THE CONSEQUENCES OF ENDING BIRTHRIGHT CITIZENSHIP

JACOB HAMBURGER*

ABSTRACT

On the first day of his second term in office, President Donald Trump issued an executive order purporting to deny citizenship to children born in the United States to undocumented parents. After numerous federal district courts enjoined implementation of the order, the Supreme Court's decision in Trump v. CASA, Inc. *paved the way for it to go into effect. Applying this order would mark a major departure from established law—overturning longstanding interpretations of the Fourteenth Amendment guaranteeing citizenship to virtually everyone born on U.S. soil. The implications for immigrants and their children would be severe.*

This Article argues that the consequences of ending universal birthright citizenship would nonetheless sweep even further than is commonly understood. In the thirteen decades since the Supreme Court decided United States v. Wong Kim Ark*, federal, state, and local governments have built a complex administrative structure on the assumption that birth in the United States is a guarantee of citizenship. In a federal system lacking a centralized registry of births and individual identifying information, a birth certificate issued by a state or local government provides sufficient proof of citizenship for any American seeking federal documents or benefits. Universal birthright citizenship ensures that the vast majority of Americans can prove their status with nothing more than a birth certificate.*

Ending universal birthright citizenship would dramatically increase the administrative burdens on all Americans seeking to claim the rights of citizenship. Securing proof of one's parents' status may prove extremely difficult for many individuals, especially as state and local governments adopt a sprawling patchwork of new rules and procedures to comply with the administration's executive order. As legal challenges to the birthright citizenship order make their way through the federal courts, it is crucial to grasp the full scope of the order's consequences. Far more than an act of immigration policy, it represents a fundamental shift in the administration of citizenship for all Americans.

* Assistant Professor of Law, Marquette Law School. Thanks to Theresa Cardinal Brown, Mike Dorf, David Froomkin, Amanda Frost, Charles Kamasaki, Sarah Rozenblum, and Steve Yale-Loehr for their invaluable feedback. Thanks as well to the editors at the *Washington University Law Review* for their helpful suggestions and attention to detail. All errors are mine.

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INTRODUCTION

On Donald Trump's first day in office after his reelection as President, he issued an executive order aimed at denying birthright citizenship to the children of undocumented immigrants and temporary visa holders.[1] Trump had promised to take similar action during his first term, and calls to revisit the Constitution's grant of universal birthright citizenship[2] have been a staple of immigration restrictionist politics going back decades.[3] Trump's

1. *See* Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) ("Protecting the Meaning and Value of American Citizenship") [hereinafter "Birthright Citizenship Order"]; *see also Agenda 47: Day One Executive Order Ending Citizenship for Children of Illegals and Outlawing Birth Tourism*, TRUMP VANCE 2025 (May 30, 2023), https://www.donaldjtrump.com/agenda47/agenda47-day-one-executive-order-ending-citizenship-for-children-of-illegals-and-outlawing-birth-tourism [https://perma.cc/9AGP-VCRJ] [hereinafter *Agenda47*] (outlining the Trump campaign's earlier plan of action).

2. In describing the interpretation of the Fourteenth Amendment's Citizenship Clause that grants citizenship to all children born on U.S. soil, subject to only a few minor or obsolete exceptions, I use the term "universal birthright citizenship," or simply "birthright citizenship."

3. *See* Paul LeBlanc, *Trump Again Says He's Looking 'Seriously' at Birthright Citizenship Despite 14th Amendment*, CNN (Aug. 22, 2019, 5:14 AM), https://www.cnn.com/2019/08/21/politics/trump-birthright-citizenship-14th-amendment/index.html [https://perma.cc/NYW4-2388]. On federal lawmakers' efforts to revise birthright citizenship since the 1990s, see, for example, Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* Wong Kim Ark*,* 37 CARDOZO L. REV. 1185, 1187–88 (2016) (observing that nearly every candidate seeking the Republican presidential nomination in the summer of 2015 joined Trump in calling for the end of birthright citizenship); Birthright Citizenship Act of 2011, H.R. 130, 112th Cong. (2011) (proposed legislation limiting birthright citizenship to children

order is nonetheless the first concrete step toward this goal in modern history, instructing federal agencies not to issue or recognize documentary proof of citizenship to children born to parents without legal status.[4]

Since the Supreme Court's 1898 decision in *United States v. Wong Kim Ark*,[5] the judicial and scholarly consensus has been that the Fourteenth Amendment's grant of citizenship to "all persons born . . . in the United States and subject to the jurisdiction thereof" applies regardless of the citizenship or status of one's parents.[6] Current immigration statutes incorporate identical language.[7] Opponents of universal birthright citizenship assert that the phrase "subject to the jurisdiction thereof" creates an exception for the children of immigrants present without authorization—echoing the views expressed in the federal government's arguments and Justice Fuller's dissent in *Wong Kim Ark*.[8] In this vein, the Trump administration contends that parents who lack lawful presence or are in the United States on temporary visas are not subject to U.S. jurisdiction, and therefore their children cannot acquire birthright citizenship.[9]

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of U.S. citizens, permanent residents, and military service members); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUND. (Mar. 30, 2006), https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship [https://perma.cc/W99N-2C4C] (legal analysis by a future Trump advisor rejecting universal birthright citizenship); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 165 (1996) (describing former California Governor Pete Wilson's calls to end birthright citizenship in the 1990s).

4. The Order states:

> It is the policy of the United States that no department or agency . . . shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons: (1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizens or lawful permanent resident at the time of said person's birth.

Birthright Citizenship Order § 2(a).

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

6. U.S. CONST. amend. XIV, § 1; *see* NEUMAN, *supra* note 3, at 165 (describing the "traditional interpretation of . . . [the Fourteenth Amendment's] citizenship clause," which "guarantees American citizenship to all children born to aliens or citizens within our territory, with a few minor exceptions").

7. *See* 8 U.S.C. § 1401(a) (stating that "a person born in the United States, and subject to the jurisdiction thereof" is a United States citizen by birth).

8. *Compare* Randy E. Barnett & Ilan Wurman, Opinion, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html [https://perma.cc/ZL9Y-Q2SS], *and* Eastman, *supra* note 3, *and* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985), *with Wong Kim Ark*, 169 U.S. at 705–32 (Fuller, J., dissenting), *and* Amanda Frost, *"By Accident of Birth": The Battle over Birthright Citizenship After* United States v. Wong Kim Ark, 32 YALE J.L. & HUMS. 38, 54–58 (2021) (summarizing the government's arguments in *Wong Kim Ark*).

9. *See* Birthright Citizenship Order § 1; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Preliminary Injunction at 14–35, New Jersey v. Trump, No. 25-cv-10139 (D. Mass. Jan. 31, 2025).

At the time of this writing, multiple federal courts have found the Birthright Citizenship Order to be unlawful, but as litigation continues, the Supreme Court has limited lower courts' ability to enjoin it. Almost immediately after the Order was issued, coalitions of state, individual, and organizational plaintiffs filed lawsuits, leading to multiple district court injunctions enjoining its application in full.[10] In *Trump v. CASA, Inc.*, however, the Supreme Court held that these "universal" injunctions likely exceeded the courts' equitable authority.[11] Justice Barrett's majority opinion in *CASA* did not hold that the Trump administration's interpretation of the Fourteenth Amendment's Citizenship Clause or the federal immigration statutes was correct.[12] It also left open the possibility that the plaintiff states or a Rule 23(b)(2) class of affected individuals might successfully restore a nationwide block against the new policy.[13] But by restricting the practice of universal injunctions, the Court paved the way for officials to begin implementing the Trump administration's Order, despite multiple courts' determinations that it is illegal.

The stakes of the constitutional, statutory, and procedural questions in the litigation over birthright citizenship remain extremely high. The Trump

10. *See* Memorandum of Decision on Motions for Preliminary Injunction, New Jersey v. Trump, No. 25-cv-10139 (D. Mass. Feb. 13, 2025); Order, Washington v. Trump, No. 25-cv-00127 (W.D. Wash. Feb. 6, 2025); Memorandum Opinion, CASA, Inc. v. Trump, No. 25-cv-00201 (D. Md. Feb. 5, 2025).

11. Trump v. CASA, Inc., 145 S. Ct. 2540, 2554 (2025) ("Because the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act.").

12. Of course, neither did the opinion hold that the administration's interpretation was incorrect. The administration's applications to stay the lower courts' injunctions did not raise these merits questions at all, and the majority did not address them. *See id.* at 2549–50. *But see id.* at 2574 (Sotomayor, J., dissenting) ("Few constitutional questions can be answered by resort to the text of the Constitution alone, but this is one. The Fourteenth Amendment guarantees birthright citizenship.").

13. *See id.* at 2558 (majority opinion) ("We decline to take up these arguments [for why states are entitled to nationwide relief] in the first instance. The lower courts should determine whether a narrower injunction is appropriate . . . ."); *id.* at 2555–56 (suggesting that Rule 23 class actions may substitute for universal injunctions without exceeding federal courts' equitable powers). The majority opinion also suggested that plaintiffs in an Administrative Procedure Act challenge could secure vacatur of any agency actions taken pursuant to the Birthright Citizenship Order. *Id.* at 2554 n.10 ("Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action."). Immediately following the Supreme Court's decision, counsel for CASA, Inc. sought certification for a class of "all children who have been born or will be born in the United States on or after February 19, 2025, who are designated by Executive Order 14,160 to be ineligible for birthright citizenship, and their parents." Plaintiffs' Motion for Class Certification at 1, CASA, Inc. v. Trump, No. 25-cv-00201 (D. Md. June 27, 2025). District judges in this case and in a separate class action granted provisional class relief to the class of all children who might be denied citizenship under the Order, but not their parents. *See* Memorandum Opinion at 32, CASA, Inc. v. Trump, No. 25-cv-00201 (D. Md. Aug. 7, 2025). Order Granting Preliminary Injunction and Provisional Class Certification at 10, Barbara v. Trump, No. 25-cv-244 (D.N.H. July 10, 2025). This Article's analysis suggests that the class of individuals affected by the Order may in fact stretch even further than these plaintiffs have contended, including not only affected children and their parents, but also all those who would be subject to more burdensome procedures in applying for federal documents and benefits.

administration has promised to carry out "mass deportations," and its "border czar" Thomas Homan has suggested that this mission will include deporting entire families: "I don't want to be breaking up families," said the architect of the first Trump administration's family separation policies, "so the only way you don't break up the family is you keep them together and you have to send them all back."[14] If federal immigration agencies can refuse to accept official documentation of birth in the United States as proof of citizenship, this could mean that U.S.-born children of undocumented immigrants—long understood to be citizens—might be swept up in these deportation schemes. Alternatively, these children might be stripped of the ability to sponsor their family members for immigration status, the right to vote, and countless other rights. These restrictions on the rights of citizen children of undocumented immigrants would mark a profound departure from established law.

My aim in this Article, however, is to show that the implications of Trump's Birthright Citizenship Order stretch even further—threatening the citizenship rights of all Americans. This Article largely brackets the question of whether the phrase "subject to the jurisdiction thereof" can be read to exclude children born to parents without status.[15] Immigration and constitutional law scholars have exhaustively made the case that the text and history of the Fourteenth Amendment create no such exclusion, and there is little in the current controversies that should lead us to rethink these accounts.[16] Nor does this Article argue that *jus soli* (granting citizenship

14. Alec Hernández, *Tom Homan Takes to Conservative Media to Outline Trump's Plan for Mass Deportations*, NBC NEWS (Dec. 11, 2024, 10:20 AM), https://www.nbcnews.com/politics/donald-trump/tom-homan-trump-mass-deportations-plan-conservative-media-rcna182885 [https://perma.cc/JWY4-W6FW].

15. U.S. CONST. amend. XIV, § 1. While this constitutional question has been at the center of the litigation and public debate over the Birthright Citizenship Order, the Order's legality also depends on the question of whether it is consistent with the statutory definition of birthright citizenship. *See* 8 U.S.C. § 1401(a).

16. On the Citizenship Clause and its application to immigrants, see, for example, Gregory Ablavsky & Bethany Berger, *"Subject to the Jurisdiction Thereof": The Indian Law Context*, N.Y.U. L. REV. ONLINE (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5222753 [https://perma.cc/3Y9T-F4UG]; Anna O. Law, *The Civil War and Reconstruction Amendments' Effects on Citizenship and Migration*, 3 J. AM. CONST. HIST. 111, 126 (2025); Amanda Frost, *Dred Scott's Daughter: Gradual Emancipation, Freedom Suits, and the Citizenship Clause*, 35 YALE J.L. & HUMS. 812, 821 (2024); KEVIN KENNY, THE PROBLEM OF IMMIGRATION IN A SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE 19TH-CENTURY UNITED STATES 162–89 (2023); Frost, *supra* note 8; Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2250 (2021); Berger, *supra* note 3; Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363 (2009); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997); Gerald L. Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing SCHUCK & SMITH, *supra* note 8).

based on birth within a territorial jurisdiction) is in all circumstances preferable to *jus sanguinis* (granting citizenship based on the citizenship of one's parent or parents).[17]

Rather, my intervention is to describe the function of universal birthright citizenship in the modern intergovernmental administrative framework in the United States. Over the thirteen decades since *Wong Kim Ark*, federal, state, and local governments have built a complex legal structure for documenting individuals' identities and administering federal benefits. Instead of maintaining uniform records of each person to be used for federal purposes—such as assigning U.S. passports and Social Security numbers, or determining eligibility for federal welfare benefits—the federal government relies on state, county, and local governments to produce birth certificates.[18] For the vast majority of Americans who receive them at the time of birth or shortly thereafter, birth certificates serve as proof of citizenship that can be used to demonstrate eligibility for federal as well as many state benefits. *Wong Kim Ark*'s mandate for universal birthright citizenship, combined with the widespread availability of birth certificates, creates a simple rule that, in virtually all cases, a birth certificate from a U.S. jurisdiction is definitive proof of citizenship.

In contrast, revising this interpretation of birthright citizenship would revive procedural hurdles we have mostly left behind in the distant past, before documentation of births was common practice.[19] This is precisely what the Birthright Citizenship Order purports to do, requiring federal agencies to no longer "accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship."[20] If a U.S. birth certificate is no longer sufficient proof of citizenship, this will require a proliferation of new procedures to verify the status of newborn children and their parents. These procedures would not only compound the administrative burden of seeking identification documents and other benefits from federal agencies, but would also likely result in conflicting state and local practices. The result would be to make it harder for all Americans—no matter who their parents are—to prove that they are citizens.

Part I situates *Wong Kim Ark*'s universal birthright citizenship rule in its historical context, describing how the Fourteenth Amendment positioned federal citizenship as a salient legal status, overtaking the patchwork of state

17. For a general defense of the view preferring *jus soli* to *jus sanguinis*, see JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 19–44 (2013).

18. *See infra* Section II.A.

19. *See infra* Sections I.B., II.A (comparing challenges faced by present-day holders of delayed birth certificates with those faced by Chinese Americans in the early twentieth century).

20. Birthright Citizenship Order § 2(a).

and local status distinctions of the antebellum period. Part II explains how this rule functions in the modern legal and administrative structure, where birth certificates produced by state and local governments provide a simple method for Americans to claim this unified federal citizenship. The analysis in Part II also demonstrates the practical consequences of eliminating birthright citizenship, creating significant administrative burdens for all Americans seeking recognition of their citizenship. Part III concludes by contending that, in light of these consequences, it is a mistake to characterize the Birthright Citizenship Order as an act of "immigration" law and policy. The judiciary and the broader public should understand the Trump administration's Order not as a regulation of the rights of noncitizens, but rather an effort to reshape the processes that define citizenship for everyone in the United States.

I. CITIZENSHIP AND IMMIGRATION IN THE WAKE OF RECONSTRUCTION

Part I surveys the history of the Fourteenth Amendment's enactment and its aftermath. The Citizenship Clause not only overturned the infamous *Dred Scott* decision and established citizenship for the formerly enslaved, but also transformed the basic understanding of citizenship and the relationship between individuals and the government in the United States. Part of this transformation also involved a transition from state to federal responsibility over immigration. In antebellum America, states had significant autonomy both to control entries from abroad, and to determine the scope of individuals' citizenship and membership rights. After Reconstruction, new constitutional amendments imposed a much greater degree of uniformity over the question of who counted as a citizen, and Congress took control over the immigration process. In this context, the *Wong Kim Ark* decision cemented a robust understanding of universal birthright citizenship, but also revealed the challenges of applying this understanding without effective means of documenting and proving birth in the United States.

A. From Status to Citizenship

Before the Civil War, U.S. citizenship was surprisingly marginal in many aspects of American public life.[21] As Professor William Novak has detailed,

21. *See* WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 32 (2022) (observing that in pre-Civil War legal thinking, "national citizenship did not figure as a particularly significant part of that formal discussion of American public law. Indeed, national

antebellum America understood the relationship between individuals and public authority less as a single, uniform relationship between equal citizens and the national government, than as a diffuse "web of relations" between groups holding various legally significant statuses, enforced primarily by state and local governments exercising their police powers.[22] The rights and relationships associated with citizenship were not necessarily the most salient in many people's lives. White European noncitizens often enjoyed a far more extensive set of political, economic, and civil rights than native-born white women, or the free African Americans who were considered U.S. citizens before the *Dred Scott* decision.[23] Even white male citizens who held marginal social status—such as "paupers" under the Elizabethan Poor Laws—could be barred from living in cities or states where they were deemed to be outsiders.[24] In the pre-Reconstruction context, national citizenship was just one status among many, and by no means the most advantageous.

Of course, U.S. citizenship became increasingly salient over the course of the sectional conflict leading up to the Civil War. At the heart of this conflict was the fact that some states recognized Black people as citizens, while others were committed to maintaining the slave system—and for that reason could not tolerate the presence of free African Americans entitled to the rights of citizens.[25] In the antebellum period, Black Americans fiercely fought to be recognized as citizens of both the states where they resided and the United States.[26] Chief Justice Taney's opinion in *Dred Scott* infamously

citizenship per se is one of the puzzling absences . . . in early American public law writing."); *see also* Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 370 (1973) (arguing that "the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen").

22. NOVAK, *supra* note 21, at 39–40.

23. *Id.* at 36; *see also* KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 100–01 (2015) (describing Western states' efforts to induce European settlement by extending various rights to noncitizens in the first half of the nineteenth century).

24. *See* Jacob Hamburger, *Immigration Law's Internal Dimension*, 16 U.C. IRVINE L. REV. (forthcoming 2025) (manuscript at 21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 4896381 [https://perma.cc/7TJB-7EWK].

25. *See* ALLAN COLBERN & S. KARTHICK RAMAKRISHNAN, CITIZENSHIP REIMAGINED: A NEW FRAMEWORK FOR STATE RIGHTS IN THE UNITED STATES 154–55 (2021) (describing the "federalism conflict" in which "antebellum states were able to create varying regimes of state citizens for Blacks . . . in the lead-up to the Civil War"); Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 127–52 (2010) (detailing the conflicts surrounding the status of free Black travelers, seamen, and fugitive slaves, and the failure of interstate comity to contain these conflicts).

26. On the history of Black struggles for citizenship rights before the Civil War, see KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE

declared that Black people could not be U.S. citizens, and that Congress had no power to ban slavery in the territories.[27] With this latter holding, *Dred Scott* undermined the Missouri Compromise of 1820, and paved the way toward the Civil War.[28] But while eroding this stalemate over the future of the slave system, Taney's opinion can also be read as a failed attempt to preserve the antebellum compromise over the status of free African Americans. *Dred Scott* allowed some states to grant their Black residents certain rights or privileges—and even to call this grant a form of "citizenship"—but crucially, refused to impose on other states any obligation to respect those rights as the privileges and immunities of U.S. citizenship.[29] Ultimately, however, this abortive compromise proved just as unworkable as the slave system itself in a country on the verge of war.[30]

These conflicts over status and citizenship and the Civil War that followed informed the enactment of the Fourteenth Amendment.[31] The framers of the Reconstruction amendments would no longer tolerate "the sectionalized, particularized, and differentiated laws of status, association, and police that dominated the early nineteenth century."[32] Instead, by declaring that all "persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," the Fourteenth Amendment ensured that membership in the national polity would now take precedence over statuses created by lower levels of government.[33]

REVOLUTION TO RECONSTRUCTION (2021); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865 (2018).

27. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05, 487–93 (1857) (enslaved party).

28. *See* KENNY, *supra* note 16, at 111.

29. *Dred Scott*, 60 U.S. at 405 ("It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State."); *see also* KENNY, *supra* note 16, at 99–100 (noting the early hints of Taney's vision in his dissent in the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), in which the Chief Justice expressed his concern that recognizing the citizenship of free African Americans implied a right to travel to any state and receive the privileges and immunities of citizenship); MASUR, *supra* note 26, at 42–82 (discussing the "second" Missouri debate over whether the Missouri constitution's prohibition on the entry of free African Americans violated the federal constitution, following the first debate over Missouri's status as a slave state).

30. *See* Boyden, *supra* note 25, at 146–52 (describing the breakdown of comity and the rule of law in the years leading up to the Civil War).

31. *See id.* at 152–53.

32. NOVAK, *supra* note 21, at 60.

33. U.S. CONST. amend. XIV, § 1; *see also* Law, *supra* note 16, at 126 ("The Fourteenth Amendment . . . was passed in part to clarify the citizenship status of Black people and to make clear that national citizenship trumped state citizenship. The near-century of state-based legal restrictions on the interstate migration and settlement of free Black people . . . came to an end."); Berger, *supra* note 3, at 1194 ("Reconstruction established citizenship as a matter of national definition and regulation."); NOVAK, *supra* note 21, at 60–61.

The Fourteenth Amendment's Citizenship Clause did not entirely remove the states' power to determine access to rights that had important bearing on membership. In the *Slaughter-House Cases*, the Supreme Court adopted a narrow reading the Fourteenth Amendment's Privileges or Immunities Clause, meaning that recognition as a citizen of the United States did not guarantee a uniform set of rights or entitlements across state lines.[34] Following this logic, the Court in *Plessy v. Ferguson* was unmoved by the fact that all African Americans were citizens in holding that laws mandating segregated spaces and services were constitutional—enabling the discriminatory Jim Crow legal regime throughout the South.[35]

The Fourteenth Amendment nonetheless created a core set of rights for all U.S. citizens that states could not entirely ignore or refuse. In part, this meant that states could no longer bar African Americans from living within their territory altogether, as many—both free and slave states—had sought to do before the Civil War.[36] Although many states spent the better part of a century after Reconstruction seeking to empty African Americans' citizenship of its content, they could no longer deny that national citizenship was an entitlement to some basic recognition of its holder's legal personhood.

B. Wong Kim Ark and the Federalization of Immigration Control

This Reconstruction-era transformation of the national conception of citizenship also coincided with the federal government's assumption of control over the admission of immigrants.[37] Throughout most of the nineteenth century, there was no uniform federal law governing who could enter the United States from abroad—instead, this law was primarily left to

34. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74–79 (1873) (holding that "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other," and that the privileges and immunities shared by all U.S. citizens are limited to those "which owe their existence to the Federal government, its National character, its Constitution, or its laws").

35. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) ("The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color . . . . Laws permitting, and even requiring their separation . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."); COLBERN & RAMAKRISHNAN, *supra* note 25, at 165–95 (describing how "federalism conflicts" over the rights of African Americans endured throughout the Jim Crow period despite the Fourteenth Amendment's recognition of Black citizenship).

36. *See* KENNY, *supra* note 16, at 69–71; Law, *supra* note 16, at 128 ("The fear of forced removal of African Americans by colonization programs to 'repatriate them' . . . that was at its apex in the 1850s ended [with the Fourteenth Amendment]."). On the antebellum project of seeking the removal of Black Americans from their states of residence and from the United States altogether, see JONES, *supra* note 26, at 35–49.

37. *See* Hamburger, *supra* note 24 (manuscript at 26–28).

states located along the country's maritime borders.[38] In these states, immigration laws functioned as extensions of traditional police powers and Poor Law controls over the movement of indigents.[39] Their purpose was not primarily to ensure that people landing at ports of entry had permission to be in the United States, but rather to protect local residents against the presence of "paupers," criminals, diseases, and other perceived threats to the public welfare.[40] As a result, state immigration laws during the first century of the country's history allowed denying entry to U.S. citizens, or even deporting them from within the country's interior.[41]

In the decades that followed Reconstruction and the passage of the Fourteenth Amendment, the Supreme Court and Congress took major steps to seize responsibility over immigration from state governments. The Court's 1876 decision in *Henderson v. New York* struck down state laws that collected bonds from arriving shipmasters, effectively eliminating the funding source of state immigration control systems.[42] In 1882, Congress enacted the first comprehensive federal legislation regulating when and how foreigners could enter or be excluded from the country's borders.[43] Although the 1882 Act allowed state agencies to continue overseeing immigration at ports of entry, Congress rescinded this policy in 1891, making immigration enforcement an exclusively federal role.[44] By the end of the nineteenth century, then, the patchwork of state laws that had previously determined who could enter the United States was replaced with a uniform federal immigration code.

In this new system, U.S. citizenship took on an increased importance for those seeking to avoid exclusion at the ports of entry. Understood as a function of the police power to protect the public against the poor or the diseased, state immigration laws operated upon citizens as well as

38. On state-based immigration law in the early and mid-nineteenth century, see HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY (2017); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

39. *See* Hamburger, *supra* note 24 (manuscript at 21–22).

40. *See id.*

41. *See* Neuman, *supra* note 38, at 1834 ("Some of this [state-level] legislation is immediately recognizable as immigration law, while other legislation is less easily recognized because it applied to citizens of other states as well as foreign immigrants."); HIROTA, *supra* note 38, at 101 (describing the deportation of U.S. citizens of Irish descent under the Know-Nothing government in Massachusetts in the 1850s).

42. *See* Henderson v. New York, 92 U.S. 259, 275 (1876); Hamburger, *supra* note 24 (manuscript at 26–27).

43. *See* Immigration Act of 1882, ch. 376, 22 Stat. 214.

44. *See* Immigration Amendments of 1891, ch. 551, 26 Stat. 1084 § 8; Hamburger, *supra* note 24 (manuscript at 27).

foreigners.[45] After the new and increasingly complex federal immigration bureaucracy replaced the old state-run system, however, citizenship served—at least in theory—as an absolute right to enter and reenter the United States.[46]

The *Wong Kim Ark* case itself illustrates these stakes of federal citizenship at the turn of the twentieth century.[47] Wong Kim Ark was born in California in 1873 to Chinese merchant parents.[48] Wong traveled to China in 1889 to marry, and successfully returned the following year.[49] Although he lacked the required paperwork to enter the United States under the 1882 Chinese Exclusion Act and subsequent anti-Chinese laws, customs agents allowed him to reenter because he was a native-born citizen.[50] But despite securing documentation of his citizenship before leaving again for China in 1894, he was detained upon his return.[51] U.S. Attorney Henry Foote believed that no Chinese person, even born in the United States, could be a citizen, as they owed "perpetual allegiance" to the Chinese emperor.[52] Foote saw Wong's case as an opportunity to test that theory.[53]

It was not immediately obvious before it issued its 1898 decision that the Supreme Court would side with Wong.[54] Opposing Wong's claim to citizenship, Solicitor General Holmes Conrad argued that Wong's parents were not "subject to the jurisdiction" of the United States when their son was born, because of their allegiance to China.[55] In a brief filed on behalf of the government, California attorney George Collins made explicit the

45. *See* Neuman, *supra* note 38, at 1849, 1860 (discussing Massachusetts Poor Laws which in the 1820s required ships to pay bonds for poor passengers including U.S. citizens, and quarantine laws which "applied to a state's own citizens as well as to aliens and citizens of other states").

46. *See In re* Look Tin Sing, 21 F. 905, 910–11 (Field, Circuit Justice, C.C.D. Cal. 1884) (holding that "no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress").

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

48. *See* CAROL NACKENOFF & JULIE NOVKOV, AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP 71–77 (2021). Nackenoff and Novkov note that some sources place Wong's birth in 1871. *Id.* at 71.

49. *Id.* at 76–77.

50. *Id.*

51. *Id.* at 80.

52. *Id.*

53. *Id.* at 80–81.

54. As Professor Amanda Frost observes, although several lower courts had held that the Fourteenth Amendment guaranteed citizenship to all children born in the United States, it was remarkable that it took the Supreme Court nearly thirty years to weigh in on this fundamental question. *See* Frost, *supra* note 8, at 51. Although Justice Stephen Field had written a strong endorsement of universal birthright citizenship under the Fourteenth Amendment while riding circuit in *In re* Look Tin Sing, 21 F. 905 (C.C.D. Cal. 1884), no other justices were on the record on the subject, and Field retired before *Wong Kim Ark* was decided. *See* Frost, *supra* note 8, at 60.

55. *Id.* at 56. Solicitor General Conrad's briefs also implied that the Fourteenth amendment and the entirety of Reconstruction were illegitimate—as Frost puts it, "for Solicitor General Conrad and the U.S. government, the Civil War itself was on trial." *Id.* at 56–59.

consequences of Conrad's position: holding that children of noncitizen parents were not subject to U.S. jurisdiction would also invalidate the citizenship of hundreds of thousands of children of European immigrants.[56] For Collins, this was of minor concern. Although the immigration laws of the late nineteenth century forbade Chinese immigrants from acquiring citizenship, these white immigrant children could naturalize even if the Court held that they were not citizens by birth.[57] Wong's lawyers retorted that this reading of the Citizenship Clause—which would effectively require that one's parents be citizens to acquire birthright citizenship—undermined the Fourteenth Amendment's purpose of granting citizenship to formerly enslaved people and their children, deemed noncitizens by *Dred Scott*.[58]

Justice Horace Gray's majority opinion adopted Wong's view, holding that he was a citizen by virtue of his birth, regardless of his parents' Chinese nationality.[59] The Court interpreted the "jurisdiction" language of the citizenship clause narrowly, reading this exception to universal birthright citizenship to apply only to members of sovereign Indian tribes, and children of foreign occupiers and diplomats.[60] Justice Gray appeared to have been concerned about the consequences of denying universal birthright citizenship recognized by Collins, writing that:

> To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.[61]

The Court could not avoid the conclusion that rejecting the principle of universal birthright citizenship for all—even to exclude children of a stigmatized minority group—would call into question the status of those in the white majority as well.[62]

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56. *Id.* at 58.
57. *Id.*
58. *Id.* at 58–59.
59. United States v. Wong Kim Ark, 169 U.S. 649, 704–05 (1898).
60. *Id.* at 682.
61. *Id.* at 694; *see also* Frost, *supra* note 8, at 61–62.
62. Throughout the nineteenth century, some of these "persons of . . . European parentage" were often themselves viewed as racial inferiors. *See* MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 43–52 (1998) (describing racist depictions of Irish and German immigrants). However, according to the "racecraft" of that period, the alleged inferiority of the Irish and other European immigrants did not prevent them from qualifying as "white" under U.S. naturalization law. *Id.* at 51; KAREN E. FIELDS & BARBARA J. FIELDS,

Although *Wong Kim Ark* was a landmark victory for immigrants and their U.S.-born children, federal officials responded to the decision with various attempts to increase scrutiny of claims to citizenship, particularly those by Chinese Americans. Not only did Congress expand upon legal prohibitions on the entry of Chinese and other Asian immigrants in the decades following the decision, it also stripped federal courts of jurisdiction to review decisions to exclude arriving immigrants at ports of entry.[63] Additionally, federal immigration officials implemented new requirements for those seeking to prove that they were citizens, which often proved difficult for Chinese immigrants to meet. Examples included denying claims to birthright citizenship made during adulthood (rather than at the time of birth), or requiring testimony by white witnesses to overcome a presumption against citizenship.[64] In the late nineteenth and early twentieth centuries, before many Americans had birth certificates, a common method for establishing one's place of birth was an affidavit sworn by those with direct knowledge of the birth—typically the child's parents, relatives, or other personal connections.[65] Rules rejecting testimony by Chinese people left many living in ethnic enclaves, and who therefore had few white acquaintances, with no other evidence that they were natural-born citizens.[66]

The federalization of immigration control and the recognition of universal birthright citizenship also did not eliminate all variation between states when it came to immigrants' rights. States no longer had the power to create their own immigration laws governing the entry of noncitizens, nor could they exclude U.S. citizens from other states. Many states nonetheless enacted and maintained restrictions on noncitizens' ability to own land, secure employment, and access various public rights.[67] Over the course of the twentieth century the Supreme Court began applying greater scrutiny to such discrimination based on "alienage." [68] Not only, then, did the

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RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 16–17 (2012) (coining the term "racecraft" to describe the "busy repertoire of strange maneuvering" required to apply the imprecise fiction of "race" to social reality).

63. *See* Berger, *supra* note 3, at 1249–52.

64. *See* Frost, *supra* note 8, at 63–64; *see also* CRAIG ROBERTSON, THE PASSPORT IN AMERICAN HISTORY: THE HISTORY OF A DOCUMENT 176 (2010) (describing immigration inspectors' efforts to expose cases of fraudulent Chinese claims to citizenship among so-called "paper families").

65. *See* Susan J. Pearson, *"Age Ought to Be a Fact": The Campaign Against Child Labor and the Rise of the Birth Certificate*, 101 J. AM. HIST. 1144, 1150–51 (2015).

66. *See* Frost, *supra* note 8, at 664.

67. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (listing cases upholding state laws restricting noncitizens' rights in these areas).

68. *See* Truax v. Raich, 239 U.S. 33, 42 (1915) (holding that an Arizona law limiting noncitizens' the right to work violated Equal Protection because it was "tantamount to the assertion of the right to deny them entrance and abode"); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420–21 (1948)

Fourteenth Amendment's Citizenship Clause create a single, national, universal rule of birthright citizenship. In the Court's mid-twentieth-century jurisprudence, the Fourteenth Amendment's Equal Protection Clause—which applies to all "persons," not only to citizens—also imposed a greater degree of uniformity when it came to immigrants' rights, giving states increasingly little room to distinguish between the rights of citizens and noncitizens.[69]

However, this uniformity had its limits, particularly concerning the rights of undocumented immigrants. Although there have been people at every stage of U.S. history present in the country in violation of law,[70] the modern undocumented population is largely a creation of the 1965 immigration reform, which for the first time imposed numerical limits on migration from Latin America.[71] In 1982, the Supreme Court was confronted with a challenge to a Texas law denying public education to undocumented children, and held that the law was unconstitutional.[72] At the same time, the Court's narrow reasoning in *Plyler v. Doe* ruled out the application of strict scrutiny to state laws discriminating against undocumented immigrants in general.[73] In so doing, the Court effectively gave its blessing to a variety of state laws governing the rights and benefits available to undocumented residents—helping create the state-to-state variation familiar to scholars of immigration federalism today.[74]

(holding California's law denying noncitizens the right to fish violated Equal Protection); *Graham*, 403 U.S. at 374 (holding that Arizona's and Pennsylvania's laws denying public assistance to noncitizens both violated Equal Protection).

69. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also* Law, *supra* note 16, at 119 ("Under the Reconstruction Amendments, not only was there a set of national citizenship rights, but Congress was also given enforcement power to guarantee the rights in what the framers anticipated would be widespread reactionary resistance by the former slave states.").

70. *See* NEUMAN, *supra* note 3, at 177–79 (explaining that even before the federal immigration legislation of the 1870s and 1880s, there were categories of foreigners present in violation of law, including those who had violated state-level immigration control laws, and persons illegally imported as slaves); Chin & Finkelman, *supra* note 16, at 2250 (at the time of the adoption of the Fourteenth Amendment, "Congress knew that there could be other people [besides illegally imported slaves] in the United States in violation of the law").

71. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 254–64 (2004).

72. Plyler v. Doe, 457 U.S. 202, 227–30 (1982).

73. *Id.* at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful action.").

74. *See* Hamburger, *supra* note 24 (manuscript at 14–15) ("Restrictive [state] policies may seek to deny undocumented immigrants access to important rights, benefits, and services—including driver's licenses and identification, professional licenses, public higher education and in-state tuition, public benefits, and rental housing—while inclusive policies seek to reduce the salience of undocumented status wherever possible." (internal citations omitted)).

II. BIRTH CERTIFICATES AND BIRTHRIGHT CITIZENSHIP: THE CONSEQUENCES OF IMPLEMENTING TRUMP'S EXECUTIVE ORDER

Part II details the importance of the birth certificate in the modern structures used to establish a person's entitlement to birthright citizenship. Understanding this legal and administrative framework leads to several predictions about the practical consequences that would likely follow from implementing the Trump administration's Birthright Citizenship Order. These largely unexplored implications of abolishing universal birthright citizenship stem from the fact that the United States does not have a centralized registry of births and personal identification. Instead, it relies on states, cities, and counties to record births and issue birth certificates. These certificates can then be used to establish citizenship for the purposes of securing federal benefits. Although this system is complex and decentralized, it creates a simple rule for those seeking federal benefits: In the vast majority of cases, a birth certificate demonstrating birth in the United States suffices as proof of citizenship. The Birthright Citizenship Order would upend this rule, refusing to accept birth certificates as evidence in at least some contexts.[75] This change will likely require adopting a slew of new procedures at the federal and sub-federal levels, increasing the administrative burdens on all Americans and their children seeking to claim their rights as citizens.

A. The Role of the Birth Certificate in Establishing Citizenship

Starting in the first half of the twentieth century, the widespread adoption of birth certificates meant that an increasing number of people had access to government-certified proof of their place of birth. Near-universal access to birth certificates in the United States was largely the result of Progressive-era advocacy for legislation to combat child labor.[76] In order to enforce laws banning the employment of children below a minimum age, labor agencies needed a reliable method of determining a child's age.[77] Reformers opposed to child labor considered a parent's affidavit to be unreliable, since parents

75. *See* Birthright Citizenship Order § 2(a).

76. *See* Pearson, *supra* note 65, at 1144. Several state and local governments created vital statistics offices before the Civil War. *See* SUSAN J. PEARSON, THE BIRTH CERTIFICATE: AN AMERICAN HISTORY 43–44 (2021). Going back even further, some northern states' gradual emancipation laws in the early nineteenth century required documentation of births of children born to escaped slaves to ensure that these children would not become enslaved themselves. *See* Frost, *supra* note 16, at 821 ("[S]everal of these states required registration of slave births with the state . . . becoming the first laws to mandate creation of birth certificates.").

77. Pearson, *supra* note 65, at 1150.

typically wanted to put their children to work.[78] The birth certificate, in contrast, was thought to be unassailable proof, produced by a disinterested government agency using uniform procedures.[79]

This reform movement successfully prompted a number of states to begin registering births and issuing birth certificates.[80] As the historian Susan Pearson notes, this movement followed a "pattern typical of the Progressive era," in which "child labor reformers initiated state-level legislative reform . . . and then federalized those standards."[81] The federal government supported the move toward birth certificates, and encouraged more states to adopt the practice: Starting in the 1910s, the Census Bureau introduced incentives for states to register live births, while the New Deal-era Fair Labor Standards Act adopted age certificate rules.[82] As more and more Americans received birth certificates, more and more state and federal benefits began requiring them as proof of eligibility.[83] Access to U.S. birth certificates provided protection for returning citizens that was not available in the immediate aftermath of *Wong Kim Ark*—for example, allowing some Mexican Americans who were wrongfully deported during the immigration raids of the 1930s to return home.[84] However, despite endorsing the movement toward universal birth records, the federal government never adopted a centralized recordkeeping system of its own, opting to continue relying on state, county, and municipal agencies to issue birth certificates.[85]

78. *Id.* at 1151.
79. *Id.* at 1152–55.
80. *Id.* at 1158–63.
81. *Id.* at 1152.
82. *Id.* at 1158–63.
83. *Id.* at 1165.
84. *See* AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS 168–70 (2021) (recounting stories of Mexican-American *repatriados* who secured copies of U.S. birth certificates and returned to the United States after deportation in the 1930s). On the Mexican deportations of the 1930s, see FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (2d ed. 2006) (1995).
85. *See* Betsy L. Fisher, *Citizenship, Federalism, and Delayed Birth Registration in the United States*, 57 AKRON L. REV. 49, 55–56 (2024) ("In the United States, state law governs birth registration processes."); Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 375 (2014) (noting that while the federal government "provide[s] leadership in the vital statistics of birth . . . individual states continue to have authority over the content and management of birth records and statistics"). Scholars have characterized the modern system that emerged from this period, in which sub-federal agencies produce birth certificates that serve as evidence of citizenship and eligibility for federal benefits, as a form of cooperative federalism. *See* David Chen, *Immigration Status Federalism*, 42 YALE J. REG. 449, 482–83 (2025); Angela R. Remus, *Caught Between Sovereigns: Federal Agencies, States, and Birthright Citizens*, 34 STAN. L. & POL'Y REV. 225, 229–32 (2023). Some opponents of the 2005 REAL ID Act feared that the law would create a national database of identifying information. *See, e.g.*, Press Release, ACLU of Maine, MCLU Blasts New REAL ID Regulations (Jan. 11, 2008), https://www.aclu.org/press-releases/mclu-blasts-new-real-id-regulations [https://perma.cc/GP3N-TLV6]. The Department of Homeland Security's website for some time had taken pains to insist that "REAL ID is a national set of

This basic structure remains in place today. The vast majority of Americans currently receive birth certificates from sub-federal agencies, providing them in practice with definitive proof that they were born in the United States and are therefore U.S. citizens.[86] When a baby is born in a hospital, the hospital notifies the relevant state or local jurisdiction's vital statistics office, which issues a birth certificate.[87] Since 1987, the Social Security Administration (SSA) has operated the "enumeration at birth" (EAB) process, which provides the agency with information about births recorded by state agencies, and generates a Social Security Number (SSN) for the child.[88] As of November 2024, EAB partnerships with all fifty states and several other jurisdictions account for 99 percent of SSNs issued to newborns.[89] For this overwhelming majority, birth certificates and SSNs—both issued almost simultaneously with birth—enable them to access a range of important documents and benefits later in life, including U.S. passports, authorization to work, driver's licenses compliant with the REAL ID Act, and federal benefits including Medicaid, Temporary Assistance for Needy Families (TANF), and the Supplemental Nutrition Assistance Program (SNAP).[90]

Despite this decentralized process of producing birth certificates, the longstanding interpretation of universal birthright citizenship since *Wong Kim Ark* creates a simple, bright-line rule: a birth certificate issued by a jurisdiction within the United States counts as conclusive proof of citizenship. There are around 14,000 distinct forms of birth certificates issued by state, county, and municipal governments currently in circulation, and these documents vary in terms of what information they collect and record.[91] Federal regulations set some basic guidelines for what birth certificates must contain to count as proof of citizenship. For example, to be

standards, not a national identification card. Real ID does not create a federal database of driver license information." *REAL ID Frequently Asked Questions*, DEP'T HOMELAND SEC., [https://perma.cc/6AQY-ST9W] (available by archive link only) (go to dropdown "Q: Is DHS trying to build a national database with all of our information?").

86. *See* Remus, *supra* note 85, at 232.

87. *See id.*

88. *See* 20 C.F.R. § 422.103(c)(2) (2025). One possible explanation for why no such system existed before 1987 is that it was only in 1986 that Congress required employers to verify that their employees were authorized to work. *See* Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1324a(1)(A). IRCA made it a practical necessity to ensure that all U.S. citizens received Social Security numbers which could be used to prove employment eligibility.

89. SSA BUREAU OF VITAL STATS., STATE PROCESSING GUIDELINES FOR ENUMERATION AT BIRTH 4 (2024), https://www.ssa.gov/dataexchange/documents/Updated%20State%20Processing%20Guidelines%20for%20EAB.pdf [https://perma.cc/G6YN-LXG9] [hereinafter STATE PROCESSING GUIDELINES].

90. *See* Remus, *supra* note 85, at 235.

91. *Id.* at 236 n.52.

considered definitive "primary" evidence of U.S. birth to support an application for a passport, a birth certificate must list the city, county, or state of birth, as well as the parents' names.[92] Notably, however, federal guidelines do not require that birth certificates list any information about parental immigration or citizenship status.[93] For Americans who have birth certificates issued at birth, federal agencies generally do not second-guess whether those certificates are sufficient to establish citizenship.[94]

In contrast, federal agencies apply much more scrutiny to the small minority of Americans who receive so-called "delayed" birth certificates sometime after birth. Those who give birth outside of hospitals—whether by choice, or because of constraints imposed by geographic isolation, poverty, or immigration status—must apply for birth certificates for their children after the fact, sometimes years later.[95] Federal agencies such as the SSA and the Department of State (DOS) do not afford delayed birth certificates the same deference as those issued at birth, and instead are authorized to evaluate independently whether an applicant is a citizen.[96] For delayed birth certificate recipients, then, birthright citizenship operates more like a standard than a bright-line rule, with federal agencies evaluating the birth certificate as one piece of evidence among others to determine whether the holder was in fact born in the United States. Border regions, where these agencies often suspect immigration fraud, currently see the

92. 22 C.F.R. § 51.42(a) (2025) ("*Primary evidence of birth in the United States.* A person born in the United States generally must submit a birth certificate. The birth certificate must show the full name of the applicant, the applicant's place and date of birth, the full name of the parent(s), and must be signed by the official custodian of birth records, bear the seal of the issuing office, and show a filing date within one year of the date of birth."); *see also* DEP'T OF STATE, APPLY FOR YOUR FIRST ADULT PASSPORT, https://travel.state.gov/content/travel/en/passports/need-passport/apply-in-person.html#Step%20Three [https://perma.cc/MRZ4-QUGU]. As primary evidence of citizenship in order to sponsor a family member for immigration status, federal regulations only require that a birth certificate be "issued by a civil authority" and that it "establishes the petitioner's birth in the United States." 8 C.F.R. § 204.1(g)(1)(i) (2025). In the immigration context, courts have treated a "contemporaneous" birth certificate to be "almost conclusive evidence of birth." Liacakos v. Kennedy, 195 F. Supp. 630, 631 (D.D.C. 1961).

93. The Centers for Disease Control's "U.S. Standard Certificate of Live Birth" includes space to list parents' places of birth and SSN, but not their immigration or citizenship status. U.S. STANDARD CERTIFICATE OF LIVE BIRTH, CENTERS FOR DISEASE CONTROL (2023), https://www.cdc.gov/nchs/data/dvs/birth11-03final-acc.pdf [https://perma.cc/BYH4-4ZMV]; *see also* STATE PROCESSING GUIDELINES, *supra* note 89, at 26–27 (listing parents' SSNs as "conditional" rather than "mandatory" inputs into the information that state records offices send to the SSA under the EAB program). In any case, SSNs are routinely issued to many categories of noncitizens. *See infra* note 114.

94. *See* Remus, *supra* note 85, at 240–42.

95. *Id.* at 227–28; Fisher, *supra* note 85 at 65–70 (describing cases of the difficulties individuals face proving their citizenship when they did not receive birth certificates at birth).

96. *See* Remus, *supra* note 85, at 235. Immigration agencies also apply greater scrutiny to delayed birth certificates. *See In re* Bueno-Almonte, 21 I & N Dec. 1029, 1033 (B.I.A. 1997) ("[A] delayed birth certificate, even when unrebutted by contradictory evidence, will not in every case establish the petitioner's status as a United States citizen.").

highest rates of holders of delayed birth certificates denied federal benefits.[97] The case of delayed birth certificate holders, however, is the exception that proves the rule: the universal grant of citizenship to all children born on U.S. soil, and the near-universal availability of birth certificates issued at the time of birth, obviates the need for further procedures to determine that the holder of such a certificate is a citizen.

B. The Bureaucratic Consequences of Rejecting Birth Certificates

Without the backstop of universal birthright citizenship, the majority of Americans—regardless of their parents' status—could be subject to the kind of scrutiny in claiming citizenship currently faced only by delayed birth certificate recipients. The Supreme Court's June 2025 decision in *CASA* allowed the Trump administration to begin drafting new agency procedures to determine the citizenship of the children of undocumented immigrants.[98]

97. *See* Remus, *supra* note 85, at 233; *see also* Debbie Weingarten, Opinion, *My Children Were Denied Passports Because They Were Delivered by a Midwife*, N.Y. TIMES (Sept. 3, 2018), https://www.nytimes.com/2018/09/03/opinion/weingarten-homebirth-border-passports.html [https://perma.cc/CG4U-8V2W] (reporting the story of a mother of two boys born at home in Arizona who were denied passports).

98. *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2563 (2025) (staying lower court injunctions "to the extent that they prohibit executive agencies from developing and issuing public guidance about the Executive's plans to implement the Executive Order"); Birthright Citizenship Order § 3 (instructing federal agencies to "take all appropriate measures" and "issue public guidance" to implement the Order's interpretation of birthright citizenship). At the time this Article went to press in August 2025, several federal agencies had published implementation plans for the Birthright Citizenship Order, many of which are relatively brief and offer few concrete details. *See* U.S. DEP'T OF STATE, EXECUTIVE ORDER 14160: *PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP* (July 26, 2025), https://travel.state.gov/content/dam/passports/forms-fees/Executive%20Order%2014160%20-%20Protecting%20the%20Meaning%20and%20Value%20of%20American%20Citizenship%20Implementation%20Plan.pdf [https://perma.cc/73QT-CS3Y] [hereinafter DOS IMPLEMENTATION PLAN]; SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (July 2025), https://www.ssa.gov/sites/g/files/npxnvu131/files/2025-07/SSA%20Guidance%20Document%20-%20EO%2014160.pdf [https://perma.cc/75SY-WVRC] [hereinafter SSA IMPLEMENTATION PLAN]; U.S. DEP'T OF HEALTH & HUM. SERVS., CMS GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR MEDICAID AND CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP) VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 AND OTHER FEDERAL STATUTES (July 25, 2025), https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/citizenship-eo-guidance-cms.pdf https://perma.cc/ZTU4-CW8B] [hereinafter HHS IMPLEMENTATION PLAN]; U.S. DEP'T OF AGRIC., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EO ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (July 26, 2025), https://www.fns.usda.gov/programs/guidance/protecting-american-citizenship [https://perma.cc/2MD6-5THM] [hereinafter USDA IMPLEMENTATION PLAN]; U.S. CITIZENSHIP & IMMIGR. SERVS., IMPLEMENTATION PLAN, IP-2025-0001 (July 25, 2025), https://www.uscis.gov/sites/default/files/document/policy-alerts/IP-2025-0001-USCIS_Implementation_Plan_of_Executive_Order_14160%20%E2%80%93%20Protecting_the_Meaning_and_Value_of_American_Citizenship.pdf [https://perma.cc/2GK2-4FZ7].

If implemented, these new procedures would make it more difficult for all Americans to claim the rights of citizenship. This expansion of the citizenship bureaucracy could also have profound implications for state, county, and municipal governments. Not only would it impose staggering and unrealistic new obligations on sub-federal agencies to gather information about parents' citizenship, it would also open the door to greater variation in the availability of citizenship rights across geographic boundaries. Justice Sotomayor warned in her *CASA* dissent that "[n]o matter how it is done, discarding the nationwide status quo of birthright citizenship would result in chaos."[99] This Section explores what this chaos might look like.

Specifically, it details the implications of policies under the Birthright Citizenship Order that require not only proof of birth in a U.S. jurisdiction, but also proof of parental status in order to receive U.S. passports, SSNs, and various federal welfare benefits. The administration has suggested that children of noncitizen permanent residents as well as citizens will also be allowed to claim birthright citizenship.[100] However, since permanent residents—like naturalized citizens—generally possess proof of the fact that they received status through the immigration system, this Section will focus on the impact of these policies for the children of U.S. citizens who themselves acquired citizenship by birth in the United States, and seek to prove it.

1. Passports

U.S. passports are a form of federal identification available only to U.S. citizens or nationals.[101] Passports may not be essential in the daily lives of those who rarely travel internationally, and about half of Americans do not have them.[102] At the same time, according to federal law, a passport

99. *CASA*, 145 S. Ct. at 2592 (Sotomayor, J., dissenting).

100. Birthright Citizenship Order § 2(a).

101. *See* 22 C.F.R. § 51.2(a) (2025) ("A passport may be issued only to a U.S. national."); 8 U.S.C. § 1101(a)(22) (defining "national of the United States" to include U.S. citizens as well as other persons who owe "permanent allegiance to the United States"); *see also* 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW & PROCEDURE § 99.06[1] (Matthew Bender ed., 2025) ("While U.S. passports can be issued to the relatively small group of noncitizen nationals who owe permanent allegiance to the United States, in practice the holder almost invariably is a U.S. citizen . . . .").

102. *See* Nathan Diller, *Americans Want to See the World, but Only 51% Took This Important Step to Do It*, USA TODAY (Oct. 23, 2024, 3:06 PM), https://www.usatoday.com/story/travel/news/2024/10/23/state-department-issues-record-us-passports/75794556007/ [https://perma.cc/MAK2-BGCH].

provides definitive proof that one is a U.S. citizen.[103] This means that a holder of a U.S. passport can use this document not only to travel abroad, but also to establish eligibility for other benefits that are reserved for citizens,[104] and to protect themselves against possible efforts to deport them if they are falsely accused of being in the country without authorization.[105]

The Trump administration has indicated that it will no longer issue U.S. passports to the children of undocumented immigrants.[106] The Birthright Citizenship Order instructs federal agencies, including DOS, not to "accept documents issued by State, local, or other governments or authority purporting to recognize United States citizenship" of the children of undocumented immigrants or those on temporary visas.[107] DOS, however, does not know in advance the immigration status of a passport applicant's parents. To evaluate whether the child applicant is eligible under the Birthright Citizenship Order, then, DOS has announced that it will "request original proof of parental citizenship or immigration status to determine the citizenship status of the applicant."[108] Under this new system, a child's birth certificate would not establish the child's citizenship, and further proof of the parents' status would be required to demonstrate eligibility—though the DOS plan does not specify what forms of proof will be accepted.[109]

Such a policy change raises further questions about how parents born in the United States could demonstrate their own citizenship when applying for passports for their children. The Birthright Citizenship Order on its face applies only to persons born thirty days from when it was issued, and also includes a clause stating that "[n]othing in this order shall be construed to affect the entitlement of other individuals, including children of lawful

103. 22 U.S.C. § 2705(1) (stating that a valid U.S. passport "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction").

104. *See infra* Section II.B.iii.

105. In removal proceedings in immigration court, the federal government has the burden of proof to show that the person targeted for removal is "an alien." *See* 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability *of an alien*" (emphasis added)); *id.* at § 1229a(c)(3)(A) ("In the [removal] proceeding the Service [i.e. the federal government] has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."); 8 C.F.R. § 1240.8(c) (2025) ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent.").

106. *See* Birthright Citizenship Order § 2(a); DOS IMPLEMENTATION PLAN, *supra* note 98.

107. Birthright Citizenship Order § 2(a).

108. DOS IMPLEMENTATION PLAN, *supra* note 98, at 2.

109. A birth certificate that lists a parent as having a U.S. birthplace might conceivably suffice to prove the child's citizenship. However, for the reasons discussed below, the Birthright Citizenship Order leaves it ambiguous whether the parent's U.S. birthplace is considered sufficient proof of the *parent's* citizenship when determining the citizenship of the child. *See infra* notes 117–24 and accompanying text.

permanent residents, to obtain documentation of their United States citizenship."[110] It is clear, then, that the Order does not seek to strip citizenship rights from today's U.S.-born adults. It is also possible to read the Order as allowing a parent to use documents such as a U.S. birth certificate to establish their own citizenship as part of an application for their child. That is to say, a parent applying for their child's passport could submit copies of both the child's birth certificate and their own, proving that the child was born in the United States to citizen parents. Parents born under the prevailing *Wong Kim Ark* rule would effectively be "grandfathered in" on two fronts: allowed to use proof of their own U.S. birth both to prove their own citizenship, and to support their child's claim to citizenship.[111]

At the same time, the Birthright Citizenship Order is not entirely clear on this question, and it is possible that future agency rules might take a harsher approach. Namely, in determining the citizenship of a child born after the Order takes effect, agencies might also decline to treat parents as citizens based solely on their U.S. place of birth (even if it would treat the parents as citizens if they apply for passports on their own behalf). This approach would be consistent with both the Order's explicit text and its constitutional justification. The Order contends that the Fourteenth Amendment does not extend—and never has extended—birthright citizenship to the children of individuals without status.[112] If that is true, why should a parent born before February 19, 2025 be allowed to claim citizenship without some further proof that *their* parents satisfied the criteria of the Birthright Citizenship Order? And if courts were to agree with the administration's theory that the Fourteenth Amendment does not allow extending birthright citizenship to the children of individuals without status, it is not clear that the administration could avoid applying this policy retroactively even if it wanted to.[113] Either way, the Order leaves open the possibility that a parent's U.S. birth certificate would not suffice to prove that their U.S.-born child is a citizen.

If DOS or other agencies adopt this more restrictive approach, many new parents born in the United States would find it difficult to prove that they

110. Birthright Citizenship Order § (2)(b)–(c).

111. Although other agency implementation plans discussed below clearly adopt this "grandfathering in" approach, the DOS Implementation Plan does not make clear what evidence or information sufficiently establishes a parent's status when applying for a passport for their child.

112. *See* Birthright Citizenship Order § 1(1); *cf.* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Preliminary Injunction at 14–35, New Jersey v. Trump, No. 25-cv-10139 (D. Mass, Jan. 31, 2025).

113. *See* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

had citizenship to pass along to their children. Parents might be able to present their own passports to secure passports for their children, since a passport does serve as proof of citizenship.[114] However, under the most aggressive interpretation of birthright citizenship, agencies might even reject existing passports as evidence, since it has long been possible to receive these documents based solely on a U.S. birth certificate.[115] And passports would only be a solution for the roughly 51 percent of Americans who currently have them—leaving the other half with no federal documentation of their citizenship.[116] This latter half disproportionately includes African Americans, those with lower incomes, and those without college degrees.[117]

If U.S. birth certificates and passports no longer qualify as primary evidence of citizenship, few other documents could easily take their place. Since Social Security cards are also issued to work-authorized noncitizens, for example, a parent's card could not count as proof of U.S. citizenship.[118] Ironically, the Trump administration's birthright citizenship policies could create an advantage for naturalized citizens, who are much more likely than those born in the United States to possess other documents—such as a certificate of naturalization—that would definitively establish their citizenship.[119]

Even while avoiding these stricter interpretations of the evidence required to demonstrate birthright citizenship, the Trump administration's rule would make it more difficult for all eligible citizens to receive passports. If a U.S. birth certificate (issued at birth) alone no longer proves citizenship, all claims to birthright citizenship are potentially subject

114. *See supra* notes 101–105 and accompanying text.

115. *See* 22 C.F.R. § 51.42(a) (2025).

116. *See* Diller, *supra* note 102.

117. *See* Jamie Ballard, *Adults Under 30 Are More Likely Than Older Americans to Have a Current U.S. Passport*, YOUGOV U.S. (Aug. 31, 2023, 7:17 AM), https://today.yougov.com/travel/articles/46028-adults-under-30-more-likely-have-us-passport [https://perma.cc/X9AM-9VA9] (56 percent of Black survey respondents say they do not have a passport, along with 69 percent of those with only a high school education or less); YOUGOV SURVEY: PASSPORTS, YOUGOV (Aug. 2023), https://ygo-assets-websites-editorial-emea.yougov.net/documents/Passports_poll_results.pdf [https://perma.cc/9MPX-N37D] (70 percent of those whose family income is less than $50,000 do not have a passport).

118. *See* 10 USCIS POLICY MANUAL Ch. 2 (listing categories of noncitizens eligible for work authorization); 20 C.F.R. § 422.103(b)(3), (c)(3) (2025) (describing procedures for assigning Social Security numbers to noncitizens); 8 U.S.C. § 1324a(b)(1)(C)(i) (listing a Social Security card as proof that an individual is authorized to work in the United States, but not establishing identity).

119. *See* 8 U.S.C. § 1449 ("A person admitted to citizenship in conformity with the provisions of this title shall be entitled upon such admission to receive from the Attorney General a certificate of naturalization . . . ."); *cf. id.* § 1452 (describing the procedure for issuing certificates of citizenship to recipients of derivative citizenship). A leading immigration treatise notes, in contrast, that federal immigration laws "have no provision for the issuance of a certificate or other document specifically verifying the citizenship of the native-born." 1 GORDON ET AL. *supra* note 101, at § 99.02[1][a].

scrutiny by federal agents. This means that DOS would need to evaluate evidence to determine whether the parents of all new passport applicants are citizens. The result would be a massive bureaucratic challenge for an agency accustomed to simple approvals based on birth certificates, and greater administrative burdens for individual applicants. Since the existing bright-line rule no longer would apply, the vast majority of children seeking passports in 2025 would be in a position closer to that of recipients of delayed birth certificates today, or even that of Chinese Americans in the immediate aftermath of *Wong Kim Ark*. "Grandfathering in" parents who hold U.S. birth certificates or passports would somewhat mitigate the impact of this bureaucratic expansion. But the Trump administration's theory of birthright citizenship nonetheless opens the door to more aggressive scrutiny of any child or parent's citizenship.

2. Social Security Numbers

Social Security Numbers serve a crucial role in establishing a person's economic life in the United States. They are used not only in allocating Social Security benefits, but also in paying taxes and—perhaps most importantly—in establishing eligibility to accept formal employment.[120] However, neither an SSN nor the card it is issued on serves itself as proof of identification or citizenship.[121] SSNs are issued to some eligible noncitizens as well as citizens.[122] But for children born in the United States, demonstrating U.S. citizenship is essential in order to receive one. The Trump administration's SSA Implementation Plan is somewhat more detailed than its DOS counterpart, but nonetheless suggests important challenges.

For those seeking SSNs outside of the EAB system, the new procedures and evidentiary requirements present similar challenges as in the case of passports. It appears that the SSA seeks to "grandfather in" parents born before the Birthright Citizenship Order was issued, since those parents can rely on existing SSN records as well as other proof of citizenship allowed under current regulations.[123] In contrast, children whose parents were born after January 2025—assuming these procedures ever apply—must establish

120. While some noncitizens can use SSNs to pay taxes, the IRS has also created the Individual Taxpayer Identification Number to allow other noncitizens to file income tax returns. *See* PUBLICATION 519, INTERNAL REVENUE SERV. (2024), https://www.irs.gov/publications/p519#en_US_2023_publink1000222406 [https://perma.cc/JV8Z-CLU8]. All U.S. employees, regardless of immigration status, must demonstrate eligibility to accept employment, including by producing a Social Security card. *See* 8 U.S.C. § 1324a(b)(1)(C)(i).

121. *See* 8 U.S.C. § 1324a(b)(1)(C)(i).

122. *See supra* note 118 and accompanying text.

123. *See* SSA IMPLEMENTATION PLAN, *supra* note 98, at 4; 20 C.F.R. § 422.107(d).

the parents' status using, for example, a passport "issued in accordance with the EO," or other "documents establishing a U.S. place of birth plus evidence of parent U.S. citizenship or eligible immigration status."[124] In either case, these new procedures require verification of additional documents beyond a child's birth certificate, raising questions like those addressed above as to how an applicant might establish a parent's status. These applicants, however, likely already face increased scrutiny in seeking SSNs today, particularly if they are also holders of delayed birth certificates.[125]

The much more significant challenge of ending universal birthright citizenship would arise in attempting to revise the EAB system, which is currently how nearly all Americans receive SSNs. Recall that through EAB, the Social Security Administration generates an SSN based on information communicated to state and local vital statistics offices shortly after a child is born.[126] Preserving this system spares the SSA the monumental task of adjudicating on its own the eligibility of each new child born in the United States. The Trump administration's SSA Implementation Plan aims to keep EAB in place, collecting the same information from states as in the past, but "conduct[ing] an automated verification of U.S. citizenship or eligible-immigration-status check using the parental SSN(s), if provided."[127] Any children and parents who fail this verification will then have an opportunity to submit additional proof of status, placing themselves in a similar situation as SSN applicants outside of EAB.[128] These changes to EAB will likely result in many eligible children being denied SSNs, while forgoing the administrative efficiencies of the existing EAB program.

If the administration is interested in preserving these efficiencies, it might seek to develop new procedures to collect information about parents' citizenship or immigration status. But to do this would require states, counties, and municipalities to develop their own procedures for collecting and communicating information about parents' status at the moment of birth.[129] Hospitals and their staff would then have to be enlisted to carry out

124. *See* SSA IMPLEMENTATION PLAN, *supra* note 98, at 4. Although this is not specified in the DOS Implementation Plan, the SSA's reference to passports "issued in accordance with the EO" suggests that the government may seek to apply increased scrutiny to those who received passports under previous administrations, as discussed *supra* notes 112–15 and accompanying text.

125. *See supra* Section II.A.

126. *See supra* notes 88–89 and accompanying text.

127. SSA IMPLEMENTATION PLAN, *supra* note 98, at 2–3.

128. *See id.* at 3 (listing steps that will be taken to notify parents and submit additional citizenship records).

129. A full survey of the thousands of distinct forms of birth certificates issued by state, county, and municipal governments across the United States is beyond the scope of this Article. Currently,

these procedures. Creating a new bureaucratic system in every sub-federal jurisdiction, requiring every hospital to verify the citizenship of parents of every child born in the United States, would be no small undertaking. The burdens of adopting this new system would fall both on participating government agencies and individual applicants.[130]

This new patchwork of procedures would once again raise similar questions to those addressed above about which documents hospitals would need to see to confirm that a parent is a U.S. citizen. Some jurisdictions might adopt more exacting standards than others. Perhaps some will accept a parent's U.S. birth certificate as proof that the child is entitled to birthright citizenship (the "grandfathering in" approach described above). Others, though, might insist on a passport or additional corroborating evidence of the parent's status. Either way, these new procedures will require parents to prepare additional documentation if they want to secure an SSN for their child using EAB's convenient in-hospital system. Since the precise timing of childbirth is unpredictable, many people will not have their own birth certificates or passports on hand when it is time to go to the hospital. Those who are unable to bring sufficient evidence at the time of birth will have to remember to apply for an SSN later, or risk leaving their child without this crucial economic identification.

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however, no federal guidelines require sub-federal agencies to include information about parents' citizenship or immigration status on birth certificates. *See supra* notes 92–93 and accompanying text. Texas at one point attempted to prevent undocumented parents from seeking birth certificates for their children by denying Mexican consular ID cards as required proof of identification. *See* Cathy Liu, Note, *An Assault on the Fundamental Right to Parenthood and Birthright Citizenship: An Equal Protection Analysis of the Recent Ban of the* Matrícula Consular *in Texas's Birth Certificate Application Policy*, 50 COLUM. J.L. & SOC. PROBLEMS 619, 621–22 (2017). Even then, though, Texas does not appear to have sought to include information about parents' status on the birth certificate itself, and today, Texas's Department of State Health Services, for example, clarifies on its website that "Your immigration or citizenship status does not affect your right to obtain a birth certificate." BIRTH RECORD FAQS, TEX. DEP'T STATE HEALTH SERVS., https://www.dshs.texas.gov/vital-statistics/frequently-asked-questions/birth-record-faqs [https://perma.cc/UH3Q-US4F]; *see also* Julia Preston, *Lawsuit Forces Texas to Make it Easier for Immigrants to Get Birth Certificates for Children*, N.Y. TIMES (July 24, 2016), https://www.nytimes.com/2016/07/25/us/lawsuit-texas-immigrants-birth-certificates.html [https://perma.cc/WR5X-9PBP] (reporting that after the settlement agreement in *Serna v. Texas Department of State Health Services, Vital Statistics Unit*, No. 15-cv-00446 (W.D. Tex. May 26, 2015), Texas would allow other forms of Mexican identification in issuing birth certificates).

130. States challenging the Birthright Citizenship Order have listed the need to develop these new procedures as one of several ways in which they are injured by the Order, as well as the loss of funds SSA provides state governments for each SSN issued to citizen infants. *See* Complaint at 37, New Jersey v. Trump, No. 25-cv-10139 (D. Mass Jan. 21, 2025) ("The Order will impose, and is already imposing, administrative and operational burdens on the Plaintiffs, in particular relating to their systems for verifying residents' eligibility of federally-funded programs [including enumeration at birth] . . . . Because federal law provides that Plaintiffs may only seek federal reimbursement for services provided to individuals who are citizens or qualified noncitizens, Plaintiffs need systems for determining whether individuals they serve are citizens or qualified noncitizens"); Complaint at 12–13, Washington v. Trump, No. 25-cv-00127 (W.D. Wash. Jan. 21, 2025) (similar).

This potential for variation among state and local jurisdictions may also compound existing efforts to enforce immigration restriction in the healthcare setting. In recent years, a handful of states have begun requiring hospitals to ask all patients about their immigration status—aiming to discourage undocumented immigrants from seeking emergency medical care.[131] New EAB procedures to collect parents' citizenship status could similarly discourage immigrant soon-to-be parents from seeking care in hospitals, while imposing additional administrative burdens on all new parents. These burdens would inevitably result in many children never receiving Social Security Numbers and birth certificates in the first place, severely hindering their ability to work, travel, vote, drive, or access public benefits in the future.[132]

3. Federal and State Benefits

U.S. citizenship is required not only to secure federal identifying documents like passports and Social Security cards—but also to receive federal health and welfare benefits, as well as a number of important benefits at the state level. Federal law delegates to states the task of administering numerous federal benefits, including Medicaid, insurance through Affordable Care Act (ACA) marketplaces, TANF, and SNAP.[133] Undocumented immigrants are generally ineligible for these benefits—with very limited exceptions—while states retain some discretion under the

131. *See* FLA. STAT. § 395.3027 (2024) (requiring Florida hospitals that accept Medicaid to ask patients about their immigration status, and to submit regular reports of this information to the state); Tex. Exec. Order No. GA-46 (Aug. 8, 2024) (ordering similar collection of information), https://gov.texas.gov/uploads/files/press/EO-GA-46_HHSC_Alienage_Data_IMAGE_08-08-2024.pdf [https://perma.cc/2ABN-UFFB]. Surveys since the Florida law went into effect indicate that undocumented immigrants have become more likely to avoid seeking out healthcare. *See* ELIZABETH ARANDA & LIZ VENTURA MOLINA, FLA. IMMIGR. POLICIES PROJECT, UNIV. OF S. FLA., REPORT: THE IMPACTS OF FLORIDA'S SB 1718 ON IMMIGRANTS' WELL-BEING 11 (2024), https://www.usf.edu/arts-sciences/centers/iwrc/documents/report-sb-1718-final-nov2024.pdf [https://perma.cc/K67Q-WT8B].

132. *See* Remus, *supra* note 85, at 235; Fisher, *supra* note 85, at 65–70 (describing difficulties faced by recipients of delayed birth certificates).

133. *See* Medha D. Makhlouf, *Laboratories of Exclusion: Medicaid, Federalism & Immigrants*, 95 N.Y.U. L. REV. 1680, 1699–1701 (2020) (describing the structure of Medicaid); 42 U.S.C. § 18031(d)(1) (stating that under the ACA, "An Exchange shall be a governmental agency or nonprofit entity that is established by a State."); 42 U.S.C. §§ 601–19 (outlining the TANF program); 7 U.S.C. § 2011 (creating the federal food assistance program known today as SNAP); *see also* Complaint at 30–35, New Jersey v. Trump, No. 25-cv-10139 (D. Mass. Jan. 21, 2025) (describing federal reimbursements for state expenses related to special education and foster care services for U.S. citizen children).

Personal Responsibility Work Opportunity Reconciliation Act of 1996 to choose whether to grant these benefits to other noncitizens.[134]

Where states are in charge of administering federal benefits that are restricted to citizens, they must determine who counts as a citizen. This is not particularly difficult when a U.S. birth certificate suffices as proof of citizenship.[135] Eliminating universal birthright citizenship here, however, would once again raise the sorts of difficulties discussed above regarding how else applicants for state-administered federal benefits might prove their citizenship. Implementation plans published by the Department of Health and Human Services and the Department of Agriculture state that a child's passport or SSN counts as definitive proof of citizenship, but a birth certificate must be supplemented by further proof of parents' status.[136] In a largely state-run system, these difficulties might be further compounded by a variety of different approaches to defining citizenship from state to state.

Finally, states may also treat the Birthright Citizenship Order as a mandate to impose heightened requirements to access other rights under state law. One area where we might be likely to see new restrictions is the right to vote. Federal law currently criminalizes noncitizen voting in federal elections, as well as in state and local elections where noncitizens are not otherwise authorized to vote.[137] Aside from a handful of local jurisdictions,

134. *See* Gregory T.W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1424–29 (2014) (describing the exclusion of immigrants from federal benefits under the Personal Responsibility and Work Opportunity Reconciliation Act). While the Biden administration in 2024 enacted regulations enabling DACA recipients to purchase healthcare through ACA exchanges, the Trump administration later excluded them from eligibility. *See* Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability, 90 Fed. Reg. 27074, 27220 (June 25, 2025) (codified at 45 C.F.R. §§ 147, 155, 156) ("We are finalizing modifications to the definition of 'lawfully present' currently articulated at § 155.20 . . . by once again excluding 'Deferred Action for Childhood Arrivals' (DACA) recipients from the definition . . . .").

135. Many state healthcare eligibility guides currently treat a U.S. birth certificate as conclusive proof of citizenship, but characterize it as a "secondary document" since it does not also serve as proof of identity, as does a U.S. passport. *See, e.g.*, N.Y. STATE DEP'T OF HEALTH, DOCUMENTATION GUIDE: CITIZENSHIP AND IMMIGRANT ELIGIBILITY FOR HEALTH COVERAGE IN NEW YORK STATE (2009), https://www.health.ny.gov/health_care/medicaid/reference/mrg/november2009/page453-6.pdf [https://perma.cc/Z77J-SQHU]; TEX. HEALTH & HUMAN SERVS., APPENDIX V, LEVELS OF EVIDENCE OF CITIZENSHIP AND ACCEPTABLE EVIDENCE OF IDENTITY REFERENCE GUIDE (2007), https://www.hhs.texas.gov/handbooks/medicaid-elderly-people-disabilities-handbook/appendix-v-levels-evidence-citizenship-acceptable-evidence-identity-reference-guide [https://perma.cc/4Q8Z-NKK5].

136. *See* HHS IMPLEMENTATION PLAN, *supra* note 98, at 1–3; USDA IMPLEMENTATION PLAN, *supra* note 98, at 1–3. Both plans accept birth certificates of parents born before the Order takes effect as proof of parents' citizenship, and both require that passports and SSNs for children born after the Order takes effect be issued in accordance with the Order.

137. *See* 18 U.S.C. § 611(a).

most sub-federal election laws also do not allow noncitizens to vote.[138] Several states have nonetheless recently taken additional measures to prevent and penalize noncitizen voting, including new proof of citizenship requirements.[139] Many such bills have been drafted so as to accept contemporaneous birth certificates as proof of citizenship.[140] Were courts to adopt the Trump administration's interpretation of birthright citizenship, however, states might seek to follow the administration's lead by rejecting these documents, excluding any Americans from voting who cannot produce passports or other federal recognition of their citizenship.[141] Such enhanced documentary requirements would be consistent with a trend in many states in recent decades to require identification to vote, which may create barriers to voting for minority groups who are less likely to have driver's licenses or passports.[142] Creative state lawmakers may imagine countless other ways that similar proof of citizenship requirements could be deployed to restrict access to public services to both noncitizens and citizens of marginalized groups.

C. Administrative Burdens on Citizenship

Implementing the Birthright Citizenship Order will therefore increase administrative burdens on anyone seeking to claim the rights and benefits of U.S. citizenship. There is a growing consensus among social scientists that administrative burdens—understood as the "costs" of interacting with

138. *See* Brief for *Amicus Curiae* Professor Ron Hayduk in Support of Appellants at 13–14, Fossella v. Adams, No. APL-2024-00033 (N.Y. App. Dec. 19, 2024) (listing contemporary jurisdictions that allow noncitizen voting); *see also* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 41–56 (2006).

139. *See* H.B. 2492, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.B. 2243, 55th Leg., 2d Reg. Sess. (Ariz. 2022); Mi Familia Vota v. Fontes, 129 F.4th 691 (9th Cir. 2025) (holding that portions of Arizona's documentation requirements are conflict preempted by federal election law); *Proof of Citizenship*, VOTING RIGHTS LAB, https://tracker.votingrightslab.org/issues/proof-of-citizenship [https://perma.cc/X72X-K8TJ] (tracking proof of citizenship bills under consideration in 5 states); *see also* Nicolae Viorel Butler, *Alabama to Use Federal Immigration Database to Check Voter Citizenship*, MIGRANT INSIDER (June 22, 2025), https://migrantinsider.com/p/alabama-to-use-federal-immigration [https://perma.cc/RF7S-2PZ8] (reporting that Alabama has signed a memorandum of understanding with the Department of Homeland Security to use a federal database to identify noncitizen registered voters).

140. *See, e.g.*, Mo. S.B. 62 § (A)(7)(e)(a), 103d Gen. Assemb., 1st Reg. Sess. (Mo. 2025) (listing a U.S. birth certificate as a form of "documentary proof of United States citizenship").

141. As noted above, only approximately 51 percent of Americans have passports, and access to passports for African Americans, people without college degrees, and people earning less than $50,000 per year are even lower. *See supra* note 117. In contrast, surveys have estimated that even in the states with the worst access to voter identification, around 78 percent of African Americans have some documentation of their eligibility to vote. *See* Joshua Hochberg, *Race and Voter ID Laws: A Review*, 127 PENN. ST. L. REV. PENN STATIM 31, 37–39 (2022) (showing that in Indiana, a state with a relatively large disparity in voter identification access, 78.2 percent of Black voters have identification).

142. *See* Hochberg, *supra* note 141, at 48 (evaluating claims of racial disparities in light of empirical literature on voter identification laws).

government agencies—significantly impact access to public benefits and services.[143] A shift away from the simple bright-line rule that holders of U.S. birth certificates are citizens would necessarily increase these burdens on applicants. The impact of the Order must be understood not only to include the loss of citizenship for children of the targeted immigrant groups, but also the procedural hurdles faced even by those whose citizenship remains intact.

Increased administrative burdens would fall not only on immigrants and their children, but more broadly, on the tens of millions of Americans who apply for these documents and benefits each year.[144] Even those who can successfully demonstrate eligibility for benefits under the Trump administration's new rules will necessarily have to gather additional evidence of parental status that was previously unnecessary. A passport

143. *See, e.g.*, PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 2 (2019) (defining administrative burdens as the "costs that people encounter when they search for information about public services (learning costs), comply with rules and requirements (compliance costs), and experience the stresses, loss of autonomy, or stigma that come from such encounters (psychological costs)"); Pamela Herd & Donald Moynihan, *Administrative Burdens in Health Policy*, 43 J. HEALTH & HUM. SERVS. ADMIN. 3, 3–4 (2020) ("[B]urdens are consequential: they have large effects on whether people are able to gain access to publicly supported health insurance."); Ashley Fox, Wenhui Feng & Megan Reynolds, *The Effect of Administrative Burden on State Safety-Net Participation: Evidence from Food Assistance, Cash Assistance, and Medicaid*, 83 PUB. ADMIN. REV. 367, 377 (2022) (finding a negative association between burdensome rules and participation in TANF, Medicaid, and SNAP).

144. Estimates of the number of children born to undocumented immigrants each year range from around 125,000 to 150,000. *See* Complaint at 22, New Jersey v. Trump, No. 25-cv-10139 (D. Mass. Feb. 13, 2025) (citing the 125,000 figure); Silvia Foster-Frau, David Nakamura & Molly Hennessy-Fiske, *What Ending Birthright Citizenship Could Look Like in the U.S.*, WASH. POST (Jan. 26, 2025), https://www.washingtonpost.com/politics/2025/01/26/trump-birthright-citizenship-undocumented-children/ [https://perma.cc/CAL7-LVCJ] (citing the 150,000 figure). Organizations supporting the Birthright Citizenship Order have claimed that the number of children affected, including children of temporary visa holders, could be as high as 250,000. *See* Jason Richwine & Stephen A. Camarota, *Births to Illegal Immigrants and Long-Term Temporary Visitors: Preliminary Estimates*, CTR. FOR IMMIGR. STUDS. (Feb. 14, 2025), https://cis.org/Richwine/Births-Illegal-Immigrants-and-LongTerm-Temporary-Visitors [https://perma.cc/A749-88JJ].

Accounting for all U.S. citizens who apply for federal documents and benefits, however, the Order would easily affect tens of millions of applicants each year, including (but not limited to) the roughly 20.4 million passport applications, the 3.57 million infants who receive SSNs through the enumeration at birth process, and 31.2 million Medicaid applications. *See Reports and Statistics*, DEP'T OF STATE: BUREAU OF CONSULAR AFFS. (Oct. 9, 2024), https://travel.state.gov/content/travel/en/about-us/reports-and-statistics.html [https://perma.cc/72G3-WEFY] (reporting 20.4 million passport applications in 2024); *Annual Data for Enumeration Accuracy*, SSA (Feb. 13, 2019), https://www.ssa.gov/data/Enumeration-Accuracy.html [https://perma.cc/EKU2-TXCK] (reporting an annual average of 3.57 million infants receiving SSNs between 2006–2015); *October 25: Medicaid and CHIP Eligibility Operations and Enrollment Snapshot*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 15, 2025), https://www.medicaid.gov/resources-for-states/downloads/eligib-oper-and-enrol-snap-october2024.pdf [https://perma.cc/B8RR-Q5EU] (reporting 31.2 million Medicaid applications in between October 2023 and October 2024). Additionally, between 3 and 4 million children are born to all parents in the United States each year, most of whom receive birth certificates from state and local authorities. *See* Michelle J.K. Osterman, Brady E. Hamilton, Joyce A. Martin, Anne K. Driscoll & Claudia P. Valenzuela, *Births: Final Data for 2022*, 73 NAT'L VITAL STAT. REPS. 1, 2 (2024); *supra* notes 86–94 and accompanying text.

applicant in January 2025 needed only present a copy of a (non-delayed) birth certificate; if the Order goes into effect, the same applicant will have to submit copies of their parents' birth certificates, passports, or other proof of citizenship. Parents who once could have received a Social Security Number for their child immediately after their child was born may soon have to reapply if they are rejected by the EAB verification system. Inevitably, these increased burdens will leave many more children without key identifying documents or access to essential benefits.

New rules seeking to end birthright citizenship will also accentuate features of federalism that perpetuate social inequalities. Legal and social science scholarship has revealed how federal programs that allow states to set eligibility requirements produce drastically different outcomes in terms of access to benefits.[145] Not only may each state and local government have to develop its own new procedures to comply with and implement the Birthright Citizenship Order, adding new administrative burdens for applicants to navigate; they will also make different choices in crafting these procedures, reflecting different substantive commitments about the rights of immigrants and providing access to key services.[146] This is likely to result in significant policy divergences, following recent patterns of partisan polarization.[147] The likely result will therefore be to exacerbate inequalities across jurisdictional lines.

These inequalities weaken the value of citizenship. Of course, some inequalities are a logical result of a federalist system premised on policy variation between state and local units. When Congress delegates to states the power to determine eligibility for certain federal benefits, it may have endorsed the prospect of disparate outcomes.[148] It is less certain whether Congress or the voting public ever intended to create such disparate

145. *See, e.g.*, Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. L. REV. 1531, 1555–80 (2020) (discussing the unequal results of fiscal federalism in education and health spending); JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 48–59 (2018) (tracing the unequal geographic health outcomes produced by variation in state Medicaid policy); JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 205 (2022) ("States are, in many ways, just not set up to provide social programs that alleviate poverty or limit insecurity in any substantial way. . . . [D]ecentralization of administration [is] a key tool for keeping the American welfare state hollow and unequally (especially racially unequally) distributed . . . .").

146. *See supra* Sections II.B.ii–iii. Such differences might also result from any future alterations to the scope existing injunctions that allow the Order to take effect in some jurisdictions, but not others.

147. On the spillover of national polarized politics onto state policymaking, see GRUMBACH, *supra* note 145, at 71–149.

148. *See* MICHENER, *supra* note 145, at 21, 48–59; Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2020 (2014) ("[M]any major federal statutes give states frontline roles precisely because Congress desires *dis*uniform implementation of national law" (emphasis in original)).

procedures for determining who counts as a citizen in the first place.[149] It is all the more doubtful that the framers of the Fourteenth Amendment intended such an outcome. As discussed above, the Fourteenth Amendment's Citizenship Clause replaced the patchwork of antebellum gradations of status and citizenship.[150] Without the simple rule of universal birthright citizenship, state and local governments will be empowered not only to condition more rights and benefits on U.S. citizenship, but also to make it difficult to prove citizenship even for those with decades- or centuries-long ties to the United States.

As a result, the Birthright Citizenship Order threatens to subject many U.S. citizens to the kind of variation in treatment across state and local lines that current law tolerates only with respect to undocumented noncitizens. Recall that under prevailing interpretations of the Equal Protection Clause, sub-federal governments have claimed the authority to enact numerous forms of discrimination against immigrants without status.[151] For example, while some states issue driver's licenses to undocumented immigrants—allowing them to drive on public roads without fear of arrest—others insist on proof of immigration status.[152] A new proliferation of state and local laws governing the issuance of birth certificates could see similar divisions, with some states refusing to issue documents to Americans who cannot provide sufficient evidence of their parents' citizenship. Scholars have described the varying bundles of rights that state and local governments offer to undocumented immigrants as alternative conceptions of "citizenship" within the United States' legal system.[153] Some of these accounts refer to

149. Federal courts have also read into the immigration statutes a strong disapproval of independent efforts by state or local officials to assess individuals' immigration status. Notably, in *Arizona v. United States*, the Supreme Court struck down an Arizona statute empowering state law enforcement officers to arrest suspected undocumented immigrants, reasoning that "This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer." Arizona v. United States, 567 U.S. 387, 408 (2012). Some lower courts have interpreted this prohibition on state officials usurping the discretion of federal immigration agencies to forbid sub-federal procedures that determine and attach consequences to undocumented status. *See* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 532 (5th Cir. 2013) (invalidating a local effort to bar undocumented immigrants from securing permits to rent apartments, in part, because it rested on the city's "assessment of 'unlawful presence'"); Lozano v. City of Hazleton, 724 F.3d 297, 317–18 (3d Cir. 2013) (invalidating a similar local scheme as "an attempt to unilaterally attach additional consequences to a person's immigration status with no regard for the federal scheme").

150. *See supra* Section I.A.

151. *See supra* notes 67–74 and accompanying text.

152. *See States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 13, 2023), https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants [https://perma.cc/49ZX-FCMJ] (listing state bills granting access to identification to undocumented residents).

153. *See, e.g.*, COLBERN & RAMAKRISHNAN, *supra* note 25; KENNETH A. STAHL, LOCAL CITIZENSHIP IN A GLOBAL AGE (2020); ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC

these alternative notions of citizenship as something less than full U.S. citizenship; others simply note that citizenship rights exist on a spectrum.[154] Regardless of how one characterizes these citizenship rights, a new proliferation of sub-federal variation in determining U.S. citizenship would transform its status in the country's legal system, creating something that looks less like uniform national membership, and more like the patchwork of statuses that existed before the Civil War.

In summary, universal birthright citizenship has long spared the vast majority of those born in the United States from any searching inquiry into their citizenship. The prevailing constitutional rule effectively creates a bright-line rule treating a U.S. birth certificate (at least, one produced at birth or shortly thereafter) as definitive proof of citizenship. This means that most Americans are protected from the kinds of procedural barriers enacted after *Wong Kim Ark* by federal officials, the scrutiny that federal agencies currently apply when evaluating delayed birth certificates, or the disparate choices state and local governments make in allocating benefits to undocumented noncitizens. The Birthright Citizenship Order threatens to upend these protections. The Order's title is "Protecting the Meaning and Value of American Citizenship."[155] The administration claims to be immigrants' access to citizenship to make the protections of citizenship stronger for those who truly deserve it. But its most likely effect is precisely the opposite: creating a new citizenship regime that adds administrative burdens at the federal, state, and local level makes all claims to citizenship more precarious—regardless of who the claimant's parents are.

POLITICS (2009); Yishai Blank, *Spheres of Citizenship*, 8 THEOR. INQ. IN L. 411 (2007); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006).

154. *See* COLBERN & RAMAKRISHNAN, *supra* note 25, at 29 (observing this divide in the literature).

155. *See* Birthright Citizenship Order.

III. THE BIRTHRIGHT CITIZENSHIP ORDER IS NOT "IMMIGRATION" POLICY

My aim in this Article has been mainly to describe the sweeping legal and institutional change that would be required in order to implement the Trump administration's Birthright Citizenship Order. I have largely bracketed the question of whether or the Order is consistent with the Fourteenth Amendment's Citizenship Clause, or with the federal statutes that mirror this constitutional text.[156] In doing so, I do not mean to suggest that the outcomes I detail are somehow irrelevant to the analysis of the Order's legality. As alluded to above, for example, to the extent that the Order invites a patchwork of divergent state and local procedures for determining citizenship, this may conflict with the Fourteenth Amendment's aim of establishing a unified national conception of citizenship.[157] Recognizing the sweeping consequences of the Order may also inform an account of how the Trump administration's effort to alter the meaning of both a federal statute and a constitutional amendment by executive order violate core principles of administrative law and the separation of powers.[158]

156. *See* 8 U.S.C. § 1401(a). The government has taken the position that since the Immigration and Nationality Act "imported [the] exact scope" of the Citizenship Clause, its arguments in favor of its interpretation of the Fourteenth Amendment suffice to defeat claims that the Order violates the statute as well as the constitution. *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Preliminary Injunction at 14 n.4, New Jersey v. Trump, No. 25-cv-10139 (D. Mass. Jan. 31, 2025). This position is questionable, since Congress can grant birthright citizenship by statute to groups that do not receive it under the Citizenship Clause. In fact, the immigration and nationality statutes do precisely this, granting automatic citizenship to members of "Indian, Eskimo, Aleutian, or other aboriginal tribe[s]" born in the United States despite tribal members' exclusion from birthright citizenship under *Wong Kim Ark*. 8 U.S.C. § 1401(b); *cf.* United States v. Wong Kim Ark, 169 U.S. 649, 682 (1898) (excluding "children of members of the Indian tribes" from birthright citizenship under the Fourteenth Amendment). A narrower reading of the Citizenship Clause does not automatically foreclose a broader reading of the citizenship statute.

157. *See supra* notes 154–55 and accompanying text. At the same time, it is important not to exaggerate the constitutional significance of this account. If the Fourteenth Amendment mandates universal birthright citizenship for all, then it would be unconstitutional to deny birthright citizenship to some even if doing so did not impose significant administrative burdens on others. If the Trump administration and its allies in Congress were to implement a national birth registration system, for example, this would greatly simplify the process of implementing the Birthright Citizenship Order and reduce administrative burdens on individual applicants for passports or federal benefits. But that in itself would do nothing to strengthen the argument that abolishing birthright citizenship for the children of undocumented immigrants is constitutional.

158. Even if courts were to agree with the Trump administration's interpretation of the Fourteenth Amendment and 8 U.S.C. § 1401(a), the Birthright Citizenship Order would still be unlawful if it was issued without statutory authority, or was arbitrary and capricious. *See* 5 U.S.C. § 706. Although this doctrine may not be directly applicable here, the Supreme Court's recent case law has also strongly indicated that federal agencies may not decide "major questions," or make "decisions of vast economic and political significance," without clear authorization from Congress. West Virginia v. EPA, 597 U.S. 697, 716 (2022) (internal quotation marks omitted); *see also* Biden v. Nebraska, 600 U.S. 477 (2023);

Although this Article's account bears on the core legal questions in the litigation over the Birthright Citizenship Order—more directly—it also demands a basic reframing of what the Order is and seeks to do. The Trump administration and its allies have been clear about the purpose of its policy on birthright citizenship: preventing immigration. Donald Trump's Campaign website described the future Birthright Citizenship Order as "part of my plan to secure the border," an effort to "choke off a major incentive for continued illegal immigration, deter more migrants from coming, and encourage many of the aliens Joe Biden has unlawfully let into our country to go back to their home countries."[159] Characterizing the Birthright Citizenship Order as a matter of immigration policy suggests that the administration is taking decisive action to fulfill President Trump's signature campaign promise of "protecting the meaning and value of American citizenship"—that is, protecting deserving native-born Americans from the supposedly undeserving citizenship claims of immigrants. But understanding birthright citizenship as "immigration" law or policy carries even greater significance under the Roberts Court, which has often taken pains to defer to executive decisionmaking in matters of immigration.[160] For the judiciary as well as the public, it matters a great deal

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Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 267 (2022) (describing the major questions doctrine as a "clear statement rule that operates as a presumption against reading statutes to authorize major regulatory action"). The sweeping consequences of the Birthright Citizenship Order—along with its departure from over a century of constitutional and statutory principles and the high political stakes of this issue—suggest that this is precisely the kind of "major" question that should not be decided by executive fiat.

159. *Agenda47*, *supra* note 1; *cf.* Application for a Partial Stay of the Injunction Issued by the United States District Court for the Western District of Washington at 5, Trump v. Washington, No. 24A885 (U.S. Mar. 13, 2025) ("That Order is part of the Administration's broader effort to repair the Nation's immigration system, resolve the border crisis, and address the significant threats to national security and public safety posed by illegal immigration" (internal quotation marks omitted)); Kathryn Watson, *Trump Praises Supreme Court Decision Limiting Use of Nationwide Injunctions*, CBS NEWS (June 27, 2025, 2:07 PM), https://www.cbsnews.com/news/trump-news-conference-supreme-court-rulings-birthright-citizenship/ [https://perma.cc/D4CB-L5GN] (quoting President Trump, in remarks praising the *CASA* decision for helping to prevent "[h]undreds of thousands of people . . . pouring into our country under birthright citizenship"). Similarly, Republican members of the House Judiciary Subcommittee on the Constitution and Limited Government focused much of their comments in a hearing on birthright citizenship on migrants who allegedly swim across the Rio Grande while pregnant, and sophisticated schemes by foreigners to exploit tourist visas and U.S. surrogacy laws to gain citizenship for their children. *See "Subject to the Jurisdiction Thereof": Birthright Citizenship and the Fourteenth Amendment: Hearing Before the H. Comm. on the Judiciary*, 119th Cong. 114–16, 125–26 (2025) (statements of Harriet Hageman and Mark Harris, Members, H. Comm. on the Judiciary).

160. *See* Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 416–41 (2024) (explaining the development of "exceptional" deference doctrines in immigration, inapplicable in other areas of law, under the Roberts Court). The government's applications to the Supreme Court for stays of lower courts' injunctions against the Birthright Citizenship Order appeal to the executive branch's particular need for protection against judicial interference in the realm of

whether the administration's actions are understood to affect a minority whose ties to and rights within the United States are suspect, or the broader majority.

This Article's analysis suggests, however, that the Birthright Citizenship Order cannot be understood straightforwardly as an act of "immigration" law or policy. Admittedly, defining what does or does not count as "immigration" can be challenging even for professional scholars of immigration law. As Professor Adam Cox has explained, for example, rules "selecting" which noncitizens can enter or remain in the United States—often assumed to be the primary function of immigration law—inevitably overlap with rules "regulating" the conduct of noncitizens who are here or who might seek to come here.[161] In one obvious sense, the Trump administration's Order does neither of these things, because it applies to citizens rather than noncitizens. The Order instructs federal agencies how to evaluate claims that someone already is a citizen by birth when that citizen seeks to interact with the federal government. It has nothing to say about what a noncitizen has to do to immigrate to the United States or eventually become a citizen.

Of course, the Trump administration's purpose is to use these citizenship procedures to remove what it sees as an incentive for foreigners to come to the United States to give birth to U.S. citizen children. In that sense, its aim is both to regulate noncitizen parents' conduct, and in so doing to "de-select" them for entry. The Birthright Citizenship Order might also be described as an attempt to expand the scope of "immigration law" by treating U.S.-born children of immigrants as noncitizens.[162] But although

immigration. *See* Application for a Partial Stay of the Injunction Issued by the United States District Court for the Western District of Washington at 36, Trump v. Washington, No. 24A885 (U.S. Mar. 13, 2025) ("the district courts' universal injunctions impair the President's efforts to address the crisis at the Nation's southern border").

161. *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 342–43 (2008); *see also* Matthew J. Lindsay, *Disaggregating "Immigration Law*,*"* 68 FLA. L. REV. 179, 195–204 (2016).

162. In this sense, the Order is consistent with other actions taken by the Trump administration that subject citizens to deportation and other immigration enforcement methods. *See, e.g.*, Rebecca Beitsch, *Mass Deportation Effort Sweeps Up U.S. Citizen Children with Deported Parents*, THE HILL (June 2, 2025, 6:00 AM), https://thehill.com/homenews/administration/5326444-trump-administration-deporting-us-citizen-children/ [https://perma.cc/5LQR-WG2R] (describing deportations without process of U.S. citizens along with their undocumented parents); Brian Mann, *'Homegrowns are Next': Trump Hopes to Deport and Jail U.S. Citizens Abroad*, N.P.R. (Apr. 16, 2025, 11:56 AM), https://www.npr.org/2025/04/16/nx-s1-5366178/trump-deport-jail-u-s-citizens-homegrowns-el-salvador [https://perma.cc/YA6E-4CBH] ("President Trump says his administration is actively exploring a proposal to detain U.S. citizens and send them to prisons in El Salvador.").

the administration's goals may be "immigration" goals, the means it uses to achieve these goals is a regulation of the rights of citizens.[163]

Reframing the Birthright Citizenship Order as a regulation of citizens, not immigrants, may shift not only the public perception, but also the judicial perception of the policy. Courts may be unwilling to give their blessing to the full extent of the Order's effects, even if judges are otherwise sympathetic to its underlying immigration aims. As legal scholars have observed for many decades, judicial outcomes favoring marginalized groups are more likely when the interests of those groups converge with those of the privileged majority.[164] The Trump administration's Birthright Citizenship Order may very well produce such a convergence of interests, sweeping the majority of U.S.-born children into its attempt to strip rights from a minority of second-generation immigrants.

This would not be the first time that birthright citizenship provides an example of the interest convergence thesis in action. *Wong Kim Ark* was itself such a case. Less than a decade earlier, the Supreme Court upheld the anti-Chinese immigration laws of the 1880s, in a unanimous decision featuring lengthy derogatory remarks about Chinese immigrants.[165] Despite joining the majority in the *Chinese Exclusion Case*, Justice Horace Gray penned the decision in *Wong Kim Ark*, writing in part that birthright citizenship for Chinese Americans was necessary to avoid stripping citizenship from "thousands of persons of English, Scotch, Irish, German, or other European parentage."[166] Even for a justice willing to sign his name to an opinion decrying the "evils" of an "Oriental invasion," universal birthright citizenship was required even if this meant treating the children of Chinese immigrants as American citizens.[167]

Members of the judiciary today might similarly think twice about endorsing the Birthright Citizenship Order's sweeping consequences for the

163. If the Trump administration is concerned about temporary visitors coming to the United States to give birth, in contrast, existing immigration regulations already allow it to deny entry in those circumstances. *See* 22 C.F.R. § 41.31(b)(2)(i) (2025); 9 F.A.M. 402.2-4(A)(8) (2025).

164. *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 155 (2011) (collecting scholarship looking to the interest convergence thesis "as providing a strategic method for producing social and political change").

165. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 594–97 (1889) (describing the "evils" of Chinese immigration). The author of that decision, Justice Field, nonetheless wrote a forceful earlier opinion in favor of universal birthright citizenship. *See In re* Look Tin Sing, 21 F. 905, 910–11 (Field, Circuit Justice, C.C.D. Cal. 1884).

166. United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898); *see also* Gabriel J. Chin, *Race and Citizenship in U.S. Law, in* AZIZA AHMED & GUY URIEL-CHARLES, RACE, RACISM, AND THE LAW HANDBOOK (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4786406 [https://perma.cc/MB2R-STJE] (manuscript at 8–9) (describing *Wong Kim Ark* as "a striking example of Derrick Bell's interest convergence thesis").

167. *Chae Chan Ping*, 130 U.S. at 595–96.

majority of Americans. It is possible that some judges or justices are sympathetic to the Trump administration's aggressive approach to immigration enforcement in general, or even to the project of stripping citizenship from the children of undocumented immigrants or temporary visa holders in particular.[168] If so, consequentialist arguments about the impact of the Order on these children may be less persuasive for these decisionmakers. Advocates both within and without the judicial process might nonetheless achieve greater success in challenging the Order by highlighting its implications for millions of children whose parents (or grandparents, or great-grandparents) were born in this country.[169] Understanding the Order in light of these consequences could help to frame it not as an immigration policy at all, but rather an effort to change the basic relationship between American citizens and their government.

CONCLUSION

For over a century, *Wong Kim Ark*'s constitutional guarantee of universal birthright citizenship and the practical guarantee of universal birth certificates have provided the overwhelming majority of Americans with a simple and easy method to prove that they are citizens. To receive virtually any federal document or benefit that depends on citizenship, a birth certificate counts as definitive proof. With the stated aim of "protecting the

168. There are few specific indications that any current justices of the Supreme Court are sympathetic to the Birthright Citizenship Order as a policy matter, even as the Court granted the government's procedural request in *CASA*. Other members of the federal judiciary have nonetheless made public remarks or issued opinions that mirror some of the rhetoric in the Trump administration's Executive Orders. *See, e.g.*, Florida v. United States, 660 F. Supp. 3d 1239, 1247, 1253 (N.D. Fla. 2023) (describing the Biden administration's immigration policy as "akin to posting a flashing 'Come In, We're Open' sign on the southern border," causing an "immigration 'crisis'"); United States v. Abbott, 110 F.4th 700, 725 (5th Cir. 2024) (Ho, J., dissenting) (writing, in reference to immigrant arrivals, that a "sovereign isn't a sovereign if it can't defend itself against invasion"); *cf.* Exec. Order No. 14,159, 90 Fed. Reg. 8443 (2025) ("Protecting the American People Against Invasion") ("Over the last 4 years, the prior administration invited, administered, and oversaw an unprecedented flood of illegal immigration into the United States."). Although the Trump administration does not rely on this view in the Birthright Citizenship Order, Judge James Ho of the Fifth Circuit has suggested in public comments that undocumented immigrants are akin to an invading force, placing them outside the jurisdictional scope of the Fourteenth Amendment. *See* Paul Blumenthal, *Judge James Ho Kicks Off the Auditions for Trump's Next Supreme Court Pick*, HUFFPOST (Nov. 15, 2024, 6:55 PM), https://www.huffpost.com/entry/james-ho-trump-supreme-court_n_6737bf30e4b089e7d9aa7d0f [https://perma.cc/RUK6-84DH] (noting that Judge Ho disavowed his earlier statements that ending birthright citizenship requires a constitutional amendment soon after the November 2024 presidential election).

169. To reiterate, despite the Supreme Court's holding that universal remedies likely exceed federal courts' equitable powers, lower courts may nonetheless apply certain remedial tools consistent with *CASA* that prevent the Order from ever going into effect anywhere. *See supra* note 13 and accompanying text. However, should the Order be implemented on some limited basis while the litigation continues, these implementation efforts may provide advocates with more concrete evidence of what these consequences will look like in practice.

meaning and value of American citizenship," the Trump administration's Birthright Citizenship Order threatens to upend this longstanding protection of citizenship. As federal, state, and local agencies attempt to implement this Order, they will increase administrative burdens that will prevent many American citizens—including those the Order claims it seeks to protect—from asserting their rights. Ending birthright citizenship in this way will not solidify the status of insiders by discouraging the arrival of outsiders. On the contrary, this attempt to exclude undocumented immigrants will make every citizen's status less secure.