Legitimation of Children Under the Immigration and Nationality Act

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INTRODUCTION

One of the most popular television shows in the world in recent memory was Home Box Office's *Game of Thrones*, based on the series of fantasy novels by author George R.R. Martin.[1] In Martin's complicated fantasy universe, illegitimacy and legitimation are central themes. In particular, the mysterious identity of the character Jon Snow, introduced as the illegitimate son of Ned Stark, garnered much attention from fans of the show.[2] Another character, Ramsay Snow, became the legitimated son of Roose Bolton.[3] In Martin's fiction, legitimation is linked to inheritance and succession rights and is typically achieved by royal decree.[4] Although *Game of Thrones* is a recent show, illegitimacy and legitimation have been major themes in literature for centuries.[5] In the real world, legitimation has long been a topic of debate in United States immigration law, particularly in the areas of citizenship, naturalization, and visa preference classification.

The Immigration and Nationality Act (hereinafter referred to as "the Act") does not define the term "legitimated" or its variations. There are different statutory provisions regarding legitimation that apply depending on whether a claim arises in the citizenship context or in the visa petition context. In the derivative citizenship context, which describes citizenship that is obtained by a minor based on the naturalization of one or both parents, the child must meet the requirements of certain statutory provisions, even repealed ones, if applicable.[6] Additionally, the pertinent statutory provision for the definition of a "child" for citizenship and naturalization purposes can be found at section 101(c)(1) of the Act,[7] 8 U.S.C. § 1101(c)(1), whereas the provision for the

definition of a "child" for visa petition purposes can be found at section 101(b)(1)(A)-(D) of the Act, 8 U.S.C. § 1101(b)(1)(A)-(D).[8]

In 2015, the Board of Immigration Appeals ("the Board") addressed the issue of legitimation in *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015), a derivative citizenship case arising under section 320(a) of the Act. In this removal case, the respondent sought to establish that he qualified as a legitimated "child" under section 101(c) of the Act.[9]

This article will discuss U.S. citizenship law, focusing on issues related to derivative citizenship and out-of-wedlock birth. Specifically, the article will explore the issue of legitimation in light of recent precedent decisions from the Board and the circuit courts of appeals. First, after a short overview of U.S. derivative citizenship law, the article will discuss the background and relevant statutory provisions of legitimation. Second, the article will examine significant Board and circuit court precedent cases prior to the Board's decision in *Matter of Cross*. Third, the article will discuss *Matter of Cross* and how the Board addressed the disparate approaches advanced in its prior decisions. Finally, this article will review recent circuit court precedent cases regarding the interpretation of legitimation, as well as the constitutionality of legitimacy-based statutory classifications in derivative citizenship cases. This article will leave for another day other issues involving derivative citizenship, such as the circuit split regarding the interpretation of former section 321(a)(5) of the Act, which pertains to "residing permanently" in the United States, or the interpretations of "legal separation" and "legal custody" under former section 321(a)(3) of the Act.[10]

RELEVANT STATUTORY PROVISIONS FOR LEGITIMATION

The U.S. Supreme Court has stated, "There are two sources of citizenship, and two only: birth and naturalization."[11] Children born in the United States are citizens pursuant to the

Fourteenth Amendment's Citizenship Clause, but sections 301 and 309 of the Immigration and Nationality Act, 8 U.S.C. §§ 1401 and 1409, control the citizenship status of children born to U.S. citizen parents outside the United States. The Act defines the term "naturalization" as "the conferring of nationality of a state upon a person after birth, by any means whatsoever."[12] The term "derivative citizenship" refers to citizenship that a child may derive *after* birth upon the naturalization of parents.[13] Derivative citizenship is distinct from "citizenship by descent" that is transmitted by the U.S. citizen parents at birth.[14] When an individual asserts a claim to derivative citizenship resulting from one or both parent's naturalization, the Board applies the law in effect when the last material condition was met.[15] An alien who was born outside the United States is presumed to be an alien and bears the burden of establishing her claim to U.S. citizenship by a preponderance of credible evidence.[16]

As originally enacted by Congress in 1952, the Act defined a "child" as an unmarried legitimate or legitimated child or stepchild under twenty-one years of age.[17] Over the years, however, Congress has "repeatedly fine-tuned the definition of 'child.'"[18] In 1995, Congress amended the definition of "child" in section 101(b)(1) of the Act by substituting "child born in wedlock" and "child born out of wedlock" for "legitimate child" and "illegitimate child."[19] The Board has noted that "[t]here has been a growing consensus, both in the United States and abroad, against labeling children "legitimate" and "illegitimate" by virtue of the marital status of their parents."[20] The Board has also explained that "[i]n recent decades, many countries have legally marginalized the legitimation concept, retaining some of its features for purposes of settling inheritance disputes but enacting legislation that otherwise places the children of unmarried parents on the same legal footing as those born to married couples."[21]

The Board has defined "legitimation" as "the act of putting a child born out-of-wedlock in the same legal position as a child born in wedlock."[22] Additionally, the Board stated that "[w]here less than equality of status results, an act of legitimation is not deemed to have occurred."[23] When Congress enacted the Immigration and Nationality Act of 1952, it explicitly stated in section 321 that a child born out of wedlock outside the United States and whose paternity had not been established by legitimation could acquire derivative citizenship through the naturalization of only his mother.[24] Under former section 321(a) of the Act,[25] 8 U.S.C. § 1432(a) (1999), a child born outside the United States to alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship, becomes a U.S. citizen once the following conditions have been fulfilled:

> (1) The naturalization of both parents; or
>
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
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> (4) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

An issue that arises in derivative citizenship cases is determining whether former section 321(a) or current section 320 of the Act, 8 U.S.C. § 1431(a), applies to an individual's claim. Section 103(a) of the Child Citizenship Act of 2000 ("CCA"), Pub. L. No. 106-395, 114 Stat. 1631, 1632, repealed former section 321 in 2000, and became effective on February 27, 2001. Under current section 320(a) of the Act, a child born outside the United States automatically becomes a citizen of the United States when all of the following conditions have been satisfied:

1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization;

2) the child is under the age of eighteen years; and

3) the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

The CCA thus eliminated the "legal separation" requirement for derivative citizenship in section 321(a)(3) after the naturalization of a custodial parent. Additionally, unlike former section 321(a), the CCA does not specifically mention legitimation, but merely provides that a "child" automatically derives citizenship through a custodial parent's naturalization when the age and residency requirements are satisfied.[26] The CCA is not retroactive, with the Board and the circuit courts having interpreted the CCA as applying only to individuals who turned eighteen after its effective date on February 27, 2001.[27] As such, former section 321(a) continues to apply to any derivative citizenship claim made by an individual who turned eighteen before the statute's effective date.[28] In much of the case law, the children in question sought to establish that they were *not* the legitimated children of their fathers, because of the additional requirements that existed under former section 321(a) for a minor to obtain derivative citizenship where paternity had been established.

SIGNIFICANT PRECEDENT CASES PRIOR TO *MATTER OF CROSS*

Matter of Cross held that the meaning of "legitimation" is tied to the laws of various foreign and U.S. jurisdictions, and nearly forty years of historical context and case law demonstrate the shifting concept of "legitimation."[29] When it comes to interpreting foreign law and legitimation, the Board has taken different approaches in its precedent decisions. In *Matter of Clahar*, 16 I&N Dec. 484 (BIA 1978) (hereinafter "*Clahar I*"), a visa petition case, the Board addressed Jamaica's Status of Children Act of 1976 ("JSCA"), which placed children born in or out of wedlock on equal legal footing. The Board in *Clahar I* concluded that the JSCA is "not a statute which treats all children born in Jamaica as legitimate at birth" and is "also not a statute which eliminates or modifies the preexisting legal procedures for effecting legitimation in Jamaica."[30] The Board also stated that "[w]hile it is evident that the statute has the effect of deleting references to the term 'illegitimate' in Jamaican law and substituting in its place the expression 'born out of wedlock,' the fact remains that under Jamaican law there are significant legal distinctions between children born in wedlock and children born out of wedlock."[31] However, in *Matter of Clahar* 18 I&N Dec. 1 (BIA 1981) (hereinafter "*Clahar II*"), another visa petition case in which a naturalized U.S. citizen submitted an alien relative petition on her brother's behalf, the Board modified *Clahar I* and held that "a child within the scope of the [JSCA] may be included within the definition of a legitimate or legitimated 'child' set forth in section 101(b)(1) of the [Act] so long as the familial tie or ties are established by the requisite degree of proof and the status arose within the time requirements set forth in section 101(b)(1)."[32] In re-interpreting the JSCA (but not for the last time), the Board held that a Jamaican child who was born out of wedlock after the effective date of the JSCA is legitimated under Jamaican law for purposes of visa preference classification, even

though the child may not technically have been "legitimated" under the Legitimation Act of Jamaica.[33]

In another visa petition case, *Matter of Goorahoo*, 20 I&N Dec. 782, 783-85 (BIA 1994), the Board addressed Guyana's Children Born Out of Wedlock (Removal of Discrimination) Act of 1983 ("Removal of Discrimination Act"), which effectively eliminated the legal distinction between Guyanese children born in wedlock and those born out of wedlock. The Board held that for purposes of visa preference classification, children born out of wedlock in Guyana after the law's May 18, 1983, effective date are deemed legitimate and those who were under the age of eighteen prior to that date are legitimated children. Unlike the JSCA, the Removal of Discrimination Act did not contain a "broad provision that purports to eliminate all legal distinctions between children born in and out of wedlock by declaring all to be of equal status regardless of the marital status of their parents."[34] Nevertheless, relying on a Library of Congress memorandum, the Board concluded that "children born out of wedlock in Guyana have rights equal to those of children born in wedlock."[35] However, the Board subsequently overruled the rule on legitimation in Guyana discussed in *Goorahoo*, holding that "legitimation occurs under Guyanese law only when the natural parents marry."[36] *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006), was a derivative citizenship case arising under former section 321(a) in which the respondent claimed to have derived citizenship through his mother's naturalization. The Board determined that individuals born out of wedlock in Guyana could derive U.S. citizenship through the naturalization of their mothers so long as they could prove that their fathers had not confirmed or established their paternity "by legitimation" under Guyana's laws, namely its Legitimacy Act (which the Removal of Discrimination Act did not amend or override).[37] While acknowledging that the term "legitimation" in former section 321(a)(3) "may not technically be the same as that

in section 101(b)(1)," the Board did not find it appropriate to distinguish its meaning simply due to its usage in different contexts.[38]

Years later, in another derivative citizenship case arising under former section 321(a), *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008), the Board overruled *Clahar II*, finding *Matter of Rowe* to be controlling and holding that the *sole* means of "legitimating" a child born out of wedlock under Jamaican law was the subsequent marriage of the child's natural parents "*for purposes of both* [visa] *preference allocation and derivative citizenship"* (emphasis added).[39] The Board noted Jamaica's retention of its Legitimation Act, by which the father could legitimate his child by subsequently marrying the child's mother, notwithstanding the JSCA.[40] Consequently, the Board indicated that paternal acknowledgement alone was insufficient to constitute a legitimating act in Jamaica under the Act.[41] Just as it had done in *Matter of Rowe*, the Board in *Hines* also concluded that its "interpretation of the legitimation concept must be consistent throughout the immigration laws."[42] Thus, *Matters of Hines* and *Rowe* held that the term should not have two separate meanings within the Act, regardless of variations in statutory context, and thus, applied a uniform interpretation of "legitimation" throughout the Act in reliance on the Board's understanding of *Clark v. Martinez*. The Board essentially held in both *Hines* and *Rowe* that where a jurisdiction requires an affirmative act to legitimate a child born out-of-wedlock, paternity is not established without such an act, even if the jurisdiction has enacted a law to place children on the same footing without regard to the circumstances of their birth. This interpretation was favorable for the respondents in *Hines* and *Rowe* as they were able to derive citizenship through their naturalized mothers because paternity had not been established by the marriage of their parents.

In 2011, the United States Court of Appeals for the Second Circuit in *Watson v. Holder*, 643 F.3d 367 (2d Cir. 2011), remanded removal proceedings to the Board to clarify its interpretation of "legitimation" within the meaning of section 101(c)(1). In *Watson*, the petitioner, who was born out of wedlock in Jamaica and whose parents never married, claimed that he had derived U.S. citizenship through his father's naturalization in 2002 when he was seventeen years old.[43] The Board agreed with the Immigration Judge's reliance on *Matter of Hines* in concluding that Watson was not "legitimated" under Jamaican law pursuant to section 101(c)(1).[44] The Second Circuit remanded to the Board to clarify whether the difference between "legitimate and illegitimate . . . is purely formalistic—in other words, where the law in question retains the label of "legitimate" for children born to married parents, but ensures that "illegitimate" children are treated *exactly* the same as their legitimate counterparts" or whether "some substantive discrimination in the law [is] necessary."[45] Citing its prior decision in *Lau v. Kiley*, 563 F.2d 543, 548 (2d Cir. 1977), the court noted that "[t]he distinction [between legitimate and illegitimate children] must have some effect and must have been designed to distinguish between the two categories in order that they have different rights or obligations."[46] The court also instructed the Board to provide the "legal and/or logical basis for its interpretation" and then explain its position on the requirements for "legitimation" under Jamaican law.[47] In essence, the Second Circuit took issue with the Board's inconsistencies as to the "legitimation" question without explicitly addressing the uniform definition that the Board used for "legitimation" for purposes of derivative citizenship under section 321(a) and visa preference classification under section 101(b)(1).[48]

Subsequently, the United States Court of Appeals for the Third Circuit in *Brandao v. Att'y Gen. of U.S.*, 654 F.3d 427 (3d Cir. 2011), considered the case of an alien who was born in Cape Verde in 1979 to an unwed mother and who claimed that he derived U.S. citizenship through his

mother's naturalization prior to his eighteenth birthday.[49] The petitioner did not provide information on his biological father, claiming he did not know him.[50] The court held that where the law of Cape Verde abolished distinctions regarding legitimacy at birth, the child was not born out of wedlock and therefore was ineligible for derivative citizenship under former section 321(a)(3).[51] Noting that a statutory definition of "legitimation" in the Act was "lacking," the court looked to the Board's uniform approach to assessing foreign law in determining whether a foreign national seeking citizenship has been legitimated under section 101(b)(1)(C) of the Act.[52] The court applied the Board's general rule in *Matter of Hernandez*, 19 I&N Dec. 14 (BIA 1983), that "[w]hen a country where [the foreign national] was born and resides eliminates all legal distinctions between legitimate and illegitimate children, all natural children are deemed to be the legitimate or legitimated offspring of their natural father."[53] The Third Circuit acknowledged Cape Verde's 1976 Decree Law No. 84/76, which abolished the distinction between legitimacy and illegitimacy and legitimated every child born thereafter regardless of whether the natural father takes formal steps to establish paternity.[54] Since the petitioner was born after 1976, he was legitimated under Cape Verde law and thus ineligible for derivative citizenship under former section 321(a)(3).[55] It is worth noting that *Brandao* did not mention *Matters of Rowe* or *Hines* and their interpretative analyses of section 321(a)(3). Rather, the court looked to a general rule concerning legitimation under section 101(b)(1)(C) propounded by an older Board visa petition decision that hinged upon "legitimation" under former section 321(a)(3).[56]

In *Anderson v. Holder*, 673 F.3d 1089 (9th Cir. 2012), a citizenship case arising under former section 309(a) of the Act,[57] the United States Court of Appeals for the Ninth Circuit considered the case of an alien who was born in England in 1954 to an unwed non-citizen mother and whose biological U.S. citizen father had no contact with him for decades after his birth.[58] The

petitioner's biological father's name did not appear on his birth certificate, but the father signed an affidavit in 1999 or 2000 stating that he was the petitioner's father.[59] The petitioner's case required reconciliation of the language of section 309(a) and Arizona's state statutory scheme, which had no provision for "paternity established by legitimation," instead stating that "[e]very child is . . . the legitimate child of its natural parents."[60] The Ninth Circuit therefore examined whether "legitimation" requires more than merely the status of being legitimate.[61] The court determined that the petitioner derived U.S. citizenship through his biological father, holding that legitimation does not require an affirmative act and that the petitioner's paternity was established by Arizona's legitimacy statute.[62] The court asserted, "Legitimation need not *always* require some formal legal act; the question is whether or not the law of the governing jurisdiction requires such a formality."[63] The court cited *Brandao* and noted that the Ninth Circuit had previously issued a similar holding in *Romero-Mendoza v. Holder*, 665 F.3d 1105 (9th Cir. 2011), where the Ninth Circuit applied the Board's holding in *Matter of Moraga*, 23 I&N Dec. 195 (BIA 2001), to conclude that "[w]hen legal distinctions are eliminated between children born to married parents and those born out of wedlock, the children born out of wedlock are deemed to be legitimated as of the date the laws are changed."[64]

A year later, in another citizenship case arising under former section 309, the Fifth Circuit in *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013), considered the case of an alien who was born out of wedlock in Mexico in 1964 to a U.S. citizen father and a non-citizen mother. The petitioner's biological parents never married, and he claimed that he automatically acquired U.S. citizenship at birth from his citizen father.[65] The court applied the meaning of "legitimation" as used in section 309 of the Act, "which is concerned with the substantive rights granted rather than with semantic distinctions in the foreign law."[66] Although the Act required "legitimation" and the

law of the Mexican jurisdiction distinguished between "legitimation" and "acknowledgement," the court held that a child in that jurisdiction was "legitimated," as the term is used in the Act, when his father "acknowledged" him by placing his name on the child's birth certificate before the Civil Registry, which gave the child the "same filial rights vis-à-vis his father as a 'legitimated' child."[67] As the petitioner's paternity was established by legitimation pursuant to former section 309, the court ultimately ruled that he was a U.S. citizen.[68] Notably, the Fifth Circuit cited *Lau v. Kiley* and *Watson v. Holder* but did not cite either *Matter of Hines* or *Matter of Rowe* (instead citing *Matter of Cabrera*, 21 I&N Dec. 589 (BIA 1996), and *Matter of Oduro*, 18 I&N Dec. 421 (BIA 1983) in its decision).[69] Further, although this case involving acquisition of citizenship arose under former section 309(a) of the Act (whose language regarding "paternity . . . established by legitimation" parallels that of section 321(a)), the court did not compare sections 309(a) and 321(a) with sections 101(b) and 101(c) of the Act (whose definitions regarding "child" contain the term "legitimated").[70]

MATTER OF CROSS

Although the Second Circuit's remand in *Watson v. Holder* did not itself result in a precedent Board decision, the Board addressed the interpretation of "legitimated" under section 101(c)(1) of the Act in *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). In this case, the Board acted to reconcile its inconsistent treatment of children born out-of-wedlock.[71] The respondent in the case was born out of wedlock in Jamaica in 1988 (after the effective date of the JSCA) to parents who were not then U.S. citizens or nationals.[72] In 1995, the respondent's father placed his name on the respondent's Jamaican birth registration form, thus qualifying him as a legitimated child for purposes of visa preference classification under the Act.[73] The respondent's father eventually immigrated to the United States and became a naturalized U.S. citizen in 2001.[74] The respondent,

who had been admitted to the United States as a lawful permanent resident, was thirteen years old and in his father's legal custody at the time of his father's naturalization.[75] When the respondent was charged with removability from the United States, he moved to terminate proceedings, claiming that he became a U.S. citizen upon his father's naturalization in 2001.[76] To establish derivative U.S. citizenship under section 320(a) of the Act, the respondent had to establish that he qualified as the "child" of his U.S. citizen father, as defined in section 101(c)(1) of the Act.[77] Whereas the Immigration Judge relied on *Matter of Hines* to conclude that the respondent had not been "legitimated" under Jamaican law because his natural parents never married, the respondent argued that he qualified as the legitimated child of his father under *Matter of Clahar*, among other decisions.[78] The Board held that a person born out of wedlock may qualify as a legitimated child of his or her biological parents under section 101(c)(1) of the Act for purposes of citizenship if he or she was born in a country or State that has eliminated all legal distinctions between children based on the marital status of their parents or has a residence or domicile in such a country or State (including a State within the United States), if otherwise eligible, irrespective of whether the country or State has prescribed other means of legitimation.[79] Accordingly, removal proceedings were terminated because the respondent was found to be a U.S. citizen.[80]

In defining "legitimation" under section 101(c)(1), the Board in *Matter of Cross* overruled in part *Matter of Hines* and *Matter of Rowe*, two derivative citizenship cases, and reinstated *Matter of Clahar* and *Matter of Goorahoo*, two visa petition cases in which "equality of rights" establishes legitimation.[81] In *Matter of Cross*, the Board discussed the Supreme Court's reasoning in *Clark v. Martinez*, 543 U.S. 371 (2005), and concluded that prior Board precedent had misconstrued *Clark v. Martinez* in interpreting "legitimation."[82] The Board distinguished *Clark v. Martinez* as conflicting with the Supreme Court's canon of statutory construction in *Envt'l. Def. v. Duke*

Energy Corp., 549 U.S. 561, 574 (2007), and held that the meaning of "legitimation" for purposes of the definition of a child under sections 101(b)(1) and (c)(1) was different from that used in "paternity . . . established by legitimation" in former section 321(a)(3).[83] *Matter of Cross* continues to hold that for purposes of former section 321(a)(3), legitimation can be established by an affirmative act even if a country has eliminated legal distinctions between out-of-wedlock and in-wedlock children.[84]

The Board addressed the stand-alone definition of "legitimation" under section 101(c)(1) of the Act.[85] For purposes of the statutory definition of the term "child" in section 101(c)(1), the express issue is whether the child has been "legitimated under the law of the child's residence or domicile [or that of the father]" and "is in the legal custody of the legitimating . . . parent or parents at the time of such legitimation," while under sixteen years of age.[86] The Board held that for purposes of section 320(a), a "child" in section 101(c)(1) has been "legitimated" if the child "was born in a country or State that has eliminated legal distinctions between children based on the marital status of their parents or had a residence or domicile in such a country or State."[87] The Board noted that Congress anticipated that the meaning of "legitimation" would vary depending on (1) the law in the country or State of residence or domicile and (2) the child's date of birth.[88] As a result, the Board concluded that "legitimation" is "an evolving, rather than a fixed, concept."[89] In essence, the Board indicated that *Matter of Hines* and other precedent decisions' analyses of legitimation for purposes of former section 321(a)(3) cannot be extended to section 101(c)(1) of the Act.[90] Based on the foregoing, the Board concluded that the respondent is his father's "child" within the meaning of sections 101(c)(1) and 320(a) of the Act and terminated his removal proceedings after determining that he met the other conditions required by section 320(a).[91]

THE POST-*CROSS* LANDSCAPE

Today, "legitimation" remains an important concept, as circuit courts of appeals have continued to address derivative citizenship cases following *Matter of Cross*. In *Gil v. Sessions*, 851 F.3d 184 (2d Cir. 2017), a case involving the agency's denial of a derivative citizenship claim, the Second Circuit considered whether the petitioner had been "legitimated" under the laws of either the Dominican Republic or New York. The court cited *Matter of Cross* in its decision and stated that, for derivative citizenship purposes, a person born out of wedlock is considered a "child" of a U.S. citizen parent or parents under section 101(c) of the Act only if he was "legitimated" under the law of his own residence or domicile before turning sixteen.[92] The court noted that a change in the Dominican Republic code eliminating legal distinctions between children born in and out of wedlock, which purportedly rendered the petitioner legitimate, was enacted well after his sixteenth birthday, and that New York law distinguished between children born in and out of wedlock for inheritance purposes.[93] As a result, the court held that the laws of the Dominican Republic and New York did not render the petitioner, who was born to unwed parents in the Dominican Republic, a legitimated child under the Act; he therefore could not derive citizenship based on his father's naturalization under former section 321(a).[94]

Courts have also looked to the Board's interpretation in *Matter of Cross* that, for derivative citizenship purposes under former section 321(a)(3), paternity could be established by legitimation only through an affirmative act by the father in accordance with the law of the jurisdiction. In *Miranda v. Sessions*, 853 F.3d 69 (1st Cir. 2017), which involved a derivative citizenship claim based upon the mother's naturalization, the First Circuit concluded that the petitioner's paternity was established by legitimation for purposes of former section 321(a)(3) under all the laws of Angola, Massachusetts, and Cape Verde, and thus he did not meet his burden of establishing that he was a U.S. citizen.[95] The court looked to the Board's interpretation of "legitimated" in *Matter*

of Cross specifically for purposes of former 321(a)(3), where the Board had stated that legitimation could be established by an affirmative act even if a country had eliminated legal distinctions between out-of-wedlock and in-wedlock children.[96] The First Circuit stated that even if Cape Verde and Angolan laws required a separate act of acknowledgement to establish paternity, the signature of Miranda's father on his birth record would be sufficient to establish "paternal legitimation" because under Cape Verde and Angola laws, paternity could be established through "an express declaration to such effect by the father."[97] Likewise, the court equated "the fact that Miranda's father signed [his] birth record before two witnesses" with "acknowledgment of paternity," which sufficed to establish paternity through legitimation under Massachusetts law.[98] As a result, the Board and the circuit courts would have to consult the country or state's laws to see what is sufficient for an individual to establish paternity by legitimation when it comes to adjudicating claims arising under former section 321(a)(3).[99]

THE CONSTITUTIONALITY OF DERIVATIVE CITIZENSHIP LAWS

In contrast to *Matter of Cross*, which considered the *interpretation* of "legitimation" in a derivative citizenship provision, a recent Supreme Court case grappled with the *constitutionality* of a citizenship statute.[100] In *Sessions v. Morales-Santana,* 137 S. Ct. 1678 (2017), the Supreme Court struck down a gender-based distinction between sections 309(a) and 309(c) that favored unwed mothers over unwed fathers, noting "stunningly anachronistic" distinctions.[101] Former section 301(a)(7), by way of section 309(a) of the Act, required unwed U.S. citizen fathers to have five years' physical presence in the United States prior to the child's birth, two of those years after the age of fourteen.[102] However, pursuant to an exception created by section 309(c), a child born abroad to an unwed U.S. citizen mother automatically becomes a U.S. citizen if the mother had continuously lived in the United States for just one year prior to the child's birth.[103] The petitioner's

U.S. citizen father and Dominican mother were not married at the time of his birth.[104] His father fell short of the U.S. physical-presence requirement to qualify his son for citizenship at the time of the petitioner's birth in 1958, but the father accepted parental responsibility for his son, eventually married the petitioner's mother, and placed his name on his son's birth certificate.[105] The petitioner claimed that the gender-based residency differential in sections 309(a) and (c) was unconstitutional in that it violated the Fifth Amendment's Equal Protection Clause.[106]

The Supreme Court agreed with him, abrogating *United States v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).[107] The Court noted that "sections [301 and 309] date from an era when [United States] lawbooks were rife with overbroad generalizations about the way men and women are."[108] However, rather than extending the exception's benefit of the one-year-physical-presence requirement to the petitioner's father (and, derivatively to the petitioner), the Court struck down the one-year provision for U.S. citizen mothers and left it to Congress to address the issue and come up with a "uniform prescription."[109] The Court's decision to leave it to Congress to set the same rule for everyone meant that it applied the more stringent residency requirement to the petitioner's case (while also applying its holding prospectively to children born to unwed U.S. citizen mothers) in an effort to equalize the law.[110] As a result, in an ironic outcome, despite striking down the gender-based distinction between the statutes as unconstitutional, the Court could not grant Morales-Santana the relief that he sought—to obtain U.S. citizenship through his father.

The Court's holding in *Morales-Santana* has relevance to future claims on the constitutionality of derivative citizenship laws.[111] However, although a statute such as former section 321(a) may appear to prescribe differing treatment between fathers and mothers of children born out of wedlock, it is more likely to withstand constitutional scrutiny as long as the legitimation

requirement is "minimal" and does not create "inordinate and unnecessary hurdles" for citizen fathers.[112] Even if it has a legitimacy-based classification, such a statute can pass constitutional muster because it can withstand intermediate scrutiny.[113]

Courts have dismissed challenges to such provisions based on gender discrimination and marital status, as well as legitimacy discrimination.[114] With regard to the issue of impermissible gender discrimination under former section 321(a), *Ngyuen v. INS*, 533 U.S. 53 (2001), has provided guidance.[115] In *Nguyen v. INS*, the Supreme Court determined in the context of section 309(a)(4) that "imposing a paternal-acknowledgement requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth."[116] The Court explained that "Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth" and that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood."[117] As applied to the context of former section 321(a), the Supreme Court has "extinguished" an equal protection argument against requiring such standards of legitimation, noting that "the government has an important interest in requiring the father to prove paternity before citizenship attaches to his child."[118] Additionally, while both cases applied intermediate scrutiny in reviewing equal protection challenges to their respective statutes at issue, *Morales-Santana* is distinguishable from *Nguyen* in their contexts. The former involved "age-calibrated physical-presence requirements" that "related solely to the duration of the parent's pre-birth residency in the United States and not to the parent's filial tie to the child," whereas the latter involved a paternal-acknowledgement requirement under section 309 in which "unwed U.S.-

citizen fathers, but not mothers, formally acknowledge parenthood of their foreign born children in order to transmit their U.S. citizenship to those children."[119]

Subsequent to *Nguyen v. INS*, the circuit courts have issued decisions rejecting claims based on legitimacy discrimination.[120] Heightened scrutiny applies (or, may apply in the context of a citizenship claim) when determining whether a non-immigration statutory provision violated the Equal Protection Clause based on gender discrimination, whereas only a "facially legitimate and bona fide reason" (equivalent to rational basis review) could apply in determining whether a former immigration statutory provision violated the Equal Protection Clause based on legitimacy discrimination.[121] In *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013), the alien argued that former section 321(a) of the Act is a naturalization statute, rather than an immigration statute, and thus, did not warrant rational basis review.[122] The Second Circuit noted that the Supreme Court had not resolved this question and that its sister circuits had reached different conclusions with some applying rational basis review to naturalization statutes.[123] However, after stating that it need not resolve the doctrinal question, the Second Circuit further asserted that even if section 321(a)(3) were viewed as containing such a classification as a naturalization statute, "it would satisfy intermediate scrutiny," citing *Nguyen v. INS*.[124] The United States Court of Appeals for the Eleventh Circuit likewise declined to resolve that same question because "the [legitimacy based] classification at issue [in its case] is substantially related to an important government interest."[125] Because it has been determined that the government has a rational basis for differentiating between legitimated and non-legitimated children for the purposes of conferring derivative citizenship, and because the statute would survive intermediate scrutiny even assuming gender and legitimacy classifications, section 321(a)(3) survives equal protection challenges.[126] On the other hand, if the government "arbitrarily and intentionally obstructed" an applicant's claim to derivative

citizenship, his constitutional right to due process is violated and the court may order the agency to grant citizenship to the applicant as a remedy even if he has not fulfilled the requirements under the Act.[127]

CONCLUSION

In attempting to provide a brief overview on legitimation in the context of derivative citizenship, this article has discussed the seemingly elusive interpretation of "legitimation" and the constitutionality of citizenship and legitimacy laws. Recent precedent, including that which addresses certificates of citizenship and naturalization, has made derivative citizenship an increasingly intriguing topic.[128] As U.S. citizenship is a complicated area of immigration law, it is imperative for attorneys and adjudicators to be mindful of whether an alien has a claim to citizenship.[129] With regard to legitimation issues, the laws of the relevant jurisdiction and domicile, the alien's date of birth, and the law at the time the conditions of derivative citizenship are satisfied are most important to keep in mind. As previously discussed, even a successful act of legitimation may work against an alien's quest for citizenship. Yet, while having been legitimated under the laws of the relevant jurisdiction will not necessarily result in an alien's ascent to an Iron Throne[130] or an overflowing inheritance of riches, it may result in the rights, rewards, and responsibilities of U.S. citizenship.

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[1] Trey Williams, *HBO is Preparing for a World Without "Game of Thrones"—Its Most Popular Show*, MARKETWATCH (Aug. 31, 2017, 2:12 p.m.), https://www.marketwatch.com/story/hbo-must-prepare-for-a-world-

without-game-of-thrones-its-most-popular-show-2017-08-29; Alison Flood, *George R.R. Martin: a New Game of Thrones Book is Coming . . .*, THE GUARDIAN, (Apr. 26, 2018, 5:55 PM), https://www.theguardian.com/books/2018/apr/25/george-rr-martin-winds-winter-not-coming-2018-sixth-volume-game-thrones-targaryen.

[2] Megan McCluskey, *Who is Jon Snow's Father? See His Game of Thrones Family Tree*, TIME (Aug. 16, 2017), time.com/4900151/who-is-jon-snows-father/.

[3] *See* GEORGE R. R. MARTIN, A STORM OF SWORDS 997 (2000).

[4] *Id.* at 629.

[5] *See, e.g.*, Charles Dickens, BLEAK HOUSE 407-10 (Alfred A. Knopf 1991) (1853).

[6] *See* section 320(a) of the Immigration and Nationality Act, 8 U.S.C. § 1431(a); *see also* former sections 309(a) and 321(a) of the Act.

[7] Under section 101(c)(1), a "child" is an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 320 and 321 of title III, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of sixteen years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(i)), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

[8] Under subclauses (A) through (E) of section 101(b)(1), a "child" is an unmarried person under twenty-one years of age who is a child born in wedlock (formerly called "legitimate child"); a step-child, whether legitimate or not, as long as the child was under eighteen when the step-relationship was created; a child legally legitimated before eighteen if in the custody of the father at the time of legitimation; a child born out-of-wedlock (formerly called "illegitimate child") where the relationship is either with the mother or with the father if, in the case of the father, a bona fide parent-child relationship exists; or children adopted before sixteen, and having two years legal custody and residence with adopting parents. However, if the family has already adopted a sibling, the second brother or sister who is adopted may be under eighteen at the time of adoption. In contrast to section 101(c)(1), section 101(b)(1) does not require legitimation for parents to petition for their out-of-wedlock children; rather, a father can merely establish a bona fide parent-child relationship.

[9] *Cf. Matter of Pineda*, 20 I&N Dec. 70 (BIA 1989) (holding that a visa petition filed by a father on behalf of his illegitimate child who was born out of wedlock was properly denied when the father failed to establish the existence of a bona fide parent-child relationship and thereby failed to establish that the beneficiary was his "child" within the meaning of section 101(b)(1)(D)).

[10] Under former section 321(a)(5), in order to automatically derive citizenship from a parent (or parents), if the child was not residing in the United States pursuant to a lawful admission for permanent residence at the time of the parent's (or parents') naturalization, the child was required to begin "to reside permanently in the United States while under the age of eighteen years." The Board and the circuit courts have opined on whether former section 321(a)(5) of the Act required a child to obtain lawful permanent resident status before reaching the age of eighteen in order to claim derivative citizenship status. *Compare Matter of Nwozuzu*, 24 I&N Dec. 609, 616 (BIA 2008), *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062 (9th Cir. 2008), and *United States v. Forey-Quintero*, 626 F.3d 1323, 1326-27 (11th Cir. 2010) *with Nwozuzu v. Holder*, 726 F.3d 323, 326-27 (2d Cir. 2013); *see also Gonzalez v. Holder*, 771 F.3d 238, 243 (5th Cir. 2014) (declining to "decide whether the Second Circuit or the BIA provided the correct interpretation of § 1432(a)(5) because [the alien did] not qualify for derivative citizenship under either interpretation"). Under former section 321(a)(3), a child born outside the United States of alien parents automatically becomes a U.S. citizen upon naturalization of the parent having legal custody of the child when there has been a legal separation of the parents, provided that both custodial parent's naturalization and child's admission to the lawful permanent residence occurred prior to the child's eighteenth birthday. *See Matter of Baires*, 24 I&N Dec. 467 (BIA 2008). The circuit courts have opined on whether a petitioner has met the requirement under former section 321(a)(3) that his father had legal custody of him following a "legal separation" from his mother. *See, e.g.*, *Thompson v. Lynch*, 808 F.3d 939 (1st Cir. 2015). The Fifth Circuit has stated that the term "legal separation" is uniformly understood to mean judicial separation, though it noted that not every state provides for legal separation. *See Nehme v. INS*, 252 F.3d 415, 426 (5th Cir. 2001); *see also Wedderburn v. INS*, 215 F.3d 795 (7th Cir. 2000); *Matter of H-*, 3 I&N Dec. 742 (BIA 1949).

[11] *Miller v. Albright*, 523 U.S. 420, 423 (1998) (internal quotation marks omitted).

[12] Section 101(a)(23) of the Act, 8 U.S.C. § 1101(a)(23).

[13] *See* 7 Charles Gordon et al., *Immigration Law and Procedure*, § 98.03[1] (Matthew Bender, Rev. Ed. 2016).

[14] *See id.*; *see also* section 301 of the Act.

[15] *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 163 (BIA 2001) (citing *Matter of L-*, 7 I&N Dec. 512, 513 (BIA 1957)); *cf. Anderson v. Holder*, 673 F.3d 1089, 1097 (9th Cir. 2012) (noting that the "applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth") (citation omitted).
[16] *Matter of Baires*, 24 I&N Dec. at 468 (citing *Matter of Tijerina-Villareal*, 13 I&N Dec. 327, 330 (BIA 1969)); *see also Leal Santos v. Mukasey*, 516 F.3d 1, 4 (1st Cir. 2008).
[17] *INS v. Hector*, 479 U.S. 85, 90 n.6 (1986).
[18] *Id.*; *see also Matter of Soares*, 12 I&N Dec. 653, 655 n.1 (BIA 1967) (noting that section 101(b)(1)(D), which references an "illegitimate child," was added to the Act in 1957).
[19] *See* Pub. L. No. 104-51, § 1(1)(b), 108 Stat. 467 (Nov. 15, 1995); *see also* 3 Charles Gordon et al., *Immigration Law and Procedure*, § 36.04[5] (Matthew Bender, Rev. Ed. 2016).
[20] *Matter of Cross*, 26 I&N Dec. at 492 & n.7.
[21] *Id.* at 492 n.7.
[22] *Matter of Cabrera*, 21 I&N Dec. 589 (BIA 1996); *Matter of Moraga*, 23 I&N Dec. 195, 197 (BIA 2001). In the past, the Board interpreted the term "legitimate," as used in section 101(b)(1) of the Act, to apply only to a child "born in wedlock." *See Matter of Kubicka*, 14 I&N Dec. 303, 304 (BIA 1972); *Matter of Clahar*, 16 I&N Dec. 484, 486 (BIA 1978). In *Kubicka*, a visa petition case, the Board also distinguished a "legitimate" child from a "legitimated" one. *Kubicka*, 14 I&N Dec. at 304 ("We, therefore, state, and should more correctly have stated in *Matter of K-*, above, that a child born out of wedlock recognized by the father as his own, in accordance with the law of Poland, becomes the father's 'legitimated' child, rather than his 'legitimate' child.").
[23] *Matter of Cabrera*, 21 I&N Dec. at 591.
[24] *See* Gordon, *supra* note 14, at § 98.03[2] n.27.
[25] The Board has noted that "[a]lthough there is little legislative history regarding former section 321(a)(3), it has generally been understood that the language requiring a putative United States citizen to prove that his or her paternity has not been established by legitimation was devised by Congress as a means of safeguarding the parental rights of alien fathers." *Matter of Cross*, 26 I&N Dec. at 485 n.5. Thus, under this provision, children born out-of-wedlock are able to derive citizenship from their mothers only if "paternity . . . has not been established by legitimation." Conversely, children born out-of-wedlock claiming citizenship through the naturalization of their fathers must establish that they were "legitimated" in some way.
[26] *See* Laura Murray-Tjan, *The Tragicomedy of Legitimation Jurisprudence After* Watson v. Holder, 14-12 IMMIGRATION BRIEFINGS 1, 2 (Dec. 2014).
[27] *See, e.g.*, *Matter of Rodriguez-Tejedor*, 23 I&N Dec. at 162; *Smart v. Ashcroft*, 401 F.3d 119, 122 (2d Cir. 2005).
[28] *See Matter of Cross*, 26 I&N Dec. at 488 n.4.
[29] *See id.* at 492 n.8.
[30] *Id.* at 489.
[31] *Id.*
[32] *Id.* at 3.
[33] *Id.*
[34] *Id.* at 783.
[35] *Id.* at 784.
[36] *Matter of Rowe*, 23 I&N Dec. 962, 967 (BIA 2006).
[37] *Id.* at 967.
[38] *Id.* (citing *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases")).
[39] *Matter of Hines*, 24 I&N Dec. at 547-48.
[40] *Id.*
[41] *See id.*; *cf. Wedderburn v. INS*, 215 F.3d at 797-98 (stating in a derivative citizenship case under former section 321(a) that a Jamaican petitioner had been legitimated in a case in which his parents had never married but the petitioner's father had added his name to the petitioner's birth certificate).
[42] *Matter of Hines*, 24 I&N Dec. at 548.
[43] *Id.* at 368.
[44] *Id.* at 369.
[45] *Id.* at 370.
[46] *Id.* at 370 n.1.
[47] *Id.* at 370.
[48] *See id.* at 369; *see also Matter of Rowe*, 23 I&N Dec. at 967.

[49] *Id.* at 428.
[50] *Id.*
[51] *Id.* at 429-30.
[52] *Id.* at 430.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Brandao*, 654 F.3d at 429-30 (citing *Matter of Cardoso*, 19 I&N Dec. 5 (BIA 1983)).
[57] Former section 309(a) of the Act contains language similar to former section 321(a). Under former section 309(a), a father could transmit U.S. citizenship to "a child born out of wedlock" only "if the paternity of such child is established while such child is under the age of 21 years by legitimation." *See Anderson*, 673 F.3d at 1097; *Gonzalez-Segura v. Sessions*, 882 F.3d 127, 132 (5th Cir. 2018).
[58] *Id.* at 1092.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 1098.
[62] *Id.* at 1099, 1104.
[63] *See id.* at n.9.
[64] *Anderson*, 673 F.3d at 1100.
[65] *Id.* at 421-23.
[66] *Id.* at 426.
[67] *Id.*
[68] *Id.* at 424, 426-27.
[69] *Id.* at 424-26.
[70] *See* Murray-Tjan, supra note 27, at 10; *compare* former section 309(a) *with* former section 321(a) of the Act; *see Brandao*, 654 F.3d at 429; *Anderson*, 673 F.3d at 1097.
[71] The Board's decision in *Matter of Cross* does not mention the Second Circuit's opinion in *Watson v. Holder*.
[72] *Matter of Cross*, 26 I&N Dec. at 486.
[73] *Id.* at 486 (citation omitted).
[74] *Id.*
[75] *Id.*
[76] *Id.* at 486-87.
[77] *Id.* at 487.
[78] *Id.* at 487-88.
[79] *Id.* at 485-86. The Board appears to have echoed its reasoning in its prior decisions. *See, e.g.*, *Matter of Wong*, 16 I&N Dec. 646 (1978) ("A country or state's law makes all children legitimate and it is unnecessary to consider whether there is a procedure in that country/state for legitimating a child."); *Matter of Cross*, 26 I&N Dec. at 497 n.7.
[80] *Id.* at 493.
[81] *See Matter of Cross*, 26 I&N Dec. at 486, 488.
[82] *Id.* at 490-91. Specifically, the Board had understood *Clark v. Martinez* to require it to interpret the concepts of "legitimation" in section 101(c) and former section 321(a)(3) as the same. *Id.* at 491.
[83] *Id.*
[84] *Id.* at 490.
[85] *Id.* at 492.
[86] *See* U.S. Citizenship and Naturalization Handbook, § 4:9, "Legal Principles Governing Legitimation" (Oct. 2017).
[87] *Id.* at 492.
[88] *See, e.g.*, *Matter of Campuzano*, 18 I&N Dec. 390 (BIA 1983) (distinguishing *Matter of Gomez*, 16 I&N Dec. 72 (BIA 1976), and noting acknowledgment by natural parents prior to respondent's eighteenth birthday under the Civil Code of Ecuador, as reinstated on August 7, 1970, by Supreme Decree 180, which makes no distinction between legitimate and illegitimate children). Other countries have eliminated legal distinctions between children born in wedlock and born out of wedlock, but they also provide other means of legitimation. *See, e.g*, *Matter of Clarke*, 18 I&N Dec. 369 (1983) (noting that a child who comes within the scope of the Barbados Status of Children Reform Act of August 13, 1979, which eliminated distinctions and is retroactive in effect, is included in the definition of legitimate or legitimated "child" under section 101(b)(1) if paternity is established and legitimation took place before the age of twenty-one); *Matter of Sanchez*, 16 I&N Dec. 671 (BIA 1979) (noting that Honduras eliminated legal distinctions between children born in and out of wedlock but retained a method for legitimation through the marriage of the natural

parents and acknowledgement); *Matter of Cardoso*, 19 I&N Dec. 5 (BIA 1983) (noting that Cape Verde legally abolished the distinction between legitimate and illegitimate children in 1976 but also provided that paternity could be "established through an express declaration to such effect by the father"); *Matter of Martinez-Gonzalez*, 21 I&N Dec. 1035, 1038 (BIA 1997) (holding, with respect to the analogous provision at section 101(b)(1)(C), that "[t]he legitimizing act in the case of Dominican law could be either the change in the law itself or the acknowledgement of paternity").

On the other hand, certain countries have not eliminated *all* legal distinctions between such children, but still require other means of legitimation. For instance, if a child is born prior to January 27, 1959, the marriage of the natural parents is required to legitimize the child in Haiti; in contrast, after January 27, 1959, an acknowledgement by the natural father suffices for legitimation if the child is not born of an incestuous or adulterous relationship. *See Matter of Mesias*, 18 I&N Dec. 298 (BIA 1982) (noting that the Haitian Presidential Decree of January 27, 1959, equalized the rights and duties of legitimate children and children born out of wedlock provided that an acknowledgement of the child has been voluntarily executed or declared by virtue of a court judgment).

Several U.S. states have eliminated legal distinctions. For example, New Jersey formerly provided that legitimation of a child born out of wedlock requires marriage of the child's natural parents. *See Matter of Clarke*, 18 I&N Dec. 369 (BIA 1983). Arizona, California, Massachusetts, Oregon, and Pennsylvania have also eliminated such legal distinctions. *See Matter of Cross*, 26 I&N Dec. at 492 & n.7. In contrast, New York law states that the biological parents of a child must marry in order to legitimate the child. *See Matter of Hernandez*, 19 I&N Dec. 14 (BIA 1983); *Matter of Patrick*, 19 I&N Dec. 726 (BIA 1988).

[89] *Id.* at 492 n.8**.**

[90] *See Matter of Cross*, 26 I&N Dec. at 491.

[91] *See id.* at 493. Not addressed in this article is the separate requirement of legal custody in section 320 also mentioned in *Matter of Cross*, which determined that "the record contains no evidence to suggest that the respondent was not in his father's legal custody at the time of his birth." *Matter of Cross*, 26 I&N Dec. at 493; *see* 8 C.F.R. § 322.1 (2017) (establishing a rebuttable presumption that a U.S. citizen parent has legal custody of his or her child absent contrary evidence); *see also Matter of Rivers*, 17 I&N Dec. 419 (BIA 1980); *Pina v. Mukasey*, 542 F.3d 5 (1st Cir. 2008) (holding that the respondent had derivative citizenship under the CCA, precluding his removal, where the issue was whether petitioner's father had "legal and physical custody" when the CCA became effective); 8 C.F.R. § 320.1(2) (allowing a finding of legal custody when the U.S. citizen parent has been "awarded 'joint custody'" or when "other factual circumstances" support such a finding). Neither is the question of retroactivity in *Matter of Cross* addressed in this article, as the Board noted but did not decide in its decision whether it could retroactively apply a reinterpretation of a statute (or foreign law) to deny citizenship. *See Matter of Cross*, 26 I&N Dec. at 488.

[92] *Gil*, 851 F.3d at 187.

[93] *Id.* at 189.

[94] *Id.*

[95] *Id.* at 74-75.

[96] *Id.* at 74 (citing *Matter of Cross*, 26 I&N Dec. at 490). Whereas *Matter of Cross* involved a discussion of current section 320(a) and whether the respondent was a legitimated "child" of his biological parents under section 101(c)(1) of the Act, *Miranda* addressed legitimation for purposes of former section 321(a)(3). *See also United States v. Lewis*, No. 16-CR-00471 (CBA), 2017 WL 2937606, (E.D. N.Y. July 6, 2017) (distinguishing its case from *Matter of Cross* in that *Cross* interpreted "legitimation" and "paternity . . . established by legitimation" under former section 321(a) of the Act, whereas *Lewis* involved "paternity established by legitimation" pursuant to section 309(a) of the Act).

[97] *Miranda*, 853 F.3d at 74-75.

[98] *Id.* at 75. As it was a case involving an alien from Cape Verde, the *Miranda* court also cited the Third Circuit's decision in *Brandao*. In *Miranda*, there was evidence that the petitioner's father, though having eventually married the biological mother, was not involved in his son's life, much like the father in *Brandao*. *See Miranda*, 853 F.3d at 72; *Brandao*, 654 F.3d at 428. Although his mother was the sole economic provider in his life, Miranda could not derive citizenship through his mother's naturalization due to his father's formal act of legitimation. As a result, legitimation for purposes of former section 321(a)(3) does not seem to take into account which parent exercised sole responsibility of the child.

[99] For instance, while "paternity" in Haiti is established by a declaration of acknowledgement before a competent official of the civil status, "legitimation" of a child born out of wedlock in Haiti requires either the subsequent marriage of the parents, or a judgment to legitimate the child." *See* Civil Code D'Haiti, Art. 302; *see also Matter of Mesias*, 18 I&N Dec. 298 (BIA 1982).

[100] *See generally Anderson*, 673 F.3d at 1100-01.

[101] *Id.* at 1693.

[102] *Id.* at 1686.
[103] *Id.*
[104] *Id.* at 1688.
[105] *Id.* at 1687-88.
[106] *See id.* at 1686, 1688.
[107] *Morales-Santana*, 137 S. Ct. at 1688, 1701.
[108] *Id.* at 1683.
[109] *Id.* at 1698-1701.
[110] *See id.* at 1701.
[111] The effect of *Sessions v. Morales-Santana* has been subsequently addressed in the circuit courts of appeals. *See Villegas-Sarabia v. Sessions*, 874 F.3d 871 (5th Cir. 2017); *see also Dent v. Sessions*, 900 F.3d 1075, 1081 (9th Cir. 2018); *Levy v. U.S. Att'y Gen*., 882 F.3d 1364 (11th Cir. 2018) (per curiam) (denying petitioner's claims that former section 321(a) unconstitutionally discriminates based on gender and legitimacy and dismissing as moot petitioner's motion to file supplemental brief on potential remedies following *Sessions v. Morales-Santana*).
[112] *See Nguyen v. INS*, 533 U.S. 53, 70-71 (2001) (upholding section 309(a)(4)); *cf. Morales-Santana*, 137 S. Ct. at 1694.
[113] *See Morales-Santana*, 137 S. Ct. at 1693-94; *Levy*, 882 F.3d at 1368-69. While "[l]egitimacy based statutory classifications usually receive intermediate scrutiny," "a facially legitimate and bona fide reason" is required for reviewing equal protection challenges to immigration statutes. *Levy*, 882 F.3d at 1368 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). Additionally, while *Morales-Santana* clarified that "heightened scrutiny is not *foreclosed* simply because a claim is in the immigration context, that "does not *automatically* result in heightened scrutiny." *Dent*, 900 F.3d at 1081.
[114] *See Wedderburn*, 215 F.3d at 802 (explaining that a legitimated child has no sex discrimination claim under section 321(a)(3)).
[115] *See Pierre v. Holder*, 738 F.3d 39, 57 (2d Cir. 2013).
[116] *Morales-Santana*, 137 S. Ct. at 1694 (citing *Nguyen*, 533 U.S. at 62-63). The *Nguyen* Court also rejected the idea of determining derivative citizenship solely by a DNA test. *See Nguyen*, 533 U.S. at 66-67 (noting that "the importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test" and that "scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority").
[117] *Nguyen*, 533 U.S. at 62-63.
[118] *See Barthelemy v. Ashcroft*, 329 F.3d 1062, 1068 (9th Cir. 2003) (citing *Nguyen v. INS*).
[119] *Morales-Santana*, 137 S. Ct. at 1694.
[120] *See Levy*, 882 F.3d at 1364 (rejecting petitioner's arguments that former section 321(a) unconstitutionally discriminates based on legitimacy and gender); *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013) (citing *Nguyen v. INS* and holding that former section 321(a)(3) did not discriminate based on legitimacy or gender of the naturalizing parent); *Ayton v. Holder*, 686 F.3d 331 (5th Cir. 2012) (rejecting equal protection challenges based upon gender and legitimacy in ruling that the petitioner was not entitled to derivative citizenship from his father's naturalization); *Barthelemy*, 329 F.3d at 1068 (stating that "[petitioner's] real objection to section 321(a) is not that it explicitly discriminates on the basis of sex" but "[r]ather . . . to the varying definition of legitimation and, in particular, how that definition varies because of the sex of the "legitimating" parent.").
[121] *Dent*, 900 F.3d at 1081; *Ayton*, 686 F.3d at 338-39; *see also Levy*, 882 F.3d at 1368 (citing *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)); *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008).
[122] *Pierre*, 738 F.3d at 50.
[123] *Id.*
[124] *Id.* at 52.
[125] *Levy*, 882 F.3d at 1368.
[126] *See Levy*, 882 F.3d at 1368-69; *Pierre*, 738 F.3d at 51-52, 57-58; *Ayton*, 686 F.3d at 339.
[127] *See Brown v. Holder*, 763 F.3d 1141, 1148-52 (9th Cir. 2014).
[128] *See Matter of Falodun*, 27 I&N Dec. 52 (BIA 2017).
[129] *See Watson v. United States*, 865 F.3d 123 (2d Cir. 2017).
[130] Kaitlin Thomas, Game of Thrones*: Everyone Who has a Claim to the Iron Throne*, TV GUIDE (Jul. 11, 2017, 8:45 AM), https://www.tvguide.com/news/game-of-thrones-iron-throne-claims/.