

Citizenship by Descent

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Kristin A. Collins, [Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation](#), 123 **Yale L.J.** 2134 (2014).

There are three paths to citizenship in the United States: birth, naturalization, and descent. In recent political debates, birthright citizenship gets all the attention. Republican lawmakers perennially propose amendments that would make the children of undocumented immigrants ineligible for citizenship, relying on an interpretation of the Fourteenth Amendment that assumes such immigrants are not “subject to the jurisdiction thereof” and are therefore not within the protections of *jus soli*. But what of citizenship by descent, also known as *jus sanguinis* or derivative citizenship? This is a powerful mode of acquiring citizenship: it allows U.S. citizen parents living abroad to pass their citizenship status to their children who are not born on U.S. soil. This is literally citizenship “by blood.” This method of transmission is not provided for in the Constitution but has been recognized in the U.S. by statute since 1790. The current *jus sanguinis* statute does not receive much press or scholarly attention, which is surprising given that it is clearly discriminatory when it comes to children born out of wedlock to a U.S. citizen parent and a foreign parent. If the U.S. citizen is the mother, transmission of U.S. citizenship is virtually automatic. If the U.S. citizen is the father, transmission is not automatic: the father must demonstrate a range of prerequisites, including blood tests and proof of legitimation, among other requirements. Fathers and their illegitimate offspring have challenged this unequal treatment, but the Supreme Court has thus far failed to overturn the provision. In one seminal case, [Nguyen v. INS \(2001\)](#), the Immigration & Naturalization Service defended the provision by arguing that the differential treatment of mothers and fathers was necessary for “administrative convenience.” They argued, in so many words, that the law is justified in requiring fathers to provide more proof of the relationship to their illegitimate child since it is harder to tell if the father is *really* the father, even if his name is on the birth certificate.

In her article “Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation,” [Kristin Collins](#) looks in depth at the origins, interpretations, and practices of derivative citizenship over the course of the nineteenth and twentieth centuries. In doing so, she not only systematically destroys the simplistic argument provided by the INS in the *Nguyen* case, but also reveals the deeply racialized nature of *jus sanguinis*. She demonstrates that throughout much of our history, derivative citizenship was moored in intertwined visions of women’s subordinate place in the family and of nonwhite persons’ subordinate place in the polity. Courts, agencies, administrators and consular officials across decades found ways to interpret and apply the law of derivative citizenship to favor white children over nonwhite children. Sometimes these efforts were explicit but other times they were hidden. It takes a skilled and capable historian like Collins to be able to dig beneath the surface of decades of government documents and court records and put the pieces of the *jus sanguinis* puzzle together.

Collins starts with an analysis of a key but underappreciated case in the law of citizenship: *Guyer v. Smith* (1864). *Guyer* was a property case, in which the Maryland Court of Appeals decided whether two brothers born on an island in the French West Indies could inherit their American father’s property. The brothers could not prove that their American father had been married to their West Indian mother. The *jus sanguinis* statute then in effect was silent as to the role of marriage: it said merely that fathers could transmit their citizenship to children born abroad. (Mothers, at this time, could not transmit their citizenship at all). The *Guyer* court interposed a marriage requirement into the *jus sanguinis* statute. As Collins explains, the court used the domestic relations idea of bastardy: mothers were responsible for illegitimate children, not fathers, and therefore fathers could not, *even under this statute that said nothing about legitimacy or marriage*, transmit citizenship to their illegitimate children. Because the brothers were aliens, not citizens, they lost their claim to the property under the state’s alien land laws.

References to the marriage requirement of *Guyer* appeared repeatedly in the ensuing decades, in other cases, administrative memos, attorney general reports, and other sources. The historical insight that Collins brings to the *Guyer* case is key: it was decided in the context of race, and its legacy has been one of racialized application. *Guyer* itself involved the sons of a white man and a woman “partly of African blood,” something the opposing counsel did not hesitate to point out as part of the reason the state should not allow the brothers to hold property. Importantly to Collin’s story, the resulting application of *Guyer* in decisions about citizenship was also racially asymmetrical: government authorities used the marriage requirement created by *Guyer* to strip children of nonwhite parents of their citizenship rights. This happened in large part because of the way authorities perceived of marriages between persons of different races. As Collins writes, “The marriage requirement was racially exclusionary because marriage was not a race-neutral institution.” (P. 2183.) Authorities repeatedly refused to recognize the relationships of white American fathers and nonwhite foreign mothers as legitimate, even if their marriages conformed to the marriage laws of the jurisdiction in which they were conducted. Because of the *Guyer* rule, any children born out of this so-called nonmarital relationship were ineligible for *jus sanguinis* citizenship.

The marriage requirement took on even greater significance in the era of Chinese exclusion. It became a convenient method of avoiding granting citizenship to the foreign-born children of Chinese American immigrant fathers. Yet, remarkably, when it came to marriages of American men to European women, the various agencies and government officials administering *jus sanguinis* adopted an exception to the *Guyer* rule, holding that a father could legitimate a child after the fact of his or her birth, even if the parents remained unmarried, and that this would enable the transmission of the father’s citizenship. When it came to the children of American fathers and nonwhite foreign women or the children born abroad of Chinese American fathers, this “legitimation exception” to the *Guyer* rule was rarely available.

Jus sanguinis took on new significance in the World War II era and in subsequent conflicts, as American soldiers stationed abroad formed relationships and had children with foreign women. In the World War II era, military authorities and Congress went out of their way to welcome European “war brides” and their children. In contrast, military authorities put up significant roadblocks to the marriages of American GIs to Asian women, making it impossible therefore to transmit their citizenship to the children of those relationships. As Collins writes, “Congress and the military marshaled extraordinary political and material resources in order to bring the non-Asian brides and babies of WWII 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.” (P. 2232.) Countless numbers of American GIs fathered children abroad and were unable to pass on citizenship due to official military policies that disfavored relationships with nonwhite foreign women.

Collins artfully traces two types of asymmetry in the application of *jus sanguinis*: not just the racial logic that prioritized claims of white children but also the domestic relations logic that placed mothers as the sole caretakers for illegitimate children. Up until 1934, only American citizen men could transmit citizenship *jus sanguinis* to their children born abroad to a foreign parent. After 1934, Congress provided that American citizen mothers could do so as well. The Nationality Act of 1940 codified the *Guyer* rule and perpetuated gender asymmetry: mothers could transmit their citizenship to nonmarital children born abroad as long as they had, at some point in their lives, had a residence in the U.S.; fathers, on the other hand, could not transmit citizenship to non-marital children unless they had been “legitimated” by the father. Racial nativism continued to influence the application of this notion of “legitimation” after 1940, as administrators, military personnel and courts used racial prohibitions in state marriage laws and practices of non-recognition to bar legitimation attempts by fathers of nonwhite children.

Through extensive archival research, Collins successfully traces the interplay of notions of gender, race, and nationality over a century and a half of American history. She shows how administrators, judges, and other officials crafted policies that were facially race neutral yet systematically benefitted Europeans and disfavored all others. Collins demonstrates that the current law’s differential treatment of mothers and fathers is rooted in much more than mere “administrative convenience,” as the INS would have us believe. Instead, it is embedded in these historical practices

of gender inequality and racial nativism. We should not ignore this historical legacy when thinking about the ways our derivative citizenship laws should look in the future.

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