

The Unborn Citizen

MICHAEL H. LEROY*

In May of 2019, the Governor of Alabama signed House Bill 314 into law. The statute, entitled the Alabama Human Life Protection Act (“the Act”), makes abortion and attempted abortion felony offenses, except in cases in which the mother is at risk of serious health complications. This Article does not address the constitutional validity of the Act. Rather, it contends that the law has one large unintended consequence: the Act has the effect of extending birthright citizenship to any fetus that has a heartbeat; however, it does nothing to address the unborn child’s basic needs for shelter, food, and healthcare.

In this Article, I adopt the perspective of Sofía, an unborn child of an unlawful immigrant in Alabama, to show that the state’s laws, in combination with President Trump’s hostile treatment of unlawful immigrants, make Sofía’s unborn life more fragile compared to an unborn child of an American citizen. I suggest measures to secure Sofía’s in utero rights as an American birthright citizen: she must have a legal identity, access to basic welfare benefits, and access to healthcare and support from her mother’s legal employment.

* Professor, University of Illinois at Urbana-Champaign School of Labor and Employment Relations and College of Law. © 2019, Michael H. LeRoy.

INTRODUCTION

In November of 2018, the Alabama State Legislature amended the Alabama State Constitution to declare the state's policy of protecting the rights of the unborn. The amendment reads:

Sanctity of Unborn Life.

(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.

(b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.¹

Shortly afterwards, in May of 2019, the Governor of Alabama, Kay Ivey, signed the Alabama Human Life Protection Act into law (“the Act”).² The Act declares it a felony to abort or attempt to abort an unborn child, except when carrying forward with the pregnancy imposes a “serious health risk to the unborn child’s mother.”³ By granting rights to an unborn child, the amendment and the Act combined have significant implications for immigration, specifically birthright citizenship.

Birthright citizenship has long existed in the United States.⁴ The Fourteenth Amendment 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.”⁵ Colonies adopted

¹ ALA. CONST. amend. 930, §§ (a)–(b). In 2018, 59% of voters approved the amendment. Abbey Crain, *Alabama Passes Anti-Abortion Amendment*, AL.COM (Nov. 7, 2018, 12:04 PM), <https://www.al.com/news/2018/11/alabama-passes-anti-abortion-amendment.html> [<https://perma.cc/6NYL-HK3H>].

² Leada Gore, *Alabama Abortion Law Passes: Read the Bill*, AL.COM (May 15, 2019), <https://www.al.com/news/2019/05/alabama-abortion-ban-passes-read-the-bill.html> [<https://perma.cc/X5WA-3UEQ>]; H.B. 314, 2019 Leg., Reg. Sess. § 1 (Ala. 2019).

³ Ala. H.B. 314 § 3(6).

⁴ This type of citizenship—also called *jus soli* (“right of the soil”)—confers citizenship to any person born “within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown.” *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927).

⁵ U.S. CONST. art. XIV, § 1.

birthright citizenship in common law cases.⁶ The Supreme Court upheld birthright citizenship in *United States v. Wong Kim Ark*.⁷

By declaring that life begins at six weeks, Alabama blurs the distinction between conception and birth as the starting point of personhood. Motivated by religious values,⁸ the law appears to reflect aspects of Catholicism, Islamism, and Protestantism. First, it reflects ensoulment under Catholic theology⁹ and tenets of the Prophet Mohammad in the Qur'an¹⁰—both of which consider forty days of gestational life as the beginning of personhood. The concept of ensoulment coincides with the Act's suggestion that an

⁶ See *Elliott v. Cruz*, 137 A.3d 646, 654 (Pa. Commw. Ct. 2016).

Under the common law principle of *jus soli* (law of the soil), persons born on English soil, even of two alien parents, were “natural born” subjects and, as noted by the Supreme Court, this “same rule” was applicable in the American colonies and “in the United States afterwards, and continued to prevail under the Constitution . . .” with respect to citizens. In textual constitutional analysis, it is understood that terms used but not defined in the document must, as explained by the Supreme Court, “be read in light of British common law” since the Constitution is “framed in the language of the English common law.”

Id.

⁷ 169 U.S. 649, 705 (1898).

⁸ See Statement, Office of the Governor, Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act (May 15, 2019), <https://governor.alabama.gov/statements/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/> [<https://perma.cc/U9PB-NHQR>]. Governor Ivey noted: “Today, I signed into law the Alabama Human Life Protection Act. . . . To the bill’s many supporters, this legislation stands as a powerful testament to Alabamians’ deeply held belief that every life is precious and that every life is a sacred gift from God.” *Id.*

⁹ See, e.g., John Haldane & Patrick Lee, *Aquinas on Human Ensoulment, Abortion and the Value of Life*, 78 PHIL. 255, 266 (2003). Catholic thought appears to be more coherently organized around the idea of ensoulment at forty days, whereas a common Protestant view is that personhood begins at conception. For a view on the Catholic perspective, see JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGICALS AND CANONISTS* (1965), at 88, 91, 232 (explaining Pope Innocent III and Pope Gregory IX recognized that a fetus was “vivified” after forty days), and Haldane & Lee, *supra*, at 266 (explaining Aquinas believed that the rational soul was ensouled at 40 days for males and at 90 days for females).

¹⁰ See e.g., Sahin Aksoy, *The Beginning of Human Life and Embryos: A Philosophical and Theological Perspective*, 14 REPROD. BIOMED. ONLINE 86, 90 (2007).

In another *hadith*, the Prophet Muhammad said: “when the *nutfa* [zygote] has been established in the womb for forty or forty-five nights, the angel comes and says: ‘My Lord, will he be wretched or fortunate?’” . . . In the last *hadith* to be mentioned here, the Prophet Muhammad said: “when forty nights pass after the *nutfa* (zygote) gets into the womb, God sends the angel and gives him the shape. Then He creates his sense of hearing, sense of sight, his skin, his flesh, his bones and then the angel says: ‘My Lord, would he be male or female?’”

Id. But see Badawy A. B. Khitamy, *Divergent Views on Abortion and the Period of Ensoulment*, 13 SULTAN QABOOS U. MED. J. 26, 30 (2013) (“The Qur’an and the tradition of the Prophet Muhammad declared the ensoulment period to be about 120 days (4 lunar months plus 10 days) computed from the moment of conception, which is equivalent to 19 weeks and one day, or 134 days from a woman’s last menstrual period.”).

unborn child's personhood is medically detectable six weeks (forty-two days) into gestational life.¹¹ Although ensoulment pegs the beginning of personhood later than some Protestants scriptures,¹² in other aspects, the Act also reflects the Protestant viewpoint that personhood begins at conception.¹³ On the other hand, Jewish law appears to view birth as the start of personhood¹⁴—an idea that corresponds to the notion that only a born person can acquire American birthright citizenship.

Although there is no theological consensus about the starting point of a human being's life, this Article presumes for the sake of argument the validity of Alabama's perspective that life begins at creation, and that it is verifiable with a detectable heartbeat. It also connects these public policy judgments to the religious underpinnings upon which Alabama overtly relies to justify the law. It asks: if an abortion physician faces a Class A felony conviction for ending the life of an unborn person, how can Alabama avoid the legal implication that all of its unborn persons acquire birthright citizenship—and attendant rights—once this unborn person's heartbeat can be detected?¹⁵ As I explain below, Alabama must acknowledge that an unborn child in Alabama is a U.S. citizen, no less so than any person who is born there.

¹¹ H.B. 314, 2019 Leg., Reg. Sess. § 2(f) (Ala. 2019) (“Recent medical advances prove a baby’s heart starts to beat at around six weeks.”).

¹² For a Protestant perspective, written with a substantial body of biblical citations, see R. Lucas Stamps, *The Incarnation Demands a Pro-Life Position*, ETHICS & RELIGIOUS LIBERTY COMMISSION (Dec. 21, 2015), <https://erlc.com/resource-library/articles/the-incarnation-demands-a-pro-life-position> [<https://perma.cc/L4F8-AGF5>].

And the New Testament makes it clear that this assumption of a human nature began at Christ’s conception, not at his birth. This is evident from Gabriel’s annunciation to Mary concerning the miraculous nature of Christ’s conception (Luke 1:26-37). The “power of the most High” would come upon Mary and would “overshadow” her, as the Spirit once hovered over the waters of creation (Gen. 1:2) and as the presence of God hovered over Israel of old like an eagle over its young (Deut. 32:11).

Id.

¹³ Ala. H.B. 314 § 3(7) (defining the terms “unborn child,” “child,” or “person” as “[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability”).

¹⁴ The primary Jewish law perspective appears to be that life begins when the head emerges during birth. See DAVID FELDMAN, BIRTH CONTROL IN JEWISH LAW, 255 (1998) (explaining Exodus 21:22 provides that a woman who miscarries due to being struck by a man may receive monetary compensation, but not “life for life,” as stated in Exodus 21:23).

¹⁵ Ala. H.B. 314 § 2(f).

I. CONSTITUTIONAL RIGHTS FOR THE UNBORN CHILD INCLUDE
BIRTHRIGHT CITIZENSHIP

A. EQUAL RIGHTS FOR THE UNBORN CHILD

A restrictive approach to birthright citizenship—for example, President Trump’s idea to limit it by executive order¹⁶—is at odds with Alabama’s solicitude for the unborn child. By criminalizing abortion, the Act enforces Alabama’s right-to-life constitutional amendment.¹⁷ This provision extends the Fourteenth Amendment’s birthright citizenship clause to the unborn child—whom Alabama defines as a person, no less than anyone who has been born. This expansion of personhood appears to grant due process and equal protection rights to the unborn child.¹⁸

Alabama’s constitution confirms this reasoning when it declares “that it is the public policy of this state to ensure the protection of the *rights of the unborn child in all manners and measures lawful and appropriate.*”¹⁹ Thus, Alabama endows the unborn child with broad unspecified rights. This policy is forcefully repeated in preamble of the Act, which suggests that an unborn child has the same rights that as a born child:

In the United States Declaration of Independence, the principle of natural law that “all men are created equal” was articulated. The self-evident truth found in natural law, that *all human beings are equal from creation*, was at least one of the bases for the anti-slavery movement, the women’s suffrage movement, the Nuremberg war crimes trials, and the American civil rights movement.²⁰

This statement of equality implicates Fourteenth Amendment protections for the unborn child, which also begins by referring to all persons, and includes a due process right to life and a right to equal protection.

Alabama strengthens its equation of unborn and born persons by imposing the same punishment upon a person who assists an abortion as it does a person who murders. Each act is a Class A felony.²¹ This punitive and deterrent sanction reinforces Alabama’s policy of equal treatment for unborn and born people.

¹⁶ Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html> [<https://perma.cc/57D4-JUPE>].

¹⁷ Ala. H.B. 314 §§ 2(d), 6(a) (adopting the “self-evident truth found in natural law, that all human beings are equal from creation”).

¹⁸ U.S. CONST. art. XIV, § 1.

¹⁹ ALA. CONST. amend. 930, § (b) (emphasis added).

²⁰ Ala. H.B. 314, 2019 Leg., Reg. Sess. § 2(d) (Ala. 2019) (emphasis added).

²¹ ALA. CODE § 13A-6-2(c) (2016) (declaring that “[m]urder is a Class A felony”); Ala. H.B. 314 § 6(a) (“An abortion performed in violation of this act is a Class A felony.”).

By erasing the legal significance of birth as a temporal boundary for creating rights for people, and sanctions to protect people, Alabama equates unborn people who will later be born on U.S. soil with people who are already born on U.S. soil. Thus, Alabama vests the unborn child with U.S. citizenship.

The implications are far-reaching. For instance, an unlawful immigrant who becomes pregnant while she resides in Alabama cannot be deported: her unborn child has a right to live in the United States as an American citizen. Any attempt to treat this unborn child of a migrant woman differently than the unborn child of an American citizen implicates the Equal Protection Clause.²² The law has other possible consequences. The census is implicated by this fundamental change in personhood: by Alabama's definition of human life,²³ an unborn child should be counted as a person in Alabama.²⁴

This Article adopts the perspective of the unborn child of an unlawful immigrant woman in Alabama. To give the child identity, I refer to her as Sofía. Can Sofía be deported before she is born? Is she entitled to public assistance? Does Alabama create any legal duty for her father to provide for Sofía's welfare? As I show in this Article, the answer to these questions is "no." In this Article, I focus on a fundamental problem for Sofía: nourishment and healthcare during her mother's gestation. Given the law's exclusive focus on women—there is no mention of men—Sofía's in utero

²² The idea that the Equal Protection Clause applies to an unborn child is not novel—indeed, abortion opponents have argued that the Equal Protection Clause applies to an unborn child. *E.g.*, Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185, 268 (2010) (“Given the recognition of unborn children as persons by the states under their municipal law, applying the Equal Protection Clause of the Fourteenth Amendment to unborn persons is unavoidable.”). *See also* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL’Y 539, 559 (2017) (“The Framers expected the Fourteenth Amendment to protect every member of the human species. The Amendment was carefully worded to ‘bring within the aegis of due process and equal protection clauses every member of the human race, regardless of age, imperfection, or condition of unwantedness.’”) (quoting Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 813 (1973)).

²³ Ala. H.B. 314 § 3(7) (defining the terms “unborn child,” “child,” and “person” as “[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability”).

²⁴ U.S. CONST. art. I, § 2, cl. 3 (Congress must conduct a census “in such [m]anner as they shall by Law direct”). According to the U.S. Census Bureau, the Framers of the Constitution intended to empower the people with respect to their new government; “The plan was to count *every person living* in the newly created United States of America, and to use that count to determine representation in the Congress.” *Decennial Census of Population and Housing: Census in the Constitution*, U.S. CENSUS BUREAU (Mar. 10, 2016) (emphasis added), <https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html> [<https://perma.cc/Q5C4-FF74>].

welfare substantially depends on her mother's legal employment. Furthermore, given President Trump's decision to rescind temporary legal status for immigrants who qualify for Deferred Action for Childhood Arrivals (DACA)²⁵ and Temporary Protected Status (TPS),²⁶ Sofía's means of support is at risk because her mother's legal access to employment is blocked.²⁷

B. BIRTHRIGHT CITIZENSHIP FOR THE UNBORN CHILD

How do Alabama's unborn-child laws implicate birthright citizenship? Its criminal abortion law states cites the Declaration of Independence's "appeal to the truth of universal human equality."²⁸ The Act further equates abortion to genocide, comparing the medical procedure to the Holocaust and other atrocities.²⁹ Alabama's equation of abortion to genocide has direct bearing on the citizenship question. Before Nazi Germany embarked on its official policy of exterminating Jews, its government stripped all Jews of German citizenship.³⁰ This signifies that citizenship status is instrumental in protecting a person's right to life—and the nullification of citizenship can enable state-sanctioned taking of lives.

The law's genocidal references look back in time. Regrettably, Alabama lawmakers gave no apparent consideration to emerging reproductive technology. Cutting-edge developments, such as artificial wombs, will mirror the state's equal treatment of unborn and naturally born children; this technology is already used for temporary periods when pregnancies encounter medical emergencies.³¹ Even in the short time when an unborn

²⁵ *Infra* note 62 and accompanying text.

²⁶ *Infra* note 45 and accompanying text.

²⁷ *See, e.g., infra* note 72.

²⁸ H.B. 314, 2019 Leg., Reg. Sess. § 2(d) (Ala. 2019).

²⁹ *Id.* § 2(i).

It is estimated that 6,000,000 Jewish people were murdered in German concentration camps during World War II; 3,000,000 people were executed by Joseph Stalin's regime in Soviet gulags; 2,500,000 people were murdered during the Chinese "Great Leap Forward" in 1958; 1,500,000 to 3,000,000 people were murdered by the Khmer Rouge in Cambodia during the 1970s; and approximately 1,000,000 people were murdered during the Rwandan genocide in 1994. All of these are widely acknowledged to have been crimes against humanity. By comparison, more than 50 million babies have been aborted in the United States since the Roe decision in 1973, more than three times the number who were killed in German death camps, Chinese purges, Stalin's gulags, Cambodian killing fields, and the Rwandan genocide combined. *Id.*

³⁰ PETER LONGERICH, HOLOCAUST: THE NAZI PERSECUTION AND MURDER OF THE JEWS 58–60 (2010) (describing a series of immigration laws that relegated German Jews to noncitizens and created a preferred legal status for "German Blood" by linking with racial laws).

³¹ Haruo Usuda et al., *Successful Use of an Artificial Placenta to Support Extremely Preterm Ovine Fetuses at the Border of Viability*, 221 AM. J. OBSTETRICS & GYNECOLOGY

child is transferred to an external machine, one can reasonably say that the child is “born” if she meets the medical criteria for viability. This technology indicates that an in vitro embryo may eventually be entirely gestated in a machine. When that happens, the definition of “birth” and “born” will be the subject of serious policy debates. Does the unborn child’s mother have any right to terminate this extracorporeal gestation? Going further, does this unborn child have a right, independent of her mother, to medical care?³²

For now, Alabama has implicated in utero birthright citizenship. It has erased the line between conception and birth by treating the former the same as the latter, and thus creating a host of undefined constitutional rights that await further explication.

C. THE CONNECTION BETWEEN BIRTHRIGHT CITIZENSHIP AND PARENTAL ALIENAGE

When the Reconstruction Congress passed the birthright-citizenship clause in the Fourteenth Amendment, there was strong sentiment to include the American-born children of aliens.³³ Congress approved a universal conception of birthright citizenship.³⁴ The Supreme Court, citing this

69.e1 (2019) (reporting successful “use of artificial placenta technology to support, for the first time, extremely preterm ovine fetuses (equivalent to 24 weeks of human gestation) in a stable, growth-normal state for 120 hours”).

³² For a prescient treatment of this matter, see generally Mark A. Goldstein, Note, *Choice Rights and Abortion: The Begetting Choice Right and State Obstacles to Choice in Light of Artificial Womb Technology*, 51 S. CAL. L. REV. 877 (1978).

³³ Pennsylvania Senator Edgar Cowan objected to this implication of racial equality. CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866). He argued: “Is the child of the Chinese immigrant in California a citizen?” *Id.* at 2890. Senator Cowan pointed to the example of California, where deep racial tensions resided. *Id.* at 2890–91. But California Senator John Conness rejected this reasoning, stating:

The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States. *Id.* at 2891.

Senator Conness concluded by emphasizing the equality principle of birthright citizenship: “We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.” *Id.* at 2892.

³⁴ Illinois Senator Lyman Trumbull proposed: “All persons born in the United States, and not subject to any foreign [p]ower, are hereby declared to be citizens of the United States, without distinction of color.” *Id.* at 498. Senator Cowan asked “whether [Senator Trumbull’s proposal] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country.” *Id.* Senator Trumbull answered that it “[u]ndoubtedly” would. *Id.* Senator Cowan disagreed with the idea of universal birthright citizenship,

legislative history, ruled in *United States v. Wong Kim Ark* that a laborer born in San Francisco to alien Chinese parents was a birthright American citizen.³⁵

How does this constitutional history apply to Alabama? The state's abortion law defines "unborn child" and "woman" without any limitation—in particular, without any restriction pertaining to parental alienage.³⁶ Although Alabama's unborn-child laws say nothing about unlawful immigrants, its constitution strengthens the inference that the unborn child of an unlawful immigrant has citizenship rights when it declares "[t]hat immigration shall be encouraged; emigration shall not be prohibited, and *no citizen shall be exiled.*"³⁷ When Alabama's constitution says that no citizen shall be exiled, it reaffirms the holding in *Wong Kim Ark* that prevented the U.S. from exiling a Chinese-American laborer.

II. THE WELFARE OF SOFÍA: PROTECTING HER UNLAWFUL IMMIGRANT MOTHER

Contemporary opponents of birthright citizenship object to the consumption of welfare benefits by unlawful immigrants.³⁸ When this belief is compared to the state's declaration of the universal sanctity of unborn life, Sofía's gestational life is given short-shrift compared to that of an unborn child with an American mother. A mother's alienage cannot be used to determine birthright citizenship or an unborn child's right to life

appearing to argue for a racial distinction: "The children of German parents are citizens; but Germans are not Chinese." *Id.* Explaining the intent of the citizenship clause, Senator Trumbull answered: "If the Senator from Pennsylvania will show me in the law any distinction made between the children of German parents and the children of Asiatic parents, I might be able to appreciate the point which he makes; but the law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European." *Id.*

³⁵ 169 U.S. 649, 652, 697–99, 705 (1898).

³⁶ H.B. 314, 2019 Leg., Reg. Sess. §§ 3(7)–(8) (Ala. 2019) (defining the terms "unborn child," "child," and "person" as "[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability" and defining the term "woman" as "[a] female human being, whether or not she has reached the age of majority").

³⁷ ALA. CONST. art. I, § 30 (emphasis added).

³⁸ See, e.g., Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 3 (2009). For other scholarship opposing birthright citizenship, see William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 224 (2008) ("[T]he historically unimagined fact of the huge number, perhaps twelve million or more, of persons unlawfully within the United States has stressed our understandings of birthright citizenship."); Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 466–69 (1999) (arguing that Congress should exclude "illegal" aliens from the census count and, by statute, bar their native-born children from gaining citizenship). See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995); PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

without eviscerating the universality of these rights.³⁹ Sofía's existence depends not only on legislation declaring her right to life, it also depends upon her mother's access to shelter, food, and healthcare to assure that Sofía has reasonable possibility of being born alive.

As an unlawful immigrant, Sofía's mother is subject to immediate deportation. And if she were not an American citizen, Sofía would be too. However, Sofía is an American citizen, and there is no lawful authority to strip an American of citizenship.⁴⁰ Thus, to protect Sofía's citizenship, her mother must remain in America. And to protect Sofía's life, her mother must also be provided with basic welfare protection.

First, I focus primarily on the welfare of Sofía's *mother* because, although Alabama's abortion law has a striking combination of breadth and exclusion, it only deals with the unborn child and the pregnant woman. Specifically, the Act defines "unborn child" and "woman," but it has no definition for "man," "husband," "spouse," "partner," or "father." Men bear no responsibility for the life of the unborn child (although, apparently, they can deny women the right to terminate a pregnancy). Alabama seems to treat unborn life as if Sofía was conceived without sperm⁴¹ or cloned from her mother.⁴²

This omission contributes to an existential problem for Sofía. The law isolates Sofía's mother from the man who fathered her unborn child. At no point do Alabama's laws address his role as a parent and provider for his child's welfare. In other words, while Alabama prohibits Sofía's mother from ending her pregnancy due to dire financial circumstances, it also fails to make the child's father responsible for support of his daughter. Sofía's mother is thus forced to scrape by alone in Alabama's denial of benefits for her child.

³⁹ The Act alludes to the universality of rights for the unborn child. *See* Ala. H.B. 314 § 2(d) (explaining that civil rights movements would not have been successful without their "appeal to the truth of universal human equality").

⁴⁰ In *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967), the Court held that § 401(e) of the Nationality Act of 1940 violated the citizenship clause of the Fourteenth Amendment. Afroyim, a naturalized American citizen who lived in Israel for ten years, was stripped of his American citizenship for voting in an Israeli election. *Id.* at 254. The Court rejected the idea that "Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent." *Id.* at 257. If citizenship-stripping is prohibited for naturalized citizens, this principle would seem to apply with equal or greater force to a birthright citizen.

⁴¹ A mammalian egg can be fertilized without sperm, but this result has been achieved only in mice, not humans. *See* Gretchen Vogel, *Egg Fertilized Without Sperm*, *SCIENCE* (July 12, 2001, 7:00 PM), <https://www.sciencemag.org/news/2001/07/egg-fertilized-without-sperm> [<https://perma.cc/835A-4V2D>].

⁴² Humans have not been cloned, and the practice "would inevitably lead to babies that are deformed, or die soon after birth." Sheryl Gay Stolberg, *Researchers Debate Human Cloning*, *N.Y. TIMES* (Aug. 7, 2001), <https://www.nytimes.com/2001/08/07/science/researchers-debate-human-cloning.html> [<https://perma.cc/XJK3-PVUX>].

More specifically, Alabama's welfare laws harshly exclude Sofia's mother in two ways. First, it requires a welfare beneficiary to be a U.S. citizen or legal alien. Second, it requires recipients to be employed.⁴³ Sofia's mother is ineligible in both respects. This puts barriers in the path of Sofia's neonatal development. She does not have equal access to nutrition compared to the unborn children of American citizens. These exclusions expose a fundamental hypocrisy in Alabama's promise to treat all unborn children with equality.

This situation is exacerbated by President Trump's rescission of Deferred Action for Childhood Arrivals and Temporary Protection Status.

First, the Trump Administration terminated the postponed enforcement policy known as Deferred Action for Childhood Arrivals (DACA).⁴⁴ Court rulings have challenged this rescission.⁴⁵ The DACA-eligible population is approximately 1.3 million people; however, only 897,605 registered as of

⁴³ Alabama administers a federally funded Family Assistance Program that provides temporary financial assistance for needy families with a dependent child under the age of eighteen. *See Alabama Family Assistance*, BENEFITS.GOV (last visited Oct. 3, 2019), <https://www.benefits.gov/benefit/1648> [<https://perma.cc/H34K-FSEG>]. A summarized list of the eligibility requirements for Family Assistance can be found online on the Alabama Department of Human Resources website. ALA. DEP'T HUM. RESOURCES, FAMILY ASSISTANCE (FA) PROGRAM SUMMARIZED ELIGIBILITY REQUIREMENTS 1-3 (2016), http://dhr.alabama.gov/services/Family_Assistance/Documents/DHR-FAD-595.pdf. Alabama makes Sofia's mother ineligible due to her unlawful alienage. *See* ALA. DEP'T HUM. RESOURCES, ALABAMA TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) STATE PLAN RENEWAL 13-14 (2016) [hereinafter ALA. DEP'T HUM. RESOURCES, ALABAMA TEMPORARY ASSISTANCE FOR NEEDY FAMILIES], http://dhr.alabama.gov/services/Family_Assistance/Documents/2016StatePlan.pdf (specifying that only citizens and qualified non-citizens are eligible to participate). The program also has work requirements. *Id.* at 7-11. Thus, Sofia's mother is excluded by law in the first place because of her unlawful alien status; and even if she became eligible, she would also need legal employment to remain eligible for benefits.

⁴⁴ Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/P7CM-W8AH>] (stating that the Department of Homeland Security will "reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum").

⁴⁵ *See, e.g., NAACP v. Trump*, 321 F. Supp. 3d 143, 146 (D.D.C. 2018) (DACA rescission was a significant policy decision and therefore reviewable); *Inland Empire-Immigrant Youth Collective v. Duke*, No. EDCV 17-2048 PSG (SHKx), 2017 WL 5900061, at *10 (C.D. Cal. filed Nov. 20, 2017) (enjoining revocation of employment authorization and DACA status); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017) (granting DACA plaintiffs broad access to administration documents that relate to the intent and formulation of DACA rescission); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1341 (N.D. Ga. 2017) (rejecting the Department of Homeland Security's jurisdiction-stripping argument).

June 2017.⁴⁶ Within this group, 362,700 were female.⁴⁷ They comprise about 40% of the registered group. By its terms, DACA applies to young adults, ages fifteen through thirty-two.⁴⁸ These ages coincide with childbearing years. Approximately 3,900 DACA recipients reside in Alabama.⁴⁹ Thus, Alabama is home to about 1,500 DACA females who are of childbearing age, which shows that Sofía's situation is not unique.

Second, the Trump Administration's decision to terminate Temporary Protected Status (TPS) jeopardizes Sofía's welfare.⁵⁰ Established by the Immigration Act of 1990, TPS authorized presidents to grant migrants a haven when they fail to qualify for refugee status but have fled dangerous political situations or natural disasters.⁵¹ If Sofía's mother was protected by TPS, Sofía will face significant hardships. Likely, her mother has been in the United States for many years if she is from Haiti, El Salvador, or Nicaragua.⁵² Like all TPS recipients, she would have been eligible for employment authorization had President Trump not terminated TPS.⁵³

⁴⁶ JIE ZONG ET AL., *MIGRATION POL'Y INST., A PROFILE OF CURRENT DACA RECIPIENTS BY EDUCATION, INDUSTRY, AND OCCUPATION 2* (2017).

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 1.

⁴⁹ *Id.* at 9.

⁵⁰ President Trump's U.S. Citizenship and Immigration Services has broadly terminated TPS. *See* Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2,654–60 (Jan. 18, 2018); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648–54 (Jan. 18, 2018); Termination of Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636–42 (Dec. 15, 2017); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228–34 (Oct. 11, 2017). A district court in *Ramos v. Nielsen*, after dismissing the agency's jurisdiction argument, No. 18-cv-01554-EMC, 2018 WL 3109604, at *1 (N.D. Cal. June 25, 2018), enjoined TPS rescissions, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018).

⁵¹ 8 U.S.C. §§ 1254a(a)(1), (b)(1) (2012). For an excellent overview of TPS, see Matthew Rooney & Laura Collins, *Deporting Salvadorans May Lead to Economic Decline*, GEORGE W. BUSH INST. (Jan. 9, 2018), <http://www.bushcenter.org/publications/articles/2018/01/deporting-salvadorans-may-lead-economic-decline.html> [<https://perma.cc/D4KF-58WQ>].

⁵² *See, e.g.*, Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418–24 (May 30, 2013); Extension of the Designation of Nicaragua for Temporary Protected Status, 78 Fed. Reg. 20,128–33 (Apr. 3, 2013); Extension of the Initial Registration Period for Haitians Under the Temporary Protected Status Program, 75 Fed. Reg. 39,957–58 (July 13, 2010).

⁵³ *See Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/ZQH2-XJ7K>] (last updated Nov. 1, 2019) (noting that TPS beneficiaries, and those found preliminarily eligible for TPS, “[c]an obtain an employment authorization document (EAD)”). The website that provides information on TPS informs that *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019), enjoined rescission of TPS for Haitians. *Id.* The website also explains that the Department of Homeland Security “[s]ometimes” issues a blanket automatic extension of the expiring employment authorization documents for TPS recipients, depending on which country they are from. *Id.*

In sum, even though Alabama appears to have a small population of unlawful immigrants, there is a strong likelihood that the state is home to at least several thousand women of childbearing age who fall into these immigration categories which face hardships due to President Trump's immigration policies.

Although Sofía is a hypothetical child for this Article, she is already alive in Alabama. Sofía's welfare in utero is threatened by a combination of a benevolent state and federal laws that grant her a right to a life, and laws that legally segregate her mother from access to the labor market for legal employment. This inevitably exposes Sofía's mother to illegal labor markets that require physical labor, involve dangerous chemicals, and lack healthcare benefits and paid sick leave—not to mention low wages and possible wage theft.⁵⁴ Therefore, the possibility that her mother will miscarry due to harsh conditions threatens Sofía's life.⁵⁵

CONCLUSION: VINDICATING SOFÍA'S RIGHTS

A statute “says what it means and means what it says.”⁵⁶ However, there are reasons to doubt that Alabama's constitution means what it says by declaring “support [for] the sanctity of unborn life and the rights of unborn children, including the right to life.”⁵⁷ In the United States, 51% of pregnancies are unintended, and 40% end with an abortion.⁵⁸ In 2011, the rate of unintended pregnancies for poor women (60%) was twice the level for the wealthiest group of women (30%).⁵⁹ However, the Act was passed without expanding Medicaid to cover all poor pregnant women who need

⁵⁴ A study of Chicago's large population of undocumented workers, and their experiences, appears in Nina Martin et al., *Migrant Worker Centers: Contending with Downgrading in the Low-Wage Labor Market*, 68 GEOJOURNAL 155, 156–58 (2007).

⁵⁵ Standing for long hours is associated with increased risk of premature delivery. See Gertrud S. Berkowitz et al., *Physical Activity and the Risk of Spontaneous Preterm Delivery*, 28 J. REPROD. MED. 581, 582, 586 (1983); Anne M. Teitelman et al., *Effect of Maternal Work Activity on Preterm Birth and Low Birth Weight*, 131 AM. J. EPIDEMIOLOGY 104, 104 (1990).

⁵⁶ *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016); see also *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (explaining that, rather than rewriting statutory text based on speculation, courts “presume more modestly instead ‘that [the] legislature says . . . what it means and means . . . what it says’” (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005))).

⁵⁷ ALA. CONST. amend. 930, § (a).

⁵⁸ Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 PERSP. ON SEXUAL & REPROD. HEALTH 3, 3 (2014). An estimated 30% of U.S. women will have an abortion by age 45. *Id.*

⁵⁹ Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 NEW ENG. J. MED. 843, 846 (2016) (reporting that in 2011, 60% of pregnancies were unintended for women whose income was less than 100% of the federal poverty level, whereas only 30% of pregnancies were unintended for women whose income was equal to or greater than 200% of the federal poverty level).

neonatal care.⁶⁰ Thus, Alabama has created significant economic challenges for the unborn children in the wombs of its poorest women without addressing these hardships.

Additionally, Alabama's ALL Kids health insurance program fails to mention unborn children at all, disregarding their neonatal needs.⁶¹ Children of unlawful immigrants are treated even worse.⁶² ALL Kids specifically excludes them from coverage.⁶³ This discrimination is part of Alabama's comprehensive anti-immigrant public policy.⁶⁴

Alabama's lack of coverage for immigrant children and unborn children leaves immigrant mothers, like Sofia's mother, without many options. Not only are immigrant mothers and mothers of unborn children denied benefits assistance in Alabama, but the federal government denies young immigrant mothers access to abortions nationwide. This leaves them no other option than to carry the pregnancy to term, but without support. *J.D. v. Azar*, involving the Trump Administration's denial of abortions for unaccompanied immigrant minors, reveals hardships faced by people like Sofia's mother.⁶⁵ Using language similar to words in Alabama's right-to-

⁶⁰ Mike Cason, *Alabama Arise Renews Call for Medicaid Expansion, Tax Reform*, AL.COM (Mar. 19, 2019), <https://www.al.com/news/2019/03/alabama-arise-renews-call-for-medicaid-expansion-tax-reform.html> [<https://perma.cc/P5ZG-NJMR>] ("Alabama is one of 14 states that have taken no action to expand Medicaid, a central part of the Affordable Care Act intended to help low-income working families.").

⁶¹ *ALL Kids All Covered, Does Your Child Qualify?*, ALA. PUB. HEALTH (Mar. 18, 2019), <http://www.alabamapublichealth.gov/allkids/eligibility.html> [<https://perma.cc/E2XL-DXFN>].

⁶² Kari White et al., *Impact of Alabama's Immigration Law on Access to Health Care Among Latina Immigrants and Children: Implications for National Reform*, 104 AM. J. PUB. HEALTH 397, 397 (2014) (stating the main effect of Alabama's 2011 immigration law on Latina immigrants and their U.S.- and foreign-born children was reduction in health services availability); see also Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 62 (2012) ("The attack on 'anchor babies' and birthright citizenship [has the goal of prescribing] immigrant women's reproductive decisions regarding pregnancy.").

⁶³ *ALL Kids All Covered, Does Your Child Qualify?*, *supra* note 61.

⁶⁴ The Beason-Hammon Alabama Taxpayer and Citizen Protection Act was a comprehensive law aimed to encourage unlawful immigrants to leave the state by prohibiting them from receiving any public benefits at either the state or local level. H.B. 56, 2011 Leg., Reg. Sess. §§ 1, 7(b) (Ala. 2011). Provisions of the law relating to housing, schools, and police profiling were permanently enjoined in *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2013 WL 10799535, at *1 (S.D. Ala. Nov. 25, 2013). The injunction does not cover the ALL Kids program.

⁶⁵ 925 F.3d 1291, 1299 (D.C. Cir. 2019). The Office of Refugee Resettlement (ORR) has custody of several hundred pregnant unaccompanied minors every year. *Id.* at 1303. They are housed in at least twenty-one shelters, including those in states that significantly restrict abortions. See *id.* In 2017, ORR received requests for abortions from eighteen pregnant unaccompanied minors. *Id.* However, in March 2017, ORR announced a policy requiring those seeking abortions to obtain permission from the ORR Director. *Id.* Previously, shelters assisted minors with an abortion if state law permitted the procedure. *Id.* If a state

life laws, the Director of the Office of Refugee Resettlement has a blanket policy to deny teenager requests for abortions because his agency provides refuge “to all the minors in our care, including their unborn children.”⁶⁶

This Article examined some of the consequences of this profoundly involuntary parenthood law. It concludes by suggesting measures to secure Sofía’s rights. The sequence of these actions is important: (1) she must have a legal identity, (2) she must have access to basic welfare benefits, and (3) she must have subsistence from her mother’s employment.

First, Sofía needs a birth certificate even though she has not yet been born. This will particularize her legal identity on the same terms as Alabama children who have been born. Sofía will encounter difficulty, however, because of Alabama’s literal focus on live birth as a condition for a birth certificate.⁶⁷ If Sofía’s mother seeks a birth certificate for Sofía once her heartbeat is detected in accordance with the Alabama right-to-life law,⁶⁸ her request should be granted in accordance with the state’s constitution and unborn child statute.

Second, if Sofía’s mother has no other minor children, Sofía will need a birth certificate to establish that she is a dependent minor so that her mother can have access to Alabama’s version of Temporary Assistance for Needy Families (TANF).⁶⁹ This program differs from ALL Kids, which is a safety-net health insurance program, by providing income support. Sofía’s mother will be ineligible for these family benefits unless Sofía has a birth certificate. Legislation or a court ruling will likely be necessary to declare Sofía a dependent unborn child. That declaration should recognize that Sofía is an American citizen in utero. However, even if a court rules that Sofía is a dependent unborn child, her mother still urgently needs legal employment because Alabama’s welfare laws make Sofía’s mother ineligible for benefits due to her unlawful alienage.⁷⁰

restricted the abortion, ORR would transfer the minor to a shelter willing to provide access. *Id.*

⁶⁶ *Id.* at 1305. Scott Lloyd, the Director in 2017, denied every abortion request presented to him during his tenure, including those involving a verifiable claim of rape. *Id.* at 1303. This included a request from Jane Poe, who was diagnosed in a medical examination as having been raped. *Id.* at 1304–05. Lloyd explained that ORR must provide refuge “to all the minors in our care, including their unborn children.” *Id.* at 1305. He wrote: “[i]n this request . . . we are being asked to participate in killing a human being in our care,” and “we ought to choose [to] protect life rather than to destroy it.” *Id.*

⁶⁷ See ALA. CODE § 22-9A-7 (a) (“A certificate of birth for each live birth that occurs in this state shall be filed with the Office of Vital Statistics . . . within five days after the birth.”).

⁶⁸ See *supra* note 11 and accompanying text.

⁶⁹ See *supra* note 43 and accompanying text.

⁷⁰ See ALA. DEP’T HUM. RESOURCES, ALABAMA TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, *supra* note 43, at 13–14.

Third, Sofia's mother will need an Employment Authorization Document (EAD) to be lawfully employed.⁷¹ Her chances of acquiring an EAD will depend on whether she falls into any of the temporary legal categories that President Trump has rescinded, but that remain in place due to court injunctions, or whether she qualifies for another immigration status.⁷² Sofia's mother should assert that Sofia is an unborn child under Alabama law, with plenary constitutional rights, and that Sofia is an American citizen by virtue of the birthright clause in the Fourteenth Amendment.

To conclude, the fundamental law in Alabama recognizes the sanctity of unborn life, but it does not recognize the legal practicalities of being a born child. Thus the law does not explicitly confer benefits for Sofia's care or grant her U.S. citizenship status. The state's emphasis on "sanctity" can only mean that the unborn Sofia has "holiness of life and character."⁷³ The public policies of Alabama, acting in combination with President Trump's hostile policies toward unlawful immigrants, place the welfare Sofia's mother, in her pregnant condition, in danger. As for Sofia's fragile unborn life, these pro-life and anti-immigrant policies prove once again that inequality is an ongoing reality for many American children—a reality that begins in a heartbeat.

⁷¹ *Supra* note 53 and accompanying text.

⁷² *Supra* note 45 and accompanying text. In addition, Sofia's mother might be eligible for protection under the Violence Against Women Act. 42 U.S.C. §§ 13701–14040 (2018). She may also be eligible for asylum, a T Visa, or a U Visa. 8 U.S.C. § 1158 (2018); 8 U.S.C. § 1101(a)(15)(T), (U) (2018). If she is a minor, she might be eligible for Special Immigrant Juvenile Status. 8 U.S.C. § 1101(a)(27)(J) (2018).

⁷³ *Sanctity*, MERRIAM-WEBSTER, <https://www.merriamwebster.com/dictionary/sanctity> [<https://perma.cc/456D-ZMQ9>] (last visited Nov. 12, 2019).