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Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the “WHP”) or Johnny and the WHP

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Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the “WHP”)

or

Johnny and the WHP

Blanche Bong Cook[†]

ABSTRACT: Title 8, United States Code, Section 1409—one of this country’s citizenship transmission laws—creates a white heteropatriarchal property right in philandering, sexual exploitation, and rape (the “WHP”). Section 1409 governs the transmission of citizenship from United States citizens to their children, where the child is born abroad, outside of marriage, and one parent is a citizen and the other is not. Section 1409, however, draws a distinct gender distinction between women and men: An unwed female American citizen who births a child outside the United States, fathered by a foreign man, automatically transmits citizenship to her child. An unwed male American citizen, by contrast, who fathers a child abroad with a foreign woman has the distinctly male prerogative to either grant or deny citizenship to his foreign-born nonmarital child at his leisure.

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On the surface, it might appear that § 1409 treats men and women differently because it is easy to determine a child's mother, as opposed to a child's father, at birth. In fact, a majority of the Supreme Court has deployed these "natural" differences between men and women to shield § 1409 from three separate gender-based equal protection challenges. Justice Ginsburg, however, has keenly observed, "[H]istory reveals what lurks behind § 1409." What lurks behind § 1409 is a long legacy of white heteropatriarchy deploying the legal category of citizenship to perfect sovereignty¹ in itself and vulnerability in "foreign" women for the very purpose of sexual domination.

The historical model for this racialized regime of sexual domination is the classic case of *Dred Scott*,² where the denial of citizenship to anyone of African descent further facilitated a white heteropatriarchal property right in philandering, sexual exploitation, and rape. In *Dred Scott*, the exclusion of anyone of African descent from personhood, through the legal mechanism of citizenship, perfected power in white men and vulnerability in racialized others. By excluding anyone of African descent from citizenship, enslaved owners continued to enjoy an unbridled property right in the use and enjoyment of the enslaved. The denial of citizenship to the enslaved facilitated their use as property. Following suit, § 1409 makes citizenship the property of men, through which they can exclude their nonmarital foreign-born children from membership in the American polity. Section 1409 vests in these fathers not just a right to exclude their children, but to discard them, leaving them profoundly vulnerable to the sting of "illegitimacy," ethnic and racial animus, and financial precarity—a form of destruction, while simultaneously empowering these fathers to sexually possess, control, use, and enjoy foreign women. Section 1409 understands all too well: in order to sexually exploit the mother, one must control the status of the child.

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1. To "perfect sovereignty" means to make perfect or to make power perfect in itself.

2. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

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INTRODUCTION

American³ militarism and sexual tourism have much in common: Each has left an indelible footprint on the bodies of foreign women and the world.⁴ As Kristin Collins⁵ has argued, this footprint is an inestimable number of children that American men have fathered and abandoned around the world.⁶ On the streets of Olongapo, Philippines alone, the home of a former American naval base, countless abandoned Amerasian children are reduced to prostitution and crime.⁷ Far from innocence, accident, or some act of nature, these children are the products of centuries of American imperialism, lawmakers, judges, administrators, military men, and sexual tourists, who, taken together, reflect a societal policy that creates supremacy by making property of others.

3. I use the terms “American” and “America” deliberately, not to insult the other countries with whom America shares a hemisphere, but to shed light on the irony of “America” as a bastion of freedom and equality contrasted with the underlying thesis of historical denigration in this Article.

4. Sex trafficking is a global problem. As of September 2017, 24.9 million people were trafficked each year; of these, over seventy percent were women and girls. *Fact Sheet: Human Trafficking by the Numbers*, HUM. RTS. FIRST (2017), [http://www.humanrightsfirst.org/sites/default/files/Trafficking by the Numbers.pdf](http://www.humanrightsfirst.org/sites/default/files/Trafficking%20by%20the%20Numbers.pdf) [<https://perma.cc/ERX7-JLSJ>]. Estimates vary, but trafficking for the purpose of sexual exploitation could drive as much as seventy-nine percent of all human trafficking. Policy Analysis & Research Branch, *Global Report on Trafficking in Persons*, U.N. OFF. ON DRUGS & CRIME (Feb. 2009), http://www.unodc.org/documents/Global_Report_on_TIP.pdf [<https://perma.cc/7BND-DHXL>]. The trafficking of women and children is frequently reported as the world’s fastest-growing crime. See, e.g., Morgan Brinlee, *13 Sex Trafficking Statistics That Put The Worldwide Problem Into Perspective*, BUSTLE (July 30, 2018), <https://www.bustle.com/p/13-sex-trafficking-statistics-that-put-the-worldwide-problem-into-perspective-9930150> [<https://perma.cc/8ADW-KJ3P>]. But see *Fact Sheet, supra* (estimating that sex trafficking comprises nineteen percent of all human trafficking).

5. This Article relies heavily on Kristin Collins’s trailblazing, comprehensive, and brilliant work on citizenship transmission laws. This piece, however, is the first treatment of § 1409 that applies a Critical Race Feminist lens and property rubric to § 1409. In doing so, this piece highlights the white heteropatriarchal operations of § 1409, which, as I argue throughout this article, creates a white heteropatriarchal property right in philandering, sexual, exploitation, and rape. This Article centralizes the role of power, as it is raced, classed, and gendered in order to expose the ways in which the sexual exploitation of foreign women becomes the routinized practice of a highly industrial nation, namely the United States, through § 1409.

6. It is impossible to know how many children American men have abandoned abroad. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2212 (2014). In an act of willful blindness, no government bureaucracy maintains records of the nonmarital foreign-born children discarded by their American fathers. Just the numbers of nonmarital foreign-born children in Asia from American servicemen alone varies based on the source. See *Amerasian Immigration Proposals: Hearing on S. 1698 Before the Subcommittee on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 63 (1982) (statement of Alfred Keane, Dir., Americans for International Aid) (estimating between 30,000 and 80,000 Amerasians in Southeast Asia); JOHN SHADE, AMERICA’S FORGOTTEN CHILDREN: THE AMERASIANS 15 (1981) (estimating the number of Amerasians born in Vietnam at between 20,000 and 100,000); Collins, *Illegitimate Borders, supra*, at 2212 n.308 (“Estimates vary significantly, from 20,000 to more than 200,000.”). John Shade suggests that by 1952 over 200,000 children had been born in Japan to American servicemen. SHADE, *supra*, at 24. If that is true, the number of children born to servicemen in Asia in the second half of the twentieth century could be closer to 300,000.

7. Joseph M. Ahern, *Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Amerasians*, 1 PAC. RIM L. & POL’Y J. 105, 108 (1992).

Collectively, these actors have decided that mass destruction is worth the price of a frolic.

Vulnerability is the lynchpin of exploitation.⁸ Historically, white heteropatriarchy—that is, power as it is raced, classed, sexed, and gendered⁹—has deployed the legal mechanism of citizenship to perfect sovereignty in itself and vulnerability in others for the specific purpose of sexual exploitation. Title 8, United States Code, § 1409 is a variation of this scheme. It is a biopower (or a legal mechanism) that subjugates the bodies of women for both sexual pleasure and racial purity, all the while exerting control over populations.¹⁰

Section 1409 regulates the transmission of citizenship from American citizens to their nonmarital, foreign-born children.¹¹ Section 1409, however, draws an explicit gender distinction based on the sex of the parents: An unwed citizen mother, who has a child abroad with a foreign man, transmits citizenship automatically to her child. By contrast, an unwed citizen father who fathers a child abroad with a foreign woman has the prerogative to transfer citizenship to his child and, if he so desires, to complete a process to do so, which includes agreeing in writing to provide financial support to his child until the child is eighteen years old.¹²

Many have argued that § 1409 treats citizen fathers and mothers differently because it is relatively simple to determine a child’s mother, as opposed to the father at birth. The Supreme Court has, in fact, used this “natural,” “biological,” and “physiological” distinction between men and women to immunize § 1409 from three distinct gender-based equal protection challenges.¹³ Despite

8. See generally Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147 (2019) (arguing that the creating and sustaining of vulnerability are necessary ingredients for sexual exploitation, at the individual level of traffickers as well as the routinized operations of highly industrial nations, like the United States).

9. “White heteropatriarchy” refers to a racialized system of power and control based on white supremacy, compulsory heterosexuality, patriarchy, and an imposed gender-binary system. Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 573 (2017).

10. Biopower is literally having power over other bodies, “an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations.” I MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 139-40 (Robert Hurley trans., Vintage Books ed. 1990) (1979) (“The old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life . . . in the field of political practices and economic observation, of the problems of birthrate, longevity, public health, housing, and migration.”).

11. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 235-36, 238-39, §§ 301, 309, 8 U.S.C. §§ 1401-1409.

12. *Id.* § 1409(a), 1409(c) (2018).

13. See *Flores-Villar v. United States*, 564 U.S. 210, 131 S. Ct. 2312 (2011) (evenly split per curiam) (affirming lower court rejection of gender equal protection challenge to the physical presence requirement in § 1409); *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (stating “[g]iven the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity”); *Miller v. Albright*, 523 U.S. 420, 436 (1998) (Stevens, J.) (plurality opinion) (upholding legitimation against gender based equal protection challenge for several reasons, including it ensured reliable proof of paternity, stating, “There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective”).

technologically advanced paternity testing, like DNA testing, § 1409 continues to thrive on antiquated justifications about the “natural” and “biological” differences between men and women—presumptions that scholars have universally denounced as “sexist, narrow-minded, and patently conservative.”¹⁴

So why does § 1409—with its explicit gender disparity between unwed citizen fathers and mothers when sexually active abroad in foreign places—continue to endure?¹⁵ As Justice Ginsburg shrewdly noted, “[H]istory reveals what lurks behind § 1409.”¹⁶ What lurks behind § 1409 is a long legacy of white heteropatriarchy deploying the legal mechanism of citizenship to perfect sovereignty in itself and vulnerability in racialized and “foreign” others for the purpose of sexual exploitation. The gender asymmetry in the transfer of citizenship between men and women in § 1409 reflects norms that privilege and protect male sexual prerogative outside of marriage while structurally supporting the creation and maintenance of vulnerability for purposes of sexual exploitation in foreign women.¹⁷ More concretely, § 1409 creates a white heteropatriarchal property right in philandering, sexual exploitation, and rape (the WHP).

Under § 1409, Congress, with the Supreme Court’s blessing, conferred a property right to citizen men in the form of citizenship. Under this particular form of citizenship, citizen men have a property right to either grant or deny citizenship to their nonmarital foreign-born children. The prerogative to grant or deny citizenship functions like property. Section 1409 confers to citizen men a package of entitlements, a bundle of rights, that includes the right to exclude, transfer, destroy, possess, control, use, and enjoy.¹⁸ Under § 1409, citizen men have a right to exclude their nonmarital foreign-born children from the American polity. By bestowing citizen fathers with the right to exclude their children from citizenship, § 1409 entitles these fathers to abandon their children, leaving them profoundly vulnerable to the sting of “illegitimacy,”¹⁹ ethnic and racial hatred,²⁰

14. Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J. L. & GENDER 405, 407 (2013) (quoting Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 245-50 (2003)).

15. Other scholars have attempted to answer this question. See Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians’ Amicus Brief in Flores-Villar v. United States*, 91 B.U. L. REV. 1485, 1487 (2011); Collins, *Illegitimate Borders*, *supra* note 6, at 2137-38 (“At formative moments in the development of American nationality law, gender- and marriage-based domestic relations laws were enlisted by administrators, judges, and legislators to deny the citizenship claims of nonwhite children, especially those who were excludable under the race-based immigration and naturalization laws.”).

16. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

17. See Collins, *A Short History*, *supra* note 15, at 1495 (“By restricting derivative citizenship as between Citizen fathers and their nonmarital foreign-born children, federal citizenship law perpetuates a system of sexual ethics that privileges men’s sexual prerogative outside marriage.”).

18. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1731 (1993) [hereinafter Harris, *WAP*] (describing the ways in which whiteness functions as property, in that whiteness conforms to the general contours of property, including the rights of possession, use, disposition, transfer or alienability, use and enjoyment, and most important, the absolute right to exclude).

19. Collins, *Illegitimate Borders*, *supra* note 6, at 2167.

20. In criticizing the *Dred Scott v. Sanford* decision, upholding the constitutionality of antebellum slavery, in 1857, then presidential candidate Abraham Lincoln stated, “There is a natural disgust in the

and financial precarity²¹—a form of destruction and statelessness.²² Section 1409 simultaneously invests in these fathers a biopower to continue the sexual possession, control, use, and enjoyment of foreign women. (For more on this, see Figure 1, p. 101.) Unprotected philandering, sexual exploitation, and rape, liberated from parental responsibility,²³ are property interests that flow from Congress's grant of power to citizen men under § 1409. Section 1409 is where American citizenship for men becomes indistinguishable from the right to engage in hypermasculinity.²⁴ Although this may initially seem hyperbolic, once

minds of nearly all white people, to the idea of an indiscriminate amalgamation of the white and black races." ABRAHAM LINCOLN, *From Speech on the Dred Scott Decision at Springfield, Illinois, in SELECTED SPEECHES AND WRITINGS* 117, 119 (First Library of Am. Paperback Classic Edition 2009) (speech given June 26, 1857). In the same speech, Lincoln again references "the amalgamation of the races" as an "odium." LINCOLN, *supra*.

21. Collins, *Illegitimate Borders*, *supra* note 6, at 2167.

22. In 2014, upon recognizing that discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. See U.N. HIGH COMM'R FOR REFUGEES, A SPECIAL REPORT: ENDING STATELESSNESS WITHIN 10 YEARS (Nov. 2010), <https://www.unhcr.org/en-us/546217229.pdf> [<https://perma.cc/9CQR-H76S>]; U.N. HIGH COMM'R FOR REFUGEES, THE CAMPAIGN TO END STATELESSNESS: APRIL 2016 UPDATE 1 (referring to speech of UNHCR "highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally"), <https://www.refworld.org/docid/571e23fb7.html> [<https://perma.cc/NU4H-6DU7>]; see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1697 (2017).

23. The determination of citizenship for foreign-born nonmarital children and parentage are two separate legal matters. Both citizenship and parentage of foreign-born children can be determined independently. Although citizenship and parentage are two separate legal matters, the absence of citizenship is a deliberate obstacle and interference with the establishment of a parental relationship as a practical matter. The absence of citizenship for the nonmarital foreign-born offspring makes it more difficult pragmatically to take advantage of parental duties and support. Moreover, the absence of citizenship inhibits the ability to establish a parental relationship.

24. See *infra* Figure 1, p. 101. Throughout this article, I use "hypermasculine sexual performance," "hypermasculine performance," or "hypermasculinity" as a shorthand for "unprotected philandering, sexual exploitation, and rape," within the context of my analysis of § 1409. In addition, I use "hypermasculinity" as primarily a performance of control over others. Drawing from Angela Harris, hypermasculinity is the exaggerated performance of masculinity, enacted out of an anxiety about the status of one's manhood, and deployed in order to bring others under one's domination and control through sexual performance, humiliation, and sexualized physical violence. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000). As Harris states, "men achieve masculinity at the expense of women." Harris, *supra*, at 785. Hypermasculinity makes of bodies and persons "sites" for the performance of their masculinity, as if to prove it—to inscribe it—permanently upon the flesh or psyche of another. Harris demonstrates how the state is complicit in hypermasculinity through the American military and police work, both of which are primary sites and practices for gender violence. As Harris points out, fundamentally grounded in an "us" v. "them" culture, the police is "what street gangs aspire to be: sovereign protectors of turf, defenders of the innocent, and possessors of a monopoly on violence and moral authority" who "share a commitment to masculine ideals, moving within a culture of honor in which respect must be paid or violence will follow." Harris, *supra*, at 794-795. As Harris states, "[M]ilitary work . . . offers individuals a chance at all the privileges of hegemonic masculinity in exchange for embracing and excelling at the job." Harris, *supra*, at 798. Harris, in conversation with Eve Kosofsky Sedgwick, explicates the hypermasculinity of the American military as follows:

[T]he military is a place where both men's manipulability and their capacity for violence is at a premium. As is true elsewhere in the culture, the privileges of masculinity require that one establish intimate relationships with other men; yet the very closeness of these bonds provokes the terror of being marked homosexual and of losing one's masculine privileges. The instability of masculine identity under these circumstances makes insecure men easily manipulable (anxious and eager to prove their masculinity) and potentially violent (for not only status but also personal identity itself is at stake). The military both exemplifies and

placed in a historical context of white heteropatriarchy's use of citizenship to both ensure racial purity and to create vulnerability for purposes of sexual exploitation, this net result is undeniable.²⁵

Section 1409 is part of a long-enduring legacy of using the legal category of citizenship, coupled with matrilineal succession (the status of the child following that of the mother), to control women's bodies for racial purity and sexual pleasure. This practice dates back to antebellum slavery, but continues forward to the sexual practices of the American military and sexual tourism.²⁶ Moreover, the ability to control the legal status of the nonmarital child is vital to sexually dominating, controlling, and exploiting the mother. The blueprint for § 1409's racialized regime of sexual domination is the classic case of *Dred Scott*,²⁷ where the denial of citizenship to anyone of African descent further facilitated a white heteropatriarchal property right in philandering, sexual exploitation, and rape. In *Dred Scott*, the lethal trifecta of (1) excluding anyone of African descent from personhood, through the legal mechanism of citizenship; (2) the continued propertization of bodies; and (3) the rules of matrilineal succession outside marriage—the status of the offspring of an enslaved woman and a white man follows the status of the mother—perfected power in white men and vulnerability in anyone of African descent. By excluding anyone of African descent from citizenship, men, white men in particular, continued to enjoy a white heteropatriarchal property right in the unbridled use and enjoyment of the enslaved.

Following suit, § 1409 creates the WHP, a white heteropatriarchal property right in philandering, sexual exploitation, and rape. Section 1409 creates a property right that is “white” in that citizenship has been, and continues to be, highly racialized. Historically, white heteropatriarchy has used the legal category

shrewdly exploits the internal structure of masculinity: Military culture, like prison culture, both seeks to make men doubt their own masculinity and encourages them to prove their manhood through violence and casual sexuality.

Id. at 787-88 (citation omitted). Throughout this piece, I discuss § 1409's impact not just on the American military, but also sexual conduct abroad, particularly sexual tourism. Thus, the use of hypermasculinity has particular resonance within the military, but it also has application within the entire scene of sexual tourism, as domination, subjugation, and performance are fundamentally a part of sexual exploitation.

25. Collins, *A Short History*, *supra* note 15, at 1496 (“Limitations on citizenship claims asserted by or on behalf of the nonmarital foreign-born children of American fathers highlight the troubling practice of sexual exploitation of non-white foreign women by white American men. If this suggestion strikes some readers as speculative, consider the statement of Edwin Borchard, one of the most well-respected citizenship law experts of the early Twentieth Century, who in 1912 uncritically declared that it ‘seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.’” (quoting EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 612 (1915))).

26. Collins, *Illegitimate Borders*, *supra* note 6, at 2152.

27. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *but see* Joshua J. Schroeder, *The Body Snatchers: How the Writ of Habeas Corpus was Taken from the People of the United States*, 35 QUINNIPIAC L. REV. 1, 60-61 (2016) (“But even today, when all of the Justices symbolically express disgust over *Dred Scott* the U.S. Supreme Court *still* has not expressly overruled *Dred Scott* or explained why its approach fails constitutional muster.”).

of citizenship to make America white—synonymous with whiteness—to make America the private property of whites.²⁸ Of necessity, white supremacy, and its handmaiden racial purity, require control over women's bodies. White heteropatriarchy, however, not only exerts control over women's bodies for racial purity, but also for pleasure.

To be clear, like *Dred Scott* and the entire system of antebellum slavery, § 1409 is not averse to what Abraham Lincoln called the "disgust" and "odium"²⁹ of racial mixing, miscegenation, or the "amalgamation of the races."³⁰ After all, masters, overseers, and other males regularly raped the enslaved, male and female.³¹ Rather, the historical concern of § 1409 is to exclude foreigners from the polity—the governing body; ownership and inheritance of property—and the privileges and immunities of citizenship—"white space."³² Although any citizen

28. See Harris, *WAP*, *supra* note 18, at 1736 ("The right to exclude was the central principle, too, of whiteness as identity . . . [t]he possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded."); see also GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS 1* (2006) (chronicling the United States' historical legislation and policies that expressly excluded non-White groups from entitlements); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (documenting the legal, historical, social, and political forces that create whiteness); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES*, 55 (2d ed. 1994) (arguing racial formation refers to "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed."); Dana Milbank, Opinion, *Yes, Half of Trump Supporters Are Racist*, WASH. POST (Sept. 12, 2016), https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a_story.html [https://perma.cc/MPN4-QPJH]; Steve Phillips, Opinion, *Trump Wants to Make America White Again*, N.Y. TIMES, (Feb. 15, 2018) <https://www.nytimes.com/2018/02/15/opinion/trump-wants-to-make-america-white-again.html> [https://perma.cc/ZVL2-GD54] (arguing that the aggressive pace of immigrants of color deportations, the elimination of the DACA program protecting immigrant children, and the constant dog-whistling cry to build a wall are all efforts to make America White again).

29. See LINCOLN, *supra* note 20.

30. See *id.* at 118.

31. There are no databases and few records of rapes during antebellum slavery. In an early stroke of legal realism, however, in 1857, then-presidential candidate Abraham Lincoln estimated that white males had raped enslaved black women at least 405,751 times around the time of 1850 alone. Abraham Lincoln, *Speech on the Dred Scott Decision* (June 26, 1857), U. VA., <https://www.virginia.edu/woodson/courses/aas-hius366a/lincoln.html> [https://perma.cc/LN4H-9BYN] ("In 1850 there were in the United States, 405,751, mulattoes. Very few of these are the offspring of whites and *free* blacks; nearly all have sprung from black *slaves* and white masters."). As to the sexual assault of male slaves, Thomas Foster writes, "The rape of slave men has also gone unacknowledged because of the current and historical tendency to define rape along gendered lines . . . [which] has obscured our ability to recognize the climate of terror and the physical and mental sexual abuse that enslaved black men also endured." Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. OF SEXUALITY 445, 448 (2011). Thomas argues that there are accounts from both the eighteenth and nineteenth centuries, including the eighteenth-century diary of a Jamaican planter Thomas Thistlewood, who tersely noted two incidents of homosexual assault. In one entry he recorded: "Report of Mr. Watt Committing Sodomy with his Negroe waiting Boy." The language is specific enough to indicate this was a case of sodomy. Thistlewood's diary also noted "strange reports about the parson and John his man." While the term "strange reports" is not precise, Trevor Burnard interprets it as meaning homosexual activity. *Id.* at 453-54.

32. As Elise Boddie explains, "space itself has social, cultural, and—in particular—racial meaning" and this "racial meaning helps to instigate territorial behavior in which one racial group seeks to exclude another racial group from what it perceives to be its own space." Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 435 (2010).

man, including a man of color, can exclude or confer citizenship on his nonmarital foreign-born child, the American polity, as an institution, is synonymous with whiteness. The driving force in the bundle of rights that § 1409 confers upon citizen men is the right to exclude from the American polity, which structurally assumes whiteness. Section 1409 grants citizen men the right to transform their nonmarital foreign-born children into trespassers on (white) American soil. Congress protects citizen men from their nonmarital foreign-born children who, with the power of citizenship, might roam freely in America, and perhaps, arrive at the family gathering in the suburbs and ask Dad for inheritance as well as a serving of turkey.

Section 1409 is “male” in that it confers privileges upon men that it withholds from women. These are the right to decide whether to transfer citizenship to offspring, an ability to abandon offspring, and the right to engage in unprotected sex outside of marriage free from the responsibilities of parenthood. It would not be hyperbolic to say that § 1409 elevates a class of johns, purchasers of sex, sexual exploiters, philanders, sexual tourists, and rapists beyond the reach of parenthood and confers to them a statutorily sanctioned right to discard their children.³³ It might also not be hyperbolic to say that Congress, with the Supreme Court’s blessing, is facilitating an international, worldwide brothel.

Section 1409 is heteropatriarchal in that it facilitates a privilege in men to perform heterosexually on foreign women free from the sanction of parenthood and the burden of “illegitimate” inheritors. It paradigmatically exemplifies what Andrew Krinks calls “the heteropatriarchal familist ideal,” as it is a law that organizes life, human embodiment, social structures, and the political economy according to male desire by subjugating female bodies with a dominant-elite male gaze³⁴ for the purposes of phallogentric sexual pleasure and the perpetuation of male-centered authority and lineage—and describes this all as the natural order.

Section 1409 ensures female subjugation in two ways: First, § 1409 keeps foreign women steadfastly prone. Specifically, § 1409 enables citizen men to go abroad, spread their seed, and then dictate the terms of their relationship with their children and the mothers of their children or whether to have any relationship at all. Section 1409 assists citizen men in leaving the foreign mothers of their children solely responsible for those children. Section 1409 thwarts any duty owed by American fathers to their nonmarital foreign-born children or the

33. See 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, 22 (observing that § 1409 reinforces men’s “sexual irresponsibility” by giving “U.S. men, but not U.S. women, a choice to disavow the children they conceive with foreign partners”).

34. Using Foucault’s “Panopticon,” the “gaze” creates a sense of “constant and permanent visibility,” so that the subject self-monitors and thoroughly internalizes the unrelenting surveillance. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 195, 201-02 (1977).

mothers of their children.³⁵ Second, § 1409 regulates the sexual activity of citizen women engaged in nonmarital sex with foreign men through the sanction of automatic parental responsibility—a kind of reproductive punishment.³⁶

On the surface, it may seem that § 1409 grants a privilege to citizen women that it denies citizen men: an opportunity to transfer citizenship automatically. By contrast, men must undergo a more arduous process.³⁷ That, however, is § 1409's normative hegemonic trick: disguising treachery as something "good," and obfuscating the sexual domination of women as the biological difference between men and women. Section 1409 camouflages the sexual domination of women as a bonus for citizen mothers. This deflects attention away from the hypermasculine sexual performance of men with foreign women and the sanctioning of women with reproductive punishment for analogous sexual conduct with foreign men. Structurally, conceptually, and symbolically, § 1409 entertains male sexual prerogative and female domination, subjugation, and control.

In § 1409, Congress has turned a physiological difference between establishing paternity and maternity into assumptions, and therefore material realities, about sexual behavior. These assumptions are inextricably linked to male power, prerogative, and privilege. Women are not permitted the same range of sexual prerogative and agency as men under § 1409. Under § 1409, women, particularly citizen women, should be home raising children, not out "whoring." If Congress wanted to avoid the gender asymmetry of § 1409, it could have granted both citizen men and women prerogative citizenship for their children, but that would not exact punishment on citizen women who philander with

35. This paper analyzes the application of American law on nonmarital foreign-born children, their American fathers, and their foreign mothers. This paper does not address the foreign laws applicable to nonmarital foreign-born children, their American fathers, and their foreign mothers. Section 1409 extinguishes any duty American fathers owe to their nonmarital foreign-born children and the mothers of those children under American law. I do not argue that American law eliminates the duties foreign countries impose on these fathers.

36. Saddling women with sole responsibility for children born outside of marriage as a form of reproductive punishment has a long history around the globe. *See, e.g.,* Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67 (1995) (explaining that giving custody of nonmarital children to mothers reflects not "hostility to biological fathers" but the "patriarchal roots of family law," which produce "devastating social and economic consequences" for women); Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000) (arguing that divesting nonmarital fathers of parental rights harms mothers who are exclusively charged with the care and support of children); Sabina Mariella, Note, *Leveling Up Over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. REV. 219, 227 (2016) (stating that unwed citizen mothers who conceive a child abroad with a noncitizen bear legal responsibility for their children by the default assignment of their citizenship to their children at birth; and that the distinction encourages men to conceive children outside of marriage, and compels women to bear the costs and the stigma of non-marital sex alone when men are unwilling to do so). Furthermore, saddling women with primary, if not sole responsibility, for nonmarital children is Congress's baseline assumption in § 1409, as well as the legal doctrine the Supreme Court ratifies and normalizes to shield § 1409 from equal protection challenge, as discussed in detail in Part IV.

37. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1707.

foreign men.³⁸ While § 1409 saddles women with the responsibilities of parenthood, it invests in men a property right to roam freely and abandon their children. As Justice Ginsburg shrewdly noted in the context of a § 1409 gender-based equal protection challenge, “There are . . . men out there who are being Johnny Appleseed.”³⁹

Section 1409 outsources the white heteropatriarchal work of the state to individual men—individual citizen fathers—middle managers—as gatekeepers at the American borders of what Angela Onwuachi-Willig calls “white space”⁴⁰ and perpetrators of racialized and gendered violence. It confers a right in men to police white and nationalistic supremacy’s control over the purity of bloodlines while simultaneously ensuring access to vulnerable foreign female bodies for pleasure. Section 1409 outsources the supply of available bodies for sexual domination beyond the border by liberating men from obligations under American law for the children who result from their sexual conquest. It thereby demonstrates the endless adaptability of white heteropatriarchy, particularly its limitless ability to morph into modern forms of female subjugation abroad despite the end of antebellum slavery domestically. Section 1409 allows citizen men to engage in hypermasculinity, as it shuts the door to hapless wards of the state discarded by their citizen fathers. Far from being an insignificant matter, § 1409 impacts the lives of an inestimable number of children abandoned by their American fathers.

Taken together, § 1409 creates an intersectional hierarchy—a hierarchy that is raced, classed, sexed, and gendered. Section 1409 grants citizen fathers the right to exclude their foreign-born children from the polity while facilitating the vulnerable conditions necessary to continue exploiting foreign women. Property, like citizenship, allocates resources, but in the context of § 1409, property and citizenship collude to dominate others and to ratify a hierarchical social order,

38. See Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 527 (1988) (“Gender performances . . . are governed by . . . punitive and regulatory social conventions.”); Stewart Chang, *Feminism in Yellowface*, 38 HARV. J. L. & GENDER 235, 262 (2015) (“Gender performance is intertwined with community expectations of how members of each gender must behave, and when those expectations are not followed, society sanctions and marginalizes deviant actors.”). Section 1409 envisions and concretizes a world in which women should be at home raising children, not out “whoring,” or having children with foreign men, and when they do, §1409 exacts a kind of punishment by saddling women with the responsibilities of parenthood. Compare, however, § 1409’s vision of men engaged in unprotected sex with foreign women who at their leisure can escape both the responsibilities of parenthood and responsible sex by being allowed to abandon their children.

39. Collins, *A Short History*, *supra* note 15, at 1495 (“Justice Ginsburg noted wryly, ‘[t]here are . . . men out there who are being Johnny Appleseed,’” and “Justice O’Connor articulated a similar concern, observing that our sex-based citizenship laws are ‘paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.’” (quoting Transcript of Oral Argument at 31, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071))); see *Nguyen*, 533 U.S. at 92 (O’Connor, J., dissenting).

40. Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017) (discussing the development of America as “white space” and the strategies, practices, and tactics for protecting it).

all under the hegemonic cover of nature.⁴¹ Treating § 1409 as solely a problem of the biological differences between men and women allows it to surreptitiously advance its white heteropatriarchal agenda. It is not just race. It is not just class. It is not just gender. It is all of these things working in concert. Although § 1409 does not explicitly reference race, its explicit silence works an implicit racialized, as well as gendered, result.⁴² Section 1409 is a citizenship regulation that facilitates a white heteropatriarchal desire to perform hypermasculinity, while simultaneously functioning as a broader mechanism of population control. Section 1409 is a classic case of sexually explicit discrimination, masking and obfuscating⁴³ racially implicit sexual subjugation, to work a white heteropatriarchal favorable outcome.⁴⁴

Enough cannot be said about § 1409. Section 1409 is perched at the entangled, intertwined, and mutually reinforcing valences of race, class, gender, sexuality, war, the American military, rape, sex, sexual tourism, sex trafficking, hypermasculinity, reproductive domination, racial purity, citizenship, property, belonging, and statelessness.⁴⁵ It is ripe for intersectional analysis. Section 1409 exemplifies how sexism keeps racism in place and racism keeps sexism in place, with all the spoils awarded to white heteropatriarchy.⁴⁶ What is at stake in equal protection challenges to § 1409 is not only its constitutionality, but also white heteropatriarchy’s entrenched legacy of creating and sustaining hierarchy, vulnerability, and regimes of violence and exploitation.

Part I of this Article lays out the text of § 1409. Drawing on the extensive work of Kristin Collins, Part II historically contextualizes § 1409 to reveal its mens rea. Historical contextuality de-obfuscates § 1409’s coercive nature and underlying legal legacy.⁴⁷ Part II grounds § 1409’s genesis in the legacy of antebellum slavery to expose how the absence of citizenship in enslaved females in combination with the rule of matrilineal succession worked to facilitate the WHP—a white heteropatriarchal property right in philandering, sexual exploitation, and rape, prototypically exemplified in *Dred Scott*.

41. See Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014).

42. See Collins, *Illegitimate Borders*, *supra* note 6, at 2134 (“[A]n important yet overlooked reason for the development of gender- and marriage-based derivative citizenship law—*ius sanguinis* citizenship—was officials’ felt need to enforce the racially nativist policies that were a core component of American nationality law for over 150 years.”).

43. See FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 10, at 86 (“[P]ower is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.”).

44. As Kimberlé Crenshaw coined the term intersectionality, § 1409 is quintessentially “the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.” Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991).

45. See generally SUSAN ZEIGER, *ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY* 9 (Kindle ed., 2010).

46. Crenshaw, *Mapping the Margins*, *supra* note 44, at 1249.

47. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1673.

Drawing on the work of Cheryl Harris and modern theories of property, Part III proposes a theoretical foundation for the WHP as a conceptual model. As a conceptual model, the WHP problematizes § 1409's function, brings it into sharp relief, and exposes it to the precious antiseptic light of day. Historical contextuality and property as a theoretical framework expose the choices and values underlying § 1409, particularly the value of male access to the bodies of foreign women outweighing the value of discarded and abandoned foreign life. Using the historical context of § 1409, as well as the property rubric of the WHP, Part IV analyzes the Supreme Court cases that have sustained the constitutional solvency of § 1409: *Fiallo v. Bell*,⁴⁸ *Miller v. Albright*,⁴⁹ *Nguyen v. INS*,⁵⁰ and *Sessions v. Morales-Santana*.⁵¹ Part IV centralizes whiteness, hypermasculinity, and hypersexualized foreign women as the central tenets, governing principles, and driving forces upon which the Supreme Court has clung in defending the property interests embedded in § 1409. Whiteness, hypermasculinity, and hypersexualized foreign women are part of the intellectual machinery and Supreme Court narratives that justify the nefarious operations of § 1409. Part IV demonstrates how § 1409 is part of an intended and organized regime of racialized sexual domination, all ratified in law. As argued in more detail in Part IV, in the last of the four cases, *Morales-Santana*, Justice Ginsburg, writing for the majority, launched a Herculean effort to find an equal protection violation in § 1409. More specifically, she found that the more lenient physical presence requirement that applied to female citizens, not males, violated equal protection. In fashioning a remedy, however, the Court preserved male privilege at the expense of women, applying the more onerous standard to both men and women, as opposed to nullifying the more onerous standard entirely. Part V proposes solutions, including automatic citizenship for nonmarital foreign-born children of both citizen men and women.

I. WHAT IS TITLE 8, UNITED STATES CODE, § 1409?

The United States has “two sources of citizenship, and two only—birth and naturalization.”⁵² As to “birth” citizenship, the Fourteenth Amendment guarantees that every person “born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.”⁵³ As to naturalization, congressional acts govern the acquisition of citizenship by persons not born in the United States.⁵⁴

48. 430 U.S. 787 (1977).

49. 523 U.S. 420 (1998).

50. 533 U.S. 53 (2001).

51. 137 S. Ct. 1678 (2017).

52. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).

53. *Id.*; see U.S. CONST. amend. XIV, § 1.

54. *Wong Kim Ark*, 169 U.S. at 703.

There are two sources of birthright citizenship: (1) place of birth (*jus soli*) or (2) parentage (*jus sanguinis*).⁵⁵ This Article addresses the latter, *jus sanguinis* citizenship—a right to citizenship by virtue of a circumstance or condition in existence at the time of a child’s birth.⁵⁶ More specifically, this Article focuses on a form of *jus sanguinis* citizenship applicable to American citizens, male and female, who have children out of wedlock and in foreign places, a set of laws known as citizenship transmission laws or derivative citizenship laws, codified in Title 8, United States Code, §§ 1401 and 1409.⁵⁷

When citizenship derives from parentage (*jus sanguinis*), American citizenship laws explicitly discriminate on the basis of marital status as well as the gender of the parents in the transmission of citizenship to foreign-born children.⁵⁸ Title 8, United States Code, § 1401(g) governs citizenship transmission to children born outside of the United States and its outlying possessions to married parents when one is a citizen and the other is an alien.⁵⁹ Section 1401 provides that the child is also a citizen if, before the birth, the citizen parent had been physically present in the United States for a total of five years, at least two of which were after the parent turned fourteen years of age.⁶⁰

As for children born under the same circumstances, but to unmarried parents, § 1409(a) sets forth the following requirements when the father is the citizen parent and the mother is an alien:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person’s birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
 - (A) the person is legitimated under the law of the person’s residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or

55. The Fourteenth Amendment confers *jus soli* citizenship based on place of birth. See U.S. CONST. amend. XIV, § 1. Acts of Congress, however, govern the grant of citizenship to persons born outside of the United States. See *Wong Kim Ark*, 169 U.S. at 702-03 (explaining that persons born outside of the United States only acquire citizenship by birth pursuant to acts of Congress).

56. Collins, *A Short History*, *supra* note 15, at 1487.

57. *Id.*

58. Compare 8 U.S.C. § 1401(c)-(e), (g)-(h) (2019), with 8 U.S.C. § 1409.

59. 8 U.S.C. § 1401(g).

60. *Id.* As will be discussed in more detail in Part IV, the last § 1409 challenge to reach the Supreme Court, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017), nullified an earlier version of this physical presence requirement.

(C) the paternity of the person is established by adjudication of a competent court.⁶¹

In addition, § 1409(a) incorporates the physical presence requirement of § 1401(g).

In stark contrast, when a citizen woman gives birth to a nonmarital foreign born child fathered by a foreign man, the requirements for the transmittal of citizenship are described in § 1409(c):

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.⁶²

Section 1409 thus imposes a set of requirements on citizen fathers that it does not impose on citizen mothers, namely proof of paternity by clear and convincing evidence, a written agreement by the father to pay child support, and paternal acknowledgment of the child before the child's eighteenth birthday.⁶³ Before turning to the historical context out of which § 1409 emerged, it is imperative to highlight several distinguishing features of § 1409—features that explain the power § 1409 confers to men.⁶⁴ Sections 1409(a)(3) and (4) set a statute of limitations (eighteen years) for citizenship claims brought by or on behalf of nonmarital foreign-born children of citizen fathers; nonmarital foreign-born children of citizen mothers have no such limitations.⁶⁵ Section 1409(a)(3)'s requirement of financial support in writing and § 1409(a)(4)'s requirement of legitimation (a father's declaration of paternity under oath or a court order of paternity) confer control to men.⁶⁶ Section 1409(a)(1) requires the "blood" relationship between the child and father,⁶⁷ but that relationship requirement may

61. 8 U.S.C. § 1409(a).

62. 8 U.S.C. § 1409(c).

63. See 8 U.S.C. § 1409(a).

64. See *id.*; Collins, *Illegitimate Borders*, *supra* note 6, at 2235.

65. 8 U.S.C. § 1409(c).

66. 8 U.S.C. § 1409(a).

67. See Manisha Lalwani, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707, 735 (2002) (demonstrating that the legislative history reveals that the superfluosity of the legitimation requirements in 1409(a)(4), when 1409(a)(1) already requires a biological relationship, originated from an adoption of the coverture principles into § 1409(a)(4), with the three legitimation options merely simplifying the previously complex legitimation rules); Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275, 306 (2002).

be satisfied against the father’s will or without the father’s consent.⁶⁸ By contrast, §§ 1409(a)(3) and (4) pivot around male prerogative. This prerogative is absolutely central to an analysis of § 1409. Unlike women, who transfer citizenship automatically, § 1409 gives men the power to exclude their nonmarital foreign-born children from citizenship. In doing so, it allows men to engage in unprotected hypermasculinity while abroad with foreign women, liberated from the responsibilities of parenthood.

As discussed in more detail in Part IV, § 1409 is particularly pernicious because the Supreme Court has tucked the power § 1409 confers to men behind the “natural” differences between men and women in establishing genetic parentage. It is this obfuscating function that Justices Stevens and Kennedy, both American servicemen ostensibly intimately familiar with the sexual practices and ethics of the military, deployed in shielding § 1409 from equal protection challenges. In the doctrine that shields § 1409 from challenge, the “natural” difference between men and women is used to obfuscate the hegemonic function of § 1409. In this way, § 1409 gives the owner of citizenship an entitlement to foreign women’s bodies that becomes naturalized in the everyday.

As developed in more detail in Part II, § 1409 did not evolve out of nature and the biological difference between men and women. As Kristin Collins has argued, § 1409 is a product of choices, particularly choices about values and the relationship between rights and power.⁶⁹ White heteropatriarchy prefers to truncate history because it appears more innocent in freeze-frame analysis, which is fundamental to its obfuscating survival, deniability, and claims of sweet innocence. Section 1409 is the product of centuries of individual decisionmakers, lawmakers, judges, administrators, and other legal actors with vested interests that are raced, classed, sexed, and gendered.⁷⁰ Section 1409 bestows a right on men who father nonmarital children abroad to abandon those children. It enables citizen fathers to control the terms of the legal relationship with their children as well as with the mothers of their children. It also empowers citizen men to determine whether to have a relationship at all.⁷¹ The power Congress confers to citizen men is absolutely central to both an understanding and critique of § 1409. The intersectionality of marital status and gender-differentiated norms for the transference of citizenship—the distinction between automatic parenthood for women and prerogative parenthood for men—is part of an enduring legacy that (1) grants men the right to engage in unprotected sexual conduct outside of

68. Tuan Anh Nguyen v. INS, 533 U.S. 53, 67 (2001) (remarking on how paternity can be established against the father’s will or knowledge if DNA samples from a few strands of hair are collected years after the birth).

69. Singer, *supra* note 41, at 1323; Collins, *Illegitimate Borders*, *supra* note 6, at 2137.

70. Collins, *Illegitimate Borders*, *supra* note 6, at 2134, 2144 (contextualizing § 1409 historically as a product of lawmakers, judges, and administrators who made choices based on “racially nativist nation-building project” and “norms and mores concerning gender, parental roles, [and] sexuality”).

71. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1698.

marriage with foreign women without incurring the full weight of parenthood; (2) sanctions women with parenthood for engaging in sex outside of marriage; (3) protects men from the children they abandon; and (4) protects the polity from children men have abandoned, all strapped in § 1409.

II. § 1409'S CONTEXTUALITY REVEALS ITS MENS REA

As Justice Ginsburg noted, “History reveals what lurks behind” the derivative citizenship statute.⁷² What lurks behind § 1409 is a long legacy of white heteropatriarchy deploying the legal mechanism of citizenship to create property rights in others, more pointedly to perfect sovereignty in itself and vulnerability in others. Both the historical context of § 1409 and the conceptual model proposed in Part III—the WHP—serve the same function: to expose the nefarious underbelly of § 1409 and to subject it to precious antiseptic light. Section 1409 is a direct descendant of antebellum slavery, where the trifecta of propertizing vulnerable bodies, barring citizenship, and following matrilineal succession outside of marriage⁷³ made the enslaved a perennial source of unbridled cheap sex while simultaneously eliminating “illegitimate” inheritors from individual lines of inheritance or belonging in the American polity. Grounding § 1409 squarely within its racist, sexist, and hypermasculine past eliminates any claims or justifications involving nature, innocence, or unintendedness. Instead, both historical contextuality and the WHP cast § 1409 as a deliberate societal policy created by intentional individual decisions, all vested with interests in whiteness, hypermasculinity, and hypersexualized and racialized female bodies upon which to perform sexual violence. It is historical context that gives § 1409 content.

The history of § 1409 exposes the choices and vested interests of American imperialism, policymakers, judges, administrators, servicemen, and sexual tourists in a legal regime that enshrines, ratifies, and protects hypermasculine performances on the bodies of foreign women liberated from paternity and citizenship claims from their offspring. Nature and neutrality did not create § 1409 or the normative base that interprets and safeguards it. White heteropatriarchy did. The history of § 1409 epitomizes the law's active role in

72. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); see also *Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) (arguing that sex-based statutes, like § 1409, cannot be viewed in a vacuum; but rather, their gender based disparity becomes clearer when historicized and placed in historical context, stating, “Sex based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation's “ ‘long and unfortunate history of sex discrimination.’”) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)); *Miller v. Albright*, 523 U.S. 420, 460-61 (1998) (Ginsburg, J., dissenting) (revealing the hegemonic trick of § 1409, which masquerades as something favorable toward women, but when placed in historical context reveals that it privileges ideas about women being primary caregivers stating, “But pages of history place the provision in real-world perspective.”).

73. Collins, *Illegitimate Borders*, *supra* note 6, at 2152.

creating and sustaining racialized and gendered hierarchies in the American polity.⁷⁴ Far from innocent, its history reveals its hegemonic function in normalizing the denigration of women and the abandonment of "illegitimate" children. In addition to cloaking its function with nature, § 1409 achieves its hegemonic operation by assuming a baseline that seamlessly incorporates the vested interests of the WHP as political ideology, legal doctrine, and philosophical assumptions while peddling these vested interests as biological, natural, and "just the way things are."⁷⁵

Furthermore, the history of § 1409 reverses the pathological gaze: rather than fixating on hypersexualized foreign women, who Justice Kennedy disturbingly said "may be unsure of the father's identity,"⁷⁶ or the evil specter of millions of war babies raiding the government coffers and flooding American bureaucracies with fraudulent claims of inheritance and citizenship, historical context focuses attention on a class of johns, purchasers of sex, sexual exploiters, philanders, and rapists, as well as the judges, lawmakers, and administrators that are complicit in their scheme. Moreover, reversing the pathological gaze through historicizing lays the foundation to bring § 1409 in line with modern notions of democracy and fairness.

As part of this historical contextualization, Section II.A squarely grounds § 1409 in its roots, antebellum chattel slavery. Drawing on Kristin Collins's extensive work on § 1409, Section II.B discusses *Guyer v. Smith*⁷⁷ as part of the lineage of § 1409 and as an example of white heteropatriarchy's adaptability after *Dred Scott* appeared imperiled. Section II.C traces three governing forces in the historical development of American citizenship and immigration law: (1) whiteness, (2) hypermasculinity, and (3) female subordination. These governing principles comprise the central tenets of the WHP as well as of immigration law generally. As will be discussed in Part IV, these central tenets will become the three prongs that the Supreme Court uses to immunize § 1409 from equal protection challenges. Finally, as Collins has argued, Section II.D explicates how Congress and the military actively discouraged interracial marriage between American men and racialized foreign women, while simultaneously facilitating sex trafficking between them, all of which led to disproportionate numbers of racialized children being discarded by their American fathers. Part II, overall, provides the historical tissue connecting § 1409's deliberate restrictions on citizenship claims asserted by or on behalf of the nonmarital foreign-born children of American fathers to what Collins calls "a troubling practice of sexual exploitation of non-white foreign women by white American men."⁷⁸

74. *Id.* at 2139-40.

75. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352 (1988).

76. *Nguyen*, 533 U.S. at 54.

77. 22 Md. 239 (1864) (foreign-born children who remain illegitimate do not qualify for citizenship).

78. Collins, *A Short History*, *supra* note 15, at 1492.

A. Dred Scott and the Anatomy of the WHP

Vulnerability is the lynchpin of exploitation.⁷⁹ Antebellum chattel slavery exemplifies this point. Without the full protections of citizenship, African Americans had no access to the courts or police and were, therefore, prone to unbridled performances of power on their vulnerable black flesh.⁸⁰ In 1662,⁸¹ the Virginia colonial assembly ruled that “[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother.”⁸² In reversing the traditional common law presumption that the father determined the status of the child, the rule of matrilineage for the enslaved in combination with the negation of citizenship concretized the continued vulnerability of enslaved women to rape, philandering, and sexual exploitation. As Cheryl Harris noted, it also facilitated the reproduction of a white heteropatriarchal-dominated labor force.⁸³ As founding father Thomas Jefferson bragged, the profitability of enslaved black women could be realized more efficiently from breeding than from labor, stating, “I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man.”⁸⁴ In remarking on the economic incentives for owners to rape their enslaved, abolitionist Henry Highland Garnet concluded that the true treachery of slavery arose from the enslaver’s desire to possess the sexuality of the slave,

79. Cook, *Stop Traffic*, *supra* note 8 (manuscript at 3).

80. In her autobiography about slavery, Harriet Jacobs described the complete control her master exerted over her: “[H]e was my master. I was compelled to live under the same roof with him . . . He told me I was his property; that I must be subject to his will in all things.” HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, CLASSIC AFRICAN AMERICAN WOMEN’S NARRATIVES 223 (William L. Andrews ed., Oxford Univ. Press 2003) (1861). In describing Jacobs’s narrative, Henry Louis Gates, Jr., stated it “charts in vivid detail precisely how the shape of her life and the choices she makes are defined by her reduction to a sexual object, an object to be raped, bred or abused.” Gates, *To be Raped, Bred or Abused*, N.Y. TIMES BOOK REV., Nov. 22, 1987, at 12; see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1437 (1991) (describing acts of unbridled power stating, “Slaveowners forced women to lie face down in a depression in the ground while they were whipped. This procedure allowed the masters to protect the fetus while abusing the mother.”).

81. Many historians of Africans in the United States begin with the arrival, in 1619, of a ship in Jamestown carrying twenty black persons, likely slaves, although possibly indentured servants. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 20-21 (Oxford Univ. Press 1979) (1978). It is interesting to note that the Virginia colonial assembly set rules on matrilineal succession less than fifty years after the arrival of that ship.

82. Harris, *WAP*, *supra* note 18 at 1719 (citing HIGGINBOTHAM, *supra* note 81, at 43). By the late 1600s and early 1700s, the legislatures of various colonies adopted similar rules of classification. See, e.g., HIGGINBOTHAM, *supra* note 81, at 128, 252 (citing a 1706 New York statute; and then citing a 1755 Georgia law).

83. Harris, *WAP*, *supra* note 18 at 1719 n.37 (“According to Paula Giddings, the Virginia statute completed ‘[t]he circle of denigration . . . [in] combin[ing] racism, sexism, greed, and piety’ in that it ‘laid women open to the most vicious exploitation.’ She noted that ‘a master could save the cost of buying new slaves by impregnating his own slave, or for that matter having anyone impregnate her.’” (quoting PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 37 (1984))).

84. Harris, *WAP*, *supra* note 18 at 1720 n.38 (quoting Letter from Thomas Jefferson to John Jordan (Dec. 21, 1805)).

writing, "Every man who resides on his plantation may have his harem, and has every inducement of custom, and of pecuniary gain, to tempt him to the common practice."⁸⁵ As Kimberlé Crenshaw has noted, for the enslaved woman, "[t]heir femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection."⁸⁶ This dichotomy is central to an understanding of § 1409's function. The negation of citizenship in both child and mother coupled with matrilineage outside marriage aided white men in raping enslaved women, protected white men from the duties and responsibilities of fathering children, and protected the racial purity of white sovereignty, the governing principles underlying § 1409.

These intersectional governing principles that privilege white heteropatriarchy⁸⁷ lie at the heart of *Dred Scott*, a Supreme Court decision that further entrenched antebellum plantation slavery and the legal domination of black people. *Dred Scott* accomplished much: (1) it affirmed the continued use of the "Negro" as property⁸⁸; (2) it held that anyone of African descent was not a citizen, including free blacks⁸⁹; and (3) it affirmed that the status of the enslaved child followed that of the mother (matrilineage outside marriage).

85. 2 HARRIET MARTINEAU, *SOCIETY IN AMERICA* 320 (AMS Press, Inc. 1966) (1837) (footnote omitted). In an early stroke of legal realism, Lincoln remarked on the scale of white males raping enslaved females in the mid-nineteenth century and argued that slavery incentivized the amalgamation of the races though rape, rather than racial purity:

In 1850 there were in the United States, 405,751, mulattoes. Very few of these are the offspring of whites and *free* blacks; nearly all have sprung from black *slaves* and white masters. A separation of the races is the only perfect preventive of amalgamation but as all immediate separation is impossible the next best thing is to *keep* them apart *where* they are not already together. If white and black people never get together in Kansas, they will never mix blood in Kansas. That is at least one self-evident truth. A few free colored persons may get into the free States, in any event; but their number is too insignificant to amount to much in the way of mixing blood. In 1850 there were in the free states, 56,649 mulattoes; but for the most part they were not born there—they came from the slave States, ready made up. In the same year the slave States had 348,874 mulattoes all of home production. The proportion of free mulattoes to free blacks—the only colored classes in the free states—is much greater in the slave than in the free states. It is worthy of note too, that among the free states those which make the colored man the nearest to equal the white, have, proportionally the fewest mulattoes the least of amalgamation. In New Hampshire, the State which goes farthest towards equality between the races, there are just 184 Mulattoes while there are in Virginia—how many do you think? 79,775, being 23,126 more than in all the free States together.

Lincoln, *supra* note 31.

86. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 158-59 (1989).

87. In *Dred Scott*, Chief Justice Taney, writing for the majority, famously declared that people in America of African descent had "no rights which white man was bound to respect" whether born free, set free, or enslaved. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Chief Justice Taney explained that the Constitution did not confer citizenship to African Americans. They were "not included, and were not intended to be included, under the word 'citizens' in the Constitution" and "therefore [they can] claim none of the rights and privileges" of citizenship. *Dred Scott*, 60 U.S. at 404; see Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255, 265-266 (2008).

88. *Dred Scott*, 60 U.S. at 410.

89. *Id.* at 395.

Taken together, these policies ensured the continued vulnerability of the enslaved to sexual exploitation.⁹⁰ *Dred Scott* exemplifies how the denial of citizenship concretized the use of African Americans as property and left African Americans in a form of statelessness, leaving them vulnerable and defenseless targets for sexual terrorism. In *Dred Scott*, the denial of citizenship to anyone of African descent left them without recourse to the courts or to legal protection, and therefore vulnerable to unbridled performances of rape, power, and rituals of spectacle.⁹¹ Without citizenship and personhood, one cannot assert an interest in or against property. The combined effect of propertization, lack of citizenship, and the rule of matrilineage allowed white males to continue unprotected and unbridled feats of hypermasculinity on the bodies of enslaved women without incurring illegitimate inheritors and while maintaining racial purity in the polity.⁹²

Like *Dred Scott*, § 1409 demonstrates how property and citizenship occupy central roles in the allocation, preservation, and maintenance of sovereignty and vulnerability. As in antebellum slavery, § 1409 illustrates how property laws, and the policies they animate, have long channeled the benefits of full citizenship through one's relationship to property. *Dred Scott* solidified a property right in philandering, rape, and sexual exploitation, as well as a right of sovereignty in the owner and vulnerability in the victim. In antebellum slavery and § 1409, white heteropatriarchal sexual autonomy is achieved through the foreign woman's sexual subjugation (the propertization of her sexual function).⁹³ Similarly, white heteropatriarchal reproductive freedom is achieved through the denial of reproductive freedom for the enslaved and the disenfranchisement of the enslaved female and her child. Additionally, the denial of citizenship to the enslaved enshrined the antebellum enslavers' economic investment in the enslaved's sexual function.⁹⁴ The enslavers' economic investment in the

90. *Id.*

91. *Id.* at 406. See also Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. CIV. RTS. & C.L. 51, 52, 75 (2005) (arguing that the paradigms of private property, enslavement, and sexuality shared a nexus of white males generating wealth and sexual gratification through cheap land, the exploitation of enslaved labor, and the exploitation of black female labor and sexuality; and that these paradigms interacted to create the white male "American Dream" of cheap land, cheap labor, and cheap sex).

92. To be clear, *Dred Scott* was only one among many cross-pollinated and cyclically reinforcing factors that ensured the racial domination of African Americans.

93. Crusto, *supra* note 91, at 81 ("[W]hite masters exploited enslaved black women to satisfy their desire for cheap sex."); see also Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 334 (1996) ("[W]hile sexual contact between Black men and white women was rigorously policed, the sexual abuse and rape of Black women was decriminalized. This allowed for the full sexual exploitation of Black women's bodies and systematic sexual abuse without social consequences or legal sanction." (footnote omitted) (citing Kimberlé Williams Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402, 413 (Toni Morrison ed., 1992))).

94. Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993) ("Both pimps and antebellum slave masters have and had economic investments in women's sexual functions.").

enslaved's sexually subjugated function was so important to the nation that it rose to the occasion of constitutional protection. As the Chief Justice Roger Taney famously declared, people in America of African descent had "no rights which white man was bound to respect" whether born free, set free, or enslaved.⁹⁵ Taney explained that the Constitution did not confer citizenship to African Americans.⁹⁶ They were "not included, and were not intended to be included, under the word 'citizens' in the Constitution" and "therefore [they can] claim none of the rights and privileges" of citizenship.⁹⁷ For blacks, this constitutional relationship ensured complete subjugation for the very purpose of unbridled exploitation.⁹⁸

In *Dred Scott*, Chief Justice Taney grapples with the question, "What must white supremacy do to own the sexual function of the enslaved?" In answering this question, Chief Justice Taney understands a vital element of § 1409. The continued use and enjoyment of the enslaved's sexual function requires controlling the status of the offspring. In other words, the white father's right to discard his child, abandoning fatherly responsibility as a matter of law, is the *sine qua non* of owning the enslaved mother's sexual function. Eliminating fatherly responsibility licensed white males to continue the naked propretization of the enslaved's sexual function for hypermasculine performance. Like § 1409, Chief Justice Taney achieves the "absenting of fatherly responsibility" by endorsing the rule of matrilineage for the enslaved. Harkening all the way back to the Roman Empire and the Institutes of Justinian, Chief Justice Taney made it abundantly clear that, as in § 1409, the enslaved followed the status of the mother, noting that in the Roman Empire, slave status "was decided by the condition of the mother," and quoting the Institutes of Justinian to show that slaves had long been "born such of bondwomen."⁹⁹ Like § 1409, Chief Justice Taney and the *Dred Scott* Supreme Court understood that the continued sexual domination of the mother mandated the right to legally discard the child.

95. *Dred Scott v. Sanford*, 60 U.S. at 407.

96. *Id.* at 404.

97. *Id.*

98. Article I, Section 2, Clause 3 of the Constitution allowed southern states to count slaves as three-fifths persons for the purposes of apportionment in Congress (even though the slaves could not, of course, vote). JUAN F. PEREA ET. AL., *RACE AND RACES* 104 (3d ed. 2015). Article I, Section 9, Clause 1 restrained Congress's ability to stop the slave trade by expressly denying congressional power to prohibit importation of new slaves until 1808. PEREA, *supra*. Furthermore, Article IV, Section 2, Clause 3 mandated that slaves who escaped into freedom in the North were required to be sent back to their owners in the South. PEREA, *supra*. Article IV, Section 2, Clause 3, contains the Fugitive Slave Clause, which states:

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

PEREA, *supra*. In effect, these constitutional provisions, by ensuring slavery and rendering non-free persons property, legally prohibited Blacks from being citizens and asserting fundamental rights. *Id.* Each of these clauses of the Constitution made black bodies vulnerable to exploitation by operation of law.

99. *Dred Scott*, 60 U.S. at 478-79; see Collins, *Illegitimate Borders*, *supra* note 6, at 2151.

Lest there be any doubt about white heteropatriarchy's use of citizenship to create vulnerability for the express purpose of sexual exploitation, in 1867, then-presidential candidate Abraham Lincoln drew the connection between citizenship, property, and sexual domination in the following response to the *Dred Scott* decision:

This very *Dred Scott* case affords a strong test as to which party most favors amalgamation [of the races], the Republicans or the dear union-saving Democracy. Dred Scott, his wife and two daughters were all involved in the suit. We desired the [C]ourt to have held that they were citizens so far at least as to entitle them to a hearing as to whether they were free or not; and then, also, that they were in fact and in law really free. Could we have had our way, the chances of these black girls, ever mixing their blood with that of white people, would have been diminished at least to the extent that it could not have been without their consent. But Judge Douglas is delighted to have them decided to be slaves, and not human enough to have a hearing, even if they were free, and thus left subject to the forced concubinage of their masters, and liable to become the mothers of mulattoes in spite of themselves—the very state of case that produces nine tenths of all the mulattoes—all the mixing of blood in the nation.¹⁰⁰

In grounding the utter savagery that was antebellum slavery in the original intent of the Founding Fathers, Chief Justice Taney made the following statement, which bears repeating in its entirety because his narrative provides foundational grounding for the WHP and recurring themes in the legal doctrines surrounding § 1409:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.¹⁰¹

100. Lincoln, *supra* note 31.

101. *Dred Scott*, 60 U.S. at 407.

Several distinguishing features of Chief Justice Taney's straightforward, transparent, undiluted, de-obfuscated, and fully intended white supremacist mantra should be noted, as they are ongoing themes in the genealogy and doctrine of § 1409. In order to appreciate the function of § 1409, one might substitute foreign women and their nonmarital children fathered by American men in the quote above for the contemplated "negro" or enslaved. The idea of inferiority as a justification for the domination and propertization of human beings has an extensive history in Western thought. It is just this notion of "inferiority" that will figure prominently in the legal doctrine surrounding § 1409 as it relates to the exclusion of foreigners and both the hypersexualization and sexual domination of foreign women ("treated as an ordinary article of merchandise and traffic"¹⁰²), developed in more detail in Parts III and IV.

Chief Justice Taney's mantra reflects the deliberate creation of a form of statelessness ("no rights which the white man was bound to respect"¹⁰³) for the express purpose of propertization, commodification, and sexual trade. Section 1409 facilitates a wall of immunity around citizen men while abroad as they procreate and sexually exploit foreign women, leaving both their offspring and foreign women in a figurative and literal form of statelessness. It is the very exclusion of anyone of African descent—foreign women and their children—from the legal category of citizenship that facilitates their vulnerability to dominant desire and fetish.

In drawing the distinction between both the "private pursuits and public world," Chief Justice Taney dog-whistles a veiled appeal to an ongoing theme in § 1409, the distinction between the sexual politics and cultural norms of the slave quarters versus that of the big house, the master's house.¹⁰⁴ Under § 1409, as in antebellum slavery, citizen men can activate the sexual politics and cultural norms of the slave shacks and preserve their respectability politics at home in the "big house." Section 1409 outsources the supply of enslaved females to the platforms of hypersexualized foreign women for hypermasculine sexual performance. Section 1409 provides the "dark place," where citizen men can let their sexual energy explode unbridled and come unhinged. It allows citizen men the opportunity to keep their impulses in check under cover of respectability politics while at home, and then let their impulses go unchecked abroad. It liberates citizen men from the expectation of respectability at home, so that they can go abroad liberated from those cultural restraints and come unhinged in the slave shacks. It allows citizen men to present fine-tuned, highly moral, dignified images in the American public, and then let their unrestrained impulses explode in the foreign places, the dark places, and in a final stroke of genius, to deny it

102. *Id.*

103. *Id.*

104. *Id.*

ever happened.¹⁰⁵ Section 1409 restrains the foreign-born nonmarital child's ability to push against the private/public boundary between male prerogative in the shack and respectability in the big house. Allowing the foreign-born nonmarital child, particularly those who are racialized, the free-flowing freedom to show up at Dad's home, his house of worship, and in his community would pierce the veneer of respectability and would subject Dad to tremendous questioning about what exactly happened down in the shack. Congress has restrained the foreign-born nonmarital child from pushing across the partition of private slave shack politics and publicly damaging respectability in the big house of the American polity. Furthermore, § 1409 allows for the illusion that the Japanese comfort women and rapes in the Congo are "foreign" phenomena by those "evil" people, rather than the routinized practices of a highly industrial nation, right here at home.

Unlike the individualized actions of citizen men, § 1409 makes sexual domination systemic. Citizen men are not making decisions as atomized individual agents or singular secretaries of state, but rather, from a long enduring culture of white heteropatriarchal supremacy. Congress has created a power imbalance between foreign women and citizen men, which also functions as part of the sexually exploitative draw and allure for citizen men toward foreign women. It is where vulnerability becomes enticing. The grant or denial of citizenship acts as a white heteropatriarchal cudgel—a whip—in the already highly imbalanced power relationship between citizen men, who are coming from a rich country, and foreign women, who often are not. Facilitating the domination of foreign women, therefore, is part of the property right that Congress bestows on citizen men. The ability to dictate the terms of the relationship with foreign women and their offspring as well as to determine whether there will be a relationship at all becomes dialectical in that it reinforces the vulnerability while simultaneously serving as enticing.

Before turning to the theoretical framework for the WHP, one more comparison between § 1409 and antebellum slavery may be illustrative. Dorothy Roberts explains that a common method of whipping the pregnant enslaved female throughout the South illustrates the slave owners' dual interest in owning the enslaved woman, particularly her sexual function, and maximizing her use as a reproductive harvester: "Slaveowners forced [pregnant] women to lie face down in a depression in the ground while they were whipped. This procedure allowed the masters to protect the commercial fetus while abusing the mother."¹⁰⁶ Both § 1409 and the whipping of the pregnant enslaved vividly

105. Anthony Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 464 (1997) ("Race is a form of pleasure in one's body which is achieved through humiliation of the Other and, then, as the last step, through a denial of the entire process By denying their fetishization of 'race,' whites create a culture in which they are both masters and innocents.").

106. Roberts, *Punishing Drug Addicts*, *supra* note 80, at 1438.

illustrate that control over the child was inextricably intertwined with the continued domination of the mother. In antebellum slavery, the slave owner was incentivized to protect the child’s life for commercial gain, while still exerting complete domination over the enslaved mother. In § 1409, the right to eliminate the child from personhood, as a practical matter, is endemic to the continued sexual enjoyment of foreign women. Controlling the child is fundamentally important to dominating the mother. Whether the gain or loss is protected, the goal is the domination of the female body, which necessitates control over the offspring.

In order to understand the intersectional interconnectedness and mutually reinforcing layers of race, class, gender, property, and citizenship in § 1409, it is imperative to acknowledge how slavery created a culture that incentivized and normalized sexual terrorism. The history of rape during antebellum chattel slavery provides the quintessential backdrop for understanding the moves and maneuvering in § 1409: by denying citizenship to both enslaved and their offspring coupled with matrilineage outside marriage, slaveholders were able to perpetuate a property interest in rape, sexual exploitation, and philandering, the prototype for § 1409. Moreover, non-inheritance erased any claim of legacy between an enslaved child and white father—for the children of Thomas Jefferson and Sally Hemmings, for example—while effectively ensuring that the legal heirs of white ruling-class men remained white, all embedded in § 1409.¹⁰⁷

B. Guyer: *Extending the WHP*

Although the Fourteenth Amendment effectively overruled *Dred Scott*, it remains foundational for using citizenship to create a white heteropatriarchal property right in sexual domination. As Cheryl Harris helps us to understand, after legalized forms of white supremacy, like slavery or segregation, were overturned, the white heteropatriarchal property right in hypermasculinity evolved into a more modern form through the law’s ratification of the settled expectations of white heteropatriarchal privilege as a legitimate and natural baseline.¹⁰⁸ Section 1409 demonstrates the unrelenting adaptability of white heteropatriarchy: It achieves the propertization of foreign human bodies without announcing itself as such. It is an example of how even after slavery was outlawed, the same result can be achieved by other means. *Guyer v. Smith*,¹⁰⁹ decided in 1864, also illustrates this point.

107. E. Michelle Rabouin, “*Gifting Children of Promise*”: *Re-Imagining the Academic Margins as Transformative Legal Space*, 3 J. GENDER RACE & JUST. 581 (2000).

108. Harris, *WAP*, *supra* note 18 at 1741.

109. 22 Md. 239 (1864).

As the advancement of abolition undermined the legal substructure of slavery and when *Dred Scott* was no longer sound precedent,¹¹⁰ *Guyer* maintained a stronghold over a white heteropatriarchal power to sexually exploit foreign women, to be free of the inheritance claims of their offspring, and to protect the polity from racialized others. According to Kristin Collins, the *Guyer* court incorporated into citizenship law “the same set of domestic relations law principles that had been instrumental to the maintenance of slavery and the denial of citizenship for persons of African descent: laws that recognized the unmarried mother as the source of status for her children, including slave status.”¹¹¹ *Guyer* recognized the ability to preserve a hierarchal order that preserved vulnerability, precarity, and disenfranchisement in foreign women by continuing the use of matrilineage for nonmarital children.

In *Guyer*, a white American citizen fathered two nonmarital foreign-born sons with a woman “of African descent.”¹¹² When the American citizen father died, he bequeathed land in America to his sons. Upon recognizing the contestability of the sons’ claims to citizenship, two other white men (the “interlopers”), challenged the sons’ claim to the property. The *jus sanguinis* citizenship statute relevant at the time allowed for citizenship transmission to foreign-born children but was silent on the marital status of the parents.¹¹³ Despite the intentions of the individual citizen father, as a matter of systemic policy, the *Guyer* court declared that foreign-born “illegitimate” children of American fathers were not citizens under the statute.¹¹⁴

Like *Dred Scott* and § 1409, *Guyer* did many things at once. It illustrates how white heteropatriarchy uses both citizenship and property laws to allocate sovereignty to itself and vulnerability to others. It exemplifies white heteropatriarchy’s unrelenting fundamental compulsion and need to control vulnerable bodies in space, specifically lines of inheritance and ownership. It shows the resiliency of white heteropatriarchy in using both citizenship and property laws to exclude racialized foreign others from the polity and preserve the ability to engage in sexual conduct with foreign women without the burdens of parenthood as a matter of societal policy, ratified in law. Furthermore, and as Collins demonstrates in granular detail, for decades after *Guyer*, administrators, judges, and legislators enlisted the antebellum-slavery-based matrilineage-outside-of-marriage/patrilineage-inside-marriage distinction to ensure racial purity in the polity and the continued sexual control of foreign women. As

110. Collins, *Illegitimate Borders*, *supra* note 6, at 2149 (noting that fifteen days before *Guyer* was decided “Maryland adopted a new state constitution that abolished slavery and declared that ‘all men are created equally free’” (citing BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* 131 (1984))).

111. *Id.* at 2141.

112. *Id.* at 2140.

113. *Id.*

114. *Id.*

Collins demonstrates, for decades, these decisionmakers denied the citizenship claims of nonwhite children, especially those who were excludable under the race-based immigration and naturalization laws, in an effort to ensure racial purity.¹¹⁵

C. *Whiteness, Hypermasculinity, and Hypersexualized Foreign Women: The Driving Forces of American Immigration and Citizenship Law*

Whiteness, hypermasculinity, and the narrative of hypersexualized foreign women have coursed through the veins of citizenship transmission since the founding.¹¹⁶ They are the three organizing tenets that govern the field of citizenship. These three straps in the WHP have shaped and designed the entire regulatory field, and the boundaries and contours of America.¹¹⁷ Section 1409 is merely one in a myriad of laws that use the legal category of citizenship as a means of granting or denying rights, creating vulnerability for purposes of exploitation, and distributing resources and burdens.¹¹⁸ Derivative citizenship laws involve a quagmire of statutes, administrative decisions, and policy practices. However, three unifying principles explain the chaos: (1) the need for racial purity and white supremacy; (2) the sanctioning of white women for having sex with foreign men; and (3) the creation and maintenance of vulnerability in foreign women for hypermasculine sexual exploitation.

As for whiteness, citizenship as a legal mechanism is the primary site of "racial formation."¹¹⁹ It is where America not only constructs itself as white,¹²⁰ but also bulwarks its porous boundaries against "aliens" and simultaneously perfects its ability to exploit.¹²¹ Since its inception, America has used the legal category of "citizenship" to make America synonymous with whiteness.¹²² In its very first citizenship act, the Naturalization Law of 1790, Congress explicitly

115. *Id.* at 2137-38.

116. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1680; *see also* Chang, *supra* note 38 (arguing that the regulation of sex is a central tenet of U.S. immigration policy); Eithne Luibhéid, *Heteronormativity, Responsibility, and Neo-liberal Governance in U.S. Immigration Control*, in *PASSING LINES: SEXUALITY AND IMMIGRATION* 69 (Brad Epps et al. eds., 2005) ("Sexuality has long been a concern to the framers of U.S. immigration law and policy, and it has consistently comprised an important axis for the regulation of newcomers.")

117. Collins, *A Short History*, *supra* note 15, at 1492 ("The history of U.S. citizenship law cannot be understood without due recognition of racism's central role in shaping the entire regulatory field.")

118. Freddy Funes, Note, *Beyond the Plenary Power Doctrine: How Critical Race Theory Can Help Move Us Past the Chinese Exclusion Case*, 11 *SCHOLAR* 341, 342 (2009).

119. OMI & WINANT, *supra* note 28 at 1-3.

120. *See* Onwuachi-Willig, *supra* note 40, at 1119.

121. *See* Collins, *A Short History*, *supra* note 15, at 1496.

122. *See* LÓPEZ, *supra* note 28. For a much more detailed history that centralizes race, *see* Collins, *Illegitimate Borders*, *supra* note 6. For a much more detailed history of derivative citizenship statutes that centralize gender, *see* Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36.

restricted naturalized citizenship to “free, white persons.”¹²³ Whiteness remained the gold standard when Congress passed racially exclusionary immigration laws, including the Chinese Exclusion Act of 1882,¹²⁴ the Immigration Act of 1891,¹²⁵ and the Geary Act of 1892.¹²⁶ Although there were amendments to this “whites only” restriction, racial bars to naturalization were not fully extirpated until 1952.¹²⁷

White supremacy, however, was not the only driving force shaping immigration policy. As in *Dred Scott*, the creation, maintenance, and regulation of sexual subjugation were also guiding principles in American citizenship and immigration law. The demonization and perennial hypersexualization of Asian women also typify the centralized role of sex and sexual conduct regulation in immigration law. Stewart Chang argues that Asian women, particularly Chinese women, were monolithically constructed as pernicious prostitutes, the antithesis to normative American sexuality, a foreign peril that threatened the integrity of American domestic unity. Quoting historian Nayan Shah, Chang explains, “[D]uring the nineteenth century anti-Chinese advocates characterized Chinese immigration as a racial war where the most pernicious weapon was the Chinese female prostitute, who . . . was ‘infusing a poison into the Anglo-Saxon blood’ and imperiling the future of the American nation.”¹²⁸ Capitalizing on the stereotype of Asian women as immoral and sexual deviants, President Ulysses S. Grant signed the Page Act of 1875, which restricted the immigration of Chinese women who were presumed to be prostitutes.¹²⁹ Following the Page Act, the Chinese Exclusion Act was just one of a myriad of laws that systemically excluded Asians, including the renewal of the Chinese Exclusion Act in 1884, 1888, and 1892.¹³⁰ The 1917 Immigration Act created the “Asiatic Barred Zone,”

123. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795) (limiting *jus sanguinis* citizenship to the children of U.S. citizen fathers; restricting naturalization to “free white” persons).

124. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

125. Immigration Act of 1891, ch. 551, 26 Stat. 1084.

126. Geary Act of 1892, chs. 60-61, 27 Stat. 25 (repealed 1943).

127. See LÓPEZ, *supra* note 28. It should be noted that in addition to congressional acts, the Supreme Court has consistently held that that “[t]he power of exclusion of foreigners [is] an incident of sovereignty” and that therefore questions arising from the exercise of that sovereignty “are not . . . for judicial determination.” *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). Furthermore, until 1965, American citizenship laws standardized racial and national-origins restrictions. See Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 180 n.64 (2017) (“Race-based immigration and naturalization laws and race-salient national-origins quotas were gradually repealed starting in the 1940s and were finally repudiated by Congress in the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), and in the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).”).

128. Chang, *supra* note 38 at 240 (quoting NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN* 107 (2001)).

129. *Id.* (citing Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974)).

130. See generally H.R. Res. 282, 112th Cong. (2011) (resolution regretting the passage of discriminatory laws against the Chinese beginning in the nineteenth century).

which prohibited immigration from most of Asia.¹³¹ The Immigration Act of 1924 followed, which extended exclusion to all "alien[s] ineligible for citizenship," including Asians.¹³² According to Chang, throughout the nineteenth century, the Asian prostitute was politically manipulated as a racial other against which normative citizens and immigrant subjects who could racially and culturally belong in America were defined.¹³³

In addition to whiteness, heteropatriarchy governed the laws associated with citizenship transmission. Beginning in 1790, white citizen fathers had the right to transmit citizenship to their marital foreign-born children provided that the mother was also white and otherwise eligible for naturalization.¹³⁴ White married citizen mothers, however, did not have the right to transmit citizenship to their white marital foreign-born children until 1934.¹³⁵ Racial purity requires control over women's bodies; thus, under the Expatriation Act of 1907, female citizens automatically forfeited citizenship if they married an alien, a practice known as marital expatriation.¹³⁶ The same act prohibited women from transmitting citizenship to their foreign-born children.¹³⁷

As Collins argues, "Prior to 1934, the text of the derivative citizenship statute recognized only the foreign-born children of citizen fathers as citizens, thus using the patrilineal norms that had long characterized domestic relations law to regulate [white] membership in the American polity."¹³⁸ As in *Dred Scott*, outside marriage, matrilineal lineage was recognized for foreign-born nonmarital children.¹³⁹ As in *Dred Scott*, the foreign mothers of nonmarital children, fathered by American men abroad, were not citizens. Following matrilineal norms outside marriage allowed citizen men to continue sexual engagement with foreign women free of legal responsibilities for fathering children.

Collins further argues that the primacy placed on marriage to secure the transfer of citizenship to foreign-born children was no accident; rather, the centrality of marriage "remained a vital and racially exclusionary principle from

131. Immigration Act, ch. 29, § 3, 39 Stat. 876 (1917) (repealed 1952).

132. Chang, *supra* note 38, at 268 (quoting Immigration Act, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (restricting immigration for all "alien[s] ineligible for citizenship" and setting an annual quota of 150,000 immigrant entries per year based on national origin, where immigration from each eligible nation was limited to two percent of the number of foreign-born persons of that nationality residing in the United States as of the 1890 census)).

133. *Id.* at 242.

134. Collins, *Illegitimate Borders*, *supra* note 6, at 2235 (citing Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 104 (repealed 1795)).

135. *Id.* (citing Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797).

136. Collins, *A Short History*, *supra* note 15, at 1490 (citing Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228).

137. Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228.

138. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 178–79 (footnotes omitted); see also *Miller v. Albright*, 523 U.S. 420, 462 (1998) (Ginsburg, J., dissenting) ("In 1855, Congress clarified that citizenship would pass to children born abroad only when the father was a United States citizen." (citing Act of February 10, 1855, § 2, 10 Stat. 604)).

139. Collins, *A Short History*, *supra* note 15, at 1490.

the late nineteenth century into the early twentieth century. The marriage requirement was racially exclusionary because marriage was not a race-neutral institution.”¹⁴⁰ The Supreme Court did not declare miscegenation laws unconstitutional until 1968.¹⁴¹ According to Collins, the marriage requirement was also racially exclusionary because immigration administrators constrained definitions of marriage and legitimacy in cases involving citizenship claims of nonwhite children.¹⁴²

The 1922 Cable Act terminated marital expatriation; thus, marriage to an alien no longer forfeited a woman’s citizenship automatically.¹⁴³ A woman, however, still lost her United States citizenship if she married an alien ineligible for citizenship, such as Chinese men.¹⁴⁴ In 1934, Congress passed an immigration act that allowed citizen-mothers, for the first time, to confer citizenship on their children.¹⁴⁵ Under the Nationality Act of 1940, Congress preserved equality in the transmission of citizenship to marital children based on the parent’s sex, but established a completely different scheme for nonmarital children, one that discriminated on the basis of marital status and the sex of the parents.¹⁴⁶ Nonmarital foreign-born children of citizen mothers were automatically entitled to citizenship. Nonmarital foreign-born children of citizen fathers, however, acquired citizenship only upon legitimation or adjudication of paternity during the child’s minority.¹⁴⁷ Drawing from Collins, by recognizing mothers as the source of parental responsibility for nonmarital children and preserving a father’s prerogative regarding his nonmarital children, the 1940 Act, like coverture, shielded men from the burdens of childcare and support for their non-marital offspring.¹⁴⁸

140. Collins, *Illegitimate Borders*, *supra* note 6, at 2182–83.

141. *Loving v. Virginia*, 388 U.S. 1 (1967).

142. Collins, *Illegitimate Borders*, *supra* note 6, at 2154.

143. Cable Act of 1922, ch. 411, § 3, 42 Stat. 1022.

144. *Id.* at §§ 3, 5.

145. Act of May 24, 1934, ch. 344, 48 Stat. 797. The Act amended § 1993 of the Revised Statutes to read:

Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother . . . has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child’s twenty-first birthday, he or she shall take an oath of allegiance to the United States of America.

48 Stat. 797, *supra*.

146. Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138-40; *see* Collins, *Illegitimate Borders*, *supra* note 6, at 2150.

147. Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138-40.

148. *See* Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 234 (2003). As Collins notes, the common law imposed a duty on women of nonmarital children to care for those children, but protected men from the property, support, and status claims of those children. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1683.

Before turning to the next section, there are a few features of citizenship transmission that require highlighting. It is important to note that § 1409, like marriage expatriation, is an example of coverture,¹⁴⁹ a continuum of laws that regulated or controlled women's bodies for purposes of racial purity, regulated women's sexual practices outside marriage through the sanction of parenthood, and legally ratified sexualized violence.¹⁵⁰ Like coverture, § 1409 incorporated the common law regime that allocated the rights and responsibilities of parenthood according to marital status and parental gender.¹⁵¹ As Collins argues, "The history of coverture and the transmission of American citizenship brings an elementary point into focus: the allocation of parental rights is always correlated with the allocation of parental responsibility."¹⁵² Drawing from Collins, this basic legal truism and its numerous implications for citizenship law suggests that the gendered injustice caused by § 1409 is its creation and perpetuation of a legal regime that squarely fixates full responsibility for foreign-born nonmarital children on women, while allowing men to escape and to continue engaging in unprotected hypermasculinity free of reproductive sanction. As Collins argues, "Once we recognize this gendered operation of § 1409, broader failures of equal protection analysis come into relief."¹⁵³

Furthermore, both slavery and coverture allowed men to solidify their dominance over women and set the stage for modern approaches to derivative citizenship.¹⁵⁴ The ideologies, discourses, and strategies that entrenched citizenship and property codes in antebellum slavery and coverture continue to have tremendous traction in our shared societal consciousness, particularly in the narratives that justify racialized and sexualized domination as exemplified in victim blaming, slut shaming, and the ways in which the bodies of women continue to be viewed as the property of men, discussed in more detail in Section III.C. Although women's formal legal status has changed, contemporary approaches to derivative citizenship reflect a racialized commitment to female subordination.¹⁵⁵

149. Coverture, in the common law, defined marital unity as a merging of a married couple into a single person—the "head" of the marriage—the husband. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11-13 (2000); CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991); M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do with It?*, 28 *GEO. IMMIGR. L.J.* 391, 453 (2016).

150. Coverture included a continuum of laws that created a right in men to dominate women, including marriage as a status contract, regulation of divorce and child custody, legal treatments of women's obligations for housework and child care, lack of recognition of marital rape, and legal sanctioning of domestic violence. Elizabeth Beaumont, *Gender Justice v. the "Invisible Hand" of Gender Bias in Law and Society*, 31(3) *HYPATIA J. FEMINIST PHIL.* 668, 676 (2016).

151. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1672.

152. *Id.*

153. *Id.*

154. *Id.* at 1681.

155. Beaumont, *supra* note 150, at 676.

D. *World War I, World War II, Korea, and Vietnam: Foreign Woman As “Whore” and the Military Sex Trade*

It is imperative to contextualize § 1409 in the hypermasculine sexual ethics of the American military. As Susan Zeiger notes, war engagements are powder kegs for sexual exploitation from the brothels of the French demimonde, to the German bordellos, to sprawling “camp towns,” often military-run, that provided sex trafficking for American GIs in Korea, the Philippines, Okinawa, Vietnam, and Thailand.¹⁵⁶ As Zeiger notes, the loneliness, fear, boredom, lust, and racially exoticizing and fetishizing tastes of servicemen combined with the economic vulnerability of foreign women detonate sexual exploitation.¹⁵⁷ American military engagements are primary sites for hypermasculinity with all the trappings incident to sexualized violence, including exponential incidents of rape.¹⁵⁸ When contextualizing § 1409 in the hypermasculine sexual practices of

156. ZEIGER, *supra* note 45.

157. *Id.* at 19-20 (“Having endured the ‘rigors of the front,’ these men were eager to be sexually serviced.”) It should also be noted that the glove-like fit between war and sexual exploitation is not unique to the United States. See, for example, the comfort women the Japanese made of Korean women, rape as warfare in the Congo, and the former Yugoslavia.

158. Because sexual assault is a severely underreported crime, no one can know just how pervasive the culture of sexual assault is in the American military, let alone how often American servicemen sexually assault when they are abroad. Thirty-three percent of women in the military will experience sexual assault. Approximately twenty percent of all rapes for military personnel get reported. See Kristina B. Wolff & Peter D. Mills, *Reporting Military Sexual Trauma: A Mixed-Methods Study of Women Veterans’ Experiences Who Served from World War II to War in Afghanistan*, 181 MIL. MED. 840 (2016). Between nine and a half and thirty-three percent of women report experiencing either an attempted or completed rape during their military service. See Juleyka Lantigua-Williams, *Taking Military Sexual Trauma Seriously*, THE ATLANTIC (Sept. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/09/women-vets-and-mst/498866/> [<https://perma.cc/85VE-S426>]. Approximately one out of every five women in the United States is raped in her lifetime. For a woman in the military, her chances of being raped increase to one out of every three women. Kristina Bell et al., *When Public Institutions Betray Women: News Coverage of Military Sexual Violence Against Women 1991-2013*, 10 J. INTERDISC. FEMINIST THOUGHT 1 (2017). Of the 5,277 service members who reported an incident of sexual assault that occurred during military service, 4,193 were women, while 1,084 were men. The number of women had increased by thirteen percent from the previous year. Lisa Ferdinando, *DoD Releases Annual Report on Sexual Assault in Military*, U.S. DEP’T OF DEF. (May 1, 2018), <https://dod.defense.gov/News/Article/Article/1508127/dod-releases-annual-report-on-sexual-assault-in-military> [<https://perma.cc/AC2M-PJRA>]. Women in combat are 180 times more likely to be sexually assaulted by a fellow soldier than killed by the enemy. *The Military’s Sexual Assault Epidemic*, THE WEEK (Mar. 31, 2013), <http://theweek.com/articles/466100/militarys-sexual-assault-epidemic> [<https://perma.cc/JZ4M-6PNH>]. Up to thirty-six percent of women veterans screened at Virginia treatments centers showed signs of trauma from either sexual abuse, harassment, or assault which occurred while on active duty. See Valerie A. Stander & Cynthia J. Thomsen, *Sexual Harassment and Assault in the U.S. Military: A Review of Policy and Research Trends*, 181 MIL. MED. 20, 21 (2016). If these reported rates of sexual assault within the military itself are any indication of the pervasiveness of a sexual assault culture in the American military, where there are legal protections for American service men and women, then one might reasonably assume that assault culture abroad is even more expansive. Moreover, the military is characterized by a patriarchal structure that emphasizes masculine ideas, dominance, and control. This is demonstrated in instances when men primarily dominate leadership and high-ranking positions. The military’s hypermasculine dynamic is associated with the acceptance and perpetration of sexual assault, where a man’s sense of patriarchal entitlement makes it easier for them to justify sexual assault. The men’s feelings of entitlement to regular sex is perceived to be the link between masculinity and rape-related attitudes. Carl Andrew

the American military, three themes emerge: (1) governmental prohibition of marriage between American servicemen and racialized foreign women; (2) military facilitation of sex trafficking between servicemen and racialized foreign women; and, as Collins has argued, (3) the combined impact of governmental policies that restricted marriage with racialized foreign women and the facilitation of sexual exploitation led to a disproportionate number of racialized nonmarital foreign-born children being abandoned by their fathers.¹⁵⁹

History is replete with examples of both Congress and the American military restricting interracial marriage. As Zeiger chronicles, the government's repression and condemnation of interracial relationships was a central feature of marriages between members of the military and foreigners from World War I through the Korean War and the Vietnam War: "In World War I, for instance, U.S. military and civilian authorities took a paternalistic stance toward white soldiers" and white foreign women, "determined to 'protect' them from sexually promiscuous foreign women."¹⁶⁰ When it came to black soldiers, however, in addition to an outright ban on interracial marriages, military officials warned allies of the sexual danger that black servicemen posed to the white women of other nations.¹⁶¹ In another example, the American Expedition Forces threatened a Filipino-American serviceman with statutory rape charges for attempting to marry a German woman with whom he had fathered two children.¹⁶²

In World War II, the government, with the support of the military, maintained its ban on interracial soldier marriage. In 1945, the War Brides Act explicitly excluded women who were "ineligible for citizenship" because of their race, such as Asian women, and the privilege of preferential immigration status was denied to them.¹⁶³ As Collins argues, "The racial prohibitions incorporated into the War Brides Acts meant not only that a soldier could not bring his racially excludable wife home, but also—pursuant to explicit military policy—that the soldier would not likely be given permission to marry his racially excludable girlfriend in the first place."¹⁶⁴

Continuing through the Korean and Vietnam Wars, the military actively thwarted marriages between soldiers and their Asian girlfriends,¹⁶⁵ but facilitated

Castro et al., *Sexual Assault in the Military*, 17 MIL. MENTAL HEALTH 2-3 (May 16, 2015), <http://cir.usc.edu/wp-content/uploads/2015/06/Sexual-Assault-in-the-Military.pdf> [https://perma.cc/VA4Q-D67M].

159. See Collins, *Illegitimate Borders*, *supra* note 6.

160. ZEIGER, *supra* note 45, at 6.

161. *Id.*

162. *Id.* at 36.

163. Collins, *Illegitimate Borders*, *supra* note 6, at 2208 (citing War Brides Act, Pub. L. No. 79-271, § 1, 59 Stat. 659, 659 (1945) (excluding brides under immigration laws from preferences provided in Act)).

164. Collins, *Illegitimate Borders*, *supra* note 6, at 2208-09.

165. Rose Cuisson Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1407-11, 1429 (2011).

and encouraged sex trafficking.¹⁶⁶ Citing Zeiger, Collins explains this duality and its impact on nonmarital foreign-born children:

[A]s Zeiger demonstrates, during the Vietnam War the military “vigorously and systematically discouraged marriage for American service personnel in Vietnam, placing a wide array of bureaucratic and financial obstacles in front of marriage aspirants.” Instead, drawing on a set of conventions and practices that had emerged during the Korean War, the military encouraged nonmarital sexual liaisons between American soldiers and local women, including long-term “contract” arrangements. The children born to such relationships were illegitimate and hence not American citizens.¹⁶⁷

As in the Korean War, during the Vietnam War, the American military actively facilitated a sex trafficking culture, through “R & R” programs, for example, which facilitated sexual exploitation between servicemen and foreign women.¹⁶⁸ In elaborating on the impact of the duality of racially restrictive marriage policy and military-facilitated sex trafficking, Zeiger argues the combined policies shared a common core:

The intention to preserve and extend male control over women. This intention was overt in regard to prostitution. The image of a military red-light district, guarded by American MPs, surrounded by a wall topped with broken glass, and staffed by army “inspected” prostitutes, is an apotheosis of female disempowerment. But crucial features of overseas marriage policy during World War II also created a wall of male control around the foreign brides of American servicemen. The procedures for wives to enter the United States and the establishment of paternity claims were both areas in which the alien spouse was denied standing to act independently and on her own behalf. In the matter of paternity, an alien woman, married or unmarried, who had given birth to the child of a U.S. serviceman had no access to child support, nor the child, access to citizenship, unless the American father formally agreed to recognize the child. Similarly, though a GI dependent was,

166. ZEIGER, *supra* note 45, at 79; Bruce Cumings, *Silent but Deadly: Sexual Subordination in the U.S.-Korean Relationship*, in SAUNDRA POLLOCK STURDEVANT & BRENDA STOLZFUS, LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 169 (1992); *see also* Linda Trinh Võ & Marian Sciacchitano, *Moving Beyond “Exotics, Whores, and Nimble Fingers”*: Asian American Women in a New Era of Globalization and Resistance, 21 FRONTIERS: J. WOMEN STUD. 1, 4 (2000) (“The trafficking of Asian women as commodities in the global sex trade continues because of the U.S. military presence in Asia, the sex tour industry in Asia, and the Asian mail-order bride business. The construction of Asian women as hyperfeminine erotic exotics who willingly and passively service male desires has contributed to these thriving sex industries.” (citation omitted)).

167. Collins, *Illegitimate Borders*, *supra* note 6, at 2211 (citing ZEIGER, *supra* note 45).

168. ZEIGER, *supra* note 45, at 79-80.

theoretically, eligible for transportation to the United States, only the American serviceman could file a transportation request.¹⁶⁹

As the result of American military bases in Philippines, thousands of Filipino mothers filed a \$68 million dollar lawsuit arguing that America had a legal responsibility to educate and provide medical care for an estimated 8,600 Amerasians in Olongapo, the site of Subic Bay Naval Station, about the size of Singapore.¹⁷⁰ The court filings described the Navy’s direct role in the local bar and sex industry, where the Navy helped regulate the clubs, some of which were owned by Navy officers or retirees. They registered 15,000 to 17,000 “hospitality” women and gave them information and medical care aimed at limiting venereal disease. The Navy also approved off-base apartments where many sailors lived with girlfriends.¹⁷¹ In remarking on Olongapo, one Navy Judge Advocate stated, “[W]e participated in creating the world’s biggest brothel. Olongapo is called ‘the city of 10,000 whores.’”¹⁷² In describing the carnival-like atmosphere of the brothels for American servicemen, the judge advocate stated:

If you’re an impressionable young kid, and you’re taken in tow—outside to Olongapo which is just row after row of bars, massage parlors, and no-pretext brothels—what does that do to a young kid’s view on the value of women?

These gals would do the most degrading things—and do them in public. And it was always in a group. A gal would come along to a table in a bar and literally “serve” all the guys at the table. It was always in groups. In fact, girls would do tricks with their bodies and orifices on stage—that was very common. One game was to have the girl go under the table and fellate each guy—and whoever’s face cracked soonest would buy the next round of drinks. This was true in all the enlisted bars—in the officer clubs there wouldn’t be the group sex, but there would be group performances.

169. *Id.*

170. Bruce Lambert, *Abandoned Filipinos Sue U.S. Over Child Support*, N.Y. TIMES (June 21, 1993), <https://www.nytimes.com/1993/06/21/world/abandoned-filipinos-sue-us-over-child-support.html> [https://perma.cc/3KMC-MXCQ]. Olongapo had the largest prostitution trade near any military base in Asia. Approximately 15,000 to 17,000 sex workers worked in Olongapo and neighboring towns. An estimated 9,000 of these women worked in over 330 bars, massage parlors, and other “entertainment” establishments in Olongapo. Elizabeth Kolby, Comment, *Moral Responsibility to Filipino Amerasians: Potential Immigration and Child Support Alternatives*, 2 ASIAN L.J. 61, 64 (1995).

171. Lambert, *supra*, at 173.

172. Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 711-12 (1996).

Subic Bay was an automatic stop for all the ships in the Pacific. So all the guys experienced this. This was not just a few of the guys or some small proportion; this was all the guys

That place was a circus. If I had to guess at the percentage of sailors—officer and enlisted—who never partook of those activities in Olongapo and Subic, I’d guess five percent.

The one thing that strikes me is: I don’t think it’s possible to overestimate the influence of places like Olongapo. And these included graduates of the top law schools in the country—and we were all affected by it I mean I can’t overstate it; it was beyond anything I’d ever seen or ever have seen since The whole carnival atmosphere cannot be overstated.¹⁷³

This fun-filled, carnival-like frat house circus contrasts sharply with the utter squalor American servicemen, with insatiable appetites for unprotected “One Dollar Chicky-Chicky Girls,” create for their abandoned children, described in more detail in Section III.C. The descriptions above provide context for the property right Congress gives these servicemen to go abroad and “Let the Good Times Roll”¹⁷⁴ without any fear that their offspring might show up at their Senate hearings, houses of worship, and family gatherings to remind Dad, his family, and his community of all those raucous fun-filled nights, all the laughter, and all the giggling. The images also reflect the moral bankruptcy of the American military in facilitating and subsidizing sex trafficking while restricting interracial marriage and the life chances of children Americans fathered. As Collins poignantly argues, the combined restrictions on interracial marriage, particularly to racialized foreign women, and the military’s active facilitation of sex trafficking, particularly with racialized foreign women, along with the derivative citizenship laws enacted by Congress, resulted in “the predominantly white babies of World War II soldiers [becoming] citizens and ‘baby boomers,’ while a very significant population of nonmarital Amerasian babies were excluded and became ‘bui doi’—children of the dust.”¹⁷⁵

III. JOHNNY, HIS WHP, AND HIS SUPPORTING CAST OF CHARACTERS, JEZEBEL AND OFFRED

Congress, with the Supreme Court’s blessing, has equipped citizen men with both a dagger and a shield when traveling abroad and spreading their seed.

173. *Id.* at 711–12.

174. *See generally* STURDEVANT & BRENDA STOLZFUS, *supra* note 166.

175. Collins, *Illegitimate Borders*, *supra* note 6, at 2213.

Section 1409 is a weapon to engage in hypermasculinity liberated from the shackles of reproductive burdens and responsibilities—freed from reproductive punishment or sanction. Under § 1409, men have a right—which is so valued that it rises to the occasion of a property interest—to proclaim to the world, “I want to whore all I want without a care in the world,” and to not suffer the reproductive sanction or punishment of forced parental responsibility against their male prerogative, autonomy, and freedom.

Section 1409 is a direct descendant of antebellum chattel slavery: using the legal category of citizenship, § 1409 perfects sovereignty in white heteropatriarchy and vulnerability in racialized and gendered others. According to Joseph Singer, “the legal system makes constant choices about what interests to define as property.”¹⁷⁶ Moreover, “[s]tate power defines and allocates property rights, and property rights, in turn, allocate power and vulnerability. Seemingly neutral definitions of property rights by the courts [and Congress] distribute power and vulnerability in ways that construct illegitimate hierarchies based on race, sex, class . . . and sexual orientation.”¹⁷⁷ In § 1409, Congress delegated to citizen men the sovereign power of “the legal category of citizenship,” which functions like property. In § 1409, Congress conferred upon citizen men a package of entitlements that work on the valences of white, male, and hypermasculine supremacy, taken together as white heteropatriarchy. Under § 1409, citizen men have the right of exclusion, what Cheryl Harris calls “the conceptual nucleus of whiteness”—the right to discard and exclude their children from the American polity, which is historically and consistently synonymous with whiteness. As part of the package of entitlements, § 1409 gives American men the power to abandon their children to circumstances tantamount to destruction. As Joseph Stigler states, “Ownership, with the attendant right to exclude others, confers power on the owner—power to deny other people things they need to live.”¹⁷⁸ In having the right to exclude and destroy, citizen men can continue the right to control, use, and enjoy foreign women free from the responsibilities and regulation of parenthood. Section 1409 turns foreign women into things to be used and their offspring into stuff to be discarded. If property is a legal relation among persons with respect to things, then § 1409 creates a legal relation of racialized and gendered sexual subordination shared between citizen men with respect to foreign women. Section 1409, like property, creates a stable basis of expectation with respect to sexual control over foreign women because it mitigates the burdens of parenthood. To the extent that property is inherently distributional,¹⁷⁹ § 1409 allocates a valued resource, citizenship.

176. Harris, *WAP*, *supra* note 18, at 1791 n.82 (quoting Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 47 (1991)).

177. *Id.* (quoting Singer, *Sovereignty and Property*, at 8).

178. Singer, *supra* note 41, at 1322.

179. Joseph W. Singer, *Property*, in *THE POLITICS OF LAW* 240, 249 (David Kairys 3d ed. 1998).

In § 1409, Congress has given men a right to mitigate any duty or responsibility owed to their children or the mothers of their children, under American law. Furthermore, Congress has granted American men a birthright to either create American citizens or to exclude and destroy them. At the same time, Congress has suppressed the ability of foreign women to create American citizens. Foreign women are good enough to sexually exploit, but not to create American citizens outside of wedlock. The right Congress gave to citizen men in the form of a choice as to the citizenship of their children mitigates the rights and decision making of foreign women who birth American citizens. The decision is one of male prerogative.

Through this process, whiteness, maleness, and hypermasculinity take on the character of property in much the same way as Cheryl Harris's "whiteness as property,"¹⁸⁰ where whiteness, maleness, and the heteropatriarchal familist ideal become the governing organizing principles of all space—citizenship. Whiteness is the touchstone and talisman of American entitlement and sense of belonging. Section 1409 is "male" in that it is an exclusively male prerogative. It is heteropatriarchal familist in that § 1409 extends a property right, part of the package of entitlements, which encompasses the right to engage in hypermasculine sexual performance freed from reproductive sanction or punishment—free from the consequences of creating children. This Article refers to the entire process outlined in this Part III as a white heteropatriarchal property right in philandering, sexual exploitation, and rape (the "WHP").

The WHP is a conceptual model that negates the claim that § 1409 emerged from the biological and natural differences between men and women. On the contrary, the WHP exposes § 1409 as the product of foundational choices—choices about the relationship between rights and power.¹⁸¹ The WHP casts § 1409 as a form of property that, as a social institution, privileges the rights of men to perform hypermasculinity on foreign women and discard their children. The WHP exposes Congress's creation of an institution and social arrangement that distributes a highly significant social good—citizenship—and justifies privilege. The WHP places § 1409 in a moral framework, so that its obfuscating layers, hidden presumptions, and allocation of rights and duties can be scrutinized and measured against a society that pledges allegiance to liberty and justice. The WHP questions whether § 1409 is an outlier in a society that rejects forms of social life and political systems, like slavery, as a way of organizing control over humans.¹⁸² In its foundational choices, § 1409 creates a property system inconsistent with the norms governing a free and democratic society that treats each person with equal concern and respect.¹⁸³ As discussed in more detail

180. Harris, *WAP*, *supra* note 18.

181. Singer, *supra* note 41, at 1323.

182. *Id.* at 1325.

183. *Id.* at 1336.

in Part V, § 1409 stands at odds with the rhetoric surrounding abortion rights and women’s reproductive integrity, specifically the morality of sexually responsible behavior, the sanctity of human life, and the responsibilities and duties of parenthood.

This Part lays the theoretical underpinnings for the claim that § 1409 creates the WHP. Drawing from Cheryl Harris and other modern theories of property, Section III.A further explicates § 1409 as a property right. Drawing from Anthony Farley and Angela Harris, Section III.B explicates the hypermasculine performance aspect of the WHP. Finally, Section III.C introduces Jezebel, the whore, the Aristotelian evil snare of men, and Johnny’s doppelganger. She embodies the narrative of victim blaming that allows Johnny to engage in treachery and still maintain his innocence. She is part of the cast of characters embedded in the DNA of § 1409. She becomes the hidden justification, “slut shaming,” in the interpretive base and doctrine that protects § 1409 from equal protection challenges in four Supreme Court cases, discussed in Part IV. Just as Jezebel symbolizes foreign women, Offred embodies citizen women. Offred is the main character in Margaret Atwood’s *The Handmaid’s Tale*, which depicts a dystopian universe where women are banished to reproductive enslavement and harvesting.¹⁸⁴ Offred is the citizen woman automatically saddled with parental responsibility.¹⁸⁵

A. *The WHP as Property*

According to Cheryl Harris, “whiteness as property” names the concept that whiteness is a form of property because (1) whiteness is constitutive of what it means to be a free person; (2) the law excludes others from whiteness (strictly policing its boundaries); and (3) crucial legal rights and advantages flow from whiteness.¹⁸⁶ Whiteness satisfies the functional criteria of property because it includes the enjoyment of rights and privileges as well as the dominion over land, bodies, and other forms of materiality. By both shielding white people from the vulnerability that comes from lacking rights, land, or wealth, and conferring upon white people the ability to materially increase their power, white personhood confers a kind of property right that solidifies white supremacy conceptually, spatially, and ontologically.¹⁸⁷ According to Harris, property is possessed not only in the form of land, but in the form of white personhood.

184. MARGARET ATWOOD, *THE HANDMAID’S TALE* (Anchor Books Penguin Random House ed. 1998).

185. I mention Offred here because she is the subject of upcoming scholarship—a companion piece that argues that § 1409 creates moral and legal accountability, as well as equality asymmetry with laws involving abortion and the criminalization of women for birthing drug-dependent children. Although some of these arguments are explored in this piece, future scholarship will explore those ideas in depth.

186. Harris, *WAP*, supra note 18, at 1725-30.

187. *Id.* at 1713.

White personhood, according to Harris, is exclusively given the powers of possession, which manifests materially in the owning of property, immunity from legal harm, and the subordination of non-whites.¹⁸⁸ Whiteness itself is the property of being able to *possess* rights, power, immunities, as well as land and human beings. White people have created supremacy in themselves by making property of others. Drawing from Harris, and as Andrew Krinks observes, whiteness is the preeminent mode of ownership and power and, in turn, has the authority to bend blackness to its will. Whiteness *becomes* the Earth because whiteness subsumes everything into itself, likewise materially manifesting itself onto the world, such that blackness can both literally and figuratively function as intrusion or trespass, simply for existing in what is sometimes explicitly or implicitly understood as “white space”¹⁸⁹ or America.

Drawing from Harris, § 1409 is where the monopolization of citizenship in the hands of citizen men traveling abroad, and the propertization of foreign bodies conflates ideologically, doctrinally, and materially: citizenship is where white heteropatriarchy perfects sovereignty in itself and vulnerability in others through a kind of statelessness¹⁹⁰—a place without rights, what Chief Justice Taney called, “no rights which the white man was bound to respect”¹⁹¹—and a place implemented by force and ratified by law.¹⁹² Citizenship, therefore, polices the boundaries of whiteness at the nation’s border as a means of preserving the material and psychological benefits of whiteness as well as lines of inheritance.¹⁹³ Section 1409 sets the boundary between the American polity and racial “filth,” bringing down the value of white cleanliness and societal order. Section 1409 draws a divide between America and inestimable numbers of foreign women whose sexual exploitation by American men marks them as the undesirable “other” imperiling white space and societal cleanliness. Section 1409 keeps foreign women and their children fathered by American men frozen as “dirty secrets” petrified in the white heteropatriarchal mind and a material world of limitless exploitation beyond the border far, far away.

Harris provides the connection between property and relationships of domination and exploitation in the following:

[P]roperty is a legal construct by which selected private interests are protected and upheld. In creating property “rights,” the law draws boundaries and enforces or reorders existing regimes of power. The

188. *Id.* at 1725-30.

189. Onwuachi-Willig, *supra* note 40, at 1121.

190. Harris, *WAP*, *supra* note 18, at 1715 (“Although the systems of oppression of Blacks and Native Americans differed in form—the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land—undergirding both was a racialized conception of property implemented by force and ratified by law.”).

191. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

192. *Id.*

193. Onwuachi-Willig, *supra* note 40, at 1119.

inequalities that are produced and reproduced are not givens or inevitabilities, but rather are conscious selections regarding the structuring of social relations. In this sense, it is contended that property rights and interests are not "natural," but are "creation[s] of law."¹⁹⁴

Under § 1409, Congress, with the Supreme Court in tow, has made a choice to grant the WHP legal status, which allocates and distributes power and vulnerability for the express purpose of sexual domination and commodification. These choices are not the product of physiological differences between men and women, but rather, valued access to foreign women for hypermasculine purposes. Section 1409 is where citizen men become ideological propositions enforced through power, and foreign women and their nonmarital children become ideological propositions imposed through subordination, all of whom exist in a material reality of power and control that § 1409 creates.¹⁹⁵ Under § 1409, citizen men become weapons of law and a resource deployable at the social, political, and institutional level to maintain control over foreign women and their children while engaged in the sexual exploitation of foreign women.¹⁹⁶

Under § 1409, the legal mechanism of citizenship maneuvers, much like property, to endow white heteropatriarchy with both the ideological and material right to exclude, possess, control, enjoy, transfer, and destroy.¹⁹⁷ In that way, § 1409 satisfies the functional criteria of property.¹⁹⁸ Like property, § 1409 creates rights and privileges in white heteropatriarchy, and it also creates duties in foreign women and their offspring, namely to respect the rights and privileges in American men and to accept their own denigration at the hands of American men. Section 1409 creates "outside" children. In this way, property not only protects value, it creates value. Section 1409 protects and creates value in whiteness and vulnerability in foreignness. It protects and creates value in maleness and vulnerability in femaleness. It protects and creates value in

194. Harris, *WAP*, *supra* note 18 at 1730.

195. *Id.* ("The law constructed 'whiteness' as an objective fact, although in reality it is an ideological proposition imposed through subordination. This move is the central feature of 'reification': 'Its basis is that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity,' an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.'")

196. *Id.* at 1734 ("The state's official recognition of a racial identity that subordinated Blacks and of privileged rights in property based on race elevated whiteness from a passive attribute to an object of law and a resource deployable at the social, political, and institutional level to maintain control.")

197. Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness As Property and Racial Performance As Political Speech*, 31 *HARV. J. RACIAL & ETHNIC JUST.* 7, 30 (2015). (quoting Harris, *WAP*, *supra* note 18, at 1736 ("The right to exclude was the central principle, too, of whiteness as identity [t]he possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded."))

198. Harris, *WAP*, *supra* note 18, at 1731 (arguing that whiteness functions as property in the right to exclude, possess, transfer, use, dispose, and enjoy).

heteropatriarchal sexual performance and the material circumstances necessary to sexually exploit.

At the core of whiteness is what Harris calls its conceptual nucleus of exclusion.¹⁹⁹ Making whiteness a kind of property “reproduces black subordination” by default, because the construction of whiteness as superior and as the access to wealth, property, and citizenship, is not possible apart from the dehumanization of blackness.²⁰⁰ Thus, whiteness not only sets up the dichotomy of insider and outsider, but by positioning itself inside the circle of rights and privileges and situating the other outside the charmed circle, it also establishes racial hierarchy that enables the vulnerable conditions for exploitation. In Harris’s words, “The fundamental precept of whiteness—the core of its value—is its exclusivity. But exclusivity is predicated not on any intrinsic characteristic, but on the existence of the symbolic Other”²⁰¹ In other words, as with many objects generally in a capitalist society, the thing in and of itself lacks value. The ability to exclude creates value. Valorized whiteness requires dehumanized blackness in order to be powerful materially and symbolically. If whiteness is property, then blackness is always trespass.²⁰²

Drawing from Harris, the “white” in the WHP is the right to exclude from the American polity, which is synonymous with whiteness. The driving force in the bundle of rights, or package of entitlements, that § 1409 confers to citizen men, regardless of their race, is the right to exclude, which structurally assumes whiteness. In fact, and as discussed in more detail in Part IV, which analyzes the Supreme Court cases that have addressed § 1409, it is the power of exclusion that triggers Congress’s plenary power in areas of immigration. It is also Congress’s plenary power that has shielded § 1409 from a more exacting scrutiny than would otherwise apply to explicit race, gender, or nationality disparity in other areas of law.²⁰³ As Harris states, “American law has recognized a property interest in whiteness that although unacknowledged now forms the background against which legal disputes are framed, argued, and adjudicated.”²⁰⁴ Moreover, § 1409 not only policies the boundaries of white space, but it also sets up a perimeter around foreign women against whom citizen men form their masculine identities through hypermasculine sexual performance. And then, in an endless

199. *Id.* at 1714; *see also* Onwuachi-Willig, *supra* note 40, at 1153; MICHELLE ALEXANDER, *THE NEW JIM CROW* 257-58 (2012) (“[A]n aspect of human nature is the tendency to cling tightly to one’s advantages and privileges and to rationalize the suffering and exclusion of others.”).

200. Harris, *WAP*, *supra* note 18 at 1731.

201. *Id.* at 1789.

202. Onwuachi-Willig, *supra* note 40, at 1156-57. This concept might also explain why black equality, for some whites, looks like trespass, a feeling some characterize as being left behind.

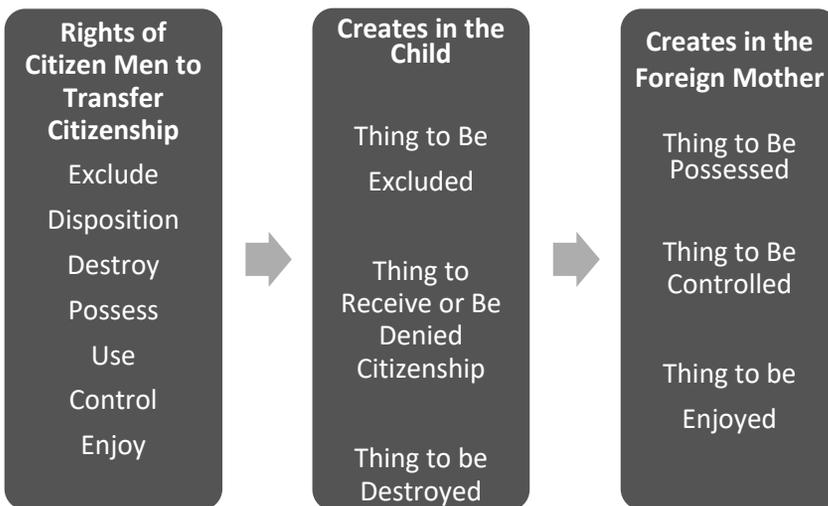
203. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); Michael G. McFarland, *Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations*, 63 N.Y.U. ANN. SURV. AM. L. 467, 509 (2008).

204. Harris, *WAP*, *supra* note 18, at 1714.

stream of ironies, the foreign woman’s sexual exploitation by American men becomes yet another reason to deny her children citizenship. As discussed in more detail in Part IV, the Supreme Court has justified the constitutional solvency of § 1409 by raising the evil specter of millions of war babies ready to raid the government coffers, and an equal number of menacing foreign women who do not know the identities of their children’s fathers; thus, the sexual immorality and depravity of these foreign women become yet another reason to deny their children access.

Extending from Harris, § 1409 creates the WHP. By conferring a package of entitlements to citizen fathers, more specifically by granting citizen fathers the right to exclude their nonmarital foreign-born children from the polity—to deny them citizenship—§ 1409 vests in these men not just a right to exclude their children, but a right to effectively destroy them, while simultaneously investing in these fathers a biopower to continue the sexual possession, control, use, and enjoyment of foreign women. The following chart is a visualization of the WHP.

Figure 1: Visualization of the WHP



To further illustrate the power conferred by § 1409 and to humanize the claim that § 1409 creates a right in citizen fathers to abandon their children in circumstances tantamount to destruction, consider the following passage from Bonnie Kae Grover, describing the “bui doi,” “children of the dust,”²⁰⁵ the

205. Collins, *Illegitimate Borders*, *supra* note 6, at 2213. Similarly in the Philippines, the Amerasians, fathered by Americans, are known as “throwaway children,” “bye, bye, Daddy,” “half dollar,” or “souvenir.” Lambert, *supra* note 170. They live on the margins, endure high rates of poverty and ill health even by Filipino standards, and are frequently abandoned as infants or raised by young single mothers. Many thus turn to prostitution. Emily Rauhala, *Filipino Children of U.S. Troops Have Mixed*

children American military men fathered and abandoned during the Vietnam War, when America was out spreading democracy.²⁰⁶ These discarded children are now middle-aged and living in squalor facilitated by their American fathers and the societal policies embedded in § 1409:

Most Amerasians were born to working class women and thus lack the education and resources to relocate to the United States or even make contact with their fathers. Many of them look strikingly occidental, but far from conferring an advantage, their Western appearance subjects them to scorn and derision. Vietnam is a relatively homogeneous society in which Amerasians cannot hide that their mothers consorted with a hated enemy. Some mothers abandoned their children, placed them in orphanages, or gave them to relatives to raise. Today, they are subject to intense discrimination. Most cannot find jobs and live on the streets or lead lives of crime and prostitution. Many live in official compounds built for their protection or otherwise depend on the government for safety. There has been little public pressure to make amends and little hue and cry in the United States to try to relieve the conditions under which these children live.²⁰⁷

In sum, modern theories of property explain the power of the WHP and its formidable strength in the face of constitutional challenge. Although many laws that facially discriminate on the basis of gender have been overturned, partially because their explicit gender references trigger a greater burden of justification, § 1409 remains entrenched. It remains resilient because it protects a time-honored property right behind the obfuscating glare of legal doctrine's power to ratify the settled expectations of white heteropatriarchal privilege as natural—the legitimate natural baseline—evinced in the biological differences between

Feelings on American Return, WASH. POST (May 15, 2016), https://www.washingtonpost.com/world/asia_pacific/filipino-children-of-us-sailors-and-soldiers-have-mixed-feelings-on-american-return/2016/05/15/a12b8a7a-1621-11e6-971a-dad9ab18869_story.html [<https://perma.cc/3W3D-MLBL>].

206. “No one knows how many Amerasians were born—and ultimately left behind in Vietnam—during the decade-long war that ended in 1975. In Vietnam’s conservative society, where premarital chastity is traditionally observed and ethnic homogeneity embraced, many births of children resulting from liaisons with foreigners went unregistered.” David Lamb, *Children of the Vietnam War*, SMITHSONIAN MAG. (June 2009), <https://www.smithsonianmag.com/travel/children-of-the-vietnam-war-131207347> [<https://perma.cc/ZUB3-EDAJ>]. Congress enacted legislation in 1987 giving Amerasians special immigration status. James Dao, *Vietnam Legacy: Finding G.I. Fathers, and Children Left Behind*, N.Y. TIMES (Sept. 15, 2013), <https://www.nytimes.com/2013/09/16/us/vietnam-legacy-finding-gi-fathers-and-children-left-behind.html> [<https://perma.cc/7BAL-QNAL>]. Since then, more than 21,000 Vietnamese Amerasians have relocated to the United States. Dao, *supra*. “It is also estimated that there are roughly 50,000 Filipino Amerasians, due to the United States’ 94-year occupation of the archipelago from the Spanish-American War in 1898 until withdrawal in 1992.” Emily von Hoffmann, *The Forgotten Americans: Meet the Abandoned Children of U.S. Military Servicemen Abroad*, PIXEL MAG. (Nov. 19, 2015), <https://medium.com/pixel-magazine/the-forgotten-americans-meet-the-abandoned-children-of-us-military-servicemen-abroad-3fc54f8cd8f3> [<https://perma.cc/7L23-3WKN>].

207. See Bonnie Kae Grover, *Aren't These Our Children? Vietnamese Amerasian Resettlement and Restitution*, 2 VA. J. SOC. POL'Y & L. 247, 254 (1995).

men and women, which cannot be disturbed without overturning the entire natural order.²⁰⁸ Part IV illuminates how the Supreme Court has entrenched and legitimated the settled expectations of the WHP through the obfuscating might of nature and biology, turning those hegemonic maneuvers into legal doctrine, which reifies a material reality of sexualized racial domination.

Before turning to the performative aspects of the WHP, it is imperative to highlight the novelty of this article, and that is the value of applying a property rubric to § 1409; centralizing the lives of racialized women as the interpretive base for a critique of § 1409; and the value of intersectional analysis to unearth the pernicious endurance of the WHP. Although the current controversy surrounding § 1409 is rightfully multifaceted, a property analysis is absent from the dialogue and debate. And yet a property perspective is ubiquitous in § 1409. Applying a property rubric to citizenship reveals that both citizenship and property share the same conceptual nucleus—exclusion. Property involves how society recognizes value,²⁰⁹ how society organizes space, and how society organizes people in space. Drawing from Harris, white heteropatriarchy has usurped all space and relegated vulnerable bodies to particularized places, for the purpose of exploitation. Space, therefore, becomes hierarchical on the valences of race, class, and gender. In restricting the movement and actions of nonmarital foreign-born children, Congress has fundamentally framed § 1409 as a property interest. In § 1409, Congress is grappling with what to do with disposable children—how to physically cordon them off from the American polity—how to leave them behind as a “dirty” and “dark” secret.

Not just Congress, but the Supreme Court, in immunizing § 1409 from equal protection challenges, has justified § 1409 as protecting government coffers, legitimate lines of inheritance for citizen men, and the nation’s (white) boundaries from undesirability, in the form of nonmarital foreign-born children and their immoral mothers. Section 1409 is a direct descendant of antebellum slavery: it is where citizenship and property collude to render foreign women vulnerable to hypermasculine performance. From the standpoint of property, it allows American men to treat both foreign women and their own children as if they were nonhuman, much like slave laws allowed white men to treat their own enslaved children and the mothers of those children as property. It makes

208. Harris, *WAP*, *supra* note 18, at 1714 (“After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.”).

209. Quoting James Madison, Cheryl Harris states:

In James Madison’s view, for example, property ‘embraces everything to which a man may attach a value and have a right,’ referring to all of a person’s legal rights. Property as conceived in the founding era included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.”

Harris, *WAP*, *supra* note 18, at 1726.

children fathered by American men trespassers on American soil. It makes individual citizen men border agents at the nation's white borders materially, psychically, and aesthetically—defending the nation's boundaries from penniless vagrants, bringing down the value of whiteness with racialized filth. Citizenship, like Harris's whiteness as property, confers tangible and economically valuable benefits and is jealously guarded as a valued possession, allowed only to those who meet a strict standard of proof.²¹⁰ In immunizing § 1409 from equal protection challenges, the Supreme Court is engaged in a turf battle—warfare—protecting the nation from undesirability, particularly racialized trespassers fathered by American men, discarded and left behind. To the extent that property law and property rights have an inescapable distributive component,²¹¹ Congress has distributed a set of rights and privileges to citizen men that work along the valences of whiteness, hypermasculinity, and foreign female subjugation—the three straps in the WHP. Moreover, as discussed in more detail in Part IV, each of the Supreme Court cases that have upheld § 1409 can be read as the Supreme Court's defense of property interests embedded in the WHP. Finally, applying a property rubric to § 1409 reveals it as a white heteropatriarchal project—fundamental to white heteropatriarchal identity formation, whereby sexually subjugated foreign women become a rite of passage in masculine identity formation, American immigration and citizenship policy, and American imperialism.

B. *The WHP as Performance*

In arguing that § 1409 creates a property right in white heteropatriarchal performance on vulnerable bodies, I reference several theorists. Most immediately, I reference Anthony Farley and his seminal article *The Black Body as Fetish Object*, particularly Farley's argument that black bodies have provided platforms, canvasses, stages, and theater for the formulation and formation of "whiteness."²¹² Farley argues, "The white identity is created and maintained by decorating black bodies with disdain, over and over again"²¹³ and that "[r]ace is a form of pleasure in one's body which is achieved through humiliation of the Other and, then, as the last step, through a denial of the entire process."²¹⁴ Whiteness, as an identity, emerges out of this discourse; for "[i]f the black body is the site and cite of all ills, then the white body is not."²¹⁵ Moreover, once the black body, and by extension foreign women, particularly foreign nonwhite women, is branded as the site for all ills, it provides carte blanche for sexual

210. *Id.*

211. Singer, *Property*, *supra* note 179, at 249.

212. Farley, *supra* note 105, at 464.

213. *Id.* at 463.

214. *Id.* at 464.

215. *Id.* at 475.

exploitation because the foreign body, and foreign land, become an indispensable justification for sexual domination and canvass for unbridled sexual fantasy.²¹⁶

Far from aberrant, these performances are endemic to the formation of white heteropatriarchal identity, and by extension, American sovereignty. It is through these performances that white heteropatriarchy takes material shape. Angela Harris, citing Elaine Scarry, maps out the connective tissue between these performances on vulnerable bodies and the creation of sovereignty, dominion, and control:

Literary theorist Elaine Scarry argues that one of the properties of human pain is that its characteristics—its vibrancy, its reality, its certainty—can be transferred away from a human body and onto something else, something that in itself does not appear vibrant, real, or certain. In this sense, pain, and the violence that induces it, is a means of creation, a way of making ideas real, the way bloodless ideas such as property and sovereignty are made real in war and conquest by the presence of actual blood and the mutilation and destruction of human bodies.²¹⁷

In the context of § 1409 and its history, white heteropatriarchal performance on vulnerable bodies, including philandering, sexual exploitation, and rape, is a way of materializing an idea about inferiority and superiority, entitlement and property, sovereignty and vulnerability, and belonging and statelessness upon the foreign female's very flesh. Such an inscription is a form of maintaining power over foreign women. It is a modality of domination. Section 1409 enables a performance on vulnerable bodies that functions as an identity formation, a rite of passage, that draws the line between domination and subjugation. Section 1409 facilitates a male citizen release valve through the inscription of sexualized performance on foreign women, creating a hierarchy of mastery and submission and superiority and inferiority, which taken together reestablishes masculinity.

C. *Johnny's Doppelganger Jezebel—the Whore and Aristotelian Evil Snare of Men*

Jezebel is Johnny Appleseed's necessary mirror image, foil, or doppelganger—the foreign woman as "whore" and Aristotelian evil snare of men. Johnny Appleseed, of course, is the embodiment of white heteropatriarchy,

216. See *id.* at 475. (discussing the branding power of narratives of supremacy to justify the use of black bodies as places for a canvass for both pleasure and humiliation).

217. Harris, *Gender, Violence, Race, and Criminal Justice*, *supra* note 24, at 781.

wielding his WHP. Joan Tarpley defines Jezebel as “the wanton, libidinous black woman whose easy ways excused white men’s abuse of their slaves as sexual ‘partners’ and bearers of mulatto offspring.”²¹⁸ Stacey Floyd-Thomas explains “the Aristotelian evil snare of men” as the necessary supporting narrative of rape culture and sexualized regimes of violence. As she explains, “[s]ex is an undisciplined result of a body overtaking its soul—a powerful force that drives men more than it does women, yet one nonetheless caused by women. Since the mind should control the body, sexual activity should be controlled as well.”²¹⁹ Interrelated patterns of sexism follow suit, for as kings and warriors, men are superior and must guard both their bodies and those of women who are subject to a “strict watch.”²²⁰ According to Floyd-Thomas, when men rape women, it is because women have used their bodies to ensnare the soul of men:

As a result, misogyny is rational, and heterosexism is a virtue. Likewise, sexual activity should be severely restricted for women of the same social and economic class as the men whose sexual needs are so powerful and demanding, but it is nonetheless allowed and encouraged for men with “lower-class” women (women outside the circle of dominant-class men).²²¹

Hypersexualized, exoticized, and licentious, Jezebel embodies a form of victim blaming that reflects a discourse of domination. She is the narrative and direct outgrowth of laws that made vulnerable bodies property (e.g., *Dred Scott* and laws of coverture).²²² Victim blaming normalizes exploitation because the pathology of the perpetrator is rendered invisible by blaming the victim. Victim blaming is a fundamental precept of hegemony because it explains societal order as the fault of its victims. Jezebel, the whore, or the snare, is a quintessential counterpart to Johnny, the embodiment of white heteropatriarchy: through the snare (victim blaming), Johnny can engage in hypermasculinity and treachery and still maintain his innocence—and the importance of Johnny’s innocence can never be imperiled, questioned, or undervalued. No matter how treacherous, Johnny must always be innocent and his actions utterly deniable. By way of example, it is the constant over-pathologizing of vulnerable women, which leads

218. Joan Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1345 (1996) (defining Jezebel as “the wanton, libidinous black woman whose easy ways excused white men’s abuse of their slaves as sexual ‘partners’ and bearers of mulatto offspring”).

219. BEYOND THE PALE: READING ETHICS FROM THE MARGINS 12 (Stacey M. Floyd-Thomas & Miguel A. De La Torre eds., 2011). This view of women, particularly loose women, as the Aristotelian Evil Snare of Men, is also reflected in the books of the Old and New Testaments. See *Proverbs* 23:27-28 (“For a whore is a deep ditch; and a strange woman is a narrow pit. She also lieth in wait for a prey, and increaseth the transgressors among men.”); *1 Corinthians* 6:13 (“Now the body is not for fornication, but for the Lord; and the Lord for the body.”).

220. BEYOND THE PALE: READING ETHICS FROM THE MARGINS, *supra* note 219.

221. BEYOND THE PALE: READING ETHICS FROM THE MARGINS, *supra* note 219.

222. Cook, *Stop Traffic*, *supra* note 8.

to their (over)criminalization. It explains why we incarcerate women who give birth to children dependent upon illicit substances, but we allow Johnny to spread his seed all over the globe and discard his children. As another example, the American military sometimes facilitated the circumstances in which servicemen fathered children—for instance, by establishing "R & R centers"—but that facilitation did not factor into Justices Stevens's and Kennedy's opinions upholding the constitutionality of § 1409. They instead justified upholding § 1409 in part because they believed that many foreign women "do not know the identity of the fathers."²²³

The hypersexualized, fetishized, and racialized narrative of Jezebel, as seen in the Supreme Court's references to foreign women who do not know the identities of the fathers of their children, is what allows Johnny to engage in treachery and sexual transgression while maintaining his innocence. Jezebel is the foreign women whose demonization provides cover for Johnny's pathology—his whoring. Jezebel is also the exoticized footstool for Johnny's unbridled and unhinged sexual fantasy and fetish. She is the "goings on" between master and enslaved in the dirty slave shacks. Jezebel renders Johnny's hypermasculinity obfuscated, hidden from view, and latent because the focus shifts from Johnny's WHP onto the hypersexualized body of a racialized foreign woman. To be clear, Jezebel is not a reflection of how foreign or racialized women are, but rather, what white heteropatriarchy needs them to be.²²⁴ She is a deliberately created fiction to render invisible the pathology of the WHP. She is one aspect of a complex set of images and mythology that deny humanity in order to rationalize exploitation.²²⁵ In the lexicon of the master, she is an "evil" deserving of rape and barred from the big house along with her disposable children.

Jezebel, like the libidinous enslaved woman and the exoticized Asian woman, is simultaneously a product of white heteropatriarchal fantasy, sexual conduct, deniability, and excuse. By way of illustration, victim blaming was a narrative created and sustained by the American military to justify sexual exploitation and to provide a defense and justification for rape. The narrative serves a two-fold purpose: both of which perfectly track the workings of implicit bias and the pathological gaze: it (1) over-valorizes the innocent men of the military and (2) pathologizes foreign women. It concretizes the concept of the American warrior as pure and at the mercy of the foreign woman as evil and transcended.²²⁶ According to Susan Zeiger, victim blaming created a veil,

223. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1702; Kolby, *supra* note 170, at 63-65 (discussing the U.S. government's role in encouraging the growth of prostitution in Angeles City, just outside Clark Air Force Base, and Olongapo, next to Subic Bay Naval Stations, both in the Philippines).

224. Chang, *supra* note 38, at 250, 261 (2015).

225. Roberts, *Punishing Drug Addicts*, *supra* note 80, at 1437.

226. ZEIGER, *supra* note 45, at 15.

providing the right conditions to perpetuate the sexual exploitation, but to hide it from public approbation that might undermine public support for the war. In other words, it hid it in plain sight for continued pleasure, but cloaked it for protection from condemnation.²²⁷ Section 1409 facilitates the sexual exploitation of foreign women, but is enshrouded with obfuscating veils to assuage guilt and to remain hidden so that the viewer of the American scene can continue to participate in the implicit bias bubble, where one can consciously and simultaneously commit treachery, wallow in ignorance, steep oneself in denial, and then claim, “Oh my goodness. Well . . . I just didn’t know.”

As developed in more detail in Part IV, the Supreme Court has deployed the evil snare to immunize § 1409 from gender-based equal protection challenges. When the Court submerged § 1409’s gender disparity in “the problems of determining paternity” and foreign women who did not know the identity of their children’s father, the snare becomes part of the victim blaming process that inverts the gaze of pathology from the perpetrator to the victim, further obfuscating the perpetrator’s treachery. This move is key in the context of § 1409 because it becomes part of the government’s justification for § 1409 and is adopted in the majority opinions by both Justice Stevens and Justice Kennedy, military men.²²⁸ In their majority opinions, the snare is lurking in the background. Johnny and Jezebel are engaged in what Angela Harris calls a Manichean²²⁹ struggle of good and evil, where the innocent Johnny falls prey to the conniving trickery of the evil Jezebel and must be liberated by the Supreme Court.

IV. THE SUPREME COURT OPINIONS AND THREE STRAPS IN THE WHP— WHITENESS, HYPERMASCULINITY, AND FEMALE SUBORDINATION

On four separate occasion in the last twenty years, the Supreme Court has had an opportunity to bring § 1409 in line with modern standards of decency that mark the maturation of an advancing nation. The Court has, however, declined such advancement. The Court has instead erected legal narratives that ratify and normalize white heteropatriarchal entitlement, privilege, and power. The Court has submerged the gender asymmetry in § 1409 into the natural differences between men and women as well as Congress’s plenary power to police the nation’s borders. In the last of the four cases, Justice Ginsburg, writing for the majority, found that the more lenient physical presence requirement that applied

227. *Id.* (stating that “[p]olitical considerations also played a role, chiefly President Wilson’s need to steer unsettled public opinion in support of the European war; an army with high moral standards was an important condition of war support for many American voters, especially evangelicals”).

228. See *Nguyen v. INS*, 533 U.S. 53, 62 (2001).

229. Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 78.

to female citizens, not males, violated the Equal Protection Clause.²³⁰ In fashioning a remedy, however, the Court applied the more onerous standard applicable to men to women; thus, in a valiant effort to bring the gender asymmetry in § 1409 in line with modern notions of fairness, the Supreme Court preserved male privilege at the expense of women.

So why has § 1409 proven so resilient? It is resilient because it strikes at the core of American identity: it perpetuates racial discrimination through gender discrimination with an added bonus of hypermasculine sexual performance. As such, it operates along three axes: (1) whiteness, (2) hypermasculinity, and (3) female subjugation, the three straps in the WHP. Each of these axes become justifying principles as the Supreme Court defends the property interests and allocation of rights embedded in the WHP. As to the first category, “whiteness,” in its earlier approaches to § 1409, the Court explicitly—and later implicitly—found that § 1409 triggered Congress’s plenary power to police the nation’s white borders against aliens and national security threats.²³¹ As such, with the exception of Justice Ginsburg’s majority opinion in *Morales-Santana*, the Court has applied a diluted form of scrutiny, much lower than the constitutional exacting applied to most explicitly discriminatory statutes.²³²

As discussed in more detail in this Part IV, each of the opinions that have upheld the constitutionality of § 1409 have raised the evil specter of the “alien” in various forms to trigger using the plenary power doctrine to shield § 1409, whether it was Congress’s recognized authority to protect the country from communists, national security threats, Jezebel, millions of war babies, or racialized deportable criminals. The massively destructive abandonment of inestimable numbers of children fathered by American men was not viewed as unconscionable, but rather became a reason to justify § 1409.²³³ Both Justices Stevens and Kennedy explicitly raised the enormous number of war babies, to the tune of millions, to justify § 1409’s gender asymmetrical treatment between men and women. As argued in more detail in Part V, both Congress’s and the Supreme Court’s actions are not only lacking in morality, they are not in keeping with the fundamental values of liberty, equality, and democracy. Moreover, as argued in Part V, to the extent that the Court is poised to overturn *Roe v. Wade*²³⁴ and wax eloquent about the sanctity of life, the morality of sexually responsible behavior, and the responsibilities of parenthood, the attitudes adopted by the

230. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698, 198 L. Ed. 2d 150 (2017).

231. *Fiallo*, 430 U.S. at 792 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

232. Mariella, *supra* note 36, at 222 (arguing that there is “substantively diluted scrutiny of § 1409’s gender classification, even though such sex-based classifications are typically reviewed under heightened scrutiny”).

233. See Collins, *A Short History*, *supra* note 15, at 1494 (stating “it is not at all clear that a majority of the sitting justices would consider it a problem, as a constitutional matter, that our citizenship laws insulate male soldiers and the United States from citizenship claims by or on behalf of nonmarital foreign-born children, regardless of the racial dimension of the phenomenon”).

234. *Roe v. Wade*, 410 U.S. 113 (1973).

Court in cases involving § 1409 reveal a bankrupt moral hypocrisy lacking in constitutional integrity.

The second axis along which the Supreme Court defended § 1409 is hypermasculinity. Section 1409 shields hypermasculinity from the reach and regulation of reproductive sanction and punishment. The Court has never explicitly addressed the halo effect that § 1409 gives to male sexual prerogatives outside marriage; however, it has dog-whistled this concern through empirical evidence involving the number of men serving abroad and engaged in sexual tourism. In dissenting opinions, both Justices Ginsburg and O'Connor have remarked on the sexual prerogatives underlying § 1409. Justice Ginsburg noted that “[t]here are . . . men out there who are being Johnny Appleseed,” and Justice O'Connor articulated a similar concern, stating that our sex-based citizenship laws are “paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.”²³⁵

As to the third category, “female subjugation,” § 1409 does three things. First, it facilitates the regulation of citizenized women’s bodies to ensure racial purity in the polity by sanctioning them with automatic motherhood for birthing nonmarital foreign-born children. As argued in more detail in Part V, this automatic sanctioning is a form of reproductive regulation and punishment. Second, § 1409 keeps foreign women prone to male power by dispossessing their children, leaving both with little recourse or protection. Third, in upholding § 1409 against constitutional challenge, the Court regularly reaches for the snare. In numerous passages, the Court states that the gender asymmetry in § 1409 results from “lurking” problems of paternity proof—code for untrustworthy, loose foreign women or, more candidly, what Justice Stevens calls women who may not know who the father is.²³⁶ Thus, the Court has hidden the hypermasculinity embedded in § 1409—the WHP—inside the snare—victim blaming.

Using the Court’s three justifying principles—whiteness, hypermasculinity, and the evil snare—this Part provides an analysis of four of the § 1409 Supreme Court cases.²³⁷ *Fiallo v. Bell*,²³⁸ *Miller v. Albright*,²³⁹ *Nguyen v. INS*,²⁴⁰ and *Sessions v. Morales-Santana*.²⁴¹ In particular, the Court’s contrasting approaches

235. See *supra* note 35.

236. *Nguyen*, 533 U.S. at 65 (stating that “[g]iven the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity”).

237. *Flores-Villar v. United States* involved a gender-based equal protection challenge to the physical presence requirement in § 1409. 564 U.S. 210 (2011) (*per curiam*), *aff’g* 536 F.3d 990 (9th Cir. 2008). However, the Court declined to reach this issue, and, in a four-four *per curiam* decision, affirmed the lower court without opinion. As a result, I have not included *Flores-Villar* in my analysis.

238. 430 U.S. 787 (1977).

239. 523 U.S. 420, 424-26 (1998) (Stevens, J.) (plurality opinion).

240. 533 U.S. at 56-57.

241. 137 S. Ct. 1678 (2017).

between *Fiallo*, *Miller*, and *Nguyen*, on the one hand and *Morales-Santana*, on the other, demonstrate the need for historical contextuality and anti-subordination principles²⁴² when deciding gender-based equal protection challenges.

A. *Fiallo*: *Immigration Preferences and Lurking Johnny*²⁴³

Fiallo addressed immigration preferences and was decided squarely within the ambit of immigration law. Section 1409, by contrast, is a derivative citizenship statute that confers citizenship at birth. Nevertheless, *Fiallo* laid the doctrinal groundwork for the derivative citizenship cases considered in this Part IV.²⁴⁴ *Fiallo* established three doctrinal principles underlying § 1409 cases: (1) white exclusion and the evil specter of alien undesirability; (2) male prerogative and the doctrine of absenting fathers; and (3) the disturbing narrative of the hypersexualized snare—all to justify the WHP.

In *Fiallo*, decided in 1977, a group of citizen fathers and their nonmarital foreign-born children brought a gender-based equal protection challenge against § 101(b)(1) of the INA. Section 101(b)(1) excluded them from immigration preferences.²⁴⁵ More specifically, it excluded unwed fathers, but not mothers, from the definition of “parent,” and their nonmarital children from the definition of “child.”²⁴⁶ Rather than separate Congress’s ability to expel or exclude aliens, on the one hand, and Congress’s gender discrimination on the other, the Court conflated the issues and rejected the plaintiffs’ claims.²⁴⁷ The Court tucked and elided Congress’s gender discrimination behind Congress’s plenary power, applied rational basis review, and stated, “Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial

242. In describing the need for anti-subordination principles in vulnerability theory, legal scholar Angela P. Harris states:

Vulnerability, in policy analysis, is commonly treated as a fixed characteristic of the population or individual in question, rather than as the outcome of social and political relations. By obscuring the political and institutional components of vulnerability, conventional policy analysis has the potential to portray domination as difference, and to hide the problem of unequal distribution of benefits and burdens within a universalist framework. Recognition of vulnerability must therefore be supplemented with an explicit commitment to the anti-subordination principle, which requires us to look for power and injustice even in our language and our frameworks for research and policy.

Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE & ENV’T 96, 148–49 (2014) [hereinafter Harris, *Vulnerability and Power*].

243. While *Fiallo* was decided squarely within the ambit of immigration law, *Miller*, *Nguyen*, *Flores-Villar*, and *Morales-Santana* considered the derivative citizenship statute, which transfers citizenship at birth. Antognini, *supra* note 14, at 413, 428. Nevertheless, *Fiallo* laid the doctrinal groundwork for the derivative citizenship cases considered in this Part IV.

244. Antognini, *supra* note 14, at 413, 428.

245. *Fiallo v. Bell*, 430 U.S. 787, 791 (1977).

246. *Id.* at 781.

247. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 189.

control.”²⁴⁸ The Court narrowed the role for judicial review in immigration cases and rejected heightened scrutiny in assessing the constitutionality of a gender-based immigration statute, which Justice Thurgood Marshall, the only person of color on the court, advanced in his dissent.²⁴⁹ Instead, the Court held that the gender explicit discriminatory selection criteria was reasonable “because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.”²⁵⁰

1. *The Evil Specter of Alien Undesirability as Threat*

In an interesting analogy, the Court drew a parallel between alien threats to national security, namely the Chinese, with the plaintiffs in order to justify Congress’s plenary power to exclude. Citing *Fong Yue Ting*, one of the foundational Chinese Exclusionary Act cases,²⁵¹ Justice Powell, writing for the majority, implicitly analogized the plaintiffs, nonmarital foreign-born children and their fathers, to vast hordes of Chinese invading white American soil who will not assimilate. Using racialized alien invasion as justification, Justice Powell deferred to Congress in matters of “the admission of aliens and their right to remain” as a necessity, “touching as it does basic aspects of national sovereignty.”²⁵² In drawing the analogy between the plaintiffs and hordes of Chinese, the Court raised the evil specter of alien undesirability to justify exclusion. The Court created a narrative of excludability premised on racialized undesirability, potential criminality, and national security threat. The Court’s likening plaintiffs to racialized aliens reveals the Court’s actual concern, as opposed to the facts before the Court, which was policing the nation’s boundaries from undesirability—the conceptual nucleus lying at the very heart of whiteness in the WHP.²⁵³ It is this foundational concern that will dilute the level of scrutiny in the gender-based equal protection cases that follow *Fiallo*, specifically *Miller*,

248. *Fiallo*, 430 U.S. at 792 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

249. *Id.* at 800 (Marshall, J., dissenting); Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 189.

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

251. *Id.* at 792 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). *Fong Yue Ting* was one of the Chinese Exclusionary Act cases, as well as a foundational case on plenary power, which, along with *Chae Chan Ping*, evokes the imagery of Chinese as vast hordes invading the United States. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

252. *Fiallo*, 430 U.S. at 792-93.

253. See Antognini, *supra* note 14, at 426-27; Collins, *Illegitimate Borders*, *supra* note 6, at 2154 (noting that well into the twentieth century, the Fourteenth Amendment notwithstanding, other formal rules that governed membership in the American polity—such as immigration and naturalization laws—were shaped in significant ways by racial nativism). It is clear that gender-based domestic relations law principles incorporated into *ius sanguinis* citizenship law served a larger racially nativist nation-building project.

Nguyen, and *Flores*.²⁵⁴ As explained in more detail in Section IV.E, Justice Ginsburg’s opinion, writing for the majority in *Morales-Santana*, guts the use of the plenary power doctrine to restrain constitutional oversight by the judiciary.²⁵⁵

2. *Absenting Fathers, a Dred Scott Move*

As Albertina Antognini noted, in an exercise of judicial activism, the Court relied on two justifications that were not actually in the record or capable of observation: perceived absent fathers, as opposed to the actual ones that were before the Court, and “lurking problems of proof,” as opposed to real ones.²⁵⁶ Together, as Antognini argues, the “perceived absence” of close family ties and the “serious problems of proof that usually lurk in paternity decisions” rendered gender discrimination between men and women in *Fiallo* imperceptible.²⁵⁷ The invisible—absentee fathers and lurking problems of establishing paternity—justified the visible gender disparity in the statute.²⁵⁸

Furthermore, before the Court decided *Fiallo*, Collins argues that the Court had begun to endorse nonmarital father’s rights in the domestic setting.²⁵⁹ Given the trend in doctrinal recognition of father’s rights, what accounted for the Court’s normalizing absentee fatherism in *Fiallo*? The answer lies in *Dred Scott*. In *Dred Scott*, the Supreme Court understood that the white male right to discard the child was essential to securing the sexual function of the enslaved female. In *Fiallo*, therefore, absentee fatherism became, as Antognini argues, the Court’s desired baseline²⁶⁰—the father engaged in hypermasculine conduct and yet freed from parental responsibility—around which to construct material reality—the WHP. Rather than honor patrilineage and fathers’ rights trending through domestic common law, the Court set a baseline of the absentee father for nonmarital foreign-born children.²⁶¹ The baseline assumed and normalized absentee fatherism, making the invisible immunized from equal protection

254. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 190.

255. *Id.* at 221.

256. Antognini, *supra* note 14, at 415 (stating “the Court articulated its reasoning in terms of that which cannot actually be observed—a perceived absence as opposed to an actual one, and lurking problems of proof as opposed to present ones”). Despite all the “lurking” elements the Court found, including absent fathers, fraudulent paternity claims, criminality, and untrustworthy foreign women, the Court did not find Johnny Appleseed.

257. *Id.*

258. *Id.*

259. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 188 (“By the time *Fiallo* was decided, the Court had repudiated some of the limits on recognition of the relationship of a father and his nonmarital child—limits that were standard in the common law and had been incorporated into modern policies regulating the family.”)

260. Antognini, *supra* note 14, at 415, 417-18 (“[A] continuous theme runs through all these cases: an unwed father, unlike an unwed mother, begins from an absence he must refute both in terms of proving paternity and establishing the existence of a parental relationship with his child.”).

261. *Id.*

challenges.²⁶² Drawing from Antognini, the Court endorsed the legal fiction of an absent father because absenting fatherly responsibility for citizen men sexually active abroad, unmarried, and with foreign women is exactly what the Court sought to preserve.²⁶³ what Hortense Spiller calls, “Mama’s Baby, Papa’s Maybe.”²⁶⁴ In creating the fiction of the absentee father, the Court created a material reality and normalized it.

Drawing from the work of Angela Harris,²⁶⁵ the Court’s reasoning in *Fiallo* exemplifies the absence of anti-subordination principles in legal reasoning. The Court’s reference to “lurking problems of proof of paternity” is a proxy for two things: (1) the “natural” differences between men and women and (2) sexually loose, untrustworthy foreign women, who tell lies about paternity, Jezebel the evil snare.²⁶⁶ In a classic case of “slut shaming,” the Court takes the pathological gaze off Congress and the WHP, and instead, fixates it on foreign women. The problem in the statute, therefore, is due to the pathology of foreign women and not male philandering or Congress creating and perpetuating inequality. The problem becomes one of the individual—a foreign woman—and not the institution that has created a power imbalance based on gender—Congress. In fixating on the foreign woman’s “bad” choices, the Court masks Congress’s role in perpetuating inequality. The inequalities Congress created in the statute get obfuscated behind the pathology of foreign women. Similarly, the Court tucked the gender inequality in the statute behind the biological difference between maternity and paternity and diverted attention away from Congress creating different social and political outcomes based on gender.²⁶⁷ As Angela Harris helps us understand, by deflecting away from the political and institutional components of the gender asymmetry in the statute, the Court is portraying domination as biological difference, and obfuscating the unequal distribution of resources (citizenship) and burdens (parenthood) within the universalist framework of nature.²⁶⁸

3. *The Aristotelian Evil Snare*

Another basis for the Court’s rejection of plaintiffs’ sex discrimination claim was the classical evil snare — “a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in

262. *Id.*

263. *Id.* at 425.

264. Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 *DIACRITICS* 65 (1987) (discussing children as the responsibilities of the mother and the prerogatives of fathers); see also Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1706 (discussing same as enshrined in legal opinions addressing 1409).

265. Harris, *Vulnerability and Power*, *supra* note 242, at 146-47.

266. *Fiallo v. Bell*, 430 U.S. 787, 813 (1977) (citing *Trimble v. Gordon*, 430 U.S. 762, 771 (1977)).

267. Harris, *Vulnerability and Power*, *supra* note 242, at 146-47.

268. *Id.*

paternity determinations,”²⁶⁹ “when [paternity] depends upon events that may have occurred in foreign countries many years earlier,”²⁷⁰ far, far away. As Antognini, however, argues “the element of the foreign was only suspect when tied to determinations of paternity, as opposed to maternity.”²⁷¹ The government was far more transparent, locating the “foreign,” in the promiscuity of foreign women, stating very clearly:

Unlike the identity of the mother, which will often appear on the birth certificate and which frequently can be corroborated by the testimony of relatives, midwives, or medical personnel, the sole evidence that a man has fathered a particular child is often the testimony of the mother—and she may not know.²⁷²

As Antognini notes, although the government portrayed the unwed foreign mother as having numerous, even simultaneous, sexual partners such that she may not know the biological father, these were not the foreign mothers before the Court in *Fiallo*.²⁷³ By raising the evil specter of the snare, the Court deflected attention away from the unequal distribution of benefits and privileges in the immigration preferences based on gender. Rather than focusing on the inequality of the statute, the asymmetry was lost in the snare.

B. Miller: *Paternal Acknowledgment and Heeere’s Johnny*

Miller set the stage for the Court’s white heteropatriarchal preoccupations, both explicit and implicit, in the context of § 1409. In particular, *Miller* reinforced three ongoing doctrinal principles underlying § 1409: whiteness, hypermasculinity, and foreign female subordination, the three major straps in the WHP. First, *Miller* reified America’s white exclusionary interests in policing its borders: The lead plurality opinion framed and dog-whistled these issues as the “war baby problem.”²⁷⁴ Second, *Miller* ratified the WHP by submerging § 1409’s gender disparity inside the physiological differences between men and women when establishing paternity.²⁷⁵ According to the lead majority opinion, men should be required to do more when transferring citizenship than women should because proof of paternity is subject to fraud. Again, the Court is masquerading the WHP in concerns about the biological differences between men and women.

269. *Fiallo*, 430 U.S. at 799 (emphasis added).

270. *Id.* at 808 n.8.

271. Antognini, *supra* note 14, at 423-24.

272. Brief for Appellee, *Fiallo v. Bell*, 430 U.S. 787 (1977) (No. 75-6297), 1976 WL 181347, at *44-45.

273. Antognini, *supra* note 14, at 417-18.

274. *Miller v. Albright*, 523 U.S. 420 (1998).

275. *Id.*

Third, when dog-whistling concerns about problems proving paternity, the Court is solidifying the narratives that justify the WHP, namely foreign woman as snare.²⁷⁶

In *Miller*, the Supreme Court found just the Madame Butterfly/Miss Saigon trope it was looking for: a military man, a white male, who conducted military service abroad, fathered a daughter out of wedlock²⁷⁷ with a racialized foreign woman (Filipina), left the foreign woman, and—in an extra gesture of Johnny good ole’ innocence—may not have been aware of his racialized foreign child when he returned to America. As a result of American involvement in Asian wars during the twentieth century, inestimable numbers of children were born to American servicemen and Asian women.²⁷⁸ Miller was just this man. Miller served in the Philippines, in 1970, during the Vietnam War. Although the exact figures are unknown, in the Philippines alone, American servicemen fathered approximately 30,000 to 50,000 children.²⁷⁹ Miller never legitimated his daughter and returned back to America. In order to transfer citizenship to his daughter, the version of § 1409 applicable to Miller required that he establish or acknowledge paternity before his daughter turned eighteen, which he failed to do. Miller challenged the legitimation requirement in a gender-based equal protection claim.²⁸⁰

The decision in *Miller* resulted in highly fractured concurring and dissenting opinions. Writing the lead plurality opinion, Justice Stevens, himself a military man,²⁸¹ joined by Chief Justice Rehnquist, also a military man, rejected the equal protection claim. Justice Stevens provided three highly dubious justifications for the legitimation requirement: (1) it fostered ties between the child and America;²⁸² (2) it encouraged “a healthy relationship between the citizen parent

276. *Id.*

277. Justice Stevens, one of the more liberal justices on the bench, makes much of Petitioner’s “illegitimacy.” *Miller*, 523 U.S. at 424.

278. Kolby, *supra* note 170.

279. *See id.*

280. Although the petitioner in *Miller* raised the constitutionality of the gender asymmetry in the derivative statute, a majority of the Court did not resolve the issue. Four Justices, in two different opinions, rejected the challenge to the gender-based distinction, with two finding the statute to be consistent with the Fifth Amendment. *See* 523 U.S. at 423 (Stevens & Rehnquist, JJ.) (plurality opinion) (concluding that the Court could not confer citizenship as a remedy even if the statute violated the Equal Protection Clause as a separation of powers issue). *Id.* at 452 (Scalia & Thomas, JJ., concurring). Three Justices dissented and would have found the statute violative of the Equal Protection Clause. *Id.* at 460 (Ginsburg, Souter & Breyer, JJ., dissenting). *Id.* at 471 (Breyer, Souter & Ginsburg, JJ., dissenting). Finally, two Justices did not reach the issue as to the father, having determined that the child, the only petitioner in *Miller*, lacked standing to raise the equal protection rights of their father. *Id.* at 445 (O’Connor & Kennedy, JJ., concurring).

281. John Paul Stevens, Letter to the Editor, *The Dissenter*, N.Y. TIMES (Nov. 4, 2007), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9903E0DF153DF937A35752C1A9619C8B63.html> [<https://perma.cc/C6YH-7X28>] (Justice Stevens was a naval officer at Pearl Harbor from 1942 to 1945).

282. *Miller*, 523 U.S. at 434 n.11; Pillard & Aleinikoff, *supra* note 33, at 10.

and the child while the child is a minor,”²⁸³ and (3) it ensured reliable proof of paternity.²⁸⁴ As in *Fiallo*, Justice Stevens’s justifications go to the heart of the WHP: (1) whiteness, (2) hypermasculinity, and (3) foreign femaleness as snare.

1. Whiteness and the “War Baby Problem”

In grappling with questions about how to imagine and construct the American polity, Justice Stevens emphatically voiced concerns about the war baby threat to the nation’s borders and coffers. In both *Miller* and *Nguyen*, military men feature prominently not only in the facts, but also the imagination, discursive preoccupations, and reasoning employed by the Court.²⁸⁵ In both *Miller* and *Nguyen*, the military man was proxy for the inestimable numbers of children abandoned by their fathers and threatening the government chest as well as foreign Jezebels. Estimating the impact of § 1409 on the number of nonmarital children abandoned by their fathers and imperiling the nation through sought-after citizenship, Justice Stevens stated:

Given the size of the American military establishment that has been stationed in various parts of the world for the past half century, it is reasonable to assume that this case is not unusual. In 1970, when petitioner was born, about 683,000 service personnel were stationed in the Far East, 24,000 of whom were in the Philippines Of all Americans in the military at that time, only one percent were female. These figures, coupled with the interval between conception and birth and the fact that military personnel regularly return to the United States when a tour of duty ends, suggest that Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children. It was surely reasonable when the INA was enacted in 1952 and remains equally reasonable today.²⁸⁶

As Collins notes, rather than being a source of moral shame, sympathy, or legal accountability, the sheer numbers of war babies, according to Justice Stevens, is even more reason to insulate male soldiers and the United States from citizenship claims by or on behalf of nonmarital foreign-born children, and to shut the nation’s door to millions of hapless wards fathered by American men.²⁸⁷ In a Ninth Circuit case raising a similar issue, Judge Andrew Kleinfeld was even more blunt in his finding that Congress was well within its constitutional authority to pass a statute that would minimize the burdens created by “paternity

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

284. *Id.* at 436.

285. Antognini, *supra* note 14, at 433.

286. *Miller*, 523 U.S. at 439 (1998).

287. Collins, *A Short History*, *supra* note 15, at 1485.

and citizenship claims” asserted by “the women the [U.S.] soldiers left behind and their children.”²⁸⁸ “This may not be pretty,” he noted, “but it is a rational basis for a sex distinction.”²⁸⁹

Interestingly, the significant number of war babies undermined any claim that the legitimation requirement encouraged ties. In fact, just the opposite, it was one in a myriad of laws and administrative regulations intended to dissuade American fathers from transferring citizenship.²⁹⁰ Furthermore, it was intended to protect not just the nation’s welfare coffers, but individual men from inheritance and property claims from “illegitimate children” or the unexpected nonmarital foreign-born visitor that might appear years later at the family gathering, looking for “Daddy.”

2. *Mama’s Baby, Johnny’s Maybe*

Justice Stevens maintained that § 1409 would have survived intermediate scrutiny because it did not involve sex discrimination; instead, the legitimate biological differences between mothers and fathers and the legitimation requirement for fathers equalized a mother’s right to abort.²⁹¹ In a series of confections, Justice Stevens reasoned that mothers and fathers did not engage in legally relevant conduct before birth and that after birth, there remained no legally relevant joint conduct unless the parties married, which would confer citizenship.²⁹² In the case of an unwed mother and father, however, Justice Stevens appeared to suggest that the legitimation requirement equalized a mother’s right to abort with a father’s right to also decline parenthood.²⁹³ In other words, men should receive a right to decline fatherhood in exchange for a woman’s right to abortion.

In many ways, *Miller* is a case study in the WHP. By grounding his justification in biological determinism, Justice Stevens doctrinally enshrined the baseline and hid it from constitutional scrutiny. Under Justice Stevens’s obfuscating reasoning, the difference in citizenship transmission based on sex was biological, and therefore, did not trigger gender discrimination. In submerging disparity in nature, Congress as an institutional actor (1) engaging

288. *Id.* at 1494 (quoting *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1129 (9th Cir. 1999) (Kleinfeld, J., dissenting)).

289. *Id.*

290. *Id.*

291. *Miller*, 523 U.S. at 434 n.11, 444-45 (Stevens, J.) (plurality opinion); Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1708. The distorted application of the Equal Protection Clause should be noted: Abortion allows women to have sex without consequences (though the burden is never shifted onto the man, whereas in the case of § 1409, the burden is shifted to the foreign woman after the child is born).

292. Antognini, *supra* note 14, at 444.

293. *Miller*, 523 U.S. at 433 (“If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion—an alternative that is available by law to many, and in reality, to most, women around the world.”).

in an inequitable distribution of resources based on sex and (2) facilitating hypermasculinity by limiting the legal consequences of these activities, is hidden from view, constitutional or otherwise. When Justice Stevens argued that because women have greater legal rights (the right to conceive or abort), women should receive greater parental rights,²⁹⁴ his reasoning reinforced the allocation of full legal responsibility for nonmarital children to women, while preserving a man's sexual prerogatives and liberty, as well as a property right in hypermasculinity.²⁹⁵ Justice Stevens's reasoning did what it was intended to do: It perpetuated a regime that protects men's ability to engage in sexual activity outside marriage with mitigated responsibilities of parenthood.²⁹⁶ As Collins notes, by arguing the only legally relevant conduct happens after birth, when a woman chooses to have a child, Justice Stevens sublimates the pre-birth joint conduct of both men and women, rendering the pre-birth conduct irrelevant for purposes of allocating parental rights and responsibilities.²⁹⁷ Born or unborn, the burden and responsibility of a nonmarital foreign-born child never shifts to the father or his home country. Justice Stevens's grounding of the gender asymmetry in the physiology of women obfuscates § 1409's true functions, which is to maintain in men the right to regulate legitimate lines of inheritance and to be liberated from the responsibilities of nonmarital children, all the while engaging in the WHP.²⁹⁸

3. *Snare Redux*

Justice Stevens, joined by Justice Rehnquist, the two military men on the court, made several dog-whistles to the suspicious circumstances in which Miller, and most military men, fathered children abroad. As Justice Stevens noted, "[D]espite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity, coupled with the clear-and-convincing evidence standard to deter fraud."²⁹⁹ In another passage, Justice Stevens famously stated that the foreign women who birth nonmarital foreign-born children may not know who the father is.³⁰⁰ In each of these passages, and as elaborated more fully in the next section, the Court is submerging the constitutional validity of § 1409, and by extension the use of the WHP, in the victim blaming problems of loose women fraudulently claiming paternity on poor innocent Johnny, the unwitting dupe, in desperate need of protection and liberation by the Supreme Court.

294. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1674.

295. *Id.* at 1673.

296. *Id.* at 1684.

297. *Id.* at 1700.

298. *Id.*

299. *Miller v. Albright*, 523 U.S. 420, 437 (1998).

300. *Id.* at 438.

C. Nguyen: *Paternal Acknowledgement and Johnny by Proxy*

In 2001, the Supreme Court revisited § 1409's legitimation requirement in *Nguyen v. INS*.³⁰¹ In a five-four decision, the Court held that § 1409 withstood another equal protection challenge. Like Charlie Miller, the Court seized upon another military man. This time the Court found a military man by proxy.³⁰² Nguyen's citizen father was not a serviceman, but a military contractor.³⁰³ Nevertheless, the Court continued to rely on the military man, citing even more empirical data about the vastness of servicemen stationed overseas during the year Nguyen was born.³⁰⁴ Although Nguyen's father had raised his son, he had not completed the legitimation process in § 1409(a)(4).

Justice Kennedy, sometimes the critical swing vote in matters of equality, wrote the majority opinion, joined by Justice Stevens, who often sides with the more liberal end of the Court except in matters concerning the sexual privileges of his fellow servicemen, namely philandering while abroad. The more conservative flank of the Court, Justices Rehnquist, Scalia, and Thomas, joined the majority opinion. Justice O'Connor wrote a dissenting opinion, in which the liberal arm of the Court joined: Justices Ginsburg, Breyer, and Souter. Engaging an ahistorical formalistic approach, the majority grounded its rejection of Nguyen's challenge in the physiological differences between men and women.³⁰⁵ According to the majority, Congress had two legitimate interests in the gender asymmetry of the statute: (1) men, unlike women, required additional biological proof of paternity to guard against fraudulent conveyances of citizenship³⁰⁶ and (2) the legitimation requirement fostered ties between a child, father, and nation.³⁰⁷

In reaching its conclusion, the majority made several arguments, all of which bear heavily on the WHP. First, the Court stated that citizen women abroad can decide to have their child in America by traveling home, thus, conferring *jus soli* citizenship. As a result, § 1409 automatically confers citizenship to citizen women.³⁰⁸ Men, on the other hand, have no control over where the child is born. Second, in amplifying the narrative of foreign woman as snare and raising the

301. *Nguyen v. INS*, 533 U.S. 53, 65 (2001).

302. Antognini, *supra* note 14, at 434.

303. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1700.

304. *Nguyen*, 533 U.S. at 65-66; Antognini, *supra* note 14, at 434.

305. Justice Kennedy shelved the separation of power question that had plagued constitutional challenges to the derivative citizenship statute: whether the plenary power doctrine usurped the field of judicial inquiry. *Nguyen*, 533 U.S. at 61 (2001) ("Given [the determination that the statute survives heightened scrutiny], we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power."). Instead, he concluded that the statute survived even under heightened scrutiny. *Id.*

306. *Id.* at 62.

307. *Id.* at 64-65.

308. *Id.* at 61.

evil specter of the "war baby" problem, Justice Kennedy laid bare his true concerns:

Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, *nor is it always clear that even the mother will be sure of the father's identity*. This fact takes on particular significance in the case of a child born overseas and out of wedlock. *One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries* [I]n 1969, the year in which Nguyen was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female.³⁰⁹

Extending the Court's concerns beyond the sexual practices of the American military, the Court went on to express a preoccupation with citizen men who go abroad and participate in sexual tourism, stating:

The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of accepting petitioners' argument, which would mandate, contrary to Congress' wishes, citizenship by male parentage subject to no condition save the father's previous length of residence in this country. In 1999 alone, Americans made almost 25 million trips abroad, excluding trips to Canada and Mexico. . . . Visits to Canada and Mexico add to this figure almost 34 million additional visits. . . . *And the average American overseas traveler spent 15.1 nights out of the United States in 1999*. Especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility.³¹⁰

Leaving aside the Court's preoccupation with citizen men's hypermasculinity practices outside marriage in the military and in the sexual tourism industry, the majority opinion is a case study in failing to use historical context and anti-subordination principles when deciding equal protection cases. The failure to historicize § 1409 allowed the Court to draw false symmetries in power between men and women. Moreover, the failure to adopt anti-subordination principles enabled the Court to perfect the scapegoating narrative of the snare. In doing so, the Court obfuscated three backbone principles of the WHP: (1) exclusion, (2) hypermasculinity, and (3) protecting innocent unwitting male dupes from the hazards of foreign female conniving and trickery.

309. *Nguyen*, 533 U.S. at 65 (emphasis added).

310. *Id.* at 66 (emphasis added).

1. *The Excludability Principle and Criminal “Half Castes”*

The Court did not explicitly decide *Nguyen* on the grounds of Congress’s plenary power to exclude aliens.³¹¹ However, as in *Fiallo* and *Miller*, the Court raised the specters of evil to reinforce the need to maintain exclusionary power. As Collins notes, in *Nguyen*, the specter of evil took the form of Nguyen himself. In the second paragraph of the body of the opinion, Justice Kennedy dog-whistled the procedural posture of Nguyen’s case: Nguyen had been convicted of two counts of child sexual assault and was, therefore, subject to deportation proceedings.³¹² Later in the opinion, Justice Kennedy noted again that Nguyen’s exclusion from citizenship by any route, derivative citizenship or naturalization, was “due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed rigidity or harshness in the citizenship laws.”³¹³ In *Nguyen*, the Court found its idealized facts: (1) an American military serviceman by proxy, who had fathered a nonmarital child while abroad with a foreign woman and (2) an exponentially undesirable racialized offspring, much better than vast hordes of Chinese—not only foreign, but also criminal.

As Collins argues, the centrality of the petitioner’s criminality in a § 1409 case is not unique to *Nguyen*. Indeed, many of the § 1409 cases come before courts in the procedural posture of deportation proceedings due to the petitioner’s criminal conviction.³¹⁴ Part of the resiliency of § 1409 in the face of gender-based equal protection challenges, therefore, is the perceived need to fortify the nation’s borders against “illegitimates” who are not just racialized, but also criminalized with an added dose of snared mothers.³¹⁵ Within the first two paragraphs of *Nguyen*, Justice Kennedy mentions Nguyen’s association with Vietnam or Vietnamese origin five times.³¹⁶ Here again, what is at stake in § 1409 cases is as much about race as it is about gender—policing the nation’s white borders from racialized criminal aliens whose mothers are “loose.”³¹⁷

311. Although the Court did not explicitly decide *Nguyen* on plenary power grounds, many scholars have suggested that, in fact, the plenary power was lurking in the background and also explained the Court’s diluted version of equal protection scrutiny. See Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 221.

312. *Nguyen*, 533 U.S. at 57.

313. *Id.*; see Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1700.

314. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 196.

315. *Id.* at 170 (stating “the line between citizen and noncitizen was being determined not in the abstract but in the context of the enforcement of deportation laws that were, at their different moments in time, politically salient and legally contested.”).

316. *Nguyen*, 533 U.S. at 57.

317. Centralizing criminality to restrict immigration policies is common practice. See Dan Cadman, *Birthright Citizenship Policy Creates Downstream Problems*, CTR. FOR IMMIGR. STUD. (Oct. 5, 2016), <http://cis.org/Cadman/Birthright-Citizenship-Policy-Creates-Downstream-Problems>, [https://perma.cc/M56D-XW2M].

2. *The Cool WHP*

The absence of historical context allowed the majority to ratify the white heteropatriarchal interests underlying § 1409 using the obfuscating glare of neutrality dipped in nature and physiological differences. By deploying the natural differences between men and women, the majority normalized the operations of the statute. By grounding disparate gender treatment in nature, the majority opinion in *Nguyen*, like *Miller*, adhered to a tautology: women and men are being treated differently because they are naturally different.³¹⁸

The contrasting dissenting and majority opinions in *Nguyen* highlight the inadequacy of ahistorical formalist approaches to § 1409 and equal protection jurisprudence generally.³¹⁹ Unlike the dissenting opinion, the ahistorical formalist approach of the majority downplayed the societal policies of discrimination that form the underbelly of § 1409. By contrast, the dissenting opinions in both *Miller*, authored by Justice Ginsburg, and *Nguyen*, authored by Justice O’Connor—the only two women on the Court at the time—placed the statute in the proper historical context of supremacy, domination, and denigration.³²⁰ By placing the statute in the proper context of its discriminatory past, the dissenting opinion eliminated many claims of innocence or hegemonic goodness, like fostering relationships between the child, father, and the nation. Rather, the dissenting opinion artfully pointed out that the history of § 1409 actively negates any claim of developing a relationship between the child, father, and nation. In fact, it fosters the exact opposite, the prerogative of males to discard their nonmarital offspring and to block them from inheritance and themselves from parental accountability.

Similarly, decontextualization also allowed the majority in *Nguyen* to draw false symmetries of power between men and women. According to the majority, women, unlike men, should have the power to confer automatic citizenship because they have the power to determine where a child is born: a pregnant citizen mother, living abroad, can travel back to the United States and give birth to her child in order to confer citizenship to her child.³²¹ Men, on the other hand, should not be saddled with automatic citizenship because they have no equivalent power to decide where the child is born. However, a historically contextualized assessment of § 1409 suggests that derivative citizenship has nothing to do with the power of women to decide the place of birth. Rather, the need to preserve the male prerogative to confer citizenship and retain autonomy

318. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1705.

319. See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 75, at 1341 (highlighting the problems with ahistorical, decontextualized approaches to antidiscrimination law).

320. *Nguyen*, 533 U.S. 53, 74 (2001) (stating “[s]ex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation’s ‘long and unfortunate history of sex discrimination.’”).

321. *Id.* at 61.

from parenthood drives the difference in the law. It ensures, among other things, that men can continue their hypermasculinity and sexual exploitation of foreign women.

Despite all its obfuscating, circularity in reasoning, and immunizing, the majority reveals its true preoccupation in two ways. First, it recognizes that paternity tests can, in fact, eliminate fraudulent citizenship claims with scientific accuracy, thereby defeating problems of proof. Yet, according to the Court, DNA samples can be taken against the father's will and "scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child."³²² Conceding the issue of proof, the Court, therefore, reveals its real concern: protecting male prerogative, power, and privilege. The historical contextuality of § 1409 reveals the utter falsity of the alleged congressional interest. Far from encouraging a relationship between father and child, § 1409's DNA is aimed at protecting men from their offspring and the polity from racial impurity.³²³

Second, without mincing words, the majority opinion acknowledges the traditional behavior it sought to protect: millions of incidences of hypermasculinity. The detailed recitation of empirical evidence about servicemen and trips out of the country, and 15.1 lonely nights—all proxies for hypermasculine performance—clearly delineate the Court's preoccupation with preserving the WHP, policing the borders, and protecting the government coffers. The majority not only shelters the rights and privileges of servicemen and sexual tourists from constitutional scrutiny, but reifies and protects their right to engage in hypermasculinity as a matter of legal doctrine. By assuming the WHP as baseline, the Court protects the settled expectations of hypermasculine sexual performance.

3. *Jezebel*

Nguyen marked the most elaborate use of the snare yet. Like *Fiallo* and *Miller*, the Court made several allusions to the explicit and implicit snare: 3,418,566 active duty servicemen; 54 million good-natured Americans "willing"³²⁴ to travel abroad (meaning to engage in sexual tourism), spending 15.1 lonely nights on average outside the United States; and famously, foreign women who do not know the identities of the fathers of their children. In perfecting *Jezebel* through the snare, however, the Court performed an awe-inspiring double backflip from the springboard of the harlot; it held that Congress had a legitimate interest because men required "additional biological proof of paternity to ward off fraudulent conveyances of citizenship."³²⁴ Here, the Court obfuscated the underbelly of § 1409, in not only the biological differences between the sexes

322. *Id.* at 55.

323. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 170.

324. *Nguyen*, 533 U.S. at 62.

and problems of proof, but also in characterizing the snare that commits fraud. Here, the Court achieves the two-step process of (1) over-valorizing innocent men, who are good-natured adventure seekers and servicemen abroad, serving their country, and (2) pathologizing foreign women engaged in trickery against the unwitting innocent dupes. The two-step process achieves what Zeiger calls a concretization of the American warrior as pure and at the discretion of the foreign woman as evil and transcended.³²⁵

Nguyen's majority opinion exemplifies the problems with failing to historically contextualize and adopt anti-subordination principles when addressing equal protection challenges. By contrast, the dissent fully contextualized the derivative citizenship statute in its highly gender discriminatory past. And in doing so, it made no references to the snare; instead, the dissent applied robust scrutiny and found § 1409:

paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Under this law . . . 'when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background.'³²⁶

Rather than submerging the nefarious underbelly of § 1409 in the snare, the dissent kept a fixed gaze on the political and institutional instigators responsible for a disparate distribution of benefits and burdens, while avoiding the use of a universalist framework, like the natural differences between men and women.

In both *Miller* and *Nguyen*, the Supreme Court, and in particular, the military men Justices Stevens and Kennedy, found their legal subject of choice—the American military man who, like the American polity, must be rescued from foreign “whores” and war babies. In both cases, the Supreme Court participated in the racialized politics of rescuing citizen men, particularly American military men, from the shackles of hypersexualized foreign women and their “illegitimate” offspring. In this way, the Supreme Court engaged in what Eithne Luibheid calls “public discourses on sexuality,” which legitimate the exclusion and condemnation of particular migrants.³²⁷ Drawing from Stewart Chang, the Supreme Court has engaged in Foucault’s Panopticon, whereby spectacle and public visibility effectuate state power over subjects through surveillance and supervision applied by institutional mediums of state authority.³²⁸ In both *Miller* and *Nguyen*, the Supreme Court created a narrative of the idealized man who

325. ZEIGER, *supra* note 45, at 23, 40, and 65.

326. *Nguyen*, 533 U.S. at 92 (O’Connor, Souter, Ginsburg & Breyer, JJ., dissenting) (citation omitted).

327. Chang, *supra* note 38, at 268 (citing EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 144 (2002)).

328. *Id.* (citing FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 200-02).

must be rescued from the “lurking,” evil vixen. In both cases, the Supreme Court situated foreign women in the normative pattern of the snare, who, because they had multiple sex partners at the same time, “do not know the identities of the father.” In both cases, the Supreme Court discursively shuts war babies out as citizen subjects. And, in both cases, the American military man must be rescued from the hypersexualized foreign woman in order to continue his hypersexual conduct, tapping the WHP all the while and yet always so pure, wholesome, and innocent. In another note of irony, the Supreme Court differentiates the lawful immigrant subject from the excludable alien across the normative conceptions of proper sexuality, meaning the looseness of foreign women is attributed to their children as grounds for exclusion. Meanwhile, Johnny keeps the WHP.³²⁹ The logic of § 1409 does more than exclude the children; it keeps the foreign woman fixated in the hypermasculine mind as a “slut,” perpetually prone, and not a mother of proper American citizens.

D. Morales-Santana: Physical Presence Requirements and Johnny Meets His Match

In a Herculean effort, after the Supreme Court rejected three opportunities to bring § 1409 into gender equality compliance, Justice Ginsburg, writing for the majority, masterfully situated § 1409 in its historically nefarious underbelly. Rejecting any ahistorical formalist traditions that deplete § 1409 of its heteropatriarchal content, Justice Ginsburg hit the nail squarely on the head, stating, “History reveals what lurks behind § 1409.”³³⁰ After historically situating § 1409 in its heteropatriarchal past,³³¹ Justice Ginsburg took a scalpel to the institutional question that had plagued constitutional challenges to § 1409 in the past: specifically, whether the plenary power doctrine immunized § 1409 from a more exacting scrutiny.³³² Distinguishing the *Fiallo* line of reasoning that Congress acted within its plenary power, Justice Ginsburg maintained that *Fiallo* applied to immigration preferences whereas *Morales-Santana* involved a claim of citizenship at birth.³³³ Rather than take the historical freeze-frame approach to § 1409, which facilitated obfuscation, circularity, and entrenchment, Justice Ginsburg reached the merits of *Morales-Santana*’s gender disparity claim and found § 1409 constitutionally infirm. The remedy meted out by the Court, however, joined a long tradition of burdening women and preserving white heteropatriarchal privilege in an effort to achieve gender symmetry.³³⁴ Rather

329. *Id.* at 266.

330. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

331. *Id.* at 1689 (2017) (stating “[s]ections 1401 and 1409, we note, date from an era when the law books of our Nation were rife with overbroad generalizations about the way men and women are”).

332. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 194.

333. *Morales-Santana*, 137 S. Ct. at 1694.

334. *See* Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 221.

than extend the more lenient residency requirement to both mothers and fathers, the Court applied the more onerous standard to both.

Like *Nguyen*, Luis Ramón Morales-Santana presented the problem of a racialized criminal in the procedural posture of a deportation proceeding.³³⁵ Morales-Santana was a nonmarital foreign born child, born in the Dominican Republic to a Dominican mother and a citizen father.³³⁶ The version of the derivative citizenship statute applicable to Morales-Santana mandated that, prior to his birth, his citizen father had to be physically present in the United States for five years, at least five of which were after his citizen father was fourteen.³³⁷ By contrast, the physical presence requirement for noncitizen mothers was one year. Morales-Santana’s citizen father missed satisfying the physical presence requirement by a mere twenty days.³³⁸ Morales-Santana filed an equal protection claim challenging the gender disparity in the physical presence requirement.³³⁹ After saturating the physical presence requirement in § 1409’s discriminatory history, the Court applied heightened scrutiny, and summarily rejected the government’s specious justifications that the requirement ensured a connection between the child and citizen father and prevented statelessness for the child. By way of remedy, however, the Court applied the more onerous standard to both men and women.

1. *Whiteness*

In eliminating plenary power applicability to § 1409, Justice Ginsburg created an opening for heightened scrutiny, specifically on issues of gender, but perhaps also on future claims involving nationality and race. The genesis of § 1409’s more extensive physical presence requirement in the Nationality Act of 1940 was Congress’s effort to reduce the number of Chinese and Mexican citizenship claims under the derivative citizenship statute.³⁴⁰ Although Justice Ginsburg did not linger on the racialized history of § 1409, arguably because the case directly addressed gender disparity, she did note that the Roosevelt Administration “[f]ear[ed] that a foreign-born child could turn out ‘more alien than American in character.’”³⁴¹ More importantly, as Kristin Collins notes, when Justice Ginsburg dismissed the plenary power line of reasoning, she undermined the kinds of racial purity arguments that the government had steadfastly maintained during *Fiallo* and all three of the equal protection cases

335. *Morales-Santana*, 137 S. Ct. at 1688.

336. *Id.* at 1686.

337. *Id.* (citing 8 U.S.C. § 601(g) (1940) (now known as § 301(g) of the Immigration and Nationality Act, current version at § 1401(g)). Currently, the requirement is five years pre-birth, two of which are after the citizen father turns 14.

338. *Id.* at 1686.

339. Immigration and Nationality Act of 1952, 8 U.S.C. § 1409, §§ 301(a)(7), 309(a).

340. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 184.

341. *Morales-Santana*, 137 S. Ct. at 1692.

involving § 1409 prior to *Morales-Santana*.³⁴² In *Morales-Santana*, by way of illustration, the Solicitor General argued that given *The Chinese Exclusion Case*, the derivative citizenship was a form of naturalization and “the power to confer or deny citizenship on individuals born abroad . . . is also an aspect of the power to exclude aliens from the Nation”³⁴³—a power that “is an incident of every independent nation” and “a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”³⁴⁴ Although Justice Ginsburg did not expressly address this argument, she distinguished *Fiallo* and its application to § 1409, shrewdly laying a foundation for heightened scrutiny in the future.³⁴⁵

2. *The Maintenance of WHP Privilege*

Throughout the opinion, Justice Ginsburg was highly critical of the sexism animating § 1409, particularly the idea that “[i]n marriage, the husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.”³⁴⁶ According to the Court, “lump characterizations” that “unwed fathers care little about, indeed are strangers to, their children” “no longer passes equal protection inspection.”³⁴⁷ Perhaps, *Morales-Santana* signals the first chink in the armor of the WHP, laying the foundation for future challenges. However, what the Court gives with one hand, it takes with the other. Rather than disturbing the statutory scheme that sustains a white heteropatriarchal property right in philandering, sexual exploitation, and rape, the majority opinion applied the more burdensome physical presence requirement applicable to fathers to mothers. The Court could have nullified the more burdensome requirement and applied the more lenient requirement to both mothers and fathers. In explaining the Court’s decision to apply the more burdensome physical presence requirement on both fathers and mothers, the Court cited congressional intent and stated that Congress would not have intended application of the more lenient rule to both citizen fathers and mothers.³⁴⁸

342. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 184.

343. Brief for Petitioner at 15, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191), 2016 WL 4436132, at *15.

344. *Id.*

345. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 184.

346. *Morales-Santana*, 137 S. Ct. at 1690.

347. *Id.* at 1695.

348. *Id.* at 1701.

3. *Evil Foreign Woman as Snare Finally Put to Rest (At Least Temporarily, in the Majority Opinion in Morales-Santana)*

Gratefully, the majority opinion did not engage in any of the previous dog-whistling about evil foreign women as Aristotelian snare and hypersexualized narratives regarding foreign women that justify the WHP. The Court's effective use of historical context negated the evil specter of the snare. Although the Court was highly critical of the gender implications of the statute, it did not grapple with the racial content of § 1409, let alone the Supreme Court's materialized animus against foreign women or its self-serving narratives about the untrustworthiness of foreign women. Setting aside the issue of whether Congress would eliminate the longer physical presence requirement, extending the less onerous standard to both citizen men and women would rightfully undermine a broader statutory scheme animated by white heteropatriarchal property rights in hypermasculine sexual performance.³⁴⁹ Such an approach could acknowledge the intersectional past of § 1409 and explicitly reject its white heteropatriarchal interests. As the Court keenly recognized, "[N]ew insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged."³⁵⁰

V. SOLUTIONS

"[T]he misfortune of an illegitimate birth cannot deprive a man of his nationality He is a part of society."³⁵¹

Section 1409 is anathema in a nation that pledges allegiance to the values of a free and democratic society committed to treating each person with equal concern and respect under the law. If a measure of democratic governance is to protect individuals against wrongful discrimination and ensure that all individuals are treated alike in the eyes of the law, § 1409 is incomprehensible. Section 1409 allocates the precious resource of citizenship impermissibly on the grounds of nationality, gender, and marital status. The rugged history of § 1409 demonstrates the entrenchment of using matrilineage coupled with the absence of citizenship to create precarity, particularly for the purpose of hypermasculinity. The history of § 1409 fails to suggest justifications based on the problems of proving paternity or fostering ties between an abandoned child and the father or this nation.³⁵² Rather, the history of § 1409 establishes that what

349. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 217-18.

350. *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

351. Collins, *Illegitimate Borders*, *supra* note 6, at 2165 (citing Letter from John Russell Young, U.S. Legation, Peking, China, to Charles Seymour, U.S. Consul, Canton, China (Feb. 23, 1885)).

352. Collins, *Illegitimate Borders*, *supra* note 6, at 2138.

is at stake is the nation's interest in guarding its white borders and coffers³⁵³ from undesirable foreign others and regulating the sexuality of men and women; it gives men autonomy, where it sanctions women.³⁵⁴ Section 1409 is a deliberately induced process for pleasure that wreaks hazards in precarity.

In this section, I propose three solutions: (1) introducing automatic citizenship for both men and women for their nonmarital foreign-born children, (2) bringing § 1409 into moral, legal accountability, and equality symmetry with abortion rights cases, and (3) emphasizing the need to gather evidence to substantiate claims for race and national origin discrimination.

A. Automatic Citizenship for Children of Citizen Men and Women

The children of both men and women should have automatic derivative citizenship. The elimination of male prerogative in § 1409 would establish symmetry in morality, legal accountability, and equality. Automatic citizenship for the children of both men and women would equalize treatment between men and women, eliminate the WHP, and establish symmetry in treatment between foreign women and American women, as well as the children of citizen mothers and fathers. As Isabel Medina argues, the willing citizen mother or the willing citizen father would have the right to transmit citizenship with ease.³⁵⁵ At the same time, neither would be able to so easily escape parental responsibilities.³⁵⁶ Although some might argue that maintaining automatic derivative citizenship for women may continue to saddle them with reproductive burden, such arguments support the need to maintain reproductive freedom for women, not the gender asymmetry in § 1409.

Congress should not create a system that empowers men to discard their children, equips men to abandon their children after engaging in unprotected hypermasculinity, or devises institutional conditions for precarity. The political rhetoric surrounding abortion rights and reproductive punishment may have some application here: If these fathers do not want the responsibilities of children, they should refrain from making them. The prospect of parenthood might also produce more responsible sexual behavior. The same solution would also greatly reduce fraudulent paternity and citizenship claims. As argued by the

353. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1691 (citing *Miller v. Albright*, 523 U.S. 420, 432 n.9 (1998) (Stevens, J.) (plurality opinion)) (noting that "one explanation for the limitations on fathers' right to transmit citizenship is to minimize the financial burden on the states").

354. *Id.*; see also Mariella, *supra* note 36, at 227 ("The effect of the distinction therefore encourages men to conceive children outside of marriage, and compels women to bear the costs and the stigma of non-marital sex alone when men are unwilling to do so.")

355. Mariella, *supra* note 36, at 227.

356. *Id.* at 258.

dissent in *Nguyen*, if the underlying reasoning was the difficulty of determining paternity, increases in technology have negated that impossibility.³⁵⁷

In proposing the solution of symmetry in automatic citizenship, I draw partially from Martha Fineman's vulnerability theory to this extent: If the state systemically excludes you from citizenship, from the means of inheriting and owning property, from wealth, humanity, personhood, and basic resources, then the state has a heightened duty to make you whole and to provide access to the sanctioned mechanism of reliance and resilience.³⁵⁸ Congress, through § 1409, has created a right in citizen men that mitigates rights in their children and the mothers of their children, while simultaneously creating the conditions of precarity. Congress has created clear privileges and equally distinct vulnerabilities that perpetuate inequitable institutional practices and operations. Having created these conditions, Congress should abolish them.³⁵⁹

B. Immoral Asymmetry, Legal Hypocrisy, and Foreign Lives Matter

The inconsistencies in morality, legal accountability, and equality that § 1409 creates are legion. Section 1409 signals to the world that the interest men may have in hypermasculinity outweighs the value of life and that the price of a frolic is worth the expense of mass destruction. In the context of nonmarital foreign-born children, § 1409 suggests that a foreign woman is good enough to sexually exploit, but not good enough to create citizens.³⁶⁰ Inside America, a

357. *Nguyen*, 533 U.S. at 80.

358. Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 636–39 (2013).

359. As for arguments related to scarcity, lack of resources, overburdening the government coffers, and administrative difficulty, such rebuttals conflate substance and procedure. Difficulty does not qualify the legitimacy or the importance of symmetry between citizen men and women, citizen and foreign women, and between the children of foreign women and citizen women, as well as eliminating a right that functions like a property right to engage in unprotected hypermasculinity with foreign women free from the responsibilities of parenthood. Moreover, the United States had abundant resources when a Republican-controlled Congress and President Donald Trump exacted a nearly \$1.5 trillion tax cut package that mainly benefitted the wealthy. In 2018, the top-earning 1 percent of households—those earning more than \$607,000 a year—will pay a combined \$111 billion less in 2018 in federal taxes than they would have if the laws had remained unchanged since 2000. Steve Wamhoff & Matthew Gardner, *Federal Tax Cuts in the Bush, Obama, and Trump Years*, INST. ON TAX'N & ECON. (July 11, 2018), <https://itep.org/federal-tax-cuts-in-the-bush-obama-and-trump-years> [<https://perma.cc/W3EQ-WUEZ>]. It is more than the tax cut received over the same period by the entire bottom 60 percent of earners, according to an analysis in the process of being published. *Id.* A July 2018 report tallied all the major federal tax cuts and tax increases since 2000. Cumulatively, the top 1 percent of earners have received 22 percent of all tax cuts during that period; the top 20 percent of earners (those earning more than \$111,000) have received 65 percent of tax cuts. *Id.* Similarly, at the time of writing, the Trump Administration is considering bypassing Congress to grant another \$100 billion tax cut mainly for the wealthy. Alan Rappeport & Jim Tankersley, *Trump Administration Mulls a Unilateral Tax Cut for the Rich*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/us/politics/trump-tax-cuts-rich.html> [<https://perma.cc/VQ55-TAXB>].

360. Dorothy E. Roberts, *Who May Give Birth to United States Citizens?*, 17 WOMEN'S RTS. L. REP. 275 (explaining that a state referendum to deny undocumented immigrants *jus soli* citizenship signals that

woman's right to choose and to be free from reproductive punishment may be in jeopardy. Outside America, men can discard human life freely. Inside America, lawmakers put women in jail for giving birth to drug-dependent children, but allow men to discard their nonmarital children abroad at their whim. Inside America, the Fourteenth Amendment eliminates a caste system where some persons born in the country are citizens, but some are not.³⁶¹ Outside America, Congress has created a caste system for children based on the sex, nationality, and marital status of their parents. Both Congress and the courts can see the sanctity of human life and the responsibilities of parenthood when controlling women's bodies, but not men's. Both the Court and Congress can see life within the nation's boundaries. Neither the Court nor Congress can see the value of human life beyond its borders when mothers are unwed and foreign and fathers are Johnny Appleseed. If we, as a society, hold mothers criminally accountable for giving birth to drug-dependent children, we should extend the same morality and legal accountability to American men traveling abroad and discarding their children. Conversely, if Congress will allow American men to travel abroad and father children and discard them, then lawmakers should refrain from holding women accountable for birthing drug-dependent children.³⁶²

The history of § 1409 and its justifications bring into sharp relief the Court's hypocrisy as to the sanctity of human life and parenthood. There should be uniformity, symmetry, and consistency in morality and the value of life in abortion politics, the transferal of citizenship, and criminal prosecutions of mothers whose children are born dependent upon illicit substances. If both Congress and the courts can only see the value of life and the sanctity of parenthood when exerting control over a woman's body, and are blind to the value of life and sanctity of parenthood when fathers are philanderers and mothers are foreign and unwed, then perhaps Congress and the courts are not really interested in life or parenthood, but rather controlling women's bodies and preserving male prerogative, power, and privilege. Life is no more or less precious when it is made within the borders or beyond them. It is no more or less sacred when made with two citizens or one.

C. Gathering Evidence About Disparate Impact Based on Race and Nationality

It is beyond the scope of this paper to argue that, given the property interest in citizenship, the denial of *jus sanguinis* birthright citizenship to nonmarital

Americans believe undocumented workers are good enough to exploit, but are not good enough to be citizens).

361. *Id.*

362. The inherent ironies in morality, legal accountability, and inequality between § 1409 and the criminal prosecutions of mothers who give birth to drug-dependent children are the subjects of another piece of upcoming scholarship.

foreign-born children of American fathers triggers a violation under the Due Process Clause, subject to strict scrutiny analysis. Similarly, it is beyond the scope of this paper to answer whether a disparate impact claim based on the race or nationality of nonmarital foreign-born children or their mothers is an effective vehicle for exposing the discriminatory animus underlying § 1409 or whether disparate impact analysis has been so thoroughly gutted as to make such an effort futile. At a minimum, as Isabel Medina argues, disaggregated data is fundamentally necessary from federal agencies determining derivative citizenship claims by the race, nationality, gender, and marital status of applicants and whether the application is rejected or approved.³⁶³ Fundamental equality, justice, and fairness require documenting the impact of race, national origin, gender, and marital status on the derivative citizenship decision-making process.³⁶⁴ As Justice Ginsburg's majority opinion in *Morales-Santana* demonstrates, § 1409 requires a thorough vetting within its raced, sexed, and classed historical context under a robust strict scrutiny to prevent spurious justifications, hegemonic feats of replicating inequality in the baseline, and drawing false symmetries in power between men and women, all in an effort to perpetuate hypermasculine conduct and regimes of sexual subordination.

CONCLUSION

Congress, with the Supreme Court's blessing, has created a white heteropatriarchal property right in philandering, sexual exploitation, and rape. In doing so, Congress has given men a right that suppresses any duty owed to their children or to the mothers of their children: They can discard them. As the Supreme Court sits perched and ready to roll back the tide of women's reproductive autonomy and undermine the integrity of *Roe v. Wade*, let it extend its moralizing about the responsibilities of parenthood, sexually responsible behavior, and the sanctity of human life to the inestimable numbers of children Americans have fathered and discarded. Congress, the courts, policymakers, and administrators have all seen fit to give men a right, amounting to a property right, to father children abroad and abandon them. Rather than subject this practice to the exacting, antiseptic light of day, the Court has ratified and reified this right over centuries of doctrine.

For some, the words of Chief Justice Taney in *Dred Scott* will appear shocking to the conscience, antiquated, and unfathomable. The day will come, however, when we look back on § 1409 with the same wonder. Future generations, as well as the current generation, must fundamentally

363. Medina, *Derivative Citizenship*, *supra* note 149, at 444.

364. *Id.*

understand: "Power concedes nothing without a demand."³⁶⁵ Power is neither natural nor inevitable. It is made. And it can be unmade.

365. FREDERICK DOUGLASS, *Speech Before the West Indian Emancipation Society, in TWO SPEECHES BY FREDERICK DOUGLASS* 22 (Rochester, N.Y., C.P. Dewey 1857).