Administrative Constitutionalism in Immigration Law

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Kristin A. Collins, Bureaucracy as the Border: Administrative Law and the Citizen Family, 66 **Duke L.J.** 1727 (2017).

Kristin A. Collins's recent article ties together "two foundational 'borders of belonging' in American law: the rules that determine family membership and the rules that determine political membership." (P. 1730.) More specifically, Collins, in a case study of the evolution of derivative citizenship, demonstrates how immigration administrators fashioned rules to guide their own decisionmaking in this area and embedded those rules in statutes and legal precedents.

Collins pushes back against the all too common idea that immigration administration is more lawless and discretionary than regulation at the economic regulatory agencies that are the usual focus of scholarship on the administrative state. Instead, Collins observes immigration officials engaged in the same kind of "administrative constitutionalism" practiced by bureaucrats elsewhere.

Gillian Metzger has defined administrative constitutionalism as not only "the application of established constitutional requirements by administrative agencies" but also "the elaboration of new constitutional understandings by administrative actors, as well as the construction (or 'constitution') of the administrative state through structural and substantive measures."[1] The rich and growing scholarship on the topic (by scholars including Sophia Z. Lee, Jeremy K. Kessler, and William N. Eskridge Jr. and John Ferejohn) examines such lawmaking by administrators at agencies including the NLRB, the War Department, and the EEOC. Like these "mezzo-level" bureaucrats (to use Daniel Carpenter's phrase), Collins argues, immigration officials in the Labor Department, State Department, and Justice Department "played an active role in crafting important substantive and procedural legal principles that reflected their understanding of foundational legal and constitutional norms." (P. 1732.)

Relying on archival sources and case law, Collins demonstrates how immigration officials in the early twentieth century developed rules to govern how children born outside the United States could derive citizenship from their U.S. citizen parents. Her clear and engaging narrative makes clear both the key role of bureaucrats in lawmaking throughout the twentieth century and the way bureaucrats' racialized and gendered concerns about immigration and citizenship in the early twentieth century became embedded into federal law for decades to come.

From the early republic on, federal law provided that children born abroad became U.S. citizens if their parents were U.S. citizens; similarly, the children of naturalizing parents became naturalized themselves. When Congress in 1855 specified that this applied only to children of U.S. citizen fathers, judges and administrators understood the law to mean only married fathers. Harsh common law rules treated nonmarital children as fatherless, and "in the nineteenth century, judicial and administrative precedents had incorporated that rule into American nationality law, thus excluding from citizenship the foreign-born nonmarital children of American fathers." (P. 1737.)

In the early twentieth century, however, the State Department began acknowledging the citizenship of children whose parents later married. In adopting a policy based on fathers' "legitimating" their children, however, officials had to determine what it meant to "legitimate" a child. This was not, Collins

emphasizes, “a lawless or purely discretionary endeavor.” (P. 1743.) Instead, in developing internal rules to govern their own decisionmaking, officials looked to family law legitimation rules, which varied by state (these rules included subsequent marriage, formal acknowledgement, and/or judicial order). At the same time, officials drew on federal immigration policies and their own institutional priorities grounded in racial exclusion. Immigration officials thus were guided by a rule (approved by the Attorney General) that approved derivative citizenship in cases where a father had legitimated his child under the appropriate state’s law, but adopted a “more restrictive interpretation of the derivative citizenship statute” when the fathers were American citizens of Chinese heritage. (P. 1739.) In a more inclusive act of administrative lawmaking, officials chose to interpret statutory language regarding American fathers to include American mothers, allowing the latter to pass on citizenship to their foreign-born children. These administrator-drafted rules were subsequently adopted by Congress in the Nationality Act of 1940 and the Immigration and Nationality Act of 1952 (which relied on local law to define “legitimation”), demonstrating administrators’ role in lawmaking outside as well as inside the agency.

As family law evolved, however, administrators clung to a narrower idea of what constituted “legitimation” than many state statutes did. Collins draws on arguments before the Board of Immigration Appeals to demonstrate that administrators “crafted an interpretive rule that in most jurisdictions required the father to marry the child’s mother.” (P. 1753.) These guidelines proved durable even as family law itself underwent radical changes in the 1960s and 1970s. States made it easier for fathers to legitimate their children, and courts drew on the Equal Protection and Due Process clauses to destabilize the marital and sexist presumptions in domestic family law. State family law and federal citizenship law thus increasingly diverged.

Immigration officials, supported by federal courts, continued to embrace a marriage-centric definition of “legitimation,” and courts were similarly loath to eliminate provisions in citizenship law that burdened unmarried fathers but not mothers. The Supreme Court, in one such challenge, chose to defer to the federal government’s plenary power over immigration rather than bringing federal law into conformity with family law trends. And while the Immigration Reform and Control Act of 1986 eliminated formal legitimation requirements for some areas of immigration law, it did not apply to derivative citizenship. The law moved away from a marital model of legitimation but contained different requirements for unmarried mothers and fathers seeking to award citizenship to their children.

Collins was writing on the eve of the Supreme Court’s decision in *Sessions v. Morales-Santana* (2017), in which Morales-Santana challenged the different residency requirements for unmarried mothers and fathers contained in federal law regarding derivative citizenship. In June, the Supreme Court struck down the provisions (which Justice Ruth Bader Ginsburg, writing for the Court, called “stunningly anachronistic”[2]). Collins (whose earlier work on derivative citizenship was cited by Justice Ginsburg in the opinion) suggests in conclusion that this case may not be the end of the story. It might instead be another opportunity for administrative lawmaking both in and out of the administrative state.

1. Gillian Metzger, *Administrative Constitutionalism*, 91 **Tex. L. Rev.** 1897, 1900 (2013).
2. *Morales-Santana* at p. 14.

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