

BUREAUCRACY AS THE BORDER: ADMINISTRATIVE LAW AND THE CITIZEN FAMILY

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ABSTRACT

This contribution to the symposium on administrative law and practices of inclusion and exclusion examines the complex role of administrators in the development of family-based citizenship and immigration laws. Official decisions regarding the entry of noncitizens into the United States are often characterized as occurring outside of the normal constitutional and administrative rules that regulate government action. There is some truth to that description. But the historical sources examined in this Article demonstrate that in at least one important respect, citizenship and immigration have long been similar to other fields of law that are primarily implemented by agencies: officials operating at various levels within the administrative hierarchy have played a profound role in the cultivation of the substantive legal principles that those agencies administer. Searching for standards with which to interpret family-based citizenship and immigration statutes, twentieth-century administrators adapted family law principles in the process of developing new rules to govern who counted as a citizen. At times, these administrators operated with a significant degree of autonomy and authority, to a certain extent because of neglect rather than by design. At other times, these administrators shaped the law through legislative and adjudicative processes. These historical sources offer an instructive case study of administrative constitutionalism and of the fluid and dynamic relationship between “internal” and “external” administrative law. They also illuminate the active role of administrators in developing a

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conception of family that determined, and in many cases continues to determine, the fates of would-be citizens and immigrants.

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INTRODUCTION

In the last decade, legal scholars have given considerable attention to the role of administrative agencies in shaping the rights, benefits, and responsibilities associated with civic and social citizenship.¹ Within this literature, less attention has been given to the role of federal agencies in developing the laws that govern *formal* inclusion in and exclusion from the American polity: citizenship and immigration law.²

1. For the canonical description of the concepts of social and civic citizenship, see generally T.H. Marshall, *Citizenship and Social Class*, in *CITIZENSHIP AND SOCIAL CLASS* 1, 3–51 (Pluto Press 1992) (1950). For examples of scholarship examining the role of administrative agencies in the cultivation of foundational legal principles governing the relationship of the individual and the state, see WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 33–34, 65–74 (2010); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *STAN. L. REV.* 553, 568 (2007); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 *COLUM. L. REV.* 1083, 1092–93 (2014); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 *VA. L. REV.* 799, 801–06, 809–10 (2010); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *VA. L. REV.* 1, 18–19 (2000); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *YALE L.J.* 314, 321–23 (2012).

2. The role of agencies in the development of immigration law and policy is well known. See, e.g., Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 *HARV. C.R.-C.L. L. REV.* 1, 6–22 (2002); Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 *DUKE L.J.* 1173, 1196–1294 (2016); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865–1965)*, 15 *GEO. IMMIGR. L.J.* 625, 627–38 (2001). However, the administration of immigration and citizenship law has not received sustained attention as a site of statutory development and constitutional construction. There are several superb histories that examine the administration of American citizenship, immigration, and naturalization law. See ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 47–74 (2003); NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN*

But since the late nineteenth century, officials operating at various levels of the administrative hierarchy have been central to the processes by which citizenship and immigration law has been cultivated, reconfigured, and preserved. Moreover, because family membership has long occupied an important place in American citizenship and immigration law, one way that administrators have regulated political membership and entry rights is by resourcefully interpreting family law principles.³ This Article focuses on the role played by administrators in developing practices, policies, statutes, and constitutional understandings that have governed recognition of the parent–child relationship for the purpose of resolving claims to citizenship and immigration status.⁴

Many of the administrators who feature in this study operated in the middling ranks of the administrative hierarchy,⁵ a fact that distinguishes this project from the growing body of legal scholarship focused on the role of—and limits on—presidential power over

GOVERNMENT, 1780–1940, at 125–45 (2013); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW*, at xiv–xvii (1995); DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 150–75* (2002).

3. This Article builds and expands on research presented in Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134 (2014) [hereinafter Collins, *Illegitimate Borders*], and Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, in *THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL* 73–98 (Kim Rubenstein & Katharine G. Young eds., 2016) [hereinafter Collins, *Deference*]. For other discussions of the role of family law in American immigration and citizenship law, see generally Kerry Abrams, *What Makes the Family Special?*, 80 *U. CHI. L. REV.* 7, 13–14 (2013); Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 *VA. L. REV.* 629, 690–706 (2014); 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 (2014); Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 *VA. J. SOC. POL'Y & L.* 103 (2006).

4. American citizenship and immigration statutes have long recognized the parent–child relationship as a basis for derivative citizenship (citizenship transmission from an American parent to his or her foreign-born child), naturalization, and certain immigration preferences. See sources cited *infra* notes 19–23, 65, 90, 161, 165. For an overview of the various modern statutes regulating immigration, naturalization, and citizenship using family status, see Abrams & Piacenti, *supra* note 3, at 690–706.

5. Political scientist Daniel Carpenter argues that mid-level administrators (what he calls “mezzo-level bureaucrats”), such as bureau and division chiefs, are generally best positioned within agency hierarchies to develop durable policies and to ensure that they are implemented. See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 18–25 (2001). Although my analysis is not strictly limited to mid-level bureaucrats, see *infra* Part II, many of the administrators I study fall into that category.

immigration.⁶ Scholarly attention to that subject is both important and understandable.⁷ But lower-level agency deliberation and decisionmaking have also had a profound and durable influence on citizenship and immigration law. Although it is sometimes difficult to discern how routine administrative decisionmaking shapes the contours of a broader field of law, the longitudinal account I provide demonstrates the central role that administrators played in the development of two foundational “borders of belonging” in American law: the rules that determine family membership and the rules that determine political membership.⁸

Changes in American citizenship and immigration law in the late nineteenth century precipitated the development of a vast administrative network that by the early twentieth century had evolved to include multiple departments, including the Department of Labor,

6. For discussions of the scope of presidential power over immigration, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 458–85 (2009); Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691, 708–19 (2015); *Symposium on Administrative Reform of Immigration Law*, BALKINIZATION (Nov. 26, 2014), https://balkin.blogspot.com/2014/11/symposium-on-administrative-reform-of_26.html [<https://perma.cc/PR9N-HAYH>] (collecting articles).

7. In recent years, presidents both Democratic and Republican have attempted to exercise their immigration authority in ways that proved politically controversial. In 2012 and 2014, high-level officials in President Barack Obama’s administration released memoranda that openly deprioritized the deportation of “dreamers”—undocumented noncitizens who were brought to the United States as children—and undocumented parents of citizens and lawful permanent residents. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, and R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/33X6-GWS4>]; Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enf’t, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/LBJ4-Q5N5>]. In January 2017, President Donald Trump issued three executive orders setting forth new immigration regulations concerning immigration from specified Muslim-majority countries, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), immigration enforcement and border security, Exec. Order No. 13,767, 82 Fed. Reg. 8,799 (Jan. 25, 2017), and deportation priorities and sanctuary jurisdictions, Exec. Order No. 13,768, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

8. “Borders of belonging” is historian Barbara Welke’s phrase describing the ways in which nineteenth-century law differentiated individuals and privileged white, able-bodied men as rights holders and citizens. See BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* 1–3 (2010).

the Department of State, and the Department of Justice.⁹ As I demonstrate, within these agencies the self-described gatekeepers¹⁰ functioned not simply—and sometimes not even—as agents of Congress’s will. At times, these administrators operated with a significant degree of autonomy and authority,¹¹ to a certain extent because of neglect rather than by design. Searching for standards with which to interpret family-based citizenship and immigration statutes, they adapted pliable family law principles to support new rules regarding who counted as a citizen and, in doing so, drew and redrew the nation’s borders. At other times, these administrators shaped the law through legislative and adjudicative processes. As quasi-legislators, they wrote new statutes.¹² And when they went to court, they defended the borders they had created by offering legal theories that were often (though not always) adopted by judges and transformed into arguably more durable forms of law.

For administrative law scholars, this study contributes to a developing body of scholarship that chronicles and examines the role of administrators as lawmakers. An important strand of this scholarship has focused on “administrative constitutionalism”—the role played by administrators in interpreting and shaping fundamental principles of constitutional law, broadly conceived, and the constitutional principles that undergird the administrative state.¹³ A related body of scholarship has focused on agencies’ cultivation of “internal” administrative law—the agency-created policies, rules, and procedures that guide administrators’ decisionmaking—and its relationship to the “external” legal principles generated by courts and

9. The agencies charged with administering citizenship and immigration law have changed over time. See LEE, *supra* note 2, at 47–74 (describing the development of a federal bureaucracy designed to implement the Chinese exclusion laws); PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 1–53 (2012) (outlining the development of federal administrative procedures for naturalization and denationalization).

10. LEE, *supra* note 2, at 10, 19–20.

11. On the concept of administrative autonomy, see generally CARPENTER, *supra* note 5. In Professor Carpenter’s account, “[b]ureaucratic autonomy prevails when a politically differentiated agency takes self-consistent action that neither politicians nor organized interests prefer but that they either cannot or will not overturn or constrain in the future.” *Id.* at 17. It is not clear that any of the administrators I discuss in this Article enjoyed the level of autonomy that Carpenter describes; hence I use the term autonomy in a looser sense to suggest agency latitude to engage in creative acts of governance.

12. See *infra* Part I.B.

13. For a searching discussion of administrative constitutionalism, see Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1901, 1921 (2013). For further discussion, see sources cited *supra* note 1.

Congress that direct and restrain agency conduct.¹⁴ Several studies of administrative constitutionalism and internal administrative law have considered whether agency-created norms and policies are law at all, and, if so, whether lawmaking is a legitimate and normatively desirable exercise of administrative power.¹⁵ Here I embrace a capacious conception of law and put aside questions concerning the legitimacy and desirability of internal administrative law and administrative constitutionalism. Instead, I examine how and why administrators enlisted various sources of authority—statutes, family law principles, and constitutional norms—to craft the laws that came to define the legal border for thousands of would-be citizens and immigrants.

For immigration law scholars, this case study offers a distinctive challenge to the commonplace notion that immigration is an exceptional field of law characterized by a surfeit of discretion and, in certain ways, a dearth of law.¹⁶ The sources I examine in this Article demonstrate that, in at least one important respect, citizenship and immigration have long been similar to other fields of law that are primarily implemented by agencies: in their routine work, administrators played an active role in crafting important substantive and procedural legal principles that reflected their understanding of foundational legal and constitutional norms. Perhaps most striking for modern readers who associate family law with state law, the historical sources I examine reveal twentieth-century federal administrators' resourceful responses to broader changes in state family law when

14. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 252–54 (2012) (discussing BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903)); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1412–58 (2010); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 *MICH. L. REV.* (forthcoming 2017) (manuscript at 7–19).

15. See, e.g., Mashaw, *supra* note 14, at 1470–72; Metzger, *supra* note 13, at 1916–29; Metzger & Stack, *supra* note 14 (manuscript at 13–21).

16. Over thirty years ago, Professor Peter Schuck observed that immigration law “has long been a maverick, a wild card, in our public law” because of its insulation “from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.” Peter H. Schuck, *The Transformation of Immigration Law*, 84 *COLUM. L. REV.* 1, 1 (1984). Immigration law scholars, including Schuck, have examined various ways in which this understanding of the field is no longer entirely accurate. For example, in 1984 Schuck argued that the exceptional features of immigration law were changing. *Id.* at 54–74. Others have complicated the notion that immigration law exists outside the basic structures of American law. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 560–80 (1990). But most immigration law scholars and practitioners would likely agree that, as a descriptive matter, the political branches are still given considerable latitude when formulating immigration policies.

determining children's claims to citizenship and immigration status.¹⁷ With respect to the foreign-born nonmarital children of American fathers, for example, administrators appeared to embrace some but not other liberalizing trends in state laws that determined recognition of the father-child relationship outside marriage. By examining the details of how administrators interpreted family law principles, we see how agency adjudication and lawmaking have occasioned cultural and constitutional contestation concerning the role of the family as a basis for belonging in the American polity.

This Article proceeds as follows. Part I focuses on the efforts of early twentieth-century administrators to develop decisional rules regulating derivative citizenship—citizenship transmission between an American parent and his or her foreign-born child—as well as the naturalization status of children of naturalizing parents. These administrators' unease concerning the rules they had developed to resolve the citizenship claims of nonmarital children eventually prompted them to draft and propose a new statute that largely codified agency interpretations and practices. They were successful in that endeavor, but the new statute did not end the dissatisfaction of those fathers and children whose relationships were recognized under local law and in their communities, but not by federal administrators.

Part II examines the efforts of late twentieth-century claimants to use emerging constitutional equality principles to challenge the lines that had been drawn by earlier administrators and then codified by Congress. Late twentieth-century administrators defended the work of their predecessors in part by offering innovative interpretations of the Supreme Court's separation-of-powers and equal protection jurisprudence. Their efforts were partly successful, and contestation over the recognition of the parent-child relationship in the

17. The conventional understanding is that, in its legal manifestation, the family is a creature of state law. See *In re Burrus*, 136 U.S. 586, 593–94 (1890) (cited in *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013)) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”). As I have demonstrated elsewhere, however, federal programs that use family status as a basis for eligibility have varied in their requirements for conformity with state family law definitions, not infrequently providing alternative (federal) standards for assessing legal family relationships. See Kristin A. Collins, *Federalism, Marriage, and Heather Gerken's Mad Genius*, 95 B.U. L. REV. 615, 622–23 (2015) [hereinafter Collins, *Federalism*]; see also Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1096, 1116–46 (2009) (describing early nineteenth-century federal pension clerks' resistance to state marriage law when administering federal military widows' pensions).

administration of citizenship and immigration law continues to this day. The Article concludes with a brief discussion of a pending Supreme Court case that could prompt modern administrators to revisit persistent questions concerning the status of the nonmarital child in American citizenship law and, more generally, the role of the family in the legal construction of the nation's borders.

I. FAMILY LAW AS THE BORDER

One often imagines the national border as a territorially defined phenomenon. But the border is also delineated by a constellation of laws concerning entry, birthplace, residence, and—my focus here—family membership.¹⁸ Thus, although not generally acknowledged as such, family law principles are also part of the United States' legal border and always have been. A 1790 statute governing citizenship acquisition was surely one of the first laws allocating a federal right, privilege, or benefit based on family status.¹⁹ Like successor statutes, it automatically naturalized the minor children of naturalizing parents, thus making the parent-child relationship a basis for acquisition of American citizenship.²⁰ The 1790 statute also recognized some American citizens' foreign-born children as citizens at birth—what today we call derivative citizenship.²¹

The original derivative citizenship statute was vague in many respects, but by 1855 Congress had clarified that only the foreign-born children of American *fathers* were citizens by descent,²² a statutory limitation that remained in place until 1934.²³ The implementation of

18. For a provocative discussion of the role of law in constructing national borders, see Mary L. Dudziak & Leti Volpp, *Introduction*, in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 1–18 (2005).

19. *See* Act to Establish an Uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103, 104 (1790).

20. *Id.*; *see also* Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts Heretofore Passed on that Subject, ch. 28, § 4, 2 Stat. 153, 155 (1802); Act to Establish an Uniform Rule of Naturalization, and to Repeal the Act Heretofore Passed on that Subject, ch. 20, § 3, 1 Stat. 414, 415 (1795).

21. Act to Establish an Uniform Rule of Naturalization § 1.

22. Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof, ch. 71, § 1, 10 Stat. 604, 604 (1855). For a discussion of modern derivative citizenship law, *see infra* Part II.

23. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797. For historical accounts of American women's efforts to secure the right to transmit citizenship to their foreign-born children, *see* CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 227–42 (1998); Collins, *Illegitimate Borders*, *supra* note 3, at 2157–58, 2191–94.

this and successor statutes in the early twentieth century still required administrators to determine the status of the father–child relationship, however. If the child was born into a marital family, this process was straightforward: assuming the marriage was legal, there was no question of the child’s status as a citizen.²⁴ But, as I have examined elsewhere in greater detail, the question of illegitimate children—under the common law, any child born outside marriage, including prenuptial children—was a source of confusion and consternation among administrators and judges in the nineteenth and early twentieth centuries.²⁵

The historical records left by early twentieth-century administrators—case files, memoranda, agency opinions, and litigation files—demonstrate the profound role those administrators played in crafting the laws that they used to distinguish citizen from noncitizen, the admissible from the inadmissible. In this Part, I demonstrate how, through a process of statutory interpretation and adaptation of family law principles, administrators developed a body of “internal” administrative law to determine the citizenship status of foreign-born nonmarital children of American parents. Internal administrative laws are the standards crafted by administrators to govern agency decisionmaking, such as “bodies of internal doctrine and precedents,”²⁶ and the “vast numbers of internal guidelines, instructing agency personnel on . . . the meaning of governing statutes.”²⁷ By denominating the agency-generated guidelines concerning recognition of the parent–child relationship as internal administrative law, I do not mean to suggest that those interpretive rules were completely distinct from “external” administrative law—legal principles developed by courts and Congress that governed and restrained agencies.²⁸ As

24. In addition, a proviso in the statute prohibited descent of citizenship “to persons whose fathers never resided in the United States.” Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof § 1.

25. See Collins, *Illegitimate Borders*, *supra* note 3, at 2144–82. In this Article, I use the term illegitimate when necessary because it was the term generally used by jurists, administrators, and legislators in describing children born outside marriage in the period under consideration. I do not endorse the pejorative connotations of the term.

26. Mashaw, *supra* note 14, at 1416.

27. Metzger & Stack, *supra* note 14 (manuscript at 10).

28. External administrative law generally refers to the “the externally-imposed constraints on agencies imposed by Congress and the courts,” Metzger & Stack, *supra* note 14 (manuscript at 3), including “legislation and common-law [principles that] regulate[] the relationship between citizens and officials,” see Mashaw, *supra* note 14, at 1414. Although state family law may qualify as external law in this context, administrators’ interpretation of the federal derivative citizenship

Professors Gillian Metzger and Kevin Stack have recently argued, “no clear line demarcates” internal and external administrative law, and the two categories of law “are best identified as constituting a spectrum.”²⁹ The historical sources examined here support that observation and also show how early twentieth-century administrators of citizenship and immigration law effectively shifted their lawmaking efforts back and forth along this spectrum. Over time, they developed internal guidelines governing recognition of the parent–child relationship, helped to transform those guidelines into statute, and then developed new (or repurposed) interpretive guidelines as they responded to novel claims and changing circumstances. By the 1950s, the conception of the parent–child relationship outside marriage that administrators had helped secure was not only in tension with a liberalizing trend in state law but would soon appear antiquated and arguably unconstitutional, as illegitimacy and gender classifications were challenged under emerging equal protection and due process principles.

A. The Legitimation Standard in the Early Twentieth Century

The case of William Alonzo Oppenheimer provides a useful introduction to early twentieth-century administrators’ efforts to determine the status of a father–child relationship for the purpose of establishing a foreign-born child’s citizenship. William was born in Nicaragua in the 1910s to an American father, Edward Oppenheimer, and a Nicaraguan mother.³⁰ William was born “out of wedlock,” and the question for the Department of State was whether he was an American citizen.³¹ The derivative citizenship statute in effect at that time provided that children “whose fathers were or shall be at the time

statute using family law principles generated a distinctive body of agency precedent that, albeit with some notable exceptions and changes over time, predictably guided agency decisionmaking.

29. Metzger & Stack, *supra* note 14 (manuscript at 10). Other scholars have observed the interactive nature of internal and external administrative law. For example, Professor Adrian Vermeule contends that the standards that govern judicial review of an agency’s decisions—a typical form of external administrative law—influence the allocation of authority among lawyers and nonlawyers within agencies. See ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 197–219 (2016). And Professor Jerry Mashaw maintains that much of the Administrative Procedure Act “was drawn from . . . a law internal to specific statutory regimes and particular agency practices.” Mashaw, *supra* note 14, at 1367.

30. See Letter from Alvey A. Adee, Second Assistant Sec’y of State, to A. Mitchell Palmer, U.S. Att’y Gen. 5 (Feb. 27, 1920) (on file with National Archives and Records Administration (NARA), Record Group (RG) 59).

31. *Id.*

of their birth citizens of the United States, shall be deemed . . . citizens of the United States” as long as the father had at some point resided in the country.³² On its face, this statute would seem to apply to William, given that Edward was a citizen and had resided in the United States prior to William’s birth.

For officials in the Department of State, however, the question was complicated by a competing interpretation: that illegitimate children were not contemplated under the citizenship statute.³³ The common law had famously denominated the “bastard” as the “son of nobody,”³⁴ and in the nineteenth century, judicial and administrative precedents had incorporated that rule into American nationality law, thus excluding from citizenship the foreign-born nonmarital children of American fathers.³⁵ However, by the time William’s case came to the attention of Alvey Adee, the Second Assistant Secretary of State, the Department had already begun granting the citizenship claims of many foreign-born children of American fathers if the child had been legitimated by the parents’ subsequent marriage.³⁶ But in William’s case, his parents had not married. Instead, Edward Oppenheimer had formally acknowledged William as his son pursuant to a Louisiana law that allowed the father to legitimate his “natural children” by declaring in a “writing executed by his own hand . . . and attested by three witnesses, that he acknowledges” the child as his own.³⁷ For Adee, it was not clear that this was sufficient, given the longstanding common law predisposition against recognizing the relationship between a father and his nonmarital child.

In 1920, Adee sought guidance on William’s case and two others, asking the Attorney General to formally resolve the Department’s quandary concerning the citizenship status of legitimated foreign-born children of American fathers. Acting Attorney General Charles Bismark Ames obliged with a nod to state law, observing that “[i]n practically every State it is provided that such a child may inherit from

32. Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof, ch. 71, § 1, 10 Stat. 604, 604 (1855).

33. See Collins, *Illegitimate Borders*, *supra* note 3, at 2141–44.

34. 1 WILLIAM BLACKSTONE, COMMENTARIES *458–59.

35. See Collins, *Illegitimate Borders*, *supra* note 3, at 2145–53.

36. See Letter from Adee to Palmer, *supra* note 30, at 2–3; see also Collins, *Illegitimate Borders*, *supra* note 3, at 2167–69 (examining the Department of State’s pre-1920 practice of recognizing legitimated foreign-born children of American fathers as citizens).

37. See Letter from Adee to Palmer, *supra* note 30, at 6 (quoting 1 REVISED LAWS OF LA. § 2173 (Solomon Wolff ed., 2d ed. 1902)).

its mother and in many it may inherit from its father, where it has been legitimated through the marriage of its parents or acknowledgment by its father as his own,” or by judicial decree.³⁸ Thus, he opined, there was no policy reason why the citizenship statute should not be interpreted to provide for the recognition of “the relationship of an illegitimate child to a father whose identity has been established in the manner provided by statute.”³⁹ With that formal assurance in hand, the Department of State continued its practice and policy of recognizing the foreign-born legitimated children of American fathers as citizens.

By interpreting the statute to allow for the recognition of children legitimated under the law of the father’s domicile, the 1920 Attorney General opinion appeared to ratify a construction of the citizenship statute that was more generous than pre-1900 interpretations had been,⁴⁰ and that followed the liberalizing trend away from the common law’s complete bar on recognition of the father–child relationship outside marriage. Not only could the father legitimate his nonmarital child by marrying the child’s mother—a legal procedure that was simply not recognized under the common law⁴¹—but, as the Attorney General opinion noted, under the laws of many states there were other ways a child could be legitimated. Although marriage to the child’s mother was the primary method, by 1920 many states, like Louisiana, had enacted legitimation-by-acknowledgment statutes that allowed the

38. Citizenship—Children Born Abroad Out of Wedlock of American Fathers and Alien Mothers, 32 Op. Att’y Gen. 162, 164 (1920).

39. *Id.*

40. On pre-1900 interpretations of the derivative citizenship statute, see Collins, *Illegitimate Borders*, *supra* note 3, at 2145–53, 2160–70, 2174–75.

41. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *208–209 (William M. Lacy ed., Philadelphia, Blackstone Publishing Co. 1889); JAMES SCHOULER, A TREATISE OF THE LAW OF THE DOMESTIC RELATIONS 379–80 (Boston, Little, Brown & Co. 1870).

father to legitimate his child using processes of varying degrees of formality.⁴² Other states allowed for legitimation by judicial decree.⁴³

Not all children seeking recognition as American citizens were given the benefit of the legitimation rule, however. Most notably, when administrators were presented with the claim of a child excludable under the race-based exclusion laws that were central to American immigration law in the late nineteenth and early twentieth centuries, they tended to use a more restrictive interpretation of the derivative citizenship statute.⁴⁴ By the 1920s, the Chinese exclusion laws had been in place for over three decades and had been expanded to exclude persons from the so-called Asiatic Barred Zone.⁴⁵ Status as an American citizen was one of the few grounds on which a racially excludable person could claim a right to enter or remain in the United States. As a consequence, many of the officials charged with enforcing the exclusion laws perceived the derivative citizenship statute to provide an undesirable loophole—a means by which Chinese American fathers could bring their Chinese-born children to the

42. By 1920 at least sixteen states had procedures allowing for “legitimation by acknowledgment” without requiring the parents to marry and leading to varying rights for the father and the child. See ERNST FREUND, U.S. DEP’T OF LABOR, CHILDREN’S BUREAU, ILLEGITIMACY LAWS OF THE UNITED STATES AND CERTAIN FOREIGN COUNTRIES 22–23 (1919) (describing the legitimation-by-acknowledgment statutes of Michigan, Louisiana, California, Arizona, Maine, Montana, Oklahoma, Nevada, North Dakota, South Dakota, and Utah); 4 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 243, at 161, 163, 170 tbl. CXVII (1936) (reproducing the pre-1921 legitimation-by-acknowledgment statutes of Delaware, Florida, Idaho, and North Dakota); 7 C.J. *Bastards* §§ 20–23 (1916) (observing that “in some states a bastard may be legitimated by a public acknowledgement of it by the father as his own, by his receiving it into his family as such and by otherwise treating it as legitimate,” and noting the recognition of legitimation by acknowledgment in several states, including Illinois, Iowa, and Louisiana).

43. See FREUND, *supra* note 42, at 22 (noting that as of 1919, “[l]egitimation by judicial proceeding is found in Alabama, Georgia, Mississippi, North Carolina, and Tennessee”); 7 C.J. *Bastards* § 25 (1916) (“In some states judicial proceedings may be instituted to obtain a judicial declaration of legitimacy.”).

44. For a much fuller discussion of this point, see Collins, *Illegitimate Borders*, *supra* note 3, at 2171–82.

45. “Asiatic Barred Zone” was the term used to describe the geographical region identified in the Immigration Act of 1917 and included most of Asia and the Pacific Islands. Individuals from that region were barred from entering the United States unless they fell into a statutory exception. See Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–77 (repealed 1952). For overviews of the exclusion laws, see BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990, at 19–36 (1993); LEE, *supra* note 2, at 23–46; MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 18 (2004); SALYER, *supra* note 2, at 1–32.

United States as citizens, thereby effectively evading the exclusion laws.⁴⁶

This concern was especially salient for officials in the Department of Labor's Bureau of Immigration, who were tasked with the daily administration of the exclusion laws. As historian Lucy Salyer has shown, Bureau officials often did their best to reject ethnic Chinese children's claims to derivative citizenship by crafting special requirements and imposing procedural hurdles or elevated evidentiary standards that would make it nearly impossible for those children to prove their claims.⁴⁷ By concluding that legitimated foreign-born children of American fathers were citizens, the 1920 Attorney General opinion had ratified a standard that was functionally in tension with the Bureau's efforts to narrowly construe the derivative citizenship statute in cases involving the foreign-born children of Chinese American fathers.

This was surely evident to the government lawyers who had to defend the Bureau's restrictive interpretation of the derivative citizenship statute in a series of habeas corpus cases brought in federal court in the 1920s.⁴⁸ Although the federal courts' power to review Bureau determinations of admissibility was limited in the early twentieth century,⁴⁹ in the 1922 case *Ng Fung Ho v. White*⁵⁰ the Supreme Court announced that when an individual threatened with deportation credibly claimed to be an American citizen, he or she had a constitutional right to judicial review of that claim: "To deport one

46. See SALYER, *supra* note 2, at 210–11; Collins, *Illegitimate Borders*, *supra* note 3, at 2170–80.

47. See SALYER, *supra* note 2, at 210–11. For example, in 1915 the Bureau of Immigration issued a regulation stating that, if he was over the age of 18, the foreign-born male child of a Chinese American father would be admitted to the United States only if he proved that he was a dependent member of his citizen father's household—a condition that barred some citizens from entering the country. See *Rules Governing the Admission of Chinese*, in U.S. DEP'T OF LABOR, BUREAU OF IMMIGRATION, TREATY, LAWS, AND RULES GOVERNING THE ADMISSION OF CHINESE 24, 29–30 (1915).

48. See, e.g., *Louie Wah You v. Nagle*, 27 F.2d 573, 574 (9th Cir. 1928); *Mason ex rel. Chin Suey v. Tillinghast*, 26 F.2d 588, 589 (1st Cir. 1928); *Ng Suey Hi v. Weedon*, 21 F.2d 801, 801 (9th Cir. 1927).

49. See, e.g., *United States v. Ju Toy*, 198 U.S. 253, 260, 261–63 (1905) (finding that the determination of an executive officer was conclusive with respect to an ethnic Chinese individual's claim to U.S. citizenship and denying his due process claim to judicial review of that determination).

50. *Ng Fung Ho v. White*, 259 U.S. 276 (1922). For an important discussion of *Ng Fung Ho*, see Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1999–2001 (2013).

who so claims to be a citizen, obviously deprives him of liberty . . . [and] may result also in loss of both property and life; or of all that makes life worth living.”⁵¹ In theory, greater judicial oversight of the Bureau’s citizenship determinations could have led the agency to adopt a modestly more generous interpretation of the derivative citizenship statute. In the case of allegedly illegitimate children of Chinese American fathers, however, this did not happen. Instead, challenges brought in federal court seemed to lead Bureau administrators and their lawyers to harden their position on ethnic Chinese children’s derivative citizenship claims.⁵²

Even a summary consideration of one of those cases, the First Circuit’s *Mason ex rel. Chin Suey v. Tillinghast*,⁵³ provides a window into how Bureau officials reasoned about family status in cases where administrators were subject to competing concerns: enforcement of the citizenship rights of American fathers and their children as provided in the derivative citizenship statute and in *Ng Fung Ho* on the one hand, and enforcement of race-based exclusion laws on the other. In *Chin Suey*, the Bureau contended that the petitioner was the child of his father’s second wife in a polygamous marriage and therefore was illegitimate.⁵⁴ Chin Suey’s attorney sought the benefit of the legitimation rule that had been extended to the foreign-born children of American fathers,⁵⁵ contending that because Chin Suey’s father and mother had married again following the first wife’s death, under state law the child was legitimate: “[I]n a large majority of the States of the Union statutes have been passed expressly enacting that the subsequent inter-marriage of the parents, followed by co-habitation and accompanied by an acknowledgement of paternity on the part of the father, legitimizes previous issue; and such is the law of Massachusetts.”⁵⁶ But the Department of Labor’s Board of Review rejected this argument, concluding that even if the death of the first

51. *Ng Fung Ho*, 259 U.S. at 284. The Court also reasoned from structural constitutional principles: “Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.” *Id.*

52. Cf. Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L L. 359, 379 (2013) (demonstrating that litigation challenging executive branch authority will “push the executive to advocate an expansive view of its own authority [and] to defend past action . . . so as to preserve executive flexibility”).

53. *Mason ex rel. Chin Suey v. Tillinghast*, 26 F.2d 588 (1st Cir. 1928).

54. Brief for Appellee at 7, *Chin Suey*, 26 F.2d 588 (No. 2175).

55. *Chin Suey*, 26 F.2d at 589.

56. Brief for Appellant at 5–6, *Chin Suey*, 26 F.2d 588 (No. 2175) (citing MASS. GEN. LAWS ch. 190, § 7 (1921)).

wife made his “secondary wife his first wife in a legal sense, . . . thereby . . . possibly. . . legitimiz[ing]” Chin Suey under state law, legitimation “could not bestow American citizenship on alien Chinese children.”⁵⁷ Following the government’s reasoning, the First Circuit found that the derivative citizenship statute did not apply to children who had been legitimated by their parents’ marriage, and that therefore Chin Suey had been properly excluded under the Chinese exclusion laws.⁵⁸

Scholars of administrative constitutionalism have been attentive to how constitutional norms and sensibilities can shape administrators’ sense of institutional mission and hence their interpretation of a governing statute and allied constitutional norms.⁵⁹ As the Bureau’s interpretation of the derivative citizenship statute in Chin Suey’s case demonstrates, the converse is true as well. Institutional mission can shape agencies’ interpretation of a statute in ways that are constitutionally significant.⁶⁰ In this instance, the cultural forces that shaped the Bureau of Immigration’s institutional mission are not difficult to discern. The virulent anti-Chinese sentiment that animated the enactment of the exclusion laws and their administration was not subtle and has been chronicled by many historians, including most recently by Lucy Salyer, Mae Ngai, and Erika Lee.⁶¹ As they have demonstrated, many Bureau administrators viewed ethnic Chinese individuals’ claims to citizenship with great skepticism, both because the administrators suspected fraud and because they perceived

57. Brief for Appellee, *supra* note 54, at 12 (quoting Board of Review decision). The Department of Labor’s Board of Review was the predecessor of the modern Board of Immigration Appeals (BIA). See ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 22–24 (2010). The fact that the father had been in a polygamous marriage was likely an insurmountable barrier to Chin Suey’s quest for citizenship, not because of a particular statutory exclusion of children of polygamous marriages, but because of the widespread and deeply held suspicion of Chinese as polygamists. For a discussion of this point, see Collins, *Illegitimate Borders*, *supra* note 3, at 2177–79. See also Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 653–64 (2005) (“Polygamy and prostitution were taken [by Americans] as evidence that Chinese culture embodied a slave-like mentality.”).

58. *Chin Suey*, 26 F.2d at 589.

59. See Lee, *supra* note 1, at 885; Tani, *supra* note 1, at 318–20.

60. Cf. Metzger, *supra* note 13, at 1921 (“[G]iven that individuals are often drawn to working at federal agencies because of a shared commitment to their underlying missions, agency officials might be thought to be particularly likely to privilege programmatic needs over constitutional concerns.”).

61. For representative historical accounts, see generally LEE, *supra* note 2; NGAI, *supra* note 45; SALYER, *supra* note 2.

Chinese Americans as merely “technical” citizens whose status deserved little respect.⁶²

From a twenty-first-century vantage point, the values and biases that shaped the administrative standards governing recognition of the father–child relationship in cases involving racially excludable children are deeply troubling. It would be a mistake, however, to characterize the administration of the derivative citizenship statute in the early twentieth century as a lawless or purely discretionary endeavor. Charged with the day-to-day implementation of race-based immigration laws and the determination of the citizenship claims of foreign-born children of American fathers, administrators did what they often do—developed standards that guided agency discretion.⁶³ It should come as little surprise that administrators tasked with this difficult line-drawing assignment would generate internal administrative standards for resolving derivative citizenship claims that reflected one of the agency’s primary missions and were at the very least consistent with the spirit of the race-based immigration statutes they were charged with enforcing.

B. Administrative Anxiety and the Push for Codification

An important function of internal administrative law is the creation of consistent guidelines and interpretations to regularize administrative decisionmaking. By the late 1920s, administrators in the Departments of State, Labor, and Justice had produced a considerable body of precedent and some published guidelines establishing agency standards for adjudication of derivative citizenship claims. But cases like *Chin Suey* shed light on the tensions between the agencies’ varied treatments of the foreign-born nonmarital children of American fathers.⁶⁴ These tensions may have contributed to a more general concern among administrators that, at least in some instances, their interpretation of the derivative citizenship statute possibly exceeded the limits of administrative authority. As I demonstrate in this section,

62. See SALYER, *supra* note 2, at 208–10.

63. As Mashaw has observed, “[i]f for no other reason than self-protection, [administrators] often seek to establish guidelines for their own discretionary judgments.” Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1685 (2007).

64. In addition to *Chin Suey*, in two other federal cases decided in the late 1920s the Ninth Circuit upheld the exclusion of the allegedly illegitimate children of Chinese American fathers, but did so based on a finding that the children had not been legitimated. See *Louie Wah You v. Nagle*, 27 F.2d 573, 574 (9th Cir. 1928); *Ng Suey Hi v. Weedon*, 21 F.2d 801, 802 (9th Cir. 1927).

in part because of concern over the scope of their own authority, in the late 1920s and into the 1930s administrators pressed for codification of their interpretations of the derivative citizenship statute by drafting what became the Nationality Act of 1940.⁶⁵

Uncertainty concerning recognition of foreign-born nonmarital children of American fathers as citizens is evident in letters and memoranda in Department of Labor and Department of State files from the late 1920s and 1930s. Private lawyers sought clarity from low-level immigration officials, who in turn sought guidance from their superiors.⁶⁶ In lengthy memoranda, administrators revisited the fundamental question of the citizenship status of foreign-born nonmarital children and reconsidered the relevant precedent—administrative and judicial—in painstaking detail. For example, in 1931 Theodore Risley, the Solicitor of the Department of Labor, drafted a twenty-three-page memorandum on the issue for the Assistant Secretary of Labor in which he noted with concern the past disagreements between the different bureaus within the Department and the “conflict between the Department [of Labor] and the Department of State over a matter as to which both Departments should be in harmony, if possible.”⁶⁷

Some administrators also expressed doubt concerning the Department of State’s and Department of Labor’s resolutions of the citizenship claims of foreign-born nonmarital children of American mothers. The derivative citizenship statute spoke only of fathers’ foreign-born children.⁶⁸ Nevertheless, starting in the early 1900s, the

65. Nationality Act of 1940, ch. 876, §§ 201(g), 205, 54 Stat. 1137, 1139–40.

66. See, e.g., Letter from O.K. Alger, Att’y, to P.J. [sic] Greeley, Dist. Dir. of Naturalization, U.S. Dep’t of Labor (Mar. 27, 1933) (seeking an opinion regarding the citizenship status of the foreign-born nonmarital son of an American father who had lived in the United States with his father from the age of one, had been “in all respects recognized and accepted as his [father’s] son,” and had inherited his father’s estate) (on file with NARA, RG 85); Letter from J.P. Greeley, Dist. Dir. of Naturalization, U.S. Dep’t of Labor, to Raymond Crist, Comm’r of Naturalization, U.S. Dep’t of Labor (Mar. 28, 1933) (forwarding inquiry from attorney O.K. Alger regarding citizenship status of nonmarital child) (on file with NARA, RG 85); Letter from Raymond Crist, Comm’r of Naturalization, U.S. Dep’t of Labor, to J.P. Greeley, Dist. Dir. of Naturalization, U.S. Dep’t of Labor (Apr. 6, 1933) (preliminarily concluding that the nonmarital child described in Alger’s letter of March 27, 1933 was not a citizen and drawing Greeley’s attention to *Mason ex rel. Chin Suey v. Tillinghast*, 26 F.2d 588 (1st Cir. 1928)) (on file with NARA, RG 85).

67. Memorandum from Theodore G. Risley, Solicitor, U.S. Dep’t of Labor, to Robe Carl White, Assistant Sec’y, U.S. Dep’t of Labor 17 (Feb. 10, 1931) (on file with NARA, RG 85).

68. In 1934, under pressure from women’s organizations, Congress revised the derivative citizenship statute to give married American women the right to transmit citizenship to their

Department of State consistently recognized the foreign-born nonmarital children of American mothers as citizens, and the Department of Labor, by and large, did so as well.⁶⁹ The reasoning of administrators in such cases was relatively straightforward. As one immigration official explained, “[M]uch distress and possible criticism would result if [we] enforced separations of mothers and children.”⁷⁰

But administrative recognition of the foreign-born nonmarital children of American mothers as citizens marked a dramatic departure from the language of the citizenship statute, and not all administrators were comfortable with the practice. Indeed, this innovative interpretation of the statute generated repeated questioning and justification in agency documents, including a 1928 memorandum by the Solicitor of the Department of State, Green Hackworth, to his colleague Richard Flournoy. Conceding that foreign-born nonmarital children of American mothers were not contemplated by the derivative citizenship statute, Hackworth reasoned pragmatically that the practice of recognizing these children as citizens should be maintained in part because it was the “long-continued action of the executive Department” and as such would receive deference from the courts.⁷¹ Thus, Hackworth was not particularly concerned that the practice would be restricted by the judiciary. Nevertheless, he urged that it would be even better if “[t]he matter . . . [were] called to the attention of Congress and regularized.”⁷² Periodic memoranda produced by Department of Labor officials also expressed anxiety about recognizing American mothers’ foreign-born nonmarital children as

foreign-born children. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797; see BREDBENNER, *supra* note 23, at 227–42; Collins, *Illegitimate Borders*, *supra* note 3, at 2157–58, 2191–94.

69. See Collins, *Illegitimate Borders*, *supra* note 3, at 2199–206; see, e.g., H.R. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., A REPORT PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, PART ONE: PROPOSED CODE WITH EXPLANATORY COMMENTS 18 (Comm. Print 1939) [hereinafter PROPOSED CODE] (“[T]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother”); Letter from H.R. Landis, U.S. Comm’r of Immigration, Montreal, Can., to Harry E. Hull, Comm’r Gen., U.S. Bureau of Immigration (Oct. 9, 1929) (on file with NARA, RG 85); Memorandum from Harry E. Hull, Comm’r Gen., U.S. Bureau of Immigration, to All Comm’rs & Dist. Dirs. of Immigration (Nov. 8, 1929) (on file with NARA, RG 85).

70. Letter from Irving F. Wixon, Acting Comm’r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm’r of Immigration, Montreal, Can. 1 (Sept. 21, 1929) (on file with NARA, RG 85).

71. Memorandum from Green Hackworth, Office of the Solicitor, U.S. Dep’t of State, to Richard Flournoy, Office of the Solicitor, U.S. Dep’t of State 5 (Aug. 14, 1929) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915)).

72. *Id.* at 6.

citizens. This was especially true in cases when the children were of Chinese descent, and at one point the Bureau of Immigration temporarily suspended recognition of all such children as citizens.⁷³

Hackworth's memorandum suggested a way forward: legislation could help resolve administrative quandaries regarding the proper interpretation of the derivative citizenship statute and secure legitimacy for the line-drawing procedures those agencies had developed. In the early twentieth century, administrators may have been especially eager to turn to the legislative process, as the practices of agencies, as well as their place in the American legal order, were under significant scrutiny by jurists, legal scholars, and legislators.⁷⁴ In the context of a much broader debate over the role of administrative agencies in American governance, the fact that administrator-made rules often determined the citizenship status of foreign-born children of American parents may have been especially worrying.

Hackworth was not the first administrator to suggest the wisdom of codifying agency precedent. Indeed, when he wrote the memorandum to Flournoy, Hackworth certainly knew that administrators of American citizenship and immigration law, including Flournoy himself, had already turned to the legislative process in an effort to bring order to that body of law.⁷⁵ In 1923, relatively high-level administrators in the Department of State—including Adee and Flournoy—had pressed for comprehensive reform.⁷⁶ In 1928, Secretary of State Frank Kellogg created a three-person committee to propose revisions to the citizenship laws, and one year later that committee issued a report.⁷⁷ But the breakthrough came in 1933, when President Franklin Delano Roosevelt issued an executive order directing the

73. See, e.g., Memorandum from C.A. Palmer, Dist. Dir., U.S. Bureau of Immigration, to Comm'r Gen., U.S. Bureau of Immigration (Mar. 28, 1929) (on file with NARA, RG 85) (noting that the policy of recognizing the foreign-born nonmarital children of American mothers as citizens, "insofar as it relates to Chinese persons, will cease to be operative").

74. See DANIEL ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 1–9 (2014); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 731–41 (2016) (reviewing ERNST, *supra*).

75. Indeed, it appears that the purpose of Hackworth's memorandum to Flournoy was to advise him on whether legislation should be drafted to address the subject of the citizenship status of foreign-born nonmarital children of American mothers. See Memorandum from Hackworth to Flournoy, *supra* note 71, at 6 (advising that the citizenship status of foreign-born nonmarital children of American mothers should be "regularized in connection with the bill for revision of the citizenship law now pending").

76. George S. Knight, *Nationality Act of 1940*, 26 A.B.A. J. 938, 938 (1940).

77. *Id.*

Departments of Labor, State, and Justice to create an interdepartmental committee “to review the nationality laws of the United States, to recommend revisions, . . . and to codify those laws into one comprehensive nationality law.”⁷⁸ The committee was composed of administrators from those departments—including Hackworth and Flournoy—and over the next few years they drafted a new nationality code that substantially revised, updated, and in significant respects altered American laws governing citizenship, naturalization, and denationalization.⁷⁹

Parent–child citizenship transmission was one of the focal points of the interdepartmental committee’s drafting efforts.⁸⁰ With respect to the status of nonmarital children, the basic framework proposed by the committee was a codification of the internal rules the agencies had developed in the course of implementing the extraordinarily summary derivative citizenship statute.⁸¹ Thus, in the draft statute written by the committee—known as the “Proposed Code”—administrators offered a provision that reflected their established practice of recognizing the foreign-born nonmarital children of American mothers as American citizens.⁸² The committee also proposed codification of the practice of recognizing the foreign-born nonmarital children of American fathers as citizens “provided the paternity is established during minority, by legitimation, or adjudication of a competent court.”⁸³ Congress held hearings on the proposed derivative citizenship provision, but when the legislators passed the Nationality Act of 1940 they made virtually no changes to the committee’s suggested statutory language governing parent–child citizenship transmission.⁸⁴

78. Exec. Order No. 6,115, Revision and Codification of the Nationality Laws of the United States (Apr. 25, 1933).

79. See generally PROPOSED CODE, *supra* note 69 (detailing revisions proposed by the committee); Knight, *supra* note 76 (providing historical background and discussing major substantive revisions).

80. See PROPOSED CODE, *supra* note 69, at vi–vii.

81. Collins, *Illegitimate Borders*, *supra* note 3, at 2188–204. The committee did propose one major change to the derivative citizenship statute: a ten-year parental residence requirement. PROPOSED CODE, *supra* note 69, at 13–14. That residence requirement did not apply to the American mothers of foreign-born nonmarital children. *Id.* at 17.

82. PROPOSED CODE, *supra* note 69, at 18.

83. *Id.* at 17.

84. Nationality Act of 1940, Pub. L. No. 76-853, §§ 201(g), 205, 54 Stat. 1137, 1139–40. For legislative deliberation concerning the Proposed Code’s derivative citizenship provision, see *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code, Hearings on H.R. 6127 and H.R. 9980 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 35–65, 78–100, 154–84 (1940) [hereinafter *Revise and Codify*].

The 1940 Act may very well qualify as an example of “unorthodox lawmaking” as that phenomenon has been described by modern political scientists and legal scholars.⁸⁵ The Act was not written according to the textbook legislative process—it was largely drafted by administrators, not legislators, and it was presented as a wartime measure on the eve of America’s entry into World War II.⁸⁶ But unorthodox or not, agency-drafted legislation was a very common phenomenon in the New Deal era.⁸⁷ Moreover, the Act certainly brought greater transparency and clarity to the standards governing derivative citizenship that had developed over the course of the early twentieth century. Administrators no longer had to debate whether they were acting *ultra vires* by recognizing the foreign-born child of an unmarried American mother as a citizen, for example. And with respect to American fathers and their foreign-born children, the rule holding that legitimated foreign-born children were to be recognized as citizens now had the imprimatur of Congress.

But statutory recognition of legitimated foreign-born children of American fathers as citizens did not answer the important question of what legitimation entailed. During the drafting process, members of the committee do not appear to have given serious consideration to what was meant by the term “legitimated.” Was marriage to the mother required? Was the child legitimated if the father raised the child in his household and held him or her out as his own? Or was formal acknowledgment by the father necessary? Moreover, when the Proposed Code was sent to Congress for consideration—and, the committee hoped, enactment—legislators did not question the concept of legitimation or what exactly the process entailed. In a brief exchange with legislators, Flournoy explained that the Department of State had long held that “where the father had taken *some act* to legitimate and had legitimated the child, the child would be treated then just as if it

85. “Unorthodox lawmaking” refers to legislation enacted using nontraditional procedures. According to Abbe Gluck, Anne Joseph O’Connell, and Rosa Po, this includes legislation that is drafted either by individuals or groups outside the federal government (such as lobbyists) or by unaccountable insiders (such as staff members and professional drafting offices inside Congress). See Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1824–25 (2015). The term was first coined by political scientist Barbara Sinclair in her book *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (1997).

86. Collins, *Illegitimate Borders*, *supra* note 3, at 2207 n.285.

87. See Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 337–40 (2013).

had been born legitimately, and therefore acquired citizenship.”⁸⁸ But Flournoy did not specify what that “act” might be.

Quoting from the 1920 Attorney General opinion at some length, the interdepartmental committee’s Proposed Code seemed to resolve this problem by noting the established administrative practice of using the law of the father’s domicile to determine whether the child had been legitimated.⁸⁹ In this respect, the interdepartmental committee drafted a standard that assumed the application of state domestic relations law or possibly that of a foreign jurisdiction. Twelve years later, the Immigration and Nationality Act of 1952⁹⁰ recodified the 1940 Act’s derivative citizenship provision in nearly all respects. It also made explicit that the law of the father’s or child’s “residence or domicile . . . whether in the United States or elsewhere” would determine whether the child had been “legitimated,” and that the child must be “in the legal custody of the legitimating . . . parent.”⁹¹

The story of administrative lawmaking on this particular issue does not end with statutory recognition of the law of the domicile as the rule of decision for legitimation determinations, however. By the time the interdepartmental committee finalized the Proposed Code in 1938, the law governing the father–child relationship had shifted further from the common law “nobody’s child” standard in many jurisdictions. As chronicled by Stanford Law Professor Chester Vernier in a multivolume examination of American family law published in the mid-1930s, marriage to the child’s mother remained the most prevalent means by which a father could legitimate his child, but legitimation by acknowledgment had become more common in state codes.⁹² This meant that for fathers and children who lived in

88. *See Revise and Codify, supra* note 84, at 62 (statement of Richard Flournoy, Assistant Legal Advisor, Department of State) (emphasis added).

89. PROPOSED CODE, *supra* note 69, at 17–18.

90. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

91. *Id.* § 101(c)(1), 66 Stat. at 171–72 (codified as amended at 8 U.S.C. § 1101(c)(1) (2012)). The 1952 Act also made clear that other family-based immigration preferences and entitlements were available to the legitimated child on the basis of a relationship with his or her father by formally recognizing that administrators could provide an exception from immigration quotas for the legitimated child of an *immigrating* father. *See id.* § 101 (b)(1)(C), 66 Stat. at 171; *id.* § 202(a)(1), 66 Stat. at 176.

92. Writing in 1936, Vernier reported that at least twenty-four states permitted legitimation in one form or another even if the parents did not marry. VERNIER, *supra* note 42, § 244, at 179–81. Twenty-one of those jurisdictions permitted legitimation by written acknowledgment of paternity. *Id.* § 245, at 181. In five others—Georgia, Mississippi, North Carolina, South Carolina, and Tennessee—the father could petition the court to decree the child legitimate. *Id.* Eight states

jurisdictions that recognized legitimation by marriage only, under the 1940 and 1952 acts marriage remained the key to father–child citizenship transmission. But for fathers and children who lived in jurisdictions that allowed legitimation by acknowledgment or judicial process, either of these procedures would satisfy the legitimation requirement in the derivative citizenship statute—at least in theory.⁹³

Despite, or even because of, increasingly generous statutory recognition of the father–child relationship outside marriage in the laws of many jurisdictions, however, immigration officials faced with such claims insisted on a narrow interpretation of the term “legitimation.” The reasons for this interpretive tendency were likely many. Given America’s substantial military presence in Asia and Europe during and following World War II, the concern that the derivative citizenship statute would allow for evasion of the race-based exclusion laws and national-origin quotas remained a significant issue.⁹⁴ The sheer volume of claims during this period also may have fueled concerns about fraud, leading some lower-level administrators to reject even formal paternal acknowledgment and adjudication as a form of legitimation.⁹⁵ Additionally, one should not overlook the influence of what historian Erika Lee calls the “gatekeeping” mission of American immigration law and the officials who administered it; exclusionary immigration laws had led to the development of a “bureaucratic machinery established to admit, examine, deny, [and] deport.”⁹⁶ For these and doubtless other reasons, the interpretive guidelines developed by immigration officials used a restrictive definition of legitimation that left many fathers and children divided by nationality.

allowed for legitimation by acknowledgement without a writing. *Id.* § 244, at 178–81; *see also* 7 AM. JUR. *Bastards* §§ 54–55, 57, 59 (1937) (“In many jurisdictions statutes provide that the legitimation of a bastard may be effected by its recognition and acknowledgement by the putative father.”).

93. *See infra* notes 108, 122.

94. *See* Collins, *Illegitimate Borders*, *supra* note 3, at 2198 n.256, 2207–10. The national-origin quota system created by the Immigration Act of 1924 limited the number of immigrants based on their country of origin and strongly favored the entry of white, Protestant immigrants. *See* Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159; NGAI, *supra* note 45, at 21–54. The race-based exclusion laws were repealed in 1952, but as I have shown elsewhere even after their repeal the legitimation requirement continued to serve as a race-salient restriction on the recognition of American soldiers’ foreign-born children as citizens. *See* Collins, *Illegitimate Borders*, *supra* note 3, at 2211 (citing the Immigration and Nationality Act of 1952, ch. 477, § 403, 66 Stat. 163, 279–80).

95. *See* Collins, *Illegitimate Borders*, *supra* note 3, at 2208–10.

96. LEE, *supra* note 2, at 21.

A 1948 decision by the Court of Claims sheds light on this interpretive tendency. In *Compagnie Generale Transatlantique v. United States*,⁹⁷ a French shipping company challenged a fine assessed by the Department of Labor for transporting four foreign-born nonmarital children of an American father from Cuba to Puerto Rico, where they were to reside permanently with their father.⁹⁸ Under the Immigration Act of 1924, shipping companies could be fined if they landed an immigrant who lacked a valid visa.⁹⁹ In this case, the father had acknowledged the children in a formal proceeding before a judge in Cuba—a process that gave the children the right to bear his surname, to be supported by him, and in certain circumstances to inherit from him.¹⁰⁰ When they landed in Puerto Rico, however, immigration officials rejected the children’s claims to American citizenship and fined the shipping company.¹⁰¹

Defending the fine in the Court of Claims, the Department of Labor urged that the father’s formal recognition of the children was insufficient to legitimate them under Cuban law and that therefore they were not citizens.¹⁰² The judges of the Court of Claims were underwhelmed by that argument, however, reasoning that it would be improper, for example, to discriminate between “two children born illegitimately to two American fathers, one of whom thereafter married his child’s mother and the other of whom, prevented from doing so by the death of the mother, did all that he could by formally acknowledging his paternity,” as had the father in this case.¹⁰³ According to the court, to designate one of those children “‘legitimate’ and an American citizen, [and] the other ‘illegitimate’ and an alien,” as the government urged, “would . . . penaliz[e] the child not only for the sins of the father but for the unfortunate death of the mother.”¹⁰⁴ The court found that such an interpretation would also ignore the trend in state law toward legitimation by acknowledgment. Citing Vernier’s treatise, the court observed that “in at least a majority of the American

97. *Compagnie Generale Transatlantique v. United States*, 78 F. Supp. 797 (Ct. Cl. 1948).

98. *Id.* at 798.

99. See Immigration Act of 1924, ch. 190, § 16(b), 43 Stat. 153, 163.

100. *Compagnie Generale Transatlantique*, 78 F. Supp. at 798.

101. *Id.*

102. *Id.* at 799.

103. *Id.*

104. *Id.*

States, what was done by [this father] to make his children legitimate, or much less than what he did, would have made them legitimate.”¹⁰⁵

Compagnie Generale rejected the Department of Labor’s narrow conception of legitimation, but the opinion had limited precedential authority.¹⁰⁶ Moreover, in the 1950s, immigration officials—now working in the Immigration and Naturalization Service (INS)—had better success entrenching their interpretation of the term “legitimated” in adversarial proceedings before the Board of Immigration Appeals (BIA), a precedent-setting administrative review board within the Department of Justice.¹⁰⁷ In several cases the BIA adopted the narrowest interpretation of the term available, holding that legitimation required a legal process through which the nonmarital child is brought into perfect parity with the child born within marriage. In other words, for a child born outside marriage to be “legitimated” by the father under the derivative citizenship statute, the process had to result in the child’s acquisition of precisely the same rights and privileges as a child born within marriage, down to every collateral inheritance right.¹⁰⁸ This was certainly one legal understanding of legitimation. But as *Compagnie Generale* shows, it was not the only one. Perhaps most significantly for fathers and their nonmarital children, under the laws of many states and foreign jurisdictions, that level of legitimation was still achievable only through the father’s

105. *Id.* (citing 4 VERNIER, *supra* note 42, §§ 243–245, at 156–82).

106. *Compagnie Generale Transatlantique* was of limited precedential value because the children’s citizenship had been determined under the 1934 version of the derivative citizenship statute, which contained no reference to the birth status of the child. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797. Hence, the Court of Claims was interpreting the statutory term “child” and in the process evaluated the government’s effort to limit the meaning of that term to legitimated children only. *See Compagnie Generale Transatlantique*, 78 F. Supp. at 798. Nevertheless, the case provides a valuable window into the government’s reasoning regarding the concept of legitimation, as its effort to use an extremely narrow definition of that term in interpreting the 1934 Act presaged its interpretation of the statutory term “legitimated” found in the 1940 and 1952 Acts. *See infra* notes 108–09 and accompanying text.

107. On the origins and development of the BIA, see LAW, *supra* note 57, at 22–24.

108. *See In re F—*, 9 I. & N. Dec. 448, 449 (B.I.A. 1957) (holding that a formal declaration of paternity to the Registry of Births and continuous legal custody of child was insufficient to legitimize a child, even though it was “clear that the affiliated or acknowledged child acquire[d] under Portuguese law certain rights such as the right to bear parents’ surname and the right to support, as well as certain inheritance rights and probably certain civil rights, the status conferred is somewhat less than that of legitimated children”); *In re D—*, 7 I. & N. Dec. 438, 440 (B.I.A. 1957) (recognizing that acknowledgment under Italian law “insures to the child certain rights of inheritance and support, as well as civil rights,” but finding that “only legitimation by subsequent marriage or by royal or presidential decree gives to the person who is born out of wedlock the attributes of a legitimate child in all respects”).

marriage to the child's mother.¹⁰⁹ Thus, as a result of the INS's and BIA's interpretive choice, many father-child dyads that were legally recognized under the law of the relevant domicile, and were recognized socially as father and child, were nevertheless denied the family-based preferences and statuses available in American citizenship and immigration law.

* * *

This was the status of the law governing recognition of the father-child relationship outside marriage in American citizenship and immigration law in the 1950s, as civil rights emerged as a central concern in American law and politics. Before considering how broader changes associated with the civil rights era shaped, and failed to shape, recognition of the parent-child relationship in this field of law—the subject of Part II—I offer two observations concerning the role of administrators in cultivating the legal boundaries of family and nation in the first half of the twentieth century.

First, the way in which family-based immigration and citizenship law was administered illuminates how officials grappled with and helped to shape fundamental norms pertaining to family membership and political membership in their routine decisionmaking practices. To be sure, these varied exercises of administrative authority were intended to delineate the technical contours of citizenship and were animated by a range of concerns, including administrability and fraud. But efforts to draw stable and discernable lines between citizen and noncitizen using family law principles generated standards that were as expressive as they were functional. As administrators enforced a narrow legitimation standard, for example, they crafted an interpretive rule that in most jurisdictions required the father to marry the child's mother. Not only did this requirement exclude many nonmarital children from citizenship and admission (and hence served to exclude a class of children already typically disadvantaged in both law and life),

109. For example, under Florida law, if the parents married, the child was “in all respects deemed and held legitimate.” *VERNIER*, *supra* note 42, § 243, at 161 tbl. CXVII. If the child was legitimated by acknowledgment in writing, he or she “inherit[ed] as if born in lawful wedlock” but did not inherit from “lineal or collateral kindred, unless parents have intermarried.” *Id.* The same was true in Minnesota, Montana, Nebraska, Oklahoma, South Dakota, Washington, and Wisconsin. *Id.* § 243, at 161–75 tbl. CXVII.

but it also signaled the cultural and political superiority of the marital family.¹¹⁰

Given the centrality of marriage in early and mid-twentieth-century America,¹¹¹ this is not particularly surprising. But in noting as much, we should also acknowledge that this obscure legitimation requirement was part of what Professors William Eskridge and John Ferejohn have called “small c” constitutional law: the statutes, regulations, and judicial opinions that form the fabric of everyday governance in the United States.¹¹² As Eskridge and Ferejohn observe, the legal structures that define and support family recognition and status are central to the process of constitutional governance: “The American constitution of the family is a microcosm of the larger constitutional evolution of our polity and our public values.”¹¹³ In the case of citizenship and immigration law, malleable family law principles were adapted, repurposed, and sometimes resisted in an administrative effort that generated a legal border that was every bit as real as the territorial border and also affirmed a vision of the citizen family as preferably marital and white, and presumptively heterosexual.¹¹⁴

Second, the administrative gloss on the term “legitimation” that had developed by mid-century has had lasting consequences for American citizenship and immigration law and for those entangled in its bureaucracies—a point that I explore in greater detail in Part II.¹¹⁵

110. For a discussion of how traditional marriage-oriented family law principles marked nonmarital relationships as deviant, see generally Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1656 (2003). See also Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 *CALIF. L. REV.* 1277, 1279 n.2 (2015) (charting the modern history of “marital supremacy”—“the legal privileging of marriage over non-marriage and marital over nonmarital families”).

111. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 158–79 (2000).

112. ESKRIDGE & FEREJOHN, *supra* note 1, at 12–22.

113. *Id.* at 252; see also COTT, *supra* note 111, at 5 (“The United States has shown through its national history a commitment to exclusive and faithful monogamy, preferably intraracial. In the name of the public interest and public order, it has furthered this model as a unifying moral standard.”).

114. The heterosexual dimension of American immigration law went largely unquestioned until the 1950s. See MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 227–54 (2011).

115. The narrow understanding of the term “legitimation” employed by administrators in the 1940s and 1950s continues to serve as the prevailing interpretation in the administration of American citizenship and immigration law. See, e.g., *Retuya v. Sec’y, Dep’t of Homeland Sec.*, 412 F. App’x 185, 188–89 (11th Cir. 2010) (holding that paternity established by formal

As immigration law scholars Kerry Abrams and Kent Piacenti have observed regarding modern American citizenship law, “[t]he same person who might likely be declared a legal parent under state family law will often find himself to be a legal stranger to his child for citizenship law purposes.”¹¹⁶ The historical record demonstrates that this phenomenon was not simply the result of legislative will; rather, it was also in significant respects the product of administrative entrenchment of a restrictive conception of legitimation.

II. FAMILY AND NATION IN THE ERA OF CONSTITUTIONAL GENDER EQUALITY

As new constitutional understandings emerged in the second half of the twentieth century, the family law standards developed and used by early and mid-twentieth-century administrators to resolve claims to family-based citizenship and immigration status came under pressure. In the 1950s, civil rights moved to center stage in American political and legal life. After formal racial equality took hold as a constitutional principle, legal norms concerning gender, family status, and illegitimacy were transformed across multiple fields of law as civil rights groups, feminist organizations, and welfare advocates urged new understandings of the role of women in the public sphere and the role of men as fathers. As part of this transformation, challenges to the legal disadvantages facing nonmarital children took constitutional form, initially as challenges to illegitimacy classifications and then as challenges to gender-based distinctions between the rights and responsibilities of unmarried mothers and fathers vis-à-vis their children.¹¹⁷

In the 1960s and 1970s, Congress, the Supreme Court, and some federal agencies began to restrict the ways in which state and federal governments were permitted to regulate the father-child relationship

acknowledgment and adjudication as allowed under Florida law did not satisfy the 1952 Act’s “legitimation” requirement).

116. Abrams & Piacenti, *supra* note 3, at 698.

117. Professor Serena Mayeri has examined these developments in searching detail. See Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2308–33 (2016) (describing several of these challenges); Mayeri, *supra* note 110, at 1289 (“What was new about the child-focused arguments of the 1960s was their context and their constitutionalization. . . . Until the civil rights victories of midcentury, [child advocates] had little ammunition for arguments sounding in due process and equal protection.”); see also Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1193–95 (2016) (discussing developments in constitutional and family law eroding distinctions between marital and nonmarital parentage).

by requiring some level of conformity with equality and due process principles.¹¹⁸ Would these emerging constitutional norms reshape the lines that early twentieth-century administrators and legislators had drawn in citizenship and immigration law?

This Part examines the resistance of many late twentieth-century administrators to abandoning the legitimation requirement in the regulation of citizenship and immigration. My focus is a series of legislative debates initially triggered by a failed constitutional challenge to the legitimation requirement. Consistent with the trends outlined in Part I, these materials underscore that if one is to understand the role of administrators in developing the legal rules that govern formal inclusion in and exclusion from the polity, one must account for administrators' participation in the legislative process. Congress is conventionally described as exercising oversight of agencies—and it is certainly true that Congress does so, at least in principle.¹¹⁹ But we know that administrators are also voluntary and sometimes eager participants in the legislative process.¹²⁰ Although the power that administrators exert in Congress is that of persuasion rather

118. Late twentieth-century federal efforts to bring the states in line with the modern trend away from illegitimacy discrimination appear to have been initiated not in the Supreme Court but in Congress and federal agencies, in the form of measures to prevent the states from excluding nonmarital children from Aid to Families with Dependent Children. For accounts of those legislative and administrative efforts, see *King v. Smith*, 392 U.S. 309, 321–27 (1968); WINIFRED BELL, *AID TO DEPENDENT CHILDREN 1–39*, 76–110 (1965); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 *YALE L.J.* 1347, 1357–59 (1963). At the urging of activists and claimants, the Supreme Court developed an important jurisprudence that helped dismantle the legal disabilities of nonmarital children. See *infra* notes 130–36.

119. See, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 *COLUM. L. REV.* 479, 521–22 (2010) (observing that “agency actions are governed by the terms of authorizing statutes and they act subject to, at times, substantial congressional and presidential oversight,” but noting that, realistically, agencies “wield considerable independent discretion in setting the shape of national policy and implementing federal programs”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 579–80 (1984) (describing agencies as operating in a system of “control relationships,” which includes legislative oversight). As an empirical matter, the level of control that Congress actually exercises over any particular agency depends on multiple factors. See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 *VA. L. REV.* 889, 967–78 (2008); see also Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2255–60 (2001) (describing various theories concerning Congress’s ability to influence agency behavior).

120. Professor Nicholas Parrillo’s analysis of New Deal administrators as drafters of federal statutes is important reading for anyone interested in administrators’ role as legislative drafters. See Parrillo, *supra* note 87, at 331–41. In his work on “bureaucratic autonomy,” political scientist Daniel Carpenter examines administrators’ work as policymakers, including successful efforts to secure legislative reform. See CARPENTER, *supra* note 5, at 2, 275–88.

than decisionmaking, participation in the legislative process is an opportunity for administrators to shape the statutes they implement and the constitutional values those statutes implicate.¹²¹ In legislative debates over proposals to bring immigration and citizenship law in line with modern equality norms, administrators tended to resist such proposals and developed innovative interpretations of the Supreme Court's equal protection and separation-of-powers jurisprudence in support of their positions.

In the second half of the twentieth century, immigration judges, the BIA, and federal courts continued to reject claimants' and litigants' arguments for a broader interpretation of the term "legitimated" as it appeared throughout the citizenship and immigration statutes.¹²² Meanwhile, claimants began cultivating constitutional objections to the ways those statutes discriminated on the basis of gender and illegitimacy.¹²³ A case called *Fiallo v. Bell*¹²⁴ generated the most attention, both in the Supreme Court and in Congress.¹²⁵ The Legal Aid Society of New York represented the *Fiallo* plaintiffs, urging that, as interpreted by the INS and the BIA, the legitimation requirement in the 1952 Immigration and Nationality Act created an insurmountable and unconstitutional burden on the fathers and children who sought recognition of their relationships.¹²⁶ The fathers in *Fiallo*—Ramon Fiallo-Sone, Arthur Wilson, and Cleophus Warner—could not or

121. Recent scholarship on administrative constitutionalism provides examples of administrators' efforts to secure their constitutional vision through the legislative process in other regulatory fields. See, e.g., Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 851–54 (2015) (describing administrators' proposed revision of the Social Security Act).

122. See, e.g., *De Los Santos v. INS*, 690 F.2d 56, 59–60 (2d Cir. 1982) (upholding agency's denial of preferential immigration status to nonmarital child on grounds that the official acknowledgment procedure used by the father did not give the child the exact same rights as a child born in marriage); *In re Reyes*, 16 I. & N. Dec. 475, 478 (B.I.A. 1978) (concluding that formal acknowledgment by the father in Dominican law does not qualify as legitimation because "the succession rights of the acknowledged child differ from that [sic] of the child born in wedlock or the child legitimated by marriage"); *In re C—*, 9 I. & N. Dec. 597, 598 (B.I.A. 1962) (concluding that formal recognition of the child by the father in the municipal civil registry was insufficient to fully legitimate the child under Spanish law, which required marriage of the parents); see also *In re Reyes*, 17 I. & N. Dec. 512, 515 (B.I.A. 1980) (listing similar BIA cases).

123. See, e.g., *Lau v. Kiley*, 563 F.2d 543, 545 n.4 (2d Cir. 1977) (noting that the petitioner had raised a constitutional challenge to the legitimation requirement in the 1952 Act but then abandoned it).

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

125. This Part draws from and builds on a fuller analysis of *Fiallo v. Bell*'s life in Congress developed in Collins, *Deference*, *supra* note 3, at 77–96.

126. Brief for Appellants at 14–18, *Fiallo*, 430 U.S. 787 (No. 75-6297).

would not legitimate their children by marrying the children's mothers.¹²⁷ And under the laws of their respective domiciles, this was the only means by which their children could obtain full parity with marital children, thereby satisfying the INS's interpretation of the term "legitimated" in the statute.¹²⁸ In these cases—as in many other cases that had come before—the legitimation requirement legally and practically prevented the fathers and their children from securing immigration preferences that would have allowed them to reside together in the United States. And because the legitimation requirement did not apply to mothers and their nonmarital children who sought family-based immigration preferences, it was gender discriminatory as well.¹²⁹

The gender and illegitimacy discrimination at the core of the statute challenged in *Fiallo* had been part of American citizenship and immigration law for over a century, but it became more salient as social and legal norms changed. By the time the Legal Aid attorneys filed the complaint in *Fiallo* in the Eastern District of New York, a raft of Supreme Court and lower federal court opinions expressing intolerance for gender and illegitimacy discrimination supported the plaintiffs' argument, including *Stanley v. Illinois*,¹³⁰ *Weinberger v. Wiesenfeld*,¹³¹ *Frontiero v. Richardson*,¹³² and *Jimenez v. Weinberger*.¹³³ Three years later, when *Fiallo* was decided by the Supreme Court, that list of cases had grown to include *Craig v. Boren*,¹³⁴ *Trimble v.*

127. Brief for Appellees at 7–13, *Fiallo*, 430 U.S. 787 (No. 75-6297).

128. *Id.* at 8, 10, 12–13.

129. 8 U.S.C. § 1101(b)(1), (b)(1)(C)–(D), (b)(2) (1970).

130. *Stanley v. Illinois*, 405 U.S. 645, 651–58 (1972).

131. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

132. *Frontiero v. Richardson*, 411 U.S. 677, 682–91 (1973).

133. *Jimenez v. Weinberger*, 417 U.S. 628, 636–67 (1974). For additional cases expressing intolerance for gender and illegitimacy discrimination, see *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975); *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975); *Gomez v. Perez*, 409 U.S. 535, 537–38 (1973); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171–76 (1972); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 70–72 (1968); *Beaty v. Weinberger*, 478 F.2d 300, 307–308 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F. Supp. 1226, 1234–37 (D. Md.), *aff'd*, 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588, 592–93 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972). See also *Ruth Bader Ginsburg, Gender and the Constitution*, 44 U. CIN. L. REV. 1, 10–15 (1975) (discussing gender discrimination cases).

134. *Craig v. Boren*, 429 U.S. 190, 208–10 (1976).

Gordon,¹³⁵ and *Califano v. Goldfarb*.¹³⁶ Nevertheless, in April 1977 the Court rejected the *Fiallo* plaintiffs' arguments in an opinion that relied largely, though not entirely, on the plenary power doctrine—the longstanding tenet that immigration law lay “wholly outside the power of th[e] Court to control.”¹³⁷

One way to understand the plenary power doctrine is that it creates, or recognizes, a domain in which the political branches are given unfettered—or nearly unfettered—authority, with little or no obligation to follow the normal constitutional rules protecting individual rights.¹³⁸ The precise contours of the plenary power doctrine were, and still are, contested.¹³⁹ But regardless of one's views regarding the judiciary's power to enforce constitutional principles in the field of immigration law, the notion that the plenary power doctrine creates a zone in which constitutional law simply does not operate is misleading in at least one respect: it risks eliding the role that constitutional norms and reasoning play outside the courts. And in this instance, it risks obscuring the important role of constitutional argument in the legislative debates over the legitimation requirement—debates in which administrators played a central part.¹⁴⁰

Even before *Fiallo* was briefed in the Supreme Court, Representative Elizabeth Holtzman of New York had sponsored a bill intended to bring “the Immigration and Nationality Act into accord with [the] constitutional prohibitions against discrimination based on

135. *Trimble v. Gordon*, 430 U.S. 762, 773–76 (1977).

136. *Califano v. Goldfarb*, 430 U.S. 199, 216–17 (1977).

137. *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

138. The Supreme Court has provided plenty of language that supports such an understanding. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts 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 control.”).

139. Recent constitutional challenges to President Donald Trump's executive orders imposing a ban on immigrants and refugees from certain Muslim-majority countries demonstrate just how much disagreement there is regarding the scope of judicial review in the field of immigration. *See, e.g.*, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 10, 2017).

140. This does not mean that in a field in which courts show great deference to the political branches, such as immigration, constitutional norms operate outside the courts in the same fashion that they do when more searching forms of judicial review are available. For a discussion of this point, and of how the plenary power doctrine as articulated in *Fiallo v. Bell* helped create a cycle of deference on the issue of gender discrimination in immigration and citizenship law, see Collins, *Deference*, *supra* note 3, at 94–96.

sex” and illegitimacy.¹⁴¹ Holtzman’s constitutional understanding of the family was apparent in her many appeals to fellow legislators to enact remedial legislation. If the legitimation requirement was evidence of the marital family’s cultural and legal supremacy, to Holtzman it was also a form of “blatant sex discrimination” that “says in effect that the father of an illegitimate child is not a ‘parent.’”¹⁴² “Fathers can have a deep and abiding relationship with their children regardless of whether they were married to the mothers of these children,” Holtzman maintained.¹⁴³ Paraphrasing *Stanley v. Illinois*,¹⁴⁴ the 1972 opinion in which the Supreme Court first recognized nonmarital fathers’ rights as parents, she contended that “it is no less important for a ‘child’ to be cared for by its parent when that parent is male rather than female and a father no less than a mother has a constitutionally protected right to the custody, care, protection, and management of the children he has sired and raised.”¹⁴⁵ In short, Holtzman promoted a vision of the family that privileged sex neutrality of parental roles and responsibilities as a core value that should be incorporated into American immigration law.¹⁴⁶

In the mid-1970s, when arguments for egalitarian division of labor at home were standard fare in American political discourse and debate, Holtzman’s effort to secure equal treatment for nonmarital children and their fathers in immigration law reflected an ascendant constitutional vision of the American family.¹⁴⁷ But even in this moment, when gender equality seemed to be gaining wider acceptance

141. *Review of Immigration Problems: Hearing on H.R. 10993 Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary*, 94th Cong. 133 (1975 & 1976) (statement of Rep. Elizabeth Holtzman, Member, H. Comm. on the Judiciary) [hereinafter *Review of Immigration*]; *id.* at 132 (reproducing a copy of H.R. 10993, 94th Cong. (1975)).

142. 121 CONG. REC. 72 (1975).

143. *Id.*

144. *Stanley v. Illinois*, 405 U.S. 645 (1972).

145. See *Review of Immigration*, *supra* note 141, at 133 (paraphrasing *Stanley*, 405 U.S. at 651). In this passage, Holtzman also borrows language from *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975).

146. Holtzman’s assertions notwithstanding, feminist arguments for gender equality in family life did not always transfer with ease to the nonmarital family. For a searching discussion of the complexities of late twentieth-century feminists’ views about gender equality and nonmarital childbearing, see Mayeri, *supra* note 117, at 2302–26.

147. On the rise of the feminist movement in the late twentieth century and the rise of an organized response to liberal feminism, see LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1970–1980*, at 65, 70–77 (2010).

socially and legally,¹⁴⁸ there were points of resistance. As I have examined in detail elsewhere, many officials in the INS and the Department of State resisted abandonment of the legitimation requirement.¹⁴⁹ For example, when Leonard Walentynowicz, head of the State Department's Bureau of Security and Consular Affairs, testified in a House committee hearing on Holtzman's bill, he offered a very different constitutional vision of the family and the relationship of fathers and their nonmarital children. The immigration laws "contemplate the existence of a family unity," he maintained.¹⁵⁰ And because "the child and its natural father" usually did not share "family unity,"¹⁵¹ immigration laws did not—and, in his view, should not—treat the children of unmarried mothers and fathers as equals. Although Walentynowicz was willing to make regulatory accommodation for what he viewed as the unusual instance of "family unity" between a father and his nonmarital child, he contended that the legitimation standard, "well-rooted in American jurisprudence and . . . still favorably regarded by our courts as well as by our society," should be preserved.¹⁵²

Neither Holtzman's bill nor her feminist vision of the family in immigration prevailed during her tenure in Congress. But in 1981 her bill was re-introduced by another Democrat, Representative Barney Frank, and was considered during a flurry of legislative activity

148. *See id.* at 70–77.

149. *See Collins, Deference, supra* note 3, at 82–83, 87–89. INS and Department of State officials serving during the Carter administration were most supportive of eliminating the legitimation requirement but were of the view that regulations designed to prevent fraud were necessary. *See Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary*, 96th Cong. 35 (1979) (statement of Elizabeth Harper, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, Department of State); *id.* at 2–3 (statement of David Crosland, Acting Comm'r, INS).

150. *Review of Immigration, supra* note 141, at 134 (statement of Leonard Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State).

151. *Id.*

152. *Id.* at 136. The gendered nature of Walentynowicz's conception of "family unity" was evident in his defense of a provision in the immigration code that allowed the *wife* of an immigrant father to sponsor the child—that is, the child's stepmother—because by marrying the father, "a family unit is being created." *Id.* at 145. Walentynowicz's testimony also suggested that his hesitance in recognizing the father-child relationship outside marriage was formed with a particular type of father in mind, as he spent significant effort explaining the high rates of illegitimacy in Caribbean countries. *Id.* at 143. For a fuller discussion of this portion of his testimony, see Collins, *Deference, supra* note 3, at 82–83.

concerning immigration in the 1980s.¹⁵³ Frank urged that “the time has long passed—if indeed a time ever existed—when a mother and a father could be viewed unequally in the eyes of the law.”¹⁵⁴ In this new round of congressional hearings, officials from President Ronald Reagan’s Department of State and the INS testified before Congress, cultivating creative constitutional arguments in opposition to the bill.

Rather than debating the question of whether unmarried fathers and their children were properly recognized as a family, however, these officials turned to the Court’s opinion in *Fiallo* as a primary basis of resistance. Representative Frank and others supporting the legislation, including the American Civil Liberties Union, relied on the *Fiallo* Court’s statements regarding “special judicial deference” in immigration matters to urge that “the Congress has an even higher responsibility to structure its immigration legislation to avoid unnecessary and blatant discriminatory practices.”¹⁵⁵ By contrast, Assistant Secretary of State for Consular Affairs Diego Asencio portrayed *Fiallo* as a clear judicial statement affirming the rationality of the gender-based distinctions drawn between mothers and fathers within the immigration code. In his view, the *Fiallo* Court had “upheld the validity of the distinction between the rights of an illegitimate child derived through its natural father as opposed to those rights derived from its natural mother.”¹⁵⁶ Deferring to the Court’s assessment of the reasoning behind the gender-based regulation of immigration, Asencio concluded that “[i]t is the Department’s present position, concurring in the Court’s view, that requiring legitimation in such cases is a rational discrimination.”¹⁵⁷ By interpreting *Fiallo* as evidence of the Court’s approval of the gender-discriminatory legitimation requirement—and ignoring the Court’s disavowal of judicial authority—Asencio engaged in the kind of “creative interpretation” of constitutional doctrine and norms that is a hallmark of administrative constitutionalism.¹⁵⁸

153. See *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 893–94 (1981) [hereinafter *Immigration Reform*]; H.R. 3405, 97th Cong. (1981).

154. *Immigration Reform*, *supra* note 153, at 893.

155. *Id.* at 1357 (letter submitted by American Civil Liberties Union); see *id.* at 895 (written testimony of Rep. Barney Frank, Member, H. Comm. on the Judiciary).

156. *Id.* at 858 (statement of Ambassador Diego Asencio, Assistant Secretary for Consular Affairs, Department of State).

157. *Id.* at 859.

158. Here I borrow the terminology developed by Professor Sophia Lee, who coined the phrase “creative interpretation” to describe administrators’ creative extension or narrowing “of court doctrine in the absence of clear, judicially defined rules.” Lee, *supra* note 1, at 801.

Legislative debate over Holtzman's and Frank's reform proposals is also a fine example of the kind of institutional dialogue that Eskridge and Ferejohn contend is part and parcel of administrative constitutionalism: administrators engage in a dialogue with other branches of government with respect to foundational constitutional principles—in this case, substantive family law and separation-of-powers principles that literally help constitute the nation.¹⁵⁹

In the end, it is impossible to determine what role these administrators' testimony played in legislative deliberation over the legitimation requirement.¹⁶⁰ But administrators' resistance to gender equality in immigration appears to have helped dilute legislative proposals that reflected modern liberal gender-equality principles. At the end of this legislative debate, the Democrats' efforts to achieve wholesale elimination of gender inequality in citizenship and immigration law, including complete elimination of the legitimation requirement, had instead generated a patchwork of changes scattered throughout the relevant statutes.¹⁶¹

The most significant win for proponents of modern gender-equality norms was a provision enacted as part of the Immigration Reform and Control Act of 1986 (IRCA) that modified the requirement that fathers formally legitimate their nonmarital children in order to secure various family-based immigration preferences. Under IRCA, “natural father[s]” would be permitted to demonstrate a pre-existing “bona fide parent–child relationship” instead of full legitimation.¹⁶² This was an important change. The concept of “family

159. See ESKRIDGE & FEREJOHN, *supra* note 1, at 69–70.

160. It is important not to overstate the influence of administrators in Congress or the role of constitutional argument in legislative deliberation. The fact that administrators testifying in Congress developed innovative theories of substantive and structural constitutional principles obviously does not mean that these theories were actually effective in convincing legislators to oppose or limit changes to the standards used to assess the father–child relationship, and it is notoriously difficult to make fine-grained assessments of why legislators vote as they do. Yet in this instance, the legislative record reveals that legislators on both sides of the issue were in many instances eager for the input and assistance of administrators. Moreover, with respect to the revision of the derivative citizenship statute, the version of the bill that was eventually enacted was drafted by Department of State administrators. See *infra* note 164 and accompanying text.

161. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 315(a), 100 Stat. 3359, 3439; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657.

162. IRCA § 315(a). For a description of the various family-based immigration preferences that allow minor children to immigrate to the United States with an immigrant parent, see THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 277–79 (7th ed. 2012).

unity” (or what is commonly called “family reunification”) in immigration law was effectively expanded to include nonmarital children and their fathers on terms that allowed recognition of their functional or social relationship, rather than according to a legitimation standard that was unachievable by many of them.¹⁶³

But the “bona fide” standard did not, and does not, apply to the derivative citizenship statute. Instead, a statutory amendment enacted that same year effected a more modest change to the recognition of the father–child relationship. This provision, which appears to have originated in a proposal drafted by administrators in the Department of State in the mid-1980s,¹⁶⁴ allows the father of a nonmarital child to satisfy a series of formal requirements in lieu of legitimation, including that the father promise in writing to financially support the child.¹⁶⁵ From the perspective of some fathers and their nonmarital children, the 1986 amendment certainly marked an improvement over the narrow legitimation requirement that usually required the father to marry the child’s mother. However, that amendment likely fell short of the egalitarian vision of the family embraced by Holtzman and Frank.¹⁶⁶ As an initial matter, none of the formal requirements that apply to fathers and their nonmarital children apply to the foreign-born nonmarital children of American mothers. And mothers and fathers of

163. It is incorrect, however, to state that Congress overruled *Fiallo*, as was later reported in the *Congressional Record*. See 134 CONG. REC. 18,744 (July 26, 1988). Congress replaced the legitimation requirement, but it did not overrule the Supreme Court’s statement that the legitimation requirement was constitutionally permissible.

164. *Administration of the Immigration and Nationality Laws, Hearing on H.R. 4823, H.R. 4444, and H.R. 2184 Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary*, 99th Cong. 150 (July 22, 1986) (written testimony of Joan M. Clark, Assistant Secretary of State for Consular Affairs, Department of State).

165. Thus, an American father of a nonmarital child must (1) legitimate his child (that is, bring his child into perfect parity with a marital child under the law of the relevant domicile), (2) acknowledge paternity in writing before the child turns eighteen, or (3) have paternity adjudicated by a court. In addition, the father must agree in writing to financially support the child until the child reaches majority and provide clear and convincing evidence of a blood relationship. Immigration and Nationality Act Amendments of 1986 § 13. Finally, the father must demonstrate that he was present in the United States for five years, two of which had to have been after he reached the age of fourteen. See 8 U.S.C. §§ 1401(g), 1409. For children of American fathers who were born after 1983 and reside in the United States, the gender-discriminatory aspect of the amended derivative citizenship law has been alleviated. See Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 101–102, 114 Stat. 1631, 1631–32.

166. The 1986 amendment was upheld in *Nguyen v. INS*, 533 U.S. 53, 58–59 (2001). Justice Sandra Day O’Connor’s dissenting opinion in *Nguyen* roundly criticized the majority opinion for failing to follow the Court’s established gender equal protection jurisprudence. *Id.* at 74–97 (O’Connor, J., dissenting).

nonmarital children are subject to disparate U.S.-presence requirements: under the 1986 amendment, an American father must have been present in the United States for five years prior to the child's birth in order to transmit citizenship to his foreign-born child, while an American mother of a foreign-born nonmarital child must have been present in the United States for only one year.¹⁶⁷ In addition, the 1986 amendment was made retroactive only to November 1968.¹⁶⁸ Therefore, the citizenship status of foreign-born nonmarital children of American fathers born before that date continued, and continues, to turn on whether the child was "legitimated" according to immigration officials' interpretation of that term.¹⁶⁹ As a result, many fathers who have assumed the legal and practical responsibilities of parenthood still find themselves divided by nationality from their children¹⁷⁰—a situation that continues to give rise to statutory and constitutional challenges.¹⁷¹

Legal scholars who have considered the normative desirability of administrative constitutionalism and, more generally, political-branch constitutionalism, have contended that it is precisely in those regulatory fields where judicial review is unavailable or is extremely deferential that political-branch engagement with constitutional values is most important, and perhaps even obligatory.¹⁷² Whether

167. See 8 U.S.C. §§ 1401(g), 1409(a), (c).

168. See Immigration and Nationality Act Amendments of 1986 § 13, *amended by* Immigration Technical Corrections Act, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609, 2619 (1988) ("Except as provided in paragraph (2)(B), the new section 309(a) [8 U.S.C. § 1409(a)] (as defined in paragraph (4)(A)) shall apply to persons who have not attained 18 years of age as of the date of the enactment of this Act [Nov. 14, 1986].").

169. See *supra* notes 115–16 and accompanying text.

170. See Abrams & Piacenti, *supra* note 3, at 698.

171. See, e.g., Flores-Villar v. United States, 564 U.S. 210, 210 (2011) (per curiam) (affirming a federal court of appeals decision holding that the gender-based derivative citizenship statute did not violate the Fifth Amendment's guaranty of equal protection); Nguyen v. INS, 533 U.S. 53, 56, 58–59 (2001) (holding that the gender-based derivative citizenship statute did not violate the Fifth Amendment's guaranty of equal protection); Morales-Santana v. Lynch, 804 F.3d 520, 538 (2d Cir. 2015) (holding that gender discrimination in the derivative citizenship statute violated the Fifth Amendment's guaranty of equal protection), *cert. granted*, 136 S. Ct. 2545 (2016) (mem.); Saldana Iracheta v. Holder, 730 F.3d 419, 421 (5th Cir. 2013) (holding that the plaintiff had been improperly denied derivative citizenship because of erroneous determination that he was illegitimate).

172. Most scholars making this point cite Professor Larry Sager's important argument that even those constitutional norms that are under- or unenforced by the judiciary remain fully binding on other government officials—an argument he originally developed in *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214–28 (1978). See, e.g., Metzger, *supra* note 119, at 522 & n.161 ("As those primarily responsible for setting governmental policy, agencies should have an obligation to take constitutional norms and

administrators have such an obligation is a question that is outside the scope of this Article, but legal scholars have shown that by dint of necessity, administrators *will* develop constitutional interpretations, norms, and values.¹⁷³ The sources examined here certainly support that contention. Late twentieth-century administrators, like their predecessors in the early twentieth century, played a central role in the processes of constitutional contestation that have shaped our current citizenship and immigration laws. As they debated the constitutionality and function of legitimation as a condition for citizenship acquisition and immigration status, they participated in a much longer-running debate over the contours of, and relationship between, two fundamental forms of membership: family and nation. For many individuals, those administrators' constitutional vision of the family continues to shape the legal conditions that govern formal inclusion in, and exclusion from, the American polity.

CONCLUSION

My primary goal in this Article has been to draw attention to the role of administrators, operating at different levels of the administrative hierarchy, in developing the legal rules that govern formal membership in the polity. I have offered as a case study the role of administrators in the regulation of parent-child citizenship transmission and the assignment of family-based preferences in immigration law, with particular attention to the father-child relationship outside marriage. By their very nature, case studies are limited in what they can tell us about broad patterns and tendencies. But the one presented here has the virtue of accounting for the multiple ways in which administrators helped cultivate legal and constitutional norms over time. It allows us to trace how, over the course of several decades, administrators shaped internal administrative policies that they then helped transform into statutes,

requirements seriously in their decisionmaking.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 695 (2005) (“As Larry Sager has argued, judicial underenforcement of constitutional equality norms ‘fortifies legislative authority’—and, I would argue, executive authority as well—‘to repair entrenched injustice against enumerated powers objections to federal legislation’” (quoting Laurence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 433 (1993))).

173. See Metzger, *supra* note 13, at 1898 (providing examples of administrators' interpretations of constitutional principles and observing that they “reflect[] the reality that most governing occurs at the administrative level and thus that is where constitutional issues often arise”).

which the next generation of administrators interpreted in the light of new realities and pressures—practical, political, and constitutional.

These administrators operated within larger institutional and political power structures. And as I have indicated, their efforts were invariably informed by multiple forces that also shaped the laws governing inclusion and exclusion through other channels. Nevertheless, it is important to recognize administrators of the laws governing citizenship and immigration as a set of actors who, by virtue of their institutional authority, have wielded substantial influence on those laws, both as they appear on the books and as they are implemented. This case study thus raises several questions for citizenship and immigration law scholars. For example, what circumstances tend to lead to administrative leadership in the development of immigration and citizenship law? How has the role of administrators in the lawmaking process in this field changed over time? How transparent are the administrative processes through which internal agency guidelines and precedent are forged? Have the institutions of civil society that represent affected groups participated in those processes? If so, in what capacity and to what ends?

For students of federalism, the story of administrators' efforts to develop and interpret family law principles in ways that furthered certain policy goals of American citizenship and immigration law reveals the complex, overlapping nature of federal and state authority in two fields of law that are often characterized alternatively as inherently local (family law) and necessarily national (citizenship and immigration law).¹⁷⁴ Overlapping power structures sometimes lead to the homogenization of national and local norms, but here federal administrative resistance to the liberalizing trends in state law resulted in divergent standards for recognizing the father–child relationship. In so noting, I do not mean to imply that federal officials are, or should be, beholden to state family law in the administration of citizenship and immigration law.¹⁷⁵ As a historical matter, federal officials have not

174. For a skeptical discussion of the theory that family law is inherently local, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619, 625–56 (2001). For a recent discussion of the federal character of immigration law, see *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”).

175. For an important defense of federal departure from state family law in citizenship and immigration law, see Abrams & Piacenti, *supra* note 3, at 674, 701. For an alternative perspective on the role of state family law principles in citizenship and immigration law, focusing on parentage rules with respect to children conceived using alternative reproductive technology, see Scott

uniformly adopted state family law principles when administering federal family-based benefits and programs.¹⁷⁶ As a normative matter, one can easily identify state family law principles that raise significant constitutional and ethical problems and yet were previously incorporated into American citizenship and immigration law, including bans on interracial and same-sex marriage. However, the friction created by divergent legal conceptions of the father–child relationship is real, and it may be one reason why challenges to the limited recognition of that relationship in citizenship law have continued to this day.

Although most of those challenges are resolved at the administrative level, individuals whose claims to citizenship have been denied do sometimes seek judicial review. In one recent case, Luis Morales-Santana—whose citizenship is governed by the 1952 Immigration and Nationality Act—has challenged a statutory provision that imposes requirements on citizenship transmission between fathers and their foreign-born nonmarital children that do not apply to mothers and their foreign-born nonmarital children.¹⁷⁷ The Supreme Court held oral argument in Morales-Santana’s case in November 2016.¹⁷⁸ Although it is impossible to know how the Court will resolve the case, Morales-Santana’s arguments have a certain momentum given that he prevailed in the Second Circuit.¹⁷⁹ If the Court finds the gender-based provision at issue to be unconstitutional, the contest over the status of nonmarital children and their recognition in American citizenship law could shift to Congress once again.¹⁸⁰ In

Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 53–58 (2010).

176. See Collins, *Federalism*, *supra* note 17, at 622–23.

177. *Morales-Santana v. Lynch*, 804 F.3d 520, 523–24 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (mem.). The 1952 Immigration and Nationality Act requires “legitimation” of the nonmarital child of an American father. However, Morales-Santana’s challenge is to the disparate U.S. parental presence requirements in that statute. The father of the nonmarital child must have been present in the United States for ten years prior to the child’s birth, while the American mother of a foreign-born nonmarital child must have been present in the United States for only one year prior to the child’s birth. *See id.* at 523.

178. *Sessions v. Morales-Santana*, No. 15-1191 (U.S. argued Nov. 9, 2016). When *Morales-Santana* was argued before the Supreme Court, Attorney General Loretta Lynch was the named appellant in the case.

179. *Morales-Santana*, 804 F.3d at 524.

180. This may be especially likely if the Court finds that it lacks the remedial authority—or, as a matter of prudence, decides that it should not exercise its remedial authority—and instead gives Congress the opportunity to remedy the equal protection violation. This possibility was suggested by Justice Elena Kagan during oral argument when she proposed that if the Court were

that event, officials from the Department of State, the Department of Homeland Security, and other agencies may be invited to participate in drafting new legislation and regulations, and to testify regarding how the legislature should respond to the Court's ruling. If the past is any indication, how those administrators participate in that process and the policy positions they take will depend on an assortment of factors, including the political and ideological circumstances of the moment, the administrators' understanding of constitutional equal protection and separation-of-powers principles, and possibly the jurisprudential resources that the Supreme Court provides, or does not provide, in its opinion in *Sessions v. Morales-Santana*.¹⁸¹

to find an equal protection violation, it could “stay[] [its] judgment for a period of time and allow[] Congress essentially to do it a different way if it wanted to.” Transcript of Oral Argument at 40, *Sessions v. Morales-Santana* (No. 15-1191).

181. *Sessions v. Morales-Santana*, No. 15-1191.