my most recent "scholarly" production

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Gentlemen - As is my wont, I write my supposedly "scholarly" articles and post them on the non-peer-reviewed - but very respected - open source website SSRN ("Social Sciences Resource Network") . Below is my most recent posting. For whatever it is worth, I am no fan of Donald Trump, but as it is said, "even a stopped watch gets it right twice a day." You may quote me if you wish.

Gene Van Loan

Brief Essay on The Illogic of America's Contemporary Version of Birthright Citizenship

By Eugene M. Van Loan III[1]

"Birthright citizenship" is a concept that citizenship is conferred upon persons on account of their having been born within the geographical confines of a political entity, typically a nation-state. In the USA, this concept is instantiated in the Citizenship Clause of Section 1 of the 14th Amendment to our Constitution - which reads as follows:

> "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."

On January 20, 2025, newly inaugurated President Trump signed a slew of Executive Orders, one of which – Protecting the Meaning and Value of American Citizenship - prescribes that birthright citizenship *not* be granted to a person born in the United States:

> "(1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or
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> (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth."

The legality of President Trump's Executive Order has been challenged in numerous lower Federal courts, typically on the grounds that it unconstitutionally conditions birthright citizenship upon a factor (the citizenship of the parents of the putative birthright citizen child) that is not authorized by the literal wording of the 14th Amendment or supposedly consistent judicial precedent. To date, Trump's EO has been declared unconstitutional in every litigated case. These decisions are presently on appeal and are awaiting determination by the Supreme Court.

My purpose here is not to hash out the legal issues involved in these cases. The volume of ink, paper and digital resources that has already been expended by constitutional scholars, historians and media commentators on these issues has been extraordinary. Most of this dialogue, however, has consisted of pro and con *legal* arguments about whether the conventional reading of 14th Amendment Citizenship Clause grants citizenship status to all children born in the United States or whether the clause's qualifying phrase "subject to the jurisdiction thereof" excludes children born to parents who were illegal aliens[2] at the time of their child's USA birth.[3]

As is acknowledged by essentially everyone who has opined on the origin of this provision of the 14th Amendment, it was primarily intended to reverse the infamous holding of the US Supreme Court in the 1857 Dred Scott case to the effect that blacks – almost all of whom at the time were slaves – were not and could not become American citizens.[4] Although the 13th Amendment, which in 1865 abolished the institution of slavery in the US, was also said to have expunged the Nation of the "incidents" of slavery, it clearly had *not* wiped the slate clean. Accordingly, one purpose of the 14th Amendment, which was ratified and became part of the Constitution in 1868, was to finish the work of the 13th Amendment.

Part of the way in which the 14th Amendment was understood to satisfy its role was through its Citizenship Clause, which conferred US citizenship upon America's former slaves who had been born here.[5] In other words, the Citizenship Clause was basically intended to be a backwards-looking provision designed to further remediate *(i.e.,* beyond the 13th Amendment) the harm done by slavery to its *past* victims.

Nevertheless, the clause was not drafted in a way that explicitly limited its supposed beneficence retrospectively. Instead, as drafted, it clearly applied prospectively as well, *i.e.*, not just to persons who had been born prior to its passage, but also to those not yet born.

Additionally, by applying generically to "*all* persons", the Citizenship Clause did not just apply to persons who were former slaves or who were black. In this regard, it is clear from the debates in Congress over the wording of what was to become the Citizenship Clause that there was an understanding among the deliberants that its grant of citizenship would indeed extend to persons other than former slaves and other than just blacks.[6]

So, if the Citizenship Clause of the 14th Amendment was about more than just the remediation of slavery,[7] what else was it about? Suffice it to say that in the 1866-1868 timeframe when the 14th Amendment was being debated and ratified, America's political/social/economic environment was quite different from what it is today. The primary difference of relevance to this discussion is that in the 1860s, America still had vast unoccupied swaths of Western lands that needed to be populated. Accordingly, virtually all who wished to come to America were welcome.[8] In other words, we *wanted* immigrants and the more, the merrier. And, what better way to incentivize immigration than to offer automatic American citizenship to the children of foreigners who wish to emigrate here?

But let us put aside the foregoing issues about the origin of the Citizenship Clause and its drafting defects (or at least its ambiguities) and examine the conventional wisdom about what it means today. A literal reading of the clause would lead one to believe that the following are the (only requisites for a person to qualify for 14th Amendment birthright citizenship in America:

1. That the person was born in the United States[9];
2. That the person, at the time of his/her birth, was "subject to the jurisdiction" of the United States.

What, then, are the adverse consequences of the conventional understanding of America's birthright citizenship rules? To begin with, it is stating the obvious to observe that by continuing to incentivize the immigration of all-comers, the Citizenship Clause of the 14th Amendment actually encourages *illegal* as well as legal immigration.[10]

But that is not the worst of the situation. Note that the foregoing enumeration of the requisites for birthright citizenship does not include any mention of the citizenship (or any other required) status of the *parents* of the "person" whose eligibility for birthright citizenship is in question. In other words, if one simply reads the 14th Amendment, one would think that whatever may be the specified birthright citizenship requisites applicable to the "person" in question, they apply only to the *baby*. And, consistent with this literal reading of the Citizenship Clause, it is the case that children born in the United States are conventionally deemed to be US citizens even though either or both of their parents may be citizens (and even permanent residents) of another nation (or of no known nation if, for example, the identities of their parents are not ascertainable).

The adverse consequences of this incongruence between the citizenship of children and that of their parents has recently been made apparent by current events involving efforts by the Trump Administration to deport illegal aliens whose minor children have acquired American birthright citizenship. In several recent cases, deportable illegal alien parents have been given the choice of either taking their birthright-citizen children with them or leaving their children in America to be adopted, raised in foster homes, or becoming wards of the state.[11] This indeed is a Hobson's Choice – or, more accurately, its evil twin: a Sophie's Choice.

So, for purposes of discussion, let me offer a few simple propositions:

1) Family integrity is an important American social, political and economic policy value.[12]

2) Our Government should not adopt a rule which undermines family integrity in the absence of a countervailing policy justification that is truly compelling.

3) There is no compelling policy justification for assigning or recognizing the citizenship of minor children differentially from that of their parents.

I suspect that most Americans would agree with propositions #1 and #2. That leaves only proposition #3. To begin with, as I outline above, to the extent that conventional understanding of the Citizenship Clause induces illegal alien parents who are subject to deportation to elect to abandon their supposed birthright citizen children (probably to pursue the proverbial "better life in America"),[13] America's current version of birthright citizenship threatens to create a permanent underclass of what I will call "Birthright Orphans".[14] This is hardly a compelling policy justification.

Some, however, contend that the elimination of America's grant of citizenship to children born in the U.S. to parents who are illegal aliens would create even more, not fewer, Birthright Orphans than we have already created under our existing version of birthright citizenship.[15]

But is this not confusing the effect and the cause? Even if we agree that eliminating statelessness is a preeminent societal goal – which I do - that does not dictate that retaining American birthright citizenship for every child born in America is the only or even the best way to achieve that goal. The culprit here is not a denial of birthright citizenship to the children of illegal aliens who are born in America; it is our failure to enforce our borders and our immigration policies so that we do not have multitudes of illegal aliens who are giving birth to their children in America! In other words, the

problem here is not that we might have too many stateless children if we deny birthright citizenship to the children of illegal aliens; it is that we have too many illegal aliens who bear (potentially stateless) children in America. And, of course, the ways for us to reduce the number of illegal aliens in the country are (a) to stop incentivizing them to illegally enter or illegally stay in the country, (b) to take effective measures to prevent those who nevertheless attempt to illegally enter or illegally stay in the country from doing so, and, finally (c) to take appropriate measures to expel those who have illegally entered or illegally stayed in the country.

Secondly, the message to the rest of the world that "if you can make it to America, whether by hook or by crook, you can birth your children here and they will become American citizens" includes an implicit promise that if you can pull this off, you, too, may eventually be able to become American citizens. This is the so-called "anchor baby" syndrome whereby the parents of birthright citizen babies plant their children's anchor in America and the parents (and other relatives) then use that anchor to haul themselves in. In the end, what we are doing is providing a perverse incentive for citizens of foreign countries who wish to emigrate to the United States to use their own children to evade or abuse our immigration rules. Again, this is hardly a compelling policy justification.

Whether President Trump's Executive Order on birthright citizens was intended to be magnanimous or mean-spirited is not for me to say. My point is that it sensibly aligns the citizenship of parents with that of their minor children and, thus, enhances the preservation of family integrity. Accordingly, if one takes the Executive Order at face value, there is a lot to commend it.

But, I repeat, my point is one of policy, not legality. [16]

Eugene M. Van Loan III

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[1] Mr. Van Loan is a retired New Hampshire lawyer. He is a 1964 graduate of Yale University and a 1967 graduate of Harvard Law School. He has published numerous articles, essays and op eds on constitutional law. He is also a past president of the Josiah Bartlett Center for Public Policy, New Hampshire's premier free-market think tank.

[2] I choose to use the term "illegal alien" herein to refer to persons who are not US citizens and who are not lawfully present in the United States either because their initial entry was unauthorized or prohibited by law or, regardless of the legality of their initial entry, because their continued presence in the United States is unauthorized or prohibited by law.
The term "illegal alien" – as used by me - is not meant to be pejorative.

[3] It is generally accepted that the "subject to the jurisdiction thereof [*i.e.,* of the United States]" language of the Citizenship Clause at least excludes children born in the US whose parents at the time were foreign diplomats, were engaged in a war with the United States, or were Native Americans who either lived on a tribal reservation and did not personally own any portion of the land on the reservation or who roamed over unsettled tracts of land.

On the other hand, one could not glean the foregoing from the bare language of the "subject to the jurisdiction thereof" of the Citizenship Clause itself - which is less than self-explanatory. Instead, such a conclusion requires a close reading of at least the following Supreme Court decisions: ***United States v. Wong Kim Ark***, 169 U.S. 649 (1898) and **Elk v. Wilkins,** 112 U.S. 94 (1884).

[4] Citation of authority for this point is truly unnecessary because it would be so voluminous and redundant. Nevertheless, for a relatively recent example, see Martha S. Jones, "The Real Origins of Birthright Citizenship", *The Atlantic* (October 31, 2018).

[5] Note that the Citizenship Clause of the 14h Amendment was not the Amendment's exclusive component designed to remediate slavery. In addition to its citizenship-conferring language, Section 1 thereof included guarantees of due process and equal protection, both of which were also intended, at least in part, to remediate the effects slavery.

On the other hand, even the 14th Amendment did not completely satisfy the goal of wiping slavery's legal slate clean. That required (at least) the passage in 1870 of the 15th Amendment, guaranteeing that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".

[6] For example, the following exchange between Senators Edgar Cowan of Pennsylvania and John Conness of California during the May 30, 1866 Senate debate is illuminating:

> Senator Cowan: "[I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to [be] immigrated out of house and home by Chinese…. They are in possession of the country of California, and if another people of a different race, of different religion, of different manners, of different traditions, different tastes and sympathies are to come there and have the free right to locate there and settle among them, and if they have an opportunity of pouring in such an immigration as in a short time will double or treble the population of California, I ask, are the people of California powerless to protect themselves?"
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> Senator Conness: "The proposition before us…relates simply…to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens…I am in favor of doing so…."

See generally, "Hearing Before the Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary, U.S. House of Representatives", Serial No.. 119-6 (February 25, 2025) (Testimony of Prof. Amanda Frost, UVA School of Law, at p. 105-6).

[7] Note that if the remediation-of-slavery theme were to fully explain the origin of the Citizenship Clause, what is one to make of the clause's grant of US citizenship to 'naturalized" persons as well as to US-born persons? One can hypothesize that its reference to naturalized persons was designed to deal with those former slaves who had been born in and imported from Africa. However - according to the Dred Scott case - since *all* blacks, whether slaves or free blacks, and whether born in the U.S. or born in Africa (and if born in Africa, whether they had been imported to the U.S. before or after the international slave trade had been banned by Congress in 1807), were not legally eligible for US citizenship, the notion that in 1868 there was an existing class of non-native-born, naturalized blacks who needed affirmation of their citizenship would seemingly have referred to a class of none.

> [Indeed, another peculiarity of the Citizenship Clause is that it makes *any* reference to persons who were "naturalized". Since naturalization, by definition, confers citizenship, one wonders what the language that naturalized persons are deemed to be US citizens was meant to accomplish that would not already be accomplished by naturalization itself. I can only surmise that this referred to the then-extant dichotomy between Federal citizenship and individual state citizenship, and, thus, that it was intended to provide that if one had been or were to be naturalized in a US state in order to become a citizen of that state, this would be tantamount to having been naturalized federally.]

[8] This is reflected in the fact that, at that time of the 14th Amendment's adoption, there essentially were no illegal immigrants. Until the 1880's – with a few isolated minor exceptions – immigration into the U.S. was legally unconstrained. *But see*, Gabriel J. Chin & Paul Finkelman, "Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation", 54 U. Cal. Davis L. Rev. 2215 (2021).

[9] Note that the language of the Citizenship Clause also makes mention of residency: "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*." (Emphasis supplied). If, under the 14th Amendment as written, this was meant to require the US residency of a beneficiary of the Citizenship Clause, it should always have been and should still now be an impediment to the practice of so-called "birth tourism" whereby non-resident foreign mothers visit the United States when pregnant in order to deliver their babies here, obtain birthright citizenship for their children, and then decamp to their foreign home. However, the Citizenship Clause's possible residency requirement has not been enforced, either with respect to the residence of a supposed birthright-citizen child or with respect to the residence of his/her parents.

[10] See, *e.g.,* "Hearing Before the Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary, U.S. House of Representatives", n. 6 herein, *ante (*Testimony of former Immigration Judge Mathew J. O'Brien , at p. 95-96). Suffice it to say that this observation is not new. *See generally*, Lino A. Graglia, "Birthright Citizenship For Children Of Illegal Aliens: An Irrational Public Policy", 14 Texas Rev. of L. and Politics 1 (Fall, 2009):

> "One of the most serious problems the country faces today, in the opinion of most Americans, is the problem of illegal immigration. The usual estimate is that nearly twelve million illegal aliens, mostly from Mexico, are now in the United States. This problem is so serious that it has driven the nation to the extreme solution of beginning construction of a fence or wall along the 2,000 miles of our southern border at the cost of billions of dollars. Popular opposition to illegal immigration is so strong that both major-party presidential candidates in the recent election found it necessary to affirm their opposition.
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> At the same time, there is an apparent paradox that American law, as currently understood, provides an enormous inducement to illegal immigration: namely, an automatic grant of American citizenship to the children of illegal immigrants born in this country. As a result, it has been estimated that over two-thirds of all births in Los Angeles public hospitals, more than one-half of all births in Los Angeles, and nearly 10% of all births in the nation in recent years were to illegal immigrant mothers. Many of these mothers frankly admitted that the reason they entered illegally was to give birth to an American citizen.
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> ….It is difficult to imagine a more irrational and self-defeating legal system than one which makes unauthorized entry into this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry."

[11] See, *e.g.,* Terrence McCoy & Marina Dias, "This 2-year-old American girl was 'deported' with her undocumented parents", *The Washington Post* (May 29, 2025).

[12] Indeed, it is a policy value which has been expressly recognized in Federal law. See, *e.g.,* 8 U.S.C. 1227 (a)(E)(iii) (providing that the Attorney General may, "in his discretion, *for humanitarian purposes to achieve family unity*", waive the application of the provisions of Section 1227 which define when a lawful alien who has permanent residency status in the U.S. may be deported because his status has been revoked". [emphasis supplied]).

[13] The benefits to a child residing in America who, for whatever reason, is separated from his/her parents now include all manner of entitlements under a plethora of federal and state social welfare programs (such as free or subsidized medical care, free or subsidized food, free or subsidized housing, free or subsidized public education, etc., etc.). Although some of these programs are conditioned upon the child being an American citizen, most of them are admittedly open to non-citizen children. See, *e.g.,* "Hearing Before the Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary, U.S. House of Representatives", n. 6 herein, *ante* (Opening remarks of Chairman/Representative Chip Roy at p. 3).

On the other hand, automatic U.S. birthright citizenship is not necessarily an unmitigated blessing. In fact, for some, it is a millstone around their necks. Virginia La Torre Jeker, "Accidental Americans Learning They Are Citizens May Face a Tax Dilemma", *Forbes* (April 9, 2024), https://www.forbes.com/sites/virginialatorrejeker/2024/04/09/beyond-borders-the-surprising-tax-dilemma-of-accidental-americans/.

[14] Polly J. Price, "Stateless in the United States: Current Reality and a Future Prediction", 46 Vanderbilt J. of Transnational Law 443 (2013) (Abstract) ("Statelessness exists in the United States – a fact that should be of concern to advocates of strict immigration control as well as those who

favor a more welcoming policy. The predominant reasons for statelessness include the presence of individuals who are unable to prove their nationality and the failure of their countries of origin to recognize them as citizens.")

[15] *Ibid (* "Migrants with unclear nationality, already a problem for the United States, obstruct efforts to control immigration by the deportation of unauthorized aliens. These existing problems of national identity will increase exponentially if birthright citizenship in the United States is amended to exclude the children of undocumented aliens. Contrary to common assumptions, proposed changes to U.S. citizenship law would exacerbate statelessness into the next generation when no fallback nationality is available.")

[16] It is undeniable that a validation of President Trump's Executive Order restricting American birthright citizenship to the children of U.S. citizens and lawful alien residents would create some administrative issues in its implementation. "Hearing Before the Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary, U.S. House of Representatives", n. 6 herein, *ante* (Testimony of Prof. Amanda Frost, at p. 111-112). Although I personally believe that the Federal bureaucrats who would be assigned the task of resolving those issues in the event that the legal validity of Trump's Executive Order were sustained, it would not be productive at this time for me to attempt to take a deep hypothetical dive into the varying administrative changes that might be necessary or appropriate to implement the new regime.