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"'Subject to the Jurisdiction Thereof': Birthright Citizenship and the Fourteenth Amendment"

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Testimony of Amanda Frost

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Thank you for inviting me to testify regarding the meaning of the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution.

I am a professor of law at the University of Virginia School of Law. My areas of expertise include immigration and citizenship law, and I have authored a book and numerous academic articles on these topics.

Part I of my testimony explains that the Citizenship Clause grants birthright citizenship to all children born on U.S. soil, with narrow exceptions, as confirmed by the text, original understanding, and over a century of judicial precedent and historical practice. Part II describes President Donald J. Trump's Executive Order 14160, which purports unilaterally to amend the Constitution and rewrite federal law by denying citizenship to those guaranteed that status at birth under both the Constitution's Citizenship Clause and a federal statute, 8 U.S.C. 1401(a). Part III describes the flaws in the legal arguments asserted in defense of the Executive Order. Part IV concludes by describing the devastating consequences of the Executive Order for *all* American families should it ever go into effect.

I. The Meaning of the Fourteenth Amendment's Citizenship Clause

Birthright citizenship is a foundational legal principle that defines "American" based on birth on U.S. soil, not ancestry. On July 4, 1776, the thirteen original colonies declared their independence from England and rejected a hereditary monarchy, transforming themselves from British subjects into sovereign U.S. citizens. According to the U.S. Constitution, "citizen" is the only title that matters—a title bestowed on all born in the United States who do not fall into a handful of common-law exceptions.

In 1857, the Supreme Court's infamous decision in *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), rejected this founding value. Chief Justice Roger B. Taney declared that no Black person could ever be a citizen of the United States, defining "American" by race and ancestry. *Id.* at 404. The Chief Justice further explained that Congress had no "power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage . . . belongs to an inferior or subordinate class." *Id.* at 417. In Taney's view, many people—including the

children of many immigrants—were "inferior" and "subordinate," and therefore excluded from U.S. citizenship.[1]

In 1868, the nation rectified *Dred Scott*'s grave error by ratifying the Fourteenth Amendment to the U.S. Constitution. The first sentence of that amendment, known as the Citizenship Clause, overturned *Dred Scott* by establishing universal birthright citizenship for all but those falling within the narrow common-law exceptions, as well as children born into sovereign Indian tribes. As its drafters explained, the Citizenship Clause guaranteed citizenship not only to the former slaves, but also to the children of immigrants arriving from around the globe.

For nearly 127 years, the U.S. Supreme Court has repeatedly stated that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth within the territory." *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). For nearly that same length of time, the federal government agreed. That is, until now.

The Text of the Citizenship Clause

Many constitutional provisions are broad and vaguely worded. The Fourteenth Amendment's Citizenship Clause is not one of them. In full, the Citizenship Clause reads:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*[2]

As the Supreme Court recognized in *Wong Kim Ark*, that language is "universal, restricted only by place and jurisdiction." 169 U.S. at 676. The clause "'subject to the jurisdiction thereof'" was meant "to exclude, by the fewest and fittest words," only the following groups: the "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state," as well as "children of members of the Indian tribes." *Id.* at 682. Everyone else falls within "the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding the alienage of the parents." *Id.* at 689. *See also Doe v. Trump*, 25 WL 487372, Civil Action No. 25-10135-LTS (D. Mass. Feb. 13,

[1] *See* Gabriel J. Chin, "*Dred Scott* and Asian Americans," 24 U. Pa. J. Const. L. 633, 642 (2022) (quoting Taney's 1840 opinion in *United States v. Dow* describing Asians as "inferior" to the "white race").

[2] U.S. Const. amend XIV, § 1.

2025). (In 1924, Congress granted children of tribal members citizenship by statute. *See* 8 U.S.C. 1401(b).)

***United States v. Wong Kim Ark* (1898)**

Wong Kim Ark was born in San Francisco in the early 1870s to Chinese immigrant parents. Like all immigrants from Asia, Wong's parents were barred under federal law from naturalizing. They left the United States when Wong was a child.

In 1895, the U.S. government denied Wong entry to the United States upon his return from a visit to China. The government argued that because Wong's parents were citizens of China at the time of his birth, they were "subject to the jurisdiction of the Emperor of China" and not the United States. As their child, Wong was therefore also "the subject[] of a foreign power" because, the government claimed, the "domicile of the parent is the domicile of the child. Their people are his people."[3]

In a 6-2 decision, the Supreme Court rejected this argument. The Citizenship Clause began with the phrase "[a]ll persons born," granting "universal" citizenship based on birthplace. *Id.* at 676. The Court agreed with Wong's lawyers that the qualifying language "and subject to the jurisdiction thereof" excluded children born to enemy aliens during a hostile occupation of the United States, and children of diplomatic representatives—both longstanding common law exceptions to birthright citizenship—as well as children born into sovereign Indian tribes. *Id.* at

[3] Brief for the Petitioner (Conrad), at 49-51, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). On behalf of the United States, Solicitor General Holmes Conrad also argued that the Fourteenth Amendment was itself unconstitutional, calling it of "doubtful validity," and describing its addition to the Constitution as a "blot on our constitutional history." *Id.* at 46-48 & n.1. Joining the United States government was private lawyer George Collins, who authored a second brief signed onto by Solicitor General Conrad. Collins had openly vilified Chinese immigrants and their children in his law review articles and statements to the press, describing them as the "obnoxious" Chinese, and arguing that Americans should not be forced to "accept [the children of Chinese immigrants] as fellow citizens . . . because of mere accident of birth." *No Ballots for Mongols*, S.F. Examiner, May 2, 1896, 16. In their joint Supreme Court brief, Collins and Conrad wrote: Are "Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth? . . . If so, then . . . American citizenship is not worth having." Brief for Petitioner (Collins), at 34, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

694.[4] In all these exceptions, the children were not subject to the full force and effect of U.S. law due to their special status, in marked contrast to the children of all other immigrants, including Wong.

In the 127 years since its decision in *Wong Kim Ark*, the Supreme Court has repeated that conclusion many times. *See, e.g., United States ex rel. Hintopoulous v. Shaughnessy*, 353 U.S. 72, 73 (1957) (A child born to undocumented immigrants is "of course[] an American citizen by birth" despite the parents' "illegal presence."); *INS v. Rios-Pineda,* 471 U.S. 444, 446 (1985) (stating that an undocumented immigrant "had given birth to a child, who, born in the United States, was a citizen of this country"); *Hirabayashi v. United States*, 320 U.S. 81, 96-97 (1943) (noting that thousands of "persons of Japanese descent" living in the United States "are citizens because born in the United States," even though "under many circumstances" they are also citizens of Japan "by Japanese law"); *INS v. Errico,* 385 U.S. 214, 215-16 (1966) (same). *See also Plyler v. Doe*, 457 U.S. at 211 & n.10 ("[N]o plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.").

Unsurprisingly, over the past month, four district courts and a federal court of appeals have all concluded that the President's effort unilaterally to amend the U.S. Constitution is unlikely to succeed. *See, e.g.,* "Per Curiam Order," *Washington v. Trump*, No. 2:17-cv-00141 (9th Cir. 2025); "Preliminary Injunction Order," *N.H. Indonesian Cmty. Support v. Trump*, 1:25-cv-38 (D.N.H. Feb. 10, 2025); "Preliminary Injunction Order," *New Jersey v. Trump*, 1:25-cv-10139 (D. Mass. Feb. 13, 2025). Federal Judge John Coughenour, appointed by President Ronald Reagan in 1981, declared the President's Executive order to be "blatantly unconstitutional," adding he could not "remember another case where the question presented is as clear as this one is." Likewise, Judge Joseph N. Laplante, a George W. Bush appointee, enjoined the Executive Order on the ground that it "contradicts the text of the Fourteenth Amendment and the century-old untouched precedent that interprets it." "Preliminary Injunction Order," at 6, *N.H. Indonesian Cmty Support v. Trump*, No. 25-cv-38-JL-TSM (Feb. 11, 2025).

[4] Children "born on foreign public ships," *id.* at 694, fall outside the Citizenship Clause because they are not born "in" the United States. *See* State Department Foreign Affairs Manual, 8 Fam 301.1-3(d).

Original Understanding

These judicial decisions follow inexorably not only from the Citizenship Clause's plain text, but also from the original understanding of the Fourteenth Amendment. *See generally* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L. J. 405 (2020).

On May 30, 1866, Senator Jacob Howard of Michigan proposed adding the Citizenship Clause to the Fourteenth Amendment. He explained that this addition is "simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Howard noted that the Clause did not apply to the children born to ambassadors—a longstanding common law exception to birthright citizenship—but added that "it will include every other class of persons."[5] In subsequent discussion, Senator Howard and others agreed that children born to members of Indian tribes would also fall within the exception for those not "subject to the jurisdiction" of the United States.

The breadth of the Citizenship Clause was immediately apparent to all. Senator Edgar Cowan of Pennsylvania, who opposed this amendment, correctly described it as "assert[ing] broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States." He objected to giving citizenship to "a traveler" who "comes here from Ethiopia, from Australia, or from Great Britain," arguing "we ought to exclude others besides Indians not taxed." In particular, Cowan was appalled by what he described as "a flood of immigration of the Mongol race," asking "[i]s the child of the Chinese immigrant in California a citizen?"[6]

The answer was yes. Senator John Conness of California immediately responded that the "children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States."[7]

The only substantive debate that followed concerned children born to Indian tribes, further confirming the breadth of the Citizenship Clause and the narrow scope of the exception for those not "subject to the jurisdiction" of the United States. Senator Howard explained that Indian tribes had unique constitutional status as "sovereign Powers" living within the United States. Accordingly, the United States has "always recognized in an Indian tribe the same sovereignty over

[5] Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).
[6] *Id.* at 2890-91.
[7] *Id.* at 2891.

the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains."[8] Illinois Senator Lyman Trumbull agreed, adding that the "very fact that we have treaty relations with them shows that they are not subject to our jurisdiction."[9] None of those arguments apply generally to children born to immigrants of any status in the United States, then or now.

Historical Practice

For more than a century, the executive branch has obeyed the command of the Citizenship Clause's text, as confirmed by the original understanding and the unbroken line of judicial precedent.

The federal government routinely grants passports, social security numbers, and all the rights of citizenship to the children of noncitizens, including the children of undocumented immigrants and temporary lawful immigrants. *See, e.g.,* 20 C.F.R. 422.107(d) ("[A]n applicant for an original or replacement social security number card may prove that he or she is a U.S. citizen by birth by submitting a birth certificate . . . that shows a U.S. place of birth."); State Department Foreign Affairs Manual, 8 Fam 301.1-1(d) ("All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth."). In testimony before the House Judiciary Committee in 1995, then-Assistant Attorney General Walter Dellinger recounted this long history, declaring: "The constitutional guarantee of citizenship to children born in the United States to alien parents has consistently been recognized by courts and Attorneys General for over a century."[10]

Congress, too, has long agreed that the Citizenship Clause means what it says. *See, e.g.,* 8 U.S.C. 1401(a). Moreover, Congress has an independent constitutional obligation to determine the citizenship of its own members.[11] Save one shameful exception in 1870—when several senators challenged the citizenship of the first Black member of Congress, Mississippi Senator Hiram Rhodes

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[8] *Id.* at 2895.
[9] *Id.* at 2893.
[10] *See Legislation Denying Citizenship at Birth to Certain Children Born in the United States: Statement Before the Subcomm. of Immigration and Claims on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of Walter Dellinger, Former Assistant Att'y Gen., Office of Legal Counsel, U.S. Department of Justice).
[11] U.S. Const. art. I, § 5, cl.1.

Revels—Congress has never questioned the citizenship of its members born in the United States based on their ancestry.[12]

II. Executive Order 14160

On January 20, 2025, President Donald J. Trump issued Executive Order 14160, which purports to deny citizenship to millions of Americans automatically granted that status at birth under the Constitution's Citizenship Clause, as well as under 8 U.S.C. 1401(a). Without legal basis, Section 1 of the Executive Orders asserts:

> *United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.*

Through this unilateral rewriting of the Constitution, the Executive Order claims to strip citizenship from everyone born in the United States to undocumented immigrants or lawful temporary immigrants (known as "nonimmigrants" under the Immigration and Nationality Act). Expressly included are the many nonimmigrant visa-holders who are permitted to live and work in the United States on such visas for a decade or more, many of whom eventually obtain green cards and citizenship in the United States. *See* 8 U.S.C. 1255 (permitting adjustment of status from nonimmigrant to lawful permanent resident (green card) status).

Section 2 of the Executive Order states that it is "the policy of the United States that no department or agency of the United States government shall issue [or accept] documents recognizing United States citizenship" of those identified in Section 1. Section 2 further states that this policy will "apply only to persons who are born within the United States after 30 days from the date of this order."[13] Accordingly, had the Executive Order not immediately been enjoined by several

[12] Richard A. Primus, "The Riddle of Hiram Revels," 119 Harv. L. Rev. 1680 (2006).

[13] Significantly, the 30-day temporal limitation in Section 2 does *not* apply to the effort to rewrite the Citizenship Clause in Section 1.

federal courts, it would bar federal agencies from providing passports, social security numbers, or federal benefits to babies born to undocumented immigrants or nonimmigrants after February 19, 2025.[14]

III. The Flawed Legal Arguments in Defense of the Executive Order

In its court filings attempting to defend the Executive Order, the Trump administration makes legal arguments that are at odds with the Citizenship Clause's text, the drafting history, Supreme Court opinions, and over a century of historical practice. Furthermore, these arguments are inconsistent with the scope of the Executive Order itself.

Allegiance

In its legal filings, the Trump administration argues that Citizenship Clause applies only to those who have an "allegiance" to the United States that is "'complete'" and "unqualified by 'allegiance to any alien power.'" *See* "Defs' Opp. to Pl's Mot. for a Prelim. Inj. and Mem. of Points and Authorities," at 10, *County of Santa Clara v. Trump,* No. 5:25-cv-00981 (N.D. Ca. 2025). *See also* "Brief of Amici Curiae Members of Congress in Support of Defs," at 12, *Washington v. Trump*, No. 2:25-cv-00127-JCC (making similar arguments). In doing so, the administration attempts to rewrite the text of the Citizenship Clause, which does not include the word "allegiance."

The Trump administration's allegiance argument is identical to the argument expressly rejected by the U.S. Supreme Court nearly 127 years ago in *Wong Kim Ark*. In 1898, the Solicitor General of the United States argued that Wong's parents were "subject to the jurisdiction of the Emperor of China" and not the United States, and so Wong was therefore also "the subject[] of a foreign power." The government lost.

Even if "complete" and "unqualified" allegiance was a prerequisite to U.S. citizenship, however, birth in the United States establishes such allegiance. The purpose of the Citizenship Clause is to ensure that all born in the United States are automatically citizens with all the rights and responsibilities that accompany that

[14] *See, e.g.,* "Preliminary Injunction Order," *N.H. Indonesian Cmty. Support v. Trump*, 1:25-cv-38 (D.N.H. Feb. 10, 2025); "Preliminary Injunction Order," *New Jersey v. Trump*, 1:25-cv-10139 (D. Mass. Feb. 13, 2025).

status, save the limited common-law exceptions. The allegiance of the parents is irrelevant to the allegiance of the child, who is an American by virtue of birth on U.S. soil. *See Wong Kim Ark,* 169 U.S. at 659 (noting that "allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign"); "Preliminary Injunction Order," *Doe v. Trump*, No. 25-10135-LTS, 25 WL 487372, (D. Mass. Feb. 13, 2025).

Finally, the allegiance rationale is at odds with the Executive Order itself. That argument would exclude from birthright citizenship not only the children of undocumented immigrants and temporary immigrants—the groups expressly targeted by the Executive Order—but also the children of dual citizens and green card holders. *See* "Preliminary Injunction Order," *Doe v. Trump*, No. 25-10135-LTS, 25 WL 487372 (D. Mass. Feb. 13, 2025). If "complete" and "unqualified" allegiance was the test, then the Citizenship Clause would apply *only* to children born to parents who both had U.S. citizenship (and no other) at the time of the child's birth in the United States—a result in conflict not only with *United States v. Wong Kim Ark* but also with the lines the Executive Order purports to draw.

Domicile

The Trump administration claims that a child of noncitizens does not receive citizenship based on birth in the United States unless at least one noncitizen parent is "domiciled" in the United States at the time of the child's birth. *See* "Defs' Opp. to Pl's Mot. for a Prelim. Inj. and Mem. of Points and Authorities," at 13, *County of Santa Clara v. Trump,* No. 5:25-cv-00981 (N.D. Ca. 2025).

Once again, the Trump administration seeks to rewrite the Citizenship Clause to add a word absent from its text. The Citizenship Clause was never intended to apply only to those making their permanent home in the United States, which is why the framers of that amendment did not use the term "domicile" to limit its application. During the 1866 debates on the Senate floor, Senator Cowan observed that the children of "traveler[s]" born in the United States would be citizens, and Senator Conness agreed that the Citizenship Clause applies to "children of all parentage whatever" born in the United States.[15]

And once again, the government's position is foreclosed by *Wong Kim Ark,* which did not turn on domicile. To the contrary, the Court's opinion concluded that the Citizenship Clause adopted the common-law rule under which "every person" born within the country was a citizen, "whether the parents were settled, or merely temporarily sojourning, in the country . . . . save only the children of foreign

[15] Cong. Globe, 39th Cong., 1st Sess. 2890-2891 (1866)

ambassadors . . . or a child born to a foreigner during the hostile occupation." *Id.* at 460. *See also id.* at 664 (favorably citing *Lynch v. Clarke,* 1 Sandf. Ch. 583 (1884), which recognized citizenship at birth for a child born to Irish parents temporarily visiting New York).[16]

Like the allegiance argument, the domicile rationale is inconsistent with the Executive Order it purports to justify. Domicile can be defined as the place "'in which [a person's] habitation is fixed without any present intention of removing therefore.'"[17] Both undocumented immigrants as well as many lawful temporary visitors (nonimmigrants) may intend to remain in the United States indefinitely.

In its legal filings, the Trump administration erroneously asserts that "[t]emporary visitors to the United States, by definition, retain permanent homes in foreign countries." *See* "Defs' Opp. to Pl's Mot. for a Prelim. Inj. and Mem. of Points and Authorities," at 12, *County of Santa Clara v. Trump,* No. 5:25-cv-00981 (N.D. Ca. 2025). That is incorrect. Several categories of nonimmigrants to the United States are permitted to enter with "dual intent"—meaning they can enter on a temporary visa but intend to stay if they can find a legal pathway to do so—and so need not demonstrate that they retain a foreign residence. *See* 8 U.S.C. 1184(b). These nonimmigrants may eventually adjust to lawful permanent resident (green card) status without leaving the United States, as permitted under 8 U.S.C. 1255, and may later become naturalized citizens. Conversely, even lawful permanent residents (green card holders) do not have an unconditional right to remain in the United States. *See* 8 U.S.C. 1227 (listing removal grounds).

Consent

Finally, the Trump administration argues that "if the United States has not consented to someone's enduring presence, it likewise has not consented to making citizens of that person's children." Defs' Mem. of Law in Objection to Pls' Mot. for

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[16] Although the Court noted that Wong's parents were "domiciled residents" of the United States at the time of his birth, it also observed that Wong was "of Chinese descent" and that he had only "one residence . . . in California" throughout his life. 169 U.S. at 458. None of these facts are relevant to Court's holding. As the Court well knew, Wong's parents did not have a legal right to remain permanently in the United States. Wong's parents were barred by federal law from naturalizing, and the U.S. government could (and did) exclude and deport Chinese immigrants like the Wong family at its discretion. *See Chae Chan Ping v. United States,* 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

[17] Justin Lollman, "The Significance of Parental Domicile Under the Citizenship Clause," 101 U. Va. L. Rev. 455, 459 (2015) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Little, Brown & Co., 6th ed. 1865).

Prelim. Inj., at 2, *N.H. Indonesian Cmty Support v. Trump*, No. 1:25-cv-38-JL-TSM. *See also* "Brief of Amici Curiae Members of Congress in Support of Defs," at 12, 16, *Washington v. Trump*, No. 2:25-cv-00127-JCC (arguing that the Citizenship Clause requires that "sovereign consent" to the parents' presence). Again, that is a requirement made up out of whole cloth that appears nowhere in the text of the Citizenship Clause.

The Citizenship Clause is focused on the *child* born on U.S. soil, not the parents. And for good reason. The Citizenship Clause's primary goal was to grant citizenship to the newly-free slaves. As Congress well knew, thousands of enslaved persons had been brought to the United States in violation federal laws banning their importation after 1808. Unquestionable, the nation intended the Citizenship Clause applied to these "illegal aliens" and their progeny, just as it applies to everyone else in America.[18]

IV. The Consequences of the Executive Order for All Americans

If the Trump administration were to succeed in rewriting the Constitution, the consequences would be dire for *all* families in the United States.

At a minimum, children born after February 19, 2025, to legal temporary immigrants as well as undocumented immigrants—approximately 300,000 children every year—would be rendered "illegal aliens" from the moment of their birth.[19] The Executive Order instructs federal agencies to deny these children social security numbers, access to federal benefits reserved for citizens, and passports. Some would be born stateless. If these children left the country with their parents,

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[18] *See* Gabriel J. Chin and Paul Finkelman, "Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation," 54 U.C. Davis L. Rev. 2215 (2021).

[19] Jeffrey S. Passel, D'Vera Cohn, and John Gramlich, *Number of U.S.-born babies with unauthorized immigrant parents has fallen since 2007*, Pew Research Center, Nov. 1, 2018 (estimating number of children born to undocumented immigrants at about 250,000 in 2016); Jason Richwine and Steven A. Camarota, *Births to Illegal Immigrants and Long-Term Temporary Visitors (Preliminary estimates)*, Center for Immigration Studies, Feb. 14, 2025 (estimating between 225,000 and 250,0000 births to undocumented immigrants in 2023, and another 70,000 births to temporary visitors (nonimmigrants) in 2023, excluding tourists).

No government agency has provided an estimate of the number of children born to women visiting the United States under a tourist visa. Federal law prohibits granting a tourist visa for "the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States." 22 C.F.R. 41.31(b)(2)(i). That regulation further provides that "[a]ny B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is presumed to be traveling for the primary purpose of obtaining U.S. citizenship for the child." *Id.* at 41.31(b)(2)(iii).

they would be barred from returning even if their parents have a legal right to re-enter the United States. By law, these newborns would be subject to removal from the country and their family from the moment of their birth.

Nor would the harm be limited to the families targeted in the Executive Order. Even families in which one or both parents are green card holders or even U.S. citizens would now have to prove their own status to the satisfaction of federal officials before their child would be recognized as a U.S. citizen. And that would not be easy.

Today, hospitals typically report live births to the relevant state agency, which then submits that information to the Social Security Administration. But hospitals do not routinely request information about the immigration or citizenship status of parents. Nor are hospital staff or state agencies equipped to determine whether documentation satisfies federal officials' requirements for such status, which would require knowledge of complex federal immigration laws and regulations. If these parents cannot quickly produce proof of their child's citizenship, the Executive Order will deprive these newborns of federal and state medical and other benefits at the most vulnerable time of their lives.[20]

The test of lineage imposed by President Trump's Executive Order would become even more difficult to satisfy in the years to come. Future generations of parents could not rely on their own birth certificates to establish their child's citizenship because place of birth would no longer suffice. For every child born in the next generation, the parents would need to provide not only their birth certificate demonstrating birth in the United States, but also proof of *their* parents' citizenship and immigration status, and on down through the generations to follow. The United States would have replaced the egalitarian rule that we are all equally American at birth with a test of lineage and ancestry—a legal rule at odds with our Constitution and antithetical to the nation's founding values.

[20] *See* Jacob Hamburger, "The Consequences of Ending Birthright Citizenship," Wash U. L. Rev. (forthcoming 2025). Immigration and citizenship documentation is complicated, confusing even legal experts on those issues. To give just a few examples: 1) even if a green card states on its face that it has expired or is conditional, the holder retains lawful permanent resident status; 2) many parents will not have easy access to birth certificates; and 3) under the Child Citizenship Act, children with lawful permanent resident status automatically become citizens if they reside with a U.S. citizen parent, but will not have any documentation of that status. Parents of newborns, busy hospital staff, and state officials should not be required to obtain and parse such documentation to obtain the rights of citizenship for their child.

Conclusion

The Citizenship Clause's text, original understanding, and longstanding historical practice all establish that, save for a handful of narrow common law exceptions, all born in the United States are U.S. citizens. The conclusion has been confirmed by judicial decisions stretching back over a century. Birthright citizenship is a fundamental expression of America's founding values, which rejected lineage as the sole basis for membership. The Supreme Court's odious decision in *Dred Scott v. Sandford* marked the only significant deviation from this founding principle. All Americans should be proud that in 1868 the nation rejected *Dred Scott* and reclaimed citizenship based on location of birth, not lineage. We must never go back.