ADDING FAMILY COMPLICATIONS TO BIRTHRIGHT CITIZENSHIP

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Abstract

On the first day of his second administration, President Trump issued an executive order purporting to restrict citizenship of U.S.-born children based on their parents' citizenship or immigration status. In the process, the order discriminates between mothers and fathers and adopts genetic definitions of "mother" and "father" to exclude any parent who is not the child's "immediate . . . biological progenitor."

Courts and scholars have condemned this attempt to restrict birthplace citizenship as a violation of both the Fourteenth Amendment and the Immigration and Nationality Act. Yet there has been little, if any, discussion of the new family-based conditions in the order. Unconditional birthplace citizenship is a simple, bright-line rule, but the order's hybrid citizenship regime is a complex mess. Its new rules would focus on parental immigration status, with different requirements for mothers as opposed to fathers. In defining who counts as "mothers" and "fathers," it adopts a genetic essentialist definition of parentage at odds with the definitions of both state laws and federal law for children born to citizens abroad. Absurdly, some of the U.S.-born children excluded under the order would be citizens if born to the same parents abroad.

This Article provides a new perspective on why the executive order is invalid, reflecting ahistorical categories and assumptions and ignoring both traditional marital presumptions and modern reproductive technology. The order is unauthorized by the text and intent of both the Immigration and Nationality Act and the Fourteenth Amendment citizenship clause, and it violates "equal protection" principles. It is pure invention, an act of executive lawmaking invalid under our constitutional system.

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I. INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States. . ."[1] Since the Nineteenth Century, this Citizenship Clause, and its later-enacted statutory twin, have guaranteed citizenship to every person born on U.S. territory, except for members of tribal nations and the children of foreign diplomats.[2] Despite this long-standing

1. U.S. CONST. amend. XIV, § 1.

2. United States v. Wong Kim Ark, 169 U.S. 649, 659–60 (1898). The children of occupying enemy soldiers are also theoretically exempted from American birthplace citizenship, but this generally accepted rule has fortunately not been tested in the post-Civil-War United States. President Trump's claim that the presence of unlawful immigrants on U.S. territory is an "invasion," triggering the Alien Enemies Act of 1798, has not generally been accepted as anything more than the metaphor it is. *See* W.M.M. v. Trump, 154 F.4th 207, 223 (5th Cir. 2025), *reh'g en banc granted, vacated,* 154 F.4th 319 (5th Cir. 2025) (defining "invasion" for purposes of the Act "as an act of war involving the entry into this country by a military force of or at least directed by another country or nation, with a hostile intent"). Since 1924, Native Americans have obtained automatic citizenship upon birth within the United States under the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).

consensus, in January 2025, President Trump signed an Executive Order denying citizenship to U.S.-born children whose "immediate female biological progenitor" is "unlawfully present" or lawfully but temporarily present, unless the child's "immediate male biological progenitor" is a U.S. citizen or lawful permanent resident.[3]

Many judicial opinions and voluminous scholarly literature support the broad traditional reading of the Citizenship Clause that guarantees unconditional birthplace citizenship to almost anyone born on U.S. territory.[4] These sources convincingly argue that the text and original intent behind both the Fourteenth Amendment Citizenship Clause and its subsequent statutory codification in Section 301(a) of the Immigration and Nationality Act (INA) guarantee nearly unconditional birthplace citizenship.[5] This Article will not rehash these arguments in detail. Rather, it focuses on the specific family-based immigration status limitations that the Executive Order adds to create

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3. *Protecting the Meaning and Value of American Citizenship*, Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025) [hereinafter Exec. Order 14160]. Because the Order's use of "unlawfully present" and "presence . . . lawful but temporary" are unclear, USCIS issued a four-page implementation plan defining those terms six months after the order was issued. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., IP-2025-0001, IMPLEMENTATION PLAN OF EXECUTIVE ORDER 14160—PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (July 25, 2025) [hereinafter USCIS IMPLEMENTATION PLAN].

4. United States v. Wong Kim Ark, 169 U.S. 649 (1898); Morrison v. California, 291 U.S. 82 (1934) (recognizing birthplace citizenship for U.S.-born children of Japanese parents, who were "ineligible" for citizenship); United States *ex rel*. Hintopoulos v. Shaughnessy, 353 U.S. 72, 73 (1957) (recognizing birthplace citizenship for children with unlawfully present parents); I.N.S. v. Errico, 385 U.S. 214, 215–16 (1966); I.N.S. v. Rios-Pineda, 471 U.S. 444, 446 (1985); *see also* Trump v. CASA, 606 U.S. 831, 885–86 (2025) (Sotomayor, J., dissenting) (citing these cases repeatedly reaffirming *Wong Kim Ark*). A small sample of the voluminous scholarship in this area could include: Margaret Stock & Nahal Kazemi, *The Non-Controversy Over Birthright Citizenship: Defending the Original Understanding of Jus Soli* Citizenship, 24 CHAPMAN L. REV. 1 (2021); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020); Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331 (2010) (detailed historical argument favoring inclusive originalist reading of the Citizenship Clause); Evan D. Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORNELL L. REV. ONLINE 101, 104 n.10 (2025) (criticizing recent ahistorical revisionist interpretation of the Fourteenth Amendment); Amanda Frost & Emily Eason, *The Dog That Doesn't Bark: Eligibility to Serve in Congress and the Original Understanding of the Citizenship Clause*, 114 GEO. L.J. ONLINE 69, 87 (2026) (describing the lack of records for immigrants who did not become citizens during an era when "'free white persons' could choose to file a declaration of intent to naturalize," or alternatively "remain[] in the United States for the rest of their lives" without a declaration of intent).

The few exceptions to unconditional birthplace citizenship have been for the children of occupying soldiers and some foreign diplomats, *see Wong Kim Ark*, 169 U.S. at 659–60, and—until 1924—Native Americans subject to tribal jurisdiction. *See infra* Part III-A.

5. *See* sources cited *supra* note 4. This Article uses the terms "birthplace citizenship" and "inherited citizenship" to describe the two traditional rules providing automatic citizenship at birth: citizenship based on birth within state territory and citizenship based on family-based inheritance, respectively. Birthplace citizenship is often called "*jus soli* citizenship," Latin for "law of the soil." Inherited citizenship is often called "citizenship by descent" or "*jus sanguinis* citizenship," Latin for "law of blood" or "blood right." But those references have sometimes led to confusion and unfortunate results. *See* Scott Titshaw, *Inheriting Citizenship*, 58 STAN. J. INT'L L. 1, 3 (2022).

The Article uses the term "birthright citizenship" to indicate automatic citizenship at birth generally, whether based on birthplace, inheritance, or a hybrid combination of the two. Although "birthright citizenship" has often been used as a specific reference to U.S. birthplace citizenship, that was based on the traditional understanding of the Fourteenth Amendment. It is confusing in the context of an Executive Order that seeks to add family-based requirements for U.S.-born citizens while describing that citizenship as a "gift" and "privilege," rather than a "right." *See* Exec. Order 14160, *supra* note 3.

its new hybrid citizenship rule. It reveals how the Order makes baseless choices and ahistorical assumptions, providing additional reasons why it should be struck down as an arbitrary usurpation of power. If the Supreme Court were to uphold the Order despite this, the Article reveals its foreign precursors and likely consequences, as well as the unanswered questions the Order raises.

The Executive Order does not expressly acknowledge the fact that rules transmitting citizenship from parents to children are much more complicated than unconditional birthplace citizenship. Yet they are.

Unconditional birthplace citizenship rules focus on only one variable: whether someone was born within the United States. If the answer is yes, then the child is a citizen; if the answer is no, the child is not. The only other occasionally relevant variable today is whether a child is "born . . . to a foreign diplomatic officer," a rare exception that matters only if both parents are covered within a very limited category of "blue list" diplomats.[6]

Inherited citizenship rules, by contrast, must answer several questions: Must both parents be citizens? If not, does it matter if the citizen is the mother or father? Does it matter if the child was born in wedlock? Is there a territorial residence requirement for the citizen parent or parents?[7] Even after these questions are answered, many additional variables are relevant to determine who the child's "parents" are for citizenship transmission purposes: Is parentage for citizenship transmission determined by family law rules? If so, are the rules determined by the jurisdiction where the child was born or resides? If the family does not reside together, then whose residence controls? If federal citizenship law creates its own definition of parentage, independent of family law, is that definition based on gestation, genetics, marriage, or some combination of the three?

The United States has answered many of these inherited citizenship questions differently during different eras, but those answers have always been based on statutes. Article I, Section 8 of the United States Constitution delegated to Congress the power "[t]o establish a uniform

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6. *See* 8 C.F.R. § 101.3 (distinguishing accredited "blue list" diplomats from consular officers and "white list" employees not included in the State Department's list of "foreign diplomatic officer(s)"; the families of the latter are subject to U.S. jurisdiction because their diplomatic immunity is more limited); 7 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, pt. O, ch. 3(B) ("If one parent was an accredited diplomat, but the other was a U.S. citizen or national . . ., then the child . . . is a citizen). Of course, the children of diplomats category can be complex due to both the issue of "parent-child" relationship definition and the determination of who is a "foreign diplomatic officer," but—unlike the general category of birthplace citizenship—Article II of the Constitution expressly provided Presidential power over foreign affairs, including "receiv[ing] . . . Ambassadors and other public Ministers." U.S. CONST. art. II, §§ 2–3. Thus, it is appropriate to allow the executive branch to make these fine distinctions in the discrete context of certain accredited "foreign diplomatic officer[s] accredited to the United States, [who] as a matter of international law, [are] . . . not subject to the jurisdiction of the United States." 8 C.F.R. § 101.3(a)(1). The other two categories of U.S.-born persons not guaranteed citizenship under the Fourteenth Amendment are Native American tribal members, whom Congress has endowed with citizenship via statute since 1924, The Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924), and children born to occupying forces, currently non-existent despite the Trump administration's use of metaphors like "invasion" and "occupation" to describe persons in the United States without lawful immigration status.

7. *See, e.g.*, 8 U.S.C. §§ 1401, 1409 (current provisions for U.S. citizenship at birth abroad addressing all these questions).

Rule of Naturalization. . .[,]"[8] which has included inherited citizenship rules for children born abroad since the First Congress enacted the Naturalization Act of 1790.[9] Congress has altered the rule several times, and both the U.S. State Department and federal courts have interpreted ambiguities and gaps in the statutes when necessary.[10] For example, the State Department has changed its understanding of parent-child relationships for citizenship purposes at least twice in the last twelve years in reaction to changing reproductive technology and family law.[11] At present, it recognizes citizenship transmission by non-biological citizen parents who are married to genetic or gestational parents when their child is born abroad.[12] The State Department's instructions for determining qualifying relationships comprise dozens of printed pages.[13]

The new Executive Order does not acknowledge this complexity, creating its own definitions and requirements to answer some of the questions above. It invents limitations based on detailed modern immigration status distinctions among the parents of U.S.-born children.[14] For some undisclosed reason, it devises different status requirements for genetic mothers and fathers in defiance of recent Supreme Court precedent.[15] Then, it promulgates free-standing federal definitions of "mother" as "the immediate female biological progenitor" and "father" as "the immediate male biological progenitor" of a U.S.-born child.[16] This focus solely on genetic parentage, ignores state family law, the parents'

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8. U.S. CONST. art. I, § 8.

9. Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103–04 (1790) (repealed 1795); *see* United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898) (establishing that inheriting citizenship, even at the time of birth, is technically a type of "naturalization" under the U.S. Constitution).

10. *See, e.g.*, Scales v. I.N.S., 232 F.3d 1159 (9th Cir. 2000) (interpreting the INA provisions related to inherited citizenship upon birth abroad to include "no requirement of a blood relationship between [a foreign-born child] . . . and his [non-biological] citizen father" so long as the child's parents were married at the time of his birth); Mize v. Pompeo, 482 F. Supp. 3d 1317 (N.D. Ga. 2020) (foreign-born child was a U.S. citizen under the INA based on the citizenship of his non-biological father, who was the spouse of his noncitizen genetic father through a surrogacy arrangement); *see infra* Part IV (describing State Department's changing interpretation of the INA in regard to assisted reproductive technology and surrogacy).

11. *See* Scott Titshaw, *Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 104–05 (2010) [hereinafter Titshaw, *Sorry Ma'am*]; Scott Titshaw, *ART, Surrogacy, Federalism, and Jus Sanguinis Citizenship in the US, Australia, and Canada*, 3 ASIAN Y.B. HUM. RTS. & HUMAN. L. 144, 160 (2019) [hereinafter Titshaw, *ART, Surrogacy, Federalism, and Jus Sanguinis Citizenship*]; Scott Titshaw, *A Modest Proposal: To Deport the Children of Gay Citizens, & etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407 (2011) [hereinafter Titshaw, *A Modest Proposal*].

12. U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, pt. H, ch. 3(B) ("USCIS considers a child to be born in wedlock when the legal parents are married to one another at the time of the child's birth and at least one of the legal parents has a genetic or gestational relationship to the child.") (last visited Apr. 20, 2026); 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 304.3 (2022) (detailed description of various scenarios following the rule above).

13. *See* 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301 (2021).

14. *See* Exec. Order 14160, *supra* note 3 (*e.g.,* relying on whether a mother is "unlawfully present"—as first defined in 1996—or in "presence" that is "lawful but temporary"—as never defined by statute). *See infra* Part II.

15. *See* Sessions v. Morales-Santana, 582 U.S. 47 (2017) (striking down the shorter physical presence requirement for mothers in contrast to fathers transmitting citizenship to children upon birth out of wedlock abroad as a violation of constitutional equal protection).

16. *See* Exec. Order 14160, *supra* note 3.

marriage, the mothers' gestation and childbirth, and current State Department guidance.[17] Illogically, some of the U.S.-born children the Order disqualifies would be citizens if born to the same parents abroad.[18]

Unlike State Department line-drawing regarding the parentage of children born to citizens abroad, the Executive Order does not interpret any statutory or constitutional language when it invents new requirements for parental immigration status or parentage in the context of U.S.-born children. This is inevitable because there is no relevant text to interpret. The Order creates its "interpretation" out of thin air.

Both the Fourteenth Amendment and the INA only limit birthplace citizenship based on the U.S.-born child's being "subject to the jurisdiction" of the United States. The Order, thus, places tremendous weight on this limitation in its attempt to construct a complicated, new hybrid citizenship regime. The Citizenship Clause limitation regarding U.S. "jurisdiction" over citizen children cannot bear so much weight.

Hybrid citizenship systems combining birthplace and family-based inheritance requirements are not unprecedented globally.[19] The Executive Order replicates many aspects of modern rules adopted since the 1980s in the United Kingdom and some of its other former colonies.[20] However, those countries all conducted open policy debates and adopted their new rules through the legal means required by their constitutions. For instance, Ireland, the only such country with a constitutional birthplace citizenship provision, held a national referendum to amend its constitution on this point.[21] If Americans debate the issue and decide a hybrid citizenship rule or some other rule is the answer, they must follow the Irish example and amend the United States Constitution.[22]

The original Framers of the Constitution understood the complex issues inherent in defining inherited citizenship when they delegated that authority, along with other naturalization authority, to Congress, which has exercised it for 235 years. It is unlikely the Framers of the Fourteenth Amendment forgot this lesson when drafting the birthplace citizenship clause in the 1860s. It is even more unlikely that they intended to silently create a novel hybrid

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17. *See* 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.7-6(a) (State Department guidance providing citizenship upon birth abroad to the child of a noncitizen biological parent, who is married to a U.S. citizen parent with no genetic or gestational connection). The word "progenitor" might be ambiguous enough to leave hope for a mother who carries a child to term and gives birth after conception *in vitro* using another woman's egg. But the Order certainly did not anticipate them when it referenced "the immediate female biological progenitor" and "the immediate male biological progenitor" in the singular, particularly not in the context of same-sex lesbian genetic and gestational mothers.

18. *See infra* Part IV.

19. *See* Titshaw, *supra* note 5, at 30–37.

20. *See infra* Part V.

21. *See infra* Part V.

22. U.S. CONST. art. VI, cl. 2. (The Constitution and Laws "shall be the supreme Law of the Land" and bind "all executive and judicial Officers . . . to support" the Constitution). This process would follow historical precedent. For example, the Twenty-First Amendment repealed the Eighteenth Amendment to end prohibition. President Roosevelt did not attempt an end-run around the eighteenth amendment with an executive order reconstructing the language limiting its ban on "intoxicating liquors" within "the United States and all territory subject to the jurisdiction thereof for beverage purposes."

citizenship regime or to silently shift the constitutional structure to delegate authority to the President to define citizenship.

Part II of this Article briefly describes the Executive Order, unveiling the many choices and assumptions it makes in the guise of interpreting birthplace citizenship. It also identifies ambiguities and additional questions raised, but not answered, by the Order. Part III provides an overview of the history of United States birthright citizenship, focusing on changes in statutory provisions governing the automatic citizenship of children born abroad to citizen parents. Part IV describes evolving forms of family creation alongside the continuing importance of marital presumptions under both state family law and federal inherited citizenship provisions. Part V briefly reviews the modern international trend toward establishing hybrid forms of conditional birthplace citizenship, including regimes that resemble the Executive Order's vision. While inviting policy debate, this also shows the Executive Order is inappropriately based on an ahistorical understanding of the original intent behind the Fourteenth Amendment, and the INA Part VI demonstrates how insights into the complex, baseless hybrid regime in the Order provide new support for arguments that it is unconstitutional and statutorily invalid. This part also identifies serious equal protection concerns raised by the Order. In the end, the Article concludes that the Order is a baseless executive branch attempt to import into established American law a modern hybrid form of citizenship unrelated to the Fourteenth Amendment or the INA, and invalid under constitutional equal protection principles.

II. THE TRUMP HYBRID CITIZENSHIP EXECUTIVE ORDER

President Trump's first-day Executive Order entitled "Protecting the Meaning and Value of American Citizenship" implies that it has something to do with the phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment and INA § 301(a), which it dutifully recites at the outset. Then, however, it proceeds to construct a new, detailed modern hybrid citizenship regime, adding to the requirement of territorial birth a requirement that the child's genetic parent maintains particular immigration or citizenship status.[23] The Order provides no further explanation of the source of this requirement or of related executive power as it decrees that "the categories of individuals born in the United States and not subject to the jurisdiction thereof" include persons whose mothers are "unlawfully present" or in "lawful but temporary" "presence" unless their fathers are citizens or lawful permanent residents.[24] It then proceeds to define "mother" as "the immediate female biological progenitor" and "father" as "the immediate male biological progenitor."[25] Since it points to no source for its pronouncements other than the "jurisdictions thereof" phrase, it is not surprising that the Order uses the

23. *See* Exec. Order 14160, *supra* note 3.
24. *Id.*
25. *Id.*

passive voice throughout, implying this is just how things are, and the President is doing nothing new with the Order.[26] Nothing to see here, move on.

To understand the magnitude of the radical executive overreach in the Order, it is essential to understand the many issues it regulates or omits without a subject or an active verb. However, if the Supreme Court should uphold the Order, agreeing that implied, but long-unnoticed, limitations have existed in the Fourteenth Amendment all along, it would be even more essential to understand how the Order defines citizenship upon birth in the United States.

As described below, rules for hybrid citizenship, adding parental immigration or citizenship status requirements for children born on national territory, are a modern innovation.[27] They would have to be, since the formal immigrant (permanent or indefinite)/nonimmigrant (temporary) immigration status distinction on which they are based is a modern phenomenon, pioneered by the United States in the twentieth century.[28] Yet, the Order relies on detailed versions of this distinction as it formulates parental status requirements. For some unexplained reason, it also distinguishes between the required status for mothers and fathers despite the added complication and equal protection ramifications.[29]

The Order allows fathers to transmit citizenship to their U.S.-born children only if they are citizens or lawful permanent residents.[30] Yet, mothers can transmit citizenship to their children so long as they are not "unlawfully present" or in "lawful but temporary" "presence."[31] This clearly includes many mothers who would not qualify if they were fathers, but the terms are not self-explanatory. The U.S. Citizenship and Immigration Services (U.S.C.I.S.) attempted to explain these terms in an Implementation Plan issued six months after the Order.[32] That plan clarifies its understanding of "unlawfully present" in the Order as defined in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[33] It then proceeds to construct a meaning for "lawful but temporary" "presence," which is not used or defined in the INA.[34] Using an honest noun ("U.S.C.I.S.") and active verbs ("will define" and "intends to . . . permit"), the plan devises a reasonable interpretation of what the Order might mean with concrete lists of mothers whose U.S.-born children would or would not qualify as

26. The Order states correctly that "the Fourteenth Amendment *has never been* interpreted to extend citizenship universally to everyone born within the United States," before baldly asserting that the classes of children it defines for the first time are "among the categories" to whom the "privilege" and "gift" of citizenship "does not automatically extend." *Id.*

27. *See infra* Part V.

28. *See infra* note 194 and accompanying text.

29. *See* Exec. Order 14160, *supra* note 3.

30. *Id.*

31. *Id.*

32. *See* USCIS IMPLEMENTATION PLAN, *supra* note 3.

33. 8 U.S.C. § 1182(a) (as amended in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 575–77 (1996)). Although this definition states it is "for purposes of this paragraph," USCIS has employed it in other contexts as well. *See* USCIS IMPLEMENTATION PLAN, *supra* note 3.

34. *See* USCIS IMPLEMENTATION PLAN, *supra* note 3.

citizens under the hybrid rule.[35] For example, the U.S.C.I.S. plan disqualifies children of mothers who are granted withholding of removal under the Convention Against Torture, nonimmigrant workers, investors, artists, scientists, students, and even fiancées of citizens.[36] It simultaneously qualifies the children of mothers who are asylees, refugees, and certain American Indians born in Canada.[37] Highlighting the Order's arbitrary distinctions, the children of fathers in these categories would be out of luck.

The United States Supreme Court has upheld distinct treatment of fathers and mothers in the transmission of citizenship to children born out of wedlock abroad, where the Court perceived a need to avoid fraudulent claims of paternity and to ensure legal and factual father-child relationships.[38] Yet, the Order fails to rely on those cases, adopting its own genetic essentialist definitions of "mother" and "father."[39] Because genetic parentage can be determined with a bright line test, these criteria leave no basis to treat fathers and mothers differently, particularly when the discrimination relates to the parent's immigration status, not their parental status.[40] Neither the Order nor the U.S.C.I.S. plan explains why the U.S.-born child of a refugee mother should be a citizen, but the child of a refugee father should not.[41]

In the process of limiting parentage to "biological progenitors," the Order ignores states' traditional regulation of familial status, traditional marital presumptions of paternity, the rights of married couples using assisted reproductive technology (A.R.T.), and the rights of children of same-sex spouses, as well as the State Department's interpretation of INA provisions concerning children born abroad to citizen parents.[42] The Order's genetic essentialist definition of parentage is likely aimed at creating rules that are easy and efficient to administer. With modern DNA testing, genetic parentage can be determined

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35. *Id.*

36. *Id.* (also disqualifying children of mothers granted withholding of removal under INA § 241(b)(3) or withholding of deportation under INA § 243 among others); *see also* 8 U.S.C. § 1101(a)(15) (listing many "nonimmigrant" status categories). Of course, a citizen or lawful permanent resident genetic father might independently fulfill the Order's requirements for his U.S.-born child's citizenship.

37. *See* USCIS IMPLEMENTATION PLAN, *supra* note 3. The State Department recognizes the same list of parents, whose children would qualify under the Order, U.S. DEP'T OF STATE, EXECUTIVE ORDER 14160: PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025), but the U.S. Social Security Administration omits categories other than citizens, nationals, lawful permanent residents, asylees, and refugees, U.S. SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (2025).

38. *See* Miller v. Albright, 523 U.S. 420, 427–45 (1998) (divided Court upholding INA § 309(a) proof-of-paternity requirements for citizenship of children born out-of-wedlock abroad to citizen father and noncitizen mother); Nguyen v. I.N.S., 533 U.S. 53, 59–71 (2001) (upholding the gender-based distinction in Section 309(a) as related to the important government objectives of ensuring biological paternity for children born out-of-wedlock and ensuring the child and father have an opportunity to develop factual as well as legal ties during childhood).

39. *See* Exec. Order 14160, *supra* note 3.

40. *Morales-Santana*, 582 U.S. 47.

41. *See* Exec. Order 14160, *supra* note 3; USCIS IMPLEMENTATION PLAN, *supra* note 3. Of course, this distinction is mandated by the Executive Order, but it is unexplained.

42. *See infra* Part IV.

based on a bright-line, but highly invasive, test.[43] Yet, as a product of the 1980s, DNA "fingerprinting" is an inappropriate basis for a rule with no statutory or constitutional basis except the phrase "subject to the jurisdiction thereof" as understood in the 1860s, or even the 1950s.[44]

Although it is somewhat ambiguous, the Order's reference to "*the* immediate female biological *progenitor*" appears to focus on only *one* mother, who is a genetic parent of the child.[45] If so, it would exclude mothers who give birth to a child conceived through *in vitro* fertilization (I.V.F.) using another woman's egg. Same-sex couples would always be limited as to which of the two spouses can convey citizenship to their children. Even if gestational mothers fell under the definition, the non-genetic spouses in any couple that uses a surrogate to create their family would not be considered a "father" or "mother" under the Order's new definitions. This is likely to be more harmful to same-sex male couples, where it is obvious that one of the fathers is not genetically related to his child. The invasive questions embassy staff asked such couples under an earlier biology-based State Department policy demonstrate this likely outcome.[46]

The United States faces particularly difficult terrain in defining parentage for citizenship transmission purposes because of its federal system.[47] Most countries in the world that rely primarily on inherited citizenship also regulate family law uniformly at the national level.[48] Yet, the United States defines family relationships and family law at the state level while the federal government, particularly Congress, maintains plenary powers over the areas of citizenship not defined in the Fourteenth Amendment.[49] The Executive Order now opts to add parent-based requirements in the birthplace citizenship context and simultaneously create a special redefinition of parentage, presumably to minimize the confusion its addition creates. However, this new definition ignores not only state parentage laws, but also the existing federal definition of parentage used to determine the citizenship of children born to citizens abroad.[50]

Where federal and state laws disagree on who they recognize as legal parents, the result is "limping parentage," where a parent is recognized for some purposes,

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43. The invasiveness and related prejudice against same-sex couples, where both parents obviously will not have a genetic link to their child, played out in cases under the old State Department biological definitions of parentage. *See Mize*, 482 F. Supp. 3d at 1327 (Embassy staff asked male same-sex spouses "whose sperm was used to conceive" their child).

44. Jill Adams, *Paternity Testing: Blood Types and DNA*, NATURE EDUC. (2008), https://www.nature.com/scitable/topicpage/paternity-testing-blood-types-and-dna-374/ [https://perma.cc/BS9U-N6B2] (describing how modern DNA fingerprinting was developed in 1984 and became available for paternity testing in 1988).

45. *See* Exec. Order 14160, *supra* note 3, "*The* immediate female biological progenitor" indicates there is only one "mother" and the "immediate . . . biological progenitor" language appears to imply a genetic "progenitor," particularly in light of the parallel definition for the genetic "father."

46. *See, e.g.*, *Mize*, 482 F. Supp. 3d at 1327.

47. Titshaw, *ART, Surrogacy, Federalism, and Jus Sanguinis Citizenship*, *supra* note 11, at 167.

48. *See* Titshaw, *Inheriting Citizenship*, *supra* note 5, at 14–17.

49. *See* United States v. Windsor, 570 U.S. 744, 767 (2013). Australia and Canada are the only two comparable federal states. *See* Titshaw, *ART, Surrogacy, Federalism, and Jus Sanguinis Citizenship*, *supra* note 11, at 146.

50. *See infra* Part IV.

but not others.[51] Replicating some of the arbitrary discrimination courts and lawmakers have condemned in their movement away from "illegitimacy" status, limping parentage often disadvantages children and sometimes even separates families.[52] The Order's new rule ignoring marriage puts it at odds with family law, as all U.S. states recognize some form of marital parentage presumption.[53] This would inevitably lead to limping parentage for children with parents (including citizen parents) under state law but no citizenship at birth. It would also sometimes lead to stateless children.

The Order would upend the primary way most Americans have always become citizens, upsetting a foundational assumption that permeates the INA Its implementation would leave extensive ambiguity and extensive gaps in its wake. Many INA provisions were clearly drafted based on an unconditional birthplace citizenship assumption. For example, INA § 320 provides automatic derivative citizenship to children residing in the United States in the legal and physical custody of a citizen parent sometime before the child reaches the age of eighteen, but only for children "born outside of the United States."[54] More importantly, the INA contains no provision related to status for U.S.-born children, the Executive Order would deprive of citizenship. The Order would, thus, leave many children in legal limbo under the INA merely *because of their birth on United States territory*, although the Act expressly provides status for children "accompanying or following to join" parent investors, workers, students, and others in temporary status in the United States.[55]

In conclusion, the Executive Order reflects at least three untenable choices. First, it denies U.S.-born children citizenship based on their *parents'* immigration or citizenship status.[56] Second, it discriminates between mothers and fathers as

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51. *See* Titshaw, *ART, Surrogacy, Federalism, and Jus Sanguinis Citizenship*, *supra* note 11, at 145.

52. *Id.* Under the limping parentage created by the State Department's previous biology-centered approach, U.S. citizen Andrew Dvash-Banks and his Israeli husband, Elad Dvash-Banks, worked with a surrogate to have twins in Canada, where they were living; both spouses were parents of both twins under provincial family law, but only the genetic child of Andrew was a U.S. citizen, while the child of Elad was not; Elad's child could not obtain a passport to enter the United States with his family. *See* Dvash-Banks v. Pompeo, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal. Feb. 21, 2019) (refusing to follow the State Department's rule and holding the child was a U.S. citizen under INA § 301(g)). If the Executive Order went into effect, similar problems would occur for children born in the United States as well, even where state family laws recognized both spouses as the twins' parents. *See* Exec. Order 14160, *supra* note 3.

53. June Carbone & Naomi Cahn, *United States: The Past, Present and Future of the Marital Presumption*, INT'L. SURV. FAM. L. 387, 390 (2013 ed.) (stating that "[a]ll states continue to recognize at least a rebuttable presumption" of paternity within marriage).

54. 8 U.S.C. § 1431.

55. *See, e.g.,* 8 U.S.C. § 1101(a)(15)(E) (children "accompanying or following to join" treaty investors or traders); *id.* § 1101(a)(15)(H) (children "accompanying . . . or following to join" workers in specialty occupations, registered nurses, and other workers); *id.* § 1101(a)(15)(F) (children "accompanying or following to join" foreign students). Recognizing that the INA makes no provision for U.S.-born noncitizen children, the USCIS Implementation Plan attempts to fill this huge gap by borrowing "registration" rules now used for the "most closely analogous" rule it could find, the rule applied to the tiny number of children of "blue list" diplomatic officers. *See* USCIS IMPLEMENTATION PLAN, *supra* note 3; 8 C.F.R. § 101.3. The Order does not even attempt to address the gap in the INA system for the many children born in the United States to "unlawfully present" parents. Exec. Order 14160, *supra* note 3.

56. To the extent this comprises intergenerational punishment, as some of the President's scholarly supporters imply, *see* Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-

parents, whose status would then be essential to their U.S.-born children's citizenship.[57] Third, it defines "parent-child" relationships by creating a new federal definition of "mother" and "father" based on genetic descent alone.[58] As described in Section VI below, these choices all lead to strong arguments that the Order is both constitutionally and statutorily invalid. The following Part first provides background regarding the sources and development of U.S. birthplace citizenship, as well as family-based inherited citizenship upon birth abroad.

III. A BRIEF HISTORY OF AMERICAN BIRTHRIGHT CITIZENSHIP

Most people obtain their citizenship automatically when they are born. This birthright citizenship traditionally has been based on birthplace citizenship rules and family-based inherited citizenship rules.[59] The United States, like most other countries in the Americas, has long relied primarily on birthplace citizenship.[60] Many countries in Europe and Asia rely instead on inherited citizenship as their primary rule for transferring citizenship from one generation to another.[61]

Like other countries relying primarily on birthplace citizenship, the United States also provides for inherited citizenship.[62] Yet—because birthplace citizenship is based on a simple, bright-line rule—the much more complicated requirements for inherited citizenship only come into play when children are born to citizens abroad.[63]

In recent decades, many countries in Europe and Asia have created a third path for birthright citizenship, devising various new hybrid rules that combine elements of the two traditional rules.[64] President Trump's Executive Order emulates hybrid rules adopted by the United Kingdom and some of its

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citizenship.html [https://perma.cc/CJZ5-97MA] (at least in the context of birthplace citizenship, the authors find it appropriate to refuse citizenship to persons based on their parents "act of defiance" of the law by entering the U.S. without inspection—or presumably overstaying their authorized stay), it is a disturbing departure from both U.S. jurisprudence and international human rights. *See* Titshaw, *supra* note 5, at 13. In any case, it is not supported by any power of the executive under our Constitution. *See infra* Part VI-A-1.

57. This discrimination violates equal protection principles as delineated in *Morales-Santana*, 582 U.S. 47. *See infra* Part VI-A-4. It also reflects an ahistorical preference for citizen mothers' relationships with children, which is just the opposite of how nineteenth and early twentieth century Americans thought about family-based citizenship in the context of family unity. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 9–10 (1985) (describing the "façade of organic unity" behind a unitary family structure with a husband/father head); *see also* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2155–58 (2014).

58. This genetic understanding of parentage is a modern departure from the importance of birth within wedlock and marital parentage presumptions that have been recognized by the United States Supreme Court, all U.S. states, and current U.S. statutes and policy in the context of children born to U.S. citizens abroad. *See infra* Part IV.

59. Titshaw, *supra* note 5, at 26–30.

60. *Id.*

61. *Id.* at 20–26.

62. *See* 8 U.S.C. §§ 1401, 1409.

63. Titshaw, *supra* note 5, at 20.

64. *See infra* Part V.

other former colonies since the 1980s.[65] It is fairly debatable whether this might be good policy for the United States, but it is not a policy that can legitimately be enacted without a constitutional amendment, let alone by Presidential fiat.[66]

A. *Birthplace Citizenship*

Before the American Revolution, North American colonies followed the well-established British rule that persons born within their territory were British subjects.[67] After the revolution, founders of the United States claimed the status of "citizen" rather than subject, but they continued to follow rules based on territorial birth.[68] The United States eventually came to exclude persons of African descent as well as some members of Native American tribes in the Nineteenth Century.[69] Yet, after the American Civil War, the Fourteenth Amendment Citizenship Clause eliminated racial birthplace citizenship exclusions.[70]

The Citizenship Clause's sole limitation on birthplace citizenship—that U.S.-born citizens be "subject to the jurisdiction" of the United States—intentionally maintained an exception for Native Americans subject to tribal jurisdiction, as well as the traditional international law exceptions for children of diplomats and occupying soldiers.[71] (Later, Congress ensured Native American birthplace citizenship by statute.)[72] In *United States v. Wong Kim Ark*, the Supreme Court rejected any remaining ambiguity regarding racial restrictions on birthplace citizenship in a case involving children whose Chinese parents Congress had expressly disqualified from naturalization.[73]

Since that nineteenth-century decision, the Fourteenth Amendment has been understood to provide nearly unconditional birthplace citizenship. The relevant language of the Citizenship Clause was codified in the Nationality Act of 1940, and again in the INA when it was enacted in 1952: "The following shall be nationals and citizens of the United States at birth: . . . a person born in the United States, and subject to the jurisdiction thereof. . ."[74]

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65. *See infra* Part V.

66. *See* sources cited *supra* note 4; *see also* James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 368, 377–78 (2006) (arguing that "a constitutional amendment is . . . the only way to restrict birthright citizenship" and warning of a potential "Dred Scott II" case based on legislative attempts to limit citizenship without such an amendment, two decades before appointment to the federal bench by President Trump and a very public about-face).

67. Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 679 (1995). Britain had expressly recognized that anyone born on its territory was its royal subject in *Calvin's Case* in 1608. Calvin v. Smith (Calvin's Case) 77 Eng. Rep. 377, 397 (1608); Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73 (1997).

68. Drimmer, *supra* note 67, at 683–85.

69. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857).

70. *See* Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Thomas, J., concurring).

71. Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 569 (2000) (citing S. Rep. No. 268, 41st Cong., 3d Sess. 10 (1870)).

72. *See* The Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).

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

74. Pub. L. No. 76-853, § 201(a), 54 Stat. 1137, 1138; 8 U.S.C. § 1401(a).

In the 1980s, two Yale professors began to challenge the long-term consensus around unconditional birthplace citizenship, citing the rule's failure to ensure consent.[75] This led to some academic discussion and occasional bills in Congress, but gained little traction until Donald Trump was elected President in 2016.[76] Since then, supportive scholars and at least one federal judge have amplified his skepticism about birthplace citizenship.[77] The Executive Order is the culmination of their efforts to alter the traditional rule without a constitutional amendment, or even Congressional action. As described below, this "interpretation" effort entails detailed line-drawing regarding many issues because inherited citizenship is not as simple as birthplace citizenship.

B. *Inherited Citizenship*

The Constitution and early Congresses were both silent regarding birthright citizenship for persons born on U.S. territory, apparently assuming continuation of the well-established, simple birthplace citizenship rule under early U.S. common law.[78] By contrast, the Founders acknowledged the complexity of family-based inherited citizenship, delegating the "naturalization" power to Congress, which employed it immediately to establish requirements for family-based citizenship inheritance upon birth abroad.[79]

Article I of the United States Constitution empowers Congress "[t]o establish an uniform Rule of Naturalization."[80] The first Congress exercised this power in 1790, enacting rules to provide automatic citizenship to children upon birth abroad to citizen parents.[81] During the 235 years since, Congress has amended the law numerous times, choosing to alter requirements based on several variables, including distinctions between citizen mothers and fathers, birth in or out of wedlock, and parental residence before and after the child's birth.[82] Rules have differed depending on whether both parents are

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75. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). Schuck and Smith seem solely concerned with the "nation's consent," not the citizen's consent. They are troubled by birthplace citizenship, but not inherited citizenship, although newborns cannot consent regardless of their parents' status.

76. Bernick, Gowder & Kreis, *supra* note 4, at 102–04.

77. *See* Josh Blackman, *An Interview with Judge James C. Ho*, VOLOKH CONSPIRACY (Nov. 11, 2024) https://reason.com/volokh/2024/11/11/an-interview-with-judge-james-c-ho/ [https://perma.cc/6UHK-QZ28] (emphasizing that "children of invading aliens" are not citizens in his response to a question about a concurring opinion accepting Texas Gov. Abbott's characterization of illegal migration as an "invasion"); Barnett & Wurman, *supra* note 56; Brief for Professor Richard A. Epstein as Amicus Curiae Supporting Petitioners, Trump v. Barbara, No. 25-365 (Jan. 27, 2026).

78. Drimmer, *supra* note 67, at 679–85; *but see* H.R. Rep. No. 1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1675 ("Prior to the argument of the Dred Scott case . . . [t]he opinion generally held seems to have been that every citizen of a State was a citizen of the United States . . . ."). Whether one viewed the source of general birthplace citizenship as state or federal version of common law, it was sufficiently established that the first Congress only provided for persons "born beyond sea, or out of the limits of the United States" when ensuring citizenship at birth to citizen parents. *See infra* note 81 and accompanying text. Of course, this is still true today.

79. *See* U.S. CONST. art. I, § 8.

80. *Id.*

81. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 104 (repealed 1795).

82. *See* Collins, *supra* note 57, at 2155–58.

citizens, and the gender of the citizen parent has mattered when they are not.[83] There have sometimes also been post-birth retention requirements for foreign-born citizens, and citizen women have lost citizenship when they married foreign men and regained it when their marriages terminated.[84]

The first Congress of the United States assumed birthplace citizenship when it enacted the Naturalization Act of 1790, providing that "the children of citizens . . . *born beyond sea, or out of the limits of the United States*, shall be considered as natural born citizens" with an exception for "persons whose fathers have never been resident in the United States."[85] By 1855, Congress changed the statute to eliminate mothers and specify that only children "whose *fathers* were or shall be at the time of their birth citizens of the United States" qualified as citizens upon birth abroad.[86] In the same 1855 Act, Congress, for the first time, provided that any woman eligible for naturalization "who shall be married to a citizen of the United States, shall be deemed [automatically] . . . to be a citizen."[87]

From 1855 until 1934, wives' citizenship tended to depend on their husbands.[88] For example, a 1907 Act provided that "any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation, she may resume her American citizenship" by registering abroad or residing in the United States.[89] The United States Supreme Court upheld this involuntary loss of married women's citizenship in *MacKenzie v. Hare*, relying on the "ancient principle" of coverture, whereby a wife's public identity "merges" with her husband's, which has "dominance."[90] Acts in 1922 and 1931 gradually allowed women to maintain their U.S. citizenship after marrying foreign men.[91] It was not until the Citizenship Act of 1934, however, that

83. *See id*.; *see also* Scott Titshaw, *Throwing the Baby Out with the Patriarchy*, 33 BERKELEY J. GENDER, L. & JUST. 179, 180–82 (2018).

84. *See* Nationality Act of 1940, Pub. L. No. 76-853, § 201(g), 54 Stat. 1137, 1139 (1940).

85. § 1, 1 Stat. 103, 103–04 (1790) (emphasis added). There was no reason to favor foreign-born children of citizens over U.S.-born children of citizens. Thus, the statutory limitation of inherited citizenship to children born "out of the limits of the United States" shows the first Congress assumed children born within the limits of the United States were "natural born citizens" without its intervention. As Congress amended other aspects of naturalization law, it repeated this limitation provision without change in 1795, 1 Stat. 414 (1795), and 1802, 2 Stat. 153, 153–55 (1802).

86. Act of Feb. 10, 1855, ch. 70, § 1, 10 Stat. 604 (1855) (emphasis added).

87. *Id*. § 2.

88. *See* Collins, *supra* note 57, at 2155–58 (providing a concise history of gender-based inherited citizenship law during this era).

89. Act of Mar. 2, 1907, Pub. L. No. 59-193, § 3, 34 Stat. 1228, 1228–29. The 1907 expatriation act clearly covered women who remained in the United States in their non-citizen status, as it explicitly indicated they would "resume" citizenship "if residing in the United States at the termination of the marital relation, by continuing to reside therein." *Id*.

90. MacKenzie v. Hare, 239 U.S. 299, 311 (1915).

91. Act of Sept. 22, 1922, Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (stating that "a woman citizen of the United States shall not cease to be a citizen . . . by reason of her marriage" unless she "marries an alien ineligible to citizenship"); Act of Mar. 3, 1931, Pub. L. No. 71-829, § 3(b), 46 Stat. 1511, 1511–12 (omitting the exception for women married to ineligible foreign husbands).

U.S. citizen women regained the right to transmit citizenship to their foreign-born children.[92]

Although married women generally could not transmit U.S. citizenship to their foreign-born children between 1855 and 1934, sometimes single mothers were able to transmit citizenship to children born out of wedlock.[93] This policy was controversial, and the Attorney General eventually issued an opinion to the contrary in 1939.[94] Fortunately, it was retroactively reversed by Congress under the Nationality Act of 1940.[95]

Meanwhile, the statutory provision generally providing inherited citizenship to foreign-born children of U.S. Citizen fathers was interpreted to exclude children born out of wedlock.[96] In these cases, however, the Attorney General ruled that children could become citizens after birth when their citizen fathers legally legitimated them.[97]

Congress eventually codified a rule covering children born out of wedlock abroad to U.S. citizens in the Nationality Act of 1940. That Act required legitimation or judicial recognition of paternity during the child's minority by citizen fathers and provided a reduced residency requirement for citizen mothers.[98] Congress enacted the current inherited citizenship provisions in the Immigration Act of 1952 (INA), including similar provisions providing automatic citizenship at birth to children "born of parents," one or more of whom was a U.S. citizen, with varying parental residence requirements depending on whether one or both of the parents are citizens.[99] It also added a one-year pre-birth residence requirement for unmarried citizen mothers transmitting citizenship.[100]

While INA § 301 now treats children the same regardless of which parent is a U.S. citizen, INA § 309 differentiates significantly between citizen fathers and mothers in its treatment of children born out of wedlock. In 1986,

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92. 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.5-1 (2025). The provision providing for citizenship transmission "only through fathers" was rectified in 1934 when Congress provided the Act of May 24, 1934, ch. 334, 48 Stat. 797, 797 (1934). Interestingly, this author has found no indication that any minor U.S. citizen children of either gender lost their citizenship along with their mother when she married a foreign man. Citizenship retention requirements, which might have denationalized some of these children if they lived abroad, were first enacted in 1934 as well. 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.4-1(G)(a) (2024).

93. 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.4-1(G)(a) (2024).

94. Citizenship of Illegitimate Child, 39 Op. Att'ys Gen. 290 (1939); *see also* 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.5-3(B) (2022).

95. 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.5-3(B) (2022).

96. 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.5-3(A) (2025).

97. *Id.* (citing 32 Op. Att'y Gen. 162); H.R. Rep. No. 1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1677.

98. *See* 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.5-3(A) (2025).

99. *See* 8 U.S.C. §§ 1401, 1409. The provisions were, however, largely identical to those in the earlier Nationality Act of 1940. *See infra* note 232. While there have been some technical changes, *see, e.g.*, Act of Oct. 24, 1988, Pub. L. No. 100-525, 102 Stat. 2609 (1988), and some special provisions were added for children of military and international organizations serving abroad, 8 U.S.C. § 1409(g), the language in these provisions has otherwise remained unchanged.

100. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 238–39 (1952); *see also* 8 U.S.C. § 1409(b).

for example, two years after modern DNA testing was developed, Congress added a requirement to Section 309 that a citizen father's "blood relationship" with a child born out of wedlock abroad be established by "clear and convincing evidence."[101] At the same time, it provided specific additional requirements to establish paternity for children born out of wedlock.[102]

The discrimination between children born out of wedlock to citizen mothers and fathers has been challenged several times, and the United States Supreme Court has upheld Section 309's requirement that a father must establish paternity while the child is a minor.[103] In 2017, however, in *Sessions v. Morales-Santana*, the Court struck down the shorter pre-birth U.S. physical presence requirement for mothers, holding this distinction comprised unconstitutional gender-based discrimination.[104] These cases seem to draw a line between valid discrimination requiring men to establish a relationship with children born out of wedlock and invalid discrimination based on requirements unrelated to establishing the relationship, like different U.S. physical presence duration requirements for mothers and fathers prior to the child's birth abroad.

In conclusion, Congress has conditioned family-based inherited citizenship for children born outside the United States on various factors, including the gender of the citizen parent, the length of that parent's prior U.S. residence, and whether the child was born in wedlock. However, it has not made major changes since the 1980s. Because of this inaction, the State Department has been forced to interpret mid-twentieth-century statutory provisions to apply in the evolving modern contexts of same-sex marriages, advances in DNA parentage tests, and in A.R.T. Meanwhile, throughout this entire history, children born on U.S. territory have continued to be recognized as U.S. citizens based on their birthplace alone.

IV. MARITAL PRESUMPTIONS OF PARENTAGE, A.R.T., AND CITIZENSHIP

As described above, the current INA provides automatic citizenship to children born abroad if they are "born of parents" one or more of whom is a U.S. citizen.[105] Yet, Congress failed to define what it means to be "born of parents." Courts and immigration officials have filled in the definitions of some of these variables where necessary.

Through much of American history, children born out of wedlock were considered the "illegitimate" children "of no one" and deprived of many

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101. *See* Act of Nov. 14, 1986, Pub. L. No. 99-653, §§ 12–13, 100 Stat. 3655, 3657 (1986) (amending 8 U.S.C. § 1409); Adams, *supra* note 44 (describing how modern DNA testing overcame the inability of prior blood-test technology to confirm paternity).

102. *See* 8 U.S.C. § 1409.

103. *See Albright*, 523 U.S. 420; *Nguyen*, 533 U.S. 53 (finding the gender classification substantially related to important government interests in ensuring a biological connection and guaranteeing the father had taken action to create a parent-child relationship).

104. *Morales-Santana*, 582 U.S. at 48. The Court's remedy substituted the general five-year physical presence requirement of 8 U.S.C. § 1401 to extend to mothers as well as fathers. *Id.*

105. 8 U.S.C. §§ 1401, 1409. While there have been some technical changes, *see, e.g.*, Act of Oct. 24, 1988, Pub. L. No. 100-525, 102 Stat. 2609 (1988), the language in these provisions generally has remained substantively the same since the INA was enacted in 1952.

rights, often including inherited citizenship.[106] More recently, state and federal courts, as well as federal immigration and citizenship authorities, have attempted to eliminate the status of "illegitimate" children and discrimination against children born out of wedlock.[107]

Unlike children born out of wedlock, the parental relationships of children born to married parents have generally been recognized under the law. From Blackstone to the twenty-first century, marriage has been a paramount consideration in determining parentage.[108] In *Michael H. v. Gerald D.*, the United States Supreme Court declared "the presumption of legitimacy is a fundamental principle of the common law."[109] The Court, therefore, refused to award substantive parental rights to the genetic father of a child born to a legally married couple.[110] In that context, the Court found that "illegitimacy is a legal construct, not a natural trait."[111] That insight logically relies on understanding parentage based on factors other than genetics, particularly marriage.

Marital presumptions of paternity often have been irrebuttable based on protection of the marital family in the context of old-fashioned adultery.[112] Where spouses have meticulously planned the use of A.R.T. to intentionally create their family and establish legal parentage in the married, intended parents, the need to support the family is often even more straightforward. The presumption has special application to same-sex couples, where A.R.T. may be the only option for planned parenthood, but it is relevant to an even larger number of different-sex couples who use A.R.T. to conceive children, impracticable or impossible to conceive otherwise.[113] United States Supreme Court opinions support this conclusion.[114]

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106. BLACK'S LAW DICTIONARY 705 (9th ed. 2009); *see also* Citizenship—Children Born Abroad Out of Wedlock of American Fathers and Alien Mothers, 32 Op. Att'y Gen. 162 (1920); Mason *ex rel.* Chin Suey v. Tillinghast, 26 F.2d 588, 589 (1st Cir. 1928) (reading "all children" under Rev. Stat. § 1993, Comp. Stat. § 3947 (1916), to apply for citizenship transmission purposes "to legitimate children only"); Guyer v. Smith, 22 Md. 239, 249 (Md. 1864) (interpreting "children of persons who are, or have been citizens of the United States" in the Naturalization Act of 1802, ch. 28, 2 Stat. 153 (1802), to mean only "legitimate" children, since "illegitimate" children are *nullius filii*, and therefore legally unrecognizable).

107. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (stressing that "legal burdens should bear some relationship to individual wrongdoing" in contrast to disabilities imposed on "illegitimate" children); Clark v. Jeter, 486 U.S. 456, 460–62 (1988) (adopting intermediate scrutiny as the equal protection test for classifications drawn on the basis of "illegitimacy"). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 955–58 (8th ed. 2010).

108. *See* 1 William Blackstone, Commentaries on the Laws of England 434 (1765) (stating that "pater est quem nuptiae demonstrant," meaning the nuptials show who is the father); *see also* Jaen v. Sessions, 899 F.3d 182, 188 (2d Cir. 2018).

109. 491 U.S. 110, 124 (1989); *see Jaen*, 899 F.3d at 188.

110. Michael H. v. Gerald D., 491 U.S. 110, 127 (1989); *see also Jaen*, 899 F.3d at 190.

111. *Michael H.*, 491 U.S. at 127.

112. *Id.* at 124.

113. Evalina Manvelyan, Abha Rajendra Sathe, David Paul Lindars & Lusine Aghajanova, *Navigating the Gestational Surrogacy Seas: The Legalities and Complexities of Gestational Carrier Services*, 41 J. ASSIST. REPROD. GENET. 3013, 3015 (2014), https://pmc.ncbi.nlm.nih.gov/articles/PMC11621256/ [https://perma.cc/7H9B-XMNW] (between 2009 and 2013 in the U.S., only 10.5% of persons reported using gestational surrogacy because they were same-sex couples or men lacking female partners).

114. *See* Pavan v. Smith, 582 U.S. 563 (2017); Obergefell v. Hodges, 576 U.S. 644 (2015).

The marital presumption also has implications in the application of inherited citizenship rules. Since the citizenship of parents determines citizenship for children born abroad, it is important to determine which parent-child relationships qualify under the INA. Because Sections 301 and 309 provide divergent rules for children born in or out of wedlock, it is also sometimes important to understand what "out of wedlock" means for children born abroad. Federal courts, therefore, have been asked to determine who a child's parents are and whether "nonbiological" children can be "born in wedlock." The leading case in this area is the Ninth Circuit Court of Appeals decision in *Scales v. INS*.[115] Its holding has been followed by the Second Circuit Court of Appeals, as well as by district courts in at least three other circuits.[116] No court appears to have ruled otherwise.[117]

In *Scales*, the court rejected a genetic essentialist approach, similar to that adopted by the Executive Order, in the context of the INA's provisions for inherited citizenship.[118] The court found it sufficient that a foreign-born child's genetically-unrelated U.S. citizen father was married to the child's biological mother at the time of his birth.[119] The case involved a child born in the Philippines to a Filipino woman and a U.S.-citizen serviceman, who married her after she was already pregnant.[120] Stanley Scales Sr. later admitted he was not his child's "natural father."[121] The Immigration Judge and Board of Immigration Appeals (BIA) followed a genetic essentialist view that a child was born "out of wedlock" if his mother's husband was not his genetic father.[122] Applying INA § 309, which requires a "blood relationship" between a U.S. citizen parent and a child born out of wedlock, they held that Stanley Scales Jr. was not a citizen.[123] The court of appeals disagreed.

The Ninth Circuit held that Stanley Jr. became a citizen when he was born to Stanley Sr.'s non-citizen wife, even though Stanley Sr. was not his biological father.[124] The court specifically considered and rejected the government's genetic essentialist approach, focusing instead on the language and structure of the relevant statutes.[125] Congress had enacted distinct sections with different requirements for children born in wedlock (INA § 301) or out of wedlock

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115. 232 F.3d 1159, 1164 (9th Cir. 2000). *Scales* specifically identified the issue as one of first impression when it was decided. *Id.* at 1161.

116. Jaen v. Sessions, 899 F.3d 182 (2d Cir. 2018); Dvash-Banks v. Pompeo, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal. Feb. 21, 2019); E.J.D.-B. v. U.S. Dep't of State, 825 F. App'x 479 (9th Cir. 2020); Kiviti v. Pompeo, 467 F. Supp. 3d 293 (D. Md. 2020); *Mize*, 482 F. Supp. 3d 1317; Sabra *ex rel.* Baby M. v. Pompeo, 453 F. Supp. 3d 291, 320 (D.D.C. 2020).

117. *Mize*, 482 F. Supp. 3d at 1339–40 ("No court has expressed the contrary view.").

118. *Scales*, 232 F.3d at 1166.

119. *Id.*

120. *Id.* at 1161–62.

121. *Id.* at 1162. Stanley Sr. filed the affidavit of nonpaternity to obtain an immigrant visa for Stanley Jr. when the family moved to the United States in 1979. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1163 n.8.

125. *Id.*

(INA § 309).[126] Relying on the dictionary definition of the words "legitimate" and "illegitimate," the court gave credence to the parents' marriage, and held that Stanley Jr. was not born "out of wedlock."[127] Although INA § 309 required a "blood relationship" for children born out of wedlock, Section 301 was silent in that regard. The Court drew the logical inference that this distinction was intended, and no blood relationship was required for children born in wedlock, like Stanley Jr.[128] A subsequent Ninth Circuit opinion looked to state legitimacy and parentage law in holding similarly that the citizen wife of a noncitizen biological father could transmit her citizenship to his child, who was considered born-in-wedlock even though another woman gave birth to the husband's child.[129]

Modern forms of A.R.T. and *in vitro* fertilization (I.V.F.), were first used in 1978.[130] They have now become relatively common, accounting for between 2.6 and 5.1 percent of annual U.S. births and totaling over ten million children worldwide.[131] Yet, Congress has never revisited the ambiguous "born of . . . parents" language, which dates back to at least the 1940 version of current inherited citizenship provisions.[132] This has left I.N.S., the Department of Homeland Security, the State Department, and federal courts to sort out novel A.R.T.-related parentage issues for citizenship purposes.

Without Congressional guidance, the State Department acted slowly and conservatively to clarify when U.S. citizenship is transmitted. Before 2014, it took an approach similar to the new Executive Order, focusing entirely on genetics, defining a child's "parents" as the sources of the sperm and egg creating the child, regardless of whose womb was used or who were the child's intended and legal parents.[133] The State Department even extended this

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126. *Id.* at 1164–65 (contrasting 8 U.S.C. §§ 1401, 1409).

127. *Id.* at 1163 n.8.

128. *Id.* at 1164.

129. *See* Solis-Espinoza v. Gonzales, 401 F.3d 1090 (9th Cir. 2005) (holding California law would have recognized parentage from birth). The Ninth Circuit later agreed with both the Fifth Circuit and the BIA that a child born *before* such a marriage was not retroactively "born-in-wedlock" regardless of state law provisions regarding retroactivity of legitimacy. *See* Titshaw, *Sorry Ma'am, supra* note 11, at 111–15.

130. The world's first baby conceived through in vitro fertilization was Louise Brown, born July 25, 1978, in the United Kingdom. *See* Remah Moustafa Kamel, *Assisted Reproductive Technology after the Birth of Louise Brown*, 14 J. REPROD. INFERTIL. 96, 96 (2013).

131. *US IVF Usage Increases in 2023, Leads to Over 95,000 Babies Born*, AM. SOC'Y FOR REPROD. MED., https://www.asrm.org/news-and-events/asrm-news/press-releasesbulletins/us-ivf-usage-increases-in-2023-leads-to-over-95000-babies-born/ [https://perma.cc/9LBY-PPCD] (last visited Apr. 5, 2026) (reporting that 2.6% of babies born in the U.S. in 2023 were conceived through IVF); Anja Pinborg, Ulla-Britt Wennerholm & Christina Bergh, *Long-term Outcomes for Children Conceived by Assisted Reproductive Technology*, 120 FERTILITY & STERILITY 449 (2023), https://www.sciencedirect.com/science/article/pii/S0015028223003072 [https://perma.cc/86E8-7X9U] (reporting that up to 5.1% of children born in the U.S. were conceived through ART).

132. *Compare* Nationality Act of 1940, Pub. L. No. 76-853, §§ 601, 605, 54 Stat. 1137 (repealing and amending prior provisions), *with* 8 U.S.C. §§ 1401, 1409 (defining nationality and legitimacy criteria).

133. A genetic link to a US citizen was required to transmit citizenship to a child upon birth abroad. *See, e.g.*, 7 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 1446.2-2(c)(4) (2009) ("[T]he basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who

genetic essentialism to its conception of whether a child was "born in wedlock" under the INA, focusing on whether the sperm and egg that created the child came from a married couple. If not, the child was considered "born out of wedlock" and subject to the more difficult criteria in that category.[134]

This genetic essentialist policy led to absurd results. For instance, consulates were required to refuse to recognize as "mothers" women who used donated eggs to carry and give birth to children they intended to parent, even when they were legal mothers at birth under relevant family law.[135] If a woman who is a U.S. citizen used a donated egg and her non-citizen husband's sperm to conceive a child *in vitro*, the State Department viewed the child as "born out of wedlock."[136] Because it was not the genetic offspring of the U.S. citizen mother, the child would be denied citizenship.[137]

In 2014, the State Department finally ameliorated the specific situation described above by shifting its focus from "genetic" parentage to "biological" parentage, recognizing gestational and legal mothers as well as genetic mothers.[138] Under this interpretation, the Department also viewed a child as born in wedlock if born to married women, a genetic and a gestational mother, both of whom have a biological relationship to the child.[139] However, parents using a surrogate to carry a child continued to be ignored for citizenship purposes unless a U.S. citizen was a genetic parent.[140] If one legal parent was not genetically related to a child, the State Department still treated the child as born out of wedlock and only recognized citizenship if the genetic parent was a citizen.[141] Obviously, this included male same-sex couples, as well as many different-sex couples. This policy could result in long delays, permanent family separation, and even stateless children.[142]

When these arbitrary statutory interpretations were challenged, courts unanimously rejected the State Department's biology-centered approach to the statute, handing the government a series of defeats between 2018 and 2020.[143] The Ninth Circuit relied on the precedent of *Scales* to acknowledge

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provided the egg."); *id.* § 1131.4-2(b) (referring specifically to the issue of egg- and sperm-donor identity as the key to citizenship transmission). *See also* Titshaw, *Sorry Ma'am*, *supra* note 11.

134. 7 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 1131.4-2 (2009).

135. 7 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 1446.2-2 (2009); *see also* Titshaw, *Sorry Ma'am*, *supra* note 11, at 103.

136. *See* Titshaw, *A Modest Proposal*, *supra* note 11, at 422.

137. Titshaw, *Sorry Ma'am, supra* note 11, at 105.

138. 7 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 1100 app. E (2015), https://web.archive.org/web/20070817163754/http://www.state.gov/documents/organization/86763.pdf [https://perma.cc/5EV9-4FFT] (last visited Apr. 5, 2026).

139. *Id.*

140. *Id.*

141. *Id.*

142. The possibility of stateless children resulting from this DOS policy undermines international legal obligations. *See Convention on the Rights of the Child* art. 7, Sept. 2, 1990, 1577 U.N.T.S. 3; G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948).

143. *See, e.g.*, Dvash-Banks v. Pompeo, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal. Feb. 21, 2019); E.J.D.-B. v. U.S. Dep't of State, 825 F. App'x 479 (9th Cir. 2020); Kiviti v. Pompeo, 467 F. Supp. 3d 293 (D. Md. 2020); *Mize*, 482 F. Supp. 3d 1317.

the U.S. citizenship of the child of a married same-sex couple, whose genetic father was not a U.S. citizen, although the father's husband was.[144] The Second Circuit reached the same conclusion as *Scales* in 2018 in *Jaen v. Sessions*, focusing on the marital presumption as part of the "settled meaning under the common law" of the term "parent," which INA § 301 employs without redefinition.[145] District courts in three other circuits agreed with the Ninth and Second Circuit rejection of the genetic essentialist view of parentage and the later biology-centered approach of the State Department when they applied INA §§ 301 and 309 to children conceived through A.R.T. as a matter of first impression.[146]

One such case, *Mize v. Pompeo*, addresses a different problem with the INA's focus on biology than those in other reported cases. In *Mize*, both of the child's fathers were U.S. Citizens, but only one of them met the INA's five-year physical presence requirement for citizen single-parents of children born abroad.[147] Unfortunately for this family, the State Department viewed the child as born out of wedlock because only one of her fathers was biologically related to her.[148] U.S. Embassy staff, therefore, asked the spouses whose sperm was used to conceive their child and denied the child citizenship because her genetic father had not resided in the U.S. for "five years, at least two of which were after attaining the age of fourteen. . ."[149] The U.S. District Court for the Northern District of Georgia found that this biology-centered understanding of the statute raises serious equal protection problems, and the court exercised constitutional avoidance by reading the INA to respect the two fathers' marriage and recognize the child was "born of" the nonbiological citizen father, who met the U.S. physical presence requirement.[150]

Finally, in 2021, the State Department accepted the growing judicial consensus that the U.S. citizen spouse of a child's genetic or gestational parent can transmit citizenship at birth even if the citizen was not the child's biological parent.[151] Taking "into account the realities of modern families and advances in A.R.T. from when the [INA] . . . was enacted in 1952[,]" the

144. *Dvash-Banks*, 2019 U.S. Dist. LEXIS 30525; *E.J.D.-B.*, 825 F. App'x 479.

145. Jaen v. Sessions, 899 F.3d 182, 187–90 (2d Cir. 2018). The citizen parent in *Jaen* was a non-biological father in the context of adultery rather than A.R.T., but the reasoning would have been at least as strong in an A.R.T. case. *Jaen* is also based on former § 301(a)(7), but the relevant part of that former section is identical to current § 301(g) except the length of prior parental physical presence required. *Compare* Immigration and Nationality Act, Pub. L. No. 84-414, 66 Stat. 163, 263 (1952) (former statutory provision) *with* 8 U.S.C. § 1401(g) (current citizenship transmission requirements for children born abroad).

146. *Kiviti*, 467 F. Supp. 3d at 313; Sabra *ex rel.* Baby M. v. Pompeo, 453 F. Supp. 3d 291, 320 (D.D.C. 2020); *Mize*, 482 F. Supp. 3d 1317.

147. *Mize*, 482 F. Supp. 3d 1317.

148. *Id.* at 1324.

149. *Id.*

150. *Id.* While it ruled primarily on the basis of the plain meaning of the INA text, the Maryland District Court in *Kiviti* also agreed, in the alternative, that the canon of constitutional avoidance "would lead to the same result because the State Department's interpretation 'would raise a multitude of constitutional problems.'" *Kiviti*, 467 F. Supp. 3d at 313 (quoting *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)).

151. *U.S. Citizenship Transmission and Assisted Reproductive Technology*, U.S. DEP'T OF STATE (May 18, 2021), https://2021-2025.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/ [https://perma.cc/V4G7-45F4].

Department altered its interpretation of birth in wedlock to encompass children born to married parents so long as the children "have a genetic or gestational tie to at least one of their parents."[152] Its final rule is that "[c]hildren born abroad to parents, at least one of whom is a U.S. citizen and who are married to each other at the time of the birth will be citizens from birth if they have a genetic or gestational tie to at least one of their parents and meet the INA's other requirements."[153] The USCIS quickly followed suit, and it now applies the same rule.[154]

President Trump's Executive Order returns to the discarded pre-2014 genetic essentialist approach in the new context of U.S.-born children. Yet the administration has not reverted to a genetic essentialist approach for children born abroad. Thus, children who would be citizens if born abroad would not be citizens under the Order *solely because they are born on United States territory*. Obviously, this is not a logical reading of these two provisions of INA § 301, nor is it a rational interpretation of the Citizenship Clause of the Fourteenth Amendment.

There is one relevant distinction between INA § 301(a) (codifying Fourteenth Amendment birthplace citizenship) and other subsections of Section 301 (providing citizenship upon birth in wedlock to a U.S. citizen abroad). When courts overturned the State Department's genetic essentialist approach in the context of birth to citizens abroad, it was rejecting the Department's misreading of the "born of" language in the INA. The new Order, in contrast, has no text to misconstrue. Instead, it is creating a complicated new hybrid citizenship rule out of whole cloth. Although the textual weakness of the "born of" language in other subsections of Section 301 is not relevant to the Executive Order, the absence of *any* reference to parents or family in subsection 301(a) or the Citizenship Clause completely undermines the Order's interpretation of it.[155]

V. RECENT HYBRID CITIZENSHIP SCHEMES IN OTHER COUNTRIES

At the time the Fourteenth Amendment was ratified, there were two primary categories of birthright citizenship rules around the world: birthplace citizenship and family-based inherited citizenship.[156] Then, as now, the United States and its New World neighbors recognized near-unconditional

152. *Id*.

153. *Id*.; 8 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 301.7-6 (2024).

154. U.S. CITIZENSHIP & IMMIGR. SERVS., PA-2021-17, ASSISTED REPRODUCTIVE TECHNOLOGY AND IN-WEDLOCK DETERMINATIONS FOR IMMIGRATION AND CITIZENSHIP PURPOSES (Aug. 5, 2021) (clarifying that both parents must be "recognized by the relevant jurisdiction as the child's legal parents"); *see also* 12 U.S. CITIZENSHIP & IMMIGR. SERVS. POLICY MANUAL, pt. A, ch. 2 (2026). USCIS and the State Department both also recognized that citizenship denied under the prior policy could be corrected under their new interpretation.

155. *See infra* Part VI-B (including a close textual analysis of this provision in the larger context of INA § 301).

156. Titshaw, *supra* note 5, at 17–19 (tracing the long history of each and contrasting them to the recent advent of hybrid birthplace citizenship regimes).

citizenship or nationality of children born on national territory without looking to their parents' status.[157] In Europe, Napoleon Bonaparte's government eventually reigned in this liberal view of citizenship, limiting French birthright citizenship to the children of citizen parents, and many European countries and their colonies around the world adopted similar inherited citizenship rules during the Nineteenth Century.[158] The western hemisphere generally has not followed suit.[159]

Both types of rules have triggered substantial criticism. Inherited citizenship rules can be racist, ethnocentric, and sectarian, creating a multigenerational underclass of noncitizen residents while bestowing citizenship on people who have not visited a country.[160] On the other hand, the United States is not the only country where existing citizens have criticized unconditional birthplace citizenship as too generous, leading to "accidental" citizens and allowing foreigners to enter without authorization and eventually rely on "anchor babies" to legitimize their family as citizens.[161]

During the latter half of the Twentieth Century, countries relying on both traditional categories began to reform their systems and invent new hybrid rules for birthright citizenship. Several countries, including Spain, Belgium, and Germany, have added birthplace and residence-based possibilities to their traditional inherited citizenship regimes.[162] More relevantly, since the 1980s, the United Kingdom, Ireland, Australia, and New Zealand have added conditions to their traditional unconditional birthplace citizenship rules in reaction to ethnonationalist fears like those now expressed by the Trump administration.[163]

The prototype for President Trump's current attempt to limit birthplace citizenship stems from the United Kingdom. *Calvin's Case* established the unconditional U.K. birthplace citizenship rule, later inherited by the United States, as a matter of common law in 1608.[164] Almost 380 years later, the British Nationality Act of 1981 added family-based limitations that converted it into a hybrid rule.[165] Now, the U.K. provides automatic citizenship to children born in the U.K. only if their parents are citizens, have permanent

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157. *Id*. at 26–30.
158. *Id*. at 20–22.
159. *Id*. at 26.
160. *Id*. at 30.
161. *Id*. at 31–34. Under U.S. law, this maneuver would require the parent to wait at least twenty-one years before the child is old enough to file an immediate relative petition to become a lawful permanent resident, 8 U.S.C. § 1151(b)(2)(A)(i), and even that would not be possible for parents who entered without inspection unless they obtain a discretionary waiver based on extraordinary hardship to the citizen child. 8 U.S.C. § 1255(a) (requiring anyone who entered the U.S. without inspection to process their immigrant visa at a consulate abroad); 8 U.S.C. § 1182(a)(9)(B)(i) & (v) (barring anyone who was unlawfully present in the U.S. from readmission for ten years unless they can obtain a discretionary waiver based on "extreme hardship" that would otherwise result to their citizen relative).
162. Titshaw, *supra* note 5, at 35–37.
163. *Id*. at 31–34.
164. Calvin's Case (1608) 77 Eng. Rep. at 382–83; *see also* Price, *supra* note 67. This common law rule was eventually codified in the British Nationality Act of 1948. *See* Charles Blake, *Citizenship, Law and the State: The British Nationality Act 1981*, 45 MOD. L. REV. 179, 180 (1982).
165. Blake, *supra* note 164, at 181.

residence status ("Indefinite Leave to Remain"), or certain other special statuses based on preferential Commonwealth or European origins.[166] Unlike under Trump's Executive Order, however, U.K.-born children, who are not citizens at birth, have a conditional right to "register" later as citizens if they reside in the U.K. for the first ten years of their lives.[167]

Between 1986 and 2005, Australia, New Zealand, and Ireland followed the U.K. example, enacting hybrid rules for automatic birthright citizenship, limited to the territorially born children of parents with status as citizens, permanent residents, or other specified forms of lawful status.[168] Because Ireland's birthplace citizenship law was part of its written constitution, it held a public referendum in 2004 to replace entitlement to Irish citizenship for "every person born in the island of Ireland. . ."[169] Its constitution now excludes an Irish-born person "who does not have, at the time of. . . birth. . ., at least one parent who is an Irish citizen or entitled to be an Irish citizen . . . unless provided for by law[,]" including a statutory provision recognizing the children of Irish permanent residents as citizens.[170]

Like the current effort to limit United States citizenship, reform movements in the United Kingdom and other countries were often motivated by fear of cultural, racial, and religious change.[171] The Home Office Minister who proposed the British changes explained: "We have got finally to dispose of the lingering notion that Britain is somehow a haven for all those whose countries we once ruled."[172] Proponents of reform in Australia, New Zealand, and Ireland all expressed fear of change and of "cheats" in the form of what American immigration restrictionists label "anchor babies."[173] This fear was, perhaps, most obvious in Australia, where the movement was partially reacting to the increase

166. *Check if you're a British Citizen: Born in the UK Between 30 April 2006 and 30 June 2021*, GOV.UK, https://www.gov.uk/check-british-citizenship/born-in-the-uk-on-30-april-2006-onwards [https://perma.cc/B86V-H99Z] (last visited Mar. 31, 2026); *Check if you're a British Citizen: Born in the UK from 1 July 2021 onwards*, GOV.UK, https://www.gov.uk/check-british-citizenship/born-in-the-uk-from-1-july-2021-onwards [https://perma.cc/BVF7-TS3N] (last visited Mar. 31, 2026).

167. British Nationality Act 1981, c. 1, § 1.4; *see also* U.K. HOME OFFICE, REGISTRATION AS A BRITISH CITIZEN: CHILDREN OF BRITISH PARENTS, https://www.gov.uk/government/publications/children-of-british-parents-nationality-policy-guidance [https://perma.cc/F7AQ-76F7] (last visited Mar. 31, 2026).

168. *Australian Citizenship Act 2007* (Cth), § 12(1); *see also* KATE MCMILLAN & ANNA HOOD, EUDO CITIZENSHIP OBSERVATORY, REPORT ON CITIZENSHIP LAW: NEW ZEALAND, 1, 9–11 (2016), https://cadmus.eui.eu/handle/1814/42648 [https://perma.cc/6ZCF-7GU8].

169. CONSTITUTION OF IRELAND 1937 art. 2. This provision was inserted in 1998 following the Belfast Agreement and multi-party negotiations in Northern Ireland. *See* Siobhan Mullally, *Citizenship and Family Life in Ireland: Asking the Questions 'Who Belongs'?*, 25 LEGAL STUD. 578, 580–82 (2005).

170. CONSTITUTION OF IRELAND 1937 art. 9(2). The Irish Nationality and Citizenship Act of 2004 then provided citizenship to Irish-born persons with a parent who is a permanent resident of Ireland or Northern Ireland, a British citizen, or a resident in Ireland for at least three of the four years immediately preceding the birth. Irish Nationality and Citizenship Act 2004 (Act No. 38/2004), § 4, https://www.irishstatutebook.ie/eli/2004/act/38/enacted/en/html [https://perma.cc/UDU3-3L2P].

171. Titshaw, *supra* note 5, at 32–34.

172. Blake, *supra* note 164, at 182.

173. Titshaw, *supra* note 5, at 32–34.

in Asian immigrants following the elimination of the longtime "White Australia" policy designed to exclude non-European immigrants.[174]

The trend toward hybrid citizenship rules among the United Kingdom and its former colonies indicates that it may be time for Americans to consider reforming our birthplace citizenship rule as well. However, any such change should be made legally after political debate. None of the countries above altered their citizenship law by executive or judicial fiat. Rather, the United Kingdom, Australia, and New Zealand amended the statutes that previously defined birthplace citizenship, and Ireland held a national referendum to amend the birthplace citizenship provision in its Constitution.[175]

The counterexample to legislative reform or constitutional amendment is the Dominican Republic, where the Dominican Constitutional Court has read its constitutional citizenship exclusion of "a person in transit" expansively to cover the descendants of Haitian immigrants who entered Dominican territory anytime since 1929.[176] The Inter-American Court of Human Rights and other international organizations have rightly condemned this act of involuntary expatriation.[177] This lawless and immoral example is not one for the world's oldest constitutional democracy to emulate.

VI. INVALID REDEFINITION OF CITIZENSHIP BY EXECUTIVE ORDER

As described above, unconditional birthplace citizenship is simple. Family-based inherited citizenship rules and hybrid citizenship systems are complex. President Trump's Executive Order seeks to hide some of this complexity by creating new rules using the line-drawing clarity of modern genetics and modern U.S. immigration categories. It also discriminates based on parental sex in a way the Supreme Court declared unconstitutional during President Trump's first term in office.[178]

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174. RAYNER THWAITES, REPORT ON CITIZENSHIP LAW: AUSTRALIA ¶ 2.5.2, at 10–11 (2017) (describing the gradual abandonment of the White Australia Policy); MICHAEL KLAPDOR, MOIRA COOMBS, & CATHERINE BOHN, PARLIAMENT OF AUSTRALIA, AUSTRALIAN CITIZENSHIP: A CHRONOLOGY OF MAJOR DEVELOPMENTS IN POLICY AND LAW, 1, 11–12 (2009), https://apo.org.au/sites/default/files/resource-files/2009-09/apo-nid18904.pdf [https://perma.cc/6YYD-7XBD] (quoting Prime Minister Hawke and describing the immigration trends leading to the 1986 Act).

175. Titshaw, *supra* note 5, at 31–34.

176. *Id*. at 34–35.

177. *See* Expelled Dominicans and Haitians v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014); *see also* Amnesty Int'l, *"Where Are We Going to Live?" Migration and Statelessness in Haiti and the Dominican Republic* 6–7 (June 2016), https://www.amnestyusa.org/wp-content/uploads/2017/04/amr3641052016_where_am_i_going_to_live.compressed.pdf [https://perma.cc/2LJV-V95K] (last visited Apr. 2, 2026) (calling for respect of international human rights obligations); Randal C. Archibold, *Dominicans of Haitian Descent Cast Into Legal Limbo by Court*, N.Y. TIMES (Oct. 24, 2013), https://www.nytimes.com/2013/10/24/world/americas/dominicans-of-haitian-descent-cast-into-legal-limbo-by-court.html [https://perma.cc/QDP8-TEST] (describing criticism by the Open Society Justice Initiative and the U.N. High Commissioner for Refugees).

178. *See Morales-Santana*, 582 U.S. at 57–58 (striking down the shorter physical presence requirement for mothers in contrast to fathers who would transmit citizenship to their children upon birth abroad as a violation of constitutional equal protection).

Numerous scholars and courts have provided convincing reasons why the Executive Order violates the Constitution and the Immigration and Nationality Act. This Part provides additional support for these arguments by focusing on the points introduced above about the Order's new rules defining family relationships and devising specific limits on birthplace citizenship.

A. *The Order's Unconstitutionality*

The United States government is famously based on a system of constitutionally enumerated powers, which also includes rights limiting its exercise of those powers. Neither the Constitution nor Congress has delegated power to the President to create birthright citizenship rules. To the contrary, the Fourteenth Amendment expressly sets out the rule for birthplace citizenship, and Article I, Section 8 of the Constitution delegates to Congress the power to naturalize citizens in all other situations. Congress codified the Fourteenth Amendment birthplace Citizenship Clause in INA § 301(a) without substantial alteration, and—rather than attempting to interfere with that rule—Congress has assumed its traditional interpretation throughout the construction of the vast system of immigration, nationality, and citizenship law in the INA.[179]

Subpart 1 below seeks but finds no legitimate source for the executive power asserted in the Order. Subpart 2 describes how the Order's focus on parental immigration status is textually unsupported and ahistorical. Subpart 3 critiques the Order's genetic essentialist definition of parentage. Finally, subpart 4 raises equal protection issues with the Order's discriminatory status requirements for mothers and fathers of U.S.-born children.

1. *Missing Authority*

As Part II points out, the Executive Order is drafted in the passive voice. Its lack of foundation becomes clear when readers seek subjects and active verbs. The absence of subjects, legitimate sources for the power the President exercises to create birthright citizenship rules, illuminates the Order's missing legal foundation.

To be legitimate, the power exercised in the Order must originate from some source other than the will of the President himself. It must derive from

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179. *See infra* Part VI-B. "Nationality" is a term based on international law, which is slightly broader than citizenship. All United States citizens are nationals, but some nationals, born in U.S. "outlying possessions," are not citizens. 8 U.S.C. § 1408. The relevant INA provisions are constructed much like INA § 301(a)—with one provision, Section 308(1), based solely on birth "in an outlying possession," one based on foundlings in the territory of a possession, and additional sections for those "born . . . of parents" one or more of whom is a U.S. national, but not citizen. The denationalizing policy of the President's Executive Order would appear to apply here too if it were correct, but there is no "subject to the jurisdiction thereof" language in Section 308. Therefore, birthplace nationals would seem to be safe. Of course, their existence and rule, again, underscores the traditional interpretation of birthplace citizenship. It is difficult to understand why the framers of INA §§ 301(a) and 308 would create rules that provided children of parents unlawfully present or in lawful but temporary presence in an outlying U.S. possession with United States nationality and the privileges it entails if they simultaneously intended to exclude children within the states from obtaining citizenship under similar circumstances.

the Fourteenth Amendment, or the original Constitution, possibly with the intervention and sub-delegation of Congress. The Order only references two sources: the Fourteenth Amendment Citizenship Clause and INA § 301(a).[180] After pointing out what those laws *do not do*, namely "extend citizenship universally to everyone born in the United States," the Order offers no source of legitimacy for what the Order *does do*, namely, construct a set of extensive new requirements and definitions for birthplace citizenship.[181]

One can imagine three sources of authority that might conceivably support the Order. As described below, none of these is credible.

First, Congress and the state ratifiers of the Fourteenth Amendment in the 1860s might have meant to implicitly create the whole hybrid birthright citizenship system revealed in the Order. Yet the facts all point in the opposite direction. Because such a system would have been groundbreaking a century before similar regimes were enacted anywhere in the world, the drafters would have logically provided some hint in the text if they intended to create such an innovative new rule. The ahistoric basis for this assumption is further revealed because the workability of the rule relies on types of status (distinct immigrant and nonimmigrant visa categories) and methods for testing for an "immediate male biological progenitor" (DNA tests) unknown in the nineteenth century.[182] These weaknesses are augmented by the many other ahistoric provisions and assumptions described below.[183]

Second, Congress and the state ratifiers of the original Constitution in the 1780s might have meant to implicitly delegate power over birthplace citizenship to the President as it has now been exercised for the first time 235 years later. This is implausible. Article I gave Congress "all legislative Powers," including the power "to establish an uniform Rule for Naturalization," the only citizenship-related power enumerated in the Constitution. Article II requires the President to "take Care that the laws be faithfully executed" and provides a short list of powers. Even if one read the executive powers to make treaties and to appoint and receive ambassadors as somehow implying a presidential role in defining citizenship, the specific rule set forth later in the Fourteenth Amendment would supersede it. This source of authority, too, is a non-starter.

Third, Congress and the state ratifiers of the Fourteenth Amendment in the 1860s might have meant for Congress to maintain power to determine the meaning of the "subject to the jurisdiction" qualification in the birthplace citizenship clause. The Amendment provides Congress "power to enforce, by appropriate legislation, the provisions of this Article."[184] It could as easily have included a qualifier in the Citizenship Clause allowing future Congresses to set

180. Exec. Order No. 14160, *supra* note 3.

181. *Id.*

182. *See supra* Part IV (the Immigration Act of 1924 and, particularly, the INA pioneered the definition of distinct "nonimmigrant" visa categories); Adams, *supra* note 44 (modern DNA fingerprinting was developed in 1984 and became available for paternity testing in 1988).

183. *See infra* Part VI-A-2.

184. U.S. CONST. amend. XIV, § 5.

conditions for birthplace citizenship as the Irish did in their recent Constitutional Amendment.[185] But it did not. Instead, it set forth a rule and the limited jurisdictional exception in the text.

Even if Article I or the Fourteenth Amendment had empowered Congress to establish conditions for birthplace citizenship, Congress has not even attempted to delegate power further to the executive branch. Rather, it codified the language of the Citizenship Clause in the Nationality Act of 1940 and again in the INA of 1952, during an era when there was a consensus about the text's broad, largely unconditional meaning.[186] Congress has not altered that statutory language. This third source of authority is also a dead end. The Order, thus, appears to be a baseless claim of executive authority.

2. *Parents and Their Immigration Status*

The Executive Order's focus on parental immigration status is ahistorical and not a credible interpretation of the Fourteenth Amendment Citizenship Clause. Unlike implied powers over immigration, where Courts have deferred to the plenary powers of Congress, or of both the "political branches" of government, all aspects of birthright citizenship are expressly granted in the Constitution. As described above, the Fourteenth Amendment citizenship clause expressly sets out a rule of automatic citizenship for "all persons born or naturalized in the United States and subject to the jurisdiction thereof."[187] According to Article I, Section 8 of the Constitution, "Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization," which covers all other modes of citizenship acquisition.[188] This leaves no role for the executive branch, except interpreting and enforcing Congressional statutes and Constitutional provisions where there are gaps or ambiguities.[189]

The Executive Order's citation of the Fourteenth Amendment to limit citizenship to American-born children of parents who are citizens and lawful permanent residents, as well as mothers in certain long-term lawful status, is an untenable originalist reading of an amendment adopted in 1868. It certainly does not stem from the text. The Fourteenth Amendment says nothing about parents of persons "born . . . in the United States." Some of the President's scholar supporters justify the Executive Order's reliance on parental status as necessary to establish "allegiance," which they deem the true meaning of

185. *See supra* Part V.
186. *See supra* Part III-A.
187. U.S. CONST. amend. XIV, § 1.
188. U.S. CONST. art. I, § 8.
189. This is true although at least nine current U.S. Senators and eighteen current Members of the U.S. House of Representatives have been willing to support the Executive Order, deferring to the President and arguing that his "interpretation" is correct. *See* Brief for U.S. Senators Ted Cruz, et al. as Amici Curiae in Support of Petitioners, Trump v. Barbara, No. 25-365 (Oct. 29, 2026); Brief for 18 Members of the Committee on the Judiciary of the U.S. House of Representatives as Amici Curiae in Support of Petitioners, Trump v. Barbara, No. 25-365 (Oct. 10, 2026).

"jurisdiction" in the citizenship context.[190] They reason that "violating the laws of this country" to enter or remain disqualifies one from necessary "amity" and "'obedience' to the laws."[191] Of course, this justification is logically irrelevant in regard to the many children the Order excludes *despite* their parents' *lawful* status. Even in the context of immigrants with "unlawful presence," this post hoc rationale has no apparent basis in the text or history of the Fourteenth Amendment.[192] The Order provides no reason why parents' status should control their children's birthplace citizenship. To the extent it is relevant, the unlawful-parents justification appears to rely on a concept of intergenerational guilt and the legitimacy of punishing children for the acts of their parents, which has long been condemned under both U.S. law and international human rights law.[193]

Because the Fourteenth Amendment is silent about the parents of persons born in the United States, it is—of course—also silent about their immigration status. The Order's citation of the amendment to justify disqualifying U.S.-born citizens whose parents are "unlawfully present" or in "lawful but temporary" presence is, therefore, baseless. It is also ahistorical. The terms themselves would have, no doubt, bewildered nineteenth-century Americans. The specific ideas they represent are products of modern immigration law first pioneered by the United States during the twentieth century.

The United States defined the term "immigrant" to exclude tourists, visitors on temporary business, and traders under a treaty of trade and commerce in 1924, creating the "immigrant"/"nonimmigrant" dichotomy that would develop into the basis for the INA's systematic immigration law in 1952.[194] The use of

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190. *See* Barnett & Wurman, *supra* note 56; Brief for Professor Richard A. Epstein as Amicus Curiae Supporting Petitioner, Trump v. Barbara, No. 25-365 (2026); *contra* Bernick, Gowder & Kreis, *supra* note 4, at 105, 107–13.

191. *See* Barnett & Wurman, *supra* note 56 (citing Calvin's Case, 77 Eng. Rep. 377 (1608)); *contra* Bernick, Gowder & Kreis, *supra* note 4, at 105.

192. *See* Bernick, Gowder & Kreis, *supra* note 4.

193. 32 Op. Att'ys Gen. 162, 164 (1920) (U.S. discrimination against illegitimate children in order to discourage illicit relations between the sexes had "been abandoned"); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (Powell, J., for the Court) (finding laws visiting condemnation of illegitimacy "on the head of an infant" to be "illogical and unjust" as well as "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); Plyler v. Doe, 457 U.S. 202, 238 (1982) (Powell, J., concurring) (focusing on the innocence of children, who "can 'affect neither their parents' conduct nor their own status" in agreeing with the Court majority that undocumented children are "persons" with a right to public education) (citing *Weber* and quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)); Mennesson and Others v. France, no. 65192/11, ¶ 99 & Labasse v. France, no. 65941/11, Eur. Ct. H.R. 185, ¶¶ 97–101 (2014) (condemning the refusal of parentage recognition to children because their parents evaded France's law against commercial surrogacy as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the UN Convention on the Rights of the Child).

194. Congress regulated voyage conditions and required captains or masters of ships to collect and provide information about whether arriving passengers intended "to become inhabitants[.]" *See* Steerage Act of 1819, ch. 46, 3 Stat. 488, 489 (1819); An Act to Regulate the Carriage of Passengers in Steamships and other Vessels, ch. 213, 10 Stat. 715, 719 (1855). Before the Civil War, immigration regulation was generally left up to states until 1875. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUMBIA L. REV. 1833 (1993). Although some statutes began distinguishing persons in some discrete temporary categories from general statutory limitations earlier, *see, e.g.,* Emergency Quota Act of 1921, Pub. L. No. 67-5, 42 Stat. 5 (1921) (exempting from nationality-based quotas "aliens in continuous transit through the United States" and "aliens visiting the United States as

"unlawful presence" to justify consequences, including bars to readmission for those accumulating such presence, was an even later development, enacted in 1996.[195] The idea of differentiating citizenship status based on such modern immigration categories in a nineteenth-century amendment is ahistorical.[196]

Even if one could read the Fourteenth Amendment to somehow imply that a parent's status was generally relevant to the child's birthplace citizenship, it could never have reflected the family structure the Order assumes. This is true not only about the Order's genetic essentialist definitions of "father" and "mother" discussed below.[197] It is also true about how the Order relies on citizen mothers and fathers.

The Order ensures citizenship for the U.S.-born children of citizen mothers on a broader basis than that for the children of citizen fathers. Yet, between 1855 and 1934, Congress established rules providing that only U.S. citizen fathers, not mothers, could transmit citizenship to children born abroad.[198] It also rendered wives' citizenship increasingly dependent on their husbands, eventually revoking the citizenship of women married to foreign men even if they always remained in the United States.[199]

If, in the 1860s, Congress had meant to condition birthplace citizenship on a child's parentage, it likely would not have recognized citizenship based on a mother's status, let alone privileged the children of citizen mothers over the children of citizen fathers. Such rules would have been entirely inconsistent with inherited citizenship between 1855 and 1934.[200] If such a break with law and tradition had been intended, it would have been expressed clearly, not left unstated to first be discovered by inference a century and a half later.

The idea of relying most heavily on a mother's citizenship status would have seemed particularly absurd after 1907 when citizen wives of foreign

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tourists or temporarily for business or pleasure" alongside intended immigrant "children of citizens" and others), the modern system for dividing "nonimmigrant" from "immigrant" visa categories, which the Order relies on, was first defined in the Immigration Act of 1924. *See* Pub. L. No. 68-139, 43 Stat. 153, 154–55 (1924) (inaugurating the practice continued in the INA of defining "immigrant" as "any alien" entering the U.S., except those in an enumerated list of nonimmigrant categories). Antebellum law focused on the citizen/non-citizen distinction, not the modern nonimmigrant/immigrant status distinction relied on by the Order. *See* Frost & Eason, *supra* note 4, at 87 (describing the lack of records for immigrants who did not become citizens during an era when "'free white persons' could choose to file a declaration of intent to naturalize," or alternatively "remain[] in the United States for the rest of their lives" without a declaration of intent).

195. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, § 301(b).

196. Even a generation after the Amendment's enactment, the Supreme Court used the language of common law "domicile" in the provision the Trump administration has latched onto to support their arguments. *See* United States v. Wong Kim Ark, 169 U.S. 649, 692–95 (1898). In 1898, there still would have been no concept of the different immigration categories the Order's conditions rely on. *See supra* note 194.

197. *See infra* Part VI-A-3.

198. Titshaw, *A Modest Proposal*, *supra* note 11, at 442. In fact, U.S. Citizen women automatically lost their citizenship if they married foreign men, and non-citizen women automatically acquired citizenship upon their marriage to a U.S. citizen husband. *See MacKenzie*, 239 U.S. at 311; *see also* Titshaw, *supra* note 83, at 182–84.

199. *See* Collins, *supra* note 57, at 2155–58.

200. *See supra* Part III-B.

men lost their citizenship even if the family never left the United States, while foreign wives of citizen men became citizens automatically even if the family remained abroad.[201] Under these rules, children born and raised in the United States by U.S.-born mothers could have become second and third-generation non-citizens without ever leaving the country.[202] Of course, the new Executive Order would create a similar problem in the future for the children of non-citizen parents and generations of their descendants if the Department of Homeland Security does not manage to deport everyone.[203]

3. *Genetic Essentialism and the Definition of Parentage*

Because it expressly relies on the status of *parents*, rather than the U.S.-born persons themselves, the Order must determine what "parent-child" relationships count. Since there is no mention of parents or children or immigration status in the Fourteenth Amendment, there is no text to interpret here. Thus, the Order is clearly inventing its own rules, not interpreting text or implementing original intent, when it defines mothers and fathers. The fact that the Order relies on modern genetic identity and modern hybrid citizenship laws shows, further, that the Order's rules are *modern* inventions.

Congress has repeatedly altered line-drawing in the inherited citizenship context over the last two and a half centuries. This requires a preliminary decision on whether to rely on state or foreign family law determinations—thereby creating a choice-of-law rule—or to enact independent federal definitions. The Executive Order opted for the latter. This required it to undertake additional lawmaking, determining whether to focus on genetic or gestational links, and how it would respect marital presumptions. Considering its need to establish Fourteenth Amendment original intent to support its rules, the Order oddly adopted the least likely of these standards—looking to a child's "immediate . . . biological progenitor[s],"—presumably meaning genetic parents, ignoring marriage altogether and apparently even ignoring "birth mothers" who carry and deliver their own legal children using other women's eggs.[204] This new federal definition departs from parentage determination in all U.S. states, as well as the federal definition employed in the context of children born to citizens abroad.[205]

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201. *See supra* Part III-B.

202. This is the sort of problematic intergenerational second-class status that later led many countries relying primarily on inherited citizenship at birth to adopt hybrid systems incorporating birthplace elements over the past half century. *See* Titshaw, *supra* note 5, at 35–37.

203. As discussed above, the order would likely create a class of stateless persons, who cannot legally be deported to any country. *See supra* Part II. Germany was addressing this problem of second- and third-generation "guest workers" when it added birthplace components to its traditional family-based inherited citizenship laws. Titshaw, *supra* note 5, at 36.

204. Alongside "the" "father," the Order defines "mother" as "*the* immediate *female biological progenitor*," presumably excluding same-sex couples and requiring a choice as to whether "the" mother is the person giving birth or the person whose genetic material is used. The latter seems to better reflect the "immediate . . . biological progenitor" language, particularly in the context of the parallel definition for the "father." Exec. Order No. 14160, *supra* note 3. *See also supra* Part II.

205. *See supra* Part IV.

As discussed above, it would inevitably lead to limping parentage and stateless children with parents under state law but without citizenship at birth.[206]

There is a provision in INA § 320, which provides automatic derivative citizenship to children residing in the United States in the legal and physical custody of a citizen parent sometime before the child reaches the age of eighteen.[207] This provision provides citizenship to adopted children and the children of naturalized parents, but its text would not appear to prevent limping parentage or statelessness for native-born noncitizen children. This is because the first sentence of Section 320 provides that it applies to "[a] child born *outside* of the United States. . ."[208] This is one of many examples throughout the INA that demonstrate how Congress has always assumed traditional unconditional birthplace citizenship as established in the Fourteenth Amendment and repeated in the INA.

In the end, the Order's definitions are not credible. It is implausible that nineteenth-century lawmakers would have supported a focus only on biological parentage at the expense of marriage and marital presumptions during an era when children born out of wedlock were considered "illegitimate" and deprived of most legal rights of inheritance, including inherited citizenship.[209] As a theory of textualism or original intent, this Fourteenth Amendment construction in the Order is absurd. Defining "mothers" and "fathers" based solely on genetic connections between children and their parents at the expense of marital presumptions would have also been anathema to the values and understandings of Americans during the nineteenth century, as well as today.[210]

4. *Equal Protection*

The first section of the Fourteenth Amendment contains not only the Citizenship Clause, but also the Equal Protection Clause, which prohibits each state from denying "*any person within its jurisdiction* the equal protection of the laws."[211] Courts have read the Fifth Amendment Due Process Clause to incorporate this provision and guarantee equal protection in relation to the federal government as well.[212] Although many legal distinctions between citizens and noncitizens have been upheld, the Supreme Court has long held that equal protection applies to "aliens," including those statutorily ineligible for citizenship and even unlawful immigrants.[213] The Court could

206. *See supra* Part II.
207. 8 U.S.C. § 1431.
208. *Id.* (emphasis added).
209. *See supra* Part IV.
210. *See supra* Part IV.
211. U.S. CONST. amend. XIV, § 1 (emphasis added).
212. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
213. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (finding that aliens are "persons" protected under Fourteenth Amendment Equal Protection Clause); Plyler v. Doe, 457 U.S. 202, 210–15 (1982) (discussing the citizenship clause and applying Fourteenth Amendment equal protection to unlawfully resident foreign nationals); *id.* at 243 (Burger, C.J., dissenting) (agreeing that the "Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed

only consider these cases because noncitizens, including undocumented immigrants, are "person[s] within its [i.e., state and United States] jurisdiction."[214] If the Court were to now find that the children of noncitizens "unlawfully present" or in "lawful but temporary" status are not "persons subject to the jurisdiction" of the United States, it would seem to be retroactively questioning the jurisdictional basis for dozens of its equal protection opinions reaching back into the nineteenth century.[215]

The Order also violates modern equal protection principles as it discriminates against children based on their parent's gender, particularly disadvantaging the children of same-sex spouses. As lower courts have recognized in the inherited citizenship context, this discrimination may violate equal protection principles based on both sex and the dignity of same-sex marital families.[216]

The Supreme Court has upheld discrimination between some citizen mothers and fathers in the transmission of citizenship to children born abroad.[217] Yet, that allowable discrimination occurred in the context of establishing and legitimating the parentage of children born out of wedlock under INA § 309.[218] The Court decided during President Trump's first term that sex-based discrimination regarding requirements unrelated to establishing and legitimating parentage was unconstitutional, even for children born out of wedlock.[219]

In *Sessions v. Morales-Santana*, the Court held that requiring divergent residence periods of mothers and fathers for citizenship transmission to children born out of wedlock abroad was unconstitutional.[220] The Court applied heightened equal protection scrutiny to this gender-based discrimination.[221] Because the government was unable to provide an "exceedingly persuasive" justification, the Court held the distinction between unwed mothers and unwed fathers to be an unconstitutional denial of equal protection.[222]

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physically 'within the jurisdiction' of a state") (emphasis in original); *see also* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 451–52 (16th ed. 2018) (listing numerous cases where federal courts ruled on equal protection claims on the basis of irrational distinctions in the context of immigration laws).

214. U.S. CONST. amend. XIV, § 1; *see generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (8th ed. 2010) (compiling the state of constitutional law at the time); *see e.g.*, Plyler v. Doe, 457 U.S. 202, 202 (1982) (exercising federal jurisdiction to extend the scope of Fourteenth Amendment equal protection to protect unlawfully resident children against arbitrary denial of educational benefits.)

215. *See, e.g., Yick Wo*, 118 U.S. at 369 (holding aliens are "persons" and guarantees of protection contained in the Fourteenth Amendment extend "to all persons within the territorial jurisdiction [of the United States], without regard to differences of race, of color, or of nationality.")

216. *See Mize*, 482 F. Supp. 3d at 1335; Kiviti v. Pompeo, 467 F. Supp. 3d 293, 313 (D. Md. 2020).

217. *See Albright*, 523 U.S. at 420–21; *Nguyen*, 533 U.S. 53.

218. *See Albright*, 523 U.S. at 424; *Nguyen*, 533 U.S. at 58–60.

219. *Morales-Santana*, 582 U.S. at 76–77. *Morales-Santana* found a provision of the INA to be unconstitutional, *id.*, and courts should certainly give no more leeway to the President when acting without either constitutional or congressional guidance. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–41 (1951) (Jackson, J., concurring).

220. *Morales-Santana*, 582 U.S. at 52.

221. *Id.* at 47, 57.

222. *Id.* at 72.

The Executive Order similarly discriminates based on gender as it limits birthplace citizenship using different immigration status criteria for mothers and fathers. Even if a mother does not have citizenship or lawful permanent residence, her child will be a citizen—regardless of the father's status—if she falls within several other categories not excluded as "unlawfully present" or "lawful but temporary" under the Order.[223] According to State Department and USCIS implementation plans, this includes mothers who are American Indians born in Canada, asylees, conditional permanent residents, refugees, and non-citizen nationals.[224]

Fathers, on the other hand, would not be relevant for the U.S.-born child's citizenship unless they are citizens or lawful permanent residents.[225] The Order states no reason for this distinction. Nor does it provide a reason for departing from traditional parentage criteria, such as birth in wedlock, as it looks instead solely to the status of "the immediate female biological progenitor" and "the immediate male biological progenitor" of a child when determining whether a U.S.-born child is a citizen.

As described in Part IV above, the Order's focus on only one mother, who is a genetic parent of the child, would be particularly difficult for the children of same-sex spouses and others using A.R.T. Appellate and district courts in five different circuits repeatedly rejected the State Department's genetic- and biology-based definitions of parentage in the inherited citizenship cases before the department abandoned them in 2021.[226] Some of those holdings were based on classic statutory interpretation and the strong common law marital presumption, but others were based on constitutional avoidance, and the likelihood the discrimination against same-sex spouses would be unconstitutional under *Obergefell v. Hodges* and *Pavan v. Smith*.[227] Similar issues inevitably would arise for U.S.-born children denied citizenship at birth because of the Order's genetic essentialist definition of parentage. In the context of U.S.-born children, courts might also consider the concerns regarding federal recognition of state family law that were important to the Supreme Court in *Windsor v. United States*, which preceded *Obergefell* and *Pavan*.[228]

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223. USCIS IMPLEMENTATION PLAN, *supra* note 3.

224. *Id.*; Exec. Order 14160, *supra* note 3; *but see generally* U.S. SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (2025) (omitting children of parents other than citizens, nationals, lawful permanent residents, asylees, and refugees).

225. USCIS IMPLEMENTATION PLAN, *supra* note 3, at 1.

226. *See supra* Part IV.

227. *See* Jaen v. Sessions, 899 F.3d 182, 190 (2d Cir. 2018) (reading the INA consistently with *Gerald D.*, 491 U.S. 110, and the common law marital presumption); Scales v. I.N.S., 232 F.3d 1159 (9th Cir. 2000) (applying classic canons of statutory interpretation to the INA provisions); *Mize*, 482 F. Supp. 3d at 1335 (finding serious doubts about the constitutionality of biological parent-child requirements in INA § 301(c) based on *Pavan v. Smith*, 582 U.S. 563 (2017), and *Obergefell v. Hodges*, 576 U.S. 644 (2015)); Kiviti v. Pompeo, 467 F. Supp. 3d 293, 313 (D. Md. 2020) (same).

228. United States v. Windsor, 570 U.S. 744, 767–78 (2013).

B. *The Order's Invalidity Under the I.N.A.*

Statutory language mirroring the citizenship clause of the Fourteenth Amendment was last codified in the INA in 1952. Although that statute also developed the elaborate immigrant/nonimmigrant status distinctions on which the Order now relies, Congress did not attempt to condition birthplace citizenship on any such parental status at that time, or since.

As described in Part III-A above, the plain meaning and legislative intent of INA § 301(a) is simple, clearly mandating automatic citizenship upon birth on U.S. territory with only a few well-established exceptions. Other sections of INA § 301 and INA § 309 provide for citizenship to children born abroad to U.S. citizens. While these sections do not attempt to define parentage, referring only to children "born of" U.S. citizens, they do expressly distinguish children born out of wedlock in a separate section, Section 309, requiring a "blood relationship" and other additional requirements such as legitimation "under the law of the person's residence or domicile."[229] Both sections also include requirements for parental residence or physical presence prior to a child's birth abroad.[230] For non-citizen immigration purposes, in contrast, the INA provides a different, long, detailed, and specific definition of "child" and "parent."[231]

Although the textual ambiguity of the "born of" language in other subsections of Section 301 is not relevant to the Executive Order, the simultaneous absence of *any* reference to parentage or family in subsection 301(a) completely undermines the Order's reliance on them. When it enacted Section 301 in the Immigration Act of 1952, generally mirroring the language of the Nationality Act of 1940, Congress included the same seven categories of birthright citizenship that exist today.[232] Four of those provisions use the phrase "born . . . of" to indicate a required parent-child relationship for children not born in the United States.[233] The fifth subsection recognizes citizenship for children "of unknown parentage found in the United States, until shown not to have been born" here.[234] The sixth subsection incorporates the Indian Citizenship Act of 1924, for children born "in the United States to" parent members of tribes and emphasizes the citizen's retention of tribal rights under that Act.[235] The main outlier in

229. 8 U.S.C. §§ 1401, 1409.

230. *See id.*

231. 8 U.S.C. §§ 1101(b), 1101(c).

232. *See* Nationality Act of 1940, Pub. L. No. 76-853, § 601, 54 Stat. 1137, 1139 (listed categories (a) through (g) of persons "born nationals and citizens"); Immigration and Nationality Act, Pub. L. No. 84-414, § 301(a), 66 Stat. 235, 235 (repeating the same categories with numerical designations rather than letters); 8 U.S.C. § 1101 (currently including the same categories, but using letters rather than numbers, and incorporating a change for the benefit of members of the foreign service and employees of the U.S. government or international organizations under Section 301(g)).

233. 8 U.S.C. §§ 1101(c)–(e), (g); *id.* § 1101(h) (including this language but limited to people born before 1934, and it was located outside the numerical list in the original INA). I am omitting it from this discussion to avoid needless overcomplication.

234. 8 U.S.C. § 1101(f).

235. *Id.* § 1101(b). Due to the exclusion of members of certain Native American tribes under jurisdictional restriction in the Fourteenth Amendment Citizenship Clause and INA § 301(a), Congress includes both birthplace and "born to" language in this provision.

Section 301 is Subsection (a), which requires only that a citizen be "*born in* the United States, and subject to the jurisdiction thereof."[236] Clearly, Congress knew how to require that a citizen be "born of" parents of particular types. The current INA, the original 1952 version, and the predecessor provisions of the 1940 Nationality Act have all used "born to" and "born of" language for this purpose. The consistent omission of such language in the birthplace citizenship provisions makes it clear that parental status has never been a requirement of Subsection 301(a).

The Executive Order ignores all of this, creating its own new rule, excluding many non-genetic parents whom states would recognize, while recognizing genetic parents whom states would not. It treats marriage and birth in or out of wedlock as irrelevant. The question of whether this is a good policy in light of modern advances in genetic science is a valid subject for debate. But it has nothing to do with "jurisdiction" and certainly does not reflect the text or original intent of the Fourteenth Amendment or the INA.

Subsection 301(a) of the INA makes no reference to family, parents, "biological progenitors," or anything else beyond the phrase "subject to the jurisdiction thereof." Congress has not changed this provision since it was ratified in the Fourteenth Amendment, later codified in the Nationality Act of 1940, and eventually repeated in the INA of 1952. Yet, if the consensus were not clear, Congress had ample opportunity to do so. For example, it might have considered the issue when it amended INA § 320, which provides derivative citizenship for children "born outside the United States" who reside in the U.S. in the custody of a citizen parent.[237] Not only did it not do so, but it clearly assumed children born inside the United States were already citizens, or it would not have excluded them in favor of otherwise identical children born abroad.

Nor did Congress make any change to the simple Fourteenth Amendment language reflected in Subsection 301(a) in 1981 when it amended the language of Section 309 to add a "blood relationship" requirement for the citizen fathers of children born out of wedlock abroad. After a century, Congress was certainly aware that the birthplace citizenship provision made no requirements regarding parental immigration status or parent-child relationships. They also should have been aware that the U.K. was then in the process of enacting its new hybrid citizenship regime. If Congress had wished to challenge the long-held consensus by attempting to add family-based requirements or establish a general genetic essentialist approach to parentage, even in the context of citizens born abroad, they knew how to do so. But they did not.

In addition to its unwarranted departure from the INA, the Order also leaves gaps that evince how it cuts against the grain of the statutory scheme enacted by Congress over the years. Significantly, the INA contains no provision related to the status of U.S.-born children whom the Executive Order would

236. *Id.* § 1401(a).
237. *Id.* §§ 1409, 1431.

deprive of citizenship. The text of the INA clearly reflects the assumption that all children born in the United States to parents in "temporary but lawful" status are citizens. Provisions for family dependents of investors, workers, students, and others in temporary status generally include provisions providing status for dependent children "accompanying or following to join" them, but not those born in the United States.[238]

The USCIS implementation plan recognized the gaping hole the Executive Order would leave in the INA by eliminating citizenship for many U.S.-born children. The plan attempts to partially address this gap by applying to the children of parents in "lawful but temporary" status registration rules borrowed from the tiny number of children of "blue list" diplomatic officers, the group "whose situation is most closely analogous to the alien children of mothers in lawful but temporary status."[239] "The Department would propose to defer immigration enforcement against such children."[240] The plan does not address children born to parents who are unlawfully present. Presumably, those children would be considered unlawfully present and immediately deportable as soon as they are born in the United States.

The Executive Order creates other "gaps" that would require imaginative work for USCIS to fill. For instance, INA § 301(f) provides automatic citizenship at birth for "a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States." To be consistent with the new limitations in the Executive Order, this provision would need to be reimagined with the limitation reading "until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States *or not to have been born to a mother who was unlawfully present or in lawful but temporary status and whose father was not a citizen or lawful permanent resident*." In addition to undermining the Order's reading of the statute, this inconsistency of INA § 301(f) and INA § 301(a) as reinvented by the Executive Order would also invite devastating practical consequences, tempting parents, whose children are not citizens under the Order, to abandon their children to give them a better future. This awful choice may sound far-fetched, but even without the Executive Order, undocumented parents have faced terrible dilemmas, and there has been substantial demand for emergency guardianship planning for the children of parents at risk of detention or deportation.[241]

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238. *See, e.g.*, *id.* § 1101(a)(15)(E) (children "accompanying or following to join" treaty investors or traders); *id.* § 1101(a)(15)(H) (children "accompanying . . . or following to join" workers in specialty occupations, registered nurses, and other workers); *id.* § 1101(a)(15)(F) (children "accompanying or following to join" foreign students).

239. USCIS IMPLEMENTATION PLAN, *supra* note 3. *See also supra* note 6 and accompanying text.

240. USCIS IMPLEMENTATION PLAN, *supra* note 3. The plan is unclear regarding the children of *fathers* whose children would no longer be citizens under the plan. U.S.C.I.S. seems to ignore the Order's distinction between children of mothers and fathers in the text when it states it "intends . . . to permit" the "*children of aliens* that possess lawful but temporary status" to register, but the heading of the section relates to "status of *children born to mothers* . . . in lawful but temporary status[.]" *Id.* (emphasis added).

241. *See* Ben Strauss & Maria Luisa Paúl, *As Deportation Fears Rise, Immigrant Parents Ask: Who Cares for My Kids?*, WASH. POST (Nov. 11, 2025), https://www.washingtonpost.com/nation/2025/11/11/parents-deportation-guardianship-plans/ [https://perma.cc/B4EF-9PL5]. Even ICE has recognized this

Finally, after decreeing that specific parental status under modern immigration law determines a child's right to birthplace citizenship and creating new federal definitions of the parent-child relationships necessary under its new requirement, the Executive Order purports to legislate further by declaring it will only apply proactively after a thirty-day grace period. If scales fell from our eyes to reveal that the centuries-old unconditional birthplace citizenship rule was always a misreading of the Constitution, as the President contends, then it is difficult to see why the executive would have leeway to draw such an arbitrary distinction in time.[242]

VII. CONCLUSION

The Executive Order purports to be "protecting the . . . value of American citizenship," a "priceless gift" and "privilege," and it seeks to maintain value by decreasing supply. The Order uses the word "right," rather than "privilege," only in its standard disclaimer that the order is "not intended . . . to create any right," but it implies that the Fourteenth Amendment does not create rights either. To the extent "consent" and "allegiance" are at issue, the Order seems to envision separate one-way streets: "consent" is required from the state to give the citizenship "privilege" to the people; allegiance is required from the citizens' *parents* to the state. This is a mistake. Neither the Fourteenth Amendment nor INA § 301(a) requires parental allegiance, and this idea of one-way "consent" is far removed from the broad understanding of citizenship acquisition held by the framers of the Fourteenth Amendment.

One can debate the best rule for birthright citizenship at this stage in American development. There are legitimate arguments for and against limiting unconditional birthplace citizenship. Yet, even if change were the best policy, such a profound alteration of the United States Constitution must be made by constitutional amendment. Under no circumstances should it be made at the whim of one elected man, or of five unelected judges.

Unconditional birthplace citizenship is simple. Family-based inherited citizenship rules and hybrid birthright citizenship systems are complex. President Trump's Executive Order creates a complicated modern hybrid rule that relies on a long list of immigration concepts and statuses, none of which were known at the time the Fourteenth Amendment was enacted, and some of which were not known when its language was codified in its present statutory form in the Nationality Act of 1940 and later the INA of 1952. The Order also discriminates arbitrarily in citizenship transmission between "fathers" and "mothers" despite the precedent of *Sessions v. Morales-Santana*. Finally, it seeks to steamroll

problem. *See ICE Guidance on Delegation of Parental Authority*, AM. IMMIGR. LAW. ASS'N (Aug. 1, 2024), https://www.aila.org/library/ice-guidance-on-delegation-of-parental-authority [https://perma.cc/F8BN-FJHF].

242. At least three other scholars have cast doubt on the Order's statement that its policy "shall apply only to persons born" after February 19, 2026, pointing out that "nothing in the legal theory asserted [in the Order] . . . is inconsistent with retroactive effect." Bernick, Gowder & Kreis, *supra* note 4, at 104 n.10.

much of the complexity long recognized in the context of inherited citizenship by inventing new genetic-essentialist federal definitions of "mother" and "father" to condition U.S.-born children's citizenship on their parents' status. These definitions are inconsistent with state family laws as well as the existing federal definition of parentage for children born to citizens abroad. Taken together, the provisions of the Order are inconsistent with the birthplace citizenship provisions in the INA and the Fourteenth Amendment, with the separation of powers devised in the Constitution, and with constitutional equal protection.

This Article has looked beyond the reasons why the Fourteenth Amendment generally means what it says and what it has been understood to say for a very long time. By focusing on the Executive Order and the hybrid birthright citizenship system it elaborates, this Article reveals the many controversial decisions and ahistorical assumptions in the Order. In addition to illuminating the results of the Order if allowed to go into effect, this perspective adds new arguments for why the Order is a baseless exercise in executive lawmaking. It demonstrates that any justification for building such a complex modern structure on the phrase "subject to the jurisdiction thereof" is untenable.