CAUGHT BETWEEN SOVEREIGNS: FEDERAL AGENCIES, STATES, AND BIRTHRIGHT CITIZENS

Angela R. Remus*

The Fourteenth Amendment enshrines a commitment to birthright citizenship that extends to almost anyone born in the United States. While the federal government is the arbiter of questions of citizenship, the states are indispensable partners: State-issued birth certificates have long been the preeminent form of proof of birthright citizenship. However, federal agencies' treatment of delayed birth certificates—which are usually held by individuals marginalized by race, class, and geography—depart from the usual federal acceptance of states' determinations of birth facts. Delayed birth certificates, including those issued pursuant to state court orders grounded in judicial factfinding, may be rejected by federal agencies like the Department of State and Social Security Administration as proof of U.S. citizenship. In exploring the relationship between federal agencies and state institutions with respect to the recognition of birthright citizenship, this Article highlights both the human consequences of the current arrangement, as well as the inability of existing scholarship on cooperative federalism and immigration federalism to account for this unique manifestation of federal-state collaboration. It argues that when federal and state governments reach different conclusions about a person's entitlement to birthright citizenship, they create an untenable conflict between sovereigns that leaves unknown numbers of de jure *U.S. citizens experiencing the* de facto *denial of citizenship. The Article concludes with recommendations for mitigating this conflicting state of affairs.*

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* Attorney-Adviser, U.S. Department of State; Lecturer-in-Law, Boston University School of Law. The author is writing in her personal capacity; the views contained herein do not necessarily reflect the views of the U.S. Department of State or the U.S. government. The author holds a J.D. from Yale Law School, an M.Sc. from the University of Oxford, and a B.A. from the University of Rochester. The author would like to thank Professor Nicholas Parrillo for his enthusiasm and support for this Article.

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INTRODUCTION

"[T]he fundamental principle of citizenship by birth . . . was reaffirmed in the most explicit and comprehensive terms" by the Fourteenth Amendment, which enshrined a commitment to birthright citizenship—citizenship based on birth in state territory—that definitively extended even to the children of noncitizens born in the United States.[1] Yet, based on the best data available, as many

1. United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898) (confirming that birthright citizenship entitlement of the Fourteenth Amendment extends to the children of noncitizen Chinese parents). States that follow the *jus soli* ("law of the soil") approach grant citizenship to individuals born in state territory, while states that follow the *jus sanguinis* ("law of the blood") approach grant citizenship based on heritage, i.e., the citizenship of parents, grandparents, etc. *See* 8 FAM 301.1-1 (summarizing *jus soli* and *jus sanguinis* citizenship acquisition principles). *See generally* THE OXFORD HANDBOOK OF CITIZENSHIP (Ayelet Shachar et al. eds., 2017). In the modern era, most states, including the United States, employ some combination of *jus soli* and *jus sanguinis* principles to bestow citizenship. *See, e.g.*, Maarten Vink, *Comparing Citizenship Regimes*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 224-25 (Ayelet Shachar et al. eds., 2017). While today we think of U.S. citizenship laws as principally relevant in

as seven percent of U.S. citizens do not have access to documents that prove their citizenship.[2] While some of these citizens may have naturalized or obtained citizenship through their parents, this Article is concerned with birthright citizens who lack federally recognized birth certificates. Birth certificates issued by states are one of the most fundamental forms of proof of birthright citizenship, yet some U.S. citizens do not possess one.[3] Still other putative U.S. citizens possess a state-issued birth certificate that federal agencies and federal courts deem inadequate to prove birthright citizenship. It is the treatment of these birth certificates with which this Article is concerned.

More specifically, this Article explores federal agency nondeference to state-issued delayed birth certificates—including federal nondeference to the determinations of state agencies and even state court judges. The U.S. Department of State and Social Security Administration (SSA) rely heavily on state-issued birth certificates to issue passports and social security cards, and they do so almost unquestioningly when they are issued contemporaneously with in-hospital deliveries. Their inquiry into applicants' eligibility is much more searching when a delayed birth certificate is presented, involving what can amount to a *de novo* review of the underlying evidence—and they may reach a conclusion at odds with that reached by the state.

As a consequence, putative U.S. citizens with delayed birth certificates are caught between sovereigns: They are recognized by their state as birthright citizens, but denied the benefits of birthright citizenship by the federal government—a reality that limits the states' ability to give effect to their own birth certificates. The fact that federal and state governments can reach different conclusions about a person's entitlement to birthright citizenship—as demonstrated by federal agencies' ability to decline to recognize state-issued birth certificates—creates an untenable conflict between sovereigns and leaves unknown

the field of immigration, *jus soli* citizenship was, of course, long withheld from enslaved people in the United States. The Fourteenth Amendment was intended "to establish the citizenship of free negroes, . . . and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States." *Wong Kim Ark*, 169 U.S. at 676. In fact, the Fourteenth Amendment's very existence is attributable in part to long-lasting black advocacy for birthright citizenship dating to the 1830s. *See generally* MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018).

2. *See* BRENNAN CTR. FOR JUST., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2 (2006), https://perma.cc/RY5H-E7XP. The seven percent includes both people who were born in the United States and do not have proof of citizenship, like a birth certificate, as well as those who naturalized and do not have proof of citizenship, such as naturalization certificates or a U.S. passport. *Id.* Although this data is from 2006, it is arguably the best available. *See* LAURA BINGHAM, OPEN SOC'Y JUST. INITIATIVE, UNMAKING CITIZENS: INSECURE CITIZENSHIP IN THE UNITED STATES 146 (2019), https://perma.cc/9QZX-FRZL.

3. *See* BRENNAN CTR. FOR JUST., *supra* note 2, at 2 (noting that some U.S. citizens lack a birth certificate).

numbers of *de jure* U.S. citizens experiencing *de facto* denial of citizenship.[4]

This reality is significant for both human and scholarly reasons. Children born to noncitizen parents, children born in rural areas or border regions, and children whose parents were marginalized by virtue of race or poverty are particularly likely to face the conundrums presented by delayed birth certificates.[5] People caught in the limbo wrought by federal and state governments' disagreements over the facts of a putative U.S. citizen's birth may experience serious challenges in pursuing basic life projects—such as voting, obtaining employment, securing public benefits, or acquiring a driver's license—and may even be at risk of deportation to another country.[6] Their presence in the United States is akin to that of an undocumented immigrant, as opposed to a U.S. citizen, with all the challenges that such (non)status entails.

Beyond the ample human consequences caused when putative citizens are caught between sovereigns, the conflict between federal and state sovereigns

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4. This assertion assumes that federal agencies are sometimes incorrect. As later analysis will make clear, I do not dispute that the federal government—and the Department of State in particular—is the ultimate arbiter of questions of citizenship. However, the fact that federal courts sometimes make decisions *contrary* to federal agencies and *aligned* with state institutions suggests that there are some number of cases in which *de jure* U.S. citizens are *de facto* denied citizenship. *See infra* Part I.C.2.

5. *See* Elisabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 IMMIGR. BRIEFINGS, June 2017, at 1, 2; Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 767-69 (2020) (discussing examples of out-of-hospital births and resulting citizenship disputes); Milan Kumar, Note, *American Indians and the Right to Vote: Why the Courts Are Not Enough*, 61 B.C. L. REV. 1111, 1134 n.178 (2020) (discussing the challenges faced by Native Americans seeking delayed birth certificates in order to access voting rights); Matthew J. McGuane, Crawford v. Marion County Election Board*: The Disenfranchised Must Wait*, 64 U. MIA. L. REV. 713, 719 n.61 (2010) (noting that many African Americans born in the early- to mid-1900s were unable to obtain birth certificates at the time of birth due to poverty and discriminatory hospital admissions); Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 722 n.118 (2019) (discussing the challenges faced by Native Americans in accessing photo identification and providing an example of a Native American woman who struggled to obtain a delayed birth certificates); BINGHAM, *supra* note 2, at 115-47 (describing "state-sanctioned profiling based on race, gender, and class," particularly in the Rio Grande Valley and among Yemeni-Americans, resulting in denial and revocation of documentation of U.S. citizenship); Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing their Citizenship into Question*, WASH. POST (Sept. 13, 2018), https://perma.cc/G9BS-MMZM (describing a pattern of denials of passports for children born in midwife-assisted deliveries in border regions); Tina Vásquez, *A Mexican American Educator Fights Back Against the State Department's Refusal to Accept his Citizenship*, PRISM (Mar. 29, 2021), https://perma.cc/R7DV-K9A4 (describing denial of passport to putative U.S. citizen of Mexican heritage who was one of eight children born to an undocumented mother); *see also* TARA WESTOVER, EDUCATED (2018) (describing how four of seven children in her family, born in rural Utah to Mormon parents, did not have birth certificates, and how she herself sought a delayed birth certificate); Debbie Weingarten, Opinion, *My Children Were Denied Passports Because They Were Delivered by a Midwife*, N.Y. TIMES (Sept. 3, 2018), https://perma.cc/9YDC-T2CA (noting in a caption one immigrant's choice to give birth at home for fear of entering a hospital and being deported).

6. *See infra* Part I.B.

should also matter to scholars of federalism and administrative law, and to scholars of cooperative federalism and immigration federalism in particular. The federal-state relationship involved in the recognition of birthright citizenship—and the failures in coordination that this relationship involves—sit squarely in the interstices of existing literature. As I argue below, the burgeoning literature on cooperative federalism lacks a model to accommodate the scenario presented by federal and state collaboration in the issuance and recognition of delayed birth certificates; the overwhelming focus of the cooperative federalism literature is on federal and state regulatory coordination.[7] Administrative law scholarship on adjudications, a closer fit for the decision-making at issue in the birth-certificate context, has only recently focused on inter-agency coordination between and among *federal* agencies, without addressing overlap in federal and state processes.[8] Likewise, the literature on immigration federalism neglects exploration of the interdependence of federal and state governments when recognizing and giving effect to delayed birth certificates.

The Article addresses this underexplored issue in three parts. In Part I, I explain the origins of the birth certificate and its early treatment in federal and state law. I then describe contemporary state birth certificate issuance processes and federal reliance on state-issued birth certificates. This Part highlights the unintentional manner in which the current federal-state relationship on the recognition and issuance of birth certificates has come to pass. This overview explains, in part, why states are indispensable partners in an area that might intuitively seem the exclusive purview of the federal government—the determination of citizenship by birth in the territory.

In Part II, the Article situates birth certificate issuance in existing scholarship on cooperative federalism, immigration federalism, and administrative law, highlighting the extent to which existing theories fail to address federal-state coordination on delayed birth certificate issuance and recognition. In so doing, I hope to enhance the scholarship by surfacing yet another way in which federal and state governments interact and highlighting areas that are ripe for further conceptualization. Specifically, I explore inter-agency coordination (and lack thereof) between the federal and state levels. This paradigm is absent from cooperative federalism and administrative law literature, which has been largely limited to federal-state *regulatory* coordination and *federal* inter-agency adjudication. Likewise, scholars of immigration federalism have left unexplored federal-state collaboration on birth certificate issuance and recognition, even as this scholarship does provide a justification for federal predominance.

Finally, in Part III, the Article suggests reforms that balance putative U.S. citizens' need for uniform federal and state recognition of their citizenship, national imperatives that justify federal predominance in matters of citizenship, and the importance of giving effect to states' fact-finding within their borders.

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7. *See infra* notes 119-121 and accompanying text.
8. *See infra* notes 140 and accompanying text.

I. THE BIRTH CERTIFICATE IN FEDERAL AND STATE LAW

The prevalent use of birth certificates postdates the Fourteenth Amendment's recognition of birthright citizenship by about fifty years, and was motivated by anti-child labor advocacy. Today, in contrast, justifications for federal reevaluation of certain types of state-issued birth certificates hinge principally on considerations related to immigration and the risk, perceived and actual, that their issuance poses for national security. This Part explores the history of state-issued birth certificates and their contemporary treatment at the federal and state levels.

A. The Advent of the State-issued Birth Certificate and Federal Reliance on It

The advent of the birth certificate and its pervasive use were motivated not by national security or immigration considerations, but rather by child labor reformers' efforts to combat child labor. The reformers' efforts and the changes they wrought in the early 1900s "transform[ed] the birth certificate into the epistemological foundation of individual identity"[9]—a foundation that persists to this day.

In the early 1900s, between fifty and seventy-five percent of births went unregistered.[10] It was not until 1933 that ninety percent of live births were registered across all forty-eight states then comprising the United States.[11] For child labor reformers, the birth certificate was an essential tool to combat child labor. With the enactment of anti-child labor laws, proving age had become critically important.[12] Initially, employers and government officials relied on parents' affidavits attesting to a child's age—a process that was rife with abuse.[13] Birth certificates offered an alternative.[14] States like New York acquiesced to reformers' demands and implemented statutes creating a preference for state-issued birth certificates over all other documents, including baptismal records and parental affidavits.[15] As one historian described the change, the newfound reliance on government-issued birth certificates "represented a shift in epistemological authority" by making "age an objective fact" and giving "state-produced documents the status of truth."[16]

The activities of the Children's Bureau, a federal agency established in 1912, provide early examples of federal reliance on state birth registration practices

9. Susan J. Pearson, *"Age Ought to Be a Fact": The Campaign Against Child Labor and the Rise of the Birth Certificate*, 101 J. AM. HIST. 1144, 1145 (2015).

10. *Id.* at 1145.

11. *Id.* at 1161.

12. *Id.* at 1144-47.

13. *Id.* at 1153.

14. *Id.* at 1152-55.

15. Pearson*, supra* note 9*,* at 1153.

16. *Id.*

and the federal government's collaboration with—and direction of—states. Motivated in part by child labor reformers' concerns, Congress and President William Howard Taft passed an act establishing the Children's Bureau in 1912.[17] The Bureau was tasked with "investigat[ing] and report[ing] . . . upon all matters pertaining to the welfare of children and child life," including infant mortality, the birth rate, and the employment of children.[18] The 1916 Keating-Owen Act, designed to prohibit interstate commerce in products manufactured using child labor, required employers to maintain "an employment certificate or other similar paper as to the age of the child."[19] The Children's Bureau, in collaboration with the Department of Labor, the National Child Labor Committee, and state factory inspection departments, established federal standards for the issuance of birth certificates and assigned first preference to state-issued birth certificates and secondary preference to baptismal certificates, immigration records, medical records, school records, and other written records contemporaneous with the birth.[20] When states' standards aligned with the federal government's, states were allowed to issue federal employment certificates, but in states that had inadequate evidentiary standards, the Children's Bureau directly issued the certificates.[21]

While the Supreme Court subsequently ruled in *Hammer v. Dagenhart* that the Keating-Owen Act was an unconstitutional violation of the Commerce Clause, government-issued documents proving age remained advocates' ideal.[22] New federal statutes aimed at regulating labor continued to rely on state- and federally-issued certificates as proof of age. The 1938 Fair Labor Standards Act, for example, called for employers to "have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age."[23] The Children's Bureau, in turn, "determined which states could issue age certificates and helped those that did not conform to federal standards establish a document-based protocol."[24]

Federal-state collaboration and the rise of the birth certificate's prominence were also motivated by health imperatives and the collection of vital statistics. The Children's Bureau was active in promoting birth registration for these purposes. The agency was assigned responsibility, for example, for administering the 1921 Sheppard-Towner Act for the Promotion of the Welfare and Hygiene

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17. CHILD.'S BUREAU, *Children's Bureau: History*, U.S. DEP'T HEALTH & HUM. SERVS. (July 1, 2021), https://perma.cc/TG3X-ADNA; Act of Apr. 9, 1912, Pub. L. No. 62-116, 37 Stat. 79 (1912) (codified as amended at 42 U.S.C. §§ 191-194).

18. Act of Apr. 9, 1912, *supra* note 17.

19. Keating-Owen Child Labor Act, § 5, 39 Stat. 675, 675-76 (1916), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918).

20. Pearson, *supra* note 9, at 1153-54.

21. *Id.* at 1154.

22. 247 U.S. 251 (1918); *see also* Pearson, *supra* note 9, at 1154.

23. Fair Labor Standards Act, Pub. L. No. 75-718, § 3(l), 52 Stat. 1060, 1061 (1938) (codified as amended at 29 U.S.C. §§ 201-219).

24. Pearson, *supra* note 9, at 1154.

of Maternity and Infancy,[25] and many states used some of the associated funding to improve their birth registration practices.[26] Concurrently, the Census Bureau increased its reliance on birth certificates to "tabulate national data about population growth, the birth rate, and infant mortality."[27] Because the Census Bureau would only include statistics from states that "could demonstrate that they registered 90 percent of live births," the Census Bureau also created incentives for states to improve birth registration practices.[28] In 1946, the federal government transferred responsibility for collecting and publishing national-level vital statistics from the Census Bureau to the Office of Vital Statistics.[29] Today, that function resides with the successor to the Office of Vital Statistics, the National Center for Health Statistics, situated within the Centers for Disease Control and Prevention in the Department of Health & Human Services.[30]

The functions for which the birth certificate originally was developed and used, such as eligibility for employment and the collection of vital statistics, continue to be important today, as the remainder of this Part explains. The next section outlines contemporary state practice in the issuance of delayed birth certificates before turning to contemporary federal reliance on state-issued birth certificates.

B. Contemporary State Practice in the Issuance of Delayed Birth Certificates

Delayed birth certificates are issued pursuant to a process that is markedly distinct from the process for obtaining a birth certificate contemporaneously with birth. To adequately highlight the differences, a brief summary of the typical case is warranted. In the vast majority of births, a baby is born in a hospital, their birth information is transmitted by hospital staff to the relevant state vital statistics agency within hours of the birth, and a birth certificate compliant with federal standards will be issued.[31] Concurrently, the SSA will be notified and will issue a social security number and card, consistent with the "enumeration at birth" process described below.[32] Although the vast majority of U.S. citizens receive a birth certificate contemporaneously with birth, all fifty states have codified statutory and regulatory provisions designed to address delayed birth registrations.[33]

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25. Sheppard-Towner Act, Pub. L. No. 67-97, § 3, 42 Stat. 224, 224-26 (1921) (repealed 1929).

26. *See* Pearson, *supra* note 9, at 1160.

27. *Id.* at 1158.

28. *Id.* at 1157-58.

29. AM. BAR ASS'N, *Birth Certificates* (Nov. 20, 2018), https://perma.cc/9S4T-2EPW.

30. *Id.*

31. *Id.*

32. *See infra* notes 79-81 and accompanying text.

33. *See, e.g.*, FLA. STATS. §§ 382.019-.0195 (2023) (describing state agency and court processes for obtaining a delayed birth certificate in Florida); 410 ILL. COMP. STAT. §§ 535/14, /15 (2021) (describing state agency and court processes for obtaining a delayed birth certificate in Illinois); OKLA. STAT. tit. 63, §§ 1-313 to -315 (2019) (describing state agency and court

Their provisions, while not identical, follow a uniform pattern involving state agency review of applications and the possibility of state court review of a denial.[34]

While delayed birth certificates have been issued and disputed in states as varied as Florida, Illinois, Oklahoma, and Washington, Texas offers an emblematic example of state practice in the issuance of delayed birth certificates and federal treatment of those certificates.[35] While a comprehensive survey of the rates at which various states issue delayed birth certificates is beyond the scope of this Article, available evidence suggests that states with large, rural, and immigrant populations—like Texas—may be the most likely to receive requests from putative U.S. citizens for delayed birth certificates.[36] Rural populations may experience greater difficulty in reaching hospitals and, consequently, residents may give birth outside them, eliminating their ability to rely on the hospital infrastructure to facilitate the request for a state-issued birth certificate.[37] Immigrants may experience linguistic or financial barriers to interacting with state institutions and, in a politicized climate, undocumented immigrants may even fear contact with institutions like hospitals due to the risk their lack of immigration status poses.[38] Further, federal agencies like the Department of State, which operates as a federal gatekeeper of citizenship, may apply particular scrutiny to border states with large immigrant populations, given concerns that the birth certificate issuance process can be manipulated to fraudulently claim citizenship.[39]

Federal litigation under section 1503 of Title VIII of the U.S. Code, which provides a cause of action for putative U.S. citizens denied the benefits of citizenship, and which is analyzed in detail in Part I.C.2, offers another indication of the geographic distribution of putative U.S. citizens' claims to birthright citizenship. Perhaps unsurprisingly, my survey of published case law suggests that

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processes for obtaining a delayed birth certificate in Oklahoma); WASH. REV. CODE §§ 70.58A.120 to .130 (2019) (describing state agency and court processes for obtaining a delayed birth certificate in Washington).

34. *See* TEX. HEALTH & SAFETY CODE ANN. § 192.027 (2015).

35. *See, e.g.*, Mathin v. Kerry, 782 F.3d 804, 806-07 (7th Cir. 2015) (involving delayed birth certificate issued by state of Illinois); Lopez v. U.S. Dep't of State, No. 11-CV-1069, 2013 WL 121804, at *11 (D. Or. Jan. 9, 2013) (involving delayed birth certificate issued by the state of Washington, though the trial ultimately occurred in Oregon); Torres v. Pompeo, No. 14-CV-552, 2019 WL 573422, at *1 (N.D. Okla. Feb. 12, 2019) (involving delayed birth certificate issued by state of Oklahoma); Arthur-Price v. Blinken, No. 21 C 3475, 2022 WL 1004415, at *1 (N.D. Ill. Apr. 4, 2022) (involving delayed birth certificate issued by state of California, though the trial ultimately occurred in Illinois); Acosta v. United States, No. C14-420, 2015 WL 1965318, at *1-11 (W.D. Wash. Apr. 29, 2015) (involving delayed birth certificate issued by state of Colorado).

36. *See supra* note 103 and accompanying text (collecting sources providing anecdotal accounts of putative U.S. citizens born outside of hospitals and seeking delayed birth certificates who have difficulty accessing federal documentation of citizenship).

37. *See id.*

38. *See, e.g.*, Weingarten, *supra* note 5.

39. *See* BINGHAM, *supra* note 2, at 124-29.

Texas is by far the state with the most federal litigation over federal agencies' rejections of state-issued delayed birth certificates.[40]

It is to Texas's legislation and regulations to which I now turn. Sections 192.021 to 192.029 of the Texas Health and Safety Code and associated regulations govern the issuance of delayed birth certificates.[41] The statute distinguishes between types of delayed birth records based on the number of years after birth that the record is requested. Delayed birth certificates for children born less than one year prior to the request can be filed with the "local registrar," while longer delays require filing with the "state registrar."[42] If the application to the registrar is denied, "the person may file a petition in the statutory probate court or [state] district court in the county in which the birth occurred, or in the statutory probate court or [state] district court in the county in which the person resides, for an order establishing a record of the person's date of birth, place of birth, and parentage."[43] Such hearings are non-adversarial and provide the putative U.S. citizen an opportunity to present documentary evidence of their birth; present other evidence tending to show residence in the United States around the period of birth, such as rental agreements or school and medical records; present witnesses to give testimony in support of the applicant; and testify in support of their own claim.[44] Upon review of the evidence, and after making credibility determinations, the state judge may order the issuance of the birth certificate, which is then communicated to the state registrar, who is required to issue the delayed birth certificate based on facts outlined in the order.[45]

Despite the procedure involved in obtaining a delayed birth certificate, and as described *infra*, federal agencies are free to disregard state agencies' and state courts' factfinding.[46] When such disagreement occurs, the utility of a delayed birth certificate is diminished at the state level. The predominance of the federal government in the context of immigration regulation and federal-state cooperation on important public benefit programs result in states' limited ability to give effect to their own state-issued birth certificates, absent federal agencies' recognition of that document.

For example, since 1976, states have relied on the social security number to

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40. *See infra* Part I.C.2.

41. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 192.021-.029; 25 TEX. ADMIN. CODE §§ 181.60-.65 (2013).

42. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 192.021-.024.

43. *See id.* at § 192.027. Recourse to probate court is longstanding. A 1939 opinion of the Texas Attorney General concluded that "proceedings for delayed registration of births and death were to be accorded status and dignity of probate proceedings and a record of the proceedings were to be kept in a docket and the minutes of the court." Tex. Att'y Gen. Op. No. GM-1203 (1939), https://perma.cc/MUS3-UU5W.

44. *See* TEX. HEALTH & SAFETY CODE ANN. § 192.027(d).

45. *See id.* at § 192.027(f); *see also* Tex. Att'y Gen. Op. No. GM-1079 (1939), https://perma.cc/M4R8-648Q (holding that a state registrar cannot legally refuse to accept the order of the state probate judge accompanying a certificate of birth or death).

46. *See infra* Part I.C.1.

administer state tax collection and motor vehicle registrations.[47] With the passage of the REAL ID Act in 2005, the federal government precluded states from issuing driver's licenses that serve as "REAL IDs" to state citizens without social security cards.[48] Most states will not issue a driver's license to a resident presenting a state-issued birth certificate unless they can also produce a social security card.[49] Social security numbers are also necessary to access a host of other public benefits that states administer but for which they rely on federal funds, such as Temporary Assistance to Needy Families, the Supplemental Nutrition Assistance Program, and Medicaid, among others.[50]

These requirements create a catch-22 for recipients of delayed birth certificates. The issuance of the delayed birth certificate indicates that the state considers the person a U.S. citizen, which suggests that they should be eligible for a social security number or U.S. passport and, in turn, a state driver's license and access to public benefits. But, as the next section highlights, federal agencies like the SSA and Department of State make independent determinations of applicants' eligibility for social security numbers and passports, and these agencies may refuse to issue the very documents that enable individuals to access state benefits. Putative U.S. citizens may therefore find themselves in the impossible position of being unable to access benefits to which the state believes they are entitled, while simultaneously being unable to prove status as a birthright citizen to the federal government. It is to the federal government's treatment of delayed birth certificates, both at federal agencies and federal courts, that I now turn.

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47. Carolyn Puckett, *The Story of the Social Security Number*, SOCIAL SECURITY BULL., July 2009, at 55, 68, https://perma.cc/V27U-ASBJ.

48. REAL ID Act, Pub. L. No. 109-13, § 202(c)(1)(C), 119 Stat. 311, 313 (2005) (codified as note to 49 U.S.C. § 30301).

49. *Cf.*, *State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration Status* 1-5, NAT'L IMMIGR. L. CTR., https://perma.cc/2A9C-DWGG (last updated Sept. 2021) (identifying those states that *will* provide a state driver's license—but not a REAL ID—to residents without a social security number). In Texas, for example, "an applicant for a driver license or ID card *must* present his or her Social Security card or other acceptable documentation containing the individual's full social security number." *Social Security Number (SSN)*, TEX. DEP'T PUB. SAFETY (emphasis added), https://perma.cc/YUR5-W2AH (archived May 28, 2023).

50. *See, e.g.*, 7 C.F.R. § 273.6(a) (requiring SSN for Supplemental Nutrition Assistance Program). The 1996 enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) is responsible for requiring social security cards to access many public benefits. *See* Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes,* 16 U. PA. J. CONST. L. 1417, 1424-25 (2014). The statute made states' access to federal funding for certain benefit programs contingent on restricting noncitizens' access to these benefits. *See id.* at 1428. Because a U.S. citizen without documents proving such citizenship is in a position that is akin to an undocumented immigrant, a robust literature on undocumented immigrants' access to benefits is instructive. *See generally id.*; Jacob Press, *Poor Law: The Deficit Reduction Act's Citizenship Documentation Requirement for Medicaid Eligibility*, 8 J. CONST. L. 1033 (2006); Medha D. Makhlouf, *Laboratories of Exclusion: Medicaid, Federalism & Immigrants*, 95 N.Y.U. L. REV. 1680 (2020); Steven Sacco, *In Defense of the Eligible Undocumented New Yorker's State Constitutional Right to Public Benefits*, 40 N.Y.U. REV. L. & SOC. CHANGE 181 (2016).

C. Contemporary Federal Reliance on State-issued Birth Certificates

In the modern era, birth certificates remain critically important proof of birth facts, and they arguably have grown to be even more significant proof of individual identity than they were in the 1930s.[51] Whereas the birth certificate originated for health and welfare purposes, it is now impossible to separate birth certificate issuance from its relationship to immigration and citizenship law.

Unlike many other nation-states, the United States does not maintain a nationally centralized repository of birth registrations, nor is there a national identity card.[52] Accordingly, federal agencies rely heavily on state reporting of birth registrations.[53]

Because the United States confers citizenship on a *jus soli* basis—granting citizenship to almost every child born in U.S. territory[54]—a birth certificate is critical proof of entitlement to the benefits of citizenship. Accordingly, for U.S. citizens who obtained citizenship through birth in U.S. territory, state-issued birth certificates play a critical role in establishing national identity and entitlement to the benefits of citizenship.[55] While states are not legally entitled to make citizenship determinations as such, their responsibility for issuing documentation to birthright citizens makes the states indispensable partners in the citizenship project.[56]

Put simply, the federal government relies on *state*-issued birth certificates as proof of *U.S*. citizenship. State-issued birth certificates are used, for example, to support applications to the SSA for social security numbers and cards and to the

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51. *See supra* notes 9, 16, and accompanying text (describing the epistemological shift wrought by the advent of the birth certificate).

52. An astonishing 14,000 different birth certificate documents are in circulation, a product of changes to the birth certificate over time and variations between the fifty states, Puerto Rico, and the District of Columbia. *See* AM. BAR ASS'N, *supra* note 29; OFF. OF THE INSPECTOR GEN., BIRTH CERTIFICATE FRAUD, at ii (2000), https://perma.cc/D43L-QX4Z [hereinafter OIG].

53. *See infra* Part I.C.1.

54. *See* U.S. CONST. amend. XIV; Immigration and Nationality Act (INA) § 301(a), 8 U.S.C. § 1401(a). The United States takes a broad approach to citizenship based on birth in the territory. Its sweep includes citizenship for the children of undocumented immigrants and the children of people who enter the country on tourist visas. *See* INA § 301(a), 8 U.S.C. § 1401(a). Only narrow exceptions exist, such as for the children of diplomats, who are deemed not to be subject to U.S. jurisdiction. *See id.*; 8 C.F.R. § 101.3.

55. U.S. citizens who obtained their citizenship through naturalization, in contrast, will possess a federal certificate of naturalization. *See* INA §§ 311-322, 8 U.S.C §§ 1422-1433; 8 C.F.R. § 338.1. U.S. citizens who obtain citizenship through derivation (citizenship through the naturalization of a parent) or acquisition abroad (citizenship through birth to a qualifying U.S.-citizen parent abroad) may apply for a federal certificate of citizenship. *See* INA §§ 320, 322, 8 U.S.C §§ 1431, 1432; 8 C.F.R. § 341.

56. The stature of the birth certificate as proof of citizenship is evident from the fact that, until 1952, state-issued U.S. birth certificates were legally sufficient proof of U.S. citizenship to cross the U.S.-Mexico border. Brodyaga, *supra* note 5, at 1-2. According to at least one account, they were accepted in practice until as late as 2009. *See id.*

U.S. Department of State for passports. For this reason, birth certificates are considered "breeder documents": documents that allow the bearer to obtain other documents and benefits.[57] As described above, those federally-issued documents are also used to access a host of other benefits, such as driver's licenses that qualify as "REAL IDs," social security benefits, loans, and other public benefits, like Temporary Assistance to Needy Families, the Supplemental Nutrition Assistance Program, and Medicaid, among other programs.[58] Social security cards and U.S. passports are also used, of course, to prove eligibility to work[59] and to travel freely between the United States and other countries.[60]

The desirability of U.S. citizenship and the resulting risk, perceived and actual, that noncitizens might abuse states' birth registration systems to obtain federal recognition of citizenship is a longstanding concern. A 1978 opinion from the Board of Immigration Appeals, for example, cautioned that a delayed birth certificate, alone, even in the absence of contradictory evidence, was not sufficient to summarily establish citizenship, noting, "the opportunity for fraud is much greater with a delayed birth certificate."[61] In 1996, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) directed federal agencies to promulgate regulations and set standards that state birth certificates needed to meet for acceptance by federal agencies.[62] In 2000, the Office of the Inspector General authored a report "provid[ing] an update on the nature and extent of birth certificate fraud," highlighting problems like inadequate document security features that made counterfeit certificates possible; the ease with which certified birth certificate copies could be obtained by people other than the person to whom it belonged; the misuse of birth certificates in immigration proceedings; delays in matching birth records with death records; and the possibility for fraud

57. *See, e.g.*, MICHAEL J. SIRI & DANIEL L. CORK, COMM. ON NAT'L STATS., NAT'L RSCH. COUNCIL, VITAL STATISTICS: SUMMARY OF A WORKSHOP 37 (2009) ("[Birth certificates] are the basis for many other important documents and legal statuses."); STEVEN SCHWARTZ, *The U.S. Vital Statistics System: The Role of State and Local Health Departments*, *in* VITAL STATISTICS: SUMMARY OF A WORKSHOP 77, 82 (2009) ("Birth certificates are breeder documents. Thus, birth certificates are used by the SSA to generate Social Security numbers, by the U.S. Department of State as evidence for passports, and by state [DMVs] to issue driver's licenses."); OIG, *supra* note 52, at 3.

58. *See* OIG, *supra* note 52, at 3 (highlighting public benefits that a birth certificate is required to access). A "REAL ID" is one that meets the requirements of the REAL ID Act of 2005, which includes a social security number and proof of lawful immigration status. *See* REAL ID Act § 202; *see also supra* note 50 and accompanying text.

59. *See* 8 U.S.C. § 1324a(b)(1)(B)-(C).

60. *See* 22 C.F.R. § 53.1 ("It is unlawful for a citizen of the United States, unless excepted under 22 C.F.R. § 53.2, to enter or depart, or attempt to enter or depart, the United States, without a valid U.S. passport.").

61. Matter of Serna, 16 I. & N. 643, 645 (B.I.A. 1978).

62. Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) § 656, 5 U.S.C. § 301.

in the issuance of delayed birth certificates and birth certificates for out-of-hospital, midwife-assisted deliveries, among other problems.[63]

The events of 9/11 precipitated further concern about the fraudulent acquisition of state-issued birth certificates.[64] The 9/11 Commission recommended that "[t]he federal government should set standards for the issuance of birth certificates,"[65] in part due to evidence that several of the terrorists involved in the attacks "had obtained passports and identity documents using fraudulently obtained birth certificates."[66] Just six months after the release of the 9/11 Commission's report, the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 was passed.[67] The statute called for HHS, in consultation with the Department of Homeland Security, the SSA, state vital statistics offices, and "other appropriate Federal agencies," to promulgate federal regulations governing state issuance of birth certificates.[68] The regulations were supposed to address the "requirements for proof and verification of identity as a condition of issuance of a birth certificate" and "standards for the processing of birth certificate applications to prevent fraud," among other requirements.[69] HHS, however, never promulgated the required joint regulations.[70]

Federal agencies have instead each adopted their own regulations to govern their reliance on state-issued birth certificates, leading to a patchwork approach to the treatment of delayed birth certificates. In the subsequent section, Part I.C.1, three key agencies' regulatory treatment of delayed birth certificates—HHS, SSA, and the Department of State—are each addressed in turn.

The following section, Part I.C.2, addresses the role of federal courts in reviewing agencies' denials of putative U.S. citizens' applications for passports. These cases, for which a cause of action exists under 8 U.S.C. § 1503, enable federal courts to serve as the final arbiter when state and federal agencies have reached different conclusions regarding a putative citizen's entitlement to federal recognition as a U.S. citizen. Together, these sections highlight both the federal

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63. *See* OIG, *supra* note 52, at 2, 7-19.

64. Acknowledgment of birth certificate fraud predates 9/11. *See* OIG, *supra* note 52.

65. THE 9/11 COMMISSION REPORT 390 (2004), https://perma.cc/4XRL-TQSZ.

66. SIRI & CORK, *supra* note 57, at 38.

67. Intelligence Reform and Terrorism Prevention Act (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified in scattered sections of U.S.C.).

68. IRTPA § 7211(b)(4), codified as a note to 5 U.S.C § 301.

69. IRTPA § 7211(b)(3), codified as a note to 5 U.S.C § 301.

70. A search of the Federal Register for all documents published since January 1, 2004, that have the words "birth," "certificate," and "live" within fifty words of each other yielded just two results, both relating to the issuance of IDs by the Department of Defense. Boolean searches of the Code of Federal Regulations also did not yield results. At least one secondary source confirms the conclusion that the required regulations were never promulgated. *See Minimum Standards for Birth Certificates, in* GUIDE TO HOMELAND SECURITY § 6:234, at n.4, Westlaw HSASUM (database updated June 2022) ("No regulations, proposed or final, establishing minimum standards [for birth certificates] have been issued to date."). I would like to thank John Nann, Senior Librarian for Research, Instruction & Collection Development and Lecturer in Legal Research, for his exceptional assistance in confirming this claim.

government's reliance on state-issued birth certificates and the federal government's authority to reevaluate and reject the states' determinations of birth facts.

1. Federal Agencies

Health and Human Services

The fact that HHS was named in IRTPA as the lead agency for promulgating regulations on birth certificate issuance is potentially surprising, given the national security interests that motivated the statute. In fact, HHS's "primary policy interest . . . is to advance a long-standing public health interest in more rapid statistical information that is collected through the registration of births and deaths."[71] But, as the history of the birth certificate demonstrates, federal reliance on the birth certificate for reasons of health and vital statistics long predated its salience in national security issues, and HHS has long been the primary federal standard-setter for state birth certificates. Thus, when 9/11 evidenced the need for further regulation of birth certificate issuance for national security reasons, HHS was named as the lead agency and other federal agencies, including those with more obvious national-security-oriented equities, were not.

Today, the federal National Center for Health Statistics (NCHS) at the Centers for Disease Control and Prevention, within HHS, continues to depend on state vital statistics offices to carry out its functions. Under the Public Health Service Act, states are required to report "satisfactory data in necessary detail and form" on births within the state to the NCHS.[72] To ensure the adequacy of states' data, HHS issues guidance about the information states should include on their birth certificates and has developed a Model State Vital Statistics Act and a model certificate of live birth.[73] The NCHS also works with the National Association for Public Health Statistics and Information Systems, which represents state vital statistics offices, to improve timeliness and data quality.[74]

While the tabulation of national vital statistics is undoubtedly an important function, birth certificates are important for many other reasons, chief among them their role in establishing national citizenship—and many other agencies rely on them for that purpose.

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71. Nat'l Ctr. for Health Stats., *The U.S. Vital Statistics System: A National Perspective*, *in* Vital Statistics: Summary of a Workshop 87, 96 (2009).

72. Health Services Research and Evaluation and Health Statistics Act of 1974, Pub. L. No. 93-353, § 306(h), 88 Stat. 362, 365 (amending Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified at 42 U.S.C. § 242k(h)).

73. Am. Bar Ass'n, *supra* note 29.

74. Nat'l Ctr. for Health Stats., *National Vital Statistics System Improvements*, U.S. Ctrs. for Disease Control and Prevention (2021), https://perma.cc/Z5LR-K8XH.

Social Security Administration

Understanding the significance of the state-issued birth certificate to the SSA depends in part on an understanding of the SSA's history. The SSA plays an integral—and arguably accidental—role in establishing national identity. The social security number was initially created in 1936 to "keep track of the earnings history of U.S. workers for Social Security entitlement and benefit computation purposes," but "it has come to be used as a nearly universal identifier."[75] Today, they are only issued to U.S. citizens and noncitizens with a lawful immigration status.[76]

The importance of this identifier ballooned in 1986 with the passage of the Immigration Reform and Control Act of 1986, which made it illegal for employers to hire or retain employees who lacked immigration status and associated work authorization.[77] The state-issued birth certificate and social security card and number, then and especially now, became one of the ways that employers could verify eligibility for work.[78] Subsequently, the SSA implemented the "enumeration at birth" process, first piloted in 1987.[79] Through this process, the parents of a newborn child request the SSA to issue a social security number as part of the state's birth registration process.[80] By 1991, forty-five states participated in the program, and, today, ninety percent of parents in all fifty states, Puerto Rico, and the District of Columbia rely on the "enumeration at birth" process to obtain their child's social security number.[81]

The passage of the IRTPA in the wake of 9/11 also impacted SSA practices. In addition to calling for improvements to the enumeration at birth process, the statute called on the SSA to implement "security enhancements" on the issuance of social security cards, including "establish[ing] minimum standards for the verification of documents or records submitted by an individual to establish eligibility for an original or replacement social security card" issued through a process *other than* enumeration at birth.[82] It also "require[d] independent verification of any birth record submitted by an individual to establish eligibility for a social security account number" outside of the enumeration at birth process.[83] In so legislating, Congress called for the SSA to promulgate regulations to account for applicants with delayed birth certificates.

The regulations now in effect at the SSA for the issuance of social security

75. Puckett, *supra* note 47, at 55.

76. 20 C.F.R. § 422.104. Note, however, that if a noncitizen obtains a social security number and card while in a lawful immigration status, they will retain that number and card if their immigration status lapses.

77. *See* 8 U.S.C. § 1324(a).

78. *See* 8 U.S.C. § 1324a(b)(1)(B)-(C).

79. Puckett, *supra* note 47, at 55, 64.

80. *See id.*; 20 C.F.R. § 422.103(c)(2).

81. Puckett, *supra* note 47, at 64.

82. IRTPA § 7213(a)(1)(B), codified as a note to 42 U.S.C. § 405.

83. IRTPA § 7213(a)(1)(C), codified as a note to 42 U.S.C. § 405.

numbers and associated cards require "convincing evidence of [] age, U.S. citizenship or alien status, and true identity."[84] Evidence of age can be shown by "a birth certificate, a religious record showing age or date of birth, a hospital record of birth, or a passport," but such evidence is divided into two tiers: "[P]referred evidence" consists of a "birth certificate or hospital birth record recorded *before age 5*."[85] The second-tier category, "other evidence of age," includes: "an original family bible or family record; school records; census records; a statement signed by the physician or midwife who was present at your birth; insurance policies; a marriage record; a passport; an employment record; *a delayed birth certificate*, [sic] your child's birth certificate; or an immigration or naturalization record."[86] Further, an applicant applying outside the enumeration at birth process requires a document other than a birth certificate to establish identity and citizenship, like a passport or state driver's license (which, for reasons described in Part I.B, might be impossible to obtain without a social security number).[87]

These evidentiary categories apply to the grant of old age, survivors', and disability benefits as well. While preferred evidence is generally sufficient to meet the threshold of "convincing evidence" required to grant these benefits, "other evidence" is subject to a more searching evaluation.[88] SSA regulations explain the criteria the SSA considers when determining whether other evidence is convincing, including whether:

> (a) Information contained in the evidence was given by a person in a position to know the facts; (b) There was any reason to give false information when the evidence was created; (c) Information contained in the evidence was given under oath, or with witnesses present, or with the knowledge there was a penalty for giving false information; (d) The evidence was created at the time the event took place or shortly thereafter; (e) The evidence has been altered or has any erasures on it; and (f) Information contained in the evidence agrees with other available evidence, including our records.[89]

As these regulations suggest, the SSA may engage in a robust *re*evaluation of the evidence underlying state-issued delayed birth certificates. Notwithstanding the states' investigations into birth facts prior to the issuance of the delayed certificate—including in-person administrative hearings or hearings before state court judges, complete with review of documentary evidence and assessment of

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84. 20 C.F.R. § 422.107.

85. 20 C.F.R. § 404.716(a) (emphasis added). This description of "preferred" and "other" evidence appears in Part 404 of the regulations, which covers old age, survivors' and disability insurance benefits. Note, however, that this section is cross-referenced in 20 C.F.R. § 422.107, which addresses the issuance of social security numbers and cards.

86. 20 C.F.R. § 404.716(b) (emphasis added). Unlike the Department of State regulations, the SSA lists a delayed birth certificate as one of the forms of secondary documents the SSA will consider.

87. *See* 20 C.F.R. §§ 422.107(c)-(d).

88. 20 C.F.R. § 404.709.

89. 20 C.F.R. § 404.708.

witnesses' credibility—the SSA is free to make its own determination of the applicant's eligibility for a social security number, card, and benefits, as federal courts have repeatedly confirmed.[90]

Department of State

The Department of State's treatment of state-issued birth certificates is exceptionally important, given the agency's role as the arbiter of passport issuance—a preeminent form of proof of citizenship and, arguably, the only single document that a birthright citizen can use to prove both identity and citizenship.[91]

Passports are issued on the basis of "documentary evidence that [the applicant] is a U.S. citizen."[92] "Primary evidence of birth in the United States" consists of birth certificates that "show the full name of the applicant, the applicant's place and date of birth, [and] the full name of the parent(s), [are] signed by the official custodian of birth records, bear the seal of the issuing office, and show a filing date within one year of the date of birth."[93] When such a birth certificate is unavailable or does not meet these requirements, the State Department will accept "secondary evidence of birth," including "hospital birth certificates, baptismal certificates, medical and school records, certificates of circumcision, other documentary evidence created shortly after birth but generally not more than five years after birth, and/or affidavits of persons having personal knowledge of the facts of the birth."[94] Such secondary evidence, however, must "establish *to the satisfaction of the Department* that [the applicant] was born in the United States."[95] Further, "[t]he Department may require an applicant to provide *any evidence that it deems necessary* to establish that he or she is a U.S. citizen," including evidence additional to those forms of evidence outlined as primary and secondary forms of evidence.[96] Unlike the SSA's list of factors that influence whether evidence is "convincing," the Department's "satisfaction" and "necessity" standards afford for the ample exercise of agency discretion. On one advocate's reading, this language grants the Department "seemingly unbounded discretion to demand any documents that it chooses and to deny a passport application if the demand is not met."[97]

Upon denial of a passport application, the applicant may be provided with

90. *See infra* notes 102, 109.

91. *See* 22 U.S.C. § 211a ("The Secretary of State may grant and issue passports."); 22 C.F.R. § 51.2 (noting that "[a] passport may be issued only to a U.S. national"); Exec. Order No. 11,295, 31 Fed. Reg. 10603 (Aug. 5, 1966) ("The Secretary of State is hereby designated and empowered . . . to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports.").

92. 22 C.F.R. § 51.41.

93. 22 C.F.R. § 51.42(a).

94. 22 C.F.R. § 51.42(b).

95. 22 C.F.R. § 51.42(b) (emphasis added).

96. 22 C.F.R. § 51.45 (emphasis added).

97. Brodyaga, *supra* note 5, at 8.

the opportunity to request a hearing at the agency, where the agency must find by a preponderance of the evidence that the applicant is a U.S. citizen.[98] The hearing is overseen by a Department employee serving as a hearing officer, in which both the Department and the applicant are represented by attorneys and at which both the agency and the applicant may present witnesses testifying under penalty of perjury, offer evidence, and make arguments.[99]

Whether on the basis of the paper record or the hearing, the agency is free to disregard the determinations made by state agencies or state judges regarding the documentary evidence, witness testimony, and credibility determinations drawn. This is so even if the agency has heard no live testimony and made its decision on a paper record alone, and is true irrespective of the procedure involved at the state level. As federal courts have unequivocally held, and as the next section highlights, the Department of State is free to make its own, independent determination regarding the facts of the applicant's birth and disregard the findings of the state agency or state court that led to the issuance of the birth certificate.[100]

2. Federal Courts

When a federal agency declines to recognize a putative U.S. citizen's delayed birth certificate, the individual can seek review under 8 U.S.C. § 1503(a), which creates a cause of action and remedy. Specifically, the statute provides that, when a government official, department, or agency denies a person "a right or privilege as a national of the United States . . . upon the ground that he is not a national of the United States," the putative U.S. citizen can file suit in federal district court seeking a declaratory judgment that she is, in fact, a citizen.[101] Thus, when the Department of State denies a passport application or the SSA refuses to issue a social security card, a putative citizen can challenge the denial.[102] Reading just a handful of these cases provides a flavor of the challenges they present: It becomes easy to imagine how the delayed birth registration process could be manipulated, but also how difficult it may be for genuine U.S. citizens to amass the requisite evidence.

A short analysis of the courts' approaches to evaluating evidence helps illuminate the considerations that may also matter at federal agencies. Section 1503

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98. *See* 22 C.F.R. §§ 51.70-.71.

99. *See* 22 C.F.R. § 51.71(d)-(e).

100. *See infra* notes 109-110 and accompanying text.

101. Nationality Act of 1940, Pub. L. No. 76-853, § 503, 54 Stat. 1137, 1171-72 (codified as amended at 8 U.S.C. §1503(a)).

102. While most of this section will discuss cases arising from the denial of a passport by the Department of State, there are cases that involve the denial of Social Security benefits. For examples, see *Miranda v. Sullivan*, 771 F. Supp. 50, 52 (S.D.N.Y. 1991), *aff'd*, 962 F.2d 3 (2d Cir. 1992), involving the denial of old age benefits; *Gutierrez v. Tillerson*, No. 17-CV-111, 2017 WL 6044108, at *2 (S.D. Tex. Nov. 15, 2017), *report and recommendation adopted*, No. 17-CV-111, 2017 WL 6054941 (S.D. Tex. Dec. 6, 2017), involving a refusal to issue social security card.

claims are brought in federal courts across the United States, though, for the reasons described in the introduction and Part I.B, many cases arise in Texas.[103] In these proceedings, unlike state agency hearings or state court proceedings on delayed birth certificate issuance, the proceedings are adversarial—the federal government appears as the defendant to present its case against recognizing citizenship.[104] The court must find by a preponderance of the evidence that the plaintiff was born in the United States, though the burden of persuasion is assigned differently by circuit.[105]

In these proceedings, federal courts conduct a *de novo* review of any evidence the plaintiff presents in support of their claim.[106] Evidence presented in federal court includes witness testimony, the plaintiff's own testimony, and documentary evidence, such as baptismal records, school records, and any foreign birth certificates showing birth abroad.[107] Frequently, the facts are extraordinary, involving circumstances that will be unfamiliar to many Americans: transient parents moving regularly between the United States and a foreign country, often Mexico; mothers who are not U.S. citizens seeking medical treatment and giving birth in the United States; scrupulous midwives who attend births in rural regions; and unscrupulous midwives who, for a fee, fraudulently request birth certificates for babies whose births abroad they did not attend.[108]

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103. In the Fifth Circuit, see *Sanchez v. Kerry*, 648 F. App'x 386 (5th Cir. 2015); *Villafranca v. Blinken*, No. 19-CV-173, 2022 WL 1210762 (S.D. Tex. Apr. 25, 2022). In the Seventh Circuit, see *Mathin v. Kerry*, 782 F.3d 804 (7th Cir. 2015); *Rivera v. Albright*, No. 99 C 328, 2000 WL 1514075 (N.D. Ill. Oct. 11, 2000). In the Eight Circuit, see *Ramirez v. Clinton*, No. 08-8770, 2011 WL 2838173 (D. Minn. July 18, 2011). In the Ninth Circuit, see *Mondaca-Vega v. Lynch*, 808 F.3d 413 (9th Cir. 2015) (en banc); *Mendez v. Blinken*, No. 20-CV-00272, 2021 WL 4775629 (E.D. Wash. Oct. 13, 2021); *Lopez v. United States Department of State*, 2013 WL 121804 (D. Or. Jan. 9, 2013). In the Ninth Circuit, see *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985); *Tiznado-Reyna v. Holder*, No. CV-14-02428, 2016 WL 3213221 (D. Ariz. June 10, 2016). In the Tenth Circuit, see *Torres v. Pompeo*, No. 14-CV-552, 2019 WL 573422, at *1 (N.D. Okla. Feb. 12, 2019). In the Eleventh Circuit, see *Martinez v. Secretary of State*, No. 15-10666, 2016 WL 3181356, (11th Cir. June 8, 2016); *Beltran v. Rivera*, No. 10-CV-24288, 2012 WL 2675477 (S.D. Fla. July 6, 2012). In the D.C. Circuit, see *Liacakos v. Kennedy*, 195 F. Supp. 630 (D.D.C 1961).

104. *See supra* note 103 (collecting cases).

105. On the burden of proof, see *Vance v. Terrazas*, 444 U.S. 252, 256 (1980); *Reyes v. Neelly*, 264 F.2d 673, 674 (5th Cir. 1959); *Richards v. Secretary of State*, 752 F.2d 1413, 1417 (9th Cir. 1985). On the burden of persuasion, compare *De La Cruz Vargas v. Blinken*, 569 F. Supp. 3d 556, 558 (S.D. Tex. 2021) ("In a § 1503(a) action, the plaintiff bears the burden of proving, by a preponderance of the evidence, that the plaintiff is a U.S. citizen."), *appeal dismissed sub nom. Vargas v. Blinken*, No. 22-40007, 2022 WL 2448086 (5th Cir. Feb. 28, 2022), with *Mondaca-Vega*, 808 F.3d at 419 (describing the burden-shifting scheme whereby the U.S. government must establish alienage in the first instance in order to trigger the plaintiff's obligation to show evidence of birth in the United States, which the U.S. government must then rebut). *See also De La Cruz Vargas*, 569 F. Supp. 3d at 556, n.6 (S.D. Tex. 2021) (distinguishing the Fifth Circuit's test and the Ninth Circuit's "burden-shifting" test).

106. *See Vance*, 444 U.S. at 256; *Reyes*, 264 F.2d at 674; *Richards*, 752 F.2d at 1417.

107. *See supra* note 103 (collecting cases).

108. *Compare Sanchez*, 648 F. App'x at 386 (involving a birth registered by a midwife

The case law leaves no doubt as to the predominance of federal agencies' assessment of birth facts over those of state institutions. The courts have been explicit that state determinations of birth facts, as represented by delayed birth certificates issued by state health departments, including those issued pursuant to state court order, do not have preclusive effect on the federal agencies or in federal court, either under the Full Faith and Credit Clause or any other basis.[109] Other remedies, such as review under section 702 of the Administrative Procedure Act, are also unavailable to recipients of state-issued delayed birth certificates.[110] In short, federal authority reigns supreme in birth certificate issues, even though states judge citizenship claims in the first instance.

Federal case law also demonstrates, however, that federal agencies are not infallible; federal courts *do* occasionally enter declaratory judgments finding that plaintiffs are U.S. citizens.[111] The existence of a foreign birth certificate, for example, will trigger the denial of a passport application at the Department of State.[112] But the existence of a foreign birth certificate, while a problematic piece of evidence for the plaintiff, is not necessarily fatal to a claim to U.S. citizenship. In such cases, courts will weigh the credibility of the witnesses,[113] which birth

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convicted for filing fraudulent Texas birth certificates), *and* Reyna v. Blinken, No. 20-CV-089, 2022 WL 2829527, *3 (S.D. Tex. July 20, 2022) (same), *and Villafranca*, 2022 WL 1210762, at *3 (same), *with* Treviño v. Pompeo, No. 16-CV-139, 2019 WL 13261429, at *2 (S.D. Tex. Sept. 13, 2019) (involving birth registered by a midwife with no fraud at issue), *and Lopez*, 2013 WL 121804, *11 (same). On the issue of midwife fraud, see BINGHAM, *supra* note 2, at 127-28 (describing the Department of State's "suspicious birth attendant" list).

109. *See, e.g.*, Sanchez v. Clinton, No. H-11-2084, 2012 WL 208565, at *6-9 (S.D. Tex. Jan. 24, 2012) ("The Full Faith and Credit Clause does not require the decision of the Texas Department of Health to be given preclusive effect in United States passport proceedings."), *aff'd sub nom.* Sanchez v. Kerry, 648 F. App'x 386 (5th Cir. 2015); *Acosta*, 2015 WL 1965318, at *8-9 (analyzing weight entitled under Full Faith and Credit Clause without deciding whether it applies); Garcia v. Kerry, 557 F. App'x 304, 308 (5th Cir. 2014); *Villafranca*, 2022 WL 1210762, at *4; Tindle v. Celebrezze, 210 F. Supp. 912, 914-15 (S.D. Cal. 1962). Other remedies, such as review under section 702 of the Administrative Procedure Act, are also unavailable to recipients of state-issued delayed birth certificates. *See, e.g.*, Cambranis v. Blinken, 994 F.3d 457, 465 (5th Cir. 2021) ("Congress intended [section 1503(a)] to . . . be the exclusive remedy for a person within the United States to seek a declaration of U.S. nationality following . . . denial of a privilege or right of citizenship upon the ground that the person is not a U.S. national.").

110. *See Cambranis*, 994 F.3d at 465.

111. *See, e.g.*, *Villafranca*, 2022 WL 1210762, at *6; *Salgado*, 573 F. Supp. 3d at 1150; Treviño v. Pompeo, No. 16-CV-139, 2019 WL 13261429, at *9 (S.D. Tex. Sept. 13, 2019); *Barrera*, 2019 WL 13218381, at *2; *Ramirez*, 2011 WL 2838173, at *5; *Acosta*, 2015 WL 1965318, at *11; *Lopez*, 2013 WL 121804, at *11-12; Torres v. Pompeo, No. 14-CV-552, 2019 WL 573422, at *4 (N.D. Okla. Feb. 12, 2019); Mendoza-Diaz v. Kerry, No. 13-CV-143, 2015 WL 13134482, at *6-7 (S.D. Tex. May 21, 2015); Cobos v. Kerry, No. H-13-02897, 2015 WL 3965660, at *7 (S.D. Tex. June 30, 2015)

112. Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, U.S. ATT'YS' BULL., July 2017, at 87, 102, https://perma.cc/MK4T-3EFN (noting that there are "usually competing birth certificates" in section 1503 cases).

113. *See, e.g.*, Barrera v. Pompeo, No. 17-CV-00245, 2019 WL 13218381, at *1 (S.D.

certificate is contemporaneous with the alleged date of birth (although what constitutes a "contemporaneous" birth record is the subject of dispute),[114] and the order of birth registration.[115] No factor is dispositive.[116] Other documentary evidence, like baptismal records and school records are among the sorts of documents considered by courts when assessing claims under section 1503.[117] Although the same evidence may have been available to the federal agency, the courts' *de novo* review allows them to reach conclusions contrary to those of federal agencies like the Department of State. This reality compels the conclusion that federal agencies sometimes erroneously deny citizenship to the bearers of delayed birth certificates issued by states.

While the federal courts are a valuable tool for correcting potential errors at federal agencies, the practical challenges to litigating such a claim are worth not-

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Tex. Aug. 15, 2019) ("In 1949, Plaintiff and his parents returned to Burgos. Plaintiff's parents believed Plaintiff needed a Mexican birth certificate because they lived in Mexico. Thus, on November 15, 1949, Plaintiff's parents falsely registered Plaintiff as having been born in Mexico."); Torres v. Pompeo, No. 14-CV-552, 2019 WL 573422, at *4 (N.D. Okla. Feb. 12, 2019) ("In light of the persuasive and credible witness testimony, the Court finds that Mr. Torres has met his burden of proving his birth in the United States by a preponderance of the evidence."); *Lopez*, 2013 WL 121804, at *11 (D. Or. Jan. 9, 2013) ("Lopez explains his parents could not afford medical care or a hospital, and thus his birth occurred in the worker's cabin where his parents lived.").

114. *Villafranca*, 2022 WL 1210762, at *4 (S.D. Tex. Apr. 25, 2022) ("Courts weigh whether a filing is 'contemporaneous' on a sliding scale, and have found that filing within three, eight, and eleven days after birth satisfied the standard."); *see also, e.g.*, *Reyna*, 2022 WL 2829527, at *4 (holding that the plaintiff was not a U.S. citizen because, "[w]here the plaintiff's birth is registered in both the United States and a foreign country, '[c]ourts have found that a delayed birth certificate is either entitled to far less evidentiary weight than a contemporaneously filed birth certificate, or given no evidentiary weight'" (quoting Sanchez v. Kerry, No. 11-CV-02084, 2014 WL 2932275, at *4 (S.D. Tex. June 27, 2014))).

115. *Compare, e.g.*, *Villafranca*, 2022 WL 1210762, at *6 (holding that plaintiff was a U.S. citizen despite the fact that a Mexican birth certificate was issued a few weeks *after* the U.S. birth certificate), *and* Salgado v. Blinken, 573 F. Supp. 3d 1144, 1147 (S.D. Tex. 2021) (holding that plaintiff was a U.S. citizen despite the fact that plaintiff's Mexican birth certificate was issued about a month *prior* to U.S. birth certificate), *with De La Cruz Vargas*, 569 F. Supp. 3d at 557 (holding that plaintiff failed to prove U.S. citizenship because an earlier in time birth certificate existed in Mexico). For a common explanation of competing Mexican birth registrations, see Rachel E. Rosenbloom, *From the Outside Looking in: U.S. Passports in the Borderlands*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 132, 138 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017).

116. *See supra* notes 113-115.

117. *See, e.g.*, Mendez v. Blinken, No. 20-CV-00272, 2021 WL 4775629, at *4 (E.D. Wash. Oct. 13, 2021) (relying in part on plaintiff's school records to hold plaintiff was a U.S. citizen); *Barrera*, 2019 WL 13218381, at *1 (relying in part on Texas baptismal record to hold plaintiff was a U.S. citizen); Acosta v. United States, No. C14-420, 2015 WL 1965318, at *7 (W.D. Wash. Apr. 29, 2015) (finding plaintiff's baptismal record of "particular probative value"); *Lopez*, 2013 WL 121804, at *5-6 (relying in part on plaintiff's school records to hold plaintiff was a U.S. citizen); Ramirez v. Clinton, No. CIV. 08-8770, 2011 WL 2838173, at *1 (D. Minn. July 18, 2011) (relying in part on Texas baptismal record to hold plaintiff was a U.S. citizen).

ing. Federal litigation is costly and time-consuming—and therefore likely to present serious hurdles for individuals who have spent years without federal recognition of their birth certificate and, as a result, without access to the benefits attendant to citizenship. Accordingly, we can be confident that some number of putative U.S. citizens with delayed birth certificates are not accessing the full suite of benefits to which they are entitled—creating the reality that unknown numbers of putative U.S. citizens are caught between federal and state sovereigns.

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Contemporary federal reliance on state-issued birth certificates is the product of a longstanding cooperative project between federal and state governments. But, as the preceding Part has made clear, although federal agencies rely heavily on state-issued birth certificates, it is the federal agencies' judgment that predominates when it conflicts with the judgment of state governments. Federal courts provide a check on this relationship, while still confirming federal predominance. The next Part explores the contemporary realities of federal-state coordination on birth certificate issuance and recognition through the lenses of administrative law, cooperative federalism, and immigration federalism.

II. (Un)cooperative Federalism, Immigration Federalism, and Birth Certificate Issuance

While the human consequences of federal and state disagreement regarding the facts of a putative U.S. citizen's birth are reason alone for academic concern, federal-state cooperation (and the breakdown thereof) in the issuance and recognition of birth certificates also presents a novel scholarly issue for the disciplines of administrative law and federalism. Federal reliance on state issuance of birth certificates—and delayed birth certificates in particular—defies easy categorization within the paradigms of existing scholarship on cooperative federalism and immigration federalism, despite their *prima facie* applicability.

This Part highlights the gaps in these areas of scholarship in an effort to both illustrate the legal puzzle presented by our approach to documenting birthright citizenship and highlight the need for theory that accounts for this situation and others like it.

A. Birth Certificate Issuance Highlights a Conceptual Gap in Existing Models of Cooperative Federalism

Birth certificate issuance is arguably one of the most sweeping examples of federal-state cooperation: The federal government relies on state agencies to be the first-line arbiters in identifying the vast majority of birthright citizens. Yet, this collaboration has been entirely overlooked in the literature on cooperative

federalism. Indeed, birth certificate issuance defies easy categorization under existing models of cooperative federalism.

Admittedly, the concept of cooperative federalism evades easy definition, despite being the subject of a voluminous literature covering a broad range of areas of public law and doctrinal questions.[118] Most commonly, the "cooperative federalism" label is used to capture the relationship between the federal government and the states in the implementation of federal programs developed pursuant to statutory schemes.[119] Under this conceptualization of cooperative federalism, a federal statutory authority gives a federal agency the power to regulate and calls on states to take new legislative and regulatory action pursuant to the federal scheme, thereby drafting states into partnership with the federal government.[120] The Clean Air Act, the Clean Water Act, the Telecommunications Act, and statutes creating Medicaid, nutrition assistance programs, cash assistance programs, and disability assistance programs have all "asked state actors to serve as frontline federal-law implementers."[121]

Contemporary federal and state coordination in the issuance and recognition of birth certificates is an imperfect fit with this model of cooperative federalism,

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118. Bridget Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320, 1323 n.1 (2023) ("'Cooperative federalism' can be a murky term."). For scholarship on cooperative federalism and constitutional law, by far the most common area of doctrine, see generally Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001). Other areas of doctrine have only recently been addressed in the context of cooperative federalism. For scholarship on cooperative federalism and statutory interpretation, see generally Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (addressing the Affordable Care Act); Shani M. King & Nicole Silvestri Hall, *Cooperative Federalism and SIJS*, 61 B.C. L. REV. 2869 (2020) (addressing the Trafficking Victims Prevention Reauthorization Act); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) [hereinafter Weiser, *Federal Common Law*] (addressing the Telecommunications Act).

119. *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014) ("Courts and scholars for decades have acknowledged the prevalence of 'cooperative federalism,' which of course is often *generated by overarching federal statutory schemes*.") (emphasis added); Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1256, 1282 n.2 (2013) (noting that "cooperative federalism is sometimes used as a broad term to encompass a wide range of ways state and federal governments may work together" and contrasting that approach to the approach used by the authors "to describe laws that task state agencies with carrying out regulatory or implementation responsibilities that are at least initially *laid out by a broad federal plan*") (emphasis added).

120. *See* Gluck, *supra* note 119, at 2007; Weiser, *Federal Common Law*, *supra* note 118, at 1697 (describing how Congress and federal agencies "set[] forth the basic framework within which state agencies can act, defin[e] relevant federal statutory terms, and institut[e] uniform minimum standards").

121. Gluck, *supra* note 119, at 2007; *see also* Fahey, *supra* note 118, at 1330-52; Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1086, 1106 (2018); Weiser, *Federal Common Law*, *supra* note 118, at 1694-1703.

although the *origins* of the birth certificate align with it. As Part I explained, the creation of the Children's Bureau by federal statute in 1912, together with the passage of the 1916 Keating-Owen Act, led the Children's Bureau and other federal agencies to create federal standards for the issuance of birth certificates, resulting in state-level legislative developments that formalized birth certificate issuance in the name of preventing child labor.[122] The 1996 IIRIRA and 2004 IRTPA share features of this model; these statutes called for federal standard-setting in birth certificate issuance. However, they lack the establishment of a concomitant, overarching program that is typically a defining feature of this model of cooperative federalism.[123]

Another manifestation of cooperative federalism involves the implementation of federal programs, but relies on the deliberate incorporation of preexisting state laws and regulations to give effect to the federal program.[124] In contrast to the previous example, in this version of federal-state interaction, the federal government is typically the implementer, rather than the state. But, as Professor Abbe Gluck has noted, this brand of federalism, in which federal statutes incorporate or make "passive use" of state law, "has gone almost entirely unrecognized" in academic discourse, even though there are numerous examples of federal statutes and programs following this approach.[125]

Once acknowledged as a discrete category of cooperative federal relationships, examples are readily identifiable. Pursuant to the Social Security Act, for example, the SSA relies on state law definitions of "marriage" and "child" for purposes of survivors' benefits.[126] The U.S. Department of Veterans Affairs does the same.[127] The Internal Revenue Service routinely relies on state property law to determine federal tax liability.[128] When awarding Special Immigrant Juvenile status pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, U.S. Citizenship & Immigration Services relies on state courts' application of state family law to determine children's dependency status and best interests.[129] The Assimilative Crimes Act ties federal criminal law to

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122. *See supra* notes 9-20 and accompanying text.

123. *See supra* notes 62-68 and accompanying text.

124. Gluck, *supra* note 119, at 2008.

125. *Id.*

126. *See* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1405 (2012); Gluck, *supra* note 119, at 2008; Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 101 (2013); Jennifer Matystik, *Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After* Astrue v. Capato, 28 BERK. J. GENDER, L. & JUST. 269, 274 (2013).

127. *See* Gluck, *supra* note 119, at 2008.

128. Richard B. Stephens & James J. Freeland, *The Role of Local Law and Local Adjudications in Federal Tax Controversies*, 46 MINN. L. REV. 223, 224 (1961).

129. *See* 8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (providing for Special Immigrant Juvenile eligibility based on a state juvenile court finding as to whether "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" and whether "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence");

state criminal law.[130] The Travel Act relies on state criminal laws to define "unlawful activity" for purposes of the act.[131] At the Board of Immigration Appeals, and prior to the Supreme Court decision in *Obergefell v. Hodges*, immigration benefits were determined based on state law definitions of marriage.[132] Federal reliance on state law is not necessarily unqualified under these cooperative schemes; Congress has also legislated to circumscribe federal reliance on state law. In the tax context, for example, Congress has occasionally opted to "expressly reject local legal concepts for tax purposes,"[133] instead "substitut[ing] a federal rule to replace prior reliance on state law."[134]

But contemporary federal reliance on state-issued birth certificates is an imperfect fit with this model of cooperative federalism as well. Although the Department of State and SSA rely on state birth certificates to issue passports and social security cards, their regulations do not call for the incorporation of varied state laws.[135] Rather, citizenship law is *ipso facto* federal law, and these federal agencies are empowered to reevaluate the states' determinations of birth facts on a post-hoc basis.[136] Federal agencies' treatment of delayed birth certificates is not a prospective qualification, as in the tax example described above, but rather the post-hoc reevaluation—and sometimes rejection—of state determinations of citizenship.

The federal-state relationship in the birth certificate context may be challenging to categorize under existing conceptualizations of cooperative federalism because of the nature of the administrative action at issue. Whereas much of the literature on cooperative federalism focuses on federal-state *regulatory* coordination, in the context of delayed birth certificates, state and federal decisions on individual cases—through paper records, hearings, and adjudications—are at issue.

Doctrine at the intersection of administrative law and cooperative federalism is in short supply. Bridget Fahey's recent article on coordinated rulemaking—rulemaking in which both state and federal agencies are involved—has high-

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see also King & Hall, *supra* note 118, at 2875 n.20 (analyzing Special Immigrant Juvenile status through the lens of cooperative federalism).

130. *See* Gluck, *supra* note 119, at 2008; Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 71-75 (2006).

131. Gluck, *supra* note 119, at 2008.

132. Baude, *supra* note 126, at 1405.

133. Stephens & Freeland, *supra* note 128, at 227.

134. Gilbert Paul Verbit, *State Court Decisions in Federal Transfer Tax Litigation:* Bosch *Revisited*, 23 REAL PROP., PROB. & TR. J. 407, 409 (1988) ("The Internal Revenue Code abounds with instances in which Congress has substituted a federal rule to replace prior reliance on state law.").

135. *See supra* Part I.C.1.

136. *See supra* Part II.C.

lighted the under-theorized nature of the *administrative law* of federal-state cooperative relationships.[137] As she writes, "[w]e have yet to conceptualize a cooperative administrative law for our cooperative federalism programs," a gap that her scholarship then tackles with respect to federal and state agency *rulemaking*.[138] In so doing, she bridges the gap between the cooperative federalism literature focused on federal-state regulatory collaboration and administrative law literature on the collaboration between *federal* agencies on regulatory initiatives.[139]

The birth certificate context highlights another gap in theory: We have yet to conceptualize a cooperative administrative law that addresses federal and state *adjudications*. Bijal Shah's work offers an insightful and unique analysis on "coordinated interagency adjudication," that is, "when multiple agencies further a single administrative claim."[140] Shah's scholarship focuses, however, on coordination between *federal* agencies—scholarship that has its disciplinary home in administrative law, not federalism. We need, in sum, a theory of cooperative federalism that takes account not only of regulatory relationships between federal and state governments, but also adjudications.

B. Birth Certificate Issuance Fits Uneasily in Existing Theories of Immigration Federalism

State issuance of birth certificates is integral to the federal government's ability to determine who is a citizen and who is not. Yet, existing theories of immigration federalism fail to address the federal-state relationship at play in state issuance and federal recognition of birth certificates. Although there are clear legal bases for federal predominance over determinations as to who is a birthright citizen, the dependence of federal and state governments on the action of the other is unique to the birth certificate context.

Most theories of immigration federalism distinguish between "immigration" laws—those laws that have to do with the admission and removal of noncitizens—and "alienage laws"—those laws that regulate noncitizens within the territory of the United States.[141] The dichotomy has been framed in varied terms,

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137. *See* Fahey, *supra* note 118, at 1323 ("We have yet to conceptualize a cooperative administrative law for our cooperative-federalism programs.").

138. *See id.* at 1323, 1330-52.

139. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138-55 (2012) (describing the ways in which statutes can delegate authority to multiple federal agencies and explaining the interagency regulatory coordination that ensues); Jason Marisam, *Interagency Administration*, 45 ARIZ. STATE L.J. 183, 188-210 (2013) (highlighting the degree of collaboration between *federal* agencies and the new forms of governance that result).

140. *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 808, 814-50 (2015).

141. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phan-*

but the distinction is pervasive in the scholarship. Professor Adam Cox, for example, distinguishes between laws that address the "selection" of immigrants—the purview of the federal government—and "rules that regulate immigrants outside the 'selection' context."[142] Ming Chen drew a distinction between "at borders" regulations, which are the purview of the federal government, and "between borders" regulations, such as laws that "touch on education, housing, drivers' licenses, and health care."[143] Alienage laws have been further subdivided: The regulation of noncitizens within U.S. territory includes both "enforcement federalism," which concerns "the extent to which localities should assist or resist federal removal policies," and "integration federalism," which concerns "measures designed to assist immigrants, regardless of status, to plant roots and acculturate to life in the United States."[144]

The distinction derives from the degree of control the federal government wields. Immigration laws—those laws that implicate admission and removal—are viewed as the exclusive purview of the federal government.[145] Consistent with the plenary power doctrine, the federal government may universally preempt state action on immigration laws.[146] The extent to which federal action

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tom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 547 (1990) (defining "immigration law" as "the body of law governing the admission and expulsion of aliens" and alienage law as "the more general law of aliens' rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment") (internal footnote omitted); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) [hereinafter Motomura, *Federalism*] (defining "immigration law" as "pertaining to the entry of noncitizens and their continued stay in the United States" and "alienage law" as "the treatment of noncitizens in the United States with respect to matters other than entry and expulsion").

142. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 345 (2008) ("[I]mmigration law and scholarship draw sharp conceptual, constitutional, and moral distinctions between rules that 'select' immigrants and rules that regulate immigrants outside the 'selection' context. This dichotomy dominates most of the central controversies concerning immigration law and theory.").

143. Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1091 (2014).

144. *See* Cristina Rodriguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. MIGRATION & HUM. SEC. 509, 509 (2017).

145. *See* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 606 (2013) ("[T]he 'core' functions of immigration law—the admission and removal of noncitizens—are commonly understood as exclusively federal."); Pratheepan Gulasekaram & Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2084 (2013) (noting that "the presumption of federal exclusivity applies robustly" to immigration laws).

146. *See* Abrams, *supra* note 145, at 602 ("[The plenary] power, according to the Court [in *Arizona v. United States*], derives from two sources: the textual constitutional grant of the power to 'establish an uniform Rule of Naturalization,' and 'its inherent power as sovereign to control and conduct relations with foreign nations.'"); Motomura, *Federalism*, *supra* note 141, at 1369-75 (describing the bases for the plenary power and immigration exceptionalism). *See generally* Chy Lung v. Freeman, 92 U.S. 275 (1875) (presenting arguments for federal exclusivity in immigration law and foreign affairs); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) (deferring to the federal political branches on

preempts state action with respect to alienage laws has resulted in more mixed outcomes.[147] Many of the areas regulated by alienage laws, such as law enforcement activity, education, housing, the issuance of drivers' licenses, and the distribution of public benefits, "are ostensibly matters of shared concern for state and federal government, if not traditionally the province of state government."[148] In some instances, however, and even in these traditionally state-governed fields, courts have nevertheless deferred to federal interests, such as when there is reason to believe the law "might affect immigration flows" or when immigration enforcement action is contemplated.[149] Cox has gone so far as to describe the distinction between immigration and alienage laws as "largely incoherent in practice."[150]

Acknowledging that these categories are not wholly dichotomous is illuminating in the context of birth certificate issuance. The criteria according to which citizenship is granted—such as what constitutes birth "in the territory," the requirements for naturalization, and the requirements for the derivation and acquisition of citizenship—are the exclusive purview of the federal government.[151] Accordingly, the statutes and regulations that govern federal agencies' and courts' ability to reevaluate and reject the determinations made by state agencies and courts with respect to delayed birth certificates might seem appropriate or unimpeachable. After all, a determination of birth in the territory of the United States is tantamount to a determination of citizenship, and therefore implicates the federal government's plenary authority to control admission.

Thus, federal authority to set the standards against which birth facts should be judged—and to reject states' determinations when they don't meet those standards—has legal logic. A contrary position is not only arguably inconsistent with the structure of U.S. immigration and citizenship law, but might be normatively undesirable, given anti-immigrant attitudes in some states.[152]

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matters of immigration).

147. Abrams, *supra* note 145, at 603-04 (noting that "when courts must grapple with statutes that regulate immigration more tangentially, the doctrine becomes murky. In these circumstances, states often regulate in a way that is arguably well within the scope of their traditional police powers," yet sometimes courts find the action preempted by federal law); Gulasekaram & Ramakrishnan, *supra* note 145, at 2084 (noting that "courts have permitted limited policymaking space for states and localities" for alienage laws).

148. *See* Chen, *supra* note 143, at 1091.

149. *See* Abrams, *supra* note 145, at 601-04.

150. Cox, *supra* note 142, at 367; *see also* Rodriguez, *supra* note 144, at 511 (describing the "enforcement-integration dichotomy" within alienage laws as "too stark"). Whether a given law is framed as implicating core immigration powers of admission or removal rather than the regulation of immigrants within the territory can impact case outcomes. *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (analyzing Arizona statute requiring registration of noncitizens that gave sweeping immigration enforcement authority to local law enforcement and concluding that the statute was preempted by federal law).

151. *See* U.S. CONST. art. I, § 8, cl. 4; *see also supra* note 54 and accompanying text.

152. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 527-58 (2001) (critiquing

However, the fact that state and federal governments can reach different conclusions about a person's entitlement to birthright citizenship—and that such differential recognition can, in theory, persist indefinitely—creates an untenable conflict between sovereigns and leaves putative U.S. citizen in limbo. If states are empowered to make initial determinations of birth facts that amount to determinations of citizenship, and if plenary power simultaneously justifies federal reevaluation and possible rejection of state agency and state court action, then better coordination is needed. Part III offers some suggestions for reform.

III. Balancing Federal Authority to Make Citizenship Determinations with the Realities Confronted by Putative U.S. Citizens and States

While the federal government is the arbiter of questions of citizenship, the states are indispensable partners. Yet, contemporary federal reliance on state-issued birth certificates is such that the states themselves cannot give full effect to their birth certificates without federal imprimatur. For the sake of putative U.S. citizens caught between federal and state sovereigns, reforms designed to harmonize federal and state governance are warranted.

This Article proposes three suggestions for reform. The first two proposals seek to minimize the number of cases in which federal agencies review and reject states' issuance of delayed birth certificates. First, federal agencies could use their regulatory authority to establish more prescriptive standards for the recognition of state-issued delayed birth certificates. Second, federal or state governments could invite the participation of federal agencies in state proceedings, thereby ensuring the state makes its decisions with more complete information. The third proposal seeks to balance federal predominance in the field of citizenship with the state's interest in giving effect to its own documents and administrative processes. This proposal suggests that federal agencies, like the SSA, could tailor their treatment of the delayed birth certificate based on its federal use.

This Article stops short of suggesting a wholesale reallocation of birth certificate issuance authority to the federal government, and makes no claims regarding the constitutionality or advisability of such a shift. Instead, this Article limits itself to those suggestions that could be addressed within the parameters, broadly construed, of contemporary federal and state practice, while still contributing to a decrease in the number of cases in which federal and state sovereigns reach different conclusions regarding putative U.S. citizens' entitlement to birthright citizenship. Reducing the number of cases in which federal and state sovereigns reach different conclusions regarding putative U.S. citizens' entitlement to birthright citizenship would be consistent with the federal government's role

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the devolution of immigration power to the states as violating antidiscrimination norms and risking bigoted treatment of immigrants).

as the ultimate arbiter in questions of citizenship, while also preventing the appearance of a conflict between sovereigns and the resulting limbo experienced by putative U.S. citizens.

A. Establish More Prescriptive Federal Statutory or Regulatory Standards

To reduce the number of cases in which federal and state sovereigns reach conflicting conclusions on a putative citizen's entitlement to recognition as such, the federal government could impose more prescriptive evidentiary requirements for the recognition of state-issued birth certificates, either through statute or, more likely, regulation.

Clearer federal standards would have the benefit of enabling states to tailor their own processes for evaluating and issuing delayed birth certificates to those of the federal government, thereby reducing the possibility that federal and state governments reach different conclusions about the facts of a putative U.S. citizen's birth. As described in Part I.B, there is already statutory authority for federal agency regulatory action under the IRTPA. The IRTPA contemplated, for example, that federal agencies would "establish standards for the processing of birth certificate applications to prevent fraud," among other regulatory standard-setting.[153] More prescriptive minimum standards designed to address the unique risk of fraud posed by applications for delayed birth certificates would conceivably fall within this grant of regulatory authority. Importantly, and as the cases discussed in Part I.C.2 illustrate, fraud concerns weigh heavily in the Department of State's evaluation of passport applicants who hold delayed birth certificates. By promulgating regulations specific to the minimum standards required for recognition of delayed birth certificates, federal agencies like the Department of State could aid the states in identifying the sort of evidence most likely to be met with approval by that agency. Thus, even if federal agencies continue to engage in a *de novo* review of the evidence underlying a state's issuance of a delayed birth certificate, more stringent regulatory guidance could minimize the number of cases in which there are discrepancies between federal and state fact-finding.

Existing federal regulations are insufficient to achieve this end. First, federal intra-agency regulations governing the issuance of agency benefits—such as the Department of State and SSA regulations discussed above—do not set minimum standards against which the federal government evaluates state birth certificates. Although states could conceivably look to these regulations for guidance on the standards their own birth certificates should meet, the regulations remain divorced from the state birth certificate process. Second, existing federal regulations lack the sort of specificity that would be helpful to states. Department of State regulations, for example, list documentary forms of evidence that may be used to prove birth in the United States, but not the criteria against which these forms of evidence are evaluated.

153. IRTPA § 7211(b)(3), codified as a note to 5 U.S.C § 301.

Uniform federal standard-setting would potentially minimize the number of instances in which a state recognizes a claim of birthright citizenship that the federal government does not. But, even if such standards cannot be agreed across agencies, federal standards need not be uniform between federal agencies. In fact, differential standards may be useful—a suggestion addressed in Part III.C.

B. Invite Federal Participation in State Proceedings

Federal regulations could also require states to invite federal authorities to supplement the record, whether at the state agency or in state court; alternatively, states could seek such federal participation. This approach would enable the state to benefit from the federal government's expertise and information during the pendency of its own evaluation of putative U.S. citizens' claims to entitlement to a delayed birth certificate. Doing so would potentially reduce the number of instances in which state governments reach conclusions at odds with those reached by the federal government.

Recall that state processes for birth certificate issuance are not adversarial. As Part I.B described, state agency review of applications for delayed birth certificates and state court hearings on their issuance afford putative U.S. citizens the opportunity to present affirmative evidence of birth in the United States. Although non-adversarial proceedings have benefits, this approach limits the ability of state decision-makers to evaluate evidence from which negative inferences could be drawn, such as the existence of foreign birth certificates or evidence of midwife fraud. To the extent that states issue delayed birth certificates on the basis of incomplete or one-sided evidence, augmenting the opportunities for states to hear from federal authorities with the ultimate authority to recognize citizens might reduce the mismatch between state and federal judgments on citizenship.

Of course, this approach is not without its concerns. States have sometimes been "laboratories of bigotry," and enhancing their role in citizenship recognition may not be advisable.[154] But states are already making decisions regarding the issuance of delayed birth certificates, and involving the federal government does

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154. *See* Wishnie, *supra* note 152, at 527-58. In fact, in 2015, Texas attempted to *limit* access to state-issued birth certificates for U.S. citizen children born to undocumented parents. *See* Emily Vincent Cox, Note, *A Most Precious Right: Equal Protection, Voter Photo Identification, and the Battle Brewing in Texas*, 51 GEO. L. REV. 235, 247 (2016) (describing Texas's change in policy, in which parents who could not present a valid foreign passport with valid U.S. visa could not obtain their U.S.-born children's birth certificates); Jonathan Blitzer, *The Front Line Against Birthright Citizenship*, NEW YORKER (Sept. 18, 2015), https://perma.cc/VJ7U-7745; Melissa del Bosque, *Children of Immigrants Denied Citizenship*, TEX. OBSERVER (July 13, 2015), https://perma.cc/RE3Q-HJMA; Manny Fernandez, *Immigrants Fight Texas' Birth Certificate Rules*, N.Y. TIMES (Sept. 17, 2015), https://perma.cc/J2ZC-75Z8. A lawsuit challenging Texas's policy has since settled, and the undocumented parents of U.S. citizen children are again able to obtain their state-issued birth certificates. *See* Julia Preston, *Lawsuit Forces Texas to Make It Easier for Immigrants to Get Birth Certificates for Children*, N.Y. TIMES (July 24, 2016), https://perma.cc/P3XP-ZYJW.

not augment the state role. In fact, providing the federal perspective on a case at the state level might align state and federal practice.

This approach also does not diminish the opportunities for recourse currently available to putative U.S. citizens. As described in Part I.B, state-issued delayed birth certificates are of limited utility without additional federal identity documentation. Thus, irrespective of the state-level decision on whether to issue a delayed birth certificate, a putative U.S. citizens would still need to apply to the relevant federal agency for the documents and benefits associated with citizenship, like a passport and social security number and card. Upon denial of such benefits, recourse to federal court would still be available under section 1503.[155]

C. Condition Federal Treatment of the Birth Certificate Based on Its Federal Use

Finally, further federal regulatory development could better calibrate the federal treatment of state-issued delayed birth certificates to the relative expertise and equities involved at the federal and state levels and across agencies. Specifically, I propose that the Department of State and SSA should engage in distinct ways with the state-issued birth certificate.[156] This proposal does not resolve the overall limbo in which a putative U.S. citizen finds themselves when federal and state sovereigns reach different conclusions about their entitlement to citizenship. It could, however, enable the state to give its state-issued birth certificate limited effect while the Department of State and federal courts resolve the overarching question of citizenship.

As described above, the social security card and number are required to access employment and numerous other benefits at the state and federal level—including state-provided benefits, like driver's licenses. Thus, the SSA operates as a gatekeeper to many of the benefits attendant to citizenship and lawful status in the United States.

However, while the Department of State is clearly tasked with the authority to determine questions of citizenship, the same is not true of the SSA.[157] Although the SSA's current process for issuing social security numbers, cards, and benefits *de facto* calls on it to assess citizenship and immigration status before issuing such benefits, its regulations hint that the it applies a different standard than the Department of State: The Department of State's regulations, unlike the SSA's, do not list a delayed birth certificate among forms of acceptable evidence, and its public-facing materials specifically request the evidence underlying the delayed birth certificate.[158] And, while a passport issued by the Department of

155. *See supra* Part I.C.2.

156. Similarly differentiated treatment may be appropriate at other federal agencies as well, though unexplored in this Article.

157. *See supra* Part I.C.1.

158. *Compare* 22 C.F.R. § 51.42, *and Citizenship Evidence*, DEP'T OF STATE, https://perma.cc/Z558-Y48T (last updated Nov. 22, 2022), *with* 20 C.F.R. § 404.716(b).

State is the preeminent form of proof of citizenship for U.S. citizens born in U.S. territory, the social security number and card, although they serve as an "unofficial national identifier," were "never intended to serve as a personal identification document—that is, they do not establish that the person presenting the card is actually the person whose name and SSN appear on the card."[159]

The SSA has the capacity to be nuanced in its issuance of social security numbers and cards. In fact, the SSA already has tools at its disposal to differentiate between citizens and noncitizens who need social security cards.[160] In order to allow the state to give effect to its delayed birth certificate, the SSA could consider adapting its regulations to enable it to issue social security cards to putative U.S. citizens who hold state-issued delayed birth certificates, while also signaling that the federal government has not endorsed that determination. Issuing such cards would be inferior to uniform federal and state recognition of a claim to birthright citizenship, but it might enable the state-issued birth certificate to have at least some effect within its state of issuance while limiting the extent to which the card could breed a claim of federal citizenship.

This proposal may seem unsatisfactory: It risks creating second-class U.S. citizens and further complicates federal, state, and private actors' reliance on the social security number and card. But the fact that the SSA can offer only an unsatisfactory solution reflects the reality that it ought not to be managing the issue. The institutions that are actually charged with adjudicating claims of citizenship and enforcing immigration laws are better positioned to rectify the concerning federal-state mismatch in recognition of birth facts—not the SSA in its *de facto* institutional role as the issuer of the only universal national identifier.

CONCLUSION

As long as the states are tasked with birth certificate issuance, the risk that federal and state governments will make different citizenship determinations will persist. The federal government's authority as the ultimate arbiter of claims of citizenship based on birth in the territory is certainly defensible. But for the sake of putative U.S. citizens caught between sovereigns, better harmonization of the dense web of federal-state collaboration on the recognition and issuance of birth certificates is warranted. In addition to the human consequences that the current state of coordination (or lack thereof) begets, it is also worth noting that federal-state inter-dependence in birth certificate issuance and recognition is unlike other paradigms in the literature on federalism, making it an area ripe for further theorization. Although ensuring the integrity of birth certificate issuance is a national imperative, so, too, is it imperative that neither Congress nor federal agencies

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159. *See* Puckett, *supra* note 47.

160. *See* 20 C.F.R. § 422.104 (distinguishing between citizens and noncitizens and providing that noncitizens may obtain social security cards for nonwork purposes when federal statute or regulation or state or local law requires it for accessing a benefit).

"restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship," by leaving putative U.S. citizens caught between sovereigns.[161]

161. United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).