

FEDERAL POLICY RESPONSES TO THE SUPREME COURT'S BIRTHRIGHT CITIZENSHIP DECISION

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HIGHLIGHTS:

- The Supreme Court's decision in *Trump v. Barbara* misinterprets the Fourteenth Amendment, preserving an ahistorical and increasingly problematic *status quo* on birthright citizenship. It should be constitutionally or jurisprudentially undone.
- In the interim, both Congress and the executive branch have a variety of policy options at their disposal that can help mitigate *Barbara*'s impact. These policies focus primarily on reducing the ability of illegal and temporarily present lawful aliens to give birth on U.S. soil and eliminating incentives for them to do so.
- Congress can statutorily limit birthright citizenship in certain U.S. territories to exclude the children of illegal or temporarily present lawful aliens.

I. INTRODUCTION

On the last day of its 2025–2026 term, the U.S. Supreme Court issued a judgment in *Trump v. Barbara*,¹ striking down President Donald Trump's January 20, 2025, Executive Order that directed relevant federal agencies to issue citizenship documents to U.S.-born children only when one parent was either a U.S. citizen or lawful permanent resident. In doing so, the Court cemented the nation to a policy of near-universal birthright citizenship for all persons born on U.S. soil, irrespective of their parents' immigration status at the time of their birth.

Although *Barbara* in one respect merely solidified a longstanding *status quo*, it was a *status quo* that, especially in recent decades, has proved increasingly dangerous to a variety of national interests.² It remains to be seen whether *Trump v. Barbara* will ultimately be undone, either by a future majority of the Court overturning it, as happened to *Roe v. Wade*, or by a constitutional amendment explicitly recognizing that the U.S.-born children of illegal or non-immigrant aliens have no claim to U.S. citizenship as their birthright. In the interim (or, pessimistically, in the absence of these

¹ 609 U.S. ___, 146 S. Ct. 2438 (2026).

² See Amy Swearer, *Interpreting the Citizenship Clause Within the Context of Contemporaneous Political Debates on Alien Conscription and Expatriation*, 2 TEX. A&M JLCG 73 (2025); Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 TEX. REV. L. & POL. 135 (2019); Brief Amicus Curiae of Former National Security Official Joshua Steinman in Support of Petitioners, *Trump v. Barbara*, 609 U.S. ___, 146 S. Ct. 2438 (2025) (No. 25-365).

developments), the federal government has a few options available to it to minimize the Court's (erroneous, in our view) recognition of near-universal birthright citizenship.

While Congressional action would be the preferred mechanism for ameliorating *Barbara's* harmful effects, there are a series of steps that the executive branch can unilaterally take to do the same. Some of these proposals may, admittedly, prove problematic in terms of political optics and public sentiment. They would nonetheless effectively minimize the number of illegal and temporarily present lawful aliens who give birth in this country to children who must be considered U.S. citizens despite their lack of significant lawful connection to this nation.

These policies include, among other things, restricting the entrance into the United States through the visa process of women who are pregnant, including tourists, students, authorized foreign employees of domestic companies, and the wives of foreign embassy personnel or female staffers who are not extended full diplomatic immunity by the State Department, which under past policy allows their children to be considered U.S. citizens if they are born on our soil. Women in these categories who become pregnant while in the United States could have their visas automatically and immediately canceled so that they must return to their homeland for the birth of their children.

Additionally, steps could be taken to induce the self-deportation of pregnant aliens who are here illegally, such as restricting their ability to open bank accounts or obtain housing to ensure that they have a strong incentive to return to their native lands for the birth of their children.

II. BREAKING DOWN *TRUMP V. BARBARA*

Chief Justice John Roberts authored the majority opinion in *Barbara*, which four justices—Sonia Sotomayor, Elena Kagan, Amy Coney Barrett, and Ketanji Brown Jackson—joined in full. The majority interpreted the Fourteenth Amendment's Citizenship Clause to “mirror the common law’s criteria for citizenship,” and thus held that children born in our country to aliens, whether present lawfully or unlawfully in the United States, are citizens at birth.³ Justice Brett Kavanaugh concurred in the judgment but disagreed with the majority's conclusion that the Fourteenth Amendment establishes birthright citizenship for the children covered by the executive order.⁴ He argued instead that the executive order contravene federal law, which could be changed by Congress.⁵

Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch wrote dissents criticizing the majority opinion, particularly the inaccuracy of the historical record as expounded

³ *Barbara*, 146 S. Ct. at 2449–50.

⁴ *Id.* at 2469 (Kavanaugh, J., concurring).

⁵ *Id.*

by Roberts. Thomas, joined by Gorsuch in the principal dissent, argued that the “Court has repurposed the Fourteenth Amendment to protect its own set of preferred rights that the Reconstruction Congress never contemplated and that cannot find support in the text” in a majority opinion that will not “stand the test of time.”⁶ Alito, meanwhile, wrote that “[e]very step” of the historical narrative outlined by Roberts is “incorrect” and the “Fourteenth Amendment does not include the rule the Court now imposes on the country.”⁷ “The Court,” he added, “has made a mistake that will seriously affect the country’s future.”⁸

There are two ways this decision can be overridden. One is through a constitutional amendment that would clarify that the Citizenship Clause does not include the children of aliens, lawful or unlawful, including those temporarily or permanently in the United States. Constitutional amendments are, however, extremely difficult to pass. Only 27 amendments have ever been ratified, the last in 1992. The most common method of amending the Constitution requires both houses of Congress to pass the proposed amendment by a two-thirds supermajority vote, and then three-quarters of the states must ratify it.⁹ Article V of the Constitution does have a second method of proposing a constitutional amendment—a constitutional convention that is called by two-thirds of the states—but such a convention has never been convened since the ratification of the Constitution, and not one of the 27 amendments was passed through this method.

The second possibility would be that the Court itself comes to understand that its opinion was incorrect and overturns its own decision at some point in the future. This would most realistically occur through changes to the Court’s personnel, like a new justice replacing any of the five justices who voted with the majority on the amendment issue. A new case could then be brought once again raising the issue and arguing that *Trump v. Barbara* was wrongly decided and should be overturned. The Court does occasionally overturn its precedents, but usually only after many years and several challenges.

That leaves the responsibility for minimizing *Barbara*’s “grotesque results,” as Alito describes them, to Congress and the Executive Branch.¹⁰ As Alito warns, while aliens “who wish to immigrate lawfully must sometimes wait for many years, a child born here to a birth tourist is automatically a citizen” and it provides “a powerful incentive to enter or remain in this country illegally.”¹¹ Additionally, as Alito noted, it raises serious national security concerns:

⁶ *Id.* at 2524 (Thomas, J., dissenting).

⁷ *Id.* at 2545 (Alito, J., dissenting).

⁸ *Id.*

⁹ U.S. Const. art. V.

¹⁰ *Barbara*, 146 S. Ct. at 2544 (Alito, J., dissenting).

¹¹ *Id.* at 2545.

Suppose that a person's only connection to this country is that he was born here to a mother who was present just long enough to give birth and then quickly returned to her native country. Suppose that country is a strategic adversary or enemy of the United States. Suppose the child never visited the United States while growing up and was inculcated with hatred of this country. According to the Court, that person is a citizen of the United States. He can enter and leave the country as he pleases. He can travel the world on a United States passport. Even if he plots to harm this country, he cannot be deprived of his status as a citizen, at least under current precedent.¹²

This constitutional fight is far from over and there remains every possibility of vindication in the medium and long-term future. That does not mean, however, that Congress and the executive branch must helplessly accept every detrimental effect of *Barbara* until it is overturned.

III. POSSIBLE FEDERAL POLICY RESPONSES TO *BARBARA*

The most effective long-term solution for undoing *Barbara* would obviously be a constitutional amendment explicitly reserving birthright citizenship for the U.S.-born children of citizen or lawful permanent resident parents, or a future Supreme Court decision overturning *Barbara* as wrongly decided. In the interim, however, Congress and the executive branch could focus on legislative and administrative responses that ensure the government interprets and applies *Barbara* in the narrowest possible way and that, to the greatest extent possible, prevent or disincentivize aliens from giving birth on U.S. soil. The federal government can implement policies designed to do just that with respect to several classes of aliens, including those present in the United States as diplomatic staff employed by foreign governments, those who arrive under nonimmigrant visas as “temporary sojourners,” and those who enter or remain in the United States unlawfully.

A. Aliens Who Are Lawfully Present in the United States on Diplomatic Visas

The *Barbara* majority improperly centered the Fourteenth Amendment's Citizenship Clause in common law principles derived directly from feudalism. In doing so, however, the Court explicitly affirmed that the Fourteenth Amendment nonetheless incorporates the common law's narrow exceptions to birthright citizenship, including the children of at least some foreign officials.¹³ The breadth of this diplomatic exception remains an open question. The *Barbara* majority accepted the existence of the diplomatic exception to birthright citizenship but did not define its exact parameters.

¹² *Id.* (citing *Vance v. Terrazas*, 444 U.S. 252, 259–60 (1980)).

¹³ *Id.* at 2449–50, 2456 (majority opinion).

Federal regulations apply the diplomatic exception when a child is born on U.S. soil to a “foreign diplomatic officer accredited to the United States.”¹⁴ The State Department maintains a specific list of such accredited diplomatic officers, traditionally called the Blue List, whose U.S.-born children are not considered U.S. citizens in light of the common law exception.¹⁵ It narrowly interprets the diplomatic exception to include only a small subset of foreign officials, limited primarily to ambassadors, ministers, chargés d'affaires, counselors, secretaries and attachés.¹⁶

At the same time, the State Department maintains a much longer list, traditionally called the White List, of diplomatic staff who are not considered “foreign diplomatic officers,” despite the fact that the “majority of these individuals enjoy certain diplomatic immunities” and all arrive in the United States on diplomatic visas.¹⁷ The most recently published Blue List contains the names of several thousand individuals (both diplomatic personnel and their spouses), an order of magnitude lower than the estimated total number of aliens typically present in the United States on diplomatic visas in recent years.¹⁸

President Trump issued an executive order on August 6, 2026, attempting to extinguish these separate policies. The order states that the federal government will not recognize the citizenship of individuals born in this country when neither parent is a citizen and any of the following situations apply¹⁹:

- (a) Either parent is an enemy alien, which is defined to include members of terrorist organizations;
- (b) Either parent is a foreign government employee, which includes ambassadors, persons employed by a foreign embassy or consulate who

¹⁴ 8 C.F.R. § 101.3(a)(1) (2026).

¹⁵ 8 C.F.R. § 101.3(a)(2) (2026). The official name of the list is the State Department Diplomatic List.

¹⁶ *Id.*

¹⁷ 8 C.F.R. § 101.3(b) (2026). For an overview of the three different types of diplomatic visas, see *Visas for Diplomats and Foreign Government Officials*, U.S. DEP'T OF STATE (last visited Aug. 12, 2026), <https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visas-diplomats.html>. All A-1 and A-2 visa holders—included among which are all categories of diplomatic officials on the White List—are, by definition, “persons traveling to the United States on behalf of [their] national government to engage solely in official activities for that government.” *Id.* See also explanation of levels of diplomatic immunity *infra*, note 26.

¹⁸ Compare U.S. DEP'T OF STATE, DIPLOMATIC LIST (Fall 2020), <https://2017-2021.state.gov/wp-content/uploads/2020/10/Fall-2020-Diplomatic-List1.pdf> with BRYAN BAKER, OFF. HOMELAND SEC. STAT., POPULATION ESTIMATES FOR NON-IMMIGRANTS RESIDING IN THE UNITED STATES: FISCAL YEARS 2019 TO 2024 Table 1 (Aug. 25, 2025), <https://ohss.dhs.gov/topics/immigration/non-immigrant/population-estimates/fy24-non-immigrant-pop-est>.

¹⁹ One potential problem this order might face in legal challenges is its insistence that at least one parent be a citizen, in contrast with the original order on birthright citizenship which required only that at least one parent be either a citizen or lawful permanent resident. All but one of the Supreme Court justices in *Barbara* who ultimately agreed with the government on the constitutional question employed arguments regarding domicile or paramount allegiance that would likely include birthright citizenship for permanent resident aliens.

- are nationals of that foreign country, persons employed by a foreign government in an official capacity, and persons employed by an international organization with international-organization immunity (such as the United Nations);
- (c) Either parent engaged in a commercial transaction to purchase or access birthright citizenship (including with a surrogate parent) or engaged in fraudulent activity to obtain citizenship; and
 - (d) The person is born in a territory of the U.S. where citizenship is not conferred by federal statute.²⁰

Since it is not at all clear that the Fourteenth Amendment, even as interpreted by *Barbara*, compels the United States to maintain the two separate policies the State Department implemented or to distinguish between levels of foreign diplomatic staff when it comes to the pregnancies of diplomatic staff, this executive order is likely constitutional and within the parameters of the *Barbara* decision. The majority opinion gestures towards diplomatic immunity and the fiction of extraterritoriality as potential bases for the exception, but never concretely adopts it or addresses the limits of its application.

As Justice Alito explained in his *Barbara* dissent, when the United States “waived its sovereign right to subject covered diplomats and their dependents to legal process,” it did so via statutes that implement treaty obligations and respect long-established norms of international law.²¹ The United States has concluded a number of bilateral agreements granting the privileges and immunities normally reserved only for diplomatic agents to all staff members of the respective embassy or consulate.²² At a minimum, then, in line with the executive order, the Blue List can be updated by the State Department to explicitly identify that all foreign embassies and consulates are covered, and clarify that all staff members are among those whose U.S.-born children are not to be considered citizens.

More broadly, an argument can be made that the common law's diplomatic exception historically was not understood to distinguish between levels of diplomatic service, at all. In *United States v. Wong Kim Ark* (1898), for example, the Court appeared to consider a central distinction to be that Wong's parents were not “employed in *any* diplomatic or official capacity” on behalf of a foreign government, and explained that

²⁰ Exec. Order No. 14418, 91 Fed. Reg. 51991 (Aug. 6, 2026).

²¹ *Barbara*, 146 S. Ct. at 2534 (Alito, J., dissenting).

²² *Privileges and Immunities*, U.S. DEP'T OF STATE, <https://2021-2025.state.gov/privileges-and-immunities/>. Specific examples of these bilateral agreements include Agreement Between the United States and China, U.S.–China, Jan. 5, 1981, Treaties and Other International Acts Series 13079, <https://2009-2017.state.gov/documents/organization/125324.pdf>; Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Socialist Republic of Albania Concerning the Re-Establishment of Diplomatic Relations, U.S.–Alb, March 15, 1991, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/intl-treaties/Bilateral-Consular-Conventions/Albanian-Treaty.html>.

Elk v. Wilkins (1884) “had no tendency to deny citizenship to the children born in the United States of foreign parents...not in the diplomatic service of a foreign country.”²³ The Court’s phrasing in both cases is consistent with the opinion of contemporary legal scholars who also understood that the jurisdictional immunity enjoyed by diplomatic agents “extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.”²⁴ And, again, all foreign national staff members on both the White and Blue lists are present in the United States on diplomatic visas issued for persons employed by a foreign government for diplomatic service.²⁵

Virtually all of them receive some level of immunity for their official acts on behalf of the foreign government, and none is completely immune from U.S. jurisdiction.²⁶ The State Department’s regulations can be changed to clarify that all persons present in the United States on diplomatic visas are extensions of the foreign government that employs them in furtherance of that government’s interest, and therefore any children born in the U.S. to the foreign employees of embassies and consulates fall within the diplomatic exception and are not U.S. citizens. That change need not affect the range or degree of diplomatic immunity provided to those same employees.

To the extent that any objections are raised that the diplomatic exception cannot be, or should not be, expanded beyond its existing boundaries, other potential paths exist to address the problem and limit the ability of all diplomatic staff and employees of foreign governments to give birth on U.S. soil. The State Department could condition

²³ *United States v. Wong Kim Ark*, 169 U.S. 649, 652, 654, 705 (1898); *id.* at 682. *See also id.* at 688 (reasoning that the Civil Rights Act of 1866 could not have been intended to “deny the right of citizenship to native-born children of foreign white parents not in the diplomatic service of their own country”).

²⁴ HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 394 (1864). Wheaton refers here to a “complete exemption from the local jurisdiction,” specifically invoking the diplomatic exemption from local birthright citizenship laws. *Id.* at 393. *See also* HENRY WAGNER HALLECK, *I HALLECK’S INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* 291–95 (1878) (similarly discussing how the exemption from local jurisdiction applies not just to the minister, but also “his family, his employes, [and] members of his legation”).

²⁵ *See Visas for Diplomats and Foreign Government Officials*, U.S. DEP’T OF STATE (last visited Aug. 17, 2026), <https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visas-diplomats.html>.

²⁶ DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL OFFICERS, U.S. DEP’T OF STATE OFF. OF FOREIGN MISSIONS (Aug. 2018), https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf [hereinafter DIPLOMATIC AND CONSULAR IMMUNITY]. Even persons with “diplomatic agent immunity,” despite their “personal inviolability,” are not completely outside the reach of U.S. legal jurisdiction. They may be civilly sued in limited circumstances, may under limited circumstances be detained by law enforcement, and may have their immunity waived by their government. Their family members, moreover, enjoy no immunity from civil and administrative jurisdiction for “matters pertaining to their professional or commercial activities” whenever they work in the United States. 2 FAM 232.1-1(c). At the same time, even the lowest level diplomatic support staff members enjoy some level of official acts immunity which severely limits the ability of the United States to exercise jurisdiction over them. Many diplomatic officers falling within the purview of the White List—such as administrative and technical staff of diplomatic missions, as well as their recognized family members—enjoy the same personal inviolability, immunity from criminal jurisdiction, and immunity from witness-related requirements as diplomatic agents on the Blue List. 2 FAM 232.1-2.

its acceptance of an ambassador's credentials on his or her agreement that no foreign national employed by the embassy will give birth on U.S. soil. The ambassador-designate should provide explicit assurances that, should any foreign national become pregnant while in the United States on a diplomatic visa associated with the embassy, the embassy will return the pregnant alien to her country of origin before the pregnancy is viable.

Ambassadors and diplomats who fail to ensure compliance with this agreement could be immediately expelled. In cases of repeated or widespread non-compliance, the State Department could cancel all diplomatic visas associated with the non-compliant embassy. Alternatively (or simultaneously), the State Department could condition its approval of diplomatic visas on the foreign national applicant's agreement not to give birth on U.S. soil or, if applicable, not to allow a qualifying spouse to give birth on U.S. soil. The State Department could enforce this condition by requiring diplomatic visa holders who become pregnant to notify relevant U.S. officials and provide concrete plans for leaving the United States before the point of viability. The State Department could automatically cancel the diplomatic visas of those who fail to comply with this requirement and promptly deport them.

Congress, meanwhile, could impose stricter statutory oversight and conditions on visa issuance for diplomatic staff in accordance with the policies outlined above, cementing them against changes by future administrations. It could, moreover, investigate the extent to which the executive branch complies with existing or future regulations regarding citizenship for the U.S.-born children of diplomats, as it is currently far from clear that the federal government always stringently enforces the diplomatic exception or takes care not to inadvertently treat as citizens those children born within its parameters.²⁷

²⁷ Examples abound of U.S.-born children of excluded diplomats nonetheless being treated as U.S. citizens for significant swaths of their lives, with their false citizenship claims often discovered only after high-profile incidents. See, e.g., Charlie Savage, *American-Born Woman Who Joined ISIS Is Not A Citizen, Judge Rules*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/us/hoda-muthana-isis-citizenship.html> (describing the case of Hoda Muthana, the U.S.-born daughter of a diplomat who was given a U.S. passport and citizenship documents, whose citizenship was successfully challenged by the Trump Administration only after Muthana dropped out of college to join a terrorist organization); John Wayne Ferguson, *Once Considered Stateless, U.S.-Born Houston Soldier Sworn in as Citizen*, HOUSTON CHRON. (March 30, 2023), <https://www.houstonchronicle.com/news/houston-texas/article/houston-soldier-stateless-becomes-citizen-17865261.php>. Significant evidence indicates that this may be much more of a systemic problem than many believe. See JON FEERE, CTR. IMMIGR. STUD., BIRTHRIGHT CITIZENSHIP FOR CHILDREN OF FOREIGN DIPLOMATS? (July 2011), <https://cis.org/sites/cis.org/files/articles/2011/birthright-diplomats.pdf>.

B. Aliens Who Are Lawfully Present in the United States on Non-immigrant Visas

Non-immigrant aliens are foreign nationals who have been authorized to enter the United States for limited periods of time, for specific purposes, and subject to specific conditions. Generally, this authorization comes in the form of a non-immigrant visa. Although there are many types of potential non-immigrant visas, by far the most commonly sought are those issued for pleasure or tourism purposes (B-2 visas), for business travel purposes (B-1 visas), for temporary workers (H visas), and for students (F visas).²⁸

Currently, few statutes or regulations expressly act to safeguard against the inherent risks of wantonly bestowing American citizenship on countless U.S.-born children of foreign nationals who lack any permanent ties to the nation, many of whom will ultimately be raised as loyal citizens of another sovereign. The federal regulation defining “pleasure” specifically clarifies that “a primary purpose of obtaining U.S. citizenship for a child by giving birth on U.S. soil” is not among the “legitimate activities of a recreational nature” that justify issuance of a B-2 visa.²⁹

Moreover, whenever a consular officer “has reason to believe” a B-2 visa applicant “will give birth during her stay in the United States,” the government presumes that the applicant’s primary purpose is, in fact, to inappropriately obtain U.S. citizenship for her child.³⁰ This presumption, however, is rebuttable. A pregnant alien can still take advantage of our now judicially mandated policy of universal birthright citizenship in several ways, including by hiding the fact of her pregnancy. She could persuade a consular officer that her expected due date falls outside the visa deadline for leaving the country and then simply overstay the visa, as hundreds of thousands of non-immigrant aliens do to varying lengths every year.³¹ Current regulations also cannot prevent non-immigrant aliens from asserting other legitimate business or pleasure purposes as the basis for securing a visa, then purposefully or inadvertently obtaining U.S. citizenship for a future child by getting pregnant and giving birth on U.S. soil during the duration of a lawful stay.³²

²⁸ U.S. DEP’T OF STATE, CLASSES OF NONIMMIGRANT ISSUED VISAS (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2020–2024, (last visited Aug. 15, 2026), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2024AnnualReport/Table%20XVA.pdf>.

²⁹ 22 C.F.R. 41.31(b)(2)(i) (2026).

³⁰ 22 C.F.R. 41.31(b)(2)(iii) (2026).

³¹ ANDORRA BRUNO, ET AL., CONG. RSCH. SERV., NON-IMMIGRANT OVERSTAYS: OVERVIEW AND POLICY ISSUES, (Nov. 21, 2023), <https://www.congress.gov/crs-product/R47848>.

³² This is a likely scenario for work and student visas, where extended years-long residence in the United States is not only common but anticipated, and where dependent visas are often simultaneously granted to spouses. In 2024, for example, 24,055 and 139,874 visas were granted to spouses or dependents of student and temporary work visa holders, respectively. CONG. RSCH. SERV., NON-IMMIGRANT AND IMMIGRANT VISA CATEGORIES: DATA BRIEF, (June 18, 2026), https://www.congress.gov/crs-external_products/R/PDF/R45938/R45938.11.pdf.

There is an array of options to address these problems. Section 212(f) of the Immigration and Nationality Act grants the President broad authority to suspend the entry of any class of aliens or to impose new restrictions on entry whenever he finds that their entry would be detrimental to the nation's interest.³³ At the most restrictive end of the spectrum, existing regulations could be modified to eliminate the discretion consular officers now have with respect to granting visas to pregnant aliens. These new regulations could mandate that consular officers deny visa applications to pregnant aliens whose unborn children would not otherwise be eligible for U.S. citizenship, and require Customs and Border Protection (CBP) agents to deny entry to all pregnant aliens who arrive at any port of entry.

A less restrictive (and perhaps more politically palatable) approach could require similar denials of entry or denials of visa applications for pregnant aliens whose unborn children would not otherwise be eligible for citizenship whenever they fail to provide evidence of concrete plans to leave the country prior to some specified point of gestation that practically eliminates the likelihood of their giving birth on U.S. soil.³⁴

The regulations governing all non-immigrant visas could also be revised to condition visa eligibility on an alien's agreement that neither the alien nor the alien's foreign national spouse will give birth in the United States during the visa's duration. Such an eligibility requirement might prove difficult to enforce, especially for visas authorizing extended lengths of stay in the United States, and children born to alien parents who violate this visa condition would still be considered U.S. citizens. Other severe consequences could nonetheless be imposed upon violators to encourage compliance with the visa condition, like deporting the parents and rendering them permanently ineligible for re-admission or citizenship.³⁵ The application process for visas could, for example, be changed to notify recipients (and, in the case of student

³³ 8 U.S.C. § 1182(f).

³⁴ Several considerations may come into play when deciding upon a reasonable pre-determined point of gestation by which pregnant aliens must have demonstrate concrete plans to leave the country. The baseline medical threshold for "viability" is often considered 24 weeks, although fewer than 3 percent of live births in the United States occur before the mother completes the 34th week of pregnancy. Michelle J.K. Osterman et al., *Births: Final Data for 2024*, 75 NAT. VITAL STATS. REP. 2, Table E (June 9, 2026), <https://www.cdc.gov/nchs/data/nvsr/nvsr75/nvsr75-02.pdf>. Health institutions in the United States generally recognize that air travel is safe for most pregnant women up until the 36th week of pregnancy but typically advise that pregnant women avoid traveling outside of a 300-mile radius during their third trimester (i.e., beginning at 28 weeks), which would include most international flights to and from the United States. *Special Considerations for Traveling While Pregnant*, JOHNS HOPKINS MEDICINE (last visited Aug. 17, 2026), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/traveling-while-pregnant-or-breastfeeding>. Several major airlines, moreover, require pregnant travelers to secure "fit-to-fly" documentation from a medical professional starting in the 28th week of pregnancy, while most heavily restrict or categorically prohibit travel for pregnant passengers around the 36th week. See Chris Hassan, *Flying While Pregnant—Your Guide to Airline Policies* [2026], UPGRADED POINTS (May 14, 2026), <https://upgradedpoints.com/travel/airlines/flying-while-pregnant-guide/>.

³⁵ One reasonable method of softening this policy might be to afford violators an opportunity to demonstrate that they intended to leave the country prior to the deadline but despite good faith efforts were prevented from doing so by extenuating emergency circumstances, and to subject such individuals to lesser degrees of sanction, as deemed appropriate.

or work visas, the sponsoring employer or institution) that visas will be automatically cancelled for an alien who gives birth on U.S. soil, or whose spouse gives birth on U.S. soil. The regulations could additionally clarify that aliens whose visas are revoked for violations of this condition become permanently inadmissible, thus eliminating their future ability to benefit from their child's citizenship status through the child's sponsorship of family-based immigration visas.

Millions of non-immigrant aliens also enter the United States every year under the U.S. Visa Waiver Program, which currently allows nationals of more than three dozen countries to bypass traditional visa requirements as long as they stay in the United States for no more than 90 days.³⁶ Eligibility for this program is determined through the Electronic System for Travel Authorization (ESTA), a web-based system operated by U.S. Customs and Border Protection. The waiver program should be modified to condition ESTA eligibility on the alien's agreement not to give birth in the United States. Aliens seeking ESTA applications should be required to affirm that they are not pregnant, or, if pregnant, they will not give birth on U.S. soil if allowed to enter the country. Moreover, ESTA applications of pregnant aliens could be denied unless the alien presents concrete documentation of plans to give birth outside of the United States.³⁷ Aliens who nonetheless violate these conditions and who give birth on U.S. soil could, as with those who violate visa conditions, be declared permanently inadmissible and ineligible for family-based immigration visas.

Finally, Congress could revoke the federal law that prevents employers from only giving hiring preferences to American citizens over legal aliens authorized to work in the U.S. "if the two individuals are equally qualified."³⁸ While employers should not be able to discriminate against authorized aliens in terms of salary, benefits, promotions, etc., once they have been hired, they should be able to always, under all circumstances, give preference to hiring American citizens. This is no different from the hiring preference provided to veterans of our armed forces in 5 U.S.C. § 2108 when applying for jobs with the federal government. All employers should be permitted to apply a similar preference to hiring citizens over foreign nationals regardless of a difference in their qualifications.

C. Aliens Who Are Unlawfully Present in the United States

As with other aliens, Congress and the executive branch could pursue policies designed to simultaneously reduce the practical ability of illegal aliens to give birth on U.S. soil and deter their desire to do so in the first place. Federal agencies could prioritize deportation and removal of illegal aliens who are pregnant to prevent them from giving birth to U.S. citizen children. If an illegal alien cannot be removed from the

³⁶ VISA WAIVER PROGRAM, U.S. DEP'T OF STATE (last visited Aug. 15, 2026), <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>.

³⁷ This evidence could include, at a minimum, already-purchased transportation out of the United States before the point of viability.

³⁸ 8 U.S.C. § 1324b.

United States in a timely manner due to a pending immigration hearing or any other administrative reasons, regulations could require that the alien be moved to one of the unincorporated U.S. territories where, as we explain below, Congress could revise applicable statutes to limit birthright citizenship.

Additionally, unlawfully present aliens who give birth in the country, along with their non-citizen family members, could be subject to automatic deportation and removal, and classified as permanently ineligible for re-entry into the United States.³⁹ Courts could be deprived of any jurisdiction to review such removals.⁴⁰ Methods of practical enforcement could include requiring that when a U.S. citizen applies to sponsor relatives on family-based immigrant visas, the citizen provide either proof of naturalization (nullifying concerns over how birthright citizenship was obtained) or proof that the sponsored relative was not unlawfully present in the United States at the time of the sponsoring citizen's birth on U.S. soil.

The executive branch could do everything in its power to both deter future illegal immigration and encourage existing populations of illegal aliens to self-deport by making it as difficult as possible for them to find work, travel, secure housing, engage in financial transactions, or otherwise live comfortably in the country whose immigration laws they insist on violating. This can include, for example, the following actions:

- Federal agencies like the Department of Homeland Security (DHS) and Department of Health and Human Services could ensure that no payments or grants are made to Non-Governmental Organizations (NGOs) that provide transport, housing, or any other benefit to persons unlawfully present in the United States.
- DHS could refuse to issue work permits to any illegal alien, including Deferred Action for Childhood Arrivals beneficiaries.⁴¹
- Executive branch agencies can eliminate illegal aliens' access to all federal benefits, including Obamacare.
- Banking regulators, including Treasury, the Federal Deposit Insurance Corporation, the Federal Reserve and the National Credit Union Administration,

³⁹ It may arguably be less desirable to authorize emergency or extenuating circumstance exceptions for pregnant illegal aliens in the same manner as might be reasonable for pregnant nonimmigrant aliens, as illegal aliens have no right to be present in the United States in the first place. Any extenuating emergency circumstances requiring a pregnant illegal alien to remain in the country through the birth of her child would be entirely the product of her own unlawful actions.

⁴⁰ The Supreme Court recently upheld such a provision in *Mullin v. Doe*, 609 U.S. ____ (2026), over the termination of Temporary Protected Status (TPS) for aliens from Syria and Haiti. The court ruled that the injunctions issued by lower courts preventing such terminations were improper because the immigration statute providing TPS authority specifically bars judicial review of decisions by the executive branch to grant, extend, or terminate TPS except for constitutional claims.

⁴¹ See *Dept' Homeland Security v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020).

can require any individual opening a bank account in banks and credit unions under their jurisdiction to provide proof of citizenship or lawful presence in the U.S. This includes amending regulations issued by the Bush Administration in 2001 under the PATRIOT Act that have “protected aliens here unlawfully” in the financial sector.⁴² On May 19, 2026, President Trump issued an executive order directing the relevant federal agencies to act in this regard.⁴³ These new regulations could also bar financial institutions from accepting the matricular consular identification card issued by the government of Mexico to illegal aliens in the United States.⁴⁴

- Banks as well as any other financial entities over which the federal government has jurisdiction could be prohibited from making wire transfers for illegal aliens. For foreign investors and others who are not present in the U.S., these rules would not apply and would not restrict their ability to invest and hold brokerage or other accounts in American banks.
- New regulations could condition approval for federal mortgage insurance for homes, multi-family apartments, or other facilities on the owners' verification of their status as U.S. citizens or aliens legally in the country, as well as their agreement not to lease or rent their properties to any individuals without requiring proof of citizenship or legal presence. Similar conditions could be applied to Section 8 housing assistance provided by HUD to low-income households. As President Trump outlined in his May executive order, financial institutions must be “attentive to the credit risks posed by the extension of mortgage and auto loans credit cards, and other consumer credit to the inadmissible and removable alien population.” Lending to such aliens “undermines the safety and soundness of the national banking systems.”⁴⁵
- The IRS can better ensure that tax refunds are not provided to aliens unlawfully present in the U.S. by cross-checking refunds through the E-Verify system maintained by DHS. The Social Security Administration could be directed to engage in the same verification process for anyone applying for a Social Security number or other Taxpayer Identification Number, which is essential to individuals seeking tax refunds. For those who claim this would be too onerous, it would simply be applying the same requirement to federal agencies that the federal government already applies to all employers and all Americans who want to be employed. Job applicants must provide proof of citizenship and identity as outlined in the federal I-9 “Employment Eligibility Verification” form.

⁴² ANDREW R. ARTHUR, CTR. FOR IMMIGR. STUD., WSJ: TRUMP II CONSIDERS REQUIRING BANKS TO COLLECT CITIZENSHIP INFO (Feb. 25, 2026), <https://cis.org/Arthur/WSJ-Trump-II-Considers-Requiring-Banks-Collect-Citizenship-Info>.

⁴³ Exec. Order No. 14406, 91 Fed. Reg. 30479 (May 19, 2026).

⁴⁴ *Id.* See also GEORGE FISHMAN, CTR. FOR IMMIGR. STUD., BIG BANKS AND THE U.S. TREASURY HAVE BEEN ENABLING ILLEGAL IMMIGRATION FOR TWO DECADES (May 20, 2026), <https://cis.org/Fishman/Big-Banks-and-US-Treasury-Have-Been-Enabling-Illegal-Immigration-Two-Decades-0>.

⁴⁵ Executive Order 14406, *supra* note 43.

To the extent that E-Verify does not provide an answer, those agencies could apply the provisions of the I-9 form to determine eligibility.

- The federal E-Verify system managed by the Department of Homeland Security that can be used by employers to verify that new hires are either U.S. citizens or aliens lawfully present with work permits could be made mandatory to prevent illegal aliens from obtaining employment.⁴⁶ To the extent that such a requirement does not pass Congress for political or other reason, state legislatures could pass legislation making mandatory use of E-Verify a requirement to do business in a state, with potential loss of a business license for knowingly employing unauthorized aliens. The U.S. Supreme Court held in 2011 that such a state requirement in Arizona was not preempted by federal immigration law.⁴⁷

D. Limiting Statutory Birthright Citizenship in the Unincorporated U.S. Territories

The United States maintains possession of thirteen unincorporated territories, five of which—Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa—are permanently inhabited. While the United States exerts sovereignty over these unincorporated territories, the Constitution does not fully apply within them.⁴⁸ Importantly, in a series of rulings known as the Insular Cases, the Supreme Court determined that the unincorporated territories do not form part of “the United States” within the meaning of the Constitution.⁴⁹ Consistent with the Court’s interpretation, the federal government has never considered persons born within the unincorporated territories to be U.S. citizens by virtue of the Fourteenth Amendment.⁵⁰

Congress has, however, statutorily extended citizenship to all permanently inhabited unincorporated territories except American Samoa.⁵¹ The language of these statutes regarding citizenship at birth closely mirrors that of the Fourteenth Amendment’s

⁴⁶ *About E-Verify*, U.S. DEP’T OF HOMELAND SEC., <https://www.e-verify.gov/about-e-verify> (last visited Aug. 18, 2026).

⁴⁷ *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011).

⁴⁸ *Downes v. Bidwell*, 182 U.S. 244 (1901); U.S. DEP’T OF JUST., JUST. MANUAL § 1–21.100 (2026), Michael Milov-Cordoba, *Territorial Courts, Constitutions, and Organic Acts, Explained*, STATE COURT REPORT (Updated May 15, 2026), <https://statecourtreport.org/our-work/analysis-opinion/territorial-courts-constitutions-and-organic-acts-explained>.

⁴⁹ See authorities cited *supra* note 48.

⁵⁰ See Dudley O. McGovney, *American Citizenship. Part II. Unincorporated Peoples and Peoples Incorporated with Less Than Full Privileges*, 11 COLUMBIA L. REV. 326 (1911); see sources *supra* note 48.

⁵¹ 8 U.S.C. §§ 1402, 1406, 1407; Pub. L. No. 94–241, 90 Stat. 266 (1976). Persons born in American Samoa are considered non-citizen U.S. nationals who owe permanent allegiance to the United States. 8 U.S.C. § 1408. As such, they may freely travel, work, and reside in any part of the United States, but must go through the standard naturalization process to receive U.S. citizenship. American Samoa’s unique situation is, in significant part, the result of American Samoans’ strong and enduring opposition to having U.S. citizenship imposed upon them. See *generally* Reply of the Honorable Eni F.H. Faleomavaega as *Amicus Curiae* in Support of Defendants, *Tuaua v. United States*, 951 F. Supp. 2d 88 (No. 12–1143).

Citizenship Clause, making U.S. citizens of all persons who are both born within the relevant territory and subject to the jurisdiction of the United States.

Longstanding federal policy has interpreted these statutes to bestow U.S. citizenship on virtually all children born within the relevant unincorporated territories, irrespective of the immigration status of the child's parents. This has rendered the unincorporated territories just as susceptible to the problems of universal birthright citizenship as the mainland United States. Puerto Rico, for example, is home to tens of thousands of non-immigrant and illegally present aliens, whose Puerto Rican-born children must be considered U.S. citizens pursuant to a federal statute.⁵²

Similarly, evidence strongly indicates that the Northern Mariana Islands are a particularly alluring location for birth tourists due to a special Congressionally authorized visa waiver program that allows Chinese nationals to visit the territory for up to 14 days without the need for a traditional tourist visa.⁵³ Although recent regulatory changes appear to have lowered the number of foreign nationals giving birth in the Northern Mariana Islands and other territories, these changes can easily be reversed by future administrations and still reward parents who successfully evade these policies with an irrevocable grant of citizenship for their child.⁵⁴

Because citizenship in these territories is effectuated by statute rather than by the Fourteenth Amendment, the statutes can and should be amended to limit U.S. citizenship only to those persons born in the territories where at least one parent is a U.S. citizen or lawful permanent resident. Such a statutory change would cement—and significantly supplement—the provision in President Trump's August 6 executive order, which states that citizenship is not recognized of a person who is "born in a territory or territorial waters of the United States where citizenship is not conferred by Federal statute."

⁵² Recent estimates suggest, for example, that 30,000 Dominican nationals illegally live in Puerto Rico. Alexandra C. Rivera-Gonzalez, *The Other US Border: Health Insurance Coverage Among Latino Immigrants in Puerto Rico*, 40 HEALTH AFF (MILLWOOD) 1117 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8359689/>.

⁵³ See *GB Temporary Visitor to Guam*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 24, 2025), <https://www.uscis.gov/working-in-the-united-states/temporary-visitors-for-business/gb-temporary-visitor-to-guam>; Jon Emont, *Saipan: The Island Where Chinese Mothers Deliver American Babies*, WALL ST. J. (Dec. 22, 2017), <https://www.congress.gov/119/meeting/house/117827/documents/HHRG-119-JU01-20250122-SD005-U5.pdf>.

⁵⁴ *Implementation of the Commonwealth of the Northern Mariana Islands (CNMI) Economic Vitality & Security Travel Authorization Program (EVS-TAP)*, U.S. CUSTOMS AND BORDER PROTECTION (Jan. 6, 2025), <https://www.federalregister.gov/documents/2025/01/06/2024-31326/implementation-of-the-commonwealth-of-the-northern-mariana-islands-cnmi-economic-vitality-and>.

IV. CONCLUSION

The most important and effective way of preventing aliens from claiming birthright citizenship is *preventing* their birth in the United States. To the greatest extent possible, federal laws, regulations, and policies could eliminate the ability of aliens, legal or illegal, to give birth in the U.S. and to personally benefit from giving birth to children automatically granted birthright citizenship. While some might argue that inquiring into the potential pregnancy of aliens is an invasion of privacy, this issue is too important to ignore and the financial, national security, and legal consequences of recognizing birthright citizenship are so dire that they outweigh any privacy interests. In any event, the executive branch has complete authority to check into, and thoroughly investigate, the background of aliens before deciding whether to admit them.

These measures, if combined with steps that can be taken by cooperative state governments—such as denying illegal aliens driver's licenses and car license tags (thus limiting their transportation options) and all other types of permits and licenses—would provide an incentive for aliens to self-deport and stop abusing the generous hospitality of the U.S. This would help minimize the damage done by the Supreme Court's decision in *Trump v. Barbara*.