

# REPRODUCING CITIZENSHIP

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## I. INTRODUCTION

There is a deli I like to visit in Newark, New Jersey.<sup>1</sup> In fact, I visit so often that I have gotten to know the woman who takes my order most days, Ana. Often, we talk about any number of things as she shows me the newest photos of her son. On a recent visit, things were a little slow. Some of the employees and Ana were gathered around talking. Ana, who loves being a mom to her one-year-old son, stood aghast listening to one of her co-workers describe what he heard on the news that morning: the new President just declared that children born to immigrants would not be citizens. Like most of her co-workers, Ana is originally from another country.

I knew what they were talking about. Almost immediately after taking office on January 20, 2025, President Donald Trump signed the *Protecting the Meaning and Value of American Citizenship* Executive Order.<sup>2</sup> Through this Order, the

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1. Though this story is based on a real-life event, it has been fictionalized to protect the identity of those involved.

2. Exec. Order No. 14160, 90 Fed. Reg. 8449 (2025) (“Protecting the Meaning and Value of American Citizenship”) [hereinafter The Order].

Trump Administration attempted to redefine U.S. Citizenship using its executive power to regulate immigration. Effectively, this Order states that to confer birth-right citizenship on the basis of being born within the territory of the United States, a child must have at least one parent who is either a permanent resident or U.S. Citizen. Framing children who do not have a permanent resident or U.S. Citizen parent as foreign nationals, the Order relies upon the argument that these children are not subject to the jurisdiction of the United States.

In the deli, I listened as everyone expressed not only shock but fear. You see, Ana has been talking about having another baby, hopeful that the next would be a little girl. Though at this moment, she declared that she would not have another baby. She could not risk it until her immigration status was secured. While I did not know nor did I ask Ana what her immigration status was, I calmly told her that there were some limits on this declaration; if she and/or the father of her children were permanent residents, their baby would still be entitled to American citizenship. But to Ana, things had become too uncertain. As she astutely noted, these policies seem to change when a new President is elected. With the knowledge that litigation was already afoot and belief that this re-interpretation of a rather unambiguous constitutional principle is preposterous, I felt more certain that Ana could proceed with her plans than she could be. Without legal expertise, what Ana could tell was that her life and the life of her family was, to some degree, under the imminent control of the federal government. This Order changed how Ana perceived not only her own security but the security of any future children she wanted to have. And just like that, Ana's dreams for her family were crushed.

Of course, any number of constitutional law scholars acknowledge there is no real legal debate: all children born within the United States are born as U.S. Citizens. The text of the Fourteenth Amendment is, as it always has been, clear. So, why would the Trump Administration issue such an order? By instilling fear in Ana and chilling her family making decisions, the Order has served its purpose despite ongoing litigation that has halted its implementation. With one stroke of a pen, the Trump Administration was able to effectively take control of Ana's family through fear.

By taking control of the family through immigration policy, the Trump Administration has engaged in the reproduction of citizenship. This Order is the Administration's attempt to limit which families can reproduce. Indeed, its Order does not tell people they cannot get pregnant or that they must limit their family size. But what it does is more sinister. If the government can limit birthright citizenship on the grounds it proposes, it effectively controls citizen making—which is to take control of the family. If we are to believe any myth about our constitutional republic, a longheld truth is that the family maintains the right to reproduce on its own terms, not the government's. The people choose their government, not the other way around.

Through barely coded language that reproduces racist and nativist attitudes, the Order attempts to control the reproduction of citizenship by handpicking who becomes a citizen. With this understanding, this Article proposes a “constitutional

rights plus” framework that demonstrates the reproductive rights of the parent and the child’s right to citizenship are linked and inseparable. This is an attack on the entire family to control which families produce citizens. Utilizing the reproductive justice framework, this Article argues that the Executive Order reproduces citizenship in four ways. First, by reifying the bounds of who constitutes a family, the Order reproduces family discrimination. Second, the Order reconstructs the noncitizen regime of *Dred Scott* that would effectively render some children stateless and open to exploitation. Third, the Order reproduces family punishment and subordination by ensuring some families are punished for existing and remain subordinated through labor regimes. Fourth, the Order reproduces poverty as it locks families and children into a regime of cyclical poverty that they cannot escape.

Discussing birthright citizenship on these terms, this Article does three things that most scholarship on birthright citizenship does not. First, this Article positions birthright citizenship as an issue of reproductive justice.<sup>3</sup> As its name suggests, *birthright* citizenship is about the exercise of one’s reproductive rights as much as it is the act of being born. Second, birthright citizenship merges the reproductive rights of a child’s parent(s) with the child’s citizenship. Thus, this Article emphasizes the role of the child citizen not just as future citizen but as a living citizen with immediate needs.<sup>4</sup> *Birthright* citizenship is about the social, sexual, and reproductive rights of noncitizen parents as much as it is the civil and political reproduction of child citizens.

Finally, acknowledging the role of labor in the lives of undocumented and temporary migrant parents, this Article shies away from justifications for birthright citizenship that are rooted in pure economic and traditional rights discourse. Reproductive rights and experiences are often omitted from the discourse of legal citizenship,<sup>5</sup> but this Article provides the critique that without considering the

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3. This Article acknowledges that reproductive justice is a concept that applies to all people. As such, this Article attempts to use gender neutral framing where possible. However, the Article does explicitly reference “women,” as in cisgender women, or “mothers” at times. In doing so, this Article does not attempt to define anyone else out of these categories as the Executive Order and its attendant policies impact all people.

4. See Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 HOWARD L.J. 359, 384 (2012) (referring to children as “America’s greatest resource”). A cornerstone of society is reproduction. Because of settler colonial history, the children of immigrants, children of the formerly enslaved, and children of American Indians have always necessitated special focus. See, e.g., 25 U.S.C. § 1902 (using this “greatest resource” language in the Indian Child Welfare Act of 1978, noting the importance of Indian children in ensuring the future of American Indian Tribes).

5. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 4 (1998) (“We are not long past the time when matters having to do with families and children were regarded as ‘women’s stuff’ and given only glancing attention in professional disciplines.”); see also Barbara Stark, *The Women’s Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL’Y 261, 271 (2011) (“Because reproductive rights focus on experiences—conception, pregnancy, childbirth—that affect women more directly than they affect men, these experiences are not reflected in traditional rights discourse.”).

specific rights of and challenges facing those who give birth and the families they create, there is no citizenship.

This Article proceeds in three parts. Part II develops the foundational theory of this Article. Part II.A examines the reproductive justice framework and ways in which it applies to birthright citizenship. Then, Part II.B describes the language of the Executive Order and its context. In Part II.C, this Article explores who the imagined undocumented immigrant or temporary worker is. This is who the Article defines as the mythical immigrant, the politically unpopular immigrant who serves as the face of public ire against immigration. Although any number of non-European immigrants can be politically unpopular, for historical and geopolitical reasons, the mythical immigrant of the American imagination is Latine.<sup>6</sup>

In Part III, this Article discusses the rights of parent and child. While reproductive justice is a human rights framework, this Article predominantly explores these rights in domestic law. Primarily, this is because as this Part explores, the Fourteenth Amendment's language speaks for itself. Part III.A briefly discusses the rights of the parent. Then, Part III.B discusses the rights of the child to citizenship. Considering both the rights of parent and child, Part III.C defines citizenship and what it means for children.

Finally, Part IV of this Article develops the theory of reproduction of citizenship. Here, the Article connects the right of parent and child to discuss the primary modes of the Order's attempt to reproduce citizenship. By limiting who is a legal citizen and gatekeeping the American identity, the Trump Administration attempts to limit reproduction to the type of citizen the conservative movement at large wants to see. Therefore, Part IV considers four types of reproduction the Order sets out: (1) the reproduction of family discrimination, (2) the reproduction of *Dred Scott*, (3) the reproduction of family punishment and subordination, and (4) the reproduction of poverty. In doing so, this Article positions the crusade against birthright citizenship as not merely problematic for economic reasons. It is problematic because the crusaders seek to design a specific citizenry in contrast with purported American ideals against the backdrop of a political moment steeped in pronatalist, nativist policies.

## II. REPRODUCTIVE JUSTICE AND THE ORDER

Ana is an Afro-Latina immigrant who has lived in the United States for several years. Ana is an unmarried mother. She is a woman of childbearing age who works a minimum wage job. She lives in a major metropolitan area on the eastern seaboard. Her city is incredibly diverse with pockets of immigrant communities from around the world—including a large community of other immigrants from

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6. This Article uses “Latine” or “Latino” to mean migrants from Latin America that can be of any racial background. However, as Part II.C explores, this is not to engage in multicultural ideals that attempt to homogenize “oppressed Mexican Americans and colonized Puerto Ricans.” *See ROXANNE DUNBAR-ORTIZ, NOT “A NATION OF IMMIGRANTS”: SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION*, 271 (2021).

her home country. Every day, Ana faces a litany of choices about her life. As an immigrant, these choices are influenced by both her identity and external factors, such as immigration enforcement.

Reproductive justice requires an examination of how Ana's identity and life circumstances impact her decision-making. Founded in 1994 by a group of women of color, reproductive justice "links sexuality, health, and human rights to social justice movements by placing abortion and reproductive health issues in the larger context of the well-being and health of women, families and communities because reproductive justice seamlessly integrates those individual and group human rights particularly important to marginalized communities."<sup>7</sup> Reproductive justice is a social movement not necessarily looking to become a legal framework—but the movement seeks contributors and allies.

Ahead of discussing the Executive Order, Part II.A examines the reproductive justice framework. Here, the Article helps the reader understand this framework and how it fits a conversation on birthright citizenship. Then, Part II.B describes the language of the Executive Order and its context. Though this Article aims to be brief here, understanding the full context of the Order is crucial to understanding its purpose and specific goals for the reproduction of citizenship. In Part II.C, this Article identifies the mythical immigrant, the Latine immigrant at the center of the American imagination who is politically unpopular for historical and geo-political reasons.

#### A. THE REPRODUCTIVE JUSTICE FRAMEWORK

Reproductive justice addresses a host of reproductive choices that people can make. Reproductive justice articulates four positive rights that all people hold: (1) the right to be fertile, (2) the right to engage in sexual relations, (3) the right to reproduce or not, and (4) the right to be able to care for our children with dignity and safety.<sup>8</sup> Reproductive justice is "a public discussion that deals with a full range of reproductive health, rights, and justice issues"<sup>9</sup> and deals in "fundamental respect for the humanity, dignity, and citizenship of girls and women."<sup>10</sup>

As a defining aspect of the movement, reproductive justice focuses on the external factors impacting people and serves as a critique to the concept of individual choice.<sup>11</sup> These external factors include the issues impacting a woman's life, including issues of race, gender, sexual orientation, disability, socioeconomic status, and more.<sup>12</sup> People are experiencing the world in many ways at the

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7. Loretta Ross, *Understanding Reproductive Justice*, SISTERSONG, Nov. 2006, at 2.

8. LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 10 (2017).

9. *Id.* at 112.

10. MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 11 (2020).

11. *See generally* Ross, *supra* note 7, at 5 (explaining the inadequacies of the choice framework addressed by reproductive justice).

12. *See* ROSS & SOLINGER, *supra* note 8, at 74–75 ("Solutions based on an intersectional analysis require a holistic approach, not a linear approach that distorts our realities.").

same time. However, reproductive justice takes a community approach instead of relating concepts of freedom or equality to individual choice.<sup>13</sup> Individual choice can only be as strong as a woman's ability to access choices. Thus, individual rights are always subject to the community's ability to exercise its rights. To proceed as though everyone can make choices and has equal access to those choices is "choice feminism," which reproductive justice rejects.<sup>14</sup>

Because people are held responsible for their "bad choices," organizing around choice has made it nearly impossible for poor people to seek access to public resources.<sup>15</sup> Since at least the 1970s, narratives like the "welfare queen" and "personal responsibility" have been racialized and baked into American discourse.<sup>16</sup> It is about decisions *and consequences* for some but simply decisions for others. Blaming individuals for their "bad" choices or improper use of liberty, society can ignore how injustice, inequality, and the organization of society are the real culprits.<sup>17</sup> Within the choice paradigm, one's ability to play by societal rules surrounding choice often determines the worthiness of their cause.

Overall, immigrants fall into the category of those who should "make better choices." Racializing and criminalizing undocumented immigrants while blaming unfit parents for making bad choices goes a long way in seeking public affirmation for family separations.<sup>18</sup> On these grounds, legal and social discrimination against undocumented immigrants is frequently deployed.<sup>19</sup>

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13. *Id.* at 16.

14. See Michael Ferguson, *Choice Feminism and the Fear of Politics*, 8 PERSPECTIVES ON POLITICS 247, 248 (2010) (explaining that choice feminism relies upon the idea that advances in rights for women have liberated all women to make any choices they want, but reproductive justice challenges this by asserting that privilege permits choice); see also KIMBERLY MUTCERSON, FEMINIST JUDGMENTS 10 (2020).

15. Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (2015), <https://perma.cc/2EQQ-TPRW>.

16. RICKIE SOLINGER, BEGGARS AND CHOOSERS 148 (2001).

17. See ROSS & SOLINGER, *supra* note 8, at 173–174 ("The project of making inequality appear to be a naturally occurring development depends, in part, on accusing poor people of a hypersexuality that leads to the creation of their own poverty when they have too many children, children they cannot afford. This charge removes any responsibility for injustice and inequality from the shoulders of society and frees those who credit this charge from grappling with the complex ways that wealth and poverty are created in the United States.").

18. See Mariela Olivares, *The Rise of Zero Tolerance and the Demise of the Family*, 36 GA. ST. U. L. REV. 287, 309–10; see also Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 963–64 (2001) (framing the imposition of American family models and stereotypes on immigrants as racial coercion); Evelyn Marcelina Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B. U. L. REV. 831, 843 (2024) (explaining that scholars argue immigration is one area of the law where race and gender discrimination are still good law); Shirley Lin, "*And Ain't I a Woman?*": Feminism, Immigrant Caregivers, and New Frontiers for Equality, 39 HARV. J. L. & GENDER 67, 99 (2016) (arguing for the role of feminist scholarship in immigration law to address gender inequality); Veronica Tobar Thronson, *The Derivative Dilemma: The Gendered Role of Dependency in Immigration Law*, 28 U. PA. J. L. & SOC. CHANGE 2 147, 167 (2025) ("Immigration law continues to subject women to antiquated notions of coverture, feminization, and domestication purely based on gender.").

19. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J. L. & SOC. JUST. 63, 112 (2012); see also Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social*

Because of their “bad choices,” immigrant families are in need of special regulation.<sup>20</sup> Immigration enforcement that purports to discourage immigrants from making “bad choices” to have children creates fear that impedes not only choice but access to care.<sup>21</sup> By reminding immigrants of their “bad choices,” the government reminds them that the threat of family separation via deportation always looms along the horizon.<sup>22</sup>

Uncertainty and fear in executive actions are often meant to encourage self-deportation.<sup>23</sup> Self-deportation is a “good choice.” For parents to make this good choice, their children are often used as bargaining chips.<sup>24</sup> Generally, the government is prohibited from indirectly finding ways to get people to waive their fundamental rights. However, this does not apply to immigrant parents who already receive limited constitutional protections.<sup>25</sup> Moreover, fear and limited constitutional protections lead to conditions which permit labor exploitation.<sup>26</sup> In some cases, immigrants who are injured and/or sick are medically repatriated to their home countries by private parties, such as the hospitals and care facilities, trying to avoid incurring the costs of their care.<sup>27</sup>

In a discussion that includes a child’s right to citizenship, it may seem a stretch to utilize reproductive justice as a framework. However, this Article uses this framework with two goals in mind. First, in discussing the perceived “invasion” of undocumented women and their U.S. born children, this Article argues that the Trump Administration has created a political class of noncitizens whose bodily autonomy and family decision-making power it wishes to control in ways that are

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*Control*, 31 GEO. IMMIGR. L.J. 525, 529 (2018) (“[I]mmigration law has served as a powerful form of domestic law, aimed at controlling and shaping the behavior of immigrants within the United States.”).

20. See Marielena Hincapié, *Symposium: DACA More Than Ten Years Later: The Legal, Political and Social Landscape Fighting for Immigrant Justice, Defending Democracy*, 25 RUTGERS RACE & L. REV. 197, 206 (2024) (“This is not just about immigrants; it is about who has political power. It is about limiting views of who is considered worthy of being considered American and who gets to belong.”); *see also* Eleanor Brown & June Carbone, *Race, Property, and Citizenship*, 116 NW. U. L. REV. ONLINE 120, 125 (2021) (connecting property ownership to accessing full citizenship).

21. Paul J. Fleming, William D. Lopez, Charo Ledon, Mikel Llanes, Adreanne Waller, Melanie Harner, Ramiro Martinez, & Daniel J. Kruger, *‘I’m going to look for you and take your kids’: Reproductive justice in the context of immigration enforcement*, PLOS ONE (2019), <https://perma.cc/J8N2-WR2W>.

22. Lori A. Nessel, *Deporting America’s Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605, 616–18 (2019).

23. Nessel, *supra* note 19, at 539.

24. See Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 447 (2021) (discussing how sometimes states use child custody as leverage to limit a parent’s rights).

25. See, e.g., Nessel, *supra* note 19, at 542 (“But notwithstanding the evolution of the equal protection doctrine and the civil rights movement, immigration law has historically remained apart, locked into an archaic view of limited constitutional protections.”).

26. *Id.* at 552.

27. See Lori A. Nessel, *Disposable Workers: Applying a Human Rights Framework to Analyze Duties Owed to Seriously Injured or Ill Migrants*, 19 IND. J. GLOBAL LEGAL STUD. 61, 89 (2012) (“Specifically, the United States provides inadequate funding, places harsh restrictions on states and hospitals that treat immigrants, and fails to properly monitor international discharges, resulting in an unregulated and underfunded grey zone that fosters nonconsensual medical repatriations.”).

otherwise foreclosed by Constitutional protections.<sup>28</sup> This class of noncitizens is created when the Administration simultaneously blames immigrants for stealing jobs and resources.<sup>29</sup> Second, reproductive justice always requires a review of the totality of the circumstances. Here, those circumstances include the interplay between the criminalization of motherhood and the criminalization of being born in a neo-nativist era. As such, this Article turns to the circumstances of the Order.

### B. THE ORDER AND ITS CONTEXT

During the 2024 General Election, Donald Trump made clear that immigration enforcement was at the top of his list of priorities if elected.<sup>30</sup> The campaign trail was full of racialized, anti-immigrant rhetoric that positioned immigrants as outsiders who are here to harm Americans and steal American jobs.<sup>31</sup> Mr. Trump's officials made a variety of claims about immigration and their proposed policies, including plans to deport whole families.<sup>32</sup>

Within hours of his inauguration on January 20, 2025, the President signed the Executive Order limiting birthright citizenship for some children born in the United States.<sup>33</sup> Citing that only children born subject to the jurisdiction of the United States have birthright citizenship,<sup>34</sup> the Trump Administration presented a particularly bold claim stating that the: "Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States."<sup>35</sup> In relevant part, the Order states:

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28. See, e.g., Nessel, *supra* note 19, at 534 ("From the perspective of regulating immigrants within the United States, immigration laws serve to maintain a compliant workforce and instill fear and vulnerability. Immigration law also allows the government to pursue criminal and national security goals in ways that might otherwise be foreclosed by the Constitution.").

29. See HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND RISE OF RACIST NATIONALISM 207 (2021).

30. Modern anti-immigration sentiment, particularly against birthright citizenship, emerged during the immediate post-September 11 era. Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens?*, 15 DIFFERENCES 91, 91–92 (2004).

31. See Daniel Arkin and David Ingram, *Trump pushes baseless claim about immigrants 'eating the pets'*, NBC News (Sep. 10, 2024), <https://perma.cc/VS5U-QFX7> ("They're eating the dogs, the people that came in, they're eating the cats. They're eating the pets of the people that live there, and this is what's happening in our country, and it's a shame."); see also Maya King, *What's a 'Black Job'? Trump's Anti-Immigration Remarks Are Met With Derision*, N.Y. TIMES (Jun. 28, 2024), <https://perma.cc/L9PZ-V3G9> ("They're taking Black jobs and they're taking Hispanic jobs and you haven't seen it yet but you're going to see something that's going to be the worst in our history."); Kate Brumback, *Man convicted of killing Laken Riley sentenced to life in prison without parole*, AP NEWS (Nov. 20, 2024), <https://perma.cc/V9QF-ELYP> (discussing the murder of Laken Riley, a college student who was murdered by a Venezuelan migrant).

32. Billal Rahman & Dan Gooding, *Trump's Deportation Plan Could Bring Back Family Separations*, NEWSWEEK (Oct. 29, 2024), <https://perma.cc/626B-63PW>.

33. The Order, *supra* note 2, at 8449.

34. See Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case* (1608), 9 YALE J. L. & HUMAN. 73, 77–78 (1997). There are two types of birthright citizenship: *jus soli* and *jus sanguis*. *Jus soli* citizenship is based on the place of birth, while *jus sanguis* citizenship is based on lineal descent. The United States recognizes both types of birthright citizenship to some degree. The Order targets *jus soli* citizenship.

35. The Order, *supra* note 2, at 8449.

the privilege of United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the 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 at the time of said person's birth was lawful but temporary . . . and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.<sup>36</sup>

Repurposing a proposed constitutional amendment that died in Congress in 1995,<sup>37</sup> the Order does not fully foreclose citizenship to the children of undocumented women or temporary residents. Additionally, the Order defines mother and father as people who are "biological progenitors of the child."<sup>38</sup>

Upending over 150 years of constitutional history, the Order was meant to take effect on February 19, 2025.<sup>39</sup> Almost immediately, several states filed a lawsuit seeking—and receiving—nationwide injunctive relief from the Order.<sup>40</sup> Litigation as to the constitutionality of the Order remains ongoing. Despite ongoing litigation, the Administration moved quickly to begin implementing its mass deportation policies.

As it implemented these draconian immigration policies, the Administration acknowledged an emerging pronatalist movement in the United States.<sup>41</sup> Mere days after the President signed this Executive Order, Vice President J.D. Vance attended and spoke at the March for Life Rally in Washington D.C. During this speech,

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36. *Id.*

37. See H.R.J. Res. 56, 104th Cong. (1995). Introduced by Anthony C. Beilenson (D-CA), the proposed amendment never made it before the full House. As Harsha Walia notes, anti-immigrant sentiment is not relegated to just one political party. *See BORDER & RULE, supra* note 29, at 52.

38. The Order, *supra* note 2, at 8450. For reasons discussed in Part III.A, *infra*, this language is legally problematic.

39. *See id.* at 8450 (noting the Order was to take effect within 30 days).

40. On January 21, 2025, Washington, Arizona, Illinois, and Oregon filed a lawsuit against the Trump Administration seeking declaratory and injunctive relief. Almost immediately, the plaintiffs received injunctive relief halting the Order while the case proceeded on its merits. *See Washington v. Trump*, No. 2:25-cv-00127 (W.D. Wash., filed Jan. 21 2025). Amidst other lawsuits on this action, the Trump Administration appealed. Before the Supreme Court, the Trump Administration challenged whether a district court had the authority to issue a nationwide injunction enjoining the executive branch from action. On June 27, 2025, the Supreme Court held that the district court did not have the authority to issue such a nationwide injunction. *See Trump v. CASA, Inc.*, 606 U.S. 831 (2025). Within hours of this Supreme Court decision, a group of plaintiffs filed a nationwide class action lawsuit against the Trump Administration seeking declaratory and injunctive relief on behalf of all future persons born in the U.S. Class status has been granted and an injunction has been issued on behalf of the class. *See Barbara v. Trump*, 25-cv-244-JL-AJ (D. New Hampshire, filed Jul. 10, 2025). For further explanation of this condensed procedural history, listen to 5-4 POD: *Trump v. CASA, Inc.* (Spotify, Jul. 8, 2025), <https://perma.cc/NBL5-PRYS>. *See also* Press Release, ACLU, Groups File Nationwide Class-Action Lawsuit Over Trump Birthright Citizenship Order (Jun. 27, 2025), <https://perma.cc/NHQ4-8SFX>.

41. *See* Caroline Kitchener, *White House Assesses Ways to Persuade Women to Have More Children*, N.Y. TIMES (Apr. 21, 2025), <https://perma.cc/4CYN-V8LD> ("Pronatalism strictly speaks to having more babies. Our ultimate goal is not just more babies but more families formed." (quoting Emma Waters of the conservative thinktank Heritage Foundation)).

he vehemently declared: “I want more babies in the United States of America!”<sup>42</sup> In the coming months, the President would also voice support for such policies.<sup>43</sup>

The Administration’s support of pronatal policies is not an aberration. Within the realm of reproductive politics, conservative policies are increasingly white nationalist.<sup>44</sup> Policies focus on increasing the birth rate of *American* babies to American families who meet the traditional family model: a married man and woman who choose to have children and ideally are white, middle class, and Christian.<sup>45</sup> Importantly, this traditional family is self-sufficient.<sup>46</sup> This traditional family model has been in continuous decline since the mid-twentieth century as single parent families and LGBTQIA+ families have grown in prominence—not to mention that the traditional family model was a myth that many American families could never attain at the height of its popularity.<sup>47</sup>

In cohesion with the conservative movement at large, the Trump Administration strategically words its Order, utilizing facially neutral language meant to remind us that we live in a post-racial society with a color-blind Constitution.<sup>48</sup> The Order references the *Dred Scott v. Sandford*<sup>49</sup> decision, which precipitated the need for the Fourteenth Amendment’s Citizenship Clause in the first place, as “shameful.”<sup>50</sup> Despite this acknowledgement, the conservative movement frequently utilizes racial dog whistles.<sup>51</sup>

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42. THE COLUMBUS DISPATCH, *Full JD Vance speech at 2025 March for Life: ‘I want more babies in the United States of America’* at 5:35 (Youtube, Jan. 24, 2025), <https://perma.cc/3YAG-DVB4>.

43. See Kitchener, *supra* note 41.

44. See Laura Briggs, *Haaland v. Brackeen and Mancari: On History, Taking Children, and the Right-Wing Assault on Indigenous Sovereignty*, 56 CONN. L. REV. 1121, 1132 (2024) (“Reproduction, not just adoption, is broadly important to the far right.”).

45. See, e.g., Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1256–57 (2010) (“The marital, nuclear family is one that encourages monogamy, procreation, industriousness, insularity, and — seemingly paradoxically — a certain kind of visibility.”).

46. See Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 222 (2017) (“Privatizing children’s upbringing means that this provision will be confined to their parents’ resources.”).

47. JOANNA L. GROSSMAN AND LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20<sup>TH</sup> CENTURY AMERICA* 4 (2011).

48. See, e.g., Students for Fair Admission, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 231 (2023) (Thomas, J., concurring) (“Our Constitution is color-blind.”). In this concurrence, Justice Thomas uses this phrase multiple times, quoting Justice Harlan’s lone dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). The full quote is: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” *Plessy v. Ferguson*, 163 U.S. at 559.

49. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Discussed further in Part III.

50. The Order, *supra* note 2.

51. See, e.g., IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 4–5 (2014) (defining “a new way of talking about race that constantly emphasizes racial divisions, heatedly denies that it does any such thing, and then presents itself as a target of self-serving charges of racism.”).

Consider the call of the infamous Project 2025. Amidst calls to eliminate “woke” programming,<sup>52</sup> the Heritage Foundation advocated:

Families comprised of a married mother, father, and their children are the foundation of a well-ordered nation and healthy society. Unfortunately, family policies and programs under President Biden’s HHS are fraught with agenda items focusing on “LGBTQ+ equity,” subsidizing single-motherhood, disincentivizing work, and penalizing marriage. These policies should be repealed and replaced by policies that support the formation of stable, married, nuclear families.<sup>53</sup>

Full of racial dog whistles like “single-motherhood” and “disincentivizing work,” which are traditionally descriptors for Black American and Latine parents, this call supports pronatalism.<sup>54</sup>

Though modern pronatal movement supporters vehemently deny any ties to religion and white supremacist goals,<sup>55</sup> there are ties between this movement and the great replacement theory. The great replacement theory claims that there is a plot by minorities to soon outpace and replace white people in America.<sup>56</sup> Considering the totality of the circumstances, the pronatalist message is as clear today as it was in the days of infamous morals enforcer Anthony Comstock: we want more [white] American babies.<sup>57</sup>

### C. THE MYTHICAL IMMIGRANT: THE IMAGINED *ILLEGAL* IMMIGRANT

If reality is stranger than fiction, allow this scene from a recent episode of *South Park* to set the stage for this conversation.<sup>58</sup> “Got a Nut” features

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52. See, e.g., Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (“Ending Illegal Discrimination and Restoring Merit-Based Opportunity”) (ordering all executive offices to end diversity, equity, and inclusion programs).

53. Roger Severino, *Department of Health and Human Services*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 451 (eds. Paul Dans and Steven Groves, 2023).

54. Hincapié, *supra* note 20, at 204. See also DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 222 (1997) (“Black mothers’ inclusion in welfare programs once reserved for white women soon became stigmatized as dependency and proof of Black people’s lack of work ethic and social depravity.”).

55. See, e.g., Jenny Kleeman, *America’s premier pronatalists on having ‘tons of kids’ to save the world: ‘There are going to be countries of old people starving to death.’* THE GUARDIAN (May 25, 2024), <https://perma.cc/853K-WW8N> (“This is not Quiverfull, the fundamentalist Christian belief that large families are a blessing from God. The Collsenses are atheists; they believe in science and data, studies and research.”); see also Sarah Jones, *There’s Nothing New about Pronatalism*, N.Y. MAG. (May 29, 2024), <https://perma.cc/M43D-D86J> (“They are atheists, after all. But their views are just as brutal as anything I encountered during my upbringing in the Christian right.”).

56. See *White Nationalist*, SOUTHERN POVERTY LAW CENTER, <https://perma.cc/BD6K-YUA2> (“White nationalists seek to return to an America that predates the Civil Rights Act of 1964 and the Immigration and Nationality Act of 1965. Both landmark pieces of federal legislation are cited as the harbingers of white dispossession and the so-called ‘white genocide’ or ‘great replacement,’ the idea that whites in the United States are being systematically replaced and destroyed.”).

57. See NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK & FAMILY REPRODUCTION IN VICTORIAN AMERICA 127 (1997) (describing how nineteenth century reformers linked moral concerns to increasing fears of immigrant social presence and political power).

58. SOUTH PARK: *Got a Nut* (Comedy Central television broadcast, aired Aug. 6, 2025).

(fictionalized) Secretary of Homeland Security Kristi Noem. After hearing a community leader mention that he is sure “there are many Latinos in heaven,” she personally leads Immigration and Customs Enforcement (ICE) agents on a raid through the pearly white gates of Heaven to deport them with the clear message that this land belongs to true Americans. She instructs her agents: “If it’s brown, it goes down!” While this comedy is meant to parody the times, it is how society has come to understand the mythical immigrant, which has a devastating impact on Latine communities within the United States. A recent American Bar Association report noted: “the rhetoric and targeting of immigrants has an impact on Latinos individually at a deeply personal level, and also impacts the communities in which they live because their family networks are continuously destabilized by the threat of deportation and increased government scrutiny.”<sup>59</sup>

So, why is there such a focus on people of Latin American descent at this moment? To understand this, it is important to define the mythical immigrant. The mythical immigrant is here to economically devastate the United States and cause unprecedented crime.<sup>60</sup> Sometimes they have a visa, and sometimes they do not—but their stay here is always meant to be temporary. Never are they to become an American. The mythical immigrant is a leech. They are here to simultaneously steal resources from hardworking American people, destroy American society, and harm Americans. They are *foreign* and un-American in their values; they speak different languages and observe different cultural values. They do not look like us. They have chosen to break the law and become criminals by not going to the back of the imaginary immigration line and fixing their status. The mythical immigrant can be anyone: your teacher, your doctor, your nanny, your neighbor, your friend’s grandmother, or even you. Whether they have committed a crime or are the best Samaritan, and regardless of how long they have lived in the United States or why, they can never be one of us. They are *illegal*, and they must go.

This is the racism and nativism responsible for this Order.<sup>61</sup> While it can, and has, targeted anyone from any group, the longstanding history of settler colonialism has largely racialized the mythical immigrant as Mexican.<sup>62</sup> Anti-Indigenous<sup>63</sup> sentiment plays a large role in this, as Mexicans have an ancient connection with the

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59. AMER. BAR ASSOC., LATINOS IN THE UNITED STATES: OVERCOMING LEGAL OBSTACLES, ENGAGING IN CIVIC LIFE 8 (2024).

60. See EDIBERTO ROMÁN, THOSE DAMNED IMMIGRANTS: AMERICA’S HYSTERIA OVER UNDOCUMENTED IMMIGRANTS 64 (2013).

61. See, e.g., Jessica Dixon Weaver, *Racial Myopia in [Family] Law*, 132 YALE L.J. FORUM 1086, 1093 (2023) (arguing that any discussion of family law ignoring race also ignores the bigger picture of what is at stake).

62. See DUNBAR-ORTIZ, *supra* note 6, at 231 (“When U.S. Americans talk with fear or hate about ‘Latinos’ or ‘Hispanics’, or that ‘there are too many of them,’ they are talking about Mexican Americans, not Cuban Americans or Argentine Americans.”).

63. This Article uses “Indigenous” to refer to Indigenous peoples broadly. However, this Article uses “American Indian” or “Indian” to specifically describe Indian Tribes and their members who fall within the purview of federal Indian law because they have a government-to-government relationship with the United States. For a further explanation of this distinction, please see Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652 (2022).

Indigenous peoples of southeastern and southwestern United States.<sup>64</sup> Though Mexicans have a deep history in the United States,<sup>65</sup> the creation of the modern nation state has made them a politically unpopular group.<sup>66</sup> Despite these deep connections to the United States, conservative policy makers racialize Latines as not belonging.<sup>67</sup> For centuries, Mexicans in the United States have been racialized and subjected to violent discrimination, including lynching.<sup>68</sup> Given the geopolitical history of the region, many Mexicans never crossed the border—the border crossed them.<sup>69</sup> And their inability to simply disappear like many other Indigenous groups in the United States has made them a necessary, but politically unpopular, actor in the American national myth.<sup>70</sup> Immigration law constructed illegality, but racism has made “Mexicans” illegal.<sup>71</sup>

Yet to be clear, not all people of Latin American descent in the United States are of Mexican origin.<sup>72</sup> The landscape of Latine immigration has been evolving since the 1980s, when United States foreign policy created political and social strife throughout Latin America.<sup>73</sup> Fallout from U.S. foreign policy in Central America created devastating conditions leaving many with no choice but to migrate in search of opportunity and safety.<sup>74</sup> Particularly, these policy initiatives created dangerous conditions for women, children, LGBTQ, and Indigenous peoples.<sup>75</sup> Despite the U.S.’s involvement in Central America being one of the main

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64. DUNBAR-ORTIZ, *supra* note 6, at 231.

65. *See id.* at 97–105 (describing the history of the American West immediately following the Mexican American War). In 1819, the United States acquired Florida from Spain. In 1848, the United States acquired the western third of the country through the Mexican Cession at the end of the Mexican American War and the Gadsden Purchase. When it acquired these lands, it acquired lands holding Spanish (now racialized as white), mixed race, and Indigenous peoples; *see also* JUAN GONZÁLEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA 48 (2d Ed. 2022).

66. *See* WALIA, *supra* note 29, at 59 (“Present-day immigration, alongside and atop settler colonialism, is bound up in the complicities of empire and its incessant negation of Indigenous sovereignty.”).

67. *See* LAURA GOMEZ, INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM 174 (2020).

68. DUNBAR-ORTIZ, *supra* note 6, at 232; *see also* Richard Delgado, *The Law of the Noose: A History of Latino Lynching Symposium: The Jenna Six, The Prosecutorial Conscience, and the Dead Hand of History* 44 HARV. C.R.-C.L. L. REV. 297, 299–300 (2009) (noting there were approximately 597 lynchings of Mexicans in the southwestern United States during the latter portion of the 19th century).

69. WALIA, *supra* note 29, at 128, 130.

70. *See* GONZÁLEZ, *supra* note 65, at 51 (arguing Mexican labor was responsible for the American prosperity of the nineteenth and twentieth centuries).

71. *See* WALIA, *supra* note 29, at 130 (“[T]he law constructs illegality, and race constructs the illegal.”).

72. 2020 Census data demonstrates that Latines of Mexican origin comprised 57.7% of the Latine population, and its population was growing at the slowest rate. *See* Jessica Pena, Ricardo Henrique Lowe Jr., & Merarys Rios-Vargas, *Eight Hispanic Groups Each Had a Million or More Population in 2020*, U.S. Census Bureau (Sep. 26, 2023), <https://perma.cc/EZW9-FQXF>.

73. GOMEZ, *supra* note 67, at 21; *see also* Angela R. Riley and Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CAL. L. REV. 63 (2021) (noting the dual role of colonialism and foreign intervention in migration).

74. *Gomez, supra* note 67, at 21.

75. *See, e.g.*, Press Release, UNICEF, *Death threats and gang violence forcing more families to flee northern Central America – UNHCR and UNICEF survey* (Dec. 17, 2020), <https://perma.cc/4P6X-EPJR> (describing interview findings that suggest violent conditions in Central America are pushing families and children to flee the area).

precipitators of the region's current conditions, Cuban migrants remain the only group from Latin America to receive permanent protections for political reasons.<sup>76</sup> Additionally, the Trump Administration has announced that it is ending Temporary Protected Status (TPS) for migrants from Venezuela.<sup>77</sup>

There are a variety of factors that push Latin American migration to the United States. Geographical proximity plays a large role in this migration. There is a long history of Mexican migration, specifically for the purposes of labor.<sup>78</sup> That history is also rife with prompt attempts to immediately deport those Mexican laborers, along with their U.S. born children, for political expediency.<sup>79</sup> However, history is also littered with examples of the desire to admit a potential labor market for their services but to never allow them to become part of the citizenry.<sup>80</sup>

Latine migrants have long faced pressure to assimilate to American norms by leaving behind their language and culture.<sup>81</sup> Due to previous waves of migration coupled with proximity to their region of origin, Latine immigrants today have not assimilated in the same way that European or Asian migrants before them did.<sup>82</sup> This is primarily because of historic proximity to the United States but also the ability to move and maintain cultural ties back home.<sup>83</sup> Also, times change. In the modern era, demands to leave behind first languages and cultures are less pressing than just a few generations ago.<sup>84</sup> However, for Mexican-Americans,

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76. Ashley Wu & Albert Sun, *How Trump Has Targeted New Groups for Deportation*, N.Y. TIMES (May 30, 2025), <https://perma.cc/E2E3-45Y6>. Although Cuban migration to the U.S. is often discussed in political terms, Afro-Cuban migrants have not been without challenges as their experiences diverge from those of their fairer skinned counterparts and the children of those who arrived in much earlier waves of immigration. *See generally* Monika Gosin, *The Mariel Boatlift, Haitian Migration, and the Revelations of the "Black Refugees,"* 17 ANTHURIUM 1 (2021).

77. Wu & Sun, *supra* note 76.

78. *See, e.g.*, GOMEZ, *supra* note 67, at 28 (describing an extended history of Mexican migrant labor dating back to the nineteenth century).

79. Fresh Air: *America's Forgotten History Of Mexican-American 'Repatriation'*, NPR (Sep. 10, 2015), <https://perma.cc/86BY-3WHD> (discussing the repatriation of Mexican migrant workers and their U.S. citizen children during the Great Depression). Approximately 60% of those repatriated to Mexico were Mexican-Americans.

80. *See, e.g.*, Anna O. Law, *The Civil War and Reconstruction Amendments' Effects on Citizenship and Migration*, 3 J. AM. CONST. HIST. 111, 130 (2025) (discussing the desire to bring in more Chinese laborers during the latter half of the nineteenth century because they were not white and could not qualify for citizenship through naturalization).

81. *See* Margaret Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories with Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 192 (1994) ("The wide-spread acceptance of traditional assimilationist thought fueled social and familial pressures on Latinos to abandon traditional values and lifestyles in order to achieve educational and economic upward mobility.").

82. *See id.* at 196 (describing how people of Latin American descent in the United States have challenged assimilationist models and rhetoric through a bicultural presence). *See also* TOMÁS R. JIMÉNEZ, *REPLENISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION, AND IDENTITY* 23 (2010) ("[T]he Mexican-origin population is best described as a permanent immigrant group that, because of ongoing immigration, perpetually deals with the turbulent process of assimilation."); GONZÁLEZ, *supra* note 65, at 237.

83. GONZÁLEZ, *supra* note 65, at 238.

84. *Id.* at 278, 295.

this has led to the idea that this group is perpetually foreign, creating questions of belonging.<sup>85</sup>

Beyond politics and international law, the history of racialization of Latinos in the U.S. led to the Order. In the United States, Latines are considered a unitary racial group. But Latines may be of many different races.<sup>86</sup> Haitian migrants, who are overwhelmingly Black, are Latine, as are the numerous white immigrants from Argentina. Ignoring this history of racialization also ignores that a great number of migrants from Latin America today are Indigenous.<sup>87</sup> Consistent with anti-Indigenous racism, Latin American countries notoriously undercount their Indigenous populations, as race remains a complicated topic in Latin America.<sup>88</sup> Today, as in the past, law and society maintain racial boundaries.<sup>89</sup>

The Trump Administration frames immigration as an “invasion.” While the Administration never explicitly mentions Latines, its focus is on Latine immigrants. Family is at the root of this animosity. It is true that the most recent wave of immigration is predominantly from Latin America.<sup>90</sup> In the era of a return to nativism, as conservatives decry declining birth rates, Hispanic birth rates remain steady.<sup>91</sup> Although most Latines living in the United States are citizens,<sup>92</sup> conservative policy makers continue to racialize Latines as those who do not belong.<sup>93</sup>

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85. See JIMENÉZ, *supra* note 82, at 161-162, 258 (describing Mexican-Americans’ experiences with nativist views on their foreignness and ethnicity, categorizing “good” and “bad” Mexicans).

86. GOMEZ, *supra* note 67, at 85.

87. Riley & Carpenter, *supra* note 73, at 66.

88. GOMEZ, *supra* note 67, at 87.

89. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 12 (2006) (arguing the normative meanings that attach to racial difference are a product of law and they map onto social life); *see also* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 198 (2017) (arguing that segregation is an ongoing practice supported by local, state, and federal policy); SOLANGEL MALDONADO, *ARCHITECTURE OF DESIRE: HOW LAW SHAPES INTERRACIAL INTIMACY AND PERPETUATES INEQUALITY* 130 (2024) (“The law’s influence on our intimate preferences has contributed to and continues to perpetuate racial and social inequality.”); GOMEZ, *supra* note 67, at 144 (arguing that how racial categories are defined on the U.S. Census acts as a tool for solidifying racial categories).

90. See GONZÁLEZ, *supra* note 65, at 237-38 (noting that about 50% of the most recent wave of immigrants hail from Latin America while 25% come from Africa or Asia); *see also* Bryan Baker and Robert Warren, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2018–January 2022*, OFF. OF HOMELAND SEC. STATISTICS 5 (2024) (finding that approximately 60% of all undocumented immigrants in the U.S. in 2022 were from Mexico, El Salvador, Guatemala, and Honduras).

91. Brady E. Hamilton, Joyce A. Martin & Michelle J.K. Osterman, *Births: Provisional Data for 2023*, NAT’L VITAL STATISTICS SYS. 2 (Apr. 2024).

92. See AMER. BAR ASSOC., *LATINOS IN THE UNITED STATES*, *supra* note 59, at 7-8. Today, 82% of Latines living in the United States are citizens. 32% of Latines living in the United States are foreign born. Of those who are foreign born, 59% are non-citizens. *Id.* at 7. Thus, of people of Latin American descent living in the United States, no more than 18% of the total population could possibly fall into the category the Executive Order targets. While this may seem like a relatively small population, the Order has broader implications when its purpose is to instill fear and encourage families to act based on fear and not necessarily legalities or realities.

93. GOMEZ, *supra* note 67, at 174.

Moreover, whether Latine or not, undocumented immigrants in the United States have children. As of 2017, approximately five million U.S. citizen children lived with at least one undocumented parent in the United States in a mixed-status household.<sup>94</sup> But from 2007 to 2016, the number of citizen children born to undocumented parents decreased by 36%.<sup>95</sup> This is likely because most Latines in the United States are already citizens.

In the view of those who support the Executive Order, Ana is the mythical immigrant—regardless of her immigration status. She is Latine, and she is not meant to become a citizen. She is here to provide her labor in a ‘job Americans do not want to do.’<sup>96</sup> Is the sin of the mythical immigrant like Ana continuing to reproduce while *true* Americans have stopped? As such, Part III looks to the rights of citizens and noncitizens in the United States.

### III. THE RIGHTS OF CITIZENS (AND NONCITIZENS)

Ana gave birth to her child in New Jersey a few years ago. Because Ana gave birth to her child here, Ana’s child is an American citizen. Ana’s act of giving birth means something for both her and her child—but the legal meaning for both is distinct. For Ana, she became a mother when she gave birth. Legally, this gives her broad parental authority over directing the upbringing of her child. When Ana takes her child to the doctor, she alone—not the government nor anyone else—can decide what vaccines and treatment the child receives. She decides whether her child learns her native language, where they go, and who they see.

For the child, Ana’s act of giving birth in New Jersey means that the child is a U.S. citizen. As a U.S. citizen, the child has the full guarantee of the rights and responsibilities of citizenship. When the child turns eighteen, they will have the right to vote. While both Ana and her child are citizens of their Newark community, Ana’s child’s citizenship gives them legal status within the nation. Because of their birth, Ana’s child has a legal home.

Because of the Fourteenth Amendment’s history and tradition,<sup>97</sup> family rights are citizenship rights. Modern family rights to marry, procreate, and parent—the rights that ensured Ana could choose if, when, and how to have a family—exist within the Fourteenth Amendment’s Due Process and Equal Protection Clauses. In its entirety, Section 1 of the Fourteenth Amendment provides:

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94. Jeffrey S. Passel, D’Vera Cohn & John Gramlich, *Number of U.S.-born babies with unauthorized immigrant parents has fallen since 2007*, PEW RESEARCH CTR. (Nov. 1, 2018), available at <https://perma.cc/3NYA-5KER>.

95. *Id.*

96. While this is common in the vernacular surrounding immigration, this is the labor-essential language this Article seeks to avoid. However, data supports that many Latines experience high unemployment rates, work in dangerous fields, and receive low wages for their work, which is reflective of their oversaturation in manual labor and service sectors. *See AMER. BAR. ASSOC., LATINOS IN THE UNITED STATES, supra* note 59, at 37–38.

97. *See generally* DAVIS, *supra* note 5, at 9–10. (“Drafters and advocates of the Fourteenth Amendment had vivid impressions of what it meant to be denied family rights, for that denial was a hallmark of slavery in the United States.”).

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>98</sup>

Tying citizenship to due process and equal treatment under the law was not a mistake.<sup>99</sup> As a Reconstruction Amendment, the Fourteenth Amendment responded to the crisis of citizenship that slavery created.<sup>100</sup>

In one of the last rallying cries before the Civil War, the U.S. Supreme Court heard *Dred Scott v. Sandford*.<sup>101</sup> Called to answer whether a Black person was a citizen, the Court reasoned that “neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words” of citizenship in the Constitution.<sup>102</sup> According to the *Dred Scott* decision, Black people were not citizens and had no rights that white people were bound to respect.<sup>103</sup>

That slavers had enslaved generations of Africans, forced them to provide free labor, separated families, and committed an untold number of crimes against them with impunity was of no consequence to the Taney Court. That was precisely the problem: to consider any Black person a citizen was to undercut the system of slavery.<sup>104</sup> More than the denial of citizenship, *Dred Scott* effectively tied Congress’s hands in granting citizenship to Black people. Southern slave holding states would have neither understood nor consented to an understanding of citizenship that included Black people.<sup>105</sup> Thus, the Court held that Congress’s authority to naturalize citizens expressly applied to white people . . . and American Indians if they so choose to consider extending that privilege to the “uncivilized.”<sup>106</sup>

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98. U.S. Const. amend. XIV. § 1.

99. Law, *supra* note 80, at 127.

100. *See id.* (“The Amendment was a direct repudiation of *Dred Scott v. Sandford*.”)

101. 60 U.S. 393 (1857).

102. *Id.* at 407.

103. *See id.* (“They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit . . . This opinion was at that time fixed and universal in the civilized portion of the white race.”).

104. *See generally id.* at 416–17.

105. *Id.* at 419–20.

106. *See id.* at 404, 421 (“Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.”). Though the Trump Administration has latched onto arguments surrounding American Indian citizenship, this argument is much more complex as American Indian citizenship is tied to a conversation around the unique political status that American Indian Tribes hold. *See* 1 Cohen’s Handbook of Federal Indian Law § 17.01 (2025).

Because of *Dred Scott*, fully abolishing slavery after the Civil War required constitutional amendment. To understand the full guarantees of the Fourteenth Amendment, including its protection of family rights, one must understand the context that precipitated its creation.<sup>107</sup> Originating in English common law, birthright citizenship is a tradition that predates the Fourteenth Amendment.<sup>108</sup> Slavery's denial of family rights and citizenship became the foundation for *textual* birthright citizenship in the United States. In essence, the Executive Order would return to *Dred Scott* by creating a group that may be able to exist in America with no true legal, civil, or political rights. And the creation of this group would be based on legally cognizable and allowable racism and nativism. The mythical immigrant may be here to work, but they may not take part in governance or presume to have rights as they are foreign invaders.

As such, this Part proceeds in three sections. Part III.A briefly discusses the rights of the parent: the right to procreate and to parent. Traditionally, within American law, these rights are subsumed within the right to marriage. However, modern trends in family law have required some further navigation of these rights. Then, Part III.B discusses the rights of the child to citizenship. Considering both the rights of parent and child, Part III.C defines citizenship and what it means for children.

#### A. THE RIGHT TO PROCREATE AND PARENT

The Fourteenth Amendment protects the right to marry,<sup>109</sup> the right to procreate,<sup>110</sup> and the right to parent.<sup>111</sup> Because procreation and parenting are inherently included in the right to marry, these rights are family rights as much as they are reproductive rights.<sup>112</sup> However, the law continues to recognize marital family supremacy, protecting and favoring the marital family above other relationships.<sup>113</sup> The Supreme Court has expressed limitations on whose privacy it will

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107. DAVIS, *supra* note 5, at 9–10.

108. See generally Price, *supra* note 34. Calvin's Case is the origin of *jus soli* citizenship in English common law.

109. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); see also *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015) (“A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”).

110. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.”).

111. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects.”).

112. See *Obergefell*, 576 U.S. at 669 (“The constitutional marriage right has many aspects, of which childbearing is only one.”); see also CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 61 (2014) (“[M]arriage continues to shadow parental rights, which are more tenuous outside marriage.”).

113. See also Melissa Murray, *Marriage as Punishment*, 100 COLUM. L. REV. 102 (2012) (evaluating how marriage has sometimes been used as a punishment and arguing that laws privileging marriage are also about state control of sex and sexuality); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 5 CAL. L. REV. 1277, 1340 (2015) (arguing that the loss of illegitimacy laws

protect, choosing to valorize and protect the rights of the traditional family.<sup>114</sup> The law may also protect the rights of nontraditional families that mimic the traditional family through marriage.<sup>115</sup> Federal law also supports marital supremacy.<sup>116</sup> As other areas of law, immigration law has traditionally supported family unity through marriage and parentage.<sup>117</sup>

Because of this emphasis on marriage, the strongest claims to parentage exist within the traditional family, or when the child's parents are married.<sup>118</sup> Despite increasing societal movement away from the traditional family model,<sup>119</sup> the law continues to place a premium on this model.<sup>120</sup> Given the evolution of the modern family, some states have looked to doctrines of estoppel such as functional parenthood to vest non-parents with rights.<sup>121</sup>

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prevented discrimination against nonmarital children while only benefiting some nonmarital parents); HUNTINGTON, *supra* note 112, at 60 (“Legal marriage . . . is a powerful institution that comes with a host of tangible benefits and obligations.”).

114. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”); *see also Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (“Of this whole ‘private realm of family life’ it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.”); Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (“When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union.”).

115. See, e.g., Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1598 (2022) (arguing that some states have declared LGBTQIA+ discrimination over post-Obergefell, moving toward a marital supremacist model to evaluate the cases involving same sex couples).

116. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, 2110 (1996) (“Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.”); *see also* Respect for Marriage Act, Pub. L. 117-228, 136 Stat. 2305 (2022) (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”).

117. See Olivares, *supra* note 18, at 325.

118. Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541, 561 (2019) (“Unwed biological mothers hold decision-making power over their children from the moment of conception and, as a physical and societal matter, are tasked with their children’s care. This justifies, according to this line of cases, immediately bestowing a fundamental constitutional right upon unwed biological mothers. Unwed biological fathers, however, have additional requirements before they have any cognizable constitutional interest.”).

119. See, e.g., *Michael H.*, 491 U.S. at 156–57 (Brennan, J., dissenting) (“Beginning with the suggestion that the situation confronting us here does not repeat itself every day in every corner of the country . . . moving on to the claim that it is tradition alone that supplies the details of the liberty that the Constitution protects, and passing finally to the notion that the Court always has recognized a cramped vision of ‘the family’ . . . When and if the Court awakes to reality, it will find a world very different from the one it expects.”); *see also* U.S. CENSUS BUREAU, U.S. MARRIAGE AND DIVORCE RATES BY STATE: 2009 & 2019 (Oct. 27, 2020), <https://perma.cc/S8CQ-EZRP> (reporting that the marriage rates within the last decade had declined).

120. See *Obergefell*, 576 U.S. at 646 (“[T]his Court’s cases and the Nation’s traditions make clear that marriage is a keystone of the Nation’s social order.”).

121. See generally Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023).

Even if parents' rights and children's rights are relational, American parentage law inherently sets an adversarial stage between the two.<sup>122</sup> Therefore, in a system where parents have rights, children have interests that represent their rights within the family. However, the application of these interests is flexible and often subject to bias of the decisionmaker.<sup>123</sup> In custody determinations involving children of immigrant parents, the parent's status may be considered when determining the best interests of the child.<sup>124</sup> A parent's immigration status may be used to manipulate how they exercise their parentage rights in state court.<sup>125</sup>

This system, in which parents' rights cover children's, relies upon the idea that most parents do not make familial decisions that will actively harm their children. Even if their decisions are not universally accepted, parents have broad parental authority. However, though the right to parent is expansive, it is not unfettered.<sup>126</sup> In cases where a parent is suspected of abusing or neglecting their child, the state retains the right to interfere with parental rights in order to protect the child.<sup>127</sup> This is the basis of the state family regulation system.<sup>128</sup> And if the parent is already receiving public benefits of any kind, they may find state action to come rather swiftly.<sup>129</sup>

Limitations on the right to parent are not limited to parents who allegedly abuse or neglect their children. Marginalized families often find that they lack political power to protect their children's interests.<sup>130</sup> For example, a recent proposal suggests parents should be allowed more voting power to vote on behalf of their children.<sup>131</sup> But not all parents have the right to vote—even if they are citizens. Additionally, parents who are incarcerated lack the ability to protect their children, as they often struggle with maintaining an

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122. Akshat Agarwal, *'New Parents' and the Best Interests Principle*, 35 YALE J. L. & FEMINISM 288, 343–44 (2024).

123. *Id.* at 292.

124. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL'Y 47, 63 (2005).

125. *Id.* at 64.

126. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

127. While the state has an interest in protecting children from abuse and neglect, *Prince*, 321 U.S. at 167, children have no affirmative right to protection from their parents. *See DeShaney v. Winnebago*, 489 U.S. 187, 196 (1989) (holding that the purpose of the Fourteenth Amendment was to protect people from the state, not people from each other).

128. This Article uses "state family regulation system" or "family regulation" system in line with current scholarship that interrogates the use of "child welfare" in policing families.

129. *See DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD* 54 (2022) (noting that families living in poverty are more likely to come into the purview of the child welfare system).

130. Catherine E. Smith, *"Children's Equality Law" in the Age of Parents' Rights*, 71 U. KAN. L. REV. 539, 540 (2023).

131. Joshua Kleinfeld & Stephen E. Sachs, *Give Parents the Vote*, 100 NOTRE DAME L. REV. 1201, 1204 (2025).

adequate parent-child relationship.<sup>132</sup> Parents who support gender affirming care and have transgender children lack the power to protect their children in some states.<sup>133</sup>

Gender provides an additional limitation on the right to parent. For example, immigration law often provides men status as visa holders, while their wives hold status only through their husbands.<sup>134</sup> In situations of abuse or when a woman may wish to leave her husband, she is essentially stuck in the marriage and unable to make decisions that may protect her and/or her children.<sup>135</sup> Because men tend to be deported at higher rates than women, many women suddenly find themselves acting as single mothers.<sup>136</sup> Some immigrant mothers are caught between a rock and a hard place when it comes to either becoming single mothers in need of public benefits, or leaving for a home country that a judge determines is not in the best interests of the child.<sup>137</sup>

Moreover, other executive actions and conditions have impacted the ability of immigrant parents to exercise their rights. Recent executive actions lifting “safe zones” create dangerous situations for undocumented parents who face potential detention in hospitals, places of worship, social services agencies, and schools—areas previously off limits for immigration enforcement.<sup>138</sup> Immigrant mothers may also find their child rearing practices under fire because their cultural practices and norms differ from what is considered correct in the United States.<sup>139</sup> Parents who are unfamiliar with the U.S. education system may find their children lacking adequate educational opportunities with little means for parent or child to advocate for themselves.<sup>140</sup>

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132. Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. 517, 528 (2022). As Professor Laroche notes, though all incarcerated parents experience challenges to exercising their parental rights, mothers experience disproportionate challenges.

133. See *L.W. v. Skrmetti*, 83 F.4th 460, 477 (6th Cir. 2023) (holding that despite parental consent, there is no right for an adult or child to receive health care that a state reasonably bans); *see also Parham v. J.R.*, 442 U.S. 584, 605 (1979) (holding that parents retain plenary authority to make decisions about their child’s health care, subject to physician review).

134. Thronson, *supra* note 18, at 148.

135. *Id.*

136. Asees Bhasin, *Love in the Time of ICE: How Parents Without Papers Are Stripped of the Right to Raise Their Children in a Safe and Healthy Environment*, 36 GEO. IMMIGR. L.J. 875, 896 (2022).

137. *Id.*

138. Lynn Damiano Pearson, *Factsheet: Trump’s Rescission of Protected Areas Policies Undermines Safety for All*, NAT’L. IMMIGR. L. CTR. (Feb. 26, 2025), available at <https://perma.cc/Q3Q9-YVQ2>.

139. See Yablon-Zug, *supra* note 19 at 113–14 (“Courts and child welfare agencies routinely express concerns regarding the language, values, and lifestyle of undocumented immigrants in immigrant parent termination cases.”).

140. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 90 (1973) (Marshall, J., dissenting) (arguing a state scheme to fund school districts was not merely discrimination on the districts but a violation of the children’s right to equal protection of the law); *see also Catherine E. Smith, Adult Bearing Rights Archetype*, 19 DUKE J. CONST. L. & PUB. POL’Y 139, 166 (2024) (critiquing the majority’s opinion in *Rodriguez* for its treatment of children as adults and failing to analyze the discrimination children faced under this scheme).

Without a doubt, where a child is born is based on a litany of their parents' decisions—and their ability to make those decisions. For example, a seasonal farm worker who becomes pregnant during the season may not have the option of simply quitting and returning home to give birth. Although this example may seem absurd to those wondering how a woman so heavily pregnant can continue to work, the reality is that the typical pregnant person in America works for as long as she can before giving birth and takes approximately two weeks off after giving birth.<sup>141</sup> For women of lower socioeconomic status and/or of color, such brief leave tends to be compounded by lack of paid leave.<sup>142</sup> And this does not account for the likelihood that many pregnant people, especially of this class, will face obstetric violence and/or the criminalization of their pregnancies.<sup>143</sup> Again, the same systemic issues facing the mythical immigrant are also facing poor people more broadly in America. The positionality of the mythical undocumented immigrant means these issues are merely amplified.

However, the exercise of broad parental authority and the idea that children do not have rights within the family is increasingly controversial.<sup>144</sup> While most children's rights scholars advocate for the preservation of parents' rights in tandem with the balancing of children's rights,<sup>145</sup> scholars have argued that the parental rights regime is essentially another form of coverture in which the law recognizes one citizen as standing in for another.<sup>146</sup> Moreover, scholars argue that

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141. See also Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2197–98 (2024) (“[A]lmost one-quarter of new mothers are back at work within two weeks.”); see also *id.* at 2184 (noting that because women are disproportionately likely to hold part-time positions, the likelihood of this paid leave is even lower); Joanna L. Grossman, *Pregnancy and Social Citizenship* in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 244 (eds. Linda C. McClain & Joanna L. Grossman, 2009) (noting that gaps in pregnancy discrimination law demonstrate the failure of equal citizenship for women).

142. Widiss, *supra* note 141, at 2186, 2198.

143. See Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 728 (2018) (categorizing obstetric violence as types of abuse, coercive, and disrespectful “conduct that women’s health advocates and individual patients find objectionable, traumatic, or harmful”); see also Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 G.W. L. REV. 1163, 1170 (2017) (“Blaming poor women of color for pregnancy outcomes that are rooted in their poverty, trauma, and lack of access to health care functionally erases these structural problems and makes criminalization seem like the more rational response to individual choice.”); Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 489 (2021) (“States overwhelmingly target poor women and women of color through their fetal endangerment laws.”)

144. See, e.g., MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 17 (2005) (tracking the modern children's rights movement since the 1960s and critiquing its call to separate the interests of parents and children).

145. See generally Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L. J. 1448, 1471–72 (2018). But see Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2534 (2022) (arguing that the emphasis on child well-being means the right to parent is self-limiting).

146. See Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 92 (2018) (“Child coverture continues to confer on parents broad control over children’s emotional, intellectual, moral, spiritual, and everyday lives.”).

children should have a fundamental right to be part of a family unit.<sup>147</sup> Within family law, the biggest critique to children's rights remains that balancing parents' and children's rights invites more state intrusion into the family.<sup>148</sup> With this understanding of the relational status between parents' and children's rights, the next Section turns to a consideration of the child's relationship with the government through citizenship.

### B. THE RIGHT TO CITIZENSHIP

The history and tradition of the Fourteenth Amendment itself points to a principle of inclusive citizenship imbued in the human rights principle.<sup>149</sup> Since 1868, this Citizenship Clause has controlled who is a citizen by birth.<sup>150</sup> The biggest exception to birthright citizenship today remains that children of foreign diplomats may not receive automatic birthright citizenship.<sup>151</sup> When birthright citizenship came before the Supreme Court, the Court concluded that just because a group may be politically unpopular, to undermine the citizenship of their U.S. born children is to undermine the citizenship of *all* U.S. born children.<sup>152</sup> Despite this acknowledgement, a great number of anti-immigration advocates rail against so-called "anchor babies." Anchor babies, a derogatory term leveled specifically at cisgender immigrant women, are the children of undocumented immigrants who give birth in hopes of attaining benefits and a fast track to citizenship. Not only are the benefits and fast track to citizenship a

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147. Barbara Bennett Woodhouse & Kelly Reese, *Reflections on Loving and Children's Rights*, 20 UNIV. FLA. J. L. & PUB. POL'Y 11, 18 (2009).

148. GUGGENHEIM, *supra* note 144, at 246–47.

149. See DAVIS, *supra* note 5, at 108 ("Antislavery people's commitment to family integrity and parental autonomy was, like their parallel commitment to the right to marry, related to a theory of human entitlement and freedom.").

150. Evan D. Bernick, Paul Gowder, & Anthony Michael Krist, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORNELL L. REV. ONLINE 101, 105 (2025) (critiquing recent editorials on the meaning of birthright citizenship as posing "a substantial risk of creating the false impression in the minds of the public that there is a serious scholarly debate on the constitutional law of birthright citizenship."); *see also* Gregory Ablavsky & Bethany Berger, "Subject to the Jurisdiction Thereof": The Indian Law Context, N.Y.U. L. REV. (forthcoming 2025) (arguing that the Trump Administration's arguments that the Fourteenth Amendment allows the government discretion to exclude some peoples is anachronistic and wrong).

151. See Immigration and Naturalization Act, 8 U.S.C. §1401(a) (codifying the "all persons born" language in the Fourteenth Amendment); *see also* 8 C.F.R. § 101.3(a)(1) (noting that children of foreign diplomats are not subject to the jurisdiction of the United States); U.S. v. Wong Kim Ark, 169 U.S. 649, 693 (1898) ("The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.").

152. See *Wong Kim Ark*, 169 U.S. at 694 (holding that the U.S. born child of Chinese immigrants was a U.S. Citizen under the Citizenship Clause); *see also* Law, *supra* note 80, at 127–28 (noting that at the time of the Fourteenth Amendment's ratification, politicians understood the Citizenship Clause to extend to all persons born on U.S. soil, including the children of Chinese laborers, with the exception of American Indians).

myth,<sup>153</sup> but the harsh reality of American history demonstrates that anyone who is not American Indian—defined as one holding tribal membership—is an anchor baby.<sup>154</sup>

So clear is the meaning and the understanding of the Citizenship Clause that the only two challenges to birthright citizenship were deeply rooted within the settler colonial politics of their time.<sup>155</sup> While the Administration asserts its interpretation of the Fourteenth Amendment is based in history, its reading of the Fourteenth Amendment is one that has existed for a relatively short period of the republic.

In addition to the Fourteenth Amendment’s guarantees, international law also provides for the right to citizenship. Drawing connections between reproduction, the right to family, and children’s rights, international law recognizes that children have rights both to belong to the family and as citizens.<sup>156</sup> Additionally, international law provides that children have the right to citizenship.<sup>157</sup> Further, international law explicitly creates a relationship between the child and state through the child’s right to citizenship. One of international law’s overarching

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153. David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law’s Treatment of Children*, 14 U.C. DAVIS J. JUV. L & POL’Y 239, 243 (2010) (“[H]aving a child in the United States does nothing to alter the parents’ immigration status, and in all but the most extreme situations, it has no impact on parents’ immigration options.”).

154. See DUNBAR-ORTIZ, *supra* note 6, at 270 (2022) (“The United States has never been ‘a nation of immigrants.’ It has always been a settler state with a core of descendants from the original colonial settlers.”); *see also* David B. Thronson, *You Can’t Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 67 (2006) (highlighting that the framing of immigration as “illegal” is a fairly new phenomenon); Bhasin, *supra* note 136, at 875) (arguing that narratives of criminality and birth tourism are used to promote immigration policies as well as limit how parents can exercise the right to parent).

155. See *Elk v. Wilkins*, 112 U.S. 94, 101 (1884) (holding that Congress had not included American Indians in the Citizenship Clause), overruled by Indian Citizenship Act of 1924 (the “Snyder Act”), H.R. 6355, Pub. L. 68-175, codified at 8 U.S.C.A. §1401(b) (declaring all tribal members born in the United States are citizens of the United States too).

156. See G.A. Res. 217A, U.N. Declaration of Human Rights art. 16(3) (Dec. 10, 1948) [hereinafter Declaration] (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”); *see also* G.A. Res. 2200A(XXI), International Covenant on Civil and Political Rights art. 24 (Dec. 16, 1966) [hereinafter ICCPR] (providing a child has the “right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”); G.A. Res. 44/25, U.N. Convention on the Rights of the Child (Sep. 2, 1990) [hereinafter CRC] (recognizing “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”); *see id.* at art. 5 (“States Parties shall respect the responsibilities, rights and duties of parents.”); *see id.* at art. 18 (“Parents. . .have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”).

157. See Declaration, *supra* note 156, at art. 15 (“Everyone has the right to a nationality.”); *see also* ICCPR, *supra* note 156, at art. 24(2)–(3) (providing every child has the right to a nationality); CRC, *supra* note 156, at art. 8 (protecting a child’s “identity, including nationality. . .as recognized by law without unlawful interference”); G.A. Res. 2200A(XXI), International Covenant on Economic, Social, and Cultural Rights art. 10(3) (Dec. 16, 1966) (protecting children from discrimination based on parentage); *see id.* at art. 2(2)(requiring nation states “to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”).

goals is to ensure that children are not stateless. A stateless person is one who has no national citizenship and lacks a legal connection to any state.<sup>158</sup> Statelessness provides a problem within the modern nation state regime.<sup>159</sup> There are approximately ten million stateless people in the world today, and most of them are children.<sup>160</sup> The problem of statelessness is that the provision of basic services and rights depends upon citizenship.<sup>161</sup>

Many modern cases of statelessness invoke “ghost citizenship.”<sup>162</sup> That is, states determine that a person is a citizen of another state and thus not entitled to citizenship in their state, even if it is where that person currently resides.<sup>163</sup> To deny a U.S. born child birthright citizenship is to possibly render them stateless. Even when their parents’ country of origin may recognize the child’s citizenship, there may be other administrative issues in providing the documentation required for citizenship.<sup>164</sup> If an undocumented pregnant woman faces availing herself to authorities by giving birth in a hospital, she may forgo giving birth in a hospital, creating potential medical concerns for mother and child as well as a lack of documentation for the child’s birth.<sup>165</sup> As supporters of the Executive Order point out, not every country engages in birthright citizenship.<sup>166</sup> Given that children have a right to citizenship under both domestic and international law, the next Section turns to defining citizenship and its importance to children.

### C. DEFINING CITIZENSHIP AND WHAT IT MEANS FOR CHILDREN

T.H. Marshall defined citizenship as a set of reciprocal civil, political, and social rights and responsibilities that exist between a government and its citizens.<sup>167</sup> Civil citizenship includes the rights necessary for individual freedoms.<sup>168</sup> Political citizenship is the right to participate in exercising political power.<sup>169</sup> Social citizenship includes health, welfare, and the right to “live the life of a civilized being according to the standards prevailing in the society.”<sup>170</sup>

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158. G.A. Res. 526 A (XVII), Convention relating to the Status of Stateless Persons, art. 1, 360 U.N.T.S. 117 (Sep. 28, 1954); G.A. Res. Convention on the Reduction of Statelessness, art. 1, 989 U.N.T.S. 175 (Aug. 30, 1961). The United States is not a party to either of these Conventions.

159. WALIA, *supra* note 66, at 277.

160. JAMIE CHAI YUN LIEW, GHOST CITIZENS: DECOLONIAL APPARITIONS OF STATELESS, FOREIGN AND WAYWARD FIGURES IN LAW 5 (2024).

161. *See, e.g.*, *id.* (explaining that in some countries, citizenship may be required for a child to receive education).

162. *Id.* at 3.

163. *Id.*

164. Melissa Stewart, *Birthright Citizenship, Denaturalization, and the Specter of Statelessness*, 73 UCLA L. REV. Discourse 24 (forthcoming 2025). Draft article on file with the author.

165. *Id.*

166. *See* LIEW, *supra* note 160, at 14–15 (describing citizenship as a western concept).

167. T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 8 (1950).

168. *Id.*

169. *Id.*

170. *Id.*

In this model, citizenship is a bundle of sticks in which some types of citizenship may exist while others do not. Some scholars argue that the Fourteenth Amendment protects only civil citizenship, and not political or social citizenship.<sup>171</sup> Meanwhile, scholars of feminist and queer theory argue that it protects all types of citizenship, including reproductive and sexual citizenship.<sup>172</sup> Reproductive citizenship is the type of citizenship reproductive justice invokes, defining existence and exercise of reproductive autonomy as a type of citizenship.<sup>173</sup> Meanwhile, sexual citizenship acknowledges sexuality's role in citizenship.<sup>174</sup> It frames sexuality as both a point of discrimination and liberation.<sup>175</sup>

Consistent with the aims of the reproductive justice movement, this Article argues that the Fourteenth Amendment's guarantee should be read to protect civil, political, social, reproductive, and sexual citizenship because the plain text calls for due process and equal protection of the law. Moreover, for the family rights articulated in the Fourteenth Amendment to exist, individuals must be able to access some degree of reproductive and sexual citizenship. To put it frankly, babies do not exist without sex nor without the exercise of reproductive autonomy. Without a doubt, a critique of this point is that the Constitution protects only negative rights that could have been understood to exist at the time of framing. However, the Bill of Rights provides for the protection of *natural* rights as well as the ones it articulates.<sup>176</sup> Though often overlooked,<sup>177</sup> the Constitution

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171. RANDY E. BARNETT AND EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 143 (2021).

172. *See, e.g.*, MAXINE EICHNER *Feminism, Queer Theory, and Sexual Citizenship* in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 325 (eds. Linda C. McClain & Joanna L. Grossman, 2009) (arguing for a more comprehensive theory of sexual citizenship that considers the intersections of different forms of oppression while evaluating the role of sexuality in citizens' lives).

173. *See generally* RUTH LISTER, CITIZENSHIP: FEMINIST PERSPECTIVES (1997).

174. DAVID EVANS, SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES 41 (1993) ("Sexuality is inextricably tied to capitalism's requirements for reproduced labour of different values, the buoyant consumerism of the metropolitan economies and, as with all capitalist social relations, sexuality's material construction is effected not only directly through the market, but also mediated through the state's formal machineries and practices of citizenship, and in all these arenas sexuality is, albeit attenuated, a channel of class relations.").

175. *Id.* at 39. *But see* Eichner, *supra* note 172, at 323 ("The fact that a citizen engages in sexual activity, it should be recognized, does not, in itself, transgress societal norms in any way that should be considered liberatory.").

176. *See* U.S. Const. amend. IX; *see also* Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) ("The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."). As the reproductive justice framework suggests, and Part II discusses in further detail, these are human rights embedded within the Constitution.

177. *See id.* at 491 (Goldberg, J., concurring) ("The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.").

explicitly reserves some rights to the people.<sup>178</sup> Though the U.S. Constitution and federal jurisprudence are meant to provide a baseline of rights, the protection of the rights of citizenship vary wildly. The state to state regime of rights in which some states provide greater rights protections than others creates a site of inequality.<sup>179</sup>

Contemplating the bundle of sticks model of citizenship, it is possible for non-citizens to enjoy some rights while not having others. For example, undocumented parents enjoy social, reproductive, and sexual citizenship. A claim for citizenship for those without immigration status may seem bizarre. However, this is why it is important to remember the full guarantee of the Fourteenth Amendment: its protections of due process and equal protection extend to *all persons*. Due process and equal protection of the law—which have defined constitutional family rights—extend to undocumented parents.<sup>180</sup> Undocumented parents have constitutionally protected reproductive and family rights much the same as anyone else living in the United States.

More than rights, citizenship is also status and practice.<sup>181</sup> Status and practice may be a source of social citizenship because these concepts are about belonging to the community.<sup>182</sup> Social citizenship creates an “ideal citizenship against which achievement can be measured and towards which aspiration can be measured.”<sup>183</sup> The American model of citizenship “creates a sense of permanent inclusion in the American political community.”<sup>184</sup> Meanwhile, legal citizenship is

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178. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (arguing that the right to parent is not an enumerated right—rather it is a natural right protected within the Ninth Amendment’s guarantees); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.”); *Obergefell*, 576 U.S. at 664 (“The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”); *see also* Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1305 (1990) (noting the Ninth Amendment “supplies both the specific textual focus on the people’s retained rights and an efficient remedy to the perceived threat of an adverse inference arising from the listing of specific limitations in a bill of rights.”).

179. See generally *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022); *see also*, e.g., David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUMIA L. REV. 1, 19-20 (2023) (discussing how women of color and poor women will face some of the greatest legal risks in the current post-*Dobbs* state to state legal framework); Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics after Dobbs*, 27, 74-75 (2023) (“In a post-*Dobbs* era, a new approach to reproductive justice will have to grapple with the political as well as legal reasons that a reproductive justice agenda has been pushed to the side...How reproductive justice advocates illuminate the relationship between eroding democratic norms and shrinking access to reproductive health care is one of the many uncertainties—and opportunities—that will define the age of fracture.”).

180. See, e.g., *Students for Fair Admission*, 600 U.S. 181 at 241 (Thomas, J., concurring) (highlighting that the Fourteenth Amendment “pledges that even noncitizens must be treated equally ‘as individuals, and not as members of racial, ethnic, or religious groups.’”).

181. Ruth Lister, *Dialectics of Citizenship*, 12 HYPATIA 7 (1997).

182. MARSHALL, *supra* note 167, at 18, 20.

183. *Id.* at 18.

184. Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 568 (2006).

about the “relationship or covenant between the state and certain individuals who are labeled citizens.”<sup>185</sup> Thus, to have social citizenship is to be American in all but name.<sup>186</sup>

As a practice, citizenship is performed. Citizenship “represents an expression of human agency” and “enables people to act as agents.”<sup>187</sup> For adults, reproduction, childrearing, joining the workforce, and political activism are all ways of practicing citizenship. Bestowing children with privileges, citizenship also encourages age-appropriate responsibilities.<sup>188</sup> Though citizenship can be both status and practice, children typically exercise their citizenship through practice.<sup>189</sup> Children’s roles as citizens are as both learners and as participants in shaping their daily lives.<sup>190</sup>

Through citizenship, children confer a relationship with the state that is distinct from the family relationship. Children hold responsibilities of their own to the state.<sup>191</sup> For example, children are expected to obtain a basic education and skills so that they may also reproduce society.<sup>192</sup> Though they may hold civil and social citizenship from the moment of birth,<sup>193</sup> immaturity places children at a slight disadvantage as citizens with limited status and participation.<sup>194</sup> Scholarship often focuses on children as future citizens.<sup>195</sup> This is a mistake because children have autonomy and immediate needs.<sup>196</sup> Children are constantly learning and developing the skills they need to exercise their rights as citizens.<sup>197</sup> Thus, children are learning to practice citizenship as they develop.

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185. Martha Albertson Fineman, *Equality: Still Illusive After All These Years*, in SOCIAL CITIZENSHIP AND GENDER 251, 252 (Joanna Grossman & Linda McClain eds., 2009).

186. Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 116 (2013) (describing DACA recipients as meeting this model).

187. Ruth Lister, *Why Citizenship: Where, When and How Children?*, 8 THEORETICAL INQ. L. 693, 695 (2007).

188. See Kate Bacon & Sam Frankel, *Rethinking Children’s Citizenship: Negotiating Structure, Shaping Meanings*, 22 INT’L J. CHILD. RTS. 21, 22 (2014).

189. See *id.* at 27.

190. *Id.* at 31.

191. See Lister, *supra* note 187, at 706.

192. See Bacon & Frankel, *supra* note 188, at 37.

193. See Lister, *supra* note 187, at 697.

194. See Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1063 (2010) (“Respecting their autonomy expands their current liberty; protecting them from their deficiencies promotes their current welfare and also preserves their future liberty.”).

195. See Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 448 (2023) (“The Constitution not only confers rights upon children as developing citizens; it also ensures those rights are accessible to children by conferring duties on their parental custodians.”).

196. See Alice Hearst, *Domesticating Reason: Children, Families and Good Citizenship*, in GOVERNING CHILDHOOD 202–03 (Anne McGillivray ed. 1997); see also Clare Ryan, *Children’s Autonomy Rights Online*, 2024 U. CHI. L. REV. ONLINE 1, 4 (2024) (“Children’s autonomy rights can be based on individual or categorical judgments about maturity.”).

197. See Bacon & Frankel, *supra* note 188, at 38; see also Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1135 (2020) (“New laws of emerging adulthood should be responsive to this age group’s economic vulnerability, need for autonomy, and capacity to learn from mistakes.”).

Additionally, citizenship suggests that citizens are treated equally.<sup>198</sup> But citizenship alone cannot produce equality when contending with the legacy of colonialism, as people of color are often omitted from the guarantee of full citizenship and equality.<sup>199</sup> Some immigrant communities are allowed to become American over time, a process that usually aligns with “becoming white.”<sup>200</sup> The “nation of immigrants” has always been a myth because the real story lies in the exclusion of those never meant to belong: Black Americans, American Indians, and any immigrant group racialized as non-white.<sup>201</sup> Racial inequality remains a natural rite of passage in achieving the American dream. Despite the promise of equal civil rights in the 21<sup>st</sup> century, group subordination has always made it difficult to coalesce around a singular national American identity.<sup>202</sup> Though, that is how immigration has long been the gatekeeper of citizenship.<sup>203</sup>

Moreover, citizenship is a gendered space of inequality for women and girls.<sup>204</sup> Although citizenship includes a bundle of rights, the rights and responsibilities of citizens are often gendered.<sup>205</sup> For example, pronatalist conversation is often geared toward women of child-bearing age focusing on their role as “breeders and consigning them to the private sphere of the home and family.”<sup>206</sup> While treating citizens equally, the law often disregards the specific rights of women and girls that need protection.<sup>207</sup> Given the status and practice of citizenship that relies upon the unpaid labor of women within the family, formal equality would not necessarily change anything within the family.<sup>208</sup>

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198. See Román, *supra* note 184, at 564-65.

199. See *United States v. Vaeillo Madero*, 596 U.S. 159, 198 (2022) (Sotomayor, J., dissenting) (“Congress’ decision to deny to the U. S. citizens of Puerto Rico a social safety net that it provides to almost all other U. S. citizens is especially cruel given those citizens’ dire need for aid. Puerto Rico has a disproportionately large population of seniors and people with disabilities.”); see also Román, *supra* note 184, at 572.

200. See HANEY LÓPEZ, *supra* note 51, at 217 (noting that while some Latinos have been able to whiten over time, the most recent arrivals tend to come from a lower socioeconomic status and have darker skin).

201. See DUNBAR-ORTIZ, *supra* note 6, at 20-21.

202. See KENNETH L. KARST, *BELONGING IN AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 182 (1989).

203. See Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 42-43 (Linda C. McClain & Joanna L. Grossman eds., 2009).

204. See Barbara Stark, *Reproductive Rights and the Reproduction of Gender*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 345, 347 (Linda C. McClain & Joanna L. Grossman eds., 2009) (critiquing the under development of reproductive rights in human rights law as an issue of formal equality).

205. Joanna L. Grossman & Linda C. McClain, *Introduction* in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 1, 10 (Linda C. McClain & Joanna L. Grossman eds., 2009).

206. Stark, *supra* note 204, at 355.

207. See generally Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2022).

208. See Fineman, *supra* note 185, at 256 (“Equality for women remains elusive in practical and material terms, in part because they remain mired in a prelegal notion of the family, in which they are understood to have unique reproductive roles and responsibilities that define them as essentially different and necessarily subordinate in a world that values economic success and discounts domestic labour.”); see also Carole J. Petersen, *Women’s Right to Equality and Reproductive Autonomy: The Impact of Dobbs v. Jackson*

While race and gender influence how adults belong, children are also learning to navigate these civil, political, and social rights and responsibilities amidst these challenges. Like all other groups, society tends to view children as a singular homogenized group when they are all having different experiences based on age, race, gender, poverty, ability, and a multitude of other factors.<sup>209</sup> When children are able to participate within a community, they are more likely to be accepted within the community.<sup>210</sup> For children, participation can happen through education as well as other community-based activities.

Because of their youth, children will not enjoy the same rights of citizenship that adults have.<sup>211</sup> Children's rights scholars argue that instead of taking the view of what children cannot do, the law should consider what they have the capacity to do as they transition to adulthood.<sup>212</sup> As a matter of public policy, it is probably not a good idea to allow an eight-year-old to enter a contract for a brand new car. However, a sixteen or seventeen year old, brandishing a driver's license, likely has the capacity to contract for that car. Moreover, there are some situations that require children to become independent actors where they must assert their own rights absent the involvement of a parent.<sup>213</sup> Though there are needs for laws that keep children separate and protected, especially when they are particularly vulnerable, scholars caution that in issuing blanket protections for children, the law has effectively alienated the children it aims to protect.<sup>214</sup>

Children's citizenship invokes the age-old question of whether children are the individual responsibility of their parents or if they are a public good.<sup>215</sup> Both American law and society have decided that children are the individual responsibility of their parents. Individual parental responsibility for children makes sense because the American tradition has continuously treated children as their parents' property. As the property of their parents, parents have ultimate authority over their children.<sup>216</sup> Through the family law principle of broad parental authority, American law limits children's ability to participate as citizens.

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Women's Health Organization, 45 U. HAW. L. REV. 305, 329 (2023) ("[W]hile women voters may outnumber male voters, that has not translated into equal political or economic power.").

209. See Lister, *supra* note 187, at 698.

210. See *id.* at 701.

211. See *id.* at 705 ("Children's disqualification from adult citizenship rights is justified on grounds of their need for protection and their dependence on adults."). But see Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 290–91 (2014) (asserting that law must address the legal and social needs of independent children to allow them to fully access rights of citizenship).

212. See Anne C. Dailey, *Children's Transitional Rights*, 12 LAW, CULTURE & HUMAN. 178, 190 (2016).

213. See Todres, *supra* note 211, at 275 ("In every armed conflict, refugee crisis, and natural disaster, children have been separated from their parents and families and thrust into the role of autonomous actors.").

214. See Karl Hanson, *Separate Childhood Laws and the Future of Society*, 12 LAW, CULTURE & HUMAN. 195, 204 (2016).

215. See Hearst, *supra* note 196, at 203.

216. See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1067 (1992) ("Alongside notions of children as individuals and

Yet, when the government does intervene in the family, it does so on the basis that the family is failing to raise good citizens.<sup>217</sup> Traditionally, the concept of the public and private spheres limits how the state regulates the family.<sup>218</sup> However, the government has always been involved in the family.<sup>219</sup> Indeed, protecting broad parental authority itself is about protecting parents' ability to create good citizens.<sup>220</sup> There is no question that immigrant parents are able to raise good citizens. At the center of a good number of white American family origin stories is the grandparent who overcame all odds and crossed the Atlantic in hopes of finding better opportunity. Indeed, the search for the proverbial American dream and escaping the conditions of colonialism is what continues to push a great number of migrants to our door.

While the Fourteenth Amendment provides baseline protections of due process and equal protection of the law to all persons, the Order has already created concern over the provision of services to children who would be born without citizenship. Considering the needs of children born within their states, the plaintiff states suing the Trump Administration over its birthright citizenship order raised the issue of public benefits.<sup>221</sup> By changing the definition of citizenship, the federal government changes which services vulnerable newborns and children will qualify for in their states. These programs include Medicaid and child welfare services.<sup>222</sup> If the Trump Administration is successful, children born without status would not qualify for Medicaid under federal rules. Likewise, funding for child welfare to the states would be slashed. This would result in a major loss of funding to each of these states—who are still forced to provide these services under federal law.<sup>223</sup>

Documented or undocumented, most immigrants are generally ineligible for federally funded public benefits like SNAP, Temporary Assistance for Needy Families, and Medicaid.<sup>224</sup> While many immigrants do not qualify for these

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national assets, Americans cherished deeply etched images of children as their God-given, inalienable property; treasures, to be sure, but private treasures under the control and custody of their parents.”).

217. See Hearst, *supra* note 196, at 219–220; see also Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 235 (2010) (“States do not completely own families and families certainly do not have dominion over the state. But in their mutual antagonism, rights of personal and political property constrain the encroachment of the other.”).

218. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1827 (1995) (“Because the domestic sphere is understood to be a central arena for the formation of individual values and beliefs, liberalism has traditionally sought to set strict limits on the power of the state to intervene in family matters.”).

219. See *id* at 1828. (“Family privacy in the sense of freedom from governmental influence or control is an incoherent idea.”).

220. See *id.* at 1833.

221. See Washington v. Trump, 2:25-cv-00127 (W.D. Wash., filed Jan. 21, 2025).

222. See *id.* at 3.

223. See *id.*

224. See generally 8 U.S.C. § 1621 (West, Westlaw through P.L. No. 119-36) (Fourteen states and Washington DC have expanded public benefits that undocumented persons can receive, including Medicaid. However, this is covered under state funding); see also Akash Pillai, Drishti Pillai, & Samantha Artiga, *State Health Coverage for Immigrants and Implications for Health Care*, KFF (May 29, 2025) <https://perma.cc/L73K-KMPA>.

programs, there are exceptions to the rule that include state funded aid and emergency medical care.<sup>225</sup> In most cases, their citizen-born children can access any of these services. For example, an undocumented woman would not typically qualify for Medicaid assistance in most states. However, a pregnant undocumented woman qualifies by meeting an exception to this federal rule under the theory that the state is protecting the health and welfare of its future citizens—and each state sets its own standards for the level of care a pregnant undocumented woman will receive.<sup>226</sup> Because children are minors, it is up to their undocumented parents to apply for these benefits, which avails themselves and their immigration status to the state. As such, their parents are often discouraged from seeking these benefits.<sup>227</sup>

Beyond the issue of what this means for the child citizen, the Order creates an issue of federalism. Federal law mandates a base line for state substantive and procedural law in child welfare that states must comply with to receive any funding at all.<sup>228</sup> States—who also retain the right and responsibility to maintain the health and welfare of its citizens<sup>229</sup>—would then be left in the difficult position of finding ways to fund Medicaid and child welfare programs on their own. If states cannot self-fund these programs, this creates a problem of equal protection of the law—which the U.S. Constitution protects for all *persons* in the United States.<sup>230</sup> Thus, more than an abstract idea of funding state programs, cutting this access to the U.S. born children of undocumented migrants means more children will go with their very basic needs unmet in a country that has amplified its intentions to create pro-birth policies. Despite claims that undocumented migrants and temporary visa holders are here to have “anchor babies” to steal public resources and gain access to citizenship for their parents, the availability of services and how immigration law works demonstrates that this is not true.<sup>231</sup> Indeed, logic provides

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225. See generally 8. C.F.R. §274a.12 (West, Westlaw through Oct. 29, 2025). See also Thronson, *supra* note 124, at 71 (“Laws stripping benefits and services on the basis of immigration status take no account for the family as a unit, and often inflict harm on U.S. citizen children through harsh treatment of immigrants.”).

226. While some state Medicaid programs provide only for labor and delivery services, some states cover prenatal care as well. Some states also cover postnatal care for an extended period. See Medicaid Postpartum Tracker, KFF (Jan. 17, 2025), <https://perma.cc/ZJD4-WZ3D>. See also Usha Ranjji, Alina Salganicoff, Jennifer Tolbert, Brittni Frederiksen, & Ivette Gomez, *5 Key Facts about Medicaid and Pregnancy*, KFF (May 29, 2025), <https://perma.cc/DK9L-GZDR> (describing Medicaid coverage for pregnant people).

227. See Thronson, *supra* note 154, at 78.

228. See, e.g., 42 U.S.C.A. § 672 (West, Westlaw through P.L. 119-36) (detailing state requirements for receiving payments for maintenance, administration, and education of children in out-of-home placements under Title IV-E of the Social Security Act).

229. See U.S. CONST. amend. X.

230. See *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (“Use of the phrase ‘within its jurisdiction’ thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory. That a person’s initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State’s territorial perimeter.”).

231. But see Thronson, *supra* note 154, at 60 (“The notion that family ties do not provide a certain route to legal immigration status runs counter to popular conceptions and representations of immigration

that undocumented immigrants and their children cannot be stealing both the jobs and the means tested benefits at the same time.

Returning to Ana's case, it is clear that she has the right to make decisions about whether to become pregnant. In her state, she retains the right to choose to terminate that pregnancy. Because she chose to become a parent, she has the right to parent her child in the way that she sees fit. Because her child was born in the United States, he has U.S. citizenship which ensures he has not only a relationship with his family but one with the federal government as well. Yet, both Ana and her child retain the rights of citizenship—albeit different rights exercised in different ways. The Executive Order attempts to limit not only the child's legal and political citizenship status, but it attempts to limit both the practice of parent's and child's citizenship. As Part IV explores, the Order purposely disrupts how their family can grow and exist.

#### IV. THE REPRODUCTION OF CITIZENSHIP

Ana has decided to wait until she has some certainty in her immigration status to have another baby—a choice that is well within her realm of reproductive rights. As a mother of one, Ana engages in the ongoing exercise of parental authority. In exercising that authority, she is engaged in a citizenship making process where her American child is practicing their citizenship daily. However, the fear of local immigration raids, the fear of having a child without citizenship, and the fear of family separation have limited her family making decisions. While not explicitly prohibiting Ana from having a child either in practice or by law, the Executive Order effectively stopped Ana from becoming pregnant again. The Order so strongly influenced her choice that there is a serious question as to whether she had a real choice. Because of her identity, the government has more than a relationship with Ana's family. The government has control over Ana's family.

Family has always been essential to not only reproducing citizens but shaping them—a role often undertaken by mothers.<sup>232</sup> Culture and values, often those children learn from their mothers, shape citizens.<sup>233</sup> While parents play an important role in shaping citizens, children's rights as citizens in the United States remain underdeveloped. But children's rights can, and do exist, under the constitutional guarantee.<sup>234</sup> Because of societal views on the lack of children's decision-making capacity,<sup>235</sup> constitutional rights for children are often limited to the criminal law context to provide limited protections from governmental

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law."); *see also* LEO R. CHAVEZ, ANCHOR BABIES AND THE CHALLENGE OF BIRTHRIGHT CITIZENSHIP 40 (2017) ("As suspect citizens, anchor babies were, and are, subject to a set of negative characterizations that make them into a threat to the nation.").

232. Dailey, *supra* note 218, at 1834–35.

233. *Id.* at 1839.

234. *See, e.g.*, Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 276 (2021) ("[E]mploying and extolling a child's right to family integrity in various legal systems furthers [children's rights].").

235. Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2122 (2011).

overreach.<sup>236</sup> Although international human rights law recognizes human rights for children, the implementation of international children's rights law will always depend upon its application in national courts.<sup>237</sup>

Recognizing that parents have the right to the care, custody, and control of their children, family law typically rejects the notion of children's rights within the family.<sup>238</sup> That is because presumptively, the "natural bonds of affection lead parents to act in the best interests of their children."<sup>239</sup> This firm distinction between parent and child rights creates a system of unequal citizenship between parent and child, treating children as second class citizens.<sup>240</sup> Whether a child's parents have formed the right kind of family may further affect the rights that a parent or child enjoy within society.<sup>241</sup> Parent's rights—specifically the rights of mothers—need not be considered truly distinct or in opposition to children's rights.<sup>242</sup> Indeed, outcomes for children might be improved if policies impacting their mothers and support for children during early childhood improved.<sup>243</sup> Suppressing the rights of undocumented mothers will have reverberating impacts on their children.<sup>244</sup>

And that is how birthright citizenship foils this strict understanding of rights within the family. If the government can limit birthright citizenship on the grounds it proposes, the government effectively controls citizen making—which is to control the family. As family law scholars note: "Reproductive control has taken many forms across time and space."<sup>245</sup> Most often, reproductive control has

236. Smith, *supra* note 140, at 155.

237. See Jonathan Todres, *Emerging Limitations on the Rights of the Child: the U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 182 (1998).

238. See *Troxel v. Granville*, 530 U.S. 57, 67 (2000); see, e.g., Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 107 (2002) ("While appropriately and even excessively deferential to the rights of parents, society tends to literally and figuratively place children's rights in scare quotes.").

239. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). *But see Smith, supra* note 130, at 544. ("Neither modern equal protection law nor family law recognizes the fallacy of relying on parents to protect children in legal and political systems founded upon inequality among groups that are socially constructed along the lines of race, citizenship, sexual orientation, gender identity, or marital status.").

240. See ADAM BENFORADO, *A MINOR REVOLUTION: HOW PRIORITIZING KIDS BENEFITS US ALL* 175 (2023) ("The zero-sum frame—the idea that making children better off means making everyone else worse off—is false. Their second-class citizenship harms us all."); *see also* Dailey, *supra* note 195, at 450 ("If children's citizenship rights are to be meaningful, it necessarily follows that children's adult custodians must have duties to allow and, in some instances, facilitate children's enjoyment of those rights.").

241. See Woodhouse & Reese, *supra* note 147, at 18 ("Marriage remains a crucial gateway to children's equal rights.").

242. See Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit For Everyone: Ecogennerism, Feminism, and Vulnerability*, 46 Hous. L. Rev. 817, 820 (2009).

243. See *id.* at 860; *see also* Jonathan Todres, *Women's Rights and Children's Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN'S L.J. 603, 611–12 (2004) (arguing that women's rights benefit children's rights indirectly because women do most of the child rearing work and work in general around the world).

244. See Todres, *supra* note 243, at 608–12.

245. Siegel, Mayeri & Murray, *supra* note 207, at 92.

been used to serve the goals of a society that either wanted more people as workers (the enslaved), children to be molded and shaped by the right families (Indigenous peoples), or children never meant to be born (the disabled and migrants). Thus, this is not about the distinct rights of the parent or of the child, it is about both at the same time. Through control of the family, the government takes an active role in determining which citizens come into being. Regardless of their immigration status, the reproductive rights of the parent, and the child's right to citizenship, are wrapped into the family's right to exist on its own terms.<sup>246</sup> It is about the family's right to reproduce on its own terms, not the government's.

Through coded language, the Order provides a unified attack against families which attempts to control the reproduction of citizenship. With this understanding, this Article proposes a “constitutional rights plus” framework that demonstrates that the reproductive rights of the parent and the child's right to citizenship are linked. Though children's rights may be predicated on a human rights framework, so too are the family rights that the Fourteenth Amendment guarantees.<sup>247</sup> If the family is a critical part of the citizenship framework in the United States, then the Fourteenth Amendment is the chassis upon which citizenship continues to grow and develop. Blending both the principles of constitutional and human rights as the Fourteenth Amendment's framers intended,<sup>248</sup> the reproductive rights of parents and the child's right to birthright citizenship are inextricably linked. Enacting the antislavery movement's vision for formerly enslaved peoples as those who could enjoy equal rights of citizenship, including the right to marry, procreate, and parent, with white people, the Fourteenth Amendment's framers got it right. The subsequent interpretations got it wrong.<sup>249</sup>

Thus, Part IV connects the right of parent and child to discuss the primary modes of the Order's attempt to reproduce citizenship. By limiting who is a legal citizen and gatekeeping the American identity, the Trump Administration

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246. Woodhouse & Reese, *supra* note 147, at 32 (“[F]amily formation and preservation, marriage, adoption and procreation, are a matter of children's rights as well as adults' rights.”).

247. See DAVIS, *supra* note 5, at 216 (“The [antislavery] movement was grounded in human rights traditions that had been enshrined in the nation's founding documents and stood throughout the slaveholding years in increasingly explicit challenge to the commodification of human beings.”); Clare Ryan, *Are Children's Rights Enough?*, 72 AM. U. L. REV. 2075, 2095 n.89 (2023).

248. See DAVIS, *supra* note 5, at 108 (“Antislavery people's commitment to family integrity and parental autonomy was, like their parallel commitment to the right to marry, related to a theory of human entitlement and freedom.”). The Fourteenth Amendment predates the modern concept of human rights. However, the concept of natural rights which its drafters relied upon is the antecedent of human rights. See Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 402 (1982) (“A natural rights theory . . . preserves the essential universality of human rights.”).

249. See KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 218 (1989) (“Constitutional interpretation, even as it looks backward, is an art of the imagination.”). But see Barbara Stark, *The Future of the Fourteenth Amendment and International Human Rights Law: The Black Heritage Trail*, 13 TEMP. POL. & CIV. RTS. L. REV. 557, 581 (2004) (criticizing the Fourteenth Amendment's application and arguing that it “can still be reshaped and revived by the leverage of the world”).

attempts to limit reproduction to the type of citizen the conservative movement at large wants to see. Therefore, Part IV considers four types of reproduction the Order sets out: (1) the reproduction of family discrimination, (2) the reproduction of *Dred Scott*, (3) the reproduction of family punishment and subordination, and (4) the reproduction of poverty.

#### A. THE REPRODUCTION OF FAMILY DISCRIMINATION

Though the Fourteenth Amendment does not expressly enumerate family rights, Peggy Cooper Davis has argued that by protecting contract (marriage) and property (parent) rights, it does include family rights as its framers would have understood them.<sup>250</sup> The Fourteenth Amendment aimed to extend the family rights previously reserved for whites only as rights of citizenship to all persons. Though marriage, procreation, and parenting are all core principles of citizenship, family law has regulated these principles such that there is a legal, if not social, preference for how one exercises these rights.

While citizenship may contain an equality principle, family law does not treat all families equally—and the Order’s language is counting on it. To be clear, regulations about the gender of the parent from whom a child confers citizenship are not unusual.<sup>251</sup> By emphasizing the child’s mother as the person whose status matters, the Administration acknowledges the biological parent who is always afforded legal parentage first. If she happens to be undocumented or a temporary resident, the child may still confer parentage through their biological father. However, the problem is that a child’s biological father is not always afforded legal parent rights unless he is married to the child’s mother.<sup>252</sup> And this does not account for so-called non-traditional family situations in which a child may be born to a single parent or to a same-sex couple. In any case, all of these matters are determined by state, not federal, law.

For example, each state sets the guidelines to establish parentage within their state. The most common proof of legal parentage is a birth certificate. To obtain a birth certificate, a parent must establish legal parentage.<sup>253</sup> Biological parentage, defined by the Order as “mother” and “father,” is not enough to secure a birth

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250. DAVIS, *supra* note 5, at 35–36.

251. See, e.g., *Sessions v. Morales-Santana*, 582 U.S. 47, 70 (2017) (noting that past differentiation in the treatment between unwed and wed U.S. citizen mothers has a lot to do with who passes culture, and thus citizenship, to their children).

252. See, e.g., June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1305 (2005) (“The marital presumption starts as a presumption about biology, but it really operates more as a presumption about the connection between marriage and parenthood.”).

253. See Elisa Cariño, *Made in America: How Birth Certificate Applications Infringe on the Right to Citizenship*, 43 N.Y.U. REV. L. & SOC. CHANGE 225, 237 (2019) (arguing that the birth certificate can limit access to citizenship); see also *Serna v. Tex. Dep’t of Health & Hum. Servs.*, No. 1-15-CV-446 RP, 2015 WL 6118623, at \*2, (W.D. Tex. Oct. 16, 2015) (discussing Texas scheme limiting which identity documents were acceptable to prove parentage and receive a copy of a U.S. citizen child’s birth certificate, which disparately impacted undocumented parents).

certificate. Though the Administration has alleged it has not had time to create policy guidance because of litigation,<sup>254</sup> surely national security requires that a father alleging his child should become a U.S. citizen by birth will provide official documentation proving legal parentage.<sup>255</sup>

Not only does the Order's understanding of parentage not comport with any legal definition at the state level, it does not even meet the Immigration and Nationality Act's definition.<sup>256</sup> Immigration law does not recognize a child unless they have a legal parent.<sup>257</sup> Thus, the Executive Branch does not determine who is a legal parent; the states do.<sup>258</sup> Legal parenthood comports with the notion that children are the property of their parents—and unmarried fathers must prove they have the right to that property.<sup>259</sup> From experience, there is a high probability the children are not meant to qualify for citizenship through their fathers.<sup>260</sup> Moreover, the biology plus line of cases emphasizes the weight the Court puts on the marital family, and if not the marital family, on making the process of adoption as easy as possible.<sup>261</sup> This also presupposes that all unmarried men will voluntarily acknowledge their parentage.<sup>262</sup>

Moreover, immigration law “routinely conflicts with private decisions about family composition and integrity.”<sup>263</sup> There is a natural tension between immigration law and family law—two areas of law housed in different parts of the federalist system.<sup>264</sup> As in general family law, the rights of children are limited in immigration law. Immigration law “establishes children as passive objects.”<sup>265</sup> Though immigration law supports the traditional American legal understandings

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254. Strict Scrutiny, *The Atextual & Illegal Attack on Birthright Citizenship*, CROOKED MEDIA (Feb. 24, 2025), <https://perma.cc/ZS8A-VHPH>.

255. See Nessel, *supra* note 23, at 527 (noting the emphasis on national security in immigration policy).

256. See 8 U.S.C. §§ 1101(b)(1)(A), (C)–(D) (defining a child as one who is born in wedlock, a child who has been legitimated in the proper domicile, or child who has a bona-fide parent-child relationship with their parent).

257. David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991 (2002).

258. See generally *Astrue v. Capato*, 566 U.S. 541, 548 (2012) (holding that where state law did not consider a person a legal parent, the person was not a parent for purposes of the Social Security Act).

259. Maillard, *supra* note 217, at 227.

260. See, e.g., *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) (declining to apply federal Indian Child Welfare Act (ICWA) as it did not apply to the child's biological father because he never established legal or physical custody of her as a matter of state law).

261. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *see also* Carbone, *supra* note 252, at 1323. Scholars refer to these cases as the “biology plus line of cases” as they describe establishing parentage rights outside of marriage.

262. See, e.g., Carbone, *supra* note 252, at 1325 (“Fatherhood, of course, also depends on identification of the biological parent and while there is little pressure for uniformity in state custody decisions, the federal government has exercised considerably more interest in child support. To that end, uniform statutes and federal legislation have attempted to facilitate identification of the biological parent at birth.”).

263. Thronson, *supra* note 154, at 59.

264. See *Olivares*, *supra* note 117, at 332–33.

265. Thronson, *supra* note 154, at 69.

of the parent-child relationship, the support for this relationship is limited to parents who hold legal status.<sup>266</sup> The preference for family unity seems to end where a parent does not hold status.<sup>267</sup>

While child welfare law emphasizes the best interests of the child, immigration law treats children as mini adults if it regards them at all.<sup>268</sup> The children born to undocumented mothers are at the center of “political controversies” and “power struggles.”<sup>269</sup> Whether by state agency or through deportation proceedings, children facing removal from their parents’ care face a trauma that research is only beginning to explore at a biological level.<sup>270</sup> Ignoring a child’s specific needs that they cannot yet provide to themselves is to deny the child equal protection under the law.<sup>271</sup> Not to mention that in a society that largely prides itself on self-sufficient families, family separations through deportation create heightened costs to taxpayers when children must enter foster care or need additional support.<sup>272</sup>

Not only do their parents not have the power to protect them, but the children have neither choice nor political power. If the law were to consider the parent’s reproductive and family rights distinct from the child’s right to citizenship, no one in this situation has rights let alone the ability to protect the rights of someone else.

#### B. THE REPRODUCTION OF *DRED SCOTT*

The Trump Administration attempts to exclusively choose its citizenship through this Order. In the eyes of the Administration and its supporters, undocumented mothers and their U.S. born children are politically unpopular for reasons this Article has discussed at length. As such, this Order serves as an explicit tool to handpick who can be a citizen of the United States. While the Order acknowledges *Dred Scott*’s “shameful” holding, it is reconstituting the circumstances that precipitated the need for the Citizenship Clause without shame. Targeting a group that it sees as having no equal claim to citizenship as other infants born in the

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266. *Id.* at 71.

267. *See id.* at 71–72; *see also* Nessel, *supra* note 22, at 614 (“When viewed in totality, all of these changes have made the interests of U.S.-citizen children largely irrelevant when their parents face removal from the United States.”).

268. *See, e.g.*, *Wilkinson v. Garland*, 601 U.S. 209, 214–15 (2024) (though this case was about the correct standard to apply in canceling the removal of a noncitizen who had overstayed his visa to stay in the U.S., the underlying facts demonstrate a U.S. citizen child with a serious medical condition and who was suffering as a result of his parent’s removal did not constitute an “exceptional and extremely unusual hardship”).

269. Smith, *supra* note 140, at 164.

270. *See generally* Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1166–69 (2019) (describing the trauma children can face because of removal from their parents).

271. Smith, *supra* note 140, at 196.

272. Nessel, *supra* note 22, at 614. Professor Nessel also draws parallels between the devastation to children whose parents are deported and American Indian child removals and the orphan trains. *See id.* at 618.

United States, the Order discriminates against a class of children and seeks to deny them a relationship with the nation.

Although parents have broad authority over their children, the government always retains a vertical relationship with citizen children. The child will always have a relationship with the state as both a part of the family and as an individual.<sup>273</sup> As citizens, the nation state sometimes interacts with the child even as the parent administers the family unit.<sup>274</sup> For example, a disabled child whose family meets income guidelines may qualify for Social Supplemental Income (SSI) payments.<sup>275</sup> To receive these payments to support the child's needs, a parent or legal guardian who will act as trustee for the funds must apply on the child's behalf. On one hand in this example, the federal government forms a quasi-contract with the eligible child to remit this benefit to them monthly. On the other, the federal government depends on the child's parent or legal guardian to complete the legal paperwork and manage the funds as the head of the family unit. Because the child is part of a family unit, the government will also consider a portion of the parents' income, child support obligations, and other public benefits received in remitting this payment.

In this way, the law recognizes that though parents' rights inherently cover children, the government retains a vertical relationship with the child. Though the SSI payment provides for the disabled child's needs, it is also a form of poverty relief for the family.<sup>276</sup> As Maxine Eichner notes, "children cannot survive, let alone thrive, if their families lack sufficient material resources to sustain them at a basic level of wellbeing."<sup>277</sup>

To explore the government-child relationship further, consider the Indian Child Welfare Act (ICWA).<sup>278</sup> ICWA aims to protect the interest that Tribal governments have in their children, Indian parents' rights, and an Indian child's ability to retain ties to their culture.<sup>279</sup> ICWA applies only to *Indian children* who are either tribal members or have immediate access to tribal membership.<sup>280</sup> As with

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273. See HUNTINGTON, *supra* note 112, at 164 (arguing that no family exists independently of the state).

274. See Dailey & Rosenbury, *supra* note 145, at 1473 ("[L]aw mediates children's interactions with multiple actors in multiple spheres across public and private divides.").

275. SOCIAL SECURITY ADMINISTRATION, UNDERSTANDING SOCIAL SUPPLEMENTAL INCOME SSI FOR CHILDREN—2025 EDITION, <https://perma.cc/5UX8-5WQM>.

276. See United States v. Vaello Madero, 569 U.S. 159, 198 (2022) (Sotomayor, J., dissenting) ("SSI is designed to support the neediest citizens. As a program of last resort, it is aimed at preventing the most severe poverty.").

277. Eichner, *supra* note 46, at 244.

278. 25 U.S.C.A. §§1901–1963 (West, Westlaw through P.L. 119-36). While ICWA is used to explore the child's unique relationship with the government, this is not to completely equate the issues of federal Indian law and immigration law. However, federal Indian law has a lot to teach us about constitutionalism. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1797 (2019) ("Beyond simple canonization, the paradigm of colonialism and federal Indian law could contribute to a fundamental rethinking of public law principles.").

279. 25 U.S.C.A. §1902 (West, Westlaw through P.L. 119-36).

280. See *id.* at § 1903(4) (defining "Indian child" for the purposes of ICWA). Though different American Indian Tribes may use different terminology, ICWA uses "membership" to define what is also known as "citizenship." For some American Indians, the term "citizenship" can be problematic as it

all federal Indian law, ICWA is predicated on political, not racial, status.<sup>281</sup> The fact that ICWA follows the child and protects their relationship with their Tribe, not necessarily with their parent, complicates family law narratives on family regulation and adoption.<sup>282</sup> In non-ICWA family regulation cases, the focus is solely on the right to parent and best interests of the child.<sup>283</sup>

However, ICWA centers the Indian child. It relies upon the child's membership to ensure the rights of Indian Tribes and parents of Indian children while also protecting the unique best interests of Indian children. ICWA's emphasis on the child's Tribe is simple: attempts to destabilize Indian Tribes by removing their children created a membership crisis. If America needs more babies born today according to pronatalists, then conservative policy makers should understand this point about citizenship. Removing American Indian children and effectively destroying any means many ever had to re-establishing membership with their Tribes was one of the most effective tools of colonialism. For their continued survival, Tribes needed their children returned and for future removals to be mitigated.

Today, ICWA is not just about the Tribal government as a sovereign. In nearly all ICWA cases, a child's Tribe and the child's interest align as the Tribe protects the child's culture and family.<sup>284</sup> Yet, the statute also ensures parents also have heightened protections so that state and private actors do not run roughshod over their rights.<sup>285</sup> Thus, ICWA effectively protects both the child's membership (citizenship) in their Tribe as well as their parents' rights. Within their Tribe, the Indian child has a unique relationship that is independent of their parents—and the Indian child's parents still retain their parental rights.

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denotes settler colonial prerogatives for citizenship. *Cf.* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 149 (2023).

281. *See generally* Morton v. Mancari, 417 U.S. 535 (1974).

282. Kathryn Fort, *The Road to Brackeen: Defending ICWA 2013-2023*, 72 AM. U. L. REV. 1673, 1682–83 (2023) (describing the role of tribal sovereignty in Indian child welfare cases); *see also* Neoshia R. Roemer, *The Indian Child Welfare Act as Reproductive Justice*, 103 B.U. L. REV. 55, 84 (2023) (“Throughout the course of U.S. history, the federal government routinely used interventions into the family as a mechanism to control American Indian populations.”); Lauren Van Schilfgaarde, *Native Reproductive Self-Determination*, 76 UCLA L. REV. 30 (forthcoming 2025) (“By controlling women’s rights to marry or raise their children, the federal government controlled the transmission of culture and, ultimately, Tribal sovereignty.”).

283. *See, e.g.*, Smith v. Org. of Foster Fams. for Equal. Reform, 431 U.S. 816, 846 (1977) (“[T]he natural parent of a foster child in voluntary placement has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflect the constitutional protection accorded the natural family.”); *see also* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (holding that the right to parent and proceedings to terminate that right are so important that they require findings stronger than by a mere preponderance of the evidence).

284. *See* Emily J. Stolzenberg, *Tribes, States, and Sovereigns' Interest in Children*, 102 N.C. L. REV. 1093, 1107 (2024) (“In ‘guard[ing] against the unjustified termination of parental rights and removal of Indian children from tribal life,’ ICWA protects a vital tribal interest: the sovereign’s interest in social reproduction, that is, in perpetuating the political community it represents. In furtherance of the United States’ trust responsibility toward Indian people, the statute protects Indian tribes as sovereigns and Indian children as developing citizens of those political communities.”).

285. *See* 25 U.S.C.A. §§ 1912–1913 (West, Westlaw through P.L. 119-36).

While this Article relies upon ICWA as an example, it does not suggest ICWA is an appropriate legal tool in this scenario. However, ICWA demonstrates two key points. First, the vertical relationship between government and child citizen is one that is vital for a functioning government. Second, the citizen child's existence is critical for the government's survival. If the declining birth rates are truly as dire as proponents of the pronatal movement suggest, why does the government so pointedly seek to cut off a path to the creation of new citizens? Though cloaked in language of not rewarding criminality, the only possible conclusion is that this is about *who* is reproducing. Like the antebellum era of *Dred Scott*, parents and children may be welcome as workers without legal or political rights. But the implication is that their identity does not match the imagined American citizen.

### C. THE REPRODUCTION OF FAMILY PUNISHMENT AND SUBORDINATION

Given the Executive Order's language, it proposes an equality between the parent's and the child's rights and responsibilities. To punish the mother, the Order extends her penance to her child, cementing a generational ripple. From the Administration's law and order rhetoric, the Administration seemingly believes that it will achieve 100% success in deporting all undocumented immigrants. It will not.<sup>286</sup> Thus, if its plans to limit birthright citizenship are to proceed, many undocumented parents and their children will remain in the U.S.—only their children face the loss of citizenship, potential statelessness, generational poverty, and more.

Because immigration is not a criminal matter, deportation is not considered a punishment per se.<sup>287</sup> However, the Administration continues to discuss both undocumented migrants and temporary migrants using language of criminality. Whether immigration is an administrative matter or a criminal matter, the concept imbued in the Order is that children are responsible for the decisions of their parents. Not only can children be punished, but they must be punished to set an example. This alleged immigration deterrence technique is a control on the reproduction of citizenship through both family punishment and subordination.

In her book *Torn Apart*, Dorothy Roberts discusses this through the lens of the family policing (child welfare) system.<sup>288</sup> For years, scholars have believed that a primary goal of the system was to remove children of poor families and place them with better adoptive families. While this may be true for white or racially ambiguous children in their tender years for whom adoptive families have a preference,<sup>289</sup> Professor Roberts uncovered a much more sinister system in place for

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286. See Nessel, *supra* note 19, at 529, 539.

287. See Nessel, *supra* note 22, at 625 ("Although the criminal justice terminology matches well with the factual reality that deportation constitutes punishment or banishment, the Supreme Court has historically rejected the characterization of immigration proceedings as criminal in nature.").

288. See generally ROBERTS, *supra* note 129.

289. Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. Davis L. Rev. 1415, 1422–23 (2006).

the Black children removed at disproportionate rates. Black children, who are less likely to be adopted, become part of a foster care to mass incarceration pipeline where, as adults, they become second class citizens.<sup>290</sup> First, the state punishes the parent by terminating their rights. Then, the state punishes the child, sentencing them to a life of systems involvement, generational poverty and more.

This Article posits that a similar trajectory awaits potentially stateless, non-U.S. citizen children without status. Given the demands of the labor market and conditions on the ground that precipitated this migration, the Trump Administration knows that it will never achieve 100% success. The labor market will always have demands for a class of people that it can exploit by placing them in dangerous jobs, caretaking jobs, and generally low wage work.<sup>291</sup> As other scholars have pointed out, newer migrants from Latin America tend to be darker skinned than some of their other counterparts.<sup>292</sup> While this may not seem like a relevant point, history is littered with examples of two track systems for children (and adults) of lighter skin and darker skin.<sup>293</sup> By stripping citizenship and opportunity, the Trump Administration is reproducing the next generation of exploited workers.<sup>294</sup>

Consider why a popular talking point *in support of* undocumented immigrants and migrant laborers is that they provide low-cost labor. Does the argument follow that without these undocumented migrants, citizens would then provide low-cost labor? Or is it that citizens are losing access to a low cost labor source? When Representative Jasmine Crockett made a quip about Black Americans not returning to slavery, people quickly realized that something might be amiss with allowing employers to routinely pay one class of laborers sub-minimum wage.<sup>295</sup> Attaching “low-cost labor” to undocumented migrants requires further interrogation as it reifies the sub-standard conditions facing those likely to have the lowest paying jobs. To attach it to migrant laborers is to reify indentured servitude.<sup>296</sup>

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290. ROBERTS, *supra* note 129, at 258, 267.

291. WALIA, *supra* note 29, at 206.

292. Haney Lopez, *supra* note 51, 252–53.

293. See, e.g., Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22, 28 (“The relatively light skin and ‘Caucasian’ features of many Latinos mean they are less threatening in the eyes of white racism . . . than African Americans.”); see also Twila L. Perry, *Race, Color, and the Adoption of Biracial Children*, 17 J. GENDER, RACE & JUST. 73, 92 (2014) (“[S]ome of the evidence supports a conclusion that both race and color are significant issues for many Whites who wish to become adoptive parents.”); Maldonado, *supra* note 289, at 1426 (“[S]ome white families unwilling to adopt an African American child are willing to accept a biracial child—a child who is only part African American.”).

294. See Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1969 (1993) (“[R]eproductive penalties turn offenders into objects . . . rather than human beings; objects that can be manipulated for the dominant society’s good.”).

295. See Andrew Mark Miller, *House Dems suggest Trump is trying to bring back slavery in racially charged livestream: ‘Back to the fields.’* FOX NEWS (Mar. 6, 2025), <https://perma.cc/2D2W-L4YR>.

296. See WALIA, *supra* note 29, at 207 (linking temporary worker programs to indentured servitude because workers have no ability to legally leave their employ and are subject to workplace violence).

## 1. The Reproduction of Family Punishment and Subordination in Administrative (and Civil) Law

Despite ongoing litigation, the Administration has made a show of moving quickly to deport undocumented persons. In some cases, U.S. citizen children have been sent along with their parents who were deported to their home country.<sup>297</sup> Though the children are thankfully with a parent, this de facto deportation from their country of origin has lingering consequences for U.S. citizen children who can repatriate as adults and face cultural disconnect.<sup>298</sup>

Both civil and administrative laws have drawn distinctions between the parent-child relationship and the idea that children are responsible for their parents' decisions. First, legitimacy cases provide a window for assessing how a family not implicitly approved by the law establishes and protects a child from punishment for their parent's acts. Second, the DACA program, which provides protection for undocumented peoples who arrived in the United States as children and who meet certain criteria, also protects children from the decisions their parents made in exercising parental authority. Third, family law principles demonstrate that family separations are not in the best interests of children.

A holdover from common law, legitimacy cases involved children whose parents dared transgress societal norms by having children out of wedlock.<sup>299</sup> Because of the sins of their parents, illegitimate children held second class legal status.<sup>300</sup> The law denied children a place within their mother's or father's family.<sup>301</sup> But legitimacy was the only way fathers could establish their legal parentage.<sup>302</sup> While continuing to highlight the lack of responsibility of parents having children out of wedlock, legitimacy cases through the 1970s focused on the child's right to be free from the legal consequences of their parents' actions.<sup>303</sup> Instead of focusing on the burdens facing their parents, the suffering of illegitimate children became the litigation strategy in these cases.<sup>304</sup>

Contemplating the relationship between mother and child in *Levy v. Louisiana*, the Court concluded it was nonsensical to rely upon intimate familial rights to deny the child a right to recover from the person liable for their mother's death.<sup>305</sup> In *Gomez v. Perez*, the Court held a state statute denying illegitimate children the right to support from their father unconstitutional.<sup>306</sup> The *Gomez* Court held there

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297. Kyle Cheney & Josh Gerstein, *Judge says 2-year-old US citizen appears to have been deported with 'no meaningful process'*, POLITICO (Apr. 25, 2025), <https://perma.cc/K9F6-LNS4>.

298. Nessel, *supra* note 22, at 615.

299. Mayeri, *supra* note 113, at 1286-87 (noting that while the legitimacy statutes may have been facially neutral, they had a disparate impact on African American communities).

300. Carbone, *supra* note 252, at 1310-11.

301. See, e.g., *id.*

302. Maillard, *supra* note 217, at 242.

303. Mayeri, *supra* note 113, at 1308.

304. *Id.* at 1288; see generally Purvis, *supra* note 118 (noting that biological differences between mother and father still provide a point of legal discrimination between parents).

305. 391 U.S. 68, 71-72 (1968).

306. 409 U.S. 535, 537 (1973).

was not sufficient justification for denying children the support of their father because their parents had not married.<sup>307</sup> In both *Levy* and *Gomez*, children had a right that existed despite their parents’ “bad decisions” not to make the socially appropriate decision to only form a family through marriage. Though the Court focused on the children’s needs, those cases were just as much about their parent’s autonomy to form a family outside of the traditional familial unit and to protect it.

Moreover, the Administration’s stated policy claims to deter undocumented immigration deeply conflicts with the legal notions of a parent’s substantive due process rights. During the first Trump Administration, its separation and detention policies were in stark contrast to the best interests of the child standard.<sup>308</sup> Perhaps in ironic accord with state child welfare practices, the Administration quickly removed children from their parents but slowly returned them, often citing false statistics about abuse to demonstrate that separation was really in their best interests.<sup>309</sup> Problems with the best interests of the child notwithstanding, this process gives little accord to the child’s right to their family.<sup>310</sup> Using children as a deterrence mechanism is not only ineffective and inconsistent with federal law, it is also not in the best interests of the child or the state.<sup>311</sup>

In the administrative context, the DACA program is a place where parental decision-making is separate from consequences for the child. DACA is part of a much longer history of proposed legislation that aims to provide status for undocumented people who arrived in the United States as children and grew up here.<sup>312</sup> After the last failed proposed bill, President Barack Obama used the administrative rule making process to promulgate the DACA program.<sup>313</sup> Undocumented childhood arrivals who arrived during specific dates, have no criminal record, and are currently working and/or in school are eligible to apply

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307. *Id.* at 538. While *Gomez* applies to the substantive right to parental support, the Court has also held that states need not provide procedures coterminous with those permitted for legitimate children. They merely need procedures substantially related to a legitimate state interest. *See Mills v. Habluetzel*, 456 U.S. 91, 97–99 (1982).

308. Olivares, *supra* note 18, at 337.

309. *Id.* at 338; *see also* S. Lisa Washington, *Time and Punishment*, 134 YALE L.J. 536, 566 (2024) (noting that every day a child remains in out-of-home care, the less likely they are to reunify with their parents).

310. Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L.REV. 267, 292–93 (2021) (stating U.S. immigration law is “wrong” because “Even in the few cases where a court found a constitutional right to family integrity for children, this right was deemed insufficient to prevent negative immigration consequences.”); Cynthia Godsoe, *Racing and Erasing Parental Rights*, 104 B.U. L. REV. 2061, 2064 (2024).

311. María Pabón López, Diomedes J. Tsitouras, & Pierce C. Azuma, *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama’s H.B. 56 and Other State Immigration Measures*, 6 FIU L. REV. 231, 248 (2011).

312. MICHAEL A. OLIVAS, *PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA* 24 (2020).

313. Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://perma.cc/J7F4-9MQ2>.

for the program.<sup>314</sup> But because this is an administrative process, DACA recipients receive no status or pathway to citizenship.<sup>315</sup> DACA merely promises deferred action, which Michael Olivas framed as a ““Hail Mary pass’ to the immigration authorities rather than Congress.”<sup>316</sup>

Though DACA provides no formal legal status, its recipients are people who have embraced American identity in abundance.<sup>317</sup> Now adults, they were children raised and educated in the United States. DACA was transformational “not only in the lives of the beneficiaries, who were finally recognized by the federal government as aspiring Americans but also for their families.”<sup>318</sup> DACA also provided recipients with the tools necessary for life in the United States such as driver’s licenses, Social Security numbers, and in some cases, in-state college tuition.<sup>319</sup> They became professionals because changes in both state and federal law facilitated pursuing higher education and obtaining professional licenses.<sup>320</sup> Today, DACA recipients are students, nurses, teachers, doctors, engineers, lawyers, professors, and more. Undoubtedly, this is the value that DACA recipients provide: an ability to assimilate to a degree and to contribute to the United States as professionals presumed more valuable than the labor their parents have provided as farmworkers, domestic laborers, and other work deemed “low-skill labor.”<sup>321</sup> In many ways, DACA recipients possess modes of citizenship that their parents will never have.<sup>322</sup>

While child immigrants achieving success through hard work seems like the very definition of the American dream, the DACA program is not without its opponents. States and individuals have filed multiple lawsuits challenging the program.<sup>323</sup> During his first Administration, President Trump attempted to rescind the DACA rule, effectively ending the program.<sup>324</sup> More recently, nineteen states challenged a Biden Administration era rule that would have permitted DACA recipients to seek health insurance on federally backed state health care

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314. See U.S. CITIZENSHIP & IMMIGRATION SERVICES, CONSIDERATION OF DEFERRED ACTION CHILDHOOD ARRIVALS (DACA) (Jan. 24, 2025), <https://perma.cc/E68B-VCKG> (providing guidelines for DACA applications and renewals).

315. See OLIVAS, *supra* note 312, at 91 (comparing DACA to proposed DREAM Act legislation that would have provided a pathway to citizenship and noting that the program is really a use of prosecutorial discretion).

316. *Id.* at 64.

317. Keyes, *supra* note 186, at 116.

318. Hincapié, *supra* note 20, at 204.

319. OLIVAS, *supra* note 312, at 91–92.

320. *Id.* at 105–06; see also Hincapié, *supra* note 20, at 201 (“Today, DACA recipients are law students, teachers, health professionals, business owners, and nonprofit leaders working in many industries nationwide.”).

321. See Keyes, *supra* note 186, at 151 (critiquing the language used to assign value to those who qualify for DACA).

322. See Montoya, *supra* note 81, at 209 (“Speaking out assumes prerogative. Speaking out is an exercise of privilege. Speaking out takes practice. Silence ensures invisibility. Silence provides protection. Silence masks.”).

323. OLIVAS, *supra* note 312, at 92.

324. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 2 (2020).

exchanges.<sup>325</sup> The State of Texas is currently litigating its third lawsuit challenging the DACA program, claiming that it is a significant burden on its state resources and illegal.<sup>326</sup>

Though DACA has survived its legal challenges so far, the Executive Branch does retain the authority to rescind the rule. However, the Trump Administration has stated that it does not plan to pursue DACA recipients in its mass deportation efforts.<sup>327</sup> Although DACA is subject to attack, its policy is instructive. DACA recipients are American in all but name, which is the problem.<sup>328</sup> Society benefits from the undocumented children who are in the United States because of parental decision-making, so it does not make sense to punish these children for the supposed crimes of the parent.

## 2. The Reproduction of Family Punishment and Subordination in Criminal Law

The U.S. Constitution prohibits Congress from punishing family members of those convicted of treason using corruption of blood statutes.<sup>329</sup> While Article III does not control the Administration's immigration actions, an attempt for the Executive Branch alone to redefine citizenship—a power that lies with Congress alone—puts this action into the realm of Article III. If corruption of blood punishment is a bridge too far for the highest crime in the land, it is too far for transgressing administrative law.<sup>330</sup>

Utilizing corruption of blood, the Trump Administration wishes to make children liable for parental decision-making—even when the parent's decision has nothing to do with the family or child. Recently, the Trump Administration attempted to immediately deport the wife and children of the Egyptian man facing federal and state charges for an anti-Semitic terrorist attack.<sup>331</sup> While the attacker had overstayed his visa, his wife and children were guilty of no immediately apparent immigration violations or crimes.<sup>332</sup> Absent due process, the

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325. *Kansas v. United States*, 124 F.4th 529, 532 (8th Cir. 2024). The parties reached a settlement agreement, and the case has been dismissed.

326. *Texas v. United States*, 126 F.4th 392, 401–02 (5th Cir. 2025); *see also* Keyes, *supra* note 186, at 147 (“[P]ositive policy feedback loops—where a policy changes public opinion—are notoriously difficult to achieve.”).

327. Adrian Florido, *DACA Recipients Skeptical After Trump Says He Wants to Protect Them*, NPR (Dec. 13, 2024), <https://perma.cc/U6TX-B2F9>.

328. *See Keyes, supra* note 186, at 117 (“One either is or is not a citizen, and therefore the DREAMers’ lack of formal status is the only thing that matters, not their ties, ‘American-ness,’ or self-definition.”).

329. U.S. CONST. art. III § 3, cl. 2.

330. *See, e.g.*, Nicholas Serafin, *The Corruption of Blood as Metaphor*, 84 Md. L. REV. 597, 608 (2025) (“Simply stated, the corruption of blood principle forbids the state from punishing children directly for the conduct of their parents.”); *see also* Cynthia Godsoe and Shanta Trivedi, *Parenting as a Crime*, 15 CAL. L. REV. 13, 16–17 (2024) (“Here, although the parents are being held responsible for their children’s actions, the children are also being held liable as adults—the prosecutions merely expand the web of criminal liability.”).

331. The Associated Press, *Judge Blocks Deportation of Boulder Attacker’s Family*, NPR (June 4, 2025), <https://perma.cc/6DUU-Y26H>.

332. *Id.*

Trump Administration tried to deport the family before a federal court judge blocked the deportation.<sup>333</sup> In the case of U.S. born children to undocumented immigrants, the children have neither right nor responsibility in the matter of where they are born. Despite no wrongdoing, children face the other side of the civil death penalty coin all the same.<sup>334</sup>

Though immigration is not a criminal offense,<sup>335</sup> the Trump Administration strengthens calls to utilize the corruption of blood theory while classing all undocumented immigrants as criminals who deserve no protections of the law.<sup>336</sup> In addition to the link between criminal and immigration law as a source of punishment, separating families through deportation is also a way in which children face punishment—especially as immigration courts ignore their right to family.<sup>337</sup> Denying children's true participation in child welfare proceedings means that removing children from their families and terminating parental rights is a form of punishing children.<sup>338</sup> Proceedings involving families often create a space where neither parent nor child have any real choices or opportunity to be heard.<sup>339</sup>

Moreover, there is a distinct issue of maturity in punishing children for perceived crimes of their parents.<sup>340</sup> Criminal law provides that children are sometimes

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333. *Id.*

334. Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud, & Adina Marx Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 866–67 (2021) (defining the termination of parental rights as the civil death penalty); *see also* S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 162–63 (2023) (discussing how the family regulation and immigration law systems often feed each other to the disadvantage of immigrant parents leading to the civil death penalty).

335. *See Padilla v. Kentucky*, 559 U.S. 356, 366, 369 (2010) (noting that while immigration consequences are linked to criminal law, immigration is a legal specialty all on its own); *see also* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006) (describing “crimmigration” as the merger between immigration and criminal law, defining who has membership within the country).

336. *See Stumpf, supra* note 335, at 392–93 (describing the vast powers of the government to detain immigrants and lack of constitutional protections beyond due process denied in immigration court); *see also* Nessel, *supra* note 19, at 537 (noting that even absent any evidence of rising crime, crime has long been used as a reason to deport immigrants). This is also in violation of international law. *See Stumpf, supra* note 335, at 418.

337. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1189 (2006); *see also* Anna Arons, *Prosecuting Families*, 173 PA. L. REV. 1029, 1041 (2025) (identifying the “carceral logic” of family regulation systems that ultimately punish families).

338. Trivedi, *supra* note 234, at 300; *see also* Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 144 (2008) (“[R]ecognition of a right of children's participation that is taking hold worldwide is compatible with the customary beliefs and practices of many Indian tribes.”).

339. Thronson, *supra* note 257, at 996 (2002) (“In some instances, removal proceedings can even take place without a child's knowledge, let alone participation.”).

340. *See Elizabeth S. Scott & Thomas Grisso, Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 827 (2005) (“At a minimum, the research on adolescent development and adjudicative competence challenges courts to consider incompetence claims based on immaturity along with those caused by mental illness and disability.”).

adults.<sup>341</sup> This is particularly true for youth of color who face the harshest punishments.<sup>342</sup> Judicial doctrine has articulated three differences between minors and adults: lack of maturity and underdeveloped sense of responsibility, increased vulnerability to outside pressures, and personality traits that are less fixed than in adults.<sup>343</sup> The reduction of culpability for juvenile offenders is not crime specific.<sup>344</sup> Because of their developmental stage and capacity for rehabilitation, juvenile justice scholars argue that the strictest penalties are meant to be rare.<sup>345</sup> Children may be less culpable for their crimes and possibly easier to rehabilitate,<sup>346</sup> but the criminal justice system may still hold them responsible for their crimes.

In the context of immigration, no one has committed a technical crime. Absent changes in federal legislation, it is impossible to rehabilitate immigration status. To treat children as culpable for their parent's imagined crime is a departure from how immigration courts typically treat children.<sup>347</sup> Though if we are to construe this as a crime and the U.S. born child to face a criminal penalty, this is a violation of the Eighth Amendment's prohibition on cruel and unusual punishment because of both age and the harshness of the penalty.<sup>348</sup> Moreover, the withholding of citizenship is also likely a violation of the Thirteenth Amendment.<sup>349</sup> In any case, criminal law requires the provision of fundamental civil rights including the right to due process and opportunity to be heard. In addition to criminalizing their mothers for being poor women at the margins who do not meet the desired image of motherhood,<sup>350</sup> the Order now criminalizes the children they birth as well. Much like the segregationists who criminalized miscegenation trapping biracial children under the scepter of illegitimacy and second class citizenship,<sup>351</sup> criminalizing

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341. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that sentencing minors to death violated the Eighth Amendment); see also *Miller v. Alabama*, 567 U.S. 460, 471 (2019) (holding that mandatory sentencing to life without parole for minors violated the Eighth Amendment).

342. Kele M. Stewart, *Re-Envisioning Child Well-Being: Dismantling the Inequitable Intersections Among Child Welfare, Juvenile Justice, and Education*, 12 COLUM. J. RACE & L. 630, 643 (2022).

343. *Roper*, 543 U.S. at 569–70.

344. Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 547 (2013).

345. Elizabeth S. Scott, “*Children Are Different: Constitutional Values and Justice Policy*”, 11 OHIO ST. J. CRIM. L. 71, 81–82 (2013).

346. In both *Roper*, 543 U.S. at 570, and *Miller*, 567 U.S. at 479, the Court emphasized how children are more likely to rehabilitate given their ongoing growth and development. See *Ryan*, *supra* note 197, at 1158 (“[T]he process of psychological and neurological development warrants reconsideration of the state’s responsibility toward them.”).

347. David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 404–05 (2008) (describing the trauma U.S. citizen children face watching their parents arrested during immigration raids and the trauma they face through separation—but usually these children play little to no role in the immigration proceeding).

348. Nessel, *supra* note 22, at 625.

349. See generally Ndjuoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN L.J. C.R. & C.L. 133 (2021) (arguing family separations at the border are an incident of slavery).

350. See generally *supra* note 143 (describing the criminalization of pregnancy and motherhood).

351. See Kevin Noble Maillard, *Miscegenation - An American Leviathan*, 36 HUM. RTS. 15, 15 (2009).

the births of these children creates lifelong consequences for them simply to punish the conduct of their parents. It is but another link in creating a permanent underclass of noncitizen citizens.

#### D. THE REPRODUCTION OF POVERTY

The U.S. born children of undocumented mothers are more likely to live in poverty than their peers.<sup>352</sup> Not only does childhood poverty impact the time parents can spend raising their children,<sup>353</sup> but it has lifelong impacts on children who are likely to continue living in the cycle of poverty.<sup>354</sup> Ignoring the conditions that cause poverty, anti-immigrant rhetoric frames the children of undocumented mothers as the source of an “invasion”<sup>355</sup> necessitating the limitation of birthright citizenship. Conservative politics capitalize on the concept of choice and “qualifications for motherhood suggest that female fertility continues to provide rich political opportunities.”<sup>356</sup> Not only are undocumented mothers responsible for their own poor decision making and poverty, but they are responsible for all growing economic inequality in America.<sup>357</sup> But the same laws keeping American citizens in poverty are used to keep undocumented immigrants in even higher levels of poverty in service of corporate interests.<sup>358</sup>

Beyond resources undocumented mothers may need to support their families, the Order furthers an attack on racialized mothers living in poverty.<sup>359</sup> Typically, the government asks poor families to give up a great deal of family privacy in exchange for public benefits.<sup>360</sup> Though scholars and policy advocates argue that better supports are needed for education and to support working parents, conservative policy largely ignores those calls in favor of policies aimed at supporting

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352. Thronson, *supra* note 153, at 246.

353. Eichner, *supra* note 46, at 261–62.

354. Naomi Cahn & June Carbone, *Growing Inequality and Children*, 23 AM. U. J. GENDER SOC. POL’Y & L. 283, 300 (2015) (describing how childhood poverty impacts broader participation within society).

355. CHAVEZ, *supra* note 231, at 24.

356. RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 224 (2002).

357. See, e.g., Hincapié, *supra* note 20, at 204 (“They are using dehumanizing rhetoric like ‘foreign-national invaders’ to refer to Black and Brown migrants and refugees. They are using immigration to divide working-class people, stoke racial divisions, and exploit people’s economic insecurities to incite a sense of scarcity.”).

358. See, e.g., HANEY LÓPEZ, *supra* note 51, at 205. Using health care reform during the Obama Administration as an example, Professor López highlights how coded racial appeals by one side and fleeing from conversations by the other tanked a universal health care program that would have helped most Americans to the disadvantage of health insurance companies. For white conservatives, accepting money from the federal government is often seen as a source of shame and can be utilized in coded racial messages, despite what people need. Conservatives see free market capitalism as an ally. See ARLINE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 151, 157 (2016).

359. See KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 80 (2017) (discussing how the moral construction of poverty leads to government and societal policing of the decisions families in poverty make).

360. *Id.* at 66.

the traditional family model as the solution for the family's concerns.<sup>361</sup> For immigrant parents, lack of supports and ability to advocate for their children in meaningful ways leads to feelings of disempowerment.<sup>362</sup>

Although Americans will always find that there is a divide between the belief in rugged individualism and the belief in communal resources,<sup>363</sup> these immigrant families join an increasing number of American families who need supports to sustain themselves. At the center of the President's own pronatalist movement are considerations for policy that support family growth.<sup>364</sup> However, the stumbling block for pro-family policy in the United States is that government policy tends to favor free-market economics over policies that economically support families and allow them to flourish.<sup>365</sup> Policy advocates note the best way to support families is to "accept the benefits and burdens that come with the market state" and provide supports for families to thrive.<sup>366</sup> While American policy already supports end of life care, it does not support beginning of life care, leaving children and families extremely vulnerable.<sup>367</sup> Indeed, Americans are largely conditioned to reject that family supports are a respectable feature of governance—especially if those supports may be used to support Black or brown families.<sup>368</sup>

Exemplifying how racism explicitly led to the retrenchment of the welfare state, the racialization and criminalization of undocumented mothers and migrant laborers demonstrates how the Order reproduces citizenship through discriminatory dualism.<sup>369</sup> At the same time the Administration seeks ways to control the reproduction of the right type of citizens, it attempts to control how those it wants

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361. Compare Cahn & Carbone, *supra* note 354, at 305–16 (proposing early childhood education programs, support for the school system, support for post-secondary education, and support for working parents) with Severino, *supra* note 53.

362. Bhasin, *supra* note 136, at 893 (describing how immigration status leads some parents feeling disempowered); see also Cahn & Carbone, *supra* note 354, at 305 ("Low-income parenting is simply difficult.").

363. DAVIS, *supra* note 149, at 10–11.

364. Rachel Cohen Booth, *A cash bonus for having a baby? Trump is considering it.*, VOX (Apr. 29, 2025), <https://perma.cc/5MHF-7B6F>.

365. See MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 129 (2020) ("Given the permanent harm that poverty causes children, countries with pro-family policy go to considerable lengths to ensure that kids from low income families get the material support they need. They do so through a mix of policies, many of which will be familiar to readers by now, including universal programs, like parental leave subsidies and child benefits, as well as programs targeting at-risk families, like child benefit supplements for the kids of single parents, and housing subsidies for low-income families.").

366. Eichner, *supra* note 46, at 259.

367. EICHNER, *supra* note 365, at 40.

368. See generally Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1578 (2023) (critiquing how rights-based and ideology centered arguments fail to resolve structural inequality in family law and arguing for pragmatic family policy that deemphasizes ideology and emphasizes core aspects of child well-being).

369. See Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 874 (2020) ("The theory of discriminatory dualism, however, focuses on how discriminatory practices themselves shift and swing to preserve and maintain existing inequalities. As the theory of adaptive discrimination explains, discrimination's fluidity and flexibility can ensure its permanence.").

to exclude should be citizens as well. As the government clamors to increase the birth rate, its language privileges families facing few barriers to formation while criminalizing families seeking supports.<sup>370</sup> Both initiatives are but two sides of the same discriminatory coin for people of childbearing age in America. The Administration emphasizes the idea that children of self-sufficient traditional families are for the state—but there is no state for the children of other families. Effectively, the federal government has chosen its families.

## V. CONCLUSION

If life were a movie, perhaps this Article would end on a positive note in which Ana has announced her second pregnancy. All obstacles to her autonomy would be gone. However, life for people like Ana in the United States remains uncertain. Despite this uncertainty, this Article has demonstrated how the Trump Administration and conservative movement attempt to reproduce a certain type of citizen while terrorizing others. Reproductive justice helps us frame how the rights of both parent and child matter in this moment. It also demonstrates the fallacy in a movement that claims to be pro-family and desperately seeking more babies to be born yet only wants babies born to those it deems worthy.

Despite uncertainty over political and legal matters, life goes on for Ana and people like her. This Article does not seek to add to the cycles of doom and gloom present in this current moment. Realistically, no Executive Order will stop all child birth to undocumented people or temporary migrants. But it can have a chilling effect on who reproduces. Further, history also demonstrates that this type of Order can and will lead to the exploitation of pregnant people and their children through both labor and adoption markets that are all too keen for their participation. However, in a society built upon the family shaping the citizen, to chill any family's decision to reproduce is one family too many. To do so is to concede the federal government should be in the business of handpicking its citizenry. It is to allow the Executive Branch to unilaterally define who *real Americans* are and to watch the liberty of family decisionmaking and citizen building die.

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<sup>370</sup> Faith Hill, *The Pro-Family Policy This Nation Actually Needs*, THE ATLANTIC (May 5, 2025), <https://perma.cc/PVF9-NYG8>.