuse to consider the child born in wedlock just as it refuses to do so for the intended parents, who are also the biological parents in a surrogacy agreement.⁶⁴ The Ninth Circuit, on the other hand, would likely consider the child born in wedlock because the intended parents are married at the time of conception and adjudicate the claim under § 1401.⁶⁵

In a situation falling within the second category of ART, the Department of State has explicitly stated in the FAM that it will never consider a child born through a surrogacy procedure in which at least one of the parents is not a U.S. citizen as a child born in wedlock.⁶⁶ Based on the Ninth Circuit cases discussed above, however, it is likely that the Ninth Circuit would consider a surrogate-born child as born in wedlock whenever the child's intended parents are married.

This conflict also affects other types of nontraditional families. In fact, the petitioners in both *Scales* and *Solis-Espinoza* came from nontraditional families formed without ART.⁶⁷ The Ninth Circuit considered both of these petitioners to be born in wedlock and granted them U.S. citizenship despite the absence of a biological relationship with the U.S. citizen parent.⁶⁸ If, however, these petitioners had applied for citizenship while abroad instead of during removal proceedings, then the Department of State would have found neither to be a

63. See 7 *id.* §§ 1131.4-2(a)-(b) (1998) (determining “born in wedlock” for the purpose of surrogacy agreements).

64. See 7 *id.* § 1131.4-2(b) (1998).

65. See *supra* text accompanying notes 53-59.

66. See 7 FOREIGN AFFAIRS MANUAL §§ 1131.4-2(a)-(b) (1998).

67. See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1091-92 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159, 1161-62 (9th Cir. 2000).

68. See *Solis-Espinoza*, 401 F.3d at 1094; *Scales*, 232 F.3d at 1166.

U.S. citizen because—according to the FAM’s interpretation of the INA—a blood relationship is always required for citizenship by descent.

Because of the split in jurisdiction and these conflicting interpretations of the INA, the result of a citizenship claim by a child born abroad to a nontraditional family will depend largely on whether he raises that claim while still abroad or during a removal proceeding once in the United States. If the alleged citizen raises the claim while abroad, it will be adjudicated by a consular officer according to the directives set forth in the FAM; the immigration judge, BIA, and federal courts will have no say in the matter. If, conversely, he raises the claim as a defense to removal proceedings, it will be adjudicated according to the standards adopted by federal courts that conflict with the approach of the State Department.

This outcome is problematic because it neglects the need for uniformity in immigration and citizenship regulation, which is required by both the Constitution and foreign policy principles.⁶⁹ Instead of adopting one unified citizenship policy, the United States treats alleged citizens differently depending on where they apply. This outcome is also troublesome from the perspective of family unity. The regulation of citizenship by descent can significantly affect families of both aliens and U.S. citizens. By asserting that a U.S. citizen living abroad cannot pass his citizenship on to someone he considers his child, immigration law in essence denies the existence of a parental relationship between that citizen and child—or, at the very least, denies that the parental relationship is sufficiently valuable to bestow immigration benefits. In doing so, it denies the child the rights and privileges of citizenship. In some instances, the inability to pass on citizenship may force families to relocate or even to live apart.⁷⁰

69. See U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power “to establish an uniform Rule of Naturalization”). The regulation of immigration is intertwined with foreign affairs because it requires the U.S. government to interact with citizens of other nations. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[W]e have recognized that Judicial deference to the Executive Branch is especially appropriate in the immigration context where officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’” (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988))). Any decisions that the United States makes concerning other nationals may affect its relations with other countries. See, e.g., Dick Clark, *Foreword* to ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS*, at ix-x (1985) (describing the use of asylum and refugee law to affect international relations). As with other areas that concern foreign affairs, such as signing treaties or declaring war, it is beneficial to have a uniform immigration policy that represents the position of the United States as a whole.

70. Substantial delays in processing visa applications from certain countries make gaining entry into the United States difficult for noncitizens even if a family relationship is established.

Unfortunately, there are no data on how many individuals claim citizenship by descent because many of these claims are adjudicated by consular officers,⁷¹ whose decisions are not publicly available.⁷² Furthermore, the Department of Homeland Security's annual *Yearbook of Immigration Statistics* does not include information about the total number of individuals who obtain citizenship through citizenship-by-descent provisions.⁷³ However, the growth and prevalence of nontraditional families⁷⁴ suggest that a significant number of individuals may be affected by these ambiguities. This outcome is especially likely considering that the lax regulations in certain countries and a growing international surrogacy industry incentivize many infertile couples to undergo ART abroad.⁷⁵ These children born through ART, who may not be biologically related to the intended U.S. citizen parent, are born abroad and have to prove the existence of a parent-child relationship to obtain citizenship by descent.

It is also important to remember that the problems discussed in this Note are not unique to citizenship by descent. Many other provisions of the INA suffer from similar ambiguities when applied to nontraditional families because they require determining who qualifies as a child for immigration purposes. For example, immigrant selection criteria also require making determinations about who qualifies as a "child." While most immigrants are

See, e.g., U.S. DEP'T OF STATE, VISA BULLETIN FOR DECEMBER 2009, http://www.travel.state.gov/visa/bulletin/bulletin_4587.html.

71. See 7 FOREIGN AFFAIRS MANUAL § 1131.1 (2009) (giving consular officers the authority to determine the validity of citizenship-by-descent claims brought by individuals abroad).
72. The *Foreign Affairs Manual* requires only that consular officers notify applicants of the reasons for their decisions; the decisions are not published. See 7 *id.* § 1445.8(c) (2009); see also Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 322 (2002) (calling for more publication of administrative decisions and noting that "[t]he Department of State does not publish any denials or opinions concerning individual cases and the decisions of individual consular officers are generally insulated from both administrative and judicial review").
73. See, e.g., 2009 YEARBOOK, *supra* note 2.
74. See *supra* notes 17-23 and accompanying text.
75. See DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 85-88 (2006) (providing an overview of the international surrogacy market); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15 (2009) (discussing the growth of the international surrogacy market in India and providing an explanation for international surrogacy's increasing attractiveness to couples unable to reproduce); Antony Barnett & Helena Smith, *Cruel Cost of the Human Egg Trade*, OBSERVER (London), Apr. 30, 2006, at 6 (describing the prevalence of "fertility tourism" in Europe).

subject to national quotas when entering the country,⁷⁶ children of U.S. citizens are exempt from the quota system and may obtain a visa immediately upon proving the existence of a parent-child relationship.⁷⁷ Children of permanent residents, while not exempt, receive priority status as family-sponsored immigrants.⁷⁸ Additionally, both family-sponsored and employment-based immigrants may be accompanied to the United States by their children, who are entitled to the same immigration status as their parents.⁷⁹ In fact, in 2009, approximately twenty-nine percent of all immigrants who received permanent residence were approved on the basis of a parent-child relationship with a U.S. citizen or permanent resident.⁸⁰ In all of these cases, as in citizenship by descent, immigration authorities must first determine whether the applicant is a child for immigration purposes. But, as in citizenship by descent, it is currently unclear whether a child who is not biologically related to the intended parent(s) should qualify for immigration benefits under these provisions.

Thus, many individuals from all types of nontraditional families may encounter definitional problems when they claim citizenship through citizenship by descent, apply for a visa through family-sponsored immigration, or seek to accompany parents who have been admitted into the United States. To avoid uncertainty and possible inequality in the application of immigration and citizenship policies, it is necessary to resolve the ambiguities in the INA and to provide a definition of family that addresses nontraditional families.

III. DEFINING FAMILY

Immigration law can resolve these ambiguities by adopting a uniform and well-developed definition of family. This Part argues that the INA should define family based on interpersonal relationships grounded in the intention to enter into familial relations and to provide care and support. Section A looks for clues within the INA about how Congress intended to define family, arguing that while the INA does not contain an explicit definition, it does suggest that family cannot be defined solely by blood relationships. Defining family by interpersonal relationships is thus consistent with existing

76. See 8 U.S.C. § 1152(a)(2) (2006).

77. See *id.* § 1151(b)(2)(A)(i).

78. See *id.* § 1153(a)(2)(A).

79. See *id.* §§ 1151(a)(1)-(2).

80. 2009 YEARBOOK, *supra* note 2, at 18 tbl.6.

immigration law. Section B turns to state family law statutes. An examination of these statutes demonstrates that most states also define family based on the existence of a substantial interpersonal relationship. The proposed definition of family, accordingly, also finds support in state law. Finally, Section C explains how this proposed definition resolves the issues raised in Part II regarding citizenship by descent and other INA provisions.

A. The INA Definition

The INA does not explicitly provide a definition of family. However, an analysis of certain sections of the INA—along with the relevant legislative history—suggests that Congress intended to define family based on something more than biological relationships. The INA defines “child” for the purposes of Titles I and II in 8 U.S.C. § 1101(b), and it defines child for the purposes of Title III in 8 U.S.C. § 1101 (c).⁸¹ To fit either definition of “child,” a person must be unmarried and under twenty-one years of age.⁸² These requirements are significant because they indicate that a blood relationship alone is not sufficient to establish the type of relationship—that of parent and child—which confers the highest form of immigration privileges.⁸³ An interpersonal relationship is also necessary, as demonstrated by the other criteria under the Title I and II definitions. Consider the following examples: a person legitimated under the law of his residence or his father’s residence is considered a child as long as he is in the legal custody of the legitimating parent(s).⁸⁴ A person born out of wedlock counts as a child only “if the father has or had a bona fide parent-child relationship with the person.”⁸⁵ An adopted person must be in the legal custody of the adopting parent(s) and must have lived with the adopting parent(s) for at least two years to be considered a child.⁸⁶

81. Titles I and II of the INA deal with general provisions and immigration; Title III deals with nationality and naturalization. *See* 8 U.S.C. §§ 1101-1537.

82. *Id.* §§ 1101(b)(1), (c)(1).

83. *See supra* notes 76-80 and accompanying text (discussing the various immigration benefits available to the children of U.S. citizens and permanent residents).

84. 8 U.S.C. § 1101(b)(1)(C).

85. *Id.* § 1101(b)(1)(D).

86. *Id.* § 1101(b)(1)(E)(i). An adopted person may fall under the definition of child without meeting the legal custody and residency requirements if, among other things, “the sole or surviving parent is incapable of providing the proper care.” *Id.* § 1101(b)(1)(F)(i). This provision suggests that, when the child’s biological and bona fide parent-child relationships are not with the same person(s), the holder of the bona fide parent-child relationship will prevail.

These definitions all suggest that marriage and adulthood terminate a “bona fide parent-child relationship” in which the parent provides care and support for the child. This type of relationship is key to defining a family unit. In fact, because several of these categories—those of stepchild and adopted child—do not include any type of blood relationship, the definition of child under Titles I and II suggests that the bona fide parent-child relationship is not only necessary but also sufficient to establish the type of family relationship that immigration law seeks to preserve.

This definition of child does not apply to citizenship by descent, which is governed by Title III of the INA. However, the principle of holding the bona fide parent-child relationship in higher esteem than a biological relationship applies. First, while the definition of child for purposes of Title III is not as expansive as the definition discussed above, it includes several clauses that suggest the importance of a bona fide parent-child relationship. Along with requiring the person to be under twenty-one years of age and unmarried, the definition again includes persons legitimated under their residence or their father’s residence, as well as adopted persons; it also imposes a legal custody requirement.⁸⁷

Furthermore, the legislative history of the citizenship-by-descent provisions suggests that they were intended to honor the bona fide parent-child relationship. During congressional hearings on the amendment that added the blood relationship requirement to § 1409,⁸⁸ the INS took the position that additional requirements imposed upon fathers wishing to pass on their citizenship to children born out of wedlock were necessary because

[w]here a natural father has maintained no relationship with his children born out of wedlock, has not previously acknowledged his paternity or held himself out as the father of his children, and has not in any way contributed to the support or rearing of his children, i.e. where no relationship other than the biological one exists, we perceive no cause to provide a benefit not demanded by normal considerations of family reunification.⁸⁹

87. *Id.* § 1101(c)(1).

88. The blood relationship requirement was added to § 1409 in 1986. See *Immigration and Nationality Act Amendments of 1986*, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657.

89. *Administration of the Immigration and Nationality Laws: Hearing on H.R. 4823, H.R. 4444, and H.R. 2184 Before the Subcomm. on Immigration, Refugees, & Int’l Law of the H. Comm. on the Judiciary*, 99th Cong. 120 (1986) (statement of Richard E. Norton, Associate Comm’r, Examinations, U.S. Immigration & Naturalization Service).

The purpose of the blood relationship requirement, according to other testimony, was only to deter fraud.⁹⁰ Here again, the bona fide parent-child relationship is considered to be more important than a relationship based on biology alone.

B. The State Law Definition

In addition to being consistent with the INA, the interpersonal definition of family is supported by the definition of family in state family law. While state law is not binding in the immigration context, it is an informative and persuasive source regarding issues dealing with the family. It is an established principle of statutory interpretation that words should be given their “ordinary or natural meaning.”⁹¹ This principle applies in the immigration context as well.⁹² When the ordinary or natural meaning is unclear, federal courts will generally look to the common law and other areas of federal law for clarification.⁹³ However, this path is unwise when defining terms in family law, which is generally under the jurisdiction of the states.⁹⁴ State courts decide matters concerning marriage, divorce, paternity, and custody; in turn, they have played a large role in shaping society’s conception of what is or should be a family. Thus, when determining the ordinary or natural meaning of family for immigration purposes, Congress should take into account “the wealth of experience and information that state family law might provide.”⁹⁵ This principle of deferring to state courts in their areas of expertise has significant

90. *Id.* at 150 (testimony of the Hon. Joan M. Clark, Assistant Secretary of State for Consular Affairs).

91. *Smith v. United States*, 508 U.S. 223, 228 (1993).

92. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (looking to the ordinary and natural meaning of “use of physical force against” another to determine what qualifies as an aggravated felony for immigration purposes).

93. *See, e.g., Kungys v. United States*, 485 U.S. 759, 767-72 (1988) (looking to the common law and federal criminal law for the definition of “material”).

94. *See, e.g., In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”). *But see* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619, 644-56 (2001) (discussing the prevalence of federal family law).

95. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 *MINN. L. REV.* 1625, 1708 (2007).

precedent and is particularly strong in the family law arena.⁹⁶ There is no reason that this principle should not apply in the immigration context; on the contrary, because state courts are better versed in these areas, it would be prudent to look to state law for guidance.

Most states define family, specifically the parent-child relationship, by reference to factors such as the intent to enter into a familial relationship and the willingness to provide the necessary type of care and support. One source of state law that is particularly illustrative of the socially acceptable definition of family is the Uniform Parentage Act (UPA) of 2000.⁹⁷ As of fall 2010, the Act has been adopted by nine states: Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.⁹⁸ The predecessor to the 2000 UPA, the Uniform Parentage Act of 1973,⁹⁹ remains in effect in twelve states,¹⁰⁰ and has been adopted in part by many others. Both Acts emphasize the importance of a bona fide parent-child relationship over a biological relationship—a principle which has consequently been translated into the statutes of the twenty-one states that have adopted either the 1973 or the 2000 UPA (or both) and of those states that have adopted significant portions of either act. Additionally, it is noteworthy that California and Texas are among the states that have adopted one of the UPAs, as more than half of immigration apprehensions and a substantial number of arrests take place in these two states.¹⁰¹ Because of the many immigration cases that arise there, the

96. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations.”).

97. UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 4 (Supp. 2010).

98. See *A Few Facts About the Uniform Parentage Act*, UNIF. LAW COMM’RS, THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Sept. 28, 2010); see also UNIF. PARENTAGE ACT (2000) references and annots. (amended 2002) (2010 Electronic Pocket Part) (providing statutory citations for each state’s Uniform Parentage Act).

99. UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001).

100. Those states are California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, Ohio, and Rhode Island. UNIF. PARENTAGE ACT (1973), 9B U.L.A. 86 (Supp. 2010). In 2000, the Uniform Parentage Act of 1973 was in effect in nineteen states. *Id.* at 377. However, after the passage of the 2000 UPA, several of those states abandoned the 1973 UPA in order to adopt the newer version. UNIF. PARENTAGE ACT (2000) prefatory note (amended 2002), 9B U.L.A. 5-7 (Supp. 2010). Many other states have adopted significant portions of the 1973 UPA, but have never adopted the Act in full. *Id.*

101. Of the 556,032 apprehensions by the U.S. Border Patrol in 2009, 292,232 (approximately 53%) took place in California or Texas. See 2009 YEARBOOK, *supra* note 2, at 93 tbl.35. Of the

family law of these states is a particularly compelling source for the definition of family for immigration purposes.

The provisions in the UPAs governing presumptions of paternity—many of which are similar in the 1973 and 2000 UPA—serve as one example of the emphasis on interpersonal relationships.¹⁰² Both UPAs establish a presumption of paternity if the child’s alleged father and mother are married and the child is born during that marriage.¹⁰³ If the alleged father and mother marry after the child is born, a presumption of paternity will still exist if the alleged father voluntarily acknowledges paternity in writing, agrees to be listed as the child’s father on the child’s birth certificate, and promises in writing to support the child.¹⁰⁴ Neither of these presumptions is dependent on a biological relationship between the man and child. They are based only on the existence of a matrimonial tie between the parents, which arguably is sufficient to ensure the development of an interpersonal relationship between the husband and the child.

A third presumption of paternity found in both UPAs supports the argument that the presumptions above are based not on biological relationships but on the assumption that the relationships described will lead to a bona fide parent-child relationship. A man is presumed to be the father of a child if the child resides with the man for a certain period of time and the man openly holds the child out as his own.¹⁰⁵ Once again, this presumption

21,887 arrests by the U.S. Immigration and Customs Enforcement Office of Investigations, 6062 (approximately 28%) occurred in California and Texas. *See id.*

102. *See* UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23-24 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 4, 9B U.L.A. 393-94 (2001). For a survey of state law regarding presumptions of paternity, see CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE RIGHTS OF PRESUMED (PUTATIVE) FATHERS: SUMMARY OF STATE LAW, available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/putativeall.pdf, which provides information current through October 2007.
103. *See* UNIF. PARENTAGE ACT (2000) § 204(a)(1) (amended 2002), 9B U.L.A. 23 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 4(a)(1), 9B U.L.A. 393 (2001). The Department of State’s FAM acknowledges that such a presumption exists in family law but rejects that it applies to immigration. *See* 7 FOREIGN AFFAIRS MANUAL § 1131.4-1(c) (1998). The Department of State fails to offer any justification for why the presumption should not apply in the immigration context, stating simply that an “actual blood relationship to a U.S. citizen parent is required.” *Id.*
104. UNIF. PARENTAGE ACT (2000) § 204(a)(4) (amended 2002), 9B U.L.A. 23-24 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 4(a)(3), 9B U.L.A. 393-94 (2001).
105. UNIF. PARENTAGE ACT (2000) § 204(a)(5) (amended 2002), 9B U.L.A. 24 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 4(a)(4), 9B U.L.A. 394 (2001).

makes no mention of a blood relationship. Instead, the focus is on whether the alleged father and child relate to each other in a way that is normally considered appropriate for parents and their children—that is, does the child live with the father, does the father provide financial and emotional support for the child, and does the father publicly accept the child as his own.

An important way in which the 2000 UPA differs from the 1973 UPA is in the provisions regarding rebuttal of presumptions. Under both UPAs, a presumption of paternity may be rebutted in an appropriate adjudication.¹⁰⁶ The 2000 UPA makes an important addition to this provision by granting courts the authority to deny a motion for genetic testing if “it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.”¹⁰⁷ The Act lays out certain criteria that courts may consider when deciding whether disproving such a relationship would be equitable, including the nature and length of the relationship between the presumed father and child.¹⁰⁸ The comment to this section explains that denying a request for genetic testing is appropriate in situations in which

a man knows that a child is not, or may not be, his genetic child, but the man has affirmatively accepted his role as child’s father and both the mother and the child have relied on that acceptance. Similarly, the man may have relied on the mother’s acceptance of him as the child’s father and the mother is then estopped to deny the man’s presumed parentage.¹⁰⁹

The addition of this section to the 2000 UPA strongly implies that now, more than ever, the focus in parent-child relationships specifically, and in family relationships more generally, is on the interpersonal relationships between parties, which are valued far more highly than purely biological relationships.

The 2000 and 1973 UPAs and the laws of the many states that have adopted these acts present a strong case for defining family based on interpersonal relationships as opposed to biological ones. Some states, however, go even further in shifting the focus from biological to interpersonal relationships.

106. UNIF. PARENTAGE ACT (2000) § 204(b) (amended 2002), 9B U.L.A. 24 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 4(b), 9B U.L.A. 394 (2001).

107. UNIF. PARENTAGE ACT (2000) § 608(a)(2) (amended 2002), 9B U.L.A. 54 (Supp. 2010).

108. *See id.* §§ 608(b)(2), (4).

109. *Id.* § 608 cmt.

California is a prime example and is particularly relevant to the immigration context given the large number of immigration cases arising in the state.¹¹⁰

As California has adopted the 1973 UPA,¹¹¹ its statutes contain many of the provisions discussed above. However, the manner in which California courts have interpreted these statutes shows a deep commitment to the idea of favoring interpersonal over biological relationships. California courts have consistently and explicitly interpreted the California Family Code to allow the granting of legal parenthood status in the absence of a biological relationship. The courts focus on the intent of the alleged parents and the existence of a bona fide parent-child relationship.

In 2002, a state court of appeals in California addressed the parental rights of nonbiological fathers in child dependency cases.¹¹² The court of appeals relied heavily on a ruling of the California Supreme Court that established certain parental rights for fathers of children born out of wedlock.¹¹³ In *Adoption of Kelsey S.*, the California Supreme Court held that an unwed father who “demonstrates a full commitment to his parental responsibilities” has a constitutional right to a parental relationship with his child.¹¹⁴ That right “prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.”¹¹⁵ In *In re Jerry P.*, the court of appeals extended the *Kelsey S.* protections to nonbiological fathers.¹¹⁶ To justify this extension, the court made clear that family law makes a distinction between biological fathers and presumed fathers.¹¹⁷ The court further noted that presumed fathers have the highest-ranked status in terms of parental rights and responsibilities.¹¹⁸ The court focused on interpersonal relationships when determining which alleged fathers are entitled to the constitutional protections of *Kelsey S.*, chiding that “[a]s adults we must not forget what every child knows—the parent-child

110. See *supra* note 101 and accompanying text.

111. California Uniform Parentage Act of 1975, Cal. Stat. 3196 (codified as amended at CAL. FAM. CODE §§ 7600-7730 (West 2009)).

112. See *In re Jerry P.*, 116 Cal. Rptr. 2d 123 (Ct. App. 2002).

113. See *id.* at 131.

114. 823 P.2d 1216, 1236 (Cal. 1992).

115. *Id.*

116. See *In re Jerry P.*, 116 Cal. Rptr. 2d at 141.

117. *Id.* at 128-30 (interpreting California Family Code section 7611—the substantive equivalent of section 4(a) of the Uniform Parentage Act of 1973—to allow a nonbiological father to assume presumed father status).

118. *Id.* at 128 (noting that, according to the California Welfare and Institutions Code, only presumed fathers are entitled to reunification services and custody of the child).

relationship is not spun from DNA. Rather, it stems from the emotional attachments which derive from the intimacy of contact between the parent and child.”¹¹⁹

Three years later, in *Elisa B. v. Superior Court*,¹²⁰ the California Supreme Court extended the presumptions of section 7611 of the California Family Code to lesbian partners. The court considered an action filed by El Dorado County seeking to establish Elisa B., a homosexual woman, as the parent of two children born to Elisa’s former partner through IVF. The court held that, even though Elisa was not biologically related to the children, the presumption of paternity applied because Elisa made the decision to have children through IVF, took the children into her home, and held them out as her own.¹²¹ The court stated that the paternity provisions of the Family Code “are driven, not by biological paternity, but by the state’s interest in the welfare of the child and the integrity of the family.”¹²² In both cases, the courts’ definitions of the parent-child relationship focused solely on interpersonal relationships between the parent and the child. The lack of a biological relationship in no way lessened the parental rights and responsibilities.

While these California cases do not necessarily reflect the law of many other states, this distinction is due in part to the fact that California courts have addressed a wider variety of issues concerning nontraditional families. It is not yet clear whether other states will agree with California’s interpretation, but California’s case law nevertheless presents a well-developed family law that confronts the questions posed by nontraditional families more extensively than the law of many other states. Accordingly, California law can serve as a helpful guide in figuring out how to deal with these questions in the immigration context, especially considering California’s unique position in terms of immigration. Even if other states do not follow California’s lead, the provisions of the UPAs that have been adopted in full by nearly half of the states, and in part by many others, support the position that family is defined by interpersonal relationships.¹²³

119. *Id.* at 141.

120. 117 P.3d 660 (Cal. 2005).

121. *See id.* at 670.

122. *Id.* at 668 (quoting *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003)).

123. *See supra* notes 98-110 and accompanying text.

C. Applying the Definition to Citizenship by Descent

Defining family by interpersonal relationships provides a solution to the problems that nontraditional families pose to citizenship by descent and other INA provisions¹²⁴ by helping to determine who should be considered a “child” for immigration purposes. Under this interpersonal relationships definition, a child born abroad who is not biologically related to a U.S. citizen or permanent resident, but who has an interpersonal parental relationship, should qualify for immigration benefits under the relevant provisions, such as citizenship by descent, immediate relative status, or family-sponsored immigration. This definition is already employed for adopted children¹²⁵ but could be expanded to include children with parental relationships through means other than biology or adoption, such as ART or the biological parent’s marriage. This Note focuses on the citizenship-by-descent provisions to illustrate further how this definition could be implemented.

Adopting this definition of family creates guidelines for citizenship by descent: (1) a blood relationship is not necessary for children born in wedlock; and (2) a child is born in wedlock whenever one of his biological parents is married and that parent and parent’s spouse form or intend to form a bona fide parent-child relationship with the child. These guidelines can be applied to children born both through traditional reproduction and through ART.

For children born through traditional reproduction, applying these guidelines requires establishing further rules to determine when the second biological parent relinquishes his or her parental rights. In other words, it is not sufficient that the biological parent and the nonbiological spouse intend to form a bona fide parent-child relationship; rather, the second biological parent must also either explicitly or implicitly abandon any intention to have such a relationship with the child. If such abandonment does not take place, the child may effectively have three intended parents, in which case the rights of the parents who are both intended and biological would take precedence over those of the nonbiologically related, intended parent. The formation of these rules –

124. For a discussion of other problematic provisions, see *supra* text accompanying notes 76-80.

125. See 8 U.S.C. § 1101(b)(1)(E)(i) (2006) (defining child as “a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household”); *id.* § 1101(c)(1) (“The term ‘child’ . . . includes . . . a child adopted in the United States, if such . . . adoption takes place before the child reaches the age of 16 years . . . , and the child is in the legal custody of the . . . adopting parent or parents at the time of such . . . adoption.”).

including rules about what actions count as abandonment and how long the abandonment must last before parental rights may be terminated¹²⁶—is beyond the scope of this Note.

Applying these guidelines to children born through ART does not require this second set of rules because of the clearly defined parental roles that exist in this context. Under these guidelines, children born through ART would be considered born in wedlock only if their intended parents are married and at least one intended parent is biologically related to the child. If the intended parents are married, the child born through ART would be able to acquire citizenship through either intended parent regardless of whether the child is biologically related to that parent. These guidelines are consistent with the Ninth Circuit's interpretation of citizenship by descent.

1. *Blood Relationship*

If family is defined based on interpersonal relationships, then any relationship in which the right kind of interpersonal relationship is present or has the potential to become present should be considered a familial relationship. Under this interpretation, 8 U.S.C. § 1401 should not require a blood relationship between a child born in wedlock and his parents because the marriage of the parents creates a presumption that a bona fide parent-child relationship between the child and both parents will develop.¹²⁷

The Department of State does not accept that this presumption of paternity exists in the immigration context but does not provide any justification for its stance.¹²⁸ It is possible that the Department of State rejects the presumption in an effort to construe narrowly the INA in order to guard the benefits of U.S. citizenship. However, a reading of the INA itself suggests that the presumption of paternity in marriage does apply to immigration law. It is noteworthy that

126. Abandonment does not automatically terminate parental rights. In furtherance of the best interests of the child policy, if an alternate intended parent exists, the abandoning biological parent may lose parental rights. If there is no such alternative, however, it is unlikely that the abandoning biological parent would be able to terminate parental rights. In fact, many states and federal law make it a criminal offense to abandon a child or to fail to pay child support. *See, e.g.*, Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228(d)(1)(B) (2006)) (making it a federal offense willfully to fail to pay child support for a child residing in another state if the support remains unpaid for one year or longer and is greater than \$5000).

127. *See, e.g.*, UNIF. PARENTAGE ACT (2000) § 204(a)(1) (amended 2002), 9B U.L.A. 23 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 4(a)(1), 9B U.L.A. 393 (2001).

128. *See* 7 FOREIGN AFFAIRS MANUAL § 1131.4-1(c) (1998).

only one of the two citizenship-by-descent provisions explicitly contains a blood-relationship requirement; 8 U.S.C. § 1401 makes no mention of it. This omission suggests that the blood-relationship requirement in § 1409 is simply a safeguard to ensure the development of a bona fide parent-child relationship in circumstances where that relationship would not otherwise be present. In other words, the existence of a marriage between the alleged parents creates the type of familial relationship in which a bona fide parent-child relationship can and often does develop. If the alleged parents are not married, there does not exist that same guarantee that the child will have the opportunity to develop a parent-child relationship with both parties, if only because all parties will most likely not reside in the same household. It is for this reason that family law creates a presumption of paternity in marriage. Of course, as discussed in Section III.B, marriage is not the only context in which a presumption of paternity exists; thus it is not the only context that creates a realm for the development of a parent-child relationship.¹²⁹ Nevertheless, marriage provides a good indicator for the development of a parent-child relationship that does not necessarily exist in cases of children born out of wedlock. It is likely, then, that the blood-relationship requirement in § 1409, like the other requirements of that section,¹³⁰ serves only to create that same assurance present in wedlock that a parent-child relationship will develop.¹³¹ The blood relationship itself does not serve any value independent of the interpersonal relationship that it can foster.

There is no doubt that biological relationships are still important to the conception of family, if only because they often lead to the interpersonal relationships that define family. The key point is that when these two types of relationships come into conflict as they do in nontraditional families, interpersonal relationships should prevail. Because marriage is presumed to lead to interpersonal parent-child relationships even absent a blood relationship, the blood relationship requirement should not apply to children born in wedlock.

129. See *supra* notes 104-105 and accompanying text.

130. Section 1409 also requires that the father agrees in writing to support the child financially until the child is eighteen years old and that the child is legitimated under the law of the father's residence, the father acknowledges paternity in writing under oath, or paternity is declared by a court. 8 U.S.C. §§ 1409(a)(3)-(4) (2006). These requirements, especially those that require voluntary acknowledgement of paternity and consent to provide support, serve to establish a bona fide parent-child relationship.

131. See, e.g., *Nguyen v. INS*, 533 U.S. 53, 64-65 (2001) (interpreting § 1409 as providing an opportunity for the parent and child to develop an interpersonal relationship).

2. *Born in Wedlock*

It is now necessary to consider under what circumstances children should be considered born in wedlock for citizenship purposes. Under the interpersonal relationship definition of family, a child should be considered born in wedlock whenever his relationship to a married couple is the type of relationship that creates a presumption of a bona fide parent-child relationship similar to the one created for children traditionally born in wedlock.

To determine what types of relationships create this presumption, this Note will turn once again to state law, which, unlike immigration law, deals explicitly with the issues raised by nontraditional families. The Note argues that because state law defines family based on interpersonal relationships characterized by intention, care, and support, it also treats children born through ART as born in wedlock if their intended parents are married.

State law concerning the first category of ART procedures – those in which the gestational mother must also be the intended mother – is far more developed than state law concerning the second category, surrogacy. Because in the first category the only possible split in parental roles is between the biological and intended parents, the category does not present some of the ethical concerns that lawmakers face when dealing with surrogacy.¹³²

Both the 1973 and the 2000 UPA discuss the first category of ART. Although the 1973 UPA includes only a short discussion of ART, even this early Act suggests that children born through ART should be treated as children born in wedlock. According to section 5, if a woman is artificially inseminated under a physician's supervision with the consent of her husband, her husband is the legal father of the child even if his sperm was not used.¹³³ A sperm donor who is not the husband of the artificially inseminated woman is not the legal father.¹³⁴ Thus, the 1973 UPA and the many states that have adopted it treat a child born through the first category of ART as they would a child born to the intended parents through traditional reproduction. This fact suggests that these states consider the first category of ART to create a sufficient possibility of a bona fide parent-child relationship between intended parents and child to warrant the granting of legal parent status to a man who, although not biologically related to the child, consents to that child's conception. In this

132. See, e.g., Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1 (discussing some of the ethical concerns associated with surrogacy and describing a few examples of surrogacy agreements that have raised these concerns).

133. See UNIF. PARENTAGE ACT (1973) § 5(a), 9B U.L.A. 407-08 (2001).

134. See *id.* § 5(b).

way, ART is similar to marriage in that the husband is automatically treated as the legal father. In fact, ART is treated with even more deference than marriage because marriage creates only a rebuttable presumption of paternity,¹³⁵ while ART births bestow irrebuttable legal father status so long as the husband consents to the procedure.¹³⁶

The 2000 UPA removes the requirement of the 1973 UPA that the man who consents to the procedure must be the woman's husband. The 2000 UPA, instead, holds that any man who consents to assisted reproduction "with the intent to be the parent of [the] child" is the legal father.¹³⁷ Likewise, while a sperm donor still has no parental status,¹³⁸ any man who provides sperm for a woman's artificial insemination "with the intent to be the parent of her child" is the legal father.¹³⁹ This change clarifies that it is not the marriage between the intended parents that creates an expectation of a parent-child relationship; it is the fact that the intended father plans to become a father.

Between these two acts, at least twenty states have laws that treat either the husband, or any man who consents to a woman's artificial insemination, as the legal father of the resulting child even though the man and child have no biological relationship.¹⁴⁰ Two more states—North Dakota and Virginia—have adopted the Uniform Status of Children of Assisted Conception Act (USCACA), which contains a similar provision.¹⁴¹ Many other states have also adopted similar provisions.¹⁴²

135. See *supra* notes 106-109 and accompanying text.

136. See UNIF. PARENTAGE ACT (1973) § 5(a), 9B U.L.A. 407-08 (2001).

137. UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 70 (Supp. 2010).

138. See *id.* § 702.

139. See *id.* § 703.

140. See *supra* notes 98, 100 and accompanying text for a list of the states that have adopted these two Acts. Oklahoma did not adopt Article 7 of the 2000 Uniform Parentage Act, which governs children born through ART.

141. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 3, 9C U.L.A. 370 (1988) ("[T]he husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception."). Because Virginia has not adopted either uniform parentage act, this brings the total number of states who treat children born through the first category of ART as the legal children of their intended fathers regardless of a blood relationship up to at least twenty-one.

142. See, e.g., ARIZ. REV. STAT. ANN. § 25-501(b) (2007); ARK. CODE ANN. § 9-10-201(a) (2009); CONN. GEN. STAT. ANN. § 45a-774 (West 2004); FLA. STAT. ANN. § 742.11(1) (West 2010); GA. CODE ANN. § 19-7-21 (2010); IDAHO CODE ANN. § 39-5405(3) (2002); LA. CIV. CODE

This same principle applies to intended mothers. Both the 1973 and 2000 UPAs hold that provisions that deal with determining paternity also apply to determining maternity.¹⁴³ The USCACA does not contain such a broad provision but does state that, with the exception of surrogacy agreements, the gestational mother is the child's natural mother.¹⁴⁴ Thus, most states treat children born through the first category of ART as the legal children of their intended parents regardless of whether those intended parents are also the biological parents. In other words, children born through the first category of ART have the same relationship to their intended parents that children born through traditional reproduction have to their married parents. This outcome suggests that defining family by interpersonal relationships requires treating children born through ART to married intended parents as children born in wedlock.

The principle outlined for the first category of ART should also apply to the second category for citizenship purposes. The only difference between the two categories is that the gestational mother is not the intended mother in the second category. The issues of biology and intention remain the same.¹⁴⁵ Neither the Ninth Circuit nor the Department of State considers gestation relevant to the determination of citizenship by descent. As demonstrated by its decision in *Solis-Espinoza v. Gonzales*,¹⁴⁶ in which the court ruled that a woman who was neither the biological nor the gestational mother was the legal mother for citizenship purposes, the Ninth Circuit does not equate motherhood with gestation. It focuses almost exclusively on interpersonal relationships. Likewise, the Department of State does not equate gestation with motherhood, as evidenced by the provision in the FAM that finds a biological mother who is not the gestational mother to be the legal mother for citizenship purposes.¹⁴⁷ The Department of State makes clear that the identity of the gestational mother

ANN. art. 188 (2007); MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2001); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009); N.Y. DOM. REL. LAW § 73(1) (McKinney 1999); N.C. GEN. STAT. ANN. § 49A-1 (2009); OR. REV. STAT. § 109.243 (2009); TENN. CODE ANN. § 68-3-306 (2001).

143. See UNIF. PARENTAGE ACT (2000) § 106 (amended 2002), 9B U.L.A. 19-20 (Supp. 2010); UNIF. PARENTAGE ACT (1973) § 21, 9B U.L.A. 494 (2001).

144. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2, 9C U.L.A. 370 (1988). The National Conference of Commissioners comment to this section explains that the section is intended to address situations in which "technology enabl[es] a woman to give birth to a child to which she is not genetically related." *Id.* § 2 cmt.

145. See *supra* Part I.

146. 401 F.3d 1090 (9th Cir. 2005).

147. See 7 FOREIGN AFFAIRS MANUAL § 1131.4-2(b) (1998).

is irrelevant, stating that “[t]he status of the surrogate mother is immaterial to the issue of citizenship transmission.”¹⁴⁸ Both entities thus agree that gestation is neither necessary nor sufficient for establishing motherhood. The only disagreement between the two is whether parentage is determined by intention or by biology. The issues of intention and biology are the same in both categories of ART, and thus any principles established by statutes dealing with the first category should apply to the second category for citizenship purposes.

It would nevertheless be useful to consider the laws of those states that do address surrogacy. These laws support treating children born to surrogate mothers as children born in wedlock if the intended parents are married. The uniform laws do not provide much guidance in this area. The 1973 UPA does not address surrogacy at all. The USCACA, the first set of uniform state laws to discuss surrogacy, puts forward two alternatives—one that allows the regulation of surrogacy agreements and one that voids all surrogacy agreements.¹⁴⁹ The only two states to adopt the USCACA adopted opposite alternatives.¹⁵⁰ The Act thus made little headway in clarifying the status of children born through surrogacy agreements. The 2000 UPA takes a strong position on the issue, stating that the intended parents in a surrogacy arrangement are the legal parents, even if neither of them is biologically related to the child.¹⁵¹ The drafters of the 2000 UPA, however, gave states the option to adopt the Act without adopting the surrogacy provision.¹⁵² Of the nine states that adopted the 2000 UPA, only two—Texas and Utah—included this provision.¹⁵³

As of 2009, eleven states have their own statutes explicitly allowing surrogacy agreements in one form or another: Arkansas, Florida, Illinois, Nevada, New Hampshire, North Dakota, Tennessee, Texas, Utah, Virginia,

148. 7 *id.* § 1131.4-2(c).

149. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT prefatory note, 9C U.L.A. 365 (1988); *id.* at Alternative A, 373-82; *id.* at Alternative B, 383.

150. See *A Few Facts About the Uniform Status of Children of Assisted Conception Act*, UNIF. LAW COMM’RS, NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uscaca.asp (last visited Oct. 5, 2010).

151. See UNIF. PARENTAGE ACT (2000) §§ 801(a)(2)-(3) (amended 2002), 9B U.L.A. 76-77 (Supp. 2010).

152. See *id.* art. 8 cmt.

153. See *Surrogacy: Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (last visited Oct. 25, 2010) (giving a summary of state surrogacy laws). The discussion of surrogacy state law in this Note is informed by information provided by the Human Rights Campaign.

and Washington.¹⁵⁴ The procedures for giving legal parent status to intended parents vary widely among these eleven states, but all do allow for the eventual treatment of the intended parents as the legal parents.¹⁵⁵ Several other states have statutes that imply that surrogacy agreements are enforceable, although they do not explicitly recognize them. Iowa,¹⁵⁶ Oregon,¹⁵⁷ Rhode Island,¹⁵⁸ West Virginia,¹⁵⁹ and Wisconsin¹⁶⁰ all imply that surrogacy agreements are enforceable.

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154. ARK. CODE ANN. § 9-10-201 (2009) (allowing all gestational and traditional surrogacy); FLA. STAT. ANN. § 63.212 (West 2005) (permitting gestational and traditional surrogacy and treating traditional surrogacy as “preplanned adoption agreement[s]”); 750 ILL. COMP. STAT. ANN. 47 (West Supp. 2008) (allowing only gestational surrogacy and requiring that one of the gametes be donated by the intended parents); NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010) (permitting only gestational surrogacy in which both gametes are donated by the intended parents); N.H. REV. STAT. ANN. § 168-B:1-:32 (LexisNexis 2010) (allowing gestational and traditional surrogacy and requiring that one of the gametes be donated by the intended parents); N.D. CENT. CODE § 14-18-08 (2009) (allowing gestational surrogacy only and requiring that both gametes be provided by the intended parents); TENN. CODE ANN. § 36-1-102(48) (2010) (allowing gestational surrogacy if both gametes are provided by the intended parents and allowing traditional surrogacy if the sperm is provided by the intended father); TEX. FAM. CODE ANN. §§ 160.754, .762 (West 2008) (allowing only gestational surrogacy but not requiring that either gamete be provided by the intended parents); UTAH CODE ANN. § 78B-15-801 (LexisNexis 2009) (allowing only gestational surrogacy and requiring that one gamete be provided by the intended parents); VA. CODE ANN. §§ 20-156, -159 (2008) (allowing all gestational and traditional surrogacy); WASH. REV. CODE ANN. § 26.26.101 (West 2005) (permitting only gestational surrogacy and not requiring that either gamete be donated by the intended parents).
155. Hofman, *supra* note 13, at 460-67 (providing an overview of the procedures intended parents must go through to receive legal parent status in each of the eleven states).
156. See IOWA CODE ANN. § 710.11 (West 2003) (noting that the criminalization of purchasing or selling human beings does not apply to surrogacy agreements).
157. See OR. REV. STAT. § 163.537(2)(d) (2009) (listing “fees for services in an adoption pursuant to a surrogacy agreement” as an exemption from the prohibition on buying or selling a person).
158. Rhode Island prohibits the cloning of human beings. However, the statute states that it does not prohibit “[i]n vitro fertilization . . . or other medical procedures used to assist a woman in becoming or remaining pregnant.” R.I. GEN. LAWS § 23-16.4-2(c)(2)(i) (2008). In vitro fertilization is the procedure employed in gestational surrogacy, and thus this statute may be read as allowing gestational surrogacy agreements.
159. See W. VA. CODE ANN. § 48-22-803(e)(3) (LexisNexis 2009) (excluding “[f]ees and expenses included in any agreement in which a woman agrees to become a surrogate mother” from the prohibition against purchasing or selling a child).
160. Wisconsin law holds that, in the case of a child born to a surrogate mother, the surrogate mother will be placed on the child’s birth certificate unless the court determines who has

It is important to note that, of the states that explicitly allow surrogacy, several treat gestational and traditional surrogacy differently. The fact that some states allow only gestational surrogacy (in which the surrogate mother is not biologically related to the child) may at first glance suggest that blood relationship is key in the surrogacy context. However, most states that allow only gestational surrogacy specify that the intended mother does not have to be biologically related to the child; the only requirement is that the surrogate mother is not biologically related to the child.¹⁶¹ This distinction clarifies that the blood relationship itself is not determinative of legal parenthood in these states. Instead, the prohibition on traditional surrogacy is likely rooted in concerns about the bodily integrity of the surrogate mother. Just as some states prohibit all surrogacy due to a belief that gestation outweighs all other parental interests, these states may base their policy on the belief that while gestation or biology alone are not enough to vest a parental interest, the combination of the two transforms the surrogate mother into something closer to a mother putting her child up for adoption. However, as stated previously, questions of gestation are irrelevant in the immigration context.¹⁶²

It is also important to note that some of these states require at least one gamete to be donated by the intended parents.¹⁶³ This requirement is also not indicative of a belief that family requires a biological relationship: most of these states do not require both intended parents to be biologically related to the child. The concern behind imposing these requirements is likely based on the much more nebulous idea that people should not be able to “order up a baby.”¹⁶⁴ Legislatures may prohibit choosing from an array of donated eggs and sperm to create a baby that fits certain desired specifications because they fear treating babies like commodities.¹⁶⁵ But this question, although important, is not one for immigration regulation.

parental rights over the child. After the court’s determination, a new birth certificate will be issued. WIS. STAT. ANN. § 69.14(h) (West 2003).

161. Illinois, Texas, Utah, and Washington fall into this category. Illinois and Utah require one gamete to be donated by the intended parents. Nevada and North Dakota are exceptions in that they require both gametes to be provided by the intended parents. *See supra* note 154.
162. *See supra* notes 145-148 and accompanying text.
163. These states are Illinois, New Hampshire, Tennessee, and Utah. Again, Nevada and North Dakota require that the intended parents donate both gametes. *See supra* note 154.
164. *See* Saul, *supra* note 132.
165. *Id.* (“This is the main problem with commercialization, seeing children as a consumer product. This is especially true when there is no genetic connection with the child It really does treat children like commodities. Like pets.” (quoting George J. Annas, Chair of

Many other states recognize the validity of surrogacy agreements through case law, either with or without limitations. To some extent, courts in Alabama,¹⁶⁶ California,¹⁶⁷ Connecticut,¹⁶⁸ Idaho,¹⁶⁹ Kentucky,¹⁷⁰ Massachusetts,¹⁷¹ Minnesota,¹⁷² New Jersey,¹⁷³ Ohio,¹⁷⁴ Oregon,¹⁷⁵

the Department of Health Law, Bioethics & Human Rights at Boston University School of Public Health)).

166. See *Brasfield v. Brasfield*, 679 So. 2d 1091 (Ala. Civ. App. 1996) (awarding custody of a child born through a traditional surrogacy agreement to the intended mother, who was not biologically related to the child).
167. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (holding that in a gestational surrogacy agreement the intended parents are the legal parents).
168. See *Doe v. Doe*, 710 A.2d 1297 (Conn. 1998) (ruling that, in a custody dispute over a child born through a traditional surrogacy agreement, the intended, nonbiological mother's role in raising the child was sufficient to give her legal parent status because the court thought it was in the child's best interests).
169. See *DeBernardi v. Steve B.D.*, 723 P.2d 829, 834 (Idaho 1986) (holding that biological relationships are not the determining factor for legal parenthood and that "in the absence of fraud, duress, or undue influence" consent to termination of parental rights by the biological mother in a surrogacy contract is final and irrevocable).
170. See *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213 (Ky. 1986) (treating surrogacy agreements as all other custody contracts, which "are avoidable, not illegal and void").
171. See *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001) (granting a request to list the biological, intended parents as the parents on a birth certificate of a child born through a gestational surrogacy agreement).
172. See *P.G.M. v. J.M.A.*, No. A07-452, 2007 Minn. App. Unpub. LEXIS 1189 (Ct. App. Dec. 11, 2007) (denying the parental rights of the surrogate mother and holding that the biological, intended father is the natural father of the child).
173. New Jersey courts allow only uncompensated, gestational surrogacy agreements, in which the surrogate mother is not the biological mother. See *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) (invalidating a compensated, traditional surrogacy agreement); *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (allowing uncompensated, gestational surrogacy agreements).
174. See *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007) (holding that a gestational surrogacy agreement did not violate public policy and that the gestational mother had no parental rights).
175. See *In re Adoption of Baby A*, 877 P.2d 107 (Or. Ct. App. 1994) (upholding a surrogacy agreement in which payment to the surrogate mother exceeded pregnancy-related expenses). Oregon statutes also suggest that surrogacy agreements are enforceable. See OR. REV. STAT. § 163.537(d) (2009) (listing "fees for services in an adoption pursuant to a surrogacy agreement" as an exemption from the prohibition on buying or selling a person).

Pennsylvania,¹⁷⁶ South Carolina,¹⁷⁷ and Vermont¹⁷⁸ have suggested that surrogacy agreements are enforceable. Thus, in one form or another, more than half of the states are likely to enforce surrogacy agreements and allow for the recognition of the intended parents as legal parents. Many of these states – but not all – would do so regardless of a blood relationship. This analysis of the state law is consistent with the state law concerning the first category of ART because it indicates that most states treat the relationship between children born through ART and their intended parents as a bona fide parent-child relationship.

The law of many of the remaining states with regard to surrogacy is unclear because it has not been addressed by either legislatures or the courts.¹⁷⁹ Five states prohibit some forms of compensated surrogacy agreements,¹⁸⁰ but these

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176. See *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006) (ruling that a surrogate mother did not have standing to seek custody of the children and reversing a lower court ruling granting her custody, but explicitly refraining from ruling on the validity of surrogacy agreements).
177. See *Mid-South Ins. Co. v. Doe*, 274 F. Supp. 2d 757 (D.S.C. 2003) (finding that a child born to a surrogate mother was not the legal child of the surrogate’s husband based on the terms of the surrogacy agreement).
178. Vermont implied that surrogacy agreements were enforceable in *Baker v. State*, 744 A.2d 864 (Vt. 1999), a case dealing with same-sex marriage. One of the arguments that the State presented for prohibiting same-sex marriage was “minimiz[ing] the legal complications of surrogacy contracts and sperm donors.” *Id.* at 884. This argument implies that the State accepts surrogacy agreements made by heterosexual couples. The court in *Baker* extended the rights afforded to heterosexual couples to same-sex couples, which arguably includes the right to enter into surrogacy agreements. The court noted that “[t]he State does nothing to discourage technologically assisted reproduction by individuals or opposite-sex couples.” *Id.* at 910.
179. The issue of surrogacy has not been addressed in Alaska, Colorado, Georgia, Hawaii, Maine, Mississippi, Missouri, Montana, North Carolina, South Dakota, and Wyoming. See HUMAN RIGHTS CAMPAIGN, *supra* note 153. The law in Arizona is also unclear, even though both the legislature and one court have addressed the issue. State law provides that surrogacy agreements are invalid, that the surrogate mother is the legal mother, and that there is a rebuttable presumption that the surrogate mother’s husband is the legal father. See ARIZ. REV. STAT. ANN. § 25-218 (West 2007). However, an Arizona court of appeals held that the provision of the statute granting legal parent status to the surrogate mother violates the Equal Protection Clause. See *Soos v. Superior Court ex rel. County of Maricopa*, 897 P.2d 1356 (Ariz. Ct. App. 1994). It is unclear whether the court struck down the entire statute or only one provision.
180. Nebraska and New Mexico statutorily prohibit compensated surrogacy agreements. See NEB. REV. STAT. § 25-21,200 (2008); N.M. STAT. ANN. § 32A-5-34(f) (2009). In Maryland and Oklahoma, the state attorneys general have issued opinions that compensated agreements are prohibited under the applicable statute. See 85 Op. Md. Att’y Gen. 348 (2000); Op. Okla. Att’y Gen. No. 83-162 (1983). Louisiana prohibits compensated

prohibitions are not relevant to the discussion of the definition of family because they deal more with concerns about human trafficking than with considerations of family unity.

Only five states and the District of Columbia explicitly prohibit both compensated and uncompensated surrogacy. The District of Columbia, Indiana, Michigan, and New York do so by statute.¹⁸¹ Delaware prohibits surrogacy through case law,¹⁸² and Kansas does so through an Attorney General opinion.¹⁸³ Not only is it notable that only five states and the District of Columbia explicitly refuse to treat intended parents in surrogacy agreements as legal parents, but the fact that all six do not differentiate between gestational and traditional surrogacy also means that the prohibition is not based on a blood-relationship requirement for paternity. Instead, the prohibitions likely focus on the issue of gestation which, as previously discussed, is understood to be irrelevant in the citizenship context. In fact, at least three of these states statutorily prohibit sperm donors from acquiring any parental rights and give parental rights to intended fathers,¹⁸⁴ demonstrating that the prohibition of surrogacy is not based on questions of biology.

This survey of state law regarding both categories of ART demonstrates that the relationships between children born through ART and their intended parents create a presumption of a bona fide parent-child relationship similar to the one created for children born in wedlock. In other words, these children and their intended families fit into the definition of family proposed by this Note. Adopting this definition of family would thus provide clear guidelines for how to treat children born in nontraditional families for citizenship purposes.

One may argue that fully adopting this definition of family would require a more extreme reworking of citizenship regulation. If family is defined exclusively by interpersonal relationships, certain other conditions imposed on citizenship by descent may seem irrelevant. For example, one could argue that

traditional surrogacy agreements but makes no mention of either uncompensated agreements or gestational surrogacy agreements. *See* LA. REV. STAT. ANN. § 9:2713 (2005).

181. *See* D.C. CODE § 16-402 (LexisNexis 2001); IND. CODE ANN. § 31-20-1-1 (LexisNexis 2007); MICH. COMP. LAWS ANN. § 722.855 (West 2002); N.Y. DOM. REL. LAW § 122 (McKinney 1999).

182. *See* *Hawkins v. Frye*, No. 34,248, 1988 Del. Fam. Ct. LEXIS 31, at *7 (May 25, 1988) (holding that a “contractual agreement to terminate parental rights . . . is against the public policy of this State and may not be enforced by the Court”).

183. *See* 54 Op. Kan. Att’y Gen. No. 82-150 (1982).

184. *See* DEL. CODE ANN. tit. 13, §§ 702-703 (2009); KAN. STAT. ANN. § 23-129 (2009); N.Y. DOM. REL. LAW § 73(1) (McKinney 1999).

the distinction between children born in and out of wedlock should be abolished altogether because the only pertinent question is whether there exists or will exist a bona fide parent-child relationship. I do not disagree with this proposition. However, such a proposal may be premature. State family law still relies heavily on marriage as an indicator of a bona fide parent-child relationship for the determination of paternity, especially for children born through ART. This reliance is evidenced by the fact that most states have a presumption of paternity for children born in wedlock¹⁸⁵ and by the fact that many states require that the intended father in an artificial insemination be married to the intended mother to gain legal parent status.¹⁸⁶ There is evidence that the reliance on marriage is disappearing—California courts have allowed homosexual partners who are not legally married to benefit from presumptions of paternity,¹⁸⁷ and the 2000 UPA allows any man who consents to a woman's artificial reproduction with the intent of becoming a father to acquire legal parent status.¹⁸⁸ These examples, however, are exceptional. States continue to associate the existence of a child-rearing interpersonal relationship with marriage. Because of this strong association, it is possible that the current definition of family cannot disregard marriage, even though the primary focus is on interpersonal relationships. Thus, just as the political and legal landscape in 1997 may have counseled against adopting a uniform definition of family to deal with nontraditional families, the same may be said of eliminating the wedlock distinction now.

IV. COMPARING THE INTERPERSONAL DEFINITION TO OTHER PROPOSED SOLUTIONS

The interpersonal family definition solves the problems posed by various INA provisions, and it does so in a way that is preferable to the approaches considered by Friedland and Epps. This Part discusses the Friedland and Epps proposals and explains why each is problematic.

The first proposal is for Congress to consider individually all of the configurations made possible by nontraditional families and to lay out how immigration law should deal with each one.¹⁸⁹ Because of the increasing

185. See *supra* note 103 and accompanying text.

186. See *supra* notes 133, 142 and accompanying text.

187. See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

188. See UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 70 (Supp. 2010).

189. See Friedland & Epps, *supra* note 9, at 441.

complexity of nontraditional families, this solution is impractical. The number of different types of relationships that may exist in nontraditional families is vast. Looking just at artificial insemination in the first category of ART, the types of families that may be formed include: a married woman inseminated by her husband's sperm, a married woman inseminated by another man's sperm either with or without her husband's consent, an unmarried woman inseminated by her partner's sperm, and an unmarried woman inseminated by another man's sperm with or without her partner's consent. This list does not even begin to address the types of relationships that may be formed through other forms of ART, including in vitro fertilization and surrogacy agreements. Even if Congress did manage to map out every configuration made possible through ART, this map would still be incomplete because it would not include nontraditional families formed through traditional reproduction like the ones at issue in *Scales v. INS*¹⁹⁰ and *Solis-Espinoza v. Gonzales*.¹⁹¹ Furthermore, reproductive technologies are constantly changing and evolving,¹⁹² suggesting that if Congress applied rules for each configuration of nontraditional family possible now, these rules would be inadequate to deal with new configurations made possible by future scientific advancements. The proposal to apply a different rule to each nontraditional family configuration is thus an impractical long-term solution.

The second proposal is for Congress to reconceptualize entirely the definition of family and allow for more than one mother and father.¹⁹³ As Friedland and Epps recognized, however, this proposal is flawed because it is not "in the best interests of the child,"¹⁹⁴ a policy that family law strives to follow. Allowing the child to identify with multiple parents for citizenship purposes may initially seem to be in the best interests of the child because it gives him more opportunities to obtain the rights and privileges of citizenship. Outside of the immigration context, however, there is much disagreement over whether such a reconceptualization of paternity would be in the best interests of the child. To date, only two courts—one in the United States and one in

190. 232 F.3d 1159 (9th Cir. 2000).

191. 401 F.3d 1090 (9th Cir. 2005).

192. See, e.g., Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825 (1999).

193. See Friedland & Epps, *supra* note 9, at 441.

194. *Id.* at 444.

Canada—have recognized the possibility of more than two legal parents.¹⁹⁵ Both of these decisions have sparked harsh criticism for going against the best interests of the child,¹⁹⁶ and other courts have been hesitant to follow suit. Because domestic family law is currently unwilling to allow for more than two legal parents, applying this solution to immigration law is highly problematic because it may lead to situations in which an individual is given parental rights by immigration authorities, only to have those rights taken away domestically. In such a situation, for example, a child may be deemed to be the legal child of his U.S. citizen, nonbiological surrogate mother for immigration purposes and would consequently receive her citizenship status. Upon arriving in the United States, however, the majority of states would not consider that child to be the legal child of the surrogate mother, causing uncertainty about who is responsible for the child.

The third proposal, the one that Friedland and Epps support, is for Congress to incorporate state and foreign law by reference instead of adopting its own definition of family.¹⁹⁷ At first glance, this proposal seems promising. Instead of forcing the federal government to regulate families explicitly—a task which is traditionally left to the states and which federal courts strive to avoid¹⁹⁸—this proposal would allow federal legislatures and courts to defer to states’ and foreign nations’ expertise in the matter. On this account, instead of attempting to divine the commonly accepted definition of family, federal courts would leave that task to those who are more experienced in dealing with the complexities and intimacies of family life. Furthermore, this proposal would

195. See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007); *A.A. v. B.B.* (2007), 83 O.R. 3d 561 (Can. Ont. C.A.).

196. See, e.g., Elizabeth Marquardt, *When 3 Really Is a Crowd*, N.Y. TIMES, July 16, 2007, at A13 (discussing the problems that arise from decisions awarding three people legal parent status, especially when the parties live in different households); Stanley Kurtz, *Heather Has 3 Parents*, NAT’L REV. ONLINE (Mar. 12, 2003, 9:00 AM), <http://www.nationalreview.com/articles/206153/heather-has-3-parents/stanley-kurtz> (“Once parental responsibilities are parceled out to more than two people—even to someone living outside the household—it becomes that much easier for any one parent to shirk his or her responsibilities. The very notion that parents can be added and subtracted at will tends to cut against the feeling of special responsibility for a given child.”).

197. See Friedland & Epps, *supra* note 9, at 442.

198. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations.”); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (“[T]he domestic relation exception . . . divests the federal courts of power to issue divorce, alimony and child custody decrees.”). *But see* Resnik, *supra* note 94, at 642-56 (arguing that federal courts often engage in making family law).

save federal courts from having to determine which state's or foreign nation's family law is best in cases of disagreement.

While tempting, this proposal has two substantial problems. First, there is a need for uniformity in immigration and citizenship regulation.¹⁹⁹ Even scholars who argue against the necessity of uniformity admit that some areas of immigration regulation—including citizenship and formal admission and removal—require uniform application because they determine who has the basic right to enter and reside in the United States.²⁰⁰ Adopting the incorporation-by-reference approach would necessarily lead to a lack of uniformity in many of these vital contexts.

Second, treating citizenship applicants differently based only on where they happen to reside leads to potential violations of equal protection. While the Equal Protection Clause may not apply to those claiming citizenship by descent while abroad, applicants like Scales and Solis-Espinoza who raise citizenship as a defense against removal proceedings are covered by the Equal Protection Clause.²⁰¹ Furthermore, even if disparate treatment of those who apply for citizenship or immigration while abroad does not rise to the level of a constitutional violation, it is nevertheless an undesirable policy as demonstrated by Congress's prior attempts at incorporation by reference. An example presented by Friedland and Epps is particularly illuminating. Until 1995, immigration law defined "child" by reference to the legitimacy laws of the child's country of birth.²⁰² However, this incorporation by reference led to disparity between children coming from countries where the legitimate/illegitimate distinction had been abolished and those coming from countries where the distinction remained. To avoid this disparity, Congress amended the INA, removing the legitimate/illegitimate distinction in favor of a born-in-wedlock/born-out-of-wedlock distinction.²⁰³ The fact that Congress created this amendment suggests that an approach that avoids disparity between applicants based on factors such as when or where they apply for

199. See *supra* note 69.

200. See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 572 (2008).

201. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens."); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (noting that illegal aliens had long been recognized as "persons" under the Constitution and are thus guaranteed due process under the Fifth and Fourteenth Amendments).

202. See Friedland & Epps, *supra* note 9, at 442.

203. See *id.*

immigration or citizenship is preferable to incorporation by reference. Thus, even though deferring completely to states in their areas of expertise may be prudent in certain circumstances, it is not a viable option in this context. Concern about having Congress and federal courts make and implement family law does not outweigh the uniformity and Equal Protection Clause concerns.²⁰⁴ Indeed, Friedland and Epps admit that “unforeseen disparity of treatment” may counsel against incorporation by reference.²⁰⁵

Adopting a uniform approach may not have been possible or politically sound in 1997, but the advances in ART legislation and jurisprudence discussed in this Note show that uniformity is emerging in the regulation of nontraditional families. While states still disagree on many of the nuances concerning ART, they do largely agree that intention and a bona fide parent-child relationship take precedence over biology. Because such a uniform definition exists and eliminates disparate treatment of nontraditional families, the adoption of this definition is preferable to approaching the issue through incorporation by reference.

CONCLUSION

Both the INA and state law suggest that the family should be defined by interpersonal relationships, not by biology. Specifically, these sources suggest that the parent-child relationship should be defined by the alleged parents’ intention to conceive, care for, and support the child. Applying this definition to immigration law resolves the questions posed by nontraditional families to citizenship by descent and provides a good framework for dealing with such questions in other areas of immigration regulation, such as the provisions governing national quotas and admission. Of course, a much more in-depth look into the intersection of family and immigration law is needed to demonstrate exactly how the interpersonal family definition would affect other areas of immigration regulation. But by adopting the definition of family proposed in this Note, at least in the citizenship-by-descent context, the United

204. Some scholars argue that the federal government already regularly makes family law, including in the immigration context. See, e.g., Abrams, *supra* note 95 (detailing how federal immigration law regulates marriage); Resnik, *supra* note 94, at 642-56 (describing federal family law generally); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008) (explaining how the regulation of immigration and child custody constitutes federal family law). On this account, having the federal government legislate a definition of family would not be far outside of the scope of its current lawmaking practices.

205. See Friedland & Epps, *supra* note 9, at 442.

States can avoid unequal application of the INA's immigration and citizenship policies. By adopting this proposed definition, U.S. immigration and citizenship policy can better conform with the emerging ideas of what constitutes a family, while also affording familial rights to nontraditional families.