THE YALE LAW JOURNAL

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Illegitimate Borders: *Jus Sanguinis* Citizenship and the Legal Construction of Family, Race, and Nation

ABSTRACT. The citizenship status of children born to American parents outside the United States is governed by a complex set of statutes. When the parents of such children are not married, these statutes encumber the transmission of citizenship between father and child while readily recognizing the child of an American mother as a citizen. Much of the debate concerning the propriety and constitutionality of those laws has centered on the extent to which they reflect gender-traditional understandings of fathers' and mothers' respective parental roles, or instead reflect "real difference." Based on extensive archival research, this Article demonstrates that an important yet overlooked reason for the development of gender- and marriage-based derivative citizenship law—*jus sanguinis* citizenship—was officials' felt need to enforce the racially nativist policies that were a core component of American nationality law for over 150 years. The complex interaction of gender, race, family law, and nationality law charted here demonstrates that gender-based *jus sanguinis* citizenship is not a biologically inevitable feature of American nationality law, as has been argued, but is in important respects the product of choices made by officials engaged in a racially nativist nation-building project. This history also suggests that what is at stake in modern challenges to gender-based citizenship laws is not only the constitutionality of those statutes, but a mode of reasoning about citizenship, family, gender, and race that continues to shape the practice and politics of citizenship in ways that are often obscured in modern citizenship debates.

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INTRODUCTION

> *[I]t seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.*
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> —Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (1915)

Children born in the United States are citizens by virtue of the Fourteenth Amendment's Citizenship Clause, but the citizenship status of children born to Americans living outside the United States is governed by a complex set of statutes.[1] When the parents of such children are unmarried, those laws encumber citizenship transmission between the father and his child, while providing nearly automatic citizenship transmission between an American mother and her child.[2] In three constitutional challenges to the gender-based regulation of parent-child citizenship transmission—*Miller v. Albright*, *Nguyen v. INS*, and *Flores-Villar v. United States*—the Supreme Court upheld these distinctions while laboring to explain why Congress has drawn such sharp lines between the nonmarital children of American mothers and fathers.[3]

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1. *Compare* U.S. CONST. amend. XIV, § 1, *with* 8 U.S.C. §§ 1401, 1409 (2012).

2. In order to secure citizenship for his nonmarital foreign-born child born on or after November 14, 1968, the father must provide proof of paternity or legitimation before the child turns eighteen and proof of provision of financial support. In addition, a blood relationship between the child and the father must be established by "clear and convincing evidence," and the father must satisfy an age-calibrated residency requirement. *See* 8 U.S.C. §§ 1401(g), 1409(a). By contrast, the mother of a nonmarital foreign-born child need only have lived in the United States for one year at any point in her life. *See id.* § 1409(c). The requirements for father-child citizenship transmission outside marriage have varied since they were first codified in 1940, while the liberal standards for mother-child citizenship transmission outside marriage have remained essentially the same. *Compare* Nationality Act of 1940, ch. 876, §§ 201-205, 54 Stat. 1137, 1138-40, *with* 8 U.S.C. § 1409(c). Because Congress generally has not made retroactive changes to the requirements that apply to nonmarital children of American fathers, the older standards remain governing law for children who achieve majority prior to the effective date of a subsequent change.

3. *See* Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (per curiam), *aff'g by an equally divided court* 536 F.3d 990 (9th Cir. 2008); Nguyen v. INS, 533 U.S. 53, 56-57 (2001); Miller v. Albright, 523 U.S. 420, 424 (1998). *Nguyen* and *Miller* involved challenges to the father-only legitimation and proof-of-paternity requirements of 8 U.S.C. § 1409(a)(4) and 8 U.S.C. § 1409(a)-(b), while *Flores-Villar* challenged the disparate parental residency requirements that apply to fathers and mothers of foreign-born nonmarital children. *Compare* 8 U.S.C. §§ 1409(a), 1401(a)(7) (1970), *with id.* § 1409(c). Although Congress reduced the duration of the parental residency requirement prospectively in 1986, the statute continues to hold mothers and fathers of nonmarital foreign-born children to

Historians and legal scholars have also addressed this issue, and the resulting scholarship has largely focused on the origin of the gender-based regulation of *jus sanguinis* citizenship in the traditional cultural and legal norms that governed mothers' and fathers' respective parental rights and responsibilities outside marriage, and the perpetuation of those norms in what is now called derivative citizenship law.[4]

In this Article, I argue that a primary and overlooked explanation for the development and durability of gender-asymmetrical *jus sanguinis* citizenship law was the felt need of judges, administrators, and legislators to further the racially nativist policies[5] that were central to American nationality law until 1965.[6] At formative moments in the development of American nationality law,

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different standards. *Compare* 8 U.S.C. §§ 1401(g), 1409(a) (2012), *with id.* § 1409(c).

4. As I have demonstrated elsewhere, the gender-asymmetrical principles governing birth status (i.e., bastardy law) were incorporated into citizenship law, limiting citizenship transmission between American fathers and their nonmarital children while readily allowing for citizenship transmission between American mothers and their nonmarital children. *See* Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. REV. 1485 (2011) [hereinafter Collins, *A Short History*]; *see also* Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669 (2000) [hereinafter Collins, *Fathers' Rights*]. A number of legal scholars have considered the perpetuation of gendered norms in modern citizenship law, focusing on the gender-discriminatory dimension of the distinctions drawn between mothers and fathers of nonmarital children. For a small sample of this literature, see Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 83 (2003); Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1281-82 (2005); and Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222, 245-50 (2003). For an account offering a different assessment of the statutes' consistency with modern constitutional gender equality principles, see Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429 (2006).

5. The term "nativism," coined in the 1840s, was defined by one of the first historians of American immigration to mean "intense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections." JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 4 (1955). "Racial nativism" refers to the ways that opponents of immigration by certain groups constructed their opposition using rhetoric and systems of classification that categorized some races as inherently un-American and unfit for American citizenship. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 20-21 (2006); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

6. *See infra* Section II.A. The role of gender-asymmetrical domestic relations laws in the enforcement and development of race-based and race-salient rules governing the status of children has largely escaped the attention of legal historians and other scholars. There are

gender- and marriage-based domestic relations laws[7] were enlisted by administrators, judges, and legislators to deny the citizenship claims of nonwhite children, especially those who were excludable under the race-based immigration and naturalization laws.

Although the statutes governing parent-child citizenship transmission were facially race neutral, the practices and legal regulation of family formation and recognition were not. Once incorporated into *jus sanguinis* citizenship law by judges, administrators, and legislators these racialized domestic relations law principles could be, and regularly were, used to exclude nonwhite children from citizenship. In some instances, these racialized practices were explicit as administrators and legislators incorporated race-based domestic relations laws

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some exceptions. Historian Linda Kerber has provided rich and textured examinations of the history of gender-based regulation of *jus sanguinis* citizenship, noting the law's racial implications. *See* Linda K. Kerber, *Birthright Citizenship: The Vulnerability and Resilience of an American Constitutional Principle*, *in* CHILDREN WITHOUT A STATE: A GLOBAL HUMAN RIGHTS CHALLENGE 255 (Jacqueline Bhabha ed., 2011) [hereinafter Kerber, *Birthright Citizenship*]; Linda K. Kerber, *The Stateless as the Citizen's Other: A View from the United States*, 112 AM. HIST. REV. 1, 6 (2007) [hereinafter Kerber, *The Stateless as the Citizen's Other*]. Historians of American immigration law and policy have studied the ways in which immigration officials attempted to limit *jus sanguinis* citizenship for the foreign-born children of Chinese American fathers, but not with attention to the role that domestic relations law played in that process. *See, e.g.*, ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943 (2003); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995). In addition, a handful of legal scholars have noted that gender-based regulation of *jus sanguinis* citizenship has racial implications today, but it has not been a focal point of their work. *See, e.g.*, Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 24 n.92 (observing in a footnote the "ugly class and race implications" of "[a]llowing U.S. fathers to elect not to convey citizenship on their foreign-born children"); Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1429, 1434 n.451 (2011) (examining military restrictions on interracial marriage during World War II and briefly noting in a footnote that these laws interacted with the gender-asymmetrical derivative citizenship laws).

7. Through Part III of this Article, I use the term "domestic relations law" in describing the body of law that encompassed legal regulations governing marriage and the relationship of parent and child in and out of marriage. Prior to the second half of the twentieth century, that is the phrase that was used by lawyers to describe what we would call "family law." Consistent with the switch in contemporary usage, when I discuss modern regulation of parent-child relations in Part IV, I switch to the modern phrase "family law." For an important discussion of the genealogy of family law as a field, including a careful historical reconstruction of the terms "domestic relations law" and "family law," see Janet Halley, *What Is Family Law? A Genealogy (pts. 1 & 2)*, 23 YALE J.L. & HUMAN. 1, 189 (2011).

governing marriage and legitimacy into *jus sanguinis* citizenship law.[8] In other instances the practices were race salient, in that officials used restrictive conceptions of marriage and legitimacy in cases involving *jus sanguinis* citizenship claims of nonwhite children.[9] Regardless of the particular means by which citizenship transmission between American fathers and their nonmarital foreign-born children was restricted, it is clear that gender-based domestic relations law principles incorporated into *jus sanguinis* citizenship law served a larger racially nativist nation-building project.[10] And they did so in a very literal way: by determining which citizens' children would be recognized as citizens, they helped regulate the actual reproduction[11]—and racial composition—of the citizenry. By focusing on the citizenship status of children,[12] this history makes visible, in granular detail, the means by which

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8. *See, e.g.*, *infra* Section III.B.

9. *See, e.g.*, *infra* Sections II.B-C. I use the term "race salient" to describe the ways that officials deployed facially race-neutral domestic relations laws and interpretations of *jus sanguinis* citizenship principles with the effect of limiting recognition of nonwhite foreign-born children of American parents as citizens. For a discussion of the use of the term "race salient" to refer to facially race-neutral regulatory regimes that nevertheless operate to perpetuate racially subordinating social practices, see Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000). On the related concept of colorblindness in immigration law, see IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (rev. ed. 2006).

10. *See* ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA (2006) (developing the thesis that immigration law has served an important nation-building function in American political development). The secondary literature on the social and legal construction of race in the context of nationality law is vast. For a small sampling, see ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); HANEY LÓPEZ, *supra* note 9; MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); and Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001). In calling attention to the racial dimension of *jus sanguinis* citizenship, I do not mean to imply that "race" is a static, transhistorical concept. To the contrary, the very notions of race and racial difference are part of an evolving body of social knowledge, and certainly racial taxonomies and the social meanings and hierarchies they generate are also born of historically specific political, economic, social, and cultural circumstances. This Article contributes to our understanding of the nationality law as an important site of production of racial knowledge by showing how laws governing *jus sanguinis* citizenship—including domestic relations principles used to interpret those laws—have been enlisted in the production of racial categories and racial difference in different ways at different historical moments.

11. For a critical analysis of this phenomenon, see JACQUELINE STEVENS, REPRODUCING THE STATE (1999).

12. Other legal scholars and historians have given important attention to the ways that race-

laws regulating birth status—long used to create and maintain racial social and legal hierarchies *within* the American polity[13]—were regularly used to shape the racial composition *of* the polity as well.

My account begins in Part I with a little-studied but influential case decided by the Maryland Court of Appeals in 1864, *Guyer v. Smith*.[14] In *Guyer* the court denied the citizenship claims of two brothers born in St. Barthélemy. The Guyer brothers' American father was white, but their mother was reportedly "of African descent." The *jus sanguinis* citizenship statute then in effect recognized as citizens foreign-born "children of persons who . . . are . . . citizens of the United States."[15] The statute was silent regarding the marital status of the parents, but the *Guyer* court declared that foreign-born illegitimate children of American fathers were not citizens under the statute.

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and gender-based belief systems, operating independently and in conjunction, have shaped the formal citizenship rights of women and men, often with attention to the racial dimensions of the laws that regulated *women's* citizenship. *See* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000) [hereinafter COTT, PUBLIC VOWS]; MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965 (2009); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1465 (1998) [hereinafter Cott, *Marriage*]; Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 POL. & SOC'Y 1 (1984); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005). Legal scholars and historians have given far less attention to the ways that gender- and race-based citizenship laws were used in the past to determine the citizenship status of children. Linda Kerber's powerful essay, *Birthright Citizenship: The Vulnerability and Resilience of an American Constitutional Principle*, is a significant exception to the tendency to overlook the legal history of children's citizenship. Kerber, *Birthright Citizenship*, *supra* note 6. Legal scholars have given significant attention to the *immigration* status of children in American law and in a forthcoming article Kerry Abrams and R. Kent Piacenti provide an illuminating and detailed comparison of the rules governing recognition of the parent-child relationship in the immigration and derivative citizenship contexts. *See* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. (forthcoming 2014) (on file with author).

13. *See, e.g.*, CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 264-65 (1940); ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 41-42 (2009); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

14. 22 Md. 239 (1864).

15. Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155. The *Guyer* court applied the 1802 version of the federal *jus sanguinis* citizenship statute, rather than the 1855 version of the statute, but in relevant part the statutes were identical. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.

The *Guyer* court said very little about race, but even as the legal substructure of slavery was crumbling, it silently incorporated into citizenship law a set of domestic relations law principles that had been instrumental to the maintenance of slavery and the denial of citizenship for persons of African descent: laws that recognized the unmarried mother as the source of status for her children, including slave status.[16]

The *Guyer* case is a crucial starting point for any thorough examination of the evolution of *jus sanguinis* principles as applied to the citizenship claims of nonmarital foreign-born children of American fathers.[17] As shown in Part II, *Guyer*'s legacy was long and impressive, as the opinion became part of the legal lexicon of American citizenship and empire over the course of the nineteenth and into the early twentieth century. The interpretive rule that nonmarital foreign-born children of American fathers were not citizens figured prominently in administrative decisions concerning the citizenship status of Samoan-born children of American fathers[18] and was also deployed in efforts to enforce race-based exclusion statutes—the laws that barred the entry of Chinese, and eventually all Asians, into the United States.[19] The *Guyer* rule[20] thus served as an important resource for judges and administrators, who were regularly called on to interpret the *jus sanguinis* citizenship statute in the course of administering racially restrictive immigration laws.

The *jus sanguinis* citizenship statute, although modified several times, remained silent on the question of nonmarital children's citizenship[21] until 1940, when Congress codified a modernized version of the *Guyer* rule by

16. *See infra* Section I.B.

17. To my knowledge, the *Guyer* opinion has been completely omitted from modern histories of American citizenship law, except for my far briefer analysis in Collins, *Fathers' Rights*, *supra* note 4, at 1689-90. In addition, although *Guyer* was regularly cited in legal documents and commentary on *jus sanguinis* citizenship through the 1930s, the case's racial content and context are not mentioned.

18. *See infra* Section II.B.

19. *See infra* Section II.C.

20. By using this term, I do not mean to imply that formalist adherence to the *Guyer* court's holding was a significant cause of the rule's longevity. Rather, the *Guyer* opinion's resilience as a precedent and a resource is symptomatic of the phenomenon I describe herein. *See infra* notes 67-68 and accompanying text.

21. *See* Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797, 797; Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104; *see also infra* Section III.A.

continuing the default exclusion of nonmarital foreign-born children of American fathers.[22] Part III tells the story of how and why pre-1940 judicial and administrative rulings concerning the citizenship of nonmarital children became the basis of the Nationality Act's *jus sanguinis* provision—a provision that, in its basic contours, survives to this day. It then turns to the implementation of the *jus sanguinis* statute during the U.S. military's multi-decade tour of duty in Europe and Asia. In these theaters of war, the *jus sanguinis* citizenship laws operated in tandem with race-based immigration laws and race-based military marriage policies to exclude Amerasian children from citizenship.[23] In sum, well into the twentieth century, officials charged with policing membership in the American polity consistently relied on the gender- and marriage-based regulation of *jus sanguinis* citizenship to help enforce racially nativist nationality policies.

The fact that, during significant periods of American history, nationality law was designed and implemented in ways that served racially nativist objectives is not news, nor is the fact that many of the laws used to achieve those objectives were facially race neutral.[24] What *is* distinctive about the account of *jus sanguinis* citizenship provided here is the particular legal technology that was enlisted in the service of a nativist agenda: durable but pliable gender-based domestic relations law principles.[25] In this regard, this detailed history of *jus sanguinis* citizenship contributes to a growing body of literature that examines the important roles nationality law played in nation-building and in the development of the administrative state by examining the central role that family law played in those processes. As others have demonstrated, much of the administrative apparatus developed to implement the increasingly elaborate body of federal nationality law in the late nineteenth

22. *See* Nationality Act of 1940, ch. 876, §§ 201-205, 54 Stat. 1137, 1138-40 (establishing existing citizenship, immigration, and naturalization laws).

23. *See infra* Section III.B.

24. *See* HANEY LÓPEZ, *supra* note 9; MOTOMURA, *supra* note 5; Son-Thierry Ly & Patrick Weil, *The Anti-racist Origins of the American Immigration Quota System*, 77 SOC. RES. 45, 48-52 (2010).

25. This tendency of government officials who serve as gatekeepers for social goods allocated based on marital status to use a more restrictive conception of family status relationships is not limited to administration of nationality laws. As I have shown elsewhere, it was also characteristic of early nineteenth-century federal widows' military pension determinations. *See* Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 61 VAND. L. REV. 1809 (2009).

and early twentieth century was built up in the service of a nativist agenda.[26] The history of *jus sanguinis* citizenship law demonstrates that laws governing marriage and birth status served this agenda as well, and they did so by providing officials with an exclusionary tool that appeared both natural and race neutral in the lines it drew between citizen and noncitizen.[27]

For some students of American nationality law, the importance of this account lies not in its historiographical significance, but in what it may mean for how we reason about the continued vitality of gender-asymmetrical *jus sanguinis* citizenship law today. Standing alone, history cannot resolve modern citizenship debates, but it can provide critical perspective on those debates, a project I undertake in Part IV. It can do so, first, by alerting us to the ways that gender- and marriage-based *jus sanguinis* principles continue to function in a race-salient manner in the practice and politics of American citizenship law.[28] Second, it challenges the view that gender-asymmetrical *jus sanguinis* citizenship laws reflect natural and "biologically inevitable"[29] means of

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26. *See, e.g.*, NGAI, *supra* note 10; SALYER, *supra* note 6; DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA (2002); ZOLBERG, *supra* note 10; Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002); Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005); Weil, *supra* note 10. The history of *jus sanguinis* citizenship, and its development in the hands of administrators charted in this Article, is a prime example of "administrative constitutionalism." Federal administrators crafted rules and policies that quite literally constituted the polity by determining the membership status of individuals. Based on those rules and policies, they then drafted the *jus sanguinis* provisions found in the Nationality Act of 1940. *See infra* Subsection III.A.2. For foundational discussions of administrative constitutionalism in other regulatory contexts, see WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); and Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). I thank Bill Eskridge for highlighting this point.

27. *See infra* notes 202-209, 331-334 and accompanying text. I do not argue that race was the only factor that informed officials' interpretation of the *jus sanguinis* citizenship rule. *See infra* notes 147, 324-325 and accompanying text. Rather, I argue that racial nativism was one of several factors that informed the way administrators and legislators reasoned about the citizenship rights of foreign-born nonmarital children of American parents, and that it was an important factor at formative moments in the law's application and development.

28. *See infra* Section IV.A.

29. *See* Nguyen v. INS, 533 U.S. 53, 65 (2001) ("The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship. The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father.").

regulating parent-child derivative citizenship—an understanding that has been developed and embraced by government attorneys and the Supreme Court in litigation challenging the constitutionality of gender-based regulation of derivative citizenship today.[30] The genealogy of *jus sanguinis* citizenship provided here reveals, instead, that those laws are the product of choices made by legal actors at formative moments in the development of American nationality law, and acting under various institutional and ideological pressures. Far from "inevitable," those choices were shaped by contemporary norms and mores concerning gender, parental roles, sexuality, and—as I demonstrate in great detail—the official imperative to enforce race-based nationality laws. To speak of these laws as inevitable thus obscures their origins and elides the ways that they continue to play an illiberal role in the practices and politics of citizenship today.

I. PERSONAL STATUS LAWS, CITIZENSHIP, AND THE CIVIL WAR

The Nationality Act of 1940 was the first statute to explicitly regulate the citizenship of nonmarital foreign-born children of American mothers or fathers. But the differential treatment of foreign-born children based on the gender of their citizen-parent predated the Nationality Act by at least a century and a half.[31] For children born outside of marriage, that gender-asymmetrical

30. *See infra* Section IV.B. In suggesting that this history can provide a critical perspective on the role that gender and marriage continue to play in American nationality law, I am mindful that political scientists have long observed what they call the "boundary problem"—the difficulty of establishing a legitimate method of determining who should be counted as members of the polity that does not itself violate basic democratic principles. *See* Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem, in* LIBERAL DEMOCRACY (NOMOS XXV) 13 (J. Roland Pennock & John W. Chapman eds., 1983). I am also mindful that the "plenary power doctrine" is often invoked as a limitation on the federal courts' power to determine the constitutionality of gender-based *jus sanguinis* citizenship laws. *See* Kristin A. Collins, Fiallo v. Bell *in Congress: Plenary Power, Coordinate Branches, and Gender-Based Nationality Laws*, *in* EN/GENDERING GOVERNANCE (Kim Rubenstein & Katharine Young eds., forthcoming 2014) (on file with author); *cf.* Nina Pillard, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 836 (2002) (noting that *Nguyen* "complicates the picture for equal protection cases that do not touch on the immigration and naturalization field"). Regardless of one's views on the scope of the plenary power doctrine, one need not turn to the courts to remedy deficiencies in modern *jus sanguinis* citizenship laws. *See* Pillard & Aleinikoff, *supra* note 6 (arguing that the commitment to constitutional gender equality principles should guide Congress's regulation of *jus sanguinis* citizenship); *see also infra* Section IV.B.

31. Starting in 1790, citizen fathers had the right to transmit citizenship to their marital foreign-

system can be traced to *Guyer v. Smith*, an 1864 Maryland Court of Appeals decision.[32] *Guyer* established the centrality of marriage as a requirement for patrilineal citizenship transmission. But the *Guyer* case was also about racial limitations on father-child citizenship transmission. The *Guyer* opinion—written during the Civil War by judges sitting in Maryland, the "middle ground" of slavery—incorporated a set of gendered and racialized domestic relations law principles concerning the status of nonmarital children. The *Guyer* opinion then served as an important and long-lasting resource for jurists, administrators, and lawmakers who interpreted, enforced, and enacted America's racially nativist nationality laws.

A. Guyer v. Smith

At first blush, *Guyer* appears to be an unlikely precedent for the interpretation of federal citizenship law, as it was a state court case and did not involve anyone's right to enter or remain in the United States. Rather, *Guyer* was a legal dispute over the ownership of a fifty-acre parcel of property in Allegany County, Maryland. John Guyer, an American citizen, had purchased the property in 1792. Approximately eight years later Guyer left Maryland and the United States, and eventually took up residence in St. Barthélemy.[33] John Guyer died in 1841, devising the property to his two sons, Benjamin and James.[34] In the 1850s, the sons' ownership was called into question in an ejectment proceeding: George Smith and Israel Thompson asserted ownership over the parcel after they secured an escheat patent—a legal document that allowed Maryland to expropriate the property and sell it, in this case to Smith and Thompson.[35]

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born children, as long as the father had at some point resided in the United States. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104. Married citizen mothers did not have that right until 1934. Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797. As discussed below, notwithstanding a complete lack of statutory authority, starting in the 1910s (if not earlier) administrators began recognizing the foreign-born nonmarital children of unwed mothers as citizens, thus creating a matrilineal citizenship regime for foreign-born nonmarital children of American mothers. *See infra* Section II.A; *see also* Collins, *A Short History*, *supra* note 4, at 1506-12.

32. 22 Md. 239 (1864).

33. *Id.* at 246.

34. *Id.*

35. Appellants' Statement and Points at 2, *Guyer*, 22 Md. 239 (No. 45); Allegany Cnty., Md., *Plat & Certificate for Yamland 50 Acres*, MD. STATE ARCHIVES (Mar. 28, 1862), http://plato.mdarchives.state.md.us/msa/stagser/s1500/s1529/cfm/dsp_unit.cfm?county=al&qualifier=S

The problem, as Guyer's lessee either knew or soon learned, and as Smith and Thompson may very well have known, was that John Guyer's sons had fragile claims to American citizenship and hence to the property itself. In the nineteenth century, in many states—including Maryland—one's property rights were partially contingent on one's citizenship status.[36] Under Maryland law, non-citizens could own land, but they could take land only as "purchasers," a term of art that meant that their land was always subject to escheat.[37]

Thus, a central question in *Guyer v. Smith* was whether the Guyer brothers were American citizens. They were born in St. Barthélemy, at the time a Swedish colony; hence, no argument was made that they were citizens via the doctrine of *jus soli*. No one suggested that they had been naturalized.[38] Rather, they claimed to be citizens by virtue of an 1802 federal statute that provided that

> the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States.[39]

On the face of it, the assertion that the Guyer brothers were American citizens looked probable. After all, their father, John Guyer, had been a citizen and had, in fact, resided in the United States, as required by the 1802 Act. No one denied that James and Benjamin were his children. Thus, the attorney for the Guyer brothers' lessee, Thomas McKaig—a respected Maryland attorney and former state senator—argued that the Guyer brothers were citizens under the 1802 statute, and that the state had no right to escheat their property, by then called

&series=1188&unit=3129. Note that the escheat patent was not obtained until four years after Guyer's lessee filed suit—a procedural irregularity that the Court of Appeals ignored.

36. *See* Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 160 (1999).

37. *See Guyer*, 22 Md. at 247. The alien's ownership interest in real property was not secure against escheat and was called a "defeasible estate" precisely because of this. *See* Price, *supra* note 36, at 160. This common law rule was widely followed in the nineteenth century. *See id.*

38. They likely could not have been naturalized, as the relevant statutes limited naturalization to "free white person[s]." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.

39. Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; *see Guyer*, 22 Md. at 244.

Yamland.[40] But McKaig did not argue the point forcefully, perhaps for good reason. Testimony offered into evidence revealed that Benjamin's and James's mother, Margaret, was of "African descent."[41]

With this fact in mind, it is notable that the Guyer brothers or their lessee chose to pursue the matter for six years and bear the expense of an appeal. After all, in *Dred Scott v. Sandford*, decided just one year before the *Guyer* case was filed, Chief Justice Taney made clear that persons of African descent could not be citizens of the national polity by any means.[42] *Dred Scott* had not been overruled by 1864, when the Maryland Court of Appeals decided *Guyer*, and it would seem that the appellees had a strong argument that the Guyer brothers were ineligible for citizenship simply because of their race. That argument was undoubtedly cognizable, as other officials confronted with similar claims around the same time had reasoned along similar lines when interpreting the *jus sanguinis* statute. For example, in the 1860s, an American consul in China had relied on *Dred Scott* to resolve the citizenship claim of the son of an American "negro" father. The son was born in Amoy, China before the Civil War. When the American consul was asked to determine the son's citizenship, he concluded that "as the Dred Scott decision before the war had deprived negroes of their rights as citizens, . . . the ban of that decree" barred the son's claim to American citizenship under the *jus sanguinis* statute.[43] But in the *Guyer* appeal, that argument was not made.

Even more curious than the plaintiffs' persistence in pursuing Yamland is the relatively minor role that race played in the defendants' arguments. Attorneys for Smith and Thompson—Oliver Miller and Thomas Devecmon—certainly did not hesitate to bring the matter to the attention of the Court of Appeals, noting that "[s]he, (their mother[]) . . . is not of pure white blood,

40. Appellants' Statement and Points, *supra* note 35, at 3-4.

41. Appellees' Statement and Points at 4, *Guyer*, 22 Md. 239 (No. 45).

42. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 419-20 (1857).

43. Letter from John Russell Young, U.S. Legation, Peking, China, to Charles Seymour, U.S. Consul, Canton, China (Feb. 23, 1885), *in* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1885, at 159 (1886) (recalling a case from the 1860s). Note that the consul's reliance on *Dred Scott* was eventually rejected by Young, a Republican serving as a diplomatic representative of the United States in China in the Grant administration. *Id.* In the 1860s, Young had been the managing editor of Horace Greeley's abolitionist-oriented *New York Tribune*. *See* John C. Broderick, *John Russell Young: The Internationalist as Librarian*, 33 Q.J. LIBR. CONG. 116, 123-24 (1976). Perhaps because of his views on slavery, then, Young lamented the consul's reliance on "the Dred Scott decision."

but partly of African blood or descent."[44] They also contended that under Maryland property law, the Guyer brothers' racial status should have weighed in the defendants' favor:

> These plaintiffs are not only *aliens*, but are proved to be of *African descent*, and it is against the policy of our laws that such persons should hold real estate in Maryland, and the rule, therefore, that an alien cannot bring an action to recover this land, should be rigidly enforced against these parties.[45]

But the available documents suggest that Miller and Devecmon did not argue that the Guyer brothers' claim to citizenship under the federal statute was categorically barred because of their race.[46] They also said nothing about *Dred Scott*, which was still technically good law, even though it would seem to have provided extremely powerful precedent, and a possibly winning argument.

Court of Appeals Judge James Bartol, the author of the opinion, appears to have been equally hesitant to make much of the Guyer brothers' race. He does not mention *Dred Scott* in the opinion, even though he might have been able to resolve the entire case in short order by doing so. Instead, in dealing with the question of the Guyer brothers' citizenship, he simply declared that illegitimate children did not have the benefit of the 1802 federal law:

> These appellants claim the benefit of that section, as the children of John Guyer, who was a citizen of the United States. But the proof shows that they were not born in lawful wedlock, they are therefore illegitimate; under our law *nullius filii*, and clearly therefore not within the provisions of the Act of 1802.[47]

The "proof" to which Judge Bartol referred was the sole witness's statement that "[h]e cannot say whether the father and mother of the plaintiffs were

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44. Appellees' Statement and Points, *supra* note 41, at 2.

45. *Id.* at 4. Attorneys for the appellees could not reasonably argue that the Guyer brothers could not own real property simply because they were allegedly black, as under Maryland law free blacks could inherit and own property throughout this period. *See* JAMES M. WRIGHT, THE FREE NEGRO IN MARYLAND, 1634-1860, at 174-97 (1921).

46. Sensibly, the appellees did not argue that a father could not devise real property to his illegitimate children. *See* Pratt's Lessee v. Flamer, 5 H. & J. 10 (Md. 1820).

47. Guyer v. Smith, 22 Md. 239, 249 (1864).

lawfully man and wife, or whether the said children were born in lawful wedlock. *To the best of my belief it was not so.*"[48]

It is impossible to establish with certainty why the Maryland Court of Appeals did not also, or simply, rely on *Dred Scott* to determine the Guyer brothers' citizenship, but one can engage in informed speculation based on the specific circumstances surrounding the *Guyer* litigation. *Dred Scott* was not formally overruled until the Fourteenth Amendment was ratified in 1868. But in November 1864, fifteen days before the court issued its opinion in *Guyer*, Maryland adopted a new state constitution that abolished slavery and declared that "all men are created equally free"[49]—a proclamation that may have offered a symbolic challenge to the validity of the *Dred Scott* opinion.[50] This is not to suggest that the many questions regarding black people's status in the United States—or in Maryland—had been resolved by the time *Guyer* was decided; far from it. The Civil War was not yet over, and even if Union forces prevailed it was not clear what that victory would mean for black people. However, it is quite possible that, because of these uncertainties and the violent, nation-rending upheaval that questions concerning black people's citizenship had precipitated, the *Guyer* court turned to domestic relations laws—laws that were facially race neutral but palpably race salient in their operation—to determine the Guyer brothers' claims to citizenship.

B. Domestic Relations Law and the Legal Construction of Race

Judge Bartol's reference to the domestic relations law principles governing the status and rights of nonmarital children was summary in nature, possibly because his readers would have been familiar with the rudimentary legal principles on which he relied. In the nineteenth century, the common law of domestic relations differentiated sharply between marital and nonmarital children. Within marriage, the father had custodial rights over his children, as well as rights to their labor. In return, so to speak, the father was required to support his marital children, and they inherited his name, status, property, and

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48. Appellees' Statement and Points, *supra* note 41, at 2.

49. *See* BARBARA JEANNE FIELDS, SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY 131 (1985).

50. This point should not be overstated. As Jamal Greene has demonstrated, even after *Dred Scott*'s holding on citizenship was overruled by the Fourteenth Amendment's Citizenship Clause, while "the wounds of the war remained fresh, it would be difficult to use *Dred Scott* as a shared symbol of constitutional error." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 437 (2011).

domicile.[51] Mothers had no, or very few, legal rights vis-à-vis their marital children.[52] But outside marriage, the opposite pattern prevailed. The putative father's estate and status did not pass to his "natural child" unless he adopted the child as his own—a measure that was left to the father's discretion and in the nineteenth century was generally limited to situations where the father married the child's mother after the birth of the child.[53] By contrast, although the strict common law originally prevented the nonmarital child from inheriting property or status from or through his mother, by the early nineteenth century many states had moderated this rule by statute, so that nonmarital children could often inherit from their mothers, and mothers had a duty to support such children.[54] As it developed in America, then, domestic relations law established default rules that enabled patrilineal property and status transmission in marriage and matrilineal property and status transmission outside marriage. The *Guyer* court incorporated these well-known principles of nineteenth-century domestic relations law into federal citizenship law.

The system of sexual ethics and racial status that these domestic relations law principles reproduced was also well known. Under these principles, women of all races bore responsibility for, and the social stigma of, children born out of wedlock.[55] In addition—and crucial to understanding the *Guyer* case—the gender-based bastardy laws on which Judge Bartol drew had long shaped and sustained the practice of slavery in slave states like Maryland. Although the line between slavery and freedom was demarcated in different ways at different times, the principle that the bastard child's status was

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51. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *436-38; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 161 (Legal Classics Library 1986) (1827) ("The father is bound to support his minor children, if he be of ability, even though they have property of their own; but this obligation in such a case does not extend to the mother.").

52. The emerging "tender years" doctrine, under which mothers were frequently awarded legal custody of children under the age of seven upon the father's death or upon separation, was softening this aspect of the common law. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 248-49 (1985).

53. *Id.* at 222-23, 376 n.53.

54. 2 KENT, *supra* note 51, at 175; *see* 1 BLACKSTONE, *supra* note 51, at *447; GROSSBERG, *supra* note 52, at 224-25. In the words of the chronicler of the American common law, James Kent, the mother was "bound to maintain [the child] as its natural guardian." 2 KENT, *supra* note 51, at 178.

55. Under "bastardy statutes," a putative father could be sued by the state for financial support for his child, but the child was not recognized as legitimate with a claim on the father's estate or domicile, or any other status-based rights. *See* GROSSBERG, *supra* note 52, at 217.

determined by the condition of the mother frequently functioned to differentiate blacks from whites and free blacks from slaves, and it effectively ensured that the children of slave mothers and white fathers (often masters) were slaves.[56] Moreover, given the prohibitions—both legal and social—on slave marriage,[57] a rule that recognized the maternal line as the source of personal status for nonmarital children meant that children of female slaves were almost always born slaves, regardless of their father's status, and, in most cases, his race. Even in states that determined racial status based on a drop or percentage of "African blood," that rule was often based on the maternal line.

For example, in *Daniel v. Guy*, an Arkansas case, a woman sued for her freedom claiming that she was white, and hence not a slave. The Arkansas Supreme Court adopted a maternal descent rule for determining blackness: "a one-drop-of-blood rule," as long as that drop passed through the maternal line.[58] Similarly, in the canonical slave law case *Hudgins v. Wrights*, the Supreme Court of Appeals of Virginia explained that "by the uniform declaration of our laws, the descendants of the *females* remain slaves, to this day, unless they can *prove a right* to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female."[59] Maryland was no exception to this rule, which jurists traced to both common law and Roman law principles.[60] Given the ubiquity of this rule, it is unsurprising that when son-of-Maryland Chief Justice Taney set out slavery's long pedigree in his *Dred Scott* opinion, he explained that in the Roman Empire slave status "was decided by the condition of the mother," and quoted the *Institutes of Justinian* to show that slaves had long been "born such of bondwomen."[61]

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56. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 44-48 (1996).

57. CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 11 (2003).

58. Daniel v. Guy, 19 Ark. 121, 131-32 (1857). For a searching analysis of *Daniel v. Guy* and the maternal line rule, see Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 136 (1998).

59. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 137 (1806). For important discussions of *Hudgins*, see Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 704 (1996); Gross, *supra* note 58, at 130; and Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 621-27 (2007).

60. Chew v. Gary, 6 H. & J. 526 (Md. 1825). For discussions of how common law and civil law doctrines supported the maternal line rule, see MORRIS, *supra* note 56, at 44-48; and Sharfstein, *supra* note 59, at 605 n.43.

61. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 478-79 (1856) (quoting J. INST. 1.3.4); *see also id.* ("A freeman is one who is born free by being born in matrimony, of parents who

These basic principles of domestic relations law—that within marriage the status of children followed that of the father, while outside marriage the status of children followed that of the mother—were deeply embedded in the logic and practice of slavery and were a fundamental component of the laws that constructed race as a sociolegal category in the antebellum South. They were frequently used to help determine the racial status of mixed-ancestry individuals—that is, whether that individual would be classified by law as black or white or some other race.[62] Importantly for present purposes, these principles were also instrumental to how nineteenth-century jurists reasoned about black people's exclusion from citizenship. When Chief Justice Taney wrote in *Dred Scott* that slave status was "decided by the condition of the mother," he was explaining not only why black people were enslaved, but also why they were not citizens.[63] And when the Maryland Court of Appeals was asked to determine the citizenship of Benjamin and James Guyer, it drew on the very same domestic relations law principles to provide an interpretation of the statute governing *jus sanguinis* citizenship, and to explain why the Guyer brothers were not citizens. Thus, although the opinion does not rely on the Guyer brothers' race as justification for their exclusion from citizenship, the laws governing racial identity and status operated just below the surface of the opinion. By turning to domestic relations laws, the Maryland Court of Appeals was able to determine the Guyer brothers' citizenship without more than passing reference to their race, with no mention of *Dred Scott*, with no mention of the violent unwinding of slavery that served as the backdrop of the *Guyer* appeal, and with no mention of the promises of racial equality that Union victory would have signaled at least to some people. However present the race

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both are free, or both freed; or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free."). Jack Balkin and Sanford Levinson have demonstrated the important ways that "*Dred Scott* connected four ideas: race, status, citizenship, and community." Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 53 (2007). Based on these passages from Chief Justice Taney's opinion, one can productively add "family" to that list. For a careful reconstruction of the possibly stronger legal claims that could have been asserted by Dred Scott's wife, Harriet Robinson Scott, see Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

62. Of course the maternal line rule was not the only legal tool used to determine race and slave status. It often functioned in tandem, and sometimes in tension, with other means or modes of racial designation—including evidence of racial appearance, performance, and reputation—which gradually prevailed as the primary means of ascertaining racial status. *See* GROSS, *supra* note 10, at 23-26; Davis, *supra* note 59, at 704-07; Sharfstein, *supra* note 59, at 622-23.

63. *Dred Scott*, 60 U.S. (19 How.) at 478.

question—and, in particular, the question of black people's citizenship—was in the everyday lives of those involved in the *Guyer* case, to those reading the opinion today, the racial content and context of the case barely register.

II. *GUYER*'S LEGACY

But who reads *Guyer v. Smith* today? Who, other than the parties affected, ever read *Guyer*? After all, less than a year after the Maryland Court of Appeals decided *Guyer*, the Civil War was over, and in short order Congress enacted the 1866 Civil Rights Act, which provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are . . . citizens of the United States."[64] Two years after that, the Fourteenth Amendment constitutionalized *jus soli* citizenship ("the right of the place"), which largely put an end to the struggle over freedmen's formal citizenship status—although contests over freedmen's rights as citizens surely continued.[65] And in 1870, Congress made naturalization available to people of "African nativity."[66] Seen in this light, *Guyer* would seem to be a relic of a bygone moment, and of a repudiated understanding of American citizenship.

But *Guyer* lived on and continued to function as a tool of racial exclusion in the practice of American *jus sanguinis* citizenship. The opinion was relied on by government attorneys, cited in judicial opinions, debated in intra- and inter-departmental administrative memoranda, and enforced by various government agencies.[67] It was discussed in treaties, in articles, and in an important Attorney General Opinion issued in 1920.[68] In these sundry sources and contexts,

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64. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

65. U.S. CONST. amend. XIV, § 1. Even freedmen's formal citizenship status was contested. *See* Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1686-90 (2006).

66. *See* Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870).

67. *See, e.g.*, Mason *ex rel.* Chin Suey v. Tillinghast, 26 F.2d 588, 589 (1st Cir. 1928) (citing Guyer v. Smith, 22 Md. 239 (1864)); Ng Suey Hi v. Weedin, 21 F.2d 801, 802 (9th Cir. 1927) (citing 11 C.J. *Citizens* § 9, at 780 (1917) (citing *Guyer*)); *In re* Leah Skousen O'Donnell (Bd. of Review, Bureau of Immigration, U.S. Dep't of Labor, Sept. 2, 1938) (on file with NARA, RG 85) (discussing *Guyer*); Brief of Appellee at 12-13, *Ng Suey Hi*, 21 F.2d 801 (No. 5238) (citing *Guyer*); Memorandum from Theodore G. Risley, Solicitor, U.S. Dep't of Labor, to Robe Carl White, Ass't Sec'y, U.S. Dep't of Labor 13-14 (Feb. 10, 1931) [hereinafter Risley Memorandum] (on file with NARA, RG 85) (distinguishing *Guyer*). Throughout this Article, "NARA" refers to the National Archives and Records Administration and "RG" refers to the relevant record group.

68. *See, e.g.*, Citizenship—Children Born Abroad out of Wedlock of American Fathers and Alien

Guyer's primary holding—the interpretive rule that nonmarital foreign-born children of American fathers were not citizens—was regularly given its strictest, most exclusionary application in cases involving nonwhite children, and therefore had the tendency to exclude such children from the American polity.[69] However, the racialized origins and operation of the *Guyer* opinion were omitted from accounts of the case. In the hands of administrators, judges, and legal scholars who regularly worked with and interpreted American nationality laws, *Guyer*—and the ostensibly race-neutral domestic relations law principles for which it stood—thus provided a useful resource for those who sought to enforce racially nativist nationality policies. As I demonstrate in the Sections that follow, it was useful in part because its racialized operation was frequently obscured.

A. A Primer on Racially Nativist and Gender-Based Nationality Laws

Well into the twentieth century, the Fourteenth Amendment notwithstanding, other formal rules that governed membership in the American polity—such as immigration and naturalization laws—were shaped in significant ways by racial nativism. Perhaps the best known chapter in that story is the categorical exclusion of people of Asian descent, starting with the Chinese, from the late nineteenth through the mid-twentieth century. On the state level, efforts to expel and exclude people of Chinese descent began as early as the 1850s, when the California legislature began enacting laws intended to discourage the immigration—and encourage the emigration—of Chinese laborers who had flocked to California in search of work during the gold

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Mothers, 32 Op. Att'y Gen. 162 (1920); 11 C.J. *Citizens* § 9, at 780 (1917) (citing *Guyer*); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD § 273, at 612 (1915); LUELLA GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 24 (1934); FLORIEN GIAUQUE, THE ELECTION AND NATURALIZATION LAWS OF THE UNITED STATES 59 (Cincinnati, Robert Clarke & Co. 1880); 1 JOHN M. GOULD & GEORGE F. TUCKER, NOTES ON THE REVISED STATUTES OF THE UNITED STATES AND THE SUBSEQUENT CONGRESSES 479 (Boston, Little, Brown & Co. 1889); 1 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW 70 (Shabtai Rosenne ed., 1975) (1930); CATHARINE SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 219 (1934); FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 49 (1904); PRENTISS WEBSTER, LAW OF NATURALIZATION IN THE UNITED STATES OF AMERICA AND OF OTHER COUNTRIES 85 (Boston, Little, Brown & Co. 1895); Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 109 n.22 (1934).

69. This does not mean that race was the only factor that informed officials' interpretation of the *jus sanguinis* citizenship statute, or the application of the *Guyer* rule. *See* sources cited *infra* notes 323-324.

rush.[70] Federal exclusion of Chinese people began in the late nineteenth century, first with the Page Law of 1875 and next with the Chinese Exclusion Act of 1882, which suspended immigration of Chinese laborers for a period of ten years and also declared that "no State Court or Court of the United States shall admit Chinese to Citizenship."[71]

Exclusion laws barring the entry of Chinese and other Asian people were expanded over the late nineteenth and early twentieth century, culminating in the National Origins Act of 1924, which both re-codified the race-based exclusion laws and created a national origins quota system that would remain in place for three decades.[72] Through this exclusionary legislation and related administrative regulations and judicial rulings, federal officials constructed a body of nationality law that was premised on a firm belief in a natural racial hierarchy: white Anglo-Saxon Protestant immigrants were welcomed, southern and eastern Europeans were allowed to enter in limited numbers, and Asians and most people of African descent likely to immigrate were excluded.[73] The belief in a hierarchy of races also informed the federal government's response to questions concerning the citizenship status of indigenous residents of America's "insular territories"—places like Guam, Puerto Rico, and the Philippines—which were controlled by the United States but were not given statehood or a path to statehood.[74]

In addition to explicitly race-based nationality laws, gender-asymmetrical domestic relations law principles were incorporated into U.S. nationality law in order to resolve various conundrums created by mixed-nationality marriages, almost always in ways that compromised American women's citizenship status. Starting in 1855, Congress incorporated the gender-based principle of "marital unity"—the notion that "the husband and wife are one person in law" and the

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70. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 20-21 (1993); MOTOMURA, *supra* note 5, at 16-17.

71. Chinese Exclusion Act, ch. 126, § 14, 22 Stat. 58 (1882); *see* Act of May 5, 1892, ch. 60, 27 Stat. 25; Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477. On the Page Law, see Abrams, *supra* note 12.

72. *See, e.g.*, Johnson Act, ch. 190, § 1, 43 Stat. 153, 155-56 (1924); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876. For important discussions of early twentieth-century immigration legislation, see Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 70 (1999); and Weil, *supra* note 10.

73. *See* MOTOMURA, *supra* note 5, at 128; NGAI, *supra* note 10, at 21-54; Ly & Weil, *supra* note 24.

74. *See* sources cited *infra* note 87.

"legal existence of the woman is suspended during the marriage"[75]—into nationality law by decreeing that when a foreign woman married an American man, she automatically became an American citizen.[76] However, the converse was not true: an American woman who married a foreign man could not secure citizenship for her husband. Indeed, starting with an influential federal appeals court opinion in 1883,[77] the principle of "marital unity" and women's subordinate and dependent status in marriage translated into laws that stripped American women of their citizenship upon marriage to a foreigner. Congress codified that principle in the Expatriation Act of 1907, and thereby preserved the doctrine of coverture in federal citizenship law.[78]

By design, the race- and gender-based principles that informed the core functions of American nationality law often operated together. For example, the benefits of the 1855 citizenship law that automatically bestowed American citizenship on the non-citizen wife of an American man were limited to foreign women who "might lawfully be naturalized"—thus restricting naturalization-by-marriage to white women, since at that time only white people could naturalize.[79] Moreover, although *all* American women were expatriated upon marriage to a foreign man under the Expatriation Act of 1907, when that law was partially repealed by the Cable Act of 1922, lawmakers purposefully left intact formal race-based restrictions on married women's citizenship rights by continuing to expatriate American women who married foreign men who were "ineligible to citizenship."[80] In 1922, that category included men of Asian descent, thus confirming the continued expatriation of all American women,

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75. 1 BLACKSTONE, *supra* note 51, at *442.

76. *See* Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604.

77. Pequignot v. City of Detroit, 16 F. 211 (C.C.E.D. Mich. 1883).

78. Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228. Nancy Cott makes the important point that the 1855 act "in effect rais[ed] the doctrine of coverture to the level of national identity." Cott, *Marriage*, *supra* note 12, at 1457.

79. *See* Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.

80. Act of Sept. 22, 1922, ch. 411, §§ 3, 5, 42 Stat. 1021, 1022. In 1922, only "free white persons" and persons of "African nativity" and "African descent" were eligible to naturalize. *See* Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870); 6 FED. STAT. ANN. § 2169 (1918) ("The provisions of this Title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."); Ozawa v. United States, 260 U.S. 178 (1922) (holding that Rev. Stat. § 2169 barred the naturalization of a person of Japanese descent).

whatever their individual racial identity, who married a non-citizen Asian man.[81]

The principle of "marital unity" and racially exclusionary immigration laws—operating separately and in conjunction—not only shaped the citizenship rights of men and women who entered mixed-nationality marriages, but also helped determine the rights of *children* under American nationality law. Within marriage, until 1934, *jus sanguinis* citizenship followed the male line: the foreign-born children of American fathers, but not mothers, were recognized as citizens.[82] This patrilineal rule conformed to the principle of coverture and the related understanding that fathers determined the national culture and political allegiance of their children, in addition to that of their wives.[83] Even after 1931, when Congress recognized American women's right to retain their citizenship upon marriage to a non-citizen, regardless of his race,[84] women's organizations had to fight several more years to secure citizenship for American women's foreign-born children. In 1934, married American mothers could, for the first time, secure citizenship for their foreign-born children,

81. For an important discussion of the 1907 Expatriation Act that pays special attention to the racial dimension of its repeal, see Volpp, *supra* note 12, at 425-42.

82. *See* Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797, 797; Collins, *A Short History*, *supra* note 4, at 1503; Collins, *Fathers' Rights*, *supra* note 4, at 1697-98. Until 1855, the text of the *jus sanguinis* citizenship statute was somewhat ambiguous as to whether citizenship transmission was limited to children of American fathers. The citizenship statutes of 1790, 1795, and 1802 referred only to transmission of citizenship to "children of citizens" or "persons," but also included a proviso that "the right of citizenship" would descend only to persons whose fathers had resided in the United States. *See* Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104. Those statutes were understood to limit citizenship transmission to children of citizen fathers. *See* 2 KENT, *supra* note 51, at 51. In the mid-nineteenth century, Congress was presented with an opportunity to repudiate the sex bias in the early *jus sanguinis* citizenship statutes. *See* CONG. GLOBE, 30th Cong., 1st Sess. 827 (1848) (statement of Sen. Webster) (announcing that he would introduce a bill that would confer citizenship on all foreign-born children "of a father or mother being or having been a natural born citizen of the United States"). Instead, in 1855 Congress affirmed the husband-favoring interpretation. Rewording the statute to clarify that only children "whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed . . . citizens of the United States," Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604, Congress codified in citizenship law the well-established norm of male headship of the marital family, *see* SMITH, *supra* note 5, at 234-35 (noting that the 1855 Act was "true to the law's pervasive patriarchalism").

83. *See* Collins, *A Short History*, *supra* note 4, at 1499-1501.

84. Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1511-12.

although after 1940 their ability to do so was more constrained than that of married American fathers.[85]

But what about children who were born outside marriage? Until 1940, this issue was not addressed by the *jus sanguinis* statute. As I demonstrate in detail below, however, their citizenship status was determined by a body of judge- and administrator-made gender-asymmetrical standards. Starting in the early twentieth century, administrators in the Department of State and the Bureau of Immigration recognized the nonmarital foreign-born child of an American mother as an American citizen (before the *jus sanguinis* statute provided for mother-child citizenship transmission).[86] And, as a default rule, the nonmarital foreign-born child of an American father was not a citizen—the principle that the Maryland court established in *Guyer*. This rule was not race neutral, however. Just as we miss a crucial dimension of *Guyer* if we fail to understand the case as part of the larger contest over the citizenship status of black people in the mid-nineteenth century, we miss a crucial dimension of the development of gender-asymmetrical *jus sanguinis* citizenship law if we fail to account for the important ways that restriction of father-child citizenship transmission outside the marital family regularly operated to exclude nonwhite children from citizenship.

In the following two Sections, I support that core assertion by drawing on the historical records from two important periods in the history of American nationality law. First, I demonstrate how, in the late nineteenth century, domestic relations law served as an important tool for American officials who sought to limit the citizenship claims of "half-caste" children of American men living in Samoa, at that point the location of a small outpost in the fledgling American empire. Next, I examine the *Guyer* rule's role as an instrument of exclusion in the enforcement of the infamous Chinese exclusion laws, as it provided a means by which Bureau of Immigration officials could limit the entry of foreign-born children of Chinese American fathers. By tracing the *Guyer* rule's long legacy in the late nineteenth and early twentieth century, I demonstrate that the gender- and marriage-based regulation of *jus sanguinis*

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85. Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797, 797; *see* Collins, *A Short History*, *supra* note 4, at 1504-06 (describing how Congress created statutory exceptions to the facially gender-neutral child and parental residency requirements in the Nationality Act of 1940, and showing that those exceptions were designed to relieve citizen-parents who were the "head of the family," a legal term of art that referred to husband-fathers, from those residency requirements).

86. *See* Collins, *Fathers' Rights*, *supra* note 4, at 1689-90; *infra* Subsection III.A.3.

citizenship was shaped by the logic of racial hierarchy and exclusion that informed American nationality law well into the twentieth century.

B. Guyer *as a Rule of Empire*

In the second half of the nineteenth century, as America's international presence expanded, officials began to actively protect and define the contours of American citizenship in consular offices around the world: China, Puerto Rico, Samoa, the Philippines, Hawaii, Guam, and elsewhere. American expansion gave rise to all manner of legal puzzles, many of which were vetted in the *Insular Cases*.[87] Likely the best-known of these issues was whether the indigenous residents of U.S. territories were American citizens, enjoying the full protection of the Constitution. In other words, did the Constitution follow the flag?[88] The answer, although notoriously complicated, was generally understood to be no.[89]

Another, less well-documented concern of officials charged with tending to America's interests abroad was the citizenship status of children born to American parents in the insular territories and in foreign countries. The United States's presence abroad was not virtual; it was physical. In addition to military personnel, the United States sent ambassadors, consuls, commercial agents, and other civil servants and employees to foreign countries near and far to represent American interests and to spread American values.[90] In the late nineteenth and early twentieth centuries, the vast majority of those Americans

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87. For discussions of these extremely important but often overlooked cases, see 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 225-56 (2006); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE]; BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 3-9, 40 (2006); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. (forthcoming 2014); and Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 257-59 (2000).

88. This was the contemporary shorthand way of asking whether the United States can possess territory to which the Constitution does not extend. *See generally* Brook Thomas, *A Constitution Led by the Flag: The* Insular Cases *and the Metaphor of Incorporation*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 87, at 82.

89. *See* Downes v. Bidwell, 182 U.S. 244, 287 (1901).

90. *Diplomatic Corps*, *in* 1 ENCYCLOPEDIA OF THE UNITED STATES IN THE NINETEENTH CENTURY 373, 373-75 (2001).

abroad were men,[91] and some of them had relationships with local women. Many of the children born of these unions, and their parents, were of the view that the child of an American father and a local woman was an American citizen. Given that the *jus sanguinis* citizenship statute appeared to recognize children of American fathers as citizens regardless of the fathers' marital status, the children's claims were, at the very least, grounded in the letter of the law. Moreover, some of these children claimed that their parents were married, a fact that would seem to guarantee the children's status under any interpretation of the statute.

But the citizenship claims asserted by children of American fathers and local women were not generally given the benefit of the *jus sanguinis* citizenship statute, as the case of Samoan-born children of American fathers illustrates. Officials evaluating these children's claims not only presumed that a child must be legitimate in order to qualify for American citizenship but also employed a definition of marriage that denied the legality of marriages that American men entered into "beyond Christendom"—marriages that frequently involved interracial unions. The children born of those unions were illegitimate and hence not citizens.

1. Samoa and "an Institution of Our Civilization"

The first American commercial agent arrived in Samoa in 1853, joining Calvinist, Methodist, and Catholic missionaries who had settled there in the 1830s, along with English and German traders and officials.[92] For several decades, Samoa remained a relatively sleepy way station, but in the 1870s, with

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91. *See, e.g.*, KAREN M. MILLS, U.S. DEP'T OF COMMERCE, AMERICANS OVERSEAS IN THE U.S. CENSUS 11 tbl.4 (1993), http://www.census.gov/population/www/socdemo/overseas/techn62-2.pdf. Mills reproduces census data from 1900 showing that 91,219 military and federal civilian employees and members of their families were stationed abroad or on naval vessels that year. Although the table does not indicate how many of those family members were women, they were counted with the 3,681 "civilian employees, etc.," and hence at most would have accounted for one to two percent of the 91,219 military and federal civilian employees residing abroad that year.

92. *See* GEORGE HERBERT RYDEN, THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA 25 (1933). The first congressionally appointed commercial agent of the United States was Virginius Chapin. Prior to Chapin's appointment, an Englishman named John Williams served as a representative of the United States, but his appointment was never approved by Congress. *Id.* at 19-20, 25. For a discussion of the European settlers who preceded the arrival of Americans in Samoa, see SYLVIA MASTERMAN, THE ORIGINS OF INTERNATIONAL RIVALRY IN SAMOA 1845-1884 (1934).

an eye toward "increasing our commercial relations" in the South Pacific, President Grant appointed Albert Barnes Steinberger as a special agent with instructions "to secure more reliable information in reference" to Samoa.[93] Steinberger's report, written in the style of Victorian ethnography, catalogued the flora and fauna of the islands and the language, religion, and customs of the people, including their marriage rituals and practices. "Polygamy," he explained, "is common on the part of men, never on the part of women, though two wives seldom live in the same house. A plurality of wives is not common, a husband usually sending a wife to her people when he takes to himself a new one."[94] Missionaries tried to eradicate the practice of polygamy in Samoa. Their influence is evident in a provision in the Samoan council's 1873 laws that—as reported by Steinberger to Congress—declared that "[p]olygamy is strictly forbidden" and criminalized the practice with a penalty of two years' hard labor for the guilty parties and a hundred-dollar fine for the husband.[95] One suspects that the 1873 law and other bans on polygamy were directed not only at native Samoans but also at the western men living in Samoa. One of the first American commercial agents in Samoa, Jonas Coe, married at least six Samoan women and fathered at least eighteen children.[96] And Albert Steinberger became intimately involved with Coe's famously beautiful daughter Emma Coe, who was the second child of Coe's first wife.[97]

Eventually, questions concerning the citizenship of the Samoan-born children of American fathers made their way to Washington, D.C. In 1887, Assistant Secretary of State George Rives received an inquiry from Harold Marsh Sewall, the American Consul General in Samoa. Soon after taking up his post, Sewall had received an inquiry from one "A[viga] Chapin, who ha[d]

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93. Letter from Hamilton Fish, Sec'y of State, to President Ulysses S. Grant (May 1, 1876), *in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT FROM THE SECRETARY OF STATE AND ACCOMPANYING PAPERS, H.R. EXEC. DOC. NO. 44-161, at 1, 2 (1876).

94. Albert B. Steinberger, Report on Samoa or Navigator's Islands (Apr. 21, 1874), *in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A COMMUNICATION FROM THE SECRETARY OF STATE, AND THE REPORT BY WHICH IT IS ACCOMPANIED UPON SAMOA OR THE NAVIGATOR'S ISLANDS, S. EXEC. DOC. NO. 43-45, at 1, 15 (1874).

95. *Id.* at 49. The 1873 laws also declared that marriage "is a contract between man and woman that they shall be one till death part them" and decreed that "[t]here shall be no divorce or separation; once married [the couple] shall live together till parted by death." *Id.*

96. R.W. ROBSON, QUEEN EMMA: THE SAMOAN-AMERICAN GIRL WHO FOUNDED AN EMPIRE IN 19TH CENTURY NEW GUINEA 32-33 (1965).

97. *Id.* at 63-76.

applied for protection as a citizen of the United States."[98] Aviga Chapin was the adult son of an American man, Virginius P. Chapin, and an unnamed "native woman."[99] The elder Chapin had served as the commercial agent of the United States in Samoa from 1853 to 1854, and he remained in Samoa for some time thereafter operating a private partnership.[100] Sewall explained that, upon his departure, Virginius had left Aviga in the charge of a British man, George Pritchard, who "states that [Aviga] has always claimed American protection."[101] Nevertheless, Sewall had "refused [the younger] Chapin's application" for citizenship, but was uncertain enough about the matter that he requested "instructions not only upon [Chapin's] case" but also "the status of men who, like him, are the children of American fathers by Samoan women."[102] Sewall advised his superior that his own "opinion is strongly in favor of restricting this recognition [of the children of Samoan mothers and American fathers] as much as possible."[103]

The response from Assistant Secretary of State Rives was as telling for what it assumed as for what it made explicit. After setting out the facts, Rives immediately began his analysis of the law governing the enforceability of foreign marriages in America. In so doing, he assumed that only *marital* foreign-born children of American fathers could claim American citizenship, even though the governing *jus sanguinis* citizenship statute said nothing about marital status.[104] As a consequence, marriage was central to his analysis, and the important question was whether marriages between American men and Samoan women qualified as legal marriages, which would make the children born of those unions legitimate and citizens.

Rives's answer was no, despite the "general principle of private international law that a marriage celebrated according to the requirements of the law of the place where the ceremony is performed is to be recognized as

98. Letter from George Rives, Ass't Sec'y of State, to Harold M. Sewall, U.S. Consul Gen., Samoa (Apr. 26, 1888), *in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING DOCUMENTS RELATING TO THE CONDITION OF AFFAIRS IN SAMOA, S. EXEC. DOC. NO. 50-31, at 55, 55 (1888) [hereinafter MESSAGE FROM THE PRESIDENT].

99. *Id.*

100. H.R. MISC. DOC. NO. 51-81, at 2 (1891).

101. Letter from Harold Marsh Sewall, U.S. Consul Gen., Samoa, to George Rives, Ass't Sec'y of State (Mar. 17, 1888), *in* MESSAGE FROM THE PRESIDENT, *supra* note 98, at 35, 35-36.

102. Letter from George Rives to Harold M. Sewall, *supra* note 98, at 55.

103. Letter from Harold M. Sewall to George Rives, *supra* note 101, at 36.

104. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

valid."[105] Rives explained that "this rule completely applies only to the countries of Christendom."[106] "In Mohammedan . . . or in uncivilized lands like Samoa . . . the privileged foreign residents carry with them their local law."[107] "It follows," he continued,

> that the custom of Samoa in regard to the lawful cohabitation of men and women can not be accepted as a rule by which to determine the character of the cohabitation of an American citizen with any woman, whether native or foreign. The character of such cohabitation must be decided by the law of the United States.[108]

With that in mind, Rives concluded that, "[v]iewed as an institution of our civilization," a valid marriage contract "should be exclusive and for life. Cohabitation for a term of years or at will does not constitute a matrimonial alliance."[109]

Relying on Steinberger's 1874 report, Rives then observed that "[p]olygamy is common on the part of [Samoan] men"[110] and concluded that "cohabitation 'fa'a Samoa' is neither exclusive nor for life and so fails to fulfill the essential conditions of marriage in the United States."[111] Given this, the children of American men and Samoan women were not American citizens. In Rives's assessment, this conclusion applied to the claim of Aviga Chapin, despite the fact that Sewall had not stated with any clarity that Virginius Chapin's relationship with the unnamed "native woman" was, in fact, polygamous. Indeed, in a further letter that was intended to clarify the standards that the Department of State would use in assessing the legitimacy of the "half-caste" children of American fathers residing in Samoa, Rives explained that *no marriage* between a Samoan woman and an American father could satisfy the American standard for legal marriage—"exclusive and for life"—because, regardless of the intent of the parents or the nature of their union, if Samoan law allowed the parties to separate, then such a marriage

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105. Letter from George Rives to Harold M. Sewall, *supra* note 98, at 55.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 56.

110. *Id.* (quoting Steinberger, *supra* note 94, at 15).

111. *Id.*

would not be recognized under American law.[112] Under this interpretation, no child of an American father and a Samoan mother could be recognized as a citizen under the *jus sanguinis* citizenship statute.

2. *Half-Castes, Polygamy, and the Presumption of Legitimacy*

On the one hand, Rives's analysis, and his insistence that "half-caste" children in Samoa were not American citizens, is hardly surprising. In the 1880s, many considered racial mixing a sin that posed a danger to the purity of the white race.[113] In the United States, most of the states had laws barring interracial marriage, and the practice was socially taboo.[114] Although Rives did not rely on such laws as the foundation of his opinion, a construction of the law of marriage that denied the legitimacy of marriages between white American men and Samoan women under any circumstances was consistent with prevailing legal and social norms of the time.

Rives's ready assumption that all American-Samoan marriages were polygamous and his conclusion that polygamous marriages were invalid was also predictable given the ferocious anti-polygamy sentiment of the time. By the 1880s, the federal government had committed substantial resources to exorcising Mormon polygamy from the nation-state.[115] In that campaign, Mormon polygamy was portrayed as a perversion of monogamous, Christian marriage.[116] And polygamy's routine identification with African and Asian peoples imbued the domestic anti-polygamy campaign with racial salience.[117] For example, eight years before Rives rejected Chapin's claim to citizenship, the Supreme Court upheld the federal government's power to criminalize polygamy, explaining that polygamy was a practice of "Asiatic and . . . African people" that was "odious" to European nations.[118] It was feared that Mormon

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112. Letter from George Rives, Ass't Sec'y of State, to Harold M. Sewall, U.S. Consul Gen., Samoa (July 19, 1888), *in* MESSAGE FROM THE PRESIDENT, *supra* note 98, at 102, 102.

113. *See* Gross, *supra* note 58, at 177-78.

114. PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 62-63 (2009).

115. *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002).

116. *Id.*

117. COTT, PUBLIC VOWS, *supra* note 12; GORDON, *supra* note 115, at 142; Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 288-89 (2010).

118. Reynolds v. United States, 98 U.S. 145, 165 (1879); *see also* Alice Ristroph & Melissa Murray,

polygamy was evidence of white people's slippage into practices associated with supposedly lower-order races, and hence their racial denigration.[119] American men's alleged predilection toward polygamy in Samoa may have triggered a similar anxiety in officials charged with determining the citizenship claims of foreign-born children of American men residing in Samoa. If the government would not tolerate—or grant statehood to—a white, arguably Christian people who practiced polygamy within the geographical bounds of the United States, they surely would not welcome the offspring of possibly polygamous relationships between American men and Samoan women, born oceans away, into the American polity. In many respects, then, Rives's analysis and conclusion seems to have been overdetermined by contemporary cultural and legal commitments against interracial marriage and polygamy.

But one should not overlook the relevant legal authorities and norms that pointed in the other direction. As an initial matter, it bears repeating that the governing *jus sanguinis* statute was silent regarding the father's marital status.[120] Moreover, not everyone thought that an interpretation of this statute that recognized nonmarital foreign-born children of American fathers as citizens would have strained common sensibilities of the day. Significantly, Rives's opinion effectively overruled an earlier practice that recognized the possibility of Samoan-American marriage and limited citizenship rights for "half-caste" children born of such unions.[121] And just a few years before Rives penned his letter, an American diplomat stationed in China, John Russell Young, concluded that the illegitimacy of a "negro" American father's foreign-born child was irrelevant to the Department of State's determination of that child's citizenship under the same *jus sanguinis* statute. Young based his reading of the statute on the guiding principle that "the misfortune of an illegitimate birth cannot deprive a man of his nationality. . . . He is a part of society."[122] In short, like the judges who presided in *Guyer*, Rives made an

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Disestablishing the Family, 119 YALE L.J. 1236, 1262-63 (2010) (analyzing *Reynolds*).

119. *See* Ertman, *supra* note 117, at 312-23.

120. The version of the statute in force in the 1880s stated that the foreign-born children of American *fathers* were American citizens, but it said nothing about the father's marital status. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604. Prior to 1855, all versions of the *jus sanguinis* statutes referred simply to "children of *persons*" but were interpreted to allow for patrilineal transmission of citizenship only. 2 KENT, *supra* note 51, at 45.

121. *See* Damon Salesa, *Samoa's Half-Castes and Some Frontiers of Comparison*, *in* HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY 71, 81-82 (Ann Laura Stoler ed., 2006).

122. Letter from John Russell Young to Charles Seymour, *supra* note 43, at 159. Young

interpretive choice in reading the statute to limit citizenship to marital children of American fathers, and in determining that, regardless of the nature of the particular marriage, Samoan-American marriages did not constitute *legal* marriages.

Rives's interpretation of the *jus sanguinis* statute also ignored one of the most fundamental principles of nineteenth-century marriage law. The legal maxim *semper praesumitur pro matrimonio*—always presume marriage—was a well-established and closely followed tenet of late nineteenth-century domestic relations law.[123] Its influence was considerable, and, quite intentionally, it operated to legalize marriages and legitimize children in a whole range of circumstances. For example, as Rives surely knew, in most parts of the United States, common law marriage—"cohabitation for a term of years" combined with public recognition of the couple as husband and wife—constituted a lawful "matrimonial alliance."[124] Judges and lawyers acknowledged that a primary purpose of common law marriage was to ensure that children born of such a union were legitimate.[125] In many states' domestic relations laws, the child born to a couple who married *after* the child's birth was deemed legitimate *nunc pro tunc*, from the day he or she was born.[126] The presumption of legitimacy was so strong that even if adultery was suspected on the part of a married woman, any child she bore was assumed to be the child of her husband, subject only to strong contrary proof.[127] Indeed, a whole body of evidentiary law supported the presumption in favor of marriage and legitimacy.[128] In light of these strong norms, Rives's determination that the

disapproved of a U.S. consul's reliance on the *Dred Scott* opinion to reject the son's claim to citizenship, but encouraged him to find alternative grounds for rejecting the son's claim. *See id.*

123. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, WITH THE EVIDENCE, PRACTICE, PLEADING, AND FORMS § 457, at 374 (Boston, Little, Brown, and Co. 6th ed. 1881) (1852) ("Every intendment of the law is in favor of matrimony."). For a discussion of the presumption of matrimony and legitimacy, see GROSSBERG, *supra* note 52, at 218-28.

124. *See* GROSSBERG, *supra* note 52, at 73-83.

125. *See id.* at 79.

126. *See id.* at 222-23, 376 n.53.

127. 4 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 241, at 150 (1936).

128. *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 970 (2000) ("A court within a common law marriage jurisdiction still had to adjudicate in each specific case whether the particular plaintiff before it deserved recognition as a party to a valid common law marriage. In this respect, evidence law took its place next to contract law as a critical piece of the doctrine.").

marriages of American men and Samoan women were invalid—and the children illegitimate—denied those children the presumption of legitimacy that helped protect many children in America from the legal liabilities and profound social stigma of illegitimacy at that time.

But in domestic relations law, as in nationality law, there were racial limits on the operation of the presumptions of marriage and legitimacy. For example, the children of interracial couples did not benefit from legal presumptions that would have made them legitimate.[129] One can see similar racialized understandings of the law of marriage and legitimacy operating in the citizenship determinations of Samoan-born children of American fathers that resulted in those children's exclusion from membership in the American polity. The role that racialized domestic relations laws served in the hands of officials charged with making citizenship determinations was by no means identical to the ends they served in other contexts. Domestically, such laws reinforced sociolegal racial hierarchies by limiting nonwhite children's access to the status and material benefits of legitimacy. In the context of interpreting the *jus sanguinis* statute, the non-recognition of marriages between American men and the "native women" of Samoa reflected anxieties of empire—the fear that America's imperial project at the periphery would dilute or corrupt the polity at the center, in this case by recognizing "half-castes" as American citizens.[130] But whether deployed at home or in the furthest reaches of America's fledgling empire, malleable but durable domestic relations law principles aided in the racial construction of family and nation.

3. *Presumptions and the Pliability of Domestic Relations Law*

Not all foreign-born children of American fathers were denied the benefit of the presumption of legitimacy and other liberal rules of recognition that were common in nineteenth-century domestic relations law. Presumptions concerning marriage and legitimacy, along with a healthy dose of administrative discretion, were incorporated into citizenship law, allowing for selective determinations of legitimacy and citizenship status—determinations that were shaped by considerations of the children's ethno-racial identity.

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129. *See* GROSSBERG, *supra* note 52, at 203, 224, 373 n.38; MANGUM, *supra* note 13, at 264-65.

130. *See generally* STEPHEN KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY 262-64 (2000); PAUL KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES AND THE PHILIPPINES 23 (2006).

For example, contrast Rives's insistence that, for purposes of determining the citizenship of foreign-born children of American fathers, the children must be born into a marriage that is "exclusive" and "for life" with the Department of State's treatment of Louis Rover in 1901. Louis was the son of Léon Jean Rover, an American born in New York, and Germaine Rivère, a Frenchwoman.[131] Louis was born out of wedlock in France in 1888, and his parents married three years later in London. Shortly afterward they legally parted and Louis remained with his mother.[132] Confronted with Louis's claim for citizenship, Department of State officials were uncertain how to proceed. Louis was born out of wedlock and therefore appeared to fall outside the *jus sanguinis* statute, which, as per *Guyer*, applied only to an American father's marital children. On the other hand, Léon and Germaine eventually married, which may have "legitimated" Louis. Would such a child be counted as an American citizen?

One possibility for Department of State officials was to adopt a strict rule that could be applied easily by administrators charged with making citizenship determinations: all children born out of wedlock were illegitimate and hence could not take citizenship through their American fathers. Instead, Louis Rover's case provided the occasion for the crystallization of an important exception to the *Guyer* rule: nonmarital foreign-born children who were "legitimated" by their American fathers would be recognized as American citizens. Rather than concluding that Rover was not a citizen under the *jus sanguinis* citizenship statute because he was born out of wedlock, Acting Secretary of State Alvey Adee took the initiative to write to the Attorney General of New York, John Davies, to inquire whether, under New York law, a child born out of wedlock was legitimized by his parents' subsequent marriage. Relying on Davies's assurance that, under New York law, Louis had been legitimized by his parents' nuptials,[133] the Department recognized Louis as a United States citizen.[134] Louis's parents had not been married when he was born, and it does not appear that Louis spent considerable time living in his

131. Letter from Charles L.E. Lardy, Swiss Chargé, to Alvey A. Adee, Ass't Sec'y of State (July 30, 1901), *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1901, at 511, 511 (1902).

132. *Id.*

133. Letter from John C. Davies, Att'y Gen. of N.Y., to Alvey A. Adee, Acting Sec'y of State (Aug. 16, 1901), *in* ANNUAL REPORT OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK 261, 261-62 (1902).

134. Letter from John Hay, Sec'y of State, to Charles L.E. Lardy, Swiss Chargé (Aug. 23, 1901), *in* 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 374, at 286 (1906).

father's household. Yet Louis's claim to American citizenship was granted. *Semper praesumitur pro matrimonio*.

As with the *Guyer* rule, the Department of State's legitimation exception would become a standard interpretive gloss on the *jus sanguinis* citizenship statute.[135] But it was often applied in a race-selective manner. For example, in the years just after the Rover case, the Department of State did not use the same generous interpretation of the laws of marriage and legitimacy in cases involving the foreign-born children of American men and Chinese women. Summarizing Department of State practice in his 1904 handbook titled *Citizenship of the United States*, Assistant Solicitor Frederick Van Dyne explained that "[i]llegitimate children born to a Chinese woman in China do not become American citizens by the subsequent marriage of the mother to a citizen of the United States." Citing *Guyer* as the lead case, Van Dyne reasoned that "[i]llegitimate children follow the status of the mother, and the mother being Chinese, and not capable of being lawfully naturalized under the laws of the United States, her marriage to a citizen of the United States did not confer American citizenship on her."[136] Van Dyne's account of the citizenship status of nonmarital children born to American fathers and Chinese mothers makes no suggestion that a child born to a Chinese mother could be legitimized by her marriage to the American father, and thus acquire citizenship through the father, though that rule had been followed just two years earlier in the Rover case.

Van Dyne's assessment of the status of the nonmarital child of a Chinese-American union is just one example of how the law of marriage and legitimacy aided in the enforcement of the Chinese exclusion statutes, a subject I turn to in the next Section. Before doing so, however, it is worth observing that

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135. *See infra* Subsection III.A.2.

136. VAN DYNE, *supra* note 68, at 49, 49-50 (citing Letter from Herbert Peirce, Ass't Sec'y of State, to U.S. Consul, Shanghai, China (Mar. 27, 1903)). Similarly, in 1902, Allen Cameron, the Vice-Consul in Charge in Hankow, China, wrote to Consul-General John Goodnow in Shanghai, inquiring as to the citizenship status of the Japanese and Chinese wives of two American men residing abroad. Cameron explained that both couples in question "had children born before their marriages, and I take it that the children are of course barred from registration [as citizens], being illegitimate." Letter from Allen N. Cameron, Vice-Consul in Charge, to John Goodnow, U.S. Consul Gen., Hankow, China (Nov. 3, 1902), *in* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1903, at 44, 44 (1904). For a probing and important study of the experiences of interracial and mixed-nationality families of Chinese and white European or American heritage as they navigated American citizenship laws, see generally EMMA JINHUA TENG, EURASIAN: MIXED IDENTITIES IN THE UNITED STATES, CHINA, AND HONG KONG, 1842-1943 (2013).

although the racial operation of domestic relations law principles in nationality law was often obscured, this was not always the case. A few years after Rives wrote his letter to the American consul in Samoa, John Bassett Moore, a towering figure in international law—and one-time secretary to the Conference on Samoan Affairs—reported and summarized the laws governing *jus sanguinis* citizenship. In his discussion of the citizenship status of nonmarital children, Moore cited Rives's letter and comfortably declared that "[h]alf-castes born in Samoa, of American fathers by Samoan women, with whom the fathers lived 'fa'a Samoa,' are not citizens of the United States."[137] And in 1915, when Moore's protégé Edwin Borchard wrote *The Diplomatic Protection of Citizens Abroad*, he reiterated and translated the conclusion of his mentor—"it seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens"—citing *Guyer v. Smith*.[138]

C. Guyer *as a Rule of Exclusion*

> *[T]he question of [jus sanguinis] citizenship, as it exists in Chinese cases, rarely became the problem of any other nationality.*[139]
>
> —Wen-Hsien Chen (1940)

In the late nineteenth and early twentieth century, the pressing questions of nationality law involved the status of persons of Chinese descent and others

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137. MOORE, *supra* note 134, § 374, at 287.

138. BORCHARD, *supra* note 68, § 273, at 612 (citing Guyer v. Smith, 22 Md. 239 (1864)).

139. Wen-Hsien Chen, Chinese Under Both Exclusion and Immigration Laws 284 (June 1940) (unpublished Ph.D. dissertation, Univ. of Chi.) (on file with author). Chen was a Chinese doctoral student at the University of Chicago who included a careful account of the travails of foreign-born children of Chinese American citizen fathers in her dissertation. Chen explained that:

> Today, foreign-born citizens constitute the only significant group of the Chinese race admissible for permanent stay. Although, in principle, their political status had been paid down since 1855, their practical rights were not recognized until 1918 in the case of Quan Hing Sun [v. White, 254 F. 402 (9th Cir. 1918)]. Further, the right of the second-generation children of the United States citizen, born outside the jurisdiction and limits of the United States, was administratively and judicially settled only in 1927 in the Chin Bow case. The question of citizenship, as it exists in Chinese cases, rarely became the problem of any other nationality. . . . It took thirty years, from Wong Kim Ark's case in 1898 to Chin Bow's case in 1927, to settle the citizenship rights of Chinese descendants.

Id.

from the "Asiatic zone."[140] In this fiercely anti-Asian context, exclusionists vigorously challenged the citizenship status of American-born individuals of Chinese descent, and immigration officials attempted to use the exclusion laws to bar the entry of American-born citizens of Chinese descent returning from sojourns abroad.[141] But for the Supreme Court's 1898 intervention in *Wong Kim Ark*, which established that the Citizenship Clause of the Fourteenth Amendment applied to native-born Chinese American citizens, the exclusionists would likely have succeeded in ensuring Chinese Americans' exclusion from the United States.[142] Unable to categorically exclude native-born Chinese Americans from the United States, exclusionists made a concerted effort to limit *jus sanguinis* as a route to citizenship for the foreign-born children of Chinese American fathers.[143] These efforts were part of a larger process by which Chinese American citizens were marked as "alien citizens"—persons who, although "born in the United States . . . remained alien in the eyes of the nation."[144] They were also part of an effort to maintain the purity and predominance of the white race in the United States.[145] This Section examines how the Bureau of Immigration embraced the *Guyer* rule in service of the racial exclusion laws.

1. *Chinese American Fathers and* Jus Sanguinis *Citizenship*

For a whole host of reasons—including the illegality of interracial marriage and the severe gender imbalance in the ethnic Chinese population in America—it was not uncommon for a Chinese American man to marry a Chinese woman who remained in China while he traveled back to the United States.[146] Those

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140. *See supra* Section II.A.

141. *See* LEE, *supra* note 6, at 103.

142. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

143. On the Bureau of Immigration's efforts to exclude such children generally, see SALYER, *supra* note 6, at 209-11.

144. *See* NGAI, *supra* note 10, at 8; *see also* SALYER, *supra* note 6, at 208-09 (noting that even after *Wong Kim Ark*, the Bureau of Immigration "urged that though native-born Asian Americans might be 'technical' citizens, they would never become 'real' citizens . . . and should not be treated in the law as genuine Americans").

145. *See* sources cited *supra* note 10.

146. For important discussions of this practice and competing explanations for trans-Pacific family formation among Chinese American men, see MADELINE YUAN-YIN HSU, DREAMING OF GOLD, DREAMING OF HOME: TRANSNATIONALISM AND MIGRATION BETWEEN THE UNITED STATES AND SOUTH CHINA, 1882-1943, at 90-123 (2000); Sucheng Chan, *The Exclusion of*

couples had children, born in China, and the citizenship status of those children was an important, and vexing, question for the Bureau of Immigration. The Bureau was clearly concerned about fraud, and there is substantial evidence that fraudulent claims to a filial relationship with a Chinese American father had become a common way of evading the harsh exclusion laws.[147] But the Bureau's obsessive effort to restrict the transmission of citizenship between Chinese American fathers and their foreign-born children was not only animated by worry about fraud; it was animated by a racial xenophobia that characterized the exclusion laws more generally. In his 1916 annual report to the Secretary of Labor, for example, Commissioner General of Immigration Anthony Caminetti lamented the recognition of foreign-born children of Chinese American fathers under the *jus sanguinis* citizenship statute. Caminetti objected to the fact that American-born individuals of Chinese descent were birthright citizens under the Fourteenth Amendment's Citizenship Clause, and found it even more troubling that their foreign-born children could be considered citizens as well. Contending that "a person of the Mongolian race who is so fortunate as to be born here is vested by the 'accident of birth' with American citizenship," Caminetti thought it a travesty that such an individual could go "to the native country of his parents and marry[] . . . and there beget[] children . . . [who] could come to the United States, [and] be freely admitted at our ports."[148]

The *jus sanguinis* citizenship statute contained no racial limitations, however; it was, as we say today, facially race neutral. But consistent with its animosity toward *jus sanguinis* citizenship for children of Chinese descent, the Bureau of Immigration implemented policies and procedures limiting its availability for the foreign-born sons of Chinese American fathers.[149] For example, in 1915 the Bureau issued a regulation stating that foreign-born male

Chinese Women, 1870-1943, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, at 94, 125-29 (Sucheng Chang ed., 1991); and Adam McKeown, *Transnational Chinese Families and Chinese Exclusion, 1875-1943*, J. AM. ETHNIC HIST., Winter 1999, at 73.

147. For a discussion of the "paper sons" system that Chinese used to evade the Chinese Exclusion laws, see ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 84-90 (2010).

148. U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR, at xv-xvi (1916).

149. Lucy Salyer describes some of the Bureau's efforts to exclude the Chinese-born children of Chinese American citizens from entering the United States. *See* SALYER, *supra* note 6, at 210; *see also* Chen, *supra* note 139, at 263-96.

children of Chinese American fathers would be recognized as citizens only if they were found to be dependent members of the father's household—a limitation that was not imposed on any other racial or ethnic group of American fathers seeking citizenship for their foreign-born children.[150] But when that policy was challenged in federal court in California, where habeas petitions challenging Bureau rulings were often heard, the court refused to enforce the regulation, explaining that the statute did not make "race a distinction in American citizenship."[151]

As an additional or alternative strategy for restricting the availability of *jus sanguinis* citizenship for the children of Chinese American fathers, the Bureau strictly applied the *Guyer* rule in an effort to exclude at least some foreign-born children of Chinese descent from citizenship. The question of legitimacy often arose in cases involving an individual whom immigration officials suspected to be the child of a Chinese American father's second wife.[152] The legal question confronting immigration officials and judges was whether the children of second wives were eligible for citizenship under a statute that provided that children "whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed . . . citizens" and that was silent on the marital status of the parents.[153] Consistent with the interpretation given to the *jus sanguinis* statute in *Guyer* and the Samoan case, in cases involving the children of Chinese American fathers, the Bureau of Immigration insisted that the statute applied to *marital* children only—a category that did not include the children of polygamous (or allegedly polygamous) marriages.[154] It also made good use of the *Guyer* rule in briefs and intra-office memoranda, relying on it to reject the possibility that the Department of State's legitimation exception—

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150. *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, 30 (1915).

151. Quan Hing Sun v. White, 254 F. 402, 405 (9th Cir. 1918).

152. For a general discussion of polygamy as a Chinese practice, see Abrams, *supra* note 12, at 656-57. For a discussion that focuses on polygamy and transnational family formation, see McKeown, *supra* note 146, at 98-99.

153. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

154. This understanding of the term "legitimation" to exclude the children of second or subsequent wives of polygamous marriages did not endure with respect to immigration preferences. In 1969, the Board of Immigration Appeals altered its interpretation of the definition of "child" in the INA to include children of polygamous marriages. *See* Matter of Kwan, 13 I. & N. Dec. 302 (B.I.A. 1969). Not incidentally, *Kwan* was decided four years after the Immigration and Nationality Act of 1965 repealed the national origins quota laws. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

established in the Rover case and formally ratified by the Department of Justice in 1920—could apply to the children of Chinese American fathers.

2. *The Legitimation Exception and Polygamous "Stock-Farms"*

Dismissing the legitimation exception to the *Guyer* rule was no small matter. Starting as early as 1901, the Department of State consistently recognized the legitimation exception, and in 1920 the Attorney General's Office issued a lengthy formal opinion analyzing and approving it.[155] Confronted with citizenship claims of three nonmarital sons of three different American fathers, Acting Attorney General Charles Bismarck Ames explained that "[t]he State Department has for many years held that a child born out of wedlock which, by the laws of its father's domicile has been legitimated, is a citizen of the United States within the meaning of Revised Statutes, section 1993."[156] Expressly departing from the rigid rule announced in *Guyer v. Smith*, Ames endorsed the Department of State's "legitimation exception" because "the recognition of the relationship of an illegitimate child to a father whose identity has been established . . . is no longer against public policy."[157] Underscoring that central point—and likely to the dismay of immigration officials—Ames added that "[t]here appear to be no considerations of public policy which require a different decision."[158] Notably, all of the three cases at issue in the Attorney General's 1920 opinion involved children who were not racially excludable: Jacques Robert Smith, William Alonzo Oppenheimer, and Gustav Feuerbach.[159]

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155. *See* Citizenship—Children Born Abroad out of Wedlock of American Fathers and Alien Mothers, 32 Op. Att'y Gen. 162 (1920); *see also supra* notes 131-134 and accompanying text (discussing the Department of State's 1901 determination of Léon Rover's claim to citizenship).

156. 32 Op. Att'y Gen. at 164-65.

157. *Id.* at 164.

158. *Id*. at 165.

159. *See* Letter from Alvey A. Adee, Ass't Sec'y of State, to Charles B. Ames, Acting U.S. Att'y Gen. (Feb. 27, 1920) (on file with NARA, RG 59, CDF 130). Throughout this Article, "CDF" refers to the central decimal file contained in Record Group 59 of the National Archives and Records Administration. In a 1931 memorandum prepared by the Solicitor of Labor, in which both the 1920 Attorney General opinion and the three court of appeals cases involving children of Chinese American fathers were analyzed, the author makes clear that the children under consideration in the Attorney General's opinion were not racially excludable. *See* Risley Memorandum, *supra* note 67, at 20-23.

In the 1920s, Bureau of Immigration officials, charged with excluding all persons from the "Asiatic zone," disagreed with the Attorney General's assessment of the Department of State's "legitimation exception." In three cases brought during that decade, the children of Chinese American fathers sought the benefit of the Attorney General's opinion.[160] In each case, Bureau officials denied citizenship—and entry—to these Chinese-born children of Chinese American fathers because the officials found that the applicants were children of second wives, and therefore illegitimate and unable to claim citizenship through their fathers. In each case, the federal court of appeals affirmed.

Given the fever pitch of opposition to Asian immigration in the 1920s, it is unsurprising that the department charged with enforcing Chinese exclusion laws fully embraced the *Guyer* rule, repudiated the legitimation exception, and rejected these children's claims to citizenship. Nevertheless, a closer examination of these cases helps underscore that, in the hands of administrative officials charged with gatekeeping for the American polity, domestic relations laws could be, and were, used to further the racially nativist policies of contemporary nationality law. They did so by enlisting a rigid understanding of marriage law that precluded any possibility of patrilineal status transmission outside marriage.

Take the case of Ng Suey Hi, who arrived in Seattle in 1926. She sought entry as an American citizen as the daughter of Ng Ock, whom Bureau lawyers described as a "native-born citizen of this country, of the Chinese race."[161] The precise basis for the Bureau's initial refusal to recognize Ng Suey Hi's claim to citizenship, and her right to enter the country, is not entirely clear from the record—it appears that the Bureau challenged almost every factual assertion underlying her claim to citizenship, with no success. But by the time the case was on appeal in the Ninth Circuit, the pivotal question had emerged: Was Ng Suey Hi "illegitimate," and, if so, did that status defeat her claim to citizenship under the *jus sanguinis* citizenship statute?

Ng Suey Hi's attorneys first insisted on a plain-text reading of the *jus sanguinis* citizenship statute; it did not matter whether their client was considered "illegitimate." By the "express statement of the National Congress," they argued, "the question of legitimacy or illegitimacy would seem to be

160. Louie Wah You v. Nagle, 27 F.2d 573 (9th Cir. 1928); Mason *ex rel.* Chin Suey v. Tillinghast, 26 F.2d 588 (1st Cir. 1928); Ng Suey Hi v. Weedin, 21 F.2d 801 (9th Cir. 1927).

161. Brief of Appellee at 2, *Ng Suey Hi*, 21 F.2d 801 (No. 5238).

entirely removed."[162] However, they would have been foolish to rest on that argument given the default rule that nonmarital children of American fathers were not citizens—a default rule that went unaltered by the 1920 Attorney General Opinion. Citing that opinion, Ng Suey Hi's attorneys next argued that "a child born out of wedlock, in a foreign country, of an American father and an alien mother, and subsequently legitimated by acknowledgment by the father is a citizen of the United States within [the statute]."[163] Noting that claims of legitimacy enjoy "the strongest presumptions known to law," they observed that Ng Ock's first wife had died, and hence Ng Suey Hi had been legitimated by her father's continued marriage to her mother.[164] "[T]he Federal Courts recognize common law marriage," they explained, "and certainly in view of the death of the first wife a common law marriage to the second wife has been completely established."[165] Calling on *Corpus Juris* for support, they urged that "for the purpose of sustaining legitimacy, a marriage may be inferred from cohabitation, reputation, and other circumstances."[166] Even "the issues of null and void marriages have nevertheless been deemed to be legitimate," they maintained, and "[t]he fact that a former subsisting marriage of one of the parties is the cause of its invalidity does not affect the operation of the rule."[167]

The arguments made by Ng Suey Hi's attorneys were not spurious given the strong presumption of legitimacy in American domestic relations law, and a growing trend to provide for and recognize paternal legitimation of nonmarital children.[168] Even attorneys for the Bureau conceded that "the general rule is that the validity of a marriage is determined by the law of the place where it is contracted,"[169] and acknowledged that the term "children" "*may* include natural and illegitimate children."[170] Indeed, as is discussed below, the Bureau was willing to apply those general principles in an important citizenship case concerning the *white* foreign-born child of a polygamous

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162. Reply Brief of Appellant at 7, *Ng Suey Hi*, 21 F.2d 801 (No. 5238).

163. *Id.* at 8 (quoting Citizenship—Children Born Abroad out of Wedlock of American Fathers and Alien Mothers, 32 Op. Att'y Gen. 162 (1920)).

164. *Id.* at 4-7.

165. *Id.* at 6.

166. *Id.* (quoting 7 C.J. *Bastards* § 15, at 945, 947 (1916)).

167. *Id.* (quoting 7 C.J. *Bastards* § 19, at 948 (1916)).

168. *See* GROSSBERG, *supra* note 52, at 203; *supra* Subsection II.B.2.

169. Brief of Appellee, *supra* note 161, at 11 (quoting 38 C.J. *Marriage* § 3, at 1276 (1925)).

170. *Id.* (quoting 11 C.J. *Child or Children* § 2, at 752 (1917)).

marriage.[171] However, in cases involving the children of Chinese American fathers, such as Ng Suey Hi, the Bureau leaned heavily on the *Guyer* rule and its rigid insistence on marriage as central to the determination of foreign-born children's claims to citizenship through the father. Citing and paraphrasing *Guyer*, the Bureau insisted that "[i]llegitimate children, born abroad, of citizens, being *nullius filii* are not within the contemplation of [the statute]."[172]

But attorneys for the Bureau did not rest on doctrinal formalisms alone. Likely sensing that their reading of the law governing the status of nonmarital children was in tension with important strands of contemporary domestic relations law, and was definitely inconsistent with the Attorney General's interpretation, they made very clear to the court what they believed was at stake in the case of Ng Suey Hi: the threat of mass reproduction of American citizens of Chinese descent. If the construction of the *jus sanguinis* statute proffered by the petitioner were correct, they warned, "there would be nothing to prevent American citizens of the Chinese race from going to China and establishing stock-farms, peopled with any desired number of polygamous wives, or concubines, for the intensive propagation of American citizens, and later bringing all the offspring of these various women to this country under that status."[173]

The image of a "stock-farm" drew on multiple anxieties that animated the Chinese exclusion laws. Concern that Chinese women would become "breeders" for a new generation of Chinese Americans had helped give rise to exclusion laws and regulations that targeted Chinese women starting with the Page Act of 1875,[174] as well as state anti-miscegenation laws that explicitly prohibited Asian-white marriages.[175] By excluding Chinese women from the United States and attempting to limit the creation of mixed-race families, exclusionists tried to limit the number of American-born children of Chinese descent who would be citizens by virtue of the Fourteenth Amendment's Citizenship Clause.[176] In addition, the practice of polygamy was held up by

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171. *See infra* Subsection II.C.3.

172. Brief of Appellee, *supra* note 161, at 12-13 (citing Guyer v. Smith, 22 Md. 239 (1864)).

173. *Id.* at 10-11.

174. Act of Mar. 3, 1875 (Page Act), ch. 141, 18 Stat. 477; Abrams, *supra* note 12, at 662, 690-715. On the Page Law, see GEORGE ANTHONY PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION (1999); and George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28 (1986).

175. *See* Abrams, *supra* note 12, at 662-63.

176. *See id.* at 661-63.

exclusionists as a key reason for the complete exclusion of the Chinese from America, in part because polygamy was evidence of the Chinese women's "slave-like mentality" and moral inferiority as a race, and hence their unsuitability for citizenship in a republic.[177] The government's reference to "stock-farms peopled with any number of wives, or concubines" drew on these powerful images—the fecundity of the Chinese and the polygamist wife as slave—to underscore the importance of the strict application of the *Guyer* rule in Ng Suey Hi's case.

The judges of the Ninth Circuit Court of Appeals did not overtly betray the same racial anxieties that animated the Bureau's interpretation of the *jus sanguinis* statute and relevant domestic relations law. Rather, reasoning in a formalist, common law juridical mode, the *Ng Suey Hi* court adopted the *Guyer* rule, rejected the Department of State's legitimation exception, and—in the alternative—embraced a constrained definition of legitimation. Paraphrasing the *Guyer* opinion, the court announced that "[i]llegitimate children, born abroad of citizens, being nullius filii, are not within the contemplation of section 1993 of the United States Revised Statutes, and hence are not themselves citizens,"[178] thus rejecting the Department of State's legitimation exception out of hand. Abandoning any and all of the presumptions of legitimacy that were part of the fabric of American domestic relations law, the court also reasoned that "at common law an illegitimate child could only be made legitimate by act of Parliament," adding—incorrectly—that "such is the law in this country."[179] Thus, the court concluded, "there is no evidence of such legitimation in this case."[180]

This pattern was repeated in two other precedent-setting cases that reached the federal courts of appeals in the late 1920s: *Mason ex rel. Chin Suey v. Tillinghast*[181] and *Louie Wah You v. Nagle*.[182] In both cases, attorneys for

177. *See id.* at 657-59. In 1891, Congress added polygamists to the list of persons "ineligible to citizenship." Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084. For a probing discussion of the analogy that was drawn between American chattel slavery and Mormon polygamy, see GORDON, *supra* note 115, at 51-58.

178. Ng Suey Hi v. Weedin, 21 F.2d 801, 802 (9th Cir. 1927) (quoting 11 C.J. *Citizens* § 9, at 780 (1917)). The section of *Corpus Juris* quoted by the *Ng Suey Hi* court cites directly to *Guyer v. Smith*, 22 Md. 239 (1864).

179. *Ng Suey Hi*, 21 F.2d at 802.

180. *Id.*

181. 26 F.2d 588 (1st Cir. 1928).

182. 27 F.2d 573 (9th Cir. 1928).

Chinese-born children of American citizen fathers drew on the long-standing presumption in domestic relations law that jurists were to presume marriage and legitimacy, as well as the liberalization of laws governing legitimation. But in both cases, as in *Ng Suey Hi*, the courts followed the Bureau's lead, turning to a restrictive, explicitly *Guyer*-based interpretation of the citizenship statute and a narrow definition of marriage and legitimacy in order to deny the petitioners' citizenship claims. On the statutory interpretation question, for example, in *Chin Suey* the First Circuit explicitly rejected the Department of State's legitimation exception and instead ruled that "[t]he statute applies to legitimate children only, and no provision is made in it in regard to the citizenship of illegitimate children who may be thereafter legitimated by marriage," citing *Guyer v. Smith*.[183] The court also concluded, without elaboration, that "children of secondary wives are not legitimate, and therefore could not be born citizens of the United States, if born abroad, although the father was an American citizen."[184] This would be so, the court insisted, "even if the father and the secondary wife married after the death of the first wife,"[185] a conclusion that ran counter to the law of many states, including Massachusetts (where the case arose), and was contrary to the presumption of legitimacy that was well established in American domestic relations law.[186]

In *Louie Wah You*, after the Bureau once again warned the court about polygamous "stock-farms," the Ninth Circuit drew on a definition of legitimation that was impossible for the appellant to satisfy *because of the race-based exclusion laws*. Not only must the father publicly acknowledge his child, but he must also receive him into his household—"a settled place of habitation of which he is the head."[187] But, of course, Louie Wah You could not reside with his American citizen father unless he was permitted to enter the country, which he could not do as a person of Chinese descent.

In all three cases, the courts of appeals used the law of domestic relations, as it had been incorporated into citizenship law in the *Guyer* opinion, as a basis

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183. *Chin Suey*, 26 F.2d at 589 (citing *Guyer*).

184. *Id.*

185. *Id.*

186. Attorneys for Chin Suey argued that "in 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 acknowledgment of paternity on the part of the father, legitimizes previous issue; and such is the law of Massachusetts." Brief for Appellant at 5-6, *Chin Suey*, 26 F.2d 588 (No. 2175) (citing MASS. GEN. LAWS ch. 190, § 7).

187. *Louie Wah You*, 27 F.2d at 574 (quoting *In re* Gird's Estate, 108 P. 499, 504 (Cal. 1910)).

for denying the benefit of the *jus sanguinis* citizenship statute to the child of a Chinese American father. Of course, what was at issue in these three cases was not the niceties of the law of legitimation or the continued vitality of the presumption of legitimacy, but the race-based exclusion laws that the Bureau was charged with enforcing. Confronted with the citizenship claim of a foreign-born child of a Chinese American father, the Bureau rejected, resisted, and narrowed the legitimation exception that had been crafted to accommodate cases involving white nonmarital children. It did so using a malleable, race-salient understanding of marriage and legitimation. What *Ng Suey Hi*, *Chin Suey*, and *Louie Wah You* show in hindsight is how the *Guyer* rule—adopted by the Bureau of Immigration and affirmed in three court of appeals cases—was insinuated in the logic of the Asian exclusion laws that by the late 1920s had been a part of America's immigration laws for over forty years.

3. *Race, Polygamy, and Legitimacy*

Now, one might resist this assertion on the ground that these cases provide less evidence of racial bias than of a moral objection to polygamy that would have determined their outcome regardless of the race of the would-be citizen. In light of the harsh efforts to exclude Mormon polygamists from the American polity,[188] it is possible to read these three cases concerning the Chinese-born children of Chinese American fathers as evidence of an official policy of polygamist exclusion rather than racial exclusion. The records of the Bureau suggest, however, that immigration officials were far less rigid in their conception of "legitimacy" in cases involving foreign-born children of white American Mormons than in cases involving foreign-born children of Chinese Americans.[189]

Take, for example, the case of Leah Skousen O'Donnell. She was the daughter of a white Mormon father, Donald Skousen, who had emigrated from Utah to Colonia Juárez, Chihuahua, Mexico, as part of a mass exodus of

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188. *See* Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084; GORDON, *supra* note 115; Ertman, *supra* note 117.

189. In making this argument, I do not wish to minimize the extreme and punitive steps taken by the federal government to eradicate Mormon polygamy. Moreover, I recognize that it is futile to try to disentangle the different biases and beliefs that animated the Asian exclusion policy, in part because exclusionists articulated their anti-Chinese views through the language of religion, culture, and an emerging discourse of biological race difference. Mormon polygamists were regularly compared to the Chinese in an effort to racially denigrate the practice of polygamy. *See* GORDON, *supra* note 115, at 142.

Utah Mormons to Mexico to escape federal bans on, and criminalization of, polygamy.[190] Donald was born in Utah and had been an American citizen until he voluntarily expatriated and naturalized as a Mexican citizen in the 1890s, several years before Leah was born.[191] Leah's mother, Sarah, also an American-born Mormon, was Donald's "second wife."[192] By the time Leah's citizenship was called into question by Bureau officials, Donald's first wife was dead, and, immigration officials explained, "he is now living with the mother of [Leah,] with whom he went through a religious ceremony of marriage in the Mormon Church prior to his first wife's death."[193] The Board of Review of the Bureau of Immigration concluded that Leah had been "legitimated" by the death of Donald's first wife, and conceded that, as a legitimated child of an American father, Leah could have acquired citizenship from her father had he remained a U.S. citizen at the time of her birth. Because Donald had expatriated, the Board observed that she could "take nothing by reason of her alleged father's citizenship because he is a citizen of Mexico."[194] But the assumption underlying the Board's analysis is important: consistent with the law of many states, the death of a first wife served to legitimate the children of a bigamous or polygamous marriage, if the father and the mother continued to live together as husband and wife.[195]

That was, of course, precisely the argument that the Bureau and the federal appeals courts had rejected in Chin Suey's and Ng Suey Hi's cases, suggesting that antipathy for polygamy was not all that was at stake when Bureau officials interpreted the *jus sanguinis* citizenship statute in cases involving foreign-born children of Chinese American fathers.[196] In the early twentieth century,

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190. *See* B. Carmon Hardy, *The Trek South: How the Mormons Went to Mexico*, 73 SW. HIST. Q. 1, 1-2 (1969).

191. *In re* Leah Skousen O'Donnell, at 2 (Bd. of Review, Bureau of Immigration, U.S. Dep't of Labor, Sept. 2, 1938) (on file with NARA, RG 85).

192. Record of Hearing at 2, *In re* Leah Skousen O'Donnell (Immigration & Naturalization Serv. Bd. of Special Inquiry, June 4, 1937) (on file with NARA, RG 85).

193. *In re* Leah Skousen O'Donnell, at 4 (Bd. of Review, Bureau of Immigration, U.S. Dep't of Labor, Sept. 2, 1938) (on file with NARA, RG 85).

194. *Id.*

195. *See* JAMES SCHOULER & ARTHUR W. BLAKEMORE, THE LAW OF MARRIAGE AND DIVORCE § 1129 (6th ed. 1921); M.C. Dransfield, *Inference or Presumption of Marriage from Continued Cohabitation Following Removal of Impediment*, 104 A.L.R. 6 (1936).

196. The Bureau's treatment of Leah O'Donnell—in contrast to its treatment of Ng Suey Hi, Chin Suey, and Louie Wah You—is also telling. Leah O'Donnell was permitted to enter the United States and remain there on her own recognizance, while the three Chinese-born

polygamy's salience as a threat to American identity continued to haunt questions of racial exclusion in immigration and citizenship law, not only because of Americans' idealization of monogamous marriage, but also because polygamy stood as a central marker of the Chinese people's racial identity and inferiority, and their ineligibility for citizenship. In the hands of Bureau of Immigration officials, the rigid enforcement of *jus sanguinis* citizenship principles, and the domestic relations law principles that had become part of American nationality law, provided a means of furthering the racial exclusionary policies that were at the core of the Bureau's mission.

D. The Practice of Jus Sanguinis *Citizenship*

By the late 1920s, the basic contours of father-child derivative citizenship had been established in judicial and administrative interpretations of the federal *jus sanguinis* statute. In 1940, those interpretations were by and large codified in the Nationality Act—a statute that was drafted by administrators from the Bureau of Immigration, the Department of State, and the Department of Justice.[197] Because the practices of early twentieth-century administrators became the basis of the first major nationality statute—and continue to provide the basic architecture for the modern parent-child derivative citizenship statute—it is worth briefly taking stock of the critical features of those interpretations.

With respect to the ability of fathers to secure citizenship for their foreign-born children, the core interpretive commitment of the *Guyer* opinion—that is, the common law inspired holding that only the marital children of American fathers were contemplated by the *jus sanguinis* citizenship statute—remained a vital and racially exclusionary principle from the late nineteenth century into

children of American-citizen fathers were held in squalid detention centers and, upon final resolution of their cases, immediately deported. *Compare* Letter from N.D. Collaer, Inspector in Charge, INS, El Paso, Tex., to M.C. O'Donnal [sic] (Oct. 5, 1938) (on file with NARA, RG 85, Case File of Leah Skousen O'Donnell, File No. 55950/184) (informing husband of Leah O'Donnell that the Department "regrets very much the difficulty" caused by the Department's determination that she is not a U.S. citizen, and allowing her to remain in the United States pending further administrative steps in "order that Mrs. O'Donnal [sic] will be inconvenienced as little as possible"), *with* Brief for the Appellee at 2, Mason *ex rel.* Chin Suey v. Tillinghast, 26 F.2d 588 (1st Cir. 1928) (No. 2175), Opening Brief on Behalf of the Appellant, at 2, Ng Suey Hi v. Weedin, 21 F.2d 801 (9th Cir. 1927) (No. 5238), *and* Petition for Writ of Habeas Corpus at 3, *In re* Louie Wah You, No. 19411 (N.D. Cal. Sept. 2, 1927) (on file with NARA, RG 21).

197. *See infra* Part III.

the early twentieth century. The marriage requirement was racially exclusionary because marriage was not a race-neutral institution. Interracial marriage was illegal in many American states and was generally socially taboo. The marriage requirement was also racially exclusionary because administrators, who were given significant discretion in interpreting the *jus sanguinis* statute, tended to use what were, for that time, constrained definitions of marriage and legitimacy in cases involving citizenship claims of nonwhite children. In the early twentieth century, resistance to citizenship transmission from fathers to nonmarital children had begun to loosen from its strict common law origins, as evidenced by the Department of State's development of an exception for "legitimated" children that was adopted and affirmed by the Attorney General in a formal opinion in 1920. However, in the hands of Bureau officials and federal judges, that exception was narrowly construed and even outright rejected in cases involving Chinese-born children who, unless they could claim citizenship through their American fathers, would be subject to the exclusion laws.

The story of the development of racialized *jus sanguinis* citizenship law also reveals a complex dialogue among jurists, administrators, and legislators. For example, the differing interpretations of *Guyer* offered by the Department and the Bureau appears to have tracked subtle but important institutional differences between the two agencies that routinely administered the *jus sanguinis* citizenship laws. The Department of State was the primary agency that dealt with the citizenship claims of foreign-born children of American citizens, as it was responsible for issuing passports for citizens, providing protection for citizens residing abroad, and registering foreign-born children of American citizens.[198] But the foreign-born children of American citizens who were of an excludable racial-ethnic group, such as Chinese citizens and their children, were treated as foreigners, and hence were also subject to rigorous screening and, often, detention by the Bureau of Immigration, which oversaw and administered the Chinese exclusion laws.[199] The fact that the Bureau remained especially committed to a strict enforcement of the *Guyer* rule was

198. *See* Gaillard Hunt, *The History of the Department of State (pt. 6): Subdivisions of the Department of State*, 5 AM. J. INT'L. L. 118, 140-41 (1911) (describing the evolution and responsibilities of the Citizenship Bureau of the Department of State, including issuance of passports to citizens and their protection and registration while residing abroad).

199. SALYER, *supra* note 6, at 38 (describing the consolidation of the Bureau's power over the Chinese exclusion laws starting in 1903).

thus consistent with its central institutional mission of enforcing the racial exclusion laws.[200]

Courts also played an important role in the development of racialized *jus sanguinis* citizenship laws, often in dialogue with administrators. In *Guyer*, a Civil War-era case involving the citizenship status of two children of African descent, the Maryland Court of Appeals interpreted the *jus sanguinis* citizenship statute by including only *marital* children as citizens.[201] Administrators in the Bureau of Immigration followed the same rule, often citing *Guyer* for authority. Gradually, administrators in the Department of State crafted a legitimation exception to the judge-made *Guyer* rule—an administrator-made exception to a judge-made exception—which the Bureau of Immigration and the circuit courts subsequently construed narrowly or rejected entirely in *Ng Suey Hi*, *Chin Suey*, and *Louie Wah You*. Through these interpretive processes, the exclusion of children on the basis of race-salient illegitimacy laws was engrained in judicial and administrative practice.

Why did administrators, government attorneys, and judges rely on domestic relations law to achieve nativist policy goals, rather than simply relying on racial classifications? This question is especially significant in light of the Supreme Court's 1889 opinion in *Chae Chan Ping v. United States* (also known as the *Chinese Exclusion Case*), in which the Court proclaimed the political branches' plenary power over immigration law.[202] Someone intent on excluding the foreign-born children of Chinese American fathers could have argued that the political branches had the authority to exclude any person or any group—including the children of American citizens—for any reason, including race. At the time, however, there were doubts as to the legality and wisdom of explicit race-based restrictions on *jus sanguinis* citizenship. For example, the lower federal courts did not permit the Bureau of Immigration to read racial limitations into the *jus sanguinis* citizenship statute.[203] Similarly, Congress did not alter the *jus sanguinis* statute to exclude children of citizens who were otherwise racially "ineligible to citizenship," and there is evidence to

200. This point should not be overstated. Officials in the Department of State were also charged with enforcing the exclusion laws and many were vocal defenders of those laws. *See, e.g.*, *infra* notes 229-230 and accompanying text. The point is, rather, that with respect to the *Guyer* rule, variation in the two departments' interpretations may have been due to differences in their clientele and their core institutional missions.

201. *See supra* Section I.A.

202. 130 U.S. 581 (1889).

203. *See supra* note 151 and accompanying text.

suggest that many legislators had doubts about Congress's authority to do so. For example, in the 1930s, legislators considered several bills that would have provided American women the right to transmit citizenship to their foreign-born children.[204] Responding to concerns that such equalization of parental citizenship rights would result in the admission of children who were racially excludable, a proviso was introduced that would have eliminated parent-child citizenship transmission when the alien parent was "ineligible to citizenship."[205] Some legislators argued that the exclusion of such children was intolerable race discrimination[206]—an argument that appears to have had some effect, as the racial restriction was eliminated from the final version of the 1934 act that recognized American mothers' foreign-born children as citizens.[207] Thus, even though legislators had the power to exclude non-citizens on the basis of race, and although the Fourteenth Amendment applied only to states, within Congress there was significant uncertainty concerning legislative power to use overt racial restrictions to exclude the children of citizen parents because such restrictions implicated those citizens' rights.[208] The *Guyer* rule provided officials who enforced the racial exclusion laws with an alternative means of

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204. For a discussion of these bills and a detailed account of the debates leading up to the May 24, 1934 Act, see BREDBENNER, *supra* note 12, at 227-42.

205. *See* 78 CONG. REC. 7330 (1934) (statement of Rep. Dickstein). In explaining the purpose of the racial restriction, Representative Dickstein described how Chinese American men tended to "go over [to China], get married, and raise a family. . . . On the birth of that child it receives derivative citizenship from the father. . . . This puts a stop to this practice upon the basis of elimination." *Id.*

206. *See, e.g.*, *id.* at 7337 (statement of Rep. O'Connor) (objecting to the bill on the ground that "[i]t is grossly unfair to single out any race and take away from it what the male members of that race now possess, their right to devolve citizenship upon their children"); *id.* ("I think any race should resent the extreme principle of discrimination in this bill."); *id.* at 7342 (statement of Rep. Martin) (urging that the racial restriction "has no place in a bill, the ostensible purpose of which is to equalize the rights of mothers and fathers"); *id.* at 7349 (arguing that the racial restriction "is a direct stab at the orientals," and referring to the provision as a "play on prejudice").

207. *See* Act of May 24, 1934, ch. 344, sec. 1, 48 Stat. 797. Although the final act was facially race neutral, a race-salient child residency requirement on *jus sanguinis* citizenship was included. *See id.*; *infra* notes 237-242 and accompanying text.

208. Congress did not always stay its hand in limiting *jus sanguinis* citizenship using explicit race-based restrictions. When Congress enacted the War Brides Acts, it explicitly excluded racially ineligible war brides and their children from the special preferences provided to soldiers' "war brides" and their children. *See infra* Section III.B.

limiting the reach of *jus sanguinis* citizenship in a manner that helped insure the integrity and efficacy of those laws.[209]

Domestic relations law, and particularly the law of marriage and illegitimacy, was particularly well suited to this task for several reasons. First, the *Guyer* rule was consistent with the long-standing notion that the husband, as head of the family, would determine the political and cultural character of the *marital* family.[210] It was also consistent with the principle that illegitimate children were excluded from the father's family, and that fathers had no rights with respect to children born outside of marriage—and, as a default matter, had no responsibilities.[211] By the early twentieth century, these aging notions of the political and legal significance of marriage, gender, and legitimacy were incrementally waning. But the male-headed marital family remained a central sociolegal institution, and the *Guyer* rule helped sustain, and was sustained by, its continued authority.

Second, racially nativist nationality laws were well served by domestic relations laws because the practice of using gender-based domestic relations law as an instrument of racial designation, and often as a means of preserving racial hierarchies within American society, was entrenched in the practices of American jurists, lawyers, and administrators. Long before the *Guyer* brothers tried to secure their ownership of Yamland in war-torn Maryland, gender-based laws governing birth status had been woven into American law—both laws governing the rights and status of individuals in the United States, and laws determining their citizenship. Thus, the law of slavery incorporated the maternal line rule to determine the status—slave or free—of individuals born to at least one enslaved parent.[212] In the context of citizenship law, gender- and marriage-based laws governing birth status had been incorporated into race-based American citizenship laws, as reflected in the *Dred Scott* opinion.[213] Laws prohibiting interracial sex and marriage were written to preserve and protect

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209. As historian Mae Ngai has observed of other nationality policies, after the ratification of the Fourteenth Amendment lawmakers were left to search for a "racial logic capable of circumventing the imperative of equality [that Amendment] established." NGAI, *supra* note 10, at 9. Ariela Gross makes a similar point, noting that after the Fourteenth Amendment "insisted that every citizen had the right to equal protection under the law, regardless of race[,] . . . efforts to discriminate on the basis of race would have to be carried out in a different spirit." GROSS, *supra* note 10, at 214.

210. *See supra* Section II.A.

211. *See* Collins, *Fathers' Rights*, *supra* note 4, at 1689-90.

212. *See supra* Section I.B.

213. *See supra* text accompanying note 61.

white purity and supremacy, and hence it followed that the generous domestic relations law principles that worked to bring children within a marital family, such as legitimation laws, often did not apply to children of interracial unions.[214] In short, to reason about foreign-born children's citizenship status using racialized gender-asymmetrical principles of descent and status was a familiar exercise, and one that was easily incorporated into the interpretation of the *jus sanguinis* citizenship statute.

A third reason that the *Guyer* rule—in its common law and modernized formulations—functioned as an effective resource for various officials is the pliability of the domestic relations law principles it incorporated into citizenship determinations. One might reason that by using marriage and legitimacy as bases for allocating citizenship, officials simply selected pre-existing statuses as eligibility criteria. But in the context of nationality laws, government officials—judges, administrators, lawyers—did not simply employ pre-existing, singular notions of "marriage" and "legitimacy" as bases for making citizenship determinations of foreign-born children of American citizens. Rather, they sometimes borrowed, sometimes ignored, and often adapted domestic relations law principles from state law or general law sources, shaping the metes and bounds of marriage and the family in part in response to the pressure created by particular policy objectives of nationality law. In one case, administrators could recognize "legitimation" as a valid means by which some American fathers could secure citizenship for their nonmarital children, affirming those men's prerogatives: fathers like Léon Rover, Edgar Smith, and Edward Oppenheimer could secure citizenship for their white nonmarital children.

In other cases, by employing a more rigid version of the *Guyer* rule, or by using a constrained definition of marriage, officials limited the reach of *jus sanguinis* citizenship. Such limitations on the transmission of citizenship from fathers to nonmarital children may have been experienced by some fathers as protecting their prerogatives (as was possibly the case for Virginius Chapin) and by others as violating their rights as fathers and as citizens (as was almost certainly the understanding of the Chinese American fathers whose children were refused entry in *Ng Suey Hi*, *Chin Suey*, and *Louie Wah You*).[215] And,

214. *See* sources cited *supra* note 129.

215. It is difficult to obtain reliable evidence of the actual felt experience of the fathers involved in these cases, so we are left to interpret the available evidence. Virginius Chapin likely left Samoa by 1859 and there is no evidence that he ever saw Aviga again, though it is also significant that he left Aviga in the care of a British associate, suggesting that he felt some

undoubtedly, officials made determinations regarding the father-child relationship in different cases for different reasons, but the very pliability of the definitions of marriage and legitimacy made them useful in the enforcement of various policy goals, including the nativist aspirations of American nationality laws of the time.

III. THE *GUYER* RULE IN THE MODERN ERA OF NATIONALITY LAW

One might anticipate the *Guyer* rule's demise along with the gradual end of explicit race- and gender-based regulation of nationality during the middle decades of the twentieth century. In the 1920s and 1930s, American women's organizations successfully lobbied Congress for repeal of many overt limitations on women's citizenship rights.[216] And, starting with the removal of Chinese from the long list of racially excludable peoples in 1943, Congress gradually purged immigration law of racial and national origins restrictions,[217] ending outright racial bars to immigration in 1952 and abolishing the quota system in 1965.[218]

But sociolegal change rarely conforms to neat and tidy progress narratives,[219] and it would be misguided to presume that the repudiation of many of the formal race- and gender-based classifications from nationality law signaled a complete departure from the concept of "marital unity" or racially nativist principles that by the mid-twentieth century had shaped American nationality law for over 150 years. In this Part, I show how the *jus sanguinis* provisions in the Nationality Act of 1940 codified many of the gendered and racialized practices of early twentieth-century administrators, including restrictions on citizenship transmission from fathers to their nonmarital children. I then turn to the application of the Nationality Act's *jus sanguinis*

responsibility for his child's well-being. *See* Letter from Harold M. Sewall to George Rives, *supra* note 101, at 36. The Chinese American fathers in the three significant federal appeals court cases were all involved in the legal efforts to secure their children's release from immigration detention and entry into the United States.

216. *See supra* Section II.A.

217. Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601.

218. *See* Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, 66 Stat. 163 (eliminating explicit racial limitations on immigration); Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (ending the national origins quota system).

219. *See* Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997).

citizenship provisions, demonstrating how the law continued to limit father-child citizenship transmission in a racialized manner into the late twentieth century, especially in theaters of war.

A. *Modernizing and Codifying* Guyer*: The Drafting of the Nationality Act of 1940*

The Nationality Act of 1940 was the first omnibus codification of American nationality law, providing the template for many of our current laws, but it has received surprisingly little attention from historians and legal scholars.[220] To understand the *jus sanguinis* citizenship provision of the Act, one cannot rely solely on the normal sources of legislative history, such as committee reports, hearings, and floor debates. The Nationality Act was drafted by an interdepartmental committee of officials appointed from the Department of State, the Department of Labor (which then housed the Bureau of Immigration), and the Department of Justice, and it is the archival records of those departments that shed the most helpful light on the system created by the Act.[221]

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220. An important and excellent exception is PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC (2013), which provides a searching examination of the Nationality Act's central role in the history of denaturalization. Denaturalization, Weil's focus, and derivative citizenship, my focus, were two of the primary concerns of the law reform movement that led to the Nationality Act of 1940. *See* H.R. REP. NO. 82-1365, at 27 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1677 ("The 1940 act combined all substantive and procedural requirements for naturalization."); George S. Knight, *Nationality Act of 1940*, 26 A.B.A. J. 938, 938 (1940).

221. The fact that the Nationality Act of 1940 was drafted by administrative officials underscores the importance of attending to the role and powers of the executive branch in the development of American nationality law. *Cf.* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009). The drafting of legislation by agency officials was not unusual in the New Deal period. As Nicholas Parrillo has demonstrated in searching detail, New Deal agency officials routinely drafted legislation for Congress, in part because legislators were understaffed. *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). I thank Bruce Ackerman for highlighting that point. A distinctive feature of the Nationality Act of 1940 is that it was drafted by an interdepartmental committee formally appointed by the President. In the decade prior to the creation of the Presidential interdepartmental committee, various officials in the Department of State pushed for revision of the nationality laws. In 1928, Secretary of State Frank B. Kellogg created a three-person committee to propose revisions to the nationality laws. That Department of State committee issued a report in 1929. In 1933, two members of the Department of State committee were appointed to the President's

What forces led to this reform? The archives reveal three primary sources of pressure. First, efforts to convene the interdepartmental committee that drafted the Nationality Act appear to have been initiated by lawyers in the Department of State who worked daily with the patchwork of nationality laws and who believed that wholesale codification and revision would achieve greater clarity and consistency within the corpus of American nationality law.[222] Second, nationality law was also front and center within the international law community as a subject that needed to be addressed through multi-national treaties that would help countries minimize conflicts between their different systems of nationality law.[223]

The third and possibly most substantively influential source of pressure for the reform of the nationality laws that regulated family-based immigration, naturalization, and *jus sanguinis* citizenship was women's organizations' sustained campaign for gender equality during the 1920s and 1930s. Following the ratification of the Nineteenth Amendment in 1920, American women's organizations, and especially the National Woman's Party, turned their attention to the nationality laws and equal citizenship rights for women.[224] In so doing, they made a set of demands that had far-reaching implications for the administration of American nationality law, including race-based exclusion laws and national origins quotas. As a consequence, women's demands triggered considerable debate and resistance within the agencies charged with enforcing those laws. In 1933, it was those very agencies—the Department of State, the Department of Labor, and the Department of Justice—that President Franklin Roosevelt directed to "designate a committee . . . to review the

interdepartmental committee, which was composed of six officials from the Department of State (Wilbur J. Carr, Green H. Hackworth, Richard W. Flournoy, Ruth B. Shipley, John J. Scanlan, and Benedict M. English), six officials from the Department of Labor, which housed the Bureau of Immigration (Daniel W. MacCormack, Charles E. Wyzanski, Edward J. Shaughnessy, Henry B. Hazard, Thomas N. Eliot, and Howard D. Ebey), and one representative from the Department of Justice (Albert Levitt). *See* Knight, *supra* note 220, at 938.

222. *See* Knight, *supra* note 220, at 938; Letter from Richard W. Flournoy, Office of the Solicitor, U.S. Dep't of State, to Alvey Adee, Ass't Sec'y of State (Dec. 28, 1922) (on file with NARA, RG 59, CDF 130); Memorandum from Raymond F. Crist, Comm'r of Naturalization, to Alvey Adee, Ass't Sec'y of State (Jan. 2, 1923) (on file with NARA, RG 59, CDF 130).

223. Nationality law was a primary subject of consideration at the First Conference for the Codification of International Law at The Hague in 1930. *See* Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 AM. J. INT'L L. 447, 452-53 (1930).

224. For an extraordinarily thorough and insightful discussion of women's campaign for equal citizenship rights in the United States, see BREDBENNER, *supra* note 12.

nationality laws of the United States, to recommend revisions . . . and to codify those laws into one comprehensive nationality law."[225] Five years later, that committee produced the Proposed Code that, with a few relatively minor changes by legislators, would become the Nationality Act of 1940.[226] In this Section, I demonstrate that the racialist concerns of administrators shaped not only their implementation of the laws, but also their work drafting the first modern *jus sanguinis* citizenship statute.

1. *Women's Claims to Equal Citizenship Rights as a Threat to the Exclusion Laws, 1922-1940*

Although Roosevelt charged the interdepartmental committee with revising American nationality laws "particularly with reference to the removal of certain existing discriminations," the committee was staffed by officials from the three key departments that had long implemented the gender- and race-based nationality laws. The reaction of some committee members to women's claims to gender equality reveals a strong commitment to those traditional modes of regulating nationality. For example, in 1922, Richard Flournoy—then an assistant solicitor in the Department of State and later a member of the interdepartmental committee—found the idea that a married woman would maintain her American citizenship upon marriage to a foreigner "very objectionable" on the ground that it was "obviously a direct blow at the principle of family unity"[227]—a reference to the principles of coverture that resulted in women's loss of independent civil identity upon marriage. When women's organizations went one step further and proposed that Congress amend the nationality laws to allow married American women to transmit

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225. Exec. Order No. 6115, Revision and Codification of the Nationality Laws of the United States (Apr. 25, 1933) (on file with author).

226. *See* H.R. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., REPORT PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, PART ONE: PROPOSED CODE WITH EXPLANATORY COMMENTS (Comm. Print 1939) [hereinafter PROPOSED CODE]; Knight, *supra* note 220, at 938.

227. Letter from Richard W. Flournoy, Office of the Solicitor, U.S. Dep't of State, to Fred Nielsen, Solicitor, U.S. Dep't of State 1 (May 31, 1922) (on file with NARA, RG 59, CDF 130); *see also* Letter from Richard W. Flournoy, Office of the Solicitor, U.S. Dep't of State, to Green Hackworth, Solicitor, U.S. Dep't of State 10 (Feb. 16, 1932) (on file with NARA, RG 59, CDF 130) (noting that women's organizations pushing for women's independent citizenship rights dislike "the principle of the unity of the family").

citizenship to their foreign-born children, Flournoy wrote a lengthy memo dismissing the proposition as "so ridiculous that it is hard to discuss it."[228]

Resistance to gender equality in the nationality code was inextricably linked to the prevailing commitment to racial exclusion and national origins quotas. For example, one reason why gender equality in *jus sanguinis* citizenship was seen as "ridiculous" was that liberalization of those laws in the name of gender equality would frustrate enforcement of the race-based exclusion laws. Thus, Flournoy worried that recognizing married American mothers' right to secure citizenship for their children "would . . . open the doors of the United States to the free and unrestricted entry" of "thousands" of children of American mothers, including "Orientals."[229] In the 1930s, another Department of State official worried that allowing American mothers to transmit citizenship to their foreign-born children would have "far reaching effects" on immigration, extending citizenship in "thousands of cases . . . involving persons in various countries, including Oriental countries," thus "letting down the immigration barriers established by the Immigration Act of 1924."[230]

Concerns about the racial implications of *jus sanguinis* citizenship were voiced not only in the intra-office memos of administrators; they were also prevalent in legislative debates over sundry nationality bills proposed by women's organizations in the decade prior to the enactment of the Nationality Act. In the early 1930s, when Congress considered a bill that would have allowed both mothers and fathers to transmit citizenship to their foreign-born children, several witnesses and legislators were alarmed. Testifying at a committee hearing, the president of the International Seamen's Union explained that the expansion of *jus sanguinis* citizenship would "leave[] the door open so that you can largely destroy your Chinese exclusion act."[231]

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228. Letter from Richard W. Flournoy to Alvey Adee, *supra* note 222, at 3. As I explain *infra* Subsection III.A.3, by the early twentieth century, administrators had begun recognizing the nonmarital children of American mothers as citizens without statutory authorization to do so. For that reason, among others, the driving goal behind the proposed legislation was to secure the right of *married* American women to transmit citizenship to their foreign-born children, although that was usually implicit rather than explicit in the legislative hearings and departmental memoranda.

229. Memorandum from Richard W. Flournoy, Office of the Solicitor, U.S. Dep't of State, to Wilbur J. Carr, Ass't Sec'y of State 2 (Feb. 9, 1933) (on file with NARA, RG 59, CDF 130). Both Flournoy and Carr were appointed to the interdepartmental committee.

230. Letter from A. Dana Hodgdon, Dep't of State, Visa Div., to Wilbur J. Carr, Ass't Sec'y of State 1-2 (Jan. 19, 1933) (on file with NARA, RG 59, CDF 130).

231. *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality:*

Legislators' questions directed at Burnita Shelton Matthews of the National Woman's Party, which sponsored the bill, betrayed similar anxieties: Representative Charles Kramer of California asked, "Don't you feel that we are increasing the probability of bringing in more of the Chinese and Japanese, and 'what have you', from these nations over there, by reason of this bill?"[232] Personalizing – and sexualizing – the issue, Kramer pressed the matter further: "How would you feel if you had a daughter, and she was sitting alongside Chinese and Japanese boys in school every day . . . ?"[233]

Representative William Traeger, also of California, similarly worried that gender equality in *jus sanguinis* citizenship would lead to a dramatic increase in Chinese and Japanese American citizens.[234] He was also concerned about another group which had more recently become the target of immigration restrictions:

> I am wondering whether the ladies who are sponsoring this bill have studied the situation in California in the past year or two . . . . Our country began to deport Mexicans [but] . . . [t]hose nationals remained in Los Angeles County long enough to produce children. Those children naturally . . . became citizens of the United States.[235]

Although the children had been deported along with their parents, Traeger worried that, under the pending bill, the female children would, years later, be entitled to bring their children to the United States as citizens.[236] In light of these concerns, Traeger drew a clear line: "If the law can be amended to preclude that sort of thing, I am for it; otherwise I am against it."[237]

Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization, 73d Cong. 23 (1933) [hereinafter *H.R. 3673 Hearings*].

232. *Id.* at 37.

233. *Id.*

234. *Id.* at 41.

235. *Id.*

236. *Id.*

237. *Id.* at 42. For additional debates in which legislators, confronted with claims to gender equality in the regulation of *jus sanguinis* citizenship, became fixated on the doctrine's implications for racial exclusion, see *Amendment to the Women's Citizenship Act of 1922, and for Other Purposes: Hearings on H.R. 14684, H.R. 14685, and H.R. 16303 Before the H. Comm. on Immigration and Naturalization*, 71st Cong. 9-11 (1930); *Amendment to the Women's Citizenship Act of 1922: Hearings on H.R. 10208 Before the H. Comm. on Immigration and Naturalization*, 71st Cong. 15 (1930) (statement of attorney Margaret Lambie); *id.* at 21 (statement of Edward McGrady, American Federation of Labor); and 74 CONG. REC. 6507,

Worried that the bill would be defeated, the Committee on Immigration and Naturalization added a provision whereby, in the words of one of the bill's sponsors, all children born abroad to a mixed-nationality couple of whom the "alien parent is an alien ineligible to citizenship by naturalization, would not derive citizenship from their citizen parent, either mother or father,"[238] thus proposing to exclude virtually all Asian foreign-born children of American citizen parents. That effort failed in the House of Representatives after considerable debate,[239] and in 1934 Congress passed a statute that gave American women the ability to transmit citizenship to their foreign-born children with no explicit racial limitations.[240] It would be wrong, however, to conclude that the 1934 statute did not respond to concerns that the gender equalization of *jus sanguinis* citizenship would lead to evasion of the exclusion laws and quotas. The final version of the bill required children of mixed-nationality marriages to fulfill a five-year U.S. residency requirement[241]—a requirement was intended by some legislators to exclude children of citizens who were otherwise racially excludable. When Senator William King of Utah expressed concern that the foreign-born children of "a Japanese or a Chinese [woman] or a woman from India . . . [married to] a man who is a citizen of the United States" would be considered citizens, his colleague Senator Royal Copeland assured him, "[T]hat is all fixed by necessity of the term of residence."[242]

7154-55 (1931) (statement of Rep. Green).

238. 78 CONG. REC. 7330 (1934) (statement of Rep. Dickstein).

239. For legislators' objection to the proposed racial restriction, see sources cited *supra* note 206.

240. Act of May 24, 1934, ch. 344, 48 Stat. 797.

241. *Id.*

242. 78 CONG. REC. 8471 (1934). The Chinese American Citizens Alliance immediately voiced their concern that the foreign-born children of Chinese American parents would be excluded from citizenship entirely by operation of the residency requirement, as Senator King suggested. Because people of Chinese descent could not enter the United States unless they were citizens (or eligible for an exception to the exclusion laws), the children of Chinese American parents would not be able to fulfill the residency requirement and would be excluded. *See* Telegram from Walter U. Lum, President of the Chinese American Citizens Alliance, to President Franklin D. Roosevelt (May 12, 1934) (on file with NARA, RG 85). However, in an opinion issued in 1934, Attorney General Homer Cummins opined that the five-year residency requirement in the 1934 Act should be interpreted as a condition subsequent, rather than a condition precedent, so as not to exclude the foreign-born children of American citizens of excluded races from citizenship. *See* Citizenship of Child Born Abroad of an American and an Alien Parent, 38 Op. Att'y Gen. 10 (1937). It is extremely difficult to tell whether Bureau of Immigration administrators followed that opinion in their administration of the 1934 Act. Writing in 1940, six years after the statute

Concern about the racial implications of gender equality in nationality law also shaped the code that the interdepartmental committee drafted and submitted to Congress in 1938, and that eventually became the Nationality Act of 1940. In addition to the five-year child residency requirement introduced in 1934, the interdepartmental committee proposed a ten-year parental residency requirement.[243] Although the parental residency requirement was race neutral by design, the committee defended it in terms that would appeal to nativist sensibilities. Testifying before Congress on behalf of the interdepartmental committee, Richard Flournoy explained that the Nationality Act's *jus sanguinis* provision "improved" the 1934 Act by introducing a significant parental residency requirement. One worry was that American citizens of Chinese or Mexican descent would leave the United States, return to China or Mexico, and have children who "are born citizens of the United States"[244]—not only spreading citizenship too thin, but giving it to the wrong sort of people. The Nationality Act's provision, he explained, "is not so loose as that because it requires that a citizen must have resided 10 years in the United States in order that he or she may transmit citizenship to the children born abroad."[245]

In sum, in the decades prior to the enactment of the Nationality Act of 1940, efforts to secure gender equality in *jus sanguinis* citizenship law triggered concern that such equalization would lead to the recognition and admission of racially excludable children as citizens. This was not the only concern voiced by administrators, who also worried that departure from the patrilineal norm that had long characterized *jus sanguinis* citizenship would lead to more cases of dual citizenship, and ran contrary to the fundamental principle that the husband determined the political allegiance of his dependents.[246] But concern

was enacted, University of Chicago doctoral student Wen-Hsien Chen expressed doubt that they would. Chen, *supra* note 139, at 295. But the 1940 Nationality Act's *jus sanguinis* provisions replaced the 1934 Act six years later, and was made retroactive to those children whose citizenship would have been determined under the 1934 Act. *See, e.g.*, Matter of V—V—, 7 I. & N. Dec. 122 (B.I.A. 1956). Hence, the law's lifespan was very short.

243. *See* PROPOSED CODE, *supra* note 226, at 13-14.

244. *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code*: *Hearings on H.R. 6127 & H.R. 9980 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 40-41 (1940) (statement of Richard W. Flournoy, Ass't Legal Adviser, U.S. Dep't of State).

245. *Id.* at 41.

246. *See* Letter from John J. Scanlan to Ruth Shipley, Chief, Passport Div., U.S. Dep't of State 1 (Mar. 7, 1936) (on file with NARA, RG 59, CDF 130) (observing that "the Act of May 24, 1934, will increase tremendously the number of cases involving dual nationality"); *see also* Letter from Wilbur J. Carr, Ass't Sec'y of State, to Rep. Samuel Dickstein, Chair, H. Comm.

about the breakdown of the carefully crafted ethno-racial limitations on immigration and naturalization was prevalent among administrators and legislators who resisted gender equality in American *jus sanguinis* citizenship law. In short, as women's organizations and their allies in Congress pressed for gender equality in nationality law, it became apparent that gender- and marriage-based restrictions on parent-child citizenship transmission were serving racially exclusionary ends.

2. *Nonmarital Children of American Fathers and the Proposed Code*

If the felt need to protect nativist immigration policies helps explain resistance to extension of *jus sanguinis* citizenship to the children of married American mothers, it also helps explain officials' particular resistance to recognizing the nonmarital foreign-born children of American fathers as citizens. In the 1920s and 1930s, questions regarding the citizenship status of mixed-race and non-white nonmarital children of American fathers was a source of confusion and consternation among officials residing abroad and administrators in Washington, D.C. The Department of State frequently received inquiries from members of the Foreign Service concerning the citizenship status of foreign-born mixed-race children of American fathers. In 1928, the Department received a letter from the consul in Calcutta concerning "the illegitimate child of an American father and Burmese mother."[247] In 1933, a dispatch from an American official in Tahiti inquired as to the citizenship of an "illegitimate child born at Tahiti of [an] American father . . . and [a] Tahitian girl . . . who has an admixture of about one-eighth white blood."[248] In 1935, the Department received an application for citizenship from a child born out of wedlock to an American citizen father and a Haitian mother.[249] And, as detailed

on Immigration and Naturalization, *reprinted in H.R. 3673 Hearings*, *supra* note 231, at 9, 9 ("It is hardly necessary to say that, when a woman having American nationality marries a man having the nationality of a foreign country, and establishes her home with him in his country, the national character of that country is likely to be stamped upon the children, so that from the standpoint of the United States they are essentially alien in character.").

247. Letter from R.Y. Jarvis, Am. Consulate, Calcutta, India, to the Sec'y of State (Sept. 4, 1928) (on file with NARA, RG 59, CDF 130).

248. Document File Note, Pomare Hitu Aitu Stevenson (June 5, 1933) (on file with NARA, RG 59, CDF 131).

249. Document File Note, Maybelle Harris (July 17, 1935) (on file with NARA, RG 59, CDF 131). These examples are representative. *See* Document File Note, William James (Dec. 18, 1936) (child of American father and Chinese mother) (on file with NARA, RG 59, CDF 131); Document File Note, Melvin Louis Marr (Dec. 11, 1935) (American father and Japanese

above, concern that *jus sanguinis* citizenship was being used to evade the race-based exclusion laws had been voiced by the Bureau of Immigration in multiple contexts, including *Ng Suey Hi*, *Louie Wah You*, and *Chin Suey*.[250]

The rule that only *marital* foreign-born children of American fathers would be recognized as citizens had provided an easy answer to some of those inquiries. For example, regarding the suggestion that the nonmarital child of an American father and a Burmese mother had a claim to American citizenship, the Department of State official noted tersely that "it is clear the child referred to in the despatch cannot claim American citizenship."[251] Similarly, the daughter of the American father and the Haitian mother was not a citizen because, even though acknowledged by her father, "it is evident that Miss Harris has not been legitimated."[252] And, as shown above, limitations on father-child citizenship transmission outside the legally recognized marital family had served Bureau of Immigration officials well in their effort to enforce the exclusion laws against foreign-born children of Chinese American fathers.[253]

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mother) (on file with NARA, RG 59, CDF 131); Document File Note, Kow Vaughan Read (Sept. 5, 1935) (American father and Chinese mother) (on file with NARA, RG 59, CDF 131); Document File Note, Opal Ione Ogden (July 19, 1935) (American father and Tibetan mother) (on file with NARA, RG 59, CDF 131); Document File Note, Helen Johnson (Dec. 18, 1934) (American father and Filipino mother) (on file with NARA, RG 59, CDF 131); Document File Note, Masaki Sato Burt (Oct. 16, 1934) (American father and Japanese mother) (on file with NARA, RG 59, CDF 131); Document File Note, Frank Henry Moss, Jr. (Oct. 2, 1934) (American father and Japanese mother) (on file with NARA, RG 59, CDF 131).

250. *See supra* Section II.B.

251. Memorandum from Passport Div. to Visa Office, U.S. Dep't of State (Sept. 26, 1928) (on file with NARA, RG 59, CDF 130).

252. Document File Note, Maybelle Harris, *supra* note 249.

253. *See supra* Section II.C. In certain circumstances the Department of State allowed the "legitimation exception," discussed above in Subsection II.C.2, to apply in cases involving children who were otherwise racially excludable. *See* Document File Note, Alice Radomski (May 14, 1916) (on file with NARA, RG 59, CDF 131) (noting that children legitimated "under the state law of father's domicile by the subsequent marriage of their parents are regarded as United States citizens . . . even though mothers are Asiatic"). But this practice was not uniformly embraced within the Department, as indicated by a memo in which one Department official objected to the recognition of legitimized children "who possess such a degree of Asiatic blood as would prevent them from being naturalized." Memorandum from Richard Hill, Office of the Solicitor, U.S. Dep't of State, to Lester Woolsey, Solicitor, U.S. Dep't of State 3 (Jan. 3, 1918) (on file with NARA, RG 59, CDF 130). The official also urged that the Department should require legitimation-by-marriage "even where by the law of the state of his domicile such recognition would have the effect of legitimizing his children . . .

In 1938 the interdepartmental committee proposed codifying the modernized version of the *Guyer* rule: nonmarital foreign-born children of American fathers would not be recognized as citizens unless and until they had been legitimated by the father.[254] Modeled after the Department of State's legitimation exception—which the report cited—this provision liberalized the absolute prohibition of citizenship transmission by fathers outside marriage that the Bureau of Immigration had favored in litigation over the citizenship claims of children of Chinese American fathers. But adopting the Department of State's legitimation exception marked a departure from the *Guyer* rule, not its complete repudiation, as the exception largely maintained marriage as a requirement of father-child citizenship transmission. In 1938, as in the 1920s, in the majority of states the only way a father could fully legitimate his child was to marry the mother.[255] Accordingly, by requiring legitimation, the Proposed Code—and the Nationality Act that transformed the Code into law—maintained marriage as the key to father-child citizenship transmission in most instances.[256] The legitimation requirement was race neutral on its face, but

especially in cases where they are born of an Asiatic mother." *Id.* at 3-4.

254. PROPOSED CODE, *supra* note 226, at 17.

255. 4 VERNIER, *supra* note 127, § 242, at 154 ("The prevailing type of statute, found in forty-eight jurisdictions, permits the child to become legitimate if the parents subsequently intermarry . . . ."). By the late 1930s, many states allowed legitimation-by-acknowledgment, but these alternative methods of legitimation were often of limited legal significance. *See id.* § 244, at 178-80 (noting that most legitimation-by-acknowledgment procedures served the limited purpose of allowing the child to inherit from the father). Courts were wary of this new method of legitimation, and interpreted these statutes narrowly. *See* GROSSBERG, *supra* note 52, at 376 n.53. Most important, officials in the Department of State rejected the notion that legitimation-by-acknowledgment satisfied the Nationality Act's legitimation requirement. *See infra* note 256.

256. *See, e.g.*, Memorandum from U.S. Dep't of State to Am. Consulate Gen., Austl. 2 (Aug. 18, 1944) (on file with NARA, RG 59, CDF 131) ("The Department has never taken the view that mere acknowledgment or recognition of an illegitimate foreign-born child by the putative American father was sufficient to make the child an American citizen under [pre-1940 law] or under the . . . Nationality Act of 1940 . . . ."). The Nationality Act of 1940 also provided that the American father's nonmarital foreign-born child would be recognized as a citizen if paternity was established by "adjudication of a competent court." Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1137, 1139-40. The "adjudication" provision was rarely used successfully to secure citizenship for a foreign-born child, as it was narrowly construed by officials in the Department of State. Correspondence between Department officials, American foreign-service officers, and foreign officials make clear that the Department of State insisted on a formal, adversarial style adjudication of paternity, even in foreign jurisdictions where voluntary acknowledgment before an official or a judge was sufficient to formally legitimize the child under that country's law and where no process of adjudication

administrators incorporated state law restrictions on marriage into federal nationality law,[257] including bans on interracial marriage, as well as the race-salient non-recognition practices of the sort developed by the Department of State in the case of Aviga Chapin and the Bureau of Immigration in the exclusion law cases. As I discuss below, those limitations on marriage would play a significant role in the exclusion of Amerasian children from citizenship in the mid and late twentieth centuries, as the United States deployed hundreds of thousands of soldiers to Asia.[258]

3. The Maternalist Exception: Nonmarital Children of American Mothers

Before turning to the wartime operation of *jus sanguinis* citizenship laws, it is important to consider the dramatic gender asymmetry in the Nationality Act's regulation of citizenship of nonmarital foreign-born children. Although the Act restricted father-child citizenship transmission for nonmarital children, it provided for automatic transmission of citizenship between American mothers and their nonmarital foreign-born children, contingent on a very liberal maternal residency requirement.[259] Why the special solicitude for the nonmarital foreign-born children of American mothers?

As is true of the limitations imposed on citizenship transmission between American fathers and their nonmarital foreign-born children, the generous recognition of nonmarital foreign-born children of American mothers found in the Nationality Act originated in the prior practices of administrators. Administrative recognition of nonmarital foreign-born children of American

was available. *See* Airgram from Acheson, U.S. Dep't of State, to Am. Consul, Bremen, Ger. (Sept. 3, 1946) (on file with NARA, RG 59, CDF 131) (noting that an action to establish paternity must be brought in a "competent court" in the state or country of the child's or father's domicile that "has full authority to hear and pass judgement in actions to determine paternity"); Telegram from Acheson, U.S. Dep't of State, to Am. Consul, Nouméa, New Caledonia (Oct. 25, 1946) (on file with NARA, RG 59, CDF 131) ("Mere recognition by American father child born out wedlock alien mother not sufficient establish paternity of child . . . ."); Airgram from Marshall, U.S. Dep't of State, to U.S. Embassy, Brussels, Belg. (May 5, 1947) (on file with NARA, RG 59, CDF 131) (describing the "[f]act that Belgian authorities regard voluntary acknowledgment by the father as having same legal value as a judgement inducing forced acknowledgment" as "not material").

257. At the end of World War II, thirty states had laws that banned at least some forms of interracial marriage. *See* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 253 (2002).

258. *See infra* Section III.B.

259. Nationality Act of 1940, ch. 876, § 205, 54 Stat. 1137, 1140.

mothers as citizens began before 1934, the year that Congress first granted women the right to transmit citizenship to their children. Hence, the recognition of such children as citizens represented a departure from the pre-1934 statute.[260] The interdepartmental committee that drafted the 1938 Proposed Code was aware of the practice, explaining to Congress that the Department of State had "uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother."[261] The Proposed Code suggested codifying this practice: "[I]f the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, [the child] shall be held to have acquired at birth her nationality status."[262] When Congress passed the Nationality Act, it adopted the language of the Proposed Code verbatim.[263]

One way to understand the solicitude shown for the nonmarital foreign-born children of American mothers is as a product of the gender-asymmetrical common law principles that also shaped (and restricted) citizenship transmission between a father and his nonmarital child.[264] If the default rule that nonmarital children of American fathers were not citizens found support in the common law rules that refused recognition of the father-child relationship outside marriage for status determinations, the corollary that outside marriage the child's citizenship status followed that of the mother also found support in American common law.[265] There is certainly evidence that administrators who endorsed the practice drew on such principles. For example, the drafters of the Proposed Code explained the recognition of unwed mothers' foreign-born children as citizens using the formalized (and gender-based) logic of the common law: it was premised on the longstanding domestic relations law principle that "the mother in such a case stands in the place of the father."[266]

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260. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 ("[Only children] whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed . . . citizens of the United States.").

261. PROPOSED CODE, *supra* note 226, at 18.

262. *Id.* at 17.

263. Nationality Act §§ 201-205.

264. *See generally* Collins, *Fathers' Rights*, *supra* note 4.

265. *Id.* at 1693.

266. PROPOSED CODE, *supra* note 226, at 18.

But fidelity to common law principles provides only a partial explanation for the administrators' behavior. Although the maternal line rule had a long pedigree in American law for purposes of determining other forms of status—such as domicile, slave status, and racial status—its application in the context of *jus sanguinis* citizenship appears to have originated in the early twentieth century. Why then? The historical sources suggest that administrators' recognition of mother-child citizenship transmission outside marriage was animated by the powerful maternalist norms that shaped early twentieth-century American social policy. At their core, maternalist social policies were committed to supporting women *as mothers*, as reflected in a wave of state law Mothers' Aid statutes in the 1910s and, at the federal level, the creation of the Children's Bureau in 1912, the enactment of the Sheppard-Towner Act in 1921, and the creation of Aid to Dependent Children in the Social Security Act of 1935.[267] As such, many of the laws and policies that maternalist activists and reformers instituted were also deeply gendered, as they were premised on the view that mothers were the natural caregivers of children.[268]

In the particular context of *jus sanguinis* citizenship law, the maternalist turn largely originated in the practices of front-line administrators in the Bureau of Immigration. Although questions concerning the citizenship status of nonmarital foreign-born children of American mothers arose in several

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267. For a discussion of the Mothers' Aid statutes of the 1910s, see LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 37-64 (1994); *see also* Maternity and Infancy (Sheppard-Towner) Act, ch. 135, 42 Stat. 224 (1921); Social Security Act, ch. 531, § 402, 49 Stat. 620, 627-28 (1935) (aid to dependent children); Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. The legacy of maternalist programs is mixed, as such programs were often woefully underfunded and led to unwanted government involvement in the lives of the mothers they tried to help. *See* MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 202 (1988); GORDON, *supra*; MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930, at 148-66 (1994); SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992). Although many early twentieth-century maternalist programs and institutions focused their efforts on abandoned and widowed mothers—worthy mothers—maternalist policy makers were also intent on addressing the plight of unwed mothers and their children. At the federal level, that initiative was led by the Children's Bureau, which commissioned important studies on the economic and legal status of nonmarital children and supported legislation intended to improve their well-being. *See* GROSSBERG, *supra* note 52, at 196-233; LADD-TAYLOR, *supra*, at 74-103; SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 166-86 (1982).

268. *See* LADD-TAYLOR, *supra* note 267, at 3.

contexts, the issue was especially pressing at crossings along the U.S.-Canadian border. In the 1920s, if not earlier, immigration officials on both sides of that border began recognizing the nonmarital foreign-born children of American and Canadian mothers as citizens of the mother's country. Despite the lack of authorizing legislation in either country, this practice was memorialized in a cross-border reciprocal agreement in which officials of both countries agreed that the minor foreign-born child of an American or Canadian unwed mother would be recognized as a citizen by the mother's country—and allowed to cross the border.[269]

Because recognition of nonmarital foreign-born children of American mothers as citizens marked a departure from the *jus sanguinis* citizenship statute, immigration administrators were frequently pressed to defend the policy, especially as some of the children would have been denied entry under the race-based exclusion laws or national origins quotas. In fact, in the late 1920s, that very issue arose in a series of cases involving Canadian and American mothers seeking to return home with a nonmarital child in tow.[270] The cross-border agreement almost fell apart when American border officials questioned whether such children should be recognized as citizens if they were of a race "ineligible to citizenship."[271]

In the case of nonmarital children of American mothers, the practical problem of who would take responsibility for those children, and concern about the costs and public relations embarrassment that could result if border officials separated children from their mothers, appear to have trumped concerns about the evasion of race-based exclusion laws and national origins quotas. Memo after memo explaining and defending the cross-border

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269. Numerous memoranda refer to this cross-border agreement between Canadian and American officials. *See, e.g.*, Letter from A.L. Jolliffee, Comm'r, Canadian Dep't. of Immigration and Colonization, to H.R. Landis, U.S. Comm'r of Immigration, Montreal, Can. (Jan. 3, 1928) (on file with NARA, RG 85); 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); *see also* 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).

270. *See* sources cited *supra* note 269.

271. *See, e.g.*, Memorandum from C.A. Palmer, Dist. Dir., U.S. Bureau of Immigration, Spokane, Wash., to Comm'r Gen., U.S. Bureau of Immigration (Mar. 28, 1929) (on file with NARA, RG 85) (noting that "the so-called reciprocal agreement, insofar as it relates to Chinese persons, will cease to be operative"); Memorandum from John L. Zurbrick, Dist. Dir., U.S. Bureau of Immigration, Detroit, Mich., to Comm'r Gen., U.S. Bureau of Immigration (Apr. 1, 1929) (on file with NARA, RG 85) (reaching the same conclusion).

agreement reveals U.S. officials' nearly uniform view that it was only practical to keep mothers and their nonmarital children together, as mothers were the presumed caretakers of such children. In 1929, the Commissioner General of the Bureau of Immigration explained that "the only purpose [for the rule] . . . is to provide against the separation of mothers and children."[272] "It can well be foreseen," explained one Bureau official, "that much distress and possible criticism would result if enforced separations of mothers and children were occasioned by the attitude which has been assumed by the Canadian Government and our own in dealing with the question."[273] No such distress and criticism attended the rule that recognized only marital or legitimated children of American fathers as citizens, for, as all agreed, "as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the illegitimate] child."[274]

How are we to understand administrators' willingness to recognize foreign-born children of American mothers as citizens? The fact that such recognition allowed some children who would have been subject to the exclusion laws to enter the United States—and to be recognized as citizens—certainly gave rise to concern among some officials. But the documents recording the back and forth between Canadian and American officials do not register anxiety that such practices would significantly compromise the system of racial exclusion laws. One very likely reason is that, given the reciprocal nature of the cross-border agreement, American officials were faced with the possibility that, unless they allowed American mothers to bring their children into the United States—even if the child was racially excludable—the Canadian border officials would refuse to allow Canadian mothers and their children to cross the border into Canada.[275] As one Canadian official reminded his

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272. Letter from Harry E. Hull, Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Nov. 8, 1929) (on file with NARA, RG 85).

273. 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. (Sept. 21, 1929) (on file with NARA, RG 85). The affirmative reply by the Canadian Department of Immigration and Colonization echoed the concern that the failure to allow nonmarital children to cross the border with their mothers would "result in much distress and possible criticism." Letter from A.L. Jolliffe, Canadian Dep't of Immigration & Colonization, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Oct. 12, 1929) (on file with NARA, RG 85).

274. Memorandum from John J. Scanlan to Ruth Shipley, *supra* note 246, at 6.

275. This concern was not hypothetical. Someone in the Bureau of Immigration saw fit to save a newspaper clipping from the *Toronto Star* that reported the refusal of Canadian border officials to allow an (apparently unwed) Canadian mother to bring her baby over the border

counterpart in the Bureau of Immigration, some of those mothers and children would have been ineligible to enter Canada, which also had racial exclusion laws and other immigration restrictions.[276] Given this, denying entry to otherwise excludable children of American mothers may not have effectively served the ends of America's restrictions on immigration. In addition, in the early twentieth century, single women likely traveled and resided internationally with much less frequency than men or married women.[277] With that in mind, it is understandable that recognition of the foreign-born nonmarital children of American mothers as citizens generated little concern about massive evasion of the exclusionary laws, in contrast to other proposals to introduce gender equality into *jus sanguinis* citizenship.[278] Given these circumstances, the relatively low-level officials faced with an unwed American mother attempting to return to the United States with her child reasoned comfortably from the maternalist premises that characterized early twentieth-century social policy more generally, lamenting the fact that compliance with the *jus sanguinis* statute would result in "separation of mothers and children."[279]

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after giving birth to the baby in New York. *See Treatment of Aliens*, TORONTO STAR, n.d. (on file with NARA, RG 85).

276. *See* Letter from A.L. Jolliffe, Canadian Dep't of Immigration & Colonization, to N.R. Landis, U.S. Comm'r of Immigration, Montreal, Can. (Jan. 3, 1928) (on file with NARA, RG 85) ("[I]t must be kept in mind that American illegitimate children would not be any more admissible to Canada under Canadian law than would Canadian-born illegitimate children be admissible to the United States under United States law."); Letter from A.L. Jolliffe, Canadian Dep't of Immigration & Colonization, to N.R. Landis, U.S. Comm'r of Immigration, Montreal, Can. 1 (June 24, 1929) ("[I]t is most likely that in a number of cases illegitimate children could not fully comply with the provisions of the [Canadian] Immigration Act . . . ."); *see also* Chinese Immigration Act, S.C. 1923, c. 38, §§ 5-9 (Can.); PETER S. LI, THE CHINESE IN CANADA (2d ed. 1998).

277. Although estimating the numbers of Americans residing abroad is fraught with difficulties, it is fair to assume that one of the largest groups of Americans residing abroad in the early twentieth century was servicemen. *See supra* note 91. During the same period, records compiled by the Bureau of Immigration show that in the early 1900s, two times as many men as women left the United States by ship. *See* 1 WALTER F. WILLCOX, INTERNATIONAL MIGRATIONS: STATISTICS 471 tbl.XIV (1929). To my knowledge, no reliable data has been compiled that divides travelers or residents abroad by marital status, but the available data suggests that unmarried women were unlikely to have made up a substantial portion of Americans traveling and residing abroad.

278. On the concern that recognition of married American mothers' ability to transmit citizenship would lead to a breakdown of the racial exclusion laws, see *supra* Subsection III.A.1.

279. Letter from Harry E. Hull, Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross,

With a general consensus among administrators that nonmarital foreign-born children should remain with their American mothers, the interdepartmental committee incorporated the longstanding practice of recognizing those children as citizens in the Proposed Code. In 1939, when the issue came to the attention of Secretary of Labor Frances Perkins—herself a dedicated maternalist—she agreed, opining that "steps should be taken to avoid subjecting these unfortunate individuals to unnecessary hardships."[280] Attorney General Frank Murphy concurred, noting that "exclusion of [such] children is not only harsh, but largely impracticable."[281] Both agreed that the pending nationality bill should codify the administrative practice of recognizing the nonmarital foreign-born children of American mothers as citizens.[282] In short, the historical record reveals that the pronounced gender asymmetry of the Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship.[283]

Acting U.S. Comm'r of Immigration, Montreal, Can. (Nov. 8, 1929) (on file with NARA, RG 85).

280. Letter Regarding Leah Skousen O'Donnell from Frances Perkins, Sec'y of Labor, to Cordell Hull, Sec'y of State 3 (Mar. 15, 1939) (on file with NARA, RG 85).

281. Letter Regarding Leah Skousen O'Donnell from Frank Murphy, Att'y Gen., to Cordell Hull, Sec'y of State 2 (May 10, 1939) (on file with NARA, RG 85).

282. *Id.*; Letter from Frances Perkins, to Cordell Hull, *supra* note 280, at 3.

283. Although the archival sources demonstrate the maternalist inclinations of administrators' recognition of nonmarital children of American mothers as citizens, the sources say little about officials' concern about the risk of statelessness for such children—an explanation that, today, government lawyers have offered in their defense of the constitutionality of the modern parent-child derivative citizenship statute. *See, e.g.*, Brief for the United States at 23-24, Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (No. 09-5801) (arguing that § 1409 was enacted to prevent the potential statelessness of foreign-born nonmarital children of U.S citizen mothers caused by the interplay of the American *jus soli* rule and the *jus sanguinis* rules of many other nations). A full exposition of this subject is well beyond the scope of this Article, but it bears noting that in the many hundreds of pre-1940 administrative memos I have read that defend or explain recognition of the nonmarital foreign-born children of American mothers as citizens, I have identified exactly one memo by a U.S. official that mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern. *See* 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 (Aug. 14, 1928) (on file with NARA, RG 59, CDF 131). This does not mean that statelessness did not become a concern for administrators; that is an issue meriting further attention. It does mean that the archival sources providing the best insight into why administrators initially recognized foreign-born nonmarital children of American mothers as citizens—and why

The fact that administrators were willing to allow mother-child citizenship transmission for children born out of wedlock, even when the child was racially excludable, does not mean that the gender-asymmetrical regulation of *jus sanguinis* citizenship was not a racially nativist practice.[284] Administrators' willingness to accommodate the foreign-born children of unwed American mothers stands out as an exception in the historical record. That record reveals officials' commitment to the concept of gender-based "family unity" in nationality law and their commitment to maintaining the racially nativist policies that had been a core component of American nationality law for over a century and a half. In the minds of many administrators, those gender- and race-based policies were interconnected. Introducing gender equality in *jus sanguinis* citizenship by allowing married American mothers and unwed fathers to transmit citizenship to their foreign-born children would defeat the core purpose of the exclusionary and quota-based regulations: the exclusion or limited admittance of ethno-racial groups that had been deemed inferior or inassimilable. The significantly expanded parent and child residency requirements found in the Nationality Act were added in part to ensure the integrity of the racial bars and national origins quotas that, in the minds of some administrators, had been compromised by granting married mothers the right to transmit citizenship to their foreign-born children. Most important for present purposes, as with pre-1940 practice, the Nationality Act of 1940 largely maintained marriage as a key to citizenship for foreign-born children of American fathers and, in so doing, the Act incorporated state laws barring interracial marriage and race-salient non-recognition rules into federal nationality law. For the foreign-born children of American fathers, the racially exclusionary operation of this constellation of domestic relations and nationality laws assumed new importance—and took on new dimensions—as the United States went to war.

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those practices were codified in the Nationality Act of 1940—do not support the contention that concerns about statelessness significantly motivated the initial development of the rule.

284. The use of gender- and marriage-based regulations to determine children's status, such as slave status, always had a Janus-faced quality. Under the maternal line rule, children of free mothers and enslaved fathers were free, while children of free fathers and slave women were not. However, it would be absurd to suggest that the law of slavery as practiced in the United States was not a system of racial servitude simply because some children of African descent were born free. Notably, the analogy with the maternal line rule as it operated in slave law to determine children's status as slave or free was occasionally used by immigration officials wrestling with the citizenship status of nonmarital foreign-born children of American mothers. *See* Risley Memorandum, *supra* note 67, at 7.

B. The Guyer *Rule at War: War Brides, War Babies, and "Bui Doi"*

The Nationality Act of 1940 was not a war measure in the traditional sense, as it was not drafted in anticipation of the United States's entry into World War II.[285] However, shortly after the statute's enactment, the wartime deployment of American soldiers to battlefields—both within and beyond "Christendom"—led to the births of inestimable numbers of foreign-born children to American fathers. In this Section, I demonstrate how the modernized *Guyer* rule—the default rule that nonmarital foreign-born children of American fathers were not citizens—operated in combination with the race-based citizenship laws and the marriage and fraternization policies of the United States military during World War II, the Korean War, and the Vietnam War.[286] Under the Nationality Act of 1940, state marriage laws were important in determining the legitimacy of the foreign-born child of an American father, and hence the child's citizenship status, as the statute directed that the laws of the father's "domicile" would be used to determine the child's legitimacy.[287] But for the men who were stationed abroad as soldiers, and the children they fathered while there, the military policies that governed the marital and sexual practices of soldiers were just as significant and, as I explain below, further amplified the impact of state law bans on interracial marriage. Even a brief analysis of the United States's welcoming treatment of children born to American soldiers and their European "war brides" during World War II—and its resistance to marriages between American soldiers and their Asian girlfriends during that war, the Korean War, and the Vietnam War—demonstrates an essential point: the limitations on father-child *jus sanguinis* citizenship for nonmarital children continued to be used to exclude nonwhite

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285. *See* The Urgent Need of Adopting the Nationality Code 7 (Aug. 30, 1940) (on file with NARA, RG 46, SEN 76A-E5) (noting that officials had "for many years been convinced that there is a great need of revising the nationality laws").

286. A handful of historians have recently turned their attention to military marriage and fraternization policies as important sites of the legal regulation of race, sexuality, and gender. *See* KATHARINE H.S. MOON, SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S.-KOREA RELATIONS (1997); SUSAN ZEIGER, ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY (2010). Until recently, few legal scholars had given race-based military marriage policies the attention they deserve, but that has begun to change with the important contributions of Nancy Ota and Rose Cuison Villazor. *See* Nancy K. Ota, *Flying Buttresses*, 49 DEPAUL L. REV. 693 (2000); Villazor, *supra* note 6. The historian Linda Kerber has examined the phenomenon of the "boi dui" in relation to citizenship law in Kerber, *Birthright Citizenship*, *supra* note 6, at 261-63.

287. *See* Nationality Act of 1940, ch. 876, §§ 201-205, 54 Stat. 1137, 1138-40.

children from citizenship and thus served a racially nativist nation-building project.

Take the much-celebrated European "war brides" and "war babies" of World War II. During and following World War II, the military often encouraged soldiers to wed their European girlfriends with whom they had fathered children, and Congress provided the soldiers' non-excludable war brides and children with special immigration status through the War Brides Acts.[288] Congress funded a massive initiative to bring the European war brides—and their many babies—"home" to the United States,[289] and the Red Cross established "war brides' schools" to help ease these women's transition into American society and prepare them to raise a new generation of citizens. But, as Susan Zeiger has chronicled in great detail, neither the military nor Congress was welcoming to all overseas girlfriends, fiancées, and wives of American soldiers—or the children they fathered with those women. The War Brides Acts specifically excluded women who were "ineligible to citizenship" because of their race, and the promise of preferential immigration status was denied those women.[290]

The racial prohibitions incorporated into the War Brides Acts meant not only that a soldier could not bring his racially excludable wife home, but also—pursuant to explicit military policy—that the soldier would not likely be given

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288. *See* War Brides Act, ch. 591, 59 Stat. 659 (1945) (providing non-quota immigrant status to non-excludable alien spouses and minor children of members of the armed forces serving during World War II); G.I. Fiancées Act, ch. 520, 60 Stat. 339 (1946) (providing special immigration status to the non-excludable fiancées and fiancés of World War II armed services members). Although British war brides were the most celebrated, immigration preferences and support networks were also extended to other non-excludable war brides. *See* ZEIGER, *supra* note 286, at 90-94.

289. ZEIGER, *supra* note 286, at 131-40.

290. War Brides Act § 1 (excluding brides inadmissible under immigration laws from preferences provided in Act); *see also* Villazor, *supra* note 6, at 1405-07 (describing the "racialized and gendered limitations" of the War Brides Act). In 1943, in light of the fact that China had become an ally, Congress amended the exclusion laws so that individuals of Chinese descent were no longer "ineligible to citizenship." *See* Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601 (repealing Chinese Exclusion Acts). Accordingly, Chinese women married to American citizens were not excluded from the War Brides Acts, as were Japanese and most other Asian women. But for Chinese women married to American men who were not soldiers, entrance to the United States remained very difficult because of the extremely low quota for Chinese immigration (105 per year). Accordingly, Chinese Americans had to lobby Congress for special legislation to allow the Chinese spouses of American citizens to enter the country on a non-quota basis. *See* Act of Aug. 9, 1946, ch. 945, 60 Stat. 975.

permission to marry his racially excludable girlfriend in the first place.[291] Starting in 1939, every member of the military stationed abroad was required to obtain permission from his superiors to marry.[292] The work of Nancy Ota and Rose Cuison Villazor shows that, as a general matter, permission to marry was to be given liberally, but official military policy counseled against giving permission in cases where the soldier sought to marry outside his race.[293] Because of racially restrictive immigration law and state law restrictions on interracial marriage, the military contended, marriage to a racially excludable woman was likely to fail because the soldier would be unable to take his bride home to the United States.[294] Given the Nationality Act's requirement that only legitimate or legitimated foreign-born children of American fathers were recognized as citizens—and that legitimation generally required marriage—the military's restrictions on interracial marriage amplified the reach of state laws banning interracial marriage. In turn, the military ban on interracial marriage had obvious implications for the many children born out of wedlock to American soldiers and Asian women: under the rules governing father-child citizenship transmission, they were excluded from citizenship.

In 1947, Congress provided a brief amnesty from the racially restrictive policy on the immigration of Asian war brides that allowed them to enter the United States under the permissive terms of the War Brides Act if they were married within thirty days.[295] But the 1947 Act was a temporary concession and

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291. *See* Villazor, *supra* note 6, at 1401 (discussing the implementation of World War II military regulations requiring soldiers stationed abroad to obtain permission to marry); *see also* U.S. DEP'T OF ARMY & AIR FORCE SPEC. REG. NO. 600-240-5, C-1, PERSONNEL—MARRIAGE IN OVERSEA COMMANDS (Jan. 17, 1951) ("In cases of marriage between citizens of the United States in the Territories and insular possessions of the United States . . . the regulations governing granting permission to marry, may, in the discretion of the commanders concerned, be declared inapplicable."); U.S. WAR DEP'T, CIRCULAR NO. 179, § 1 (June 8, 1942) ("No military personnel on duty in any foreign country or possession may marry without the approval of the commanding officer of the United States Army forces stationed in such foreign country or possession.").

292. *See* U.S. DEP'T OF ARMY, REG. NO. 600-750, PERSONNEL—RECRUITING FOR THE ARMY AND THE REGULAR RESERVE 7 (Apr. 10, 1939). *See generally* Ross W. Branstetter, *Military Constraints upon Marriages of Service Members Overseas, or If the Army Had Wanted You to Have a Wife* . . . , 102 MIL. L. REV. 5 (1983) (discussing the development of the Army's regulation of marriage by enlisted soldiers).

293. *See* Ota, *supra* note 286, at 721-22; Villazor, *supra* note 6, at 1407-11.

294. *See* ZEIGER, *supra* note 286, at 181; Villazor, *supra* note 6, at 1407-11.

295. *See, e.g.*, Act of July 22, 1947, ch. 289, 61 Stat. 401 ("The alien spouse of an American citizen by a marriage occurring before thirty days after the enactment of this Act, shall not be considered as inadmissible because of race, if otherwise admissible under this Act."); *see also*

did not overcome the military's policy against interracial marriages between American soldiers and Asian women.[296] Moreover, the 1947 Act did not clarify the status of the many children born abroad to American soldiers and their Asian wives prior to marriage. In an urgent telegram sent to the Department of State several months after the 1947 Act was passed, the American Consul in Yokohama asked for guidance concerning the citizenship status of the "[c]onsiderable numbers of children born to service personnel prior to marriage of American citizen husbands to Japanese wives."[297] Although the soldiers' "alien wives" were admissible under the 1947 Act, "apparently alien children ineligible [to] citizenship [are] not admissible under those acts," the consul explained, and it was "[t]hus essential [to] determine whether [a] child [was] legitimated by subsequent marriage and therefore [was an] American citizen prior to departure."[298]

In a responding airgram, intended to help American officials in Japan with this process, Department of State officials noted the states in which legitimation was effected by the marriage of the parents, but cautioned that "certain States forbid marriage between certain races."[299] If the husband's home state would not recognize his marriage, the marriage could not provide the basis for a child's legitimation under the Nationality Act, which explicitly required that the child be legitimated under the laws of the father's domicile.[300] Moreover, when the temporary exemption from race-based exclusion laws expired, it left in place a military policy that effectively banned interracial marriage in many countries where American soldiers were stationed, which thwarted the marriage plans of many couples. The children born to such unions, along with the thousands of other children born out of wedlock to

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ZEIGER, *supra* note 286, at 181-82 (noting the act).

296. In a telegram to the American officials in Japan written six months after the 1947 statute was enacted, the Department of State queried whether the "military authorities [could be] persuaded to withdraw for humanitarian reasons objection to certification of these marriages" between American soldiers and Japanese women. Telegram from Marshall, U.S. Dep't of State, to Yokohama Branch, Office of the U.S. Political Adviser, Yokohama, Jap. (Nov. 12, 1947) (on file with NARA, RG 59, CDF 131).

297. Telegram from Johnson, Yokohama Branch, Office of U.S. Political Adviser, Yokohama, Jap., to U.S. Sec'y of State (Nov. 12, 1947) (on file with NARA, RG 59, CDF 131).

298. *Id.*

299. Letter from Lovett, U.S. Dep't of State, to Yokohama Branch, Office of U.S. Political Adviser, Yokohama, Jap. (Dec. 8, 1947) (on file with NARA, RG 59, CDF 131).

300. *See* Nationality Act of 1940, ch. 876, §§ 201-205, 54 Stat. 1137, 1138-40.

American soldiers and Asian women during World War II and its aftermath, were excluded from citizenship.[301]

In 1952 Congress eliminated all explicit race-based exclusions from American nationality law, and thirteen years later, it removed all national origins quotas, thus lifting a significant barrier to the immigration of Asian wives of American servicemen.[302] In 1967 the Supreme Court declared unconstitutional all laws banning interracial marriage.[303] But the marriage and legitimation requirements in the *jus sanguinis* citizenship statute—by then recodified in the 1952 Immigration and Nationality Act[304]—continued to serve as a race-salient limitation on the recognition of American soldiers' foreign-born children as citizens. Soldiers' interracial marriages were no longer illegal (or presumed illegal) under state law, but military officials continued to discourage soldiers from marrying local women in many of the Asian countries where American troops were stationed. For example, as Zeiger demonstrates, during the Vietnam War the military "vigorously and systematically discouraged marriage for American service personnel in Vietnam, placing a wide array of bureaucratic and financial obstacles in front of marriage aspirants."[305] Instead, drawing on a set of conventions and practices that had emerged during the Korean War, the military encouraged nonmarital sexual liaisons between American soldiers and local women, including long-term "contract" arrangements.[306] The children born to such relationships were illegitimate and hence not American citizens. Unlike in World War II Europe,

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301. On the experiences of mixed-race children of American soldiers in Japan, see YUKIKO KOSHIRO, TRANS-PACIFIC RACISMS AND THE U.S. OCCUPATION OF JAPAN 156-58 (1999); and William R. Burkhardt, *Institutional Barriers, Marginality, and Adaptation Among the American-Japanese Mixed Bloods in Japan*, 42 J. ASIAN STUD. 519 (1983).

302. *See* Immigration and Nationality Act of 1952 (McCarran-Walter Act), ch. 477, 66 Stat. 163 (eliminating race as a bar to immigration); Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (ending the national origins quota system).

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

304. *See* Immigration and Nationality Act §§ 301(a)(7), 309.

305. ZEIGER, *supra* note 286, at 222. Zeiger describes official military policies that thwarted marriage between U.S. soldiers and Vietnamese women. *See id.* at 222-24.

306. *See* Bruce Cumings, *Silent but Deadly: Sexual Subordination in the U.S.-Korean Relationship*, *in* LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 169 (Saundra Pollock Sturdevant & Brenda Stoltzfus eds., 1992). During the Vietnam War a culture of prostitution—often facilitated by the U.S. military through the "R & R" program—often set the stage for intimate encounters between U.S. servicemen and local women. *See* ZEIGER, *supra* note 286, at 220-21. On "contract" arrangements between American soldiers and Vietnamese women, see *id.* at 218-19.

where military officials had frequently encouraged soldiers to marry their pregnant English girlfriends, no pressure was used to encourage American soldiers to marry the Vietnamese mothers of their children; no special ships were commissioned to bring the soldiers' new families "home," and no "war brides' schools" were established to help these women adjust to American life—or to raise a new generation of citizens.[307]

It is impossible to know how many children were born out of wedlock to American soldiers stationed in Asia or elsewhere during the late twentieth century.[308] It is also impossible, of course, to determine the extent to which legal and military policy barriers to marriage shaped the decisions of individual soldiers and the women with whom they had relationships. For example, despite these policies, many American soldiers did marry their Korean and Vietnamese girlfriends—and legitimized their children in so doing.[309] And even when a child was born, presumably many couples would have opted out of marriage regardless of the policies discouraging or prohibiting the solemnization of their relationships.[310]

Nonetheless, the differences between the legitimacy and citizenship status of children fathered by American soldiers in England circa 1945, Japan circa 1947, and Vietnam circa 1968 lay not just in the private choices of individuals entangled by war, but also—and significantly—in the official race-based

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307. ZEIGER, *supra* note 286, at 85-87, 223-30.

308. Estimates vary significantly, from 20,000 to more than 200,000. *See* JOHN SHADE, AMERICA'S FORGOTTEN CHILDREN: THE AMERASIANS 15 (1981) (cataloguing estimates of the number of Amerasian children born in Vietnam at between 20,000 and 100,000); *Amerasian Immigration Proposals*: *Hearing on S. 1698 Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 63 (1982) (statement of Alfred Keane, Dir., Americans for International Aid) (estimating that there were between 30,000 and 80,000 Amerasian children in Southeast Asia) [hereinafter *Amerasian Immigration Proposals*]. John Shade suggests that by 1952, over 200,000 children had been born in Japan to American servicemen. SHADE, *supra*, at 24. If that is true, the number of children born to servicemen in Asia in the second half of the twentieth century could be closer to 300,000.

309. ZEIGER, *supra* note 286, at 222 (noting that many Vietnamese-American couples managed to marry during and after the war, despite determined efforts on the part of the military to prevent such unions).

310. Although it is difficult to collect reliable data regarding the personal decision-making processes of trans-national couples, social and financial pressures on an Asian woman to marry the father of her child may have been significant, suggesting that in many instances the choice not to marry would have been his, not hers. For examples of such scenarios provided as testimony in Congress, see generally *Amerasian Immigration Proposals*, *supra* note 308, at 45-63 (documents submitted by Alfred Keane, Dir., Americans for International Aid).

marriage and fraternization policies of the United States military and *jus sanguinis* citizenship laws enacted by Congress.[311] The combined operation of those laws and policies undoubtedly shaped the marriage practices of American soldiers stationed abroad and, on aggregate, helped determine the citizenship status of children fathered by those soldiers: the predominantly white babies of World War II soldiers became citizens and "baby boomers," while a very significant population of nonmarital Amerasian babies were excluded and became "bui doi"—children of the dust.[312]

The plight of the "bui doi"—Amerasian children born to American soldiers stationed in Asia—became a regular news item in the 1970s.[313] And in the 1980s, under pressure from civil rights organizations, the racial operation of *jus sanguinis* citizenship and its impact on the citizenship status of foreign-born Amerasian children was eventually raised in Congress.[314] In 1981, Representatives Barney Frank and Patricia Schroeder introduced a bill that would have provided an immigration preference and a fast track to citizenship for Amerasian children born during periods of American military presence in certain Asian countries.[315] Testifying in support of the measure, Representative Stewart McKinney explained:

> Since 1950 the United States has sent hundreds of thousands of military personnel to the Asian area with ramifications that are well known around the world. However, little has been said or done concerning the

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311. One strategy for denying the state's role in gender-discriminatory social practices is to characterize those practices as a matter of "choice" or "custom," rather than as the product of state action. *See* Reva B. Siegel, *Home as Work*: *The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1078, 1113-18 (1994) (noting that antebellum women's rights activists contended that women's economic dependence on their husbands was a situation constructed and therefore remediable by state law).

312. On the connection between "bui doi" and the *jus sanguinis* provisions in the Immigration and Nationality Act of 1952, see Kerber, *Birthright Citizenship*, *supra* note 6, at 255-66.

313. *See, e.g.*, Leon Daniel, *Mixed-Race Children: Legacies of War*, L.A. TIMES, Dec. 3, 1976, at C1; Michael Kernan, *Children with No Country: A Champion in Pearl Buck*, WASH. POST, Aug. 7, 1971, at B1; Ronald Yates, *GIs Left Legacy of Tears in Asia*, CHI. TRIB., May 6, 1979, at B1; *4,000 Children Left by Americans Being Stripped of Thai Citizenship*, N.Y. TIMES, Nov. 27, 1977, at 22.

314. *See* LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 151-53, 156-58 (2012).

315. H.R. 808, 97th Cong. (1st Sess. 1981); *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 870 (1981) [hereinafter *Immigration Reform*]. The bill was initially introduced by Representative Stewart McKinney in 1979, but it failed to pass. H.R. 3439, 96th Cong. (1st Sess. 1979).

> plight of the thousands of mixed-race children left behind in inhuman social and political conditions by their U.S. fathers.[316]

Encountering significant resistance from Department of State officials, Representative Schroeder quarreled with the notion that "the military can go into foreign countries and do whatever they want, and they won't be responsible."[317] During the hearings on the bill, the committee demanded documentary evidence of the military's fraternization policies during the Vietnam War, drawing a direct link between those policies and the creation of an underclass of Amerasian children who, because of the requirements of the *jus sanguinis* citizenship statute, were not recognized as American citizens.[318]

The bill initially failed, but when it was introduced again in 1982, testimony offered at congressional hearings also drew the connection between the limits on *jus sanguinis* citizenship and officials' resistance to approving or recognizing marriages between American soldiers and Asian women. An immigration lawyer who testified at the hearings noted that resistance to such marriages had tainted the bureaucratic procedures of Department of State officials responsible for processing passport applications submitted by foreign-born children of American soldiers. She explained that many Amerasian children left behind were, in fact, legitimate or legitimated by their parents' marriages and were therefore "already entitled, under current law, to full U.S. citizenship."[319] Recounting practices that bear a resemblance to the Bureau of Immigration officials' efforts to deny entry to the children of Chinese American fathers based on inadequate evidence of their status, the attorney explained that the Department of State had "refused in many cases to issue passports to such Amerasian children," placing the burden on the children to prove that the documentary evidence of their parents' marriage was not fraudulent.[320] "This heavy burden of proof is not required in cases arising out of Canada or Europe, where the applicants are usually white," she noted; "[r]ather, this insurmountable burden of proof is applied solely in cases involving nonwhites, and especially Asians."[321]

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316. *Immigration Reform*, *supra* note 315, at 903 (testimony of Rep. Stewart B. McKinney).

317. *Id.* at 876 (statement of Rep. Patricia Schroeder); *see also id.* at 877 ("[Y]ou communicate to the military people abroad that they can do whatever they want abroad and they pay nothing for it.").

318. *See id.* at 870-83, 890-902.

319. *Amerasian Immigration Proposals*, *supra* note 308, at 80 (testimony of attorney Judith Foster).

320. *Id.*

321. *Id.*

Although efforts to secure citizenship for Amerasian children foundered in Congress, legislators did enact an immigration preference for Amerasian children from certain countries.[322] As remarkable as even the partial recognition of Amerasian children in American immigration law, however, was the fact that the congressional debates leading up to that legislation contained explicit acknowledgment of the racial operation of America's gender-based *jus sanguinis* citizenship principles and the government's role in enacting policies that led to the exclusion of Amerasian children from citizenship. Historically, recognition of the racial operation of *jus sanguinis* citizenship has been selective at best. Although the racial dimension of the "war baby" problem has long been acknowledged in popular culture, the role of *jus sanguinis* citizenship laws in the exclusion of those children from citizenship is rarely recognized, especially by military officials, executive branch officials, and legislators. The racialized operation of *jus sanguinis* citizenship laws has also been obscured in modern debates concerning the continued gender-based regulation of *jus sanguinis* citizenship—a point that I return to in Part IV.

C. On Nation Building, Nationality, and Family Law

The racially nativist commitments that animated American nationality law for well over a century and a half are a well-studied phenomenon.[323] What has been largely overlooked, however, are the significant ways that domestic relations laws were deployed in the service of those commitments to determine the citizenship of *children*. Malleable but durable gender-based domestic relations law principles used to determine children's birth status were deployed

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322. *See* Act of Oct. 22, 1982, Pub. L. No. 97-359, 96 Stat. 1716 (codified as amended at 8 U.S.C. § 1154(f) (2012)) (extending "preferential treatment" in immigrant visa allocation to children fathered by U.S. citizens and born in Korea, Vietnam, Laos, Kampuchea, or Thailand after 1950 and before October 22, 1982). In 1987, Congress passed what is commonly called the Amerasian Resettlement Act or the Amerasian Homecoming Act, which provided that all Amerasians born in Vietnam between January 1, 1962, and January 1, 1976, could immigrate to the United States along with their immediate family, guardians, or spouse. *See* Indochinese Refugee Resettlement and Protection Act of 1987, Pub. L. No. 100-202, § 584, 101 Stat. 1329, 1329-183. In 2003, 2005, 2007, and 2012, Congress considered bills that would have granted automatic citizenship to Vietnamese Amerasians who were residing legally in the United States, but the bills did not pass. *See* Amerasian Paternity Recognition Act of 2012, H.R. 5156, 112th Cong.; Amerasian Paternity Recognition Act, H.R. 4007, 110th Cong. (2007); Amerasian Naturalization Act, H.R. 2687, 109th Cong. (2005); Amerasian Naturalization Act of 2003, H.R. 3360, 108th Cong.

323. *See supra* Section II.A.

by administrators, judges, and legislators in different ways at different times, often in support of a broader racially nativist nationality policy. Of course, marriage and legitimacy requirements served multiple purposes in the hands of officials who designed and implemented *jus sanguinis* citizenship law as it applied to the foreign-born children of American fathers. Officials voiced concern about fraudulent paternity claims.[324] Administrative convenience played a significant part.[325] But the historical sources reveal a much deeper resistance to recognizing the nonmarital children of American fathers as citizens—resistance that was born of a long-standing social and legal commitment to the male-headed marital family as the proper source of citizenship, and the related felt need to enforce racially nativist nationality laws. In short, racial nativism was one of several factors that informed the way administrators and legislators reasoned about the citizenship rights of foreign-born nonmarital children, and it was an *important factor*.

Attention to the processes by which domestic relations law principles were enlisted in the service of nationality laws' racially nativist objectives deepens and expands our understanding of the history of American citizenship in important ways. First, careful attention to the memos, case files, briefs, opinions, and notes of early twentieth-century administrators, lawyers, judges, and legislators reveals the complex entanglement of domestic relations law, racialized conceptions of citizenship, and gender in developing the fundamental structure of our *jus sanguinis* citizenship law. In some instances, administrators incorporated explicitly race-based domestic relations laws and policies into federal *jus sanguinis* citizenship law. This process was especially apparent in the military's ban on interracial marriage[326] and the Department of State's interpretation of the 1940 Nationality Act's requirement that only legitimated nonmarital children of American fathers would be recognized as citizens, subject to the restriction of anti-miscegenation laws of the father's state of domicile. Similarly, legislators overtly excluded certain races from the

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324. *See, e.g.*, *Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the H. Comm. on Immigration and Naturalization*, 72d Cong. 3-5 (1931); *see also supra* note 147 and accompanying text.

325. Letter from Raymond F. Crist, U.S. Comm'r of Naturalization 1 (Dec. 31, 1931) (on file with NARA, RG 85) (expressing disapproval of a bill that would confer American citizenship on foreign-born children, regardless of legitimacy, where one parent was at the time of the child's birth an American citizen, based on "the difficulty which would arise in determining the status of the individuals concerned").

326. *See supra* Section III.B.

benefits of family-based citizenship laws, as demonstrated by the exclusion of women who were racially "ineligible to citizenship," and their children, from the War Brides Acts.[327]

In other instances, officials shaped domestic relations law in order to limit the reach of *jus sanguinis* citizenship in ways that were not explicitly race based, but were purposefully race salient. For example, officials charged with enforcing the nationality laws tended toward a narrower construction of laws governing marriage and legitimacy in an effort to limit the recognition of citizenship claims asserted by or on behalf of nonwhite children. This practice was at work in the Department of State's refusal to recognize any Samoan-American marriages for purposes of determining the citizenship of Samoan-born children of American fathers.[328] It was also at work in the Bureau of Immigration's insistence that the presumption of legitimacy—a staple of early twentieth-century domestic relations law—did not apply when determining the citizenship claims of children of Chinese American fathers.[329] Finally, such race-salient practices were evident in the military's efforts to thwart soldiers' marriages to Asian women, even after explicit race-based and national origins quotas were abandoned.[330] Regardless of whether they took the form of explicitly race-based domestic relations laws that were incorporated into citizenship laws, or facially race-neutral but operationally race-salient interpretations of domestic relations laws, what is clear from the historical sources is that, at significant and formative moments, the laws governing marriage and birth status provided an alternative means of policing the racial bounds of the polity.

Second, what is also clear from the historical sources is that, as a method of shaping the racial composition of the polity, reliance on domestic relations law principles tended to obscure the racialist ambitions of decision makers and policy makers. The *Guyer* court could rely on the legal principle *nullius filii* rather than engage with the explosive question of the citizenship status of persons of African descent—a question that was being contested on the battlefield as the judges of the Maryland Court of Appeals deliberated.[331] Confronted with claims to citizenship by Samoan-born children of American fathers, the Department of State could rely on a constrained definition of

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327. *See supra* notes 288-301 and accompanying text.

328. *See supra* Section II.B.

329. *See supra* Section II.C.

330. *See supra* Section III.B.

331. *See supra* Section I.A.

marriage to determine those children's claims, helping to secure the unstable distinctions between center and periphery, citizen and noncitizen, in America's fledgling empire.[332] In deciding the citizenship status of foreign-born children of Chinese American fathers, the Bureau of Immigration could turn to the laws governing birth status and marriage when purely race-based regulation was politically infeasible.[333] And after the race-based and national origins restrictions were finally eliminated from American nationality law in the mid-1960s, military officials could enlist marriage and legitimacy laws to restrict the availability of citizenship to the thousands of foreign-born children of American soldiers stationed in Asia.[334] At key moments, then, domestic relations law principles were used by officials to prevent significant numbers of nonwhite children from securing citizenship through their fathers, without relying on transparently racialist reasoning.

Third, and related, by focusing on the role of domestic relations law principles in the administration and development of *jus sanguinis* citizenship law, one can better describe how race-salient gender-asymmetrical understandings of marriage and family became entrenched, normalized, and naturalized in the law governing parent-child citizenship transmission. Building on the insights of law and society theorists who emphasize the constitutive effects of the everyday practice of law,[335] one can track how gender- and marriage-based domestic relations law became ingrained in the everyday legal practices of federal and state judges and federal administrators, and was eventually codified in statute. To identify this process of entrenchment and naturalization is to resist the suggestion that such practices are transhistorical, while also acknowledging their hold on American law. Like all sociolegal phenomena, the racialization of *jus sanguinis* citizenship was the product of specific social, cultural, and political circumstances that shaped Americans' understanding of what it meant to be a member of the nation-state: who was in, who was not, and the justifications that were offered for those determinations. But as much as the history of *jus sanguinis* citizenship

332. *See supra* Section II.B.

333. *See supra* Section II.C.

334. *See supra* Section III.B.

335. *See, e.g.*, Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21, 50-52 (Austin Sarat & Thomas R. Kearns eds., 1993); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409, 410 (1988) (examining how "exchanges between [court] clerk and citizens produce legal and moral frameworks").

demonstrates that American nationality law developed in response to particular historical conditions, one would be remiss to ignore the common thread that runs through the regulation of *jus sanguinis* citizenship: the way that the gender-based domestic relations laws that structure parent-child relationships frequently operated in nationality law as instruments of racial exclusion. Indeed, a risk of doing so is to participate inadvertently in a practice of elision that has frequently characterized racially nativist discourse and strategies in the field of nationality law.

IV. REFLECTIONS ON THE PRACTICE AND POLITICS OF MODERN DERIVATIVE CITIZENSHIP

For some students of American nationality law, the importance of the history of *jus sanguinis* citizenship—now called derivative citizenship—lies not in its significance for our understanding of the past, but in what it may mean for how we reason about modern citizenship law. The historical account provided here bears on a wide range of important issues concerning the regulation of formal membership in the American polity, including the role of bureaucracy in the development of substantive principles of nationality law, and vice versa;[336] the allocation of power between the executive branch and Congress in the regulation of nationality law;[337] nationality law's modern role as a nation-building tool;[338] the complex interrelationship of family-based immigration preferences and derivative citizenship law; and how the norms and processes of administrative decision making shape the contours of the legally recognized family.[339] A full exploration of these topics would extend far beyond the scope of this Article. In closing, I focus on the ways that the history of *jus sanguinis* citizenship sheds critical light on modern citizenship dilemmas concerning the role of family, and family law, in the rules and processes used to determine citizenship today. Standing alone, history cannot resolve such dilemmas. It cannot tell us how to craft an optimal system of citizenship designation.[340] However, this granular history of *jus sanguinis* citizenship can

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336. *See* sources cited *supra* note 26.

337. *Cf.* Cox & Rodríguez, *supra* note 221.

338. *See* ZOLBERG, *supra* note 10.

339. *Cf.* Collins, *supra* note 25.

340. By suggesting that the history of *jus sanguinis* citizenship should prompt reconsideration of the role that gender and marriage continue to play in American nationality law, I do not mean to imply that a more generous practice of citizenship would remedy all wrongs, or

alert us to the ways that the complex constellation of ideas concerning family, gender, race, and political membership traced here may continue to shape both individuals' lived experience of gender-based derivative citizenship law and the politics of citizenship law today. In addition, turning to recent contests over the constitutionality of modern gender-based citizenship laws, the history of *jus sanguinis* citizenship can illuminate past and present practices in ways that can productively reframe the current debate, and prompt modern jurists, lawyers, legislators, and administrators to ask different questions about the wisdom and constitutional moorings of those laws today.

A. Re-reading the Present

Lest one think that gender-based family law principles no longer play a race-salient role in the practice of American citizenship, more recent chapters in the development and implementation of *jus sanguinis* citizenship principles suggest that the lines drawn by our predecessors continue to inform the operation of the rules that govern membership in the American polity, as well as proposals to fundamentally alter those rules. Most obvious in this regard is the fact that past citizenship determinations premised on racialized family law policies and administrative practices continue to determine the citizenship status of individuals living today and will have intergenerational effects into

redress the massive global misallocation of resources that citizenship theorists have identified as a significant moral failure of modern birthright citizenship regimes, *jus sanguinis* and *jus soli*. *See* AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009). Ayelet Shachar and other critics of birthright citizenship have suggested that a thicker model of citizenship would provide a sounder basis for citizenship and a more just allocation of the social goods, protections, and entitlements that most nation-states attach to citizenship today. *Id.* at 123-28. Shachar develops a theory of "*jus nexi*," the principle that political membership should be based on, and distributed according to, center-of-life connections. *See id.* at 166-70; *see also* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 9-41, 116-40 (1985) (describing alternative conceptions of citizenship and arguing for a "consensualist" framework). My granular account of the history of *jus sanguinis* citizenship in American law does demonstrate, however, that we live in a world in which proxies for consent, affiliation, and allegiance—including, perhaps especially, family membership—regularly have been used to exclude individuals and groups from the American polity along lines that are illiberal in nature: ethno-racial identity, gender, and birth status. For other histories of American citizenship law that confirm this view, see GARDNER, *supra* note 12; MOTOMURA, *supra* note 5; NGAI, *supra* note 10; SMITH, *supra* note 5; and Cott, *Marriage*, *supra* note 12.

the future.[341] The appeals of organizations to Congress seeking recognition of Amerasian children as citizens are concrete reminders of this fact, and of current efforts to ameliorate the racial operation of derivative citizenship law in a particular context.[342]

There is also evidence to suggest that gender- and marriage-based derivative citizenship laws continue to function in a race-salient manner in the modern administration of those laws. The experience of Sigifredo Saldana Iracheta is instructive in this regard. Saldana Iracheta was born in 1964 in Tamaulipas, Mexico, to a Mexican mother and a Mexican American father, Sigifredo Saldana.[343] Over the course of two decades, from 1992 to 2012, the son entered and was deported from the United States several times. Immigration officials repeatedly rejected Saldana Iracheta's claim that he was an American citizen, concluding that Sigifredo Sr. could not have transmitted citizenship to him because Saldana Iracheta was illegitimate.[344] His father had acknowledged him on his birth certificate, and Saldana Iracheta was raised by both parents along with seven siblings. But according to immigration officials, these undisputed facts were insufficient to legitimate Saldana Iracheta under Mexican law.[345] They maintained that under the Mexican Constitution, Saldana Iracheta's parents were required to marry in order to legitimate him. As they had not done so, Saldana Iracheta was not an American citizen under the derivative citizenship statute.[346]

The problem with the immigration officials' position, however, was that one of the provisions of the Mexican Constitution they had relied on simply does not exist, and never did, and the other provision they relied on was inapposite.[347] The Fifth Circuit Court of Appeals found that Sigifredo Sr.'s

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341. For an important and detailed discussion of the intergenerational effects of *jus sanguinis* citizenship, see SHACHAR, *supra* note 340.

342. *See* sources cited *supra* note 322.

343. *See* Saldana Iracheta v. Holder, 730 F.3d 419, 421 (5th Cir. 2013).

344. *See* Appendix of Decisions for Review at 4, 9, 13-17, *Saldana Iracheta*, 730 F.3d 419 (No. 12-60087).

345. *See Saldana Iracheta,* 730 F.3d at 421, 424. Because Saldana Iracheta was over eighteen years old when the 1986 amendments came into effect, his citizenship status was determined under a pre-1986 version of the statute, which required him to prove that he was legitimated under the laws of his father's domicile. *See id.* at 423; 8 U.S.C. § 1409(a) (1964).

346. *Saldana Iracheta,* 730 F.3d at 423-24.

347. *Id.* In 2008, the Administrative Appeals Office of the U.S. Citizen and Immigration Services (AAO) denied Saldana Iracheta's citizenship claim based on a finding that Article 314 of the Mexican Constitution required his parents to marry in order to legitimate him. The AAO

acknowledgment had legitimated Saldana Irachetta under the relevant body of law, the law of the state of Tamaulipas, and that consequently Saldana Iracheta had been a U.S. citizen since birth. The court also found that Saldana Iracheta's case was not unusual: At least since 1978, immigration officials had relied on the very same non-existent and misinterpreted provisions of Mexican constitutional law in ruling on the derivative citizenship claims of children of Mexican American fathers.[348]

How are we to understand Saldana Iracheta's case and those of the unknown number of Mexican-born individuals who, like him, were denationalized and deported based on immigration officials' erroneous construction of Mexican law? One possibility, as the Department of Justice lawyers suggested in court, is that it was the result of "a mere 'typo.'"[349] That could certainly be true. Without ready access to immigration records and internal agency memoranda of the last three decades, we lack the sources that would enable a full assessment of this proposed explanation.[350] But it is undoubtedly true that immigration officials labor under excessive caseloads that easily lead to errors; those errors are then compounded once they are enshrined in precedential opinions.

At the same time, reading *Saldana Iracheta* against the history of *jus sanguinis* citizenship raises the possibility that ingrained interpretive practices, along with institutional and political pressure to restrict immigration across the U.S.-Mexican border today, may also help explain the government's multi-

cited *Matter of Reyes*, a 1978 BIA case, to substantiate this claim. *See* Appendix of Decisions for Review, *supra* note 344, at 4; Matter of Reyes, 16 I. & N. Dec. 436, 436 (B.I.A. 1978). The Fifth Circuit concluded—and the Department of Justice attorneys representing USCIS conceded—that there is not, and never has been, an Article 314 in the Mexican constitution. *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.). The Fifth Circuit found three other recent cases where agencies relied on this nonexistent provision, *Saldana Iracheta*, 730 F.3d at 423, but there are undoubtedly many more. In a separate misreading of the Mexican Constitution, a 2004 AAO decision cited Article 130 of the Mexican Constitution to show that Saldana Iracheta's father could legitimize him only by marrying his mother. Appendix of Decisions for Review, *supra* note 344, at 14. Article 130 declares that marriage is a "civil contract," thus distinguishing marriages recognized by the state from religious marriages; it does not mention birth status. C.P. art. 130.

348. *Saldana Iracheta*, 730 F.3d at 424 n.3.

349. *Id.*

350. For example, immigration files of individuals admitted to the United States after 1951 are not publicly available. *See Researching Individuals*, U.S. CITIZENSHIP & IMMIGR. SERV., http://www.uscis.gov/history-and-genealogy/research/individuals/researching-individuals (last visited Mar. 24, 2014).

decade reliance on a mistaken understanding of Mexican law governing birth status.[351] The point is not that Saldana Iracheta's case demonstrates that immigration officials reason about derivative citizenship in a race-selective manner. Rather, as the history of the administration of *jus sanguinis* citizenship law demonstrates, political pressure to rigorously enforce immigration laws with respect to a particular group or along a particular border can lead front-line administrators to employ more restrictive practices in assessing individual claims to derivative citizenship. Because derivative citizenship claims are based on family status relationships, the status in question—and in particular "legitimacy"—tends to be interpreted restrictively in such contexts. It follows that when the border being policed is marked by an ethno-racial divide—as is the case with the U.S.-Mexican border today[352]—restrictive interpretation of family status will function in a race-salient manner.[353]

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351. It is also notable that even after Department of Justice lawyers conceded that USCIS relied on a complete misapprehension of Mexican constitutional law, they continued to offer a very narrow construction of Tamaulipas's law of legitimacy—an interpretation that the court of appeals rejected. *See Saldana Iracheta*, 730 F.3d at 424-26. Up to the point of reversal by the court of appeals, Saldana Iracheta's case appears to have been a classic instance of "bureaucratic disentitlement," a phrase that is used in social welfare literature to describe "programmatic retrenchment" in which "obligations to [program] beneficiaries are reduced . . . through largely obscure 'bureaucratic' actions and inactions of public authorities." Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984).

352. *See* RACHEL ST. JOHN, LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER (2011).

353. Other legal scholars have observed a racial pattern in litigation over limitations placed on father-child citizenship transmission for children born out of wedlock. *See* Dowd, *supra* note 4, at 1290 n.123; Pillard & Aleinikoff, *supra* note 6, at 24 n.92. Obtaining data that would enable one to test the statistical salience of such observations is extremely difficult given the general limitations on access to late twentieth-century records of individual immigration and citizenship determinations. *See supra* note 350. But data produced by the Department of State in 1976, although dated, suggests that the more recent observations are representative of larger, predictable patterns. That year, Congress held hearings on a bill that would have liberalized gender-based limits on immigration preferences for the nonmarital children of naturalized American fathers, and for the noncitizen fathers of nonmarital citizen children. Department of State officials testifying in Congress against the bill presented data showing that the vast majority of requests for an immigration preference based on the relationship of a nonmarital child and father were handled by consular offices in the Caribbean and Latin America. *See Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 133, 146-47 (1976) [hereinafter *Review of Immigration Problems*] (statement of Hon. Leonard F. Walentynowicz, Adm'r, Bureau of Sec. & Consular Affairs, U.S. Dep't of State). The consular offices were: Haiti; Tijuana, Mexico; Jamaica; Trinidad; Honduras; Ecuador; Guyana; Dominican

"Birthright citizenship bills"—proposals to restrict *jus soli* birthright citizenship for children born within the United States—reveal that the complex entanglement of gender, birth status, and race also continues in political battles over immigration and citizenship. These proposals, calculated to exclude the children of undocumented noncitizen mothers from citizenship, have also taken shape in the course of contestation over the citizenship status of individuals of Hispanic descent, and would deny citizenship to American-born children of undocumented mothers, the so-called anchor babies. Although these bills are race neutral, congressional testimony of proponents of such measures makes clear that the primary problem, as they formulate it, is recognizing as citizens the children of undocumented mothers from south of the U.S.-Mexican border.[354]

The birthright citizenship bills are non-starters politically, but their structure nevertheless reveals the durability of gender-asymmetrical *jus sanguinis* citizenship principles as a resource for those who seek to restrict American citizenship to certain ethno-racial groups. Virtually all such bills would limit *jus soli* citizenship using *jus sanguinis* principles: for a U.S.-born individual to qualify for *jus soli* citizenship, at least one parent must be a citizen (or, in some proposals, a lawful permanent resident).[355] Some of these proposals would also use gender- and marriage-based limitations to regulate *jus soli* birthright citizenship, to the exclusion of nonmarital children of

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Republic; and El Salvador. Although it is unclear whether the data produced included requests for derivative citizenship (as well as immigration preferences), the pattern would presumably hold. Kerry Abrams and R. Kent Piacenti suggest another way that the administration of derivative citizenship can function in a race-salient manner. Derivative citizenship for nonmarital children of American fathers requires demonstration of a "blood relationship," a statutory requirement that does not apply to marital children. Because children from developing countries or countries where nonmarital births are more common also often have a more difficult time producing documentary evidence of their relationship with their American parent, they must produce DNA evidence. Marital children from countries where vital records are well maintained may not be the biological child of the citizen parent, but they would not be required to submit evidence of their blood relationship with their American parent. *See* Abrams & Piacenti, *supra* note 12 (manuscript at 49-53).

354. *See, e.g.*, *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing Before the Subcomm. on Immigration & Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 21-22, 24, 35, 91-94, 119-126 (1995) [hereinafter *Societal and Legal Issues*].

355. *See, e.g.*, H.R. 126, 111th Cong. (2009); H.R.J. Res. 46, 110th Cong. (2007); H.R. 6294, 109th Cong. (2006); H.R. 698, 109th Cong. (2005); H.R. 7, 105th Cong. (1997); H.R. 2162, 104th Cong. (1995); H.R. 1363, 104th Cong. (1995); H.R. 705, 104th Cong. (1995); H.R.J. Res. 357, 102d Cong. (1991); H.R. 3605, 102d Cong. (1991).

American fathers. For example, a bill proposed in 2005 would have denied citizenship to any nonmarital child born within the United States unless the *mother* was a citizen or lawful permanent resident. Thus, the nonmarital child of an American father and a noncitizen mother residing in the United States without official permission would be an alien.[356] For good measure, the bill explicitly noted that the parents "are not considered to be married if such marriage is only a common law marriage."[357] Never presume marriage.[358] A 2007 bill was slightly more generous to the nonmarital native-born child of an American father and an undocumented mother. Under that proposal, the child would be recognized as a citizen as long as the father satisfied several conditions drawn directly from the current derivative citizenship statute that applies to foreign-born children: proof of paternity by clear and convincing evidence, an agreement by the father to pay child support, and paternal acknowledgment of the child prior to the child's eighteenth birthday.[359] In short, several of the birthright citizenship bills would revive the maternal line principle—the nonmarital child's citizenship status follows that of the mother—in the law governing citizenship of children born in the United States.[360] As critics of such proposals have noted, when applied to the children

356. H.R. 698, 109th Cong. (2005).

357. *Id.* § 3(a).

358. *Cf. supra* Subsection II.B.2 (describing the presumption of marriage and legitimacy that generally characterized nineteenth- and early twentieth-century domestic relations law and the race-salient interpretation of the presumption by officials construing *jus sanguinis* citizenship law).

359. *Compare* H.R. 133, 110th Cong. (2007), *with* 8 U.S.C. § 1409 (2012). Possibly because of the similar structure of § 1409 and some of the birthright citizenship bills, one of the leading organizations in the movement to alter the interpretation of the Citizenship Clause through legislation, the Federation of American Immigration Reform (FAIR), intervened as an amicus in *Flores-Villar v. United States*, the most recent equal protection challenge to gender-based derivative citizenship laws heard by the Supreme Court. *See Birthright Citizenship*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/issue/birthright-citizenship (last visited Dec. 9, 2013) ("The logical first step for correcting the [birthright citizenship] problem is for Congress to adopt legislation clarifying the meaning of the 14th amendment."); Brief for Immigration Reform Law Institute as Amicus Curiae Supporting Respondents, Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (No. 09-5801). Given FAIR's support for limitation of the constitutional guaranty of *jus soli* birthright citizenship, and given that most of the birthright citizenship bills use parental gender as a basis for regulating transmission of citizenship to children born in the United States, it is unsurprising that FAIR would defend the constitutionality of the current gender-based derivative citizenship statute that governs the citizenship of *foreign-born* nonmarital children of American parents.

360. For example, under the 2005 bill, H.R 698, 109th Cong., a child born in the United States

of undocumented mothers the birthright citizenship bills would create a hereditary caste of non-citizens within the United States.[361] What has gone unnoted, however, is that some of those bills would do so using the very same family law principles that were long used to effect, or enhance the efficacy of, racially exclusionary nationality laws.[362]

By observing the formal and functional parallels between the role that birth status determinations play in the context of citizenship determinations, past and present, I do not mean to diminish the significant transformation that has taken place in American nationality law. For all of the inertia and overt hostility to both gender and racial equality in laws governing citizenship transmission and nationality law more generally, in the mid-twentieth century pressure to repeal inegalitarian nationality laws gradually yielded significant changes.[363] More recently, Congress prospectively altered the rules governing father-child citizenship transmission to foreign-born nonmarital children, simultaneously liberalizing and placing new requirements on recognition of the father-child relationship.[364] Thus, the lines drawn by previous administrators, judges, and

to an unmarried, undocumented non-citizen mother would not be an American citizen. In addition, a child born in the United States to an undocumented non-citizen mother married to a non-citizen also would not be an American citizen. Reading the plain language of the bill, it would seem that the only child born in the United States of an undocumented non-citizen mother who would be an American citizen is the child of an undocumented mother formally married to the child's American citizen father. Such a situation would be rare given that marriage to an American citizen would generally make the mother eligible for lawful permanent resident status.

361. *See* HANEY LÓPEZ, *supra* note 9, at 30; Gerald Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485, 491 (1987) (reviewing SCHUCK & SMITH, *supra* note 340); *see also* Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1367 (2009). Notably, Professor Peter Schuck, who has argued in favor of limitation of birthright citizenship, testified against the birthright citizenship bills for this reason. *See Societal and Legal Issues, supra* note 354, at 96 (statement of Professor Peter H. Schuck, Yale Law School).

362. Critics of the birthright citizenship bills have observed that the bills would rely on gender-discriminatory measures to effect the exclusion of certain children from citizenship. *See, e.g.*, HANEY LÓPEZ, *supra* note 9, at 30; *Societal and Legal Issues, supra* note 354, at 112 (statement of Prof. Gerald L. Neuman, Columbia University Law School).

363. *See supra* notes 217-218.

364. In 1986, Congress prospectively amended the parent-child derivative statute by providing for recognition of the nonmarital foreign-born child of an American father as a citizen even if the father did not marry the child's mother (still required for formal legitimation in many jurisdictions), but only if the father promised in writing to support the child until age eighteen, and, prior to the child's eighteenth birthday, (1) he formally legitimated the child; (2) he acknowledged paternity of the child in writing under oath; or (3) paternity was

lawmakers dividing marital from nonmarital children, citizens from noncitizens, have transformed over time, taking varied forms in different institutional settings and at different moments. Nevertheless, despite such changes, these examples suggest that the complex entanglement of gender-based *jus sanguinis* citizenship principles, concepts of birth status, and race continues to inform the practice and politics of citizenship law in America.

Although these practices episodically come into public view, as in the past, the racial operation of gender- and marriage-based derivative citizenship laws is often obscured. It is obscured, I suggest, because the normalizing discourses of family law have been reaffirmed and entrenched in the practice of American citizenship, eliding and neutralizing the gendered and racialist operation of *jus sanguinis* citizenship law. Saldana Iracheta was repeatedly found not to be a citizen because he was "illegitimate"—a basis that, when contested, courts and executive branch officials have found to be justified because the unwed father "normally" does not have a substantive relationship with his child.[365] The race-salient operation of restrictions on father-child citizenship transmission are also obscured because, as in the past, such laws are most often implemented by immigration officials whose work is significantly shielded from judicial and public scrutiny.[366] In the everyday, inconspicuous practices of immigration officials, the boundaries of the nation and the family are affirmed and reaffirmed (sometimes erroneously), sometimes redrawn, and sometimes contested.

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adjudicated. *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657. The 1986 amendments also added the requirement that the father of nonmarital foreign-born children must establish a blood relationship by clear and convincing evidence. *Id.*

365. *See, e.g.*, *Review of Immigration Problems*, *supra* note 353, at 134 (statement of Hon. Leonard F. Walentynowicz) ("[I]n the case of a child born out of wedlock, a family unity is normally maintained between the child and its natural mother but not necessarily between the child and its natural father."); *cf.* Nguyen v. INS, 533 U.S. 53, 65 (2001) (observing that mothers, but not fathers, necessarily have an "opportunity to bond" with their nonmarital children).

366. Although the question of whether the plenary power doctrine applies to derivative citizenship determinations is undecided, *see Nguyen,* 533 U.S. at 72-73, judicial deference to the political branches in matters relating to naturalization and immigration is well established, if contested. *See generally* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

B. "Biological Inevitability" and Constitutional Choices

Occasionally, however, the gender-based derivative citizenship laws become the focus of legal contests in the highest profile adjudicative forum in the American system: the Supreme Court. Over the last fifteen years, the Court has heard three challenges to those laws, and in each of those cases the citizenship claim of a foreign-born nonmarital child of an American father was denied.[367] The juridical records produced in these cases mention the petitioners' country of birth only in passing, and the histories of America's exclusionary immigration policies toward their birth countries—the Philippines, Vietnam, and Mexico[368]—are absent. Instead, framed by the concerns highlighted in the Court's gender equal protection jurisprudence, debates among the Justices, lower court judges, and attorneys have focused in significant part on whether the statutes reflect and reinforce stereotypical assumptions about men's and women's roles as parents, or if they reflect "real differences" between the sexes.[369] This is understandable, as American equal

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367. In *Miller v. Albright* and *Nguyen v. INS*, nonmarital foreign-born children of American fathers challenged the father-only legitimation and proof of paternity requirements of the current law, while in *Flores-Villar v. United States*, the petitioner challenged the disparate parental residency requirements that apply to fathers and to mothers of nonmarital foreign-born children. *See* Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (per curiam), *aff'g by an equally divided court* 536 F.3d 990 (9th Cir. 2008); Nguyen v. INS, 533 U.S. 53 (2001); Miller v. Albright, 523 U.S. 420 (1998). *Compare* 8 U.S.C. §§ 1409(a), 1401(a)(7) (1970), *with id.* § 1409(c). Similar cases have been brought in lower federal courts. *See, e.g.*, Pierre v. Holder, 738 F.3d 39 (2d Cir. 2013) (rejecting gender and illegitimacy equal protection challenges to 8 U.S.C. § 1432(a)(3)); Johnson v. Whitehead, 647 F.3d 120, 127 (4th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 1005 (2012); *see also* Lake v. Reno, 226 F.3d 141, 148 (2d Cir. 2000) (holding that § 1409(a) violates citizen fathers' rights under the Equal Protection Clause), *vacated sub nom.* Ashcroft v. Lake, 533 U.S. 913 (2001); United States v. Ahumada-Aguilar, 189 F.3d 1121, 1122 (9th Cir. 1999) (holding that § 1409(a)(3) and (a)(4) violate a father's equal protection rights), *vacated*, 533 U.S. 913 (2001); O'Donovan-Conlin v. U.S. Dep't of State, 255 F. Supp. 2d 1075, 1079-81 (N.D. Cal. 2003) (holding, in light of *Nguyen*, that § 1409(a) does not violate the Equal Protection Clause); Lamas-Macias v. INS, No. EP-00-CA-10-DB, 2000 WL 33348221, at *2 (W.D. Tex. Nov. 9, 2000) (discussing petitioner's claim that the citizenship conferral provisions of §§ 1401 and 1409 unconstitutionally discriminate on the basis of gender).

368. RICK BALDOZ, THE THIRD ASIATIC INVASION: MIGRATION AND EMPIRE IN FILIPINO AMERICA, 1898-1946 (2011); HING, *supra* note 70, at 121-38; ST. JOHN, *supra* note 352.

369. *See, e.g.*, sources cited *supra* note 367. Note, however, that several of the lower court challenges have asserted claims based on illegitimacy discrimination. Thus far, however, those claims have not received the same level of attention from legal scholars and the Supreme Court has not articulated a view on an equal protection challenge based on

protection jurisprudence focuses on formal "suspect classifications" such as race, gender, and illegitimacy, and treats such classifications as discrete sources of injury.[370] But a brief examination of the arguments that have been developed by jurists and government lawyers in defense of gender- and marriage-based regulation of derivative citizenship—interventions that have largely rejected the relevance of historical accounts of *jus sanguinis* citizenship, and yet are now an important part of that history—suggests that the analytic frame offered by modern gender equality jurisprudence can generate naturalizing accounts of derivative citizenship law that obscure illiberal practices of citizenship, both past and present.[371]

The Supreme Court's majority opinion in *Nguyen v. INS*—the only one of the three cases that has resulted in a majority opinion—demonstrates this point. A core assertion in *Nguyen* is that differential regulation of citizen mothers and fathers in the current parent-child derivative citizenship statute passes constitutional muster because of "a biological difference between

illegitimacy. *See, e.g.*, *Pierre*, 738 F.3d 39; *Johnson*, 647 F.3d 120.

370. The category-based mode of reasoning about constitutional equality norms—and the practice of understanding race and sex discrimination as analogical but not intersectional—is not essential to how one might interpret the phrase "equal protection of the laws," nor is that category-based interpretation transhistorical. Rather, it is a product of historical contestation, politics, and legal process. For a rich account of the development of analogies between race and sex discrimination, and the abandonment of what today would be called intersectional theories of both constitutional and statutory anti-discrimination law, see SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS MOVEMENT (2011). For classic treatments of intersectionality, both theoretical and historiographical, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Davis, *supra* note 59; and Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855-1914*, 13 LAW & HIST. REV. 261 (1995).

371. The point is not, of course, that gender equal protection jurisprudence necessarily generates such accounts. For example, consider Justice O'Connor's dissenting assessment of § 1409(a)(4) in *Nguyen* as "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting); *see also Miller*, 523 U.S. at 462 (Ginsburg, J., dissenting); Collins, *Fathers' Rights*, *supra* note 4, at 1704-05. Rather, faced with such historically based characterizations, a jurist writing an opinion upholding the law as constitutional will logically seek to portray the gender-based distinction involved as something other than a vestige of antiquated stereotypes. *See, e.g.*, *Miller*, 523 U.S. at 422 (plurality opinion) (concluding that the current gender-asymmetrical regulation of *jus sanguinis* citizenship cannot "be fairly characterized as an accidental byproduct of a traditional way of thinking about members of either sex").

parents."[372] For mothers, the Court reasons, "the opportunity for a meaningful relationship between citizen parent and child inheres *in the very event of birth*, an event so often critical to our constitutional and statutory understandings of citizenship," while that "opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father."[373] The contention that gender-asymmetrical citizenship laws mark biological difference draws on a significant, if contested, line of jurisprudence that has situated "real" difference as a permissible basis for gender-based regulation.[374] However, when the Court reasons that maternal preferences and paternal restrictions embedded in derivative citizenship law are a "biological[ly] inevitab[le]" consequence of differences between men's and women's procreative roles,[375] it portrays the regulatory scheme as fixed and transhistorical.

The historical sources suggest, to the contrary, that gender-based regulation of *jus sanguinis* citizenship is not fixed or inevitable, but is the product of choices—choices made by officials acting under historically and institutionally contingent pressures and imperatives. Two examples, of the many that could be drawn from the historical sources, illustrate this point. First, the protracted effort of American women to secure the right to transmit citizenship to their children—a right denied married women entirely until 1934—demonstrates that "the event of birth" has not served as an inevitable basis for citizenship transmission in American law. During the century and a half that married women were unable to transmit citizenship to their foreign-born children, the birthing process was decidedly not a salient event in the regulation of *jus sanguinis* citizenship. Rather, it was understood that the

372. *See Nguyen*, 533 U.S. at 64-65.

373. *Id.* at 65 (emphasis added).

374. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 261 (1983) (reasoning that, for unwed fathers, "the mere existence of a biological link does not merit equivalent constitutional protection" giving the father the right to contest an adoption); Michael M. v. Super. Ct., 450 U.S. 464, 471 (1981) (plurality opinion) (upholding a statutory rape law that held men over eighteen criminally liable for engaging in sexual intercourse with females under eighteen on the ground that the "physical, emotional, and psychological consequences" of teenage pregnancies lie with women, rather than men); Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974) (upholding an exclusion of pregnancy-related disabilities from a state disability insurance program on the ground that "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics" and that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis").

375. *See Nguyen*, 533 U.S. at 65.

husband-father was the head of the household, that his citizenship would determine that of his marital children, and that married women (as dependents themselves) had no such power.[376] In order to change this law, women's organizations engaged in a sustained multi-decade campaign in order to secure the right of married mothers to transmit citizenship to their foreign-born children. In the course of that campaign, they had to overcome fierce resistance that recognition of women's equal citizenship would seriously compromise the efficacy of the racial exclusion laws and national origins quotas that characterized American nationality law at the time.[377] But they eventually prevailed. They prevailed not because legislators came to understand the "event of birth" as having particular importance in the law of citizenship—nor because a majority of legislators abandoned their commitment to exclusion laws and quotas[378]—but because women's organizations convinced legislators of the merits of recognizing women's equal citizenship rights, or at least convinced them that it was politically expedient to do so.[379]

The historical sources also do not support the view that generous recognition of mother-child citizenship transmission for children born out of wedlock was animated by administrators' or lawmakers' belief in a connection between "the event of birth" and citizenship. Rather, the administrators who developed the rule, later adopted by Congress, largely reasoned in the vein of pragmatic maternalism, acknowledging that, "as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the illegitimate] child."[380] Sociolegal norms concerning the roles and responsibilities of mothers for children born outside marriage, not theories of "biological inevitability," provide the best explanation for the recognition of

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376. *See supra* Section II.A.

377. *See supra* Subsection III.A.1.

378. *See supra* notes 241-242 and accompanying text.

379. *See* BREDBENNER, *supra* note 12, at 195-242.

380. Letter from John J. Scanlan to Ruth Shipley, *supra* note 246, at 6. By observing that early twentieth-century administrators did not articulate the view that the mother's procreative role was germane to the question of *jus sanguinis* citizenship, I do not mean to imply that early twentieth-century policymakers did not sometimes reason in terms that, today, we might understand as deriving from physiologically-based understandings of sex difference. However, the historical sources that I reviewed do not support the view that officials administering the nationality laws reasoned in such terms. Moreover, such physiologically-based reasoning would have been strained given that the law as written prior to 1934, and as applied to married mothers, did not reflect that view.

American mothers' ability to transmit citizenship to their nonmarital foreign-born children.

A second example drawn from the historical record speaks to the other half of the *Nguyen* Court's assertion: That in the case of the unwed father, the opportunity to develop ties with his child "does not result from the event of birth, as a matter of biological inevitability."[381] This, the Court urges, was a special concern in the case of servicemen stationed abroad, thus demonstrating "the critical importance of the Government's interest in ensuring some opportunity for a tie between citizen father and foreign-born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth."[382] What the Court's formulation elides—and what the historical record illuminates—is that during key moments in the development of *jus sanguinis* citizenship law, government officials facilitated some men's "opportunity to bond" with their nonmarital foreign-born children, while thwarting others' opportunity to do the same. The disparate treatment of nonwhite children of servicemen renders the Court's formulation especially troubling. Congress and the military marshaled extraordinary political and material resources in order to bring the non-Asian brides and babies of World War II soldiers home to the United States. Meanwhile, military policies that prohibited and limited interracial marriage between U.S. soldiers stationed in Asia and local women frustrated the efforts of those servicemen who sought recognition of, and American citizenship for, their children.[383] This sorry history calls into question the suggestion that a father's lack of an opportunity to bond with his child at birth can reasonably be understood as a "biological inevitability." Instead, it reveals the limitation of citizenship transmission between the American father and his nonmarital foreign-born child as the product of choices of officials charged with enforcing and developing the rules that governed membership in the polity—rules that were constructed and construed in ways that tended to exclude nonwhite children from citizenship.[384]

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

382. *Id.* at 64.

383. *See supra* Section III.B.

384. This is not a case where the notion of recognizing citizenship transmission between a father and his nonmarital child was completely unimaginable by contemporaries. As I have shown elsewhere, in the 1930s, women's organizations pressed for recognition of father-child citizenship transmission for children born out of wedlock. *See* Collins, *Fathers' Rights*, *supra* note 4, at 1695-97. And as early as the 1880s, at least one Department of State official reasoned that "the misfortune of an illegitimate birth cannot deprive a man of his

These examples also demonstrate a crucial point that, while obvious from the history provided here, is easily overlooked if one focuses exclusively on how *jus sanguinis* citizenship is regulated according to the gender and marital status of the citizen parent without attending to the fact that the laws were designed to determine the *child's* citizenship. The officials who implemented and developed American *jus sanguinis* citizenship law were not agnostic as to the child's birth status, and they also were not agnostic as to the child's race. Instead, at key junctures, judges, administrators, and legislators enlisted gender- and marriage-based citizenship laws in an effort to limit recognition of nonwhite children as citizens: The "illegitimate half-castes born . . . of American fathers and native women"; the children of Chinese American fathers born, it was feared, on polygamous "stock-farms"; the children of the dust. In so doing, officials charged with policing the bounds of the polity helped create racial sociolegal hierarchies using birth status designations that had been used for similar purposes in American domestic law.[385] In the context of nationality law, these designations were formulated and enforced through the blunt instrument of exclusion from membership in the polity.

My purpose in offering these observations is not to provide an ultimate resolution to questions concerning the constitutionality of current gender-based citizenship laws—questions that would take different forms in different cases. Nor do I propose an alternative system of citizenship designation. Rather, my purpose is to urge that a historical account attentive to the origins and operation of the *jus sanguinis* statutes calls for open acknowledgment of the ideological and political commitments that have informed the development and continued vitality of the gendered construction of the parent-child relationship in American nationality law.[386] However we might parse the history of gender-based and racialized regulation of *jus sanguinis* citizenship

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nationality. . . . He is a part of society." Letter from John Russell Young to Charles Seymour, *supra* note 43.

385. For discussions of the race-salient use of illegitimacy laws in American domestic relations law, see sources cited *supra* note 13.

386. Such a candid evaluation of the facts may not lead everyone to the same conclusion. For example, Ninth Circuit Judge Andrew Kleinfeld was forthright in his assessment that Congress was well within its constitutional authority to pass a statute that would minimize the burdens created by "paternity and citizenship claims" asserted by "the women the [U.S.] soldiers left behind and their children." United States v. Ahumada-Aguilar, 189 F.3d 1121, 1129 (9th Cir. 1999) (Kleinfeld, J., dissenting). "This may not be pretty," he noted, "but it is a rational basis for a sex distinction." *Id.* Linda Kerber provides a careful and contextualized discussion of Judge Kleinfeld's reasoning in Kerber, *The Stateless as the Citizen's Other*, *supra* note 6, at 6.

law, by portraying the gender-asymmetrical regime we have in place today as an "inevitable" consequence of physiological differences between mothers and fathers, the analysis offered by modern jurists and advocates defending those laws—and now memorialized in the United States Reports—risks eclipsing the different ways those laws have been, and may continue to be, shaped and informed by premises that are no longer accepted as reasonable and legal bases for citizenship determinations.[387] Those commitments have been animated not only by gender-traditional modes of reasoning about parental roles, but also by racially nativist understandings of citizenship.

CONCLUSION

It is possible that the Supreme Court will revisit the questions surrounding the constitutionality of gender-asymmetrical derivative citizenship laws in the future. It is even possible that the Court will constrain the choices of modern legislators and administrators by finding certain aspects of our current gender- and marriage-based nationality laws unconstitutional.[388] But even if it does so—and in the more probable event that it does not—officials in the political branches will continue to grapple with how to regulate derivative citizenship and immigration preferences that are premised on the parent-child relationship.[389] Legislators will be confronted with proposals to grant citizenship to Amerasian children of American soldiers and to expand the geographical reach of immigration preferences currently given to some Amerasian children.[390] In their everyday work, administrators will exercise

387. *Cf.* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264 (1992) (arguing that "reason[ing] about reproductive regulation in physiological paradigms . . . obscures the possibility that such regulation may be animated by constitutionally illicit judgments about women").

388. Although *Nguyen* seemed to provide the definitive word on the constitutionality of gender-based regulation of derivative citizenship, the Justices tied in their most recent effort to resolve the constitutionality of modern gender-based citizenship laws, *Flores-Villar v. United States*. In that case, the Court considered a challenge to the disparate parental residency requirements that apply to fathers and mothers of foreign-born nonmarital children. *See* Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (per curiam), *aff'g by an equally divided court* 536 F.3d 990 (9th Cir. 2008).

389. Nina Pillard and Alexander Aleinikoff argue that Congress has a special responsibility to ensure that derivative citizenship laws conform to constitutional equality principles precisely because the plenary power doctrine limits judicial oversight. *See* Pillard & Aleinikoff, *supra* note 6.

390. *See* sources cited *supra* note 322.

discretion in interpreting parent-child derivative citizenship statutes and other laws that recognize the parent-child relationship for immigration and naturalization preferences. Federal judges will sit in review of those determinations and will be confronted with a host of statutes that make birth status a factor in determining an individual's membership in the polity. Government attorneys will be called on to defend those laws against challenges alleging interpretive errors and constitutional violations. Whatever the institutional context, and whatever the particular issue, the history provided here suggests that officials charged with these tasks would do well to reconsider the commonplace—but oversimplified—understanding that derivative citizenship laws operate to ensure "family unity." Such laws, and the principles and processes used to implement them, do not simply incorporate pre-existing notions of "family" in drawing lines between citizen and noncitizen. Rather, officials borrow, adapt, and reformulate family law principles to determine what relationships count for membership in the polity. In that process, officials' conceptions of what counts as a family have been shaped by gender-traditional conceptions of the parent-child relationship that, in turn, have been—and may continue to be—used to shape the ethno-racial composition of the polity. Like their predecessors, modern jurists, administrators, and judges are engaged in an ongoing nation-building project of the most fundamental sort. How they enlist the family in the furtherance of that project need not be determined by the choices of their predecessors.