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# MORALES-SANTANA BEFORE THE U.S. SUPREME COURT: GENDER DISCRIMINATION IN DERIVATIVE CITIZENSHIP WITH CONSEQUENCES FOR GENDER EQUITY, PARENTAL RESPONSIBILITY AND CHILDREN'S WELL BEING

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On November 9, 2016, the U.S. Supreme Court will hear arguments in *Lynch v. Morales-Santana*.[2] The case directly addresses the constitutionality of gender differences in the acquisition of U.S. citizenship by statute through parentage.[3] But the case is infused with issues about the historical record of discrimination based in gender, non-marital birth, race and imperialism in U.S. law. The outcome of the case will be legally and socially significant because of the standards the Court may apply to gender discrimination and to a remedy for discrimination in the context of citizenship and because of the societal message sent regarding parental responsibility for non-marital children grounded in gender stereotypes.

Specifically, the case involves the statutory difference in acquiring U.S. citizenship at birth outside of the U.S. through an out of wedlock citizen

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[1] Thanks for assistance on this article to the staff of *The City University of New York Law Review* and to my colleagues, Professors Ruthann Robson and Natalie Gomez-Velez.

[2] Docket for No. 15-1191 (Lynch v. Morales-Santana), SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-1191.htm (last visited Oct. 15, 2016) [https://perma.cc/GH2V-ASB2].

[3] Question Presented at 1, Lynch v. Morales-Santana (No. 15-1191), SUPREME COURT OF THE UNITED STATES (June 28, 2016), https://www.supremecourt.gov/qp/15-01191qp.pdf [https://perma.cc/KGG6-9RCH]; Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (U.S. June 28, 2016) (No. 15-1191).

father as versus an out of wedlock citizen mother.[4] Persons become U.S. citizens at birth through parental heritage based on the statute in effect on the date of the person's birth.[5] At issue in *Morales-Santana* is the longer time of physical presence in the U.S. required for a non-marital father before his child is born as versus a non-marital mother, as a condition for the child's acquisition of citizenship at birth.[6]

The statute in effect at Luis Morales-Santana's birth in 1962 required that an out of wedlock father have ten years of physical presence in the U.S., five years of which had to be after the father's fourteenth birthday.[7] In contrast, an out of wedlock mother had to have continuous physical presence in the U.S. for only one year at any time prior to the child's birth.[8] The statute also required an established relationship between father and child through legitimation.[9] A similar requirement in an amended statute was upheld as constitutional by the Supreme Court in *Nguyen v. INS*.[10] In an opinion authored by Judge Raymond Lohier, the U.S. Court of Appeals for the Second Circuit held that the gender-based difference in physical presence requirements violated the Equal Protection Clause of the U.S. Constitution.[11] The federal government appealed to the U.S. Supreme Court.[12]

Luis Morales-Santana was born in the Dominican Republic in 1962 to a United States citizen father, Jose Morales, and a Dominican mother. His parents were unmarried at the time. Luis Morales-Santana was

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[4] *See* Brief for Respondent at 1, Lynch v. Morales-Santana, No. 15-1191 (U.S. Sept. 26, 2016), http://www.scotusblog.com/wp-content/uploads/2016/09/15-1191-bs.pdf [https://perma.cc/K6HM-ABJ2]; *see also* Brief for Petitioner at 5, Lynch v. Morales-Santana, No. 15-1191 (U.S. Aug. 19, 2016), 2016 WL 4436132 at *5, http://www.scotusblog.com/wp-content/uploads/2016/08/15-1191-petitioner-merits-brief.pdf [https://perma.cc/JJP9-B6HC].

[5] 8 U.S.C. § 1409(a) (2015); 8 U.S.C. § 1401(g) (2016).

[6] Question Presented at 1, Lynch v. Morales-Santana (No. 15-1191), SUPREME COURT OF THE UNITED STATES (June 28, 2016), https://www.supremecourt.gov/qp/15-01191qp.pdf [https://perma.cc/GN6Y-GVED].

[7] 8 U.S.C. § 1401(a)(7) (1958); *see Morales-Santana*, 804 F.3d at 523-24.

[8] 8 U.S.C. § 1409(c) (1958); *see Morales-Santana*, 804 F.3d at 523 n.2 (excerpting the relevant statutory language from sections 1401(a)(7), 1409(a), and 1409(c)).

[9] 8 U.S.C. § 1409(a); 8 U.S.C. § 1401(g) (1994).

[10] Nguyen v. INS, 533 U.S. 53 (2001). That statute required legitimation or acknowledgement or adjudication of paternity and a written agreement to provide financial support. 8 U.S.C. § 1409(a).

[11] *Morales-Santana*, 804 F.3d at 523-24.

[12] Petition for Writ of Certiorari, Lynch v. Morales-Santana, No. 15-1191 (U.S. Mar. 22, 2016), 2016 WL 1157006, http://www.scotusblog.com/wp-content/uploads/2016/04/Morales-Santana-Pet.pdf [https://perma.cc/E8GK-B5UF]; Morales-Santana v. Lynch, 804 F.3d 520 (2d. Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (U.S. June 28, 2016) (No. 15-1191).

"legitimated" by his parents' marriage in 1970. He became a legal permanent resident of the U.S. in 1975 at age thirteen when he moved to the U.S. with his parents. He has lived in the U.S. since that time, for over forty years. Before his birth, his father, Jose Morales, was physically present in Puerto Rico until just twenty days before his nineteenth birthday when he left Puerto Rico to work for an American company in the Dominican Republic, then occupied by the United States.[13] The Second Circuit accepted his claim that he was a citizen at birth through his citizen father as a remedy for the statute's gender discrimination.[14]

This is not the first time the U.S. Supreme Court has addressed the constitutionality of the difference in physical presence requirements for mothers and fathers for derivative citizenship of their children. In 2011, the Supreme Court divided four to four in the case of *Flores-Villar v. United States*.[15] Only eight justices considered the case since Justice Kagan recused herself because she had been the U.S. Solicitor General on the case before she was appointed to the Supreme Court.[16] *Flores-Villar* thereby resulted in the continuation of the Ninth Circuit's opinion[17] upholding the constitutionality of the same statute now in contention in the *Morales-Santana* case. There is always the chance that *Morales-Santana* will result

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[13] *Morales-Santana*, 804 F.3d at 524.

[14] *Id*. at 523-24. The case arose in the context of a removal case. The government claimed Mr. Morales-Santana was removable because of a criminal conviction. He claimed he was not removable because he was not an "alien" but a citizen at birth through his father.

[15] Flores-Villar v. United States, 564 U.S. 210 (2011). For description of and commentary on Flores-Villar, see, for example, Ruthann Robson, *Gender, Equal Protection & Immigration SCOTUS grants cert in* Flores-Villar*: Analysis*, CONSTITUTIONAL LAW PROF BLOG (Mar. 22, 2010), http://lawprofessors.typepad.com/conlaw/2010/03/gender-equal-protection-immigration-scotus-grants-cert-in-floresvillar-analysis.html [https://perma.cc/VU6A-8HEX]; Ruthann Robson, Flores-Villar *Oral Argument Analysis: Father's Rights or Citizenship Rights? And What Remedy?*, CONSTITUTIONAL LAW PROF BLOG (Nov. 10, 2010), http://lawprofessors.typepad.com/conlaw/2010/11/flores-villar-oral-argument-analysis-fathers-rights-or-citizenship-rights.html [https://perma.cc/QL4V-VHQZ]; Ruthann Robson, *Equally Divided Court Affirms* Flores-Villar*: Gender Differentials in Immigration Statutes Remain Constitutional*, CONSTITUTIONAL LAW PROF BLOG (June 13, 2011), http://lawprofessors.typepad.com/conlaw/2011/06/equally-divided-court-affirms-flores-villar-gender-differentials-in-immigration-statutes-remain-cons.html [https://perma.cc/MH9K-BH4K]; Ruthann Robson, *Revisiting* Flores-Villar*: Collins and Kerber*, CONSTITUTIONAL LAW PROF BLOG (July 25, 2011), http://lawprofessors.typepad.com/conlaw/2011/07/revisiting-flores-villar.html [https://perma.cc/J6LS-YNDV].

[16] Lisa McElroy, *This week at the Court: In Plain English*, SCOTUSBLOG (June 15, 2011, 2:43 PM), http://www.scotusblog.com/2011/06/this-week-at-the-court-in-plain-english-6/ [https://perma.cc/LFB6-YTPE].

[17] United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008).

in a four to four tie at the Supreme Court, since now there are only eight justices as the Senate has refused to move forward with the President's nomination of Judge Garland to replace Justice Scalia.[18] If there is a tie, the Second Circuit's decision will stand, as will the current conflict in the circuits about the issue.

There is also a recent case in which a district court in Texas held the same statute at issue in *Morales-Santana* unconstitutional. In *Villegas-Sarabia v. Johnson*, the District Court agreed with the Second Circuit in *Morales-Santana* and disagreed with the Ninth Circuit in *Flores-Villar* to hold that the different physical presence requirements for mothers and fathers violated equal protection.[19] An additional aspect of *Villegas-Sarabia* illustrates a further problem with the statute. The U.S. citizen father in this case was eighteen when his child was born.[20] Therefore, there was no way he could meet the requirement for his child's citizenship that he have five years of physical presence after his fourteenth birthday no matter how many total years of presence he had in the U.S.

In the *Morales-Santana* case, the U.S. Supreme Court will address whether the different physical presence requirements for unwed citizen fathers violates the Constitution's guarantee of equal protection, and, if so, what the proper remedy is for the equal protection violation.[21] In its equal protection analysis, the Second Circuit applied intermediate "heightened" scrutiny, since the court determined that the statute discriminated on the basis of gender. The Second Circuit stated, "Under intermediate scrutiny, the government classification must serve actual and important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives."[22] The court further stated, "the justification for the challenged classification 'must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or

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[18] *See, e.g.*, Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html; Russell Berman, *Judge Merrick Garland Meets a Senate Blockade*, ATLANTIC (Mar. 16, 2016), http://www.theatlantic.com/politics/archive/2016/03/merrick-garland-meets-the-senate-blockade/474060/ [https://perma.cc/89LM-TGZ9].

[19] Villegas-Sarabia v. Johnson, 123 F. Supp. 3d 870 (W.D. Tex. 2015), *appeal docketed*, No. 15-50993 (5th Cir. Oct. 19, 2015).

[20] *Id.* at 876.

[21] Question Presented at 1, Lynch v. Morales-Santana (No. 15-1191), SUPREME COURT OF THE UNITED STATES (June 28, 2016), https://www.supremecourt.gov/qp/15-01191qp.pdf [https://perma.cc/ZRX8-BWGA].

[22] Morales-Santana v. Lynch, 804 F.3d 520, 528 (2d Cir. 2015) (citing Nguyen v. INS, 533 U.S. 53, 68 (2001); U.S. v. Virginia, 518 U.S. 515, 533 (1996)).

preferences of males and females.'"[23]

The Second Circuit then turned to the question of whether the government had shown that the statute's gender-based distinction was substantially related to an actual and important governmental objective. The Second Circuit rejected the government's two proposed objectives. The first assertion was that the legislature imposed the distinction to ensure the biological parent-child relationship and a sufficient connection between the United States and the U.S. citizen's child. The court pointed out that Mr. Morales-Santana's father took the affirmative step of demonstrating a meaningful relationship by legitimating his son.[24] Moreover, the court did not see any reason "that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad."[25]

The second government assertion was that the legislature imposed the different physical presence requirements to reduce the level of statelessness among newborn children. The court found that the avoidance of statelessness was not the actual legislative purpose and, further, that the difference in the physical presence requirements was not substantially related to that goal. Rather, the historical legislative record reflected legislators' gender-based generalizations concerning who would care for and be associated with a child born out of wedlock.[26] Further, even if the potential for statelessness was the legislative concern, gender-neutral alternatives could achieve that goal, such as providing citizenship to a child born to a citizen in the event that the child would otherwise be stateless.[27]

The Second Circuit then decided that as a remedy for the equal protection violation Luis Ramon Morales-Santana was a U.S. citizen at birth because his citizen father met the one year of continuous physical presence required of a citizen mother.[28] The court found that this remedy was most consistent with Congressional intent. The court rejected the contention that it was unlawfully affording citizenship.[29] It held that the court was exercising its traditional remedial powers "so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth."[30] In the court's view, the judgment in Mr.

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[23] *Id.* (citing *Virginia*, 518 U.S. at 533).
[24] *Id.* at 531.
[25] *Id.* at 530.
[26] *Id*. at 532.
[27] *Id*. at 534.
[28] *Morales-Santana*, 804 F.3d at 528.
[29] *Id.* at 536.
[30] *Id*. at 537 (quoting Nguyen v. INS, 533 U.S. 53, 95-96 (2001) (O'Connor, J., dissenting)).

Morales-Santana's favor confirms his pre-existing citizenship acquired at birth rather than granting him rights that he did not possess.[31] Further, a federal statute directs that if a court finds that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.[32]

In its brief to the Supreme Court the federal government disagrees with the Second Circuit on each point.[33] The respondent's brief agreed with the Second Circuit and amplified the arguments.[34] The historical record is of significant import as the respondent's brief shows that the statute's actual roots in "archaic and overbroad gender stereotypes" negate any bona fide rationale for the statute's distinctions.[35]

In its brief to the Supreme Court, the government, while admitting that the statute used the gendered terms mother and father, argues that the distinctions were not based on gender but rather on whether a child had one or two legally recognized parents.[36] The government asserts that when an out of wedlock child is born to a citizen mother, that mother is the only legally recognized parent at birth, while the out of wedlock citizen father is a legally recognized parent only when he legitimizes the child, thereby affording the child two legally recognized parents.[37] It points out that under the statute a citizen married to a non-citizen whose child was born outside of the U.S. had to meet the same physical presence requirements as an out of wedlock citizen father.[38] Therefore, the government argues that, upon legitimation, the statute imposed the same conditions on the out of wedlock father as if he had been married at the child's birth.[39] In the government's view the distinctions therefore were not gender-based. The government argues that the distinctions are justified because if a child has only one parent, and that parent is a U.S. citizen, the child will be influenced only by a person with U.S. citizenship.[40] But if the child has two parents, one of whom is not a U.S. citizen, the child will be subject to the parental influence of a person with the interests of a "foreign" citizenship.[41] The respondent's brief argues that the statute is grounded in gender discrimination as the relevant distinction in the statute is between a foreign born nonmarital child

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[31] *Id.* at 537-38.
[32] 8 U.S.C. § 1252(b)(5)(A) (2005).
[33] *See generally* Brief for Petitioner, *supra* note 3.
[34] *See generally* Brief for Respondent, *supra* note 3.
[35] *Id.* at 19.
[36] Brief for Petitioner, *supra* note 3, at 10.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 4.
[40] *Id.* at 9.
[41] *Id.*

of an alien mother and a U.S. citizen father who legitimated his child, and a foreign born nonmarital child of a U.S. citizen mother and an alien father who legitimated.[42]

The government further asserts that even if gender-based discrimination were involved, the statute only has to be justified by a deferential rational basis review requiring a facially legitimate and bona fide reason because the discrimination is in the context of nationality.[43] The government relies on its interpretation of *Fiallo v. Bell*,[44] a case that involved the entry of aliens, and not birth citizenship.[45] The Second Circuit stated that *Fiallo* applied rational basis scrutiny only to discrimination in the context of aliens seeking entry into the country, and held that this standard was not applicable to the context of citizenship.[46]

But, the government reads Article 1 of the Constitution, which states that Congress has the authority to establish a uniform rule of naturalization,[47] to give Congress plenary authority to decide which persons born outside the U.S. should be given derivative citizenship through a citizen parent. However, naturalization is statutorily defined as conferring nationality after birth, not acquisition of citizenship at birth.[48]

The respondent's brief pointed out that the government offered no support for the assertion that derivative citizenship is subject to the kind of "plenary" congressional power that applies to the exclusion of "aliens." It asserted that Congress could not constitutionally allow derivative citizenship, for example, only through fathers or white citizens.[49] Moreover, the deferential rationality standard as part of the plenary power doctrine has been highly criticized even in the immigration context.[50] It is seen as a judicial failure to uphold important constitutional norms, especially when it is used as a justification for the imposition of unfortunate domestic negative social prejudices that have nothing to do with the relationships between the U.S. and foreign nations and have no place in determinations of who should be members of the U.S. community.[51] Even now, in *Morales-Santana*, the

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[42] Brief for Respondent, *supra* note 3, at 11.
[43] Brief for Petitioner, *supra* note 3, at 17.
[44] Fiallo v. Bell, 430 U.S. 787 (1977).
[45] Brief for Petitioner, *supra* note 3, at 17.
[46] Morales-Santana v. Lynch, 804 F.3d 520, 527-30 (2015).
[47] U.S. CONST. art. I, § 8, cl. 4.
[48] 8 U.S.C. § 1101(a)(23) (2014).
[49] Brief for Respondent, *supra* note 3, at 18.
[50] *See infra* note 50.
[51] *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY—THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Kif Augustine-Adams, *The Plenary Power Doctrine after September 11*, 38 U.C. DAVIS L. REV. 701 (2005); Nora V. Demleitner, *How Much Do Western Democracies*

government asserts such authority by citing cases from the nineteenth century era of *Plessy v. Ferguson*'s[52] racial discrimination involving similarly archaic stereotypes against Asians.[53]

The government further contends that the objective of preventing statelessness meets any equal protection standard applied.[54] According to the government, most countries recognize the unwed mother as the child's only parent, so that if an out of wedlock child is born in a country in which citizenship at birth is solely determined by parentage through a father then the child would be stateless.[55] The respondent's brief includes a detailed rendition of the historical record demonstrating the infusion of gender discrimination into the history of the citizenship law.[56] The brief demonstrates how the citizenship laws were grounded in the now abandoned archaic notions of coverture and imposed gender roles.[57] It further shows that the historical record did not support the government's assertion that unmarried mothers faced a greater risk than fathers of having stateless children.[58]

An amicus brief filed by historians in *Morales-Santana* supports the Second Circuit's determination that a concern about statelessness was not the actual purpose for Congressional imposition of differing physical presence requirements; rather, this provision as well as other aspects of citizenship law reflected gender role assumptions.[59] An amicus brief filed by scholars on statelessness concluded that the government's assertions

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*Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273 (2003); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1 (1999).

[52] Plessy v. Ferguson, 163 U.S. 537 (1896).

[53] *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[54] Brief for Petitioner, *supra* note 3, at 33.

[55] *Id.* at 34.

[56] Brief for Respondent, *supra* note 3, at 2-10. The Respondent seems to be saying to the government, "Don't Know Much About History." SAM COOKE, *What a Wonderful World*, *on* THE WONDERFUL WORLD OF SAM COOKE (Keen Records 1960), https://www.youtube.com/watch?v=R4GLAKEjU4w.

[57] Brief for Respondent, *supra* note 3, at 41-46.

[58] *Id.* at 30-41.

[59] Brief of Professors of History, Political Science, and Law as Amici Curiae in Support of Petitioner, Lynch v. Morales-Santana, No. 15-1191 (U.S. Sept. 26, 2016), http://www.scotusblog.com/wp-content/uploads/2016/10/AMICUS-History2c-poli-sci-law-professors.pdf [https://perma.cc/B25Q-J9UJ].

about statelessness were without evidence, and that there was, and continues to be, a substantial risk of statelessness for children born abroad of unmarried U.S. citizen fathers.[60] But even if the government's assertion about the status of out of wedlock children born in other countries was true, it does not justify sanctioning the infusion of those prejudices into U.S. law.

Further, in the government's view, even if the statute is declared unconstitutional as a violation of equal protection, the courts do not have the legal authority to grant citizenship.[61] Additionally, the government argues that if the court decides to impose a remedy for an equal protection violation, then the remedy most consistent with respect for the authority of Congress would be to extend to mothers, on a prospective basis, the longer physical presence requirements imposed on fathers.[62] The respondent's brief presents several arguments against these positions including that the government failed to identify a single case in which the Supreme Court contracted rather than extended benefits to cure an equal protection violation[63] and that precluding recognition of citizenship through mothers who do not have ten years of physical presence would be tantamount to taking away already conferred citizenship.[64]

This case has immediate legal consequences for those born to out of wedlock citizen fathers from 1940 to the present since the difference in physical presence requirements for out of wedlock fathers as versus out of wedlock mothers has explicitly existed in statutes since then, but with different timeframes. For example, the current statute requires an out of wedlock citizen father to have five years of physical presence, two of which must be after age fourteen,[65] while still only requiring one year of continuous presence for out of wedlock citizen mothers.[66] If the Supreme Court decides that differences in required times of physical presence violate the constitution, then presumably these other timeframe differences are also unconstitutional. The case may also have an impact on future children of out of wedlock citizen mothers, because of the federal government's position that if the statute violates equal protection then the appropriate resolution is to impose the longer time period of physical presence fathers face on citizen mothers, rather than requiring citizen fathers to meet the

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[60] Brief of Scholars on Statelessness as Amici Curiae in Support of Respondent at 10, Lynch v. Morales-Santana, No. 15-1191 (U.S. Oct. 3, 2016), http://www.scotusblog.com/wp-content/uploads/2016/10/15-1191-resp-amicus-statelesness.pdf [https://perma.cc/TE4M-QASZ].

[61] Brief for Petitioner, *supra* note 3, at 48.

[62] *Id.* at 12.

[63] Brief for Respondent, *supra* note 3, at 49.

[64] *Id*. at 56.

[65] 8 U.S.C. § 1401(g) (2012).

[66] 8 U.S.C. § 1409(a), (c) (2012).

lesser time period that mothers must meet.[67]

The outcome of this case will not only affect persons seeking derivative citizenship, but it will also convey important messages about gender equality, parental responsibility and discrimination grounded in out of wedlock birth.[68] These citizenship laws are some of the exceptions to the twentieth and twenty-first century legal developments that remove antiquated discrimination based in gender and out of wedlock status.[69] Most of the early citizenship and immigration laws were grounded in the coverture doctrine[70] and discriminated against women,[71] thus undermining the assertion that recognizing the close connection of mothers to children explains the gender lines drawn in derivative citizenship laws, rather than out-of-date gender stereotypes. Further, as Justices Ginsburg, Breyer and O'Connor have pointed out, even if more unwed mothers than unwed fathers take responsibility for their children, generalized notions about the way women and or men "are" does not justify distinctions between male and female United States citizens who take responsibility, or avoid responsibility, for raising their children, especially when gender neutral alternatives are available to assure a close connection between parent and child.[72] An amicus brief filed in *Morales-Santana* by population and family scholars asserts that the population and social science data show that a number of nonmarital fathers are regularly in a parental role at the time of their children's births, many formally acknowledge their paternity, and others are parenting their children without the involvement of a mother.[73]

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[67] Brief for Petitioner, *supra* note 3, at 51.

[68] The law can reinforce or reject stigma against certain groups. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 378 n.207 (2011).

[69] *See generally* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016).

[70] Under coverture, spouses and children were subjected to their fathers. Husband and wife were one and the one was the husband. Fathers had total control over children. *See generally* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991).

[71] Miller v. Albright, 523 U.S. 420, 460-68 (1998) (Ginsburg, J., dissenting); Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2144 (2014); *see generally* Janet M. Calvo, *Gender, Wives, and U.S. Citizenship Status: The Failure of Constitutional and Legislative Protection*, 9 INT'L REV. CONSTITUTIONALISM 263 (2009).

[72] *Miller*, 523 U.S. at 468-71 (Ginsburg, J., dissenting); *id.* at 471-72, 476-80 (Breyer, J., dissenting); Nguyen v. INS, 533 U.S 53, 74-97 (2001) (O'Connor, J., dissenting).

[73] Brief of Population and Family Scholars as Amici Curiae in Support of Respondent, Lynch v. Morales-Santana, No. 15-1191 (U.S. Oct. 3, 2016), http://www.scotusblog.com/wp-content/uploads/2016/10/15-1191-resp-amicus-PFS.pdf [https://perma.cc/MJ2X-HDKT].

The facts in the *Morales-Santana* case and other citizenship cases[74] involved fathers who took the kind of significant parental responsibility for their children that society should encourage, but who suffered the kind of denigration and emotional and practical harms gender discrimination imposes.

Moreover, these types of discrimination harm both women and men, as well as their children. They send the message, sanctioned by governmental reinforcement of harmful stereotypes, that unwed mothers are responsible for parenting their children, but unwed fathers are not, and that marriage makes a difference in societal expectations of parental care-taking for fathers, but not for mothers.

By imposing full responsibility for the well-being of children on mothers, the stereotypes harm women as well as men. This type of gender discrimination preserves a male prerogative to choose whether or not to take responsibility for children by deciding whether or not to marry the child's mother. It makes the responsibility for the father-child relationship dependent on the relationship of the child's parents rather than the direct relationship between father and child. This has a coercive effect on mothers, signaling to the mother that she must maintain a relationship of his choice with the father of her child or the child will suffer. And it denies maternal agency and imposes blame on a mother for failure in paternal choice. The mother may not want to marry the father of her child for a variety of good reasons. On the other hand, she might want to marry her child's father but he may not want to marry her. Whatever the situation, the mother then holds the responsibility for the nature of the relationship between her child and the child's father. But parental responsibility for the well-being of a child and the parent-child relationship should not depend on the relationship between mother and father. Each parent has an independent responsibility for his or her child.

Additionally, those substantially harmed by discrimination against parents based in out of wedlock birth are children, who are thereby perpetually condemned as not worthy, a burden no child should bear.[75] At

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[74] *See, e.g.*, Nguyen v. INS, 533 U.S 53 (2001); United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008); Villegas-Sarabia v. Johnson, 123 F. Supp. 3d 870 (W.D. Texas 2015).

[75] Variations on these perspectives have (and have not) been argued in a variety of cases. *See* Mayeri, *supra* note 68, at 2307-08. Janet Calvo was one of the Legal Aid Society lawyers who made similar arguments in an early, unfortunately unsuccessful, challenge to similar "illegitimacy" and gender-based discrimination in the context of immigration laws. *See* Fiallo v. Bell, 430 U.S. 787, 809-16 (1977) (Marshall, J., dissenting); *see also* Fiallo v. Levi, 406 F. Supp. 162, 169 (E.D.N.Y. 1975) (Weinstein, J., dissenting); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1327-30 (2015).

common law, out of wedlock children were considered nobody's children, denigrated as "bastards"[76] and subjected to a myriad of legal and social barriers.[77] Perpetuation of disadvantages on individuals because of the nature of their parents' relationship when they were born has no place in twenty-first century America. Therefore, the Supreme Court decision in this case will have important social as well as legal significance. The Court should make clear that the infusion of historical prejudices into any part of U.S. law to the denigration and detriment of any person cannot be sanctioned under the U.S. Constitution.

The *Morales-Santana* case is additionally interesting because it addresses the impact on U.S. citizenship of the United States' historical occupation of territories. Luis Morales's father, Jose, was born in 1900 in Puerto Rico, which became a U.S. territory after the Spanish American War. Jose Morales and others born in Puerto Rico acquired statutory U.S. citizenship through the Jones Act in 1917.[78] Jose Morales lived in Puerto Rico for eighteen years, until twenty days before his nineteenth birthday in 1919 when he left Puerto Rico to work for an American company in the Dominican Republic.[79] Between 1916 and 1924, the Dominican Republic was occupied by and under the control of the U.S. military.[80] Luis Morales argued that his father therefore had the requisite physical presence since Jose Morales lived in Puerto Rico for eighteen years and 345 days, and the twenty days until Jose Morales' nineteenth birthday were also spent in a territory controlled by the U.S. government.

The Second Circuit rejected the argument that Jose Morales met the statutory physical presence requirement because, even though the U.S. had historical control during its occupation of the Dominican Republic, the U.S. Proclamation of the Military Occupation of Santo Domingo stated that it did not destroy the sovereignty of the Dominican Republic.[81] The court also

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[76] Words to the song "Alexander Hamilton" from the Broadway musical, Hamilton, indicate this attitude: "How does a bastard, orphan, son of a whore…. Impoverished, in Squalor…. The ten-dollar founding father without a father…." LESLIE ODOM, JR., ANTHONY RAMOS, DAVEED DIGGS, OKIERIETE ONAODOWAN, LIN-MANUEL MIRANDA, PHILLIPA SOO, CHRISTOPHER JACKSON, ORIGINAL BROADWAY CAST OF HAMILTON, *Alexander Hamilton*, *on* HAMILTON ORIGINAL BROADWAY CAST RECORDING (Atlantic Recording Co. 2015), https://www.youtube.com/watch?v=yIl1OIGzuDg.

[77] Maldonado, *supra* note 67, at 351; *see generally* John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327 (2003).

[78] Jones-Shafroth Act of 1917 (Puerto Rican Federal Relations Act), Pub. L. No. 64-368, 39 Stat. 951 (codified as amended in scattered sections of 48 U.S.C.).

[79] Morales-Santana v. Lynch, 804 F.3d 520, 524 (2d Cir. 2015).

[80] *See generally* BRUCE J. CALDER, THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924 (2006).

[81] *Proclamation of the Military Occupation of Santo Domingo by the United States*, 11 AM. J. INT'L L. 94, 95 (1917).

rejected the argument that the twenty-day lack of physical presence was *de minimis*.[82]

The legacy of citizenship determinations grounded in U.S. territorial control of both Puerto Rico and the Dominican Republic add additional context to the history of U.S. citizenship laws that unfortunately reflected societal prejudices based in race, ethnicity, gender and "illegitimacy."[83] Persons born in Puerto Rico (and in other U.S. territories) are considered citizens through statutes, not the Constitution, as the "Insular Cases" limit the full applicability of the Constitution in "unincorporated territories."[84] The reasoning of cases supporting this limitation has been unsuccessfully challenged as resting on anachronistic views of race and imperialism.[85]

In *Morales-Santana*, the United States Supreme Court has the opportunity to reject the perpetuation of harmful archaic prejudicial stereotypes in U.S. law.[86] The court should do so.

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[82] *Morales-Santana*, 804 F.3d at 525-27.

[83] *See* Calvo, *supra* note 70, at 263-66; Collins, *supra* note 70, at 2154-58.

[84] Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 264-71 (1996).

[85] *See* Tuaua v. U.S., 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016). The D.C. Circuit determined that the citizenship clause of the Fourteenth Amendment affording citizenship to all persons born in the United States and subject to its jurisdiction does not apply to persons born in American Samoa, a U.S. territory since 1900, relying in part on the Insular Cases.

[86] Think about Justice Ginsburg, backed by Justices Breyer and Sotomayor and channeling Diana Ross and the Supremes, standing up with hands raised singing to other members of the Court: "Stop! In the Name of Law . . . The law can perpetuate historical stigma or reject it . . ." "Think it O'Over . . ." THE SUPREMES, *Stop in the Name of Love*, *on* MORE HITS BY THE SUPREMES (Motown 1965), https://www.youtube.com/watch?v=NPBkiBbO4_4.