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Proceedings

A monthly newsletter from McGraw-Hill Education

December 2018 Volume 10, Issue 5

Contents

Dear Professor,

The end of the fall semester fast approaches! Welcome to McGraw-Hill Education's December 2018 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 10, Issue 5 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the December 2018 newsletter topics with the various McGraw-Hill Education business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. A California jury verdict and resulting judicial intervention in the Roundup Weed Killer case;

2. "Birthright citizenship" in the United States; and

3. A "bad faith" jury verdict against Aetna, the nation's third-largest insurance company;

4. Videos related to a) a negligence lawsuit against Sacred Heart University regarding a student's death after a pancake-eating contest and b) an Amazon building collapse during a tornado in Maryland, leaving two people dead;

5. An "ethical dilemma" related to the Food and Drug Administration's decision to approve a powerful new opioid medication during the midst of the nation's opioid crisis; and

6. "Teaching tips" related to Article 2 ("What is Birthright Citizenship?") of the newsletter.

I wish you a joyous holiday season, including a very Merry Christmas and a Happy New Year!

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Of Special Interest

This section of the newsletter covers three (3) topics:

1) A California jury verdict and resulting judicial intervention in the Roundup Weed Killer case;

2) "Birthright citizenship" in the United States; and

3) A "bad faith" jury verdict against Aetna, the nation's third-largest insurance company.

Hot Topics in Business Law

Article 1: "Bayer Sags as Judge Finds Roundup Weed Killer Caused Cancer"

https://www.bloomberg.com/news/articles/2018-10-22/bayer-loses-bid-to-wipe-out-first-roundup-cancer-verdict

According to the article, Bayer AG shares slumped after the German conglomerate failed to persuade a California state judge to set aside a jury's verdict in the first trial over allegations that its Roundup weed killer causes cancer.

The stock fell as much as 8.5 percent in Frankfurt trading, the most since August 13 following the first jury verdict in the case, even though the judge said damages should be slashed to $78.6 million from $289 million. Bayer said it plans to appeal the ruling.

San Francisco Superior Court Judge Suzanne Ramos Bolanos rejected Bayer's arguments that the jury didn't have any basis to conclude that the herbicide caused a former school groundskeeper's cancer. The decision isn't a legal precedent for thousands of related lawsuits across the U.S., but it will encourage plaintiffs to press forward with their claims. For Bayer, the ruling "is not good news," said Thomas G. Rohback, a trial lawyer who isn't involved in the Roundup litigation. "From Bayer's perspective the bigger concern is it's saying there was enough science to support the plaintiff's case."

Jurors awarded $39.3 million to compensate former groundskeeper Dewayne Lee Johnson for his lost earnings and enjoyment of life. They also concluded that Monsanto Co., which Bayer acquired this year, should pay $250 million as punishment for hiding the dangers of the herbicide.

There are already another 8,700 plaintiffs arguing that the key ingredient in Roundup, glyphosate, causes cancer -- so extrapolating the level of the current award for all the cases points to a liability of about $680 billion, Ian Hilliker, an analyst at Jefferies LLC in London, wrote in a note to clients.

"Uncertainty around this case is likely to be an overhang on Bayer, and potentially the use of glyphosate for many months, possibly years," Hilliker said.
Bolanos said punitive damages more than seven times as large as the compensatory award aren't legally justified. Instead, she said that under

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constitutional law, the ratio should be 1-to-1. The judge set a December 7 deadline for the plaintiff to accept a total of $78.6 million. If Johnson rejects it, Bayer is entitled to a new trial on punitive damages, she said.

Johnson's attorneys said they're weighing their options.

"Although we believe a reduction in punitive damages was unwarranted and we are weighing the options, we are pleased the court did not disturb the verdict," according to a statement issued by the law firms of Michael Baum and Michael Miller. "The evidence presented to this jury was, quite frankly, overwhelming."

Bayer stood by its position that glyphosate has been proven safe in studies required by regulators in the U.S. and Europe. The chemical was first approved for use in Monsanto's weed killer in 1974. While it became the world's most popular and widely used herbicide, the question of whether it causes cancer has been hotly debated by environmentalists, regulators, researchers and lawyers.

"The court's decision to reduce the punitive damage award by more than $200 million is a step in the right direction, but we continue to believe that the liability verdict and damage awards are not supported by the evidence at trial or the law and plan to file an appeal with the California Court of Appeal," Bayer said in a statement.

The German company sought to convince Bolanos that the jury wasn't presented with sufficient scientific evidence to hold Monsanto at fault for Johnson's non-Hodgkin lymphoma.

In its challenge to the evidence, Bayer attacked the testimony of Johnson's expert oncology witness, whom the judge described as the linchpin of Johnson's case. Chadi Nabhan testified that Johnson was much younger than the average patient who develops non-Hodgkin lymphoma, which raised a red flag, according to the ruling.

"Dr. Nabhan did not need to eliminate every other possible cause" of his cancer, Bolanos wrote. "Because there is no substantial evidence of an alternative explanation" for his cancer, "the jury was free to give weight to Dr. Nabhan's testimony" that a glyphosate-based herbicide such as Roundup was "a substantial factor in causing the cancer," the judge said.

Bayer investors panicked at the jury's initial verdict, triggering a selloff in which shares plunged the most in seven years on Aug. 13. The company is preparing for the next test trials in St. Louis state court and San Francisco federal court in February.

The case is Johnson v. Monsanto Co., CGC-16-550128, California Superior Court, County of San Francisco (San Francisco).

Discussion Questions

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1. As the article indicates, jurors awarded $39.3 million to compensate Dewayne Lee Johnson for his lost earnings and enjoyment of life. They also concluded that Monsanto Co., which Bayer acquired this year, should pay $250 million as punishment for hiding the dangers of the herbicide. Define compensatory damages. On what basis are compensatory damages calculated? Define punitive damages. On what basis are punitive damages calculated?

Compensatory damages are designed to compensate the plaintiff for the harm (physical and/or economic) he or she has sustained due to the fault of the defendant. Examples of compensatory damages include losses due to medical expenses, time out of work, and emotional pain and suffering. Punitive damages are designed to punish the defendant for egregious behavior that would shock the conscience of a reasonable person. Punitive damages are designed to deter the defendant and others from similar, future conduct. They are typically calculated on a "sliding scale" basis depending on the defendant corporation's revenue and profitability, with larger corporations expected to pay greater punitive damages for egregious conduct.

2. As the article indicates, Judge Bolanos said punitive damages more than seven times as large as the compensatory award are not legally justified. Instead, she said that under constitutional law, the ratio should be 1-to-1. Specifically, what is Judge Bolanos' constitutional argument regarding punitive damages? In your opinion, should the ratio of compensatory damages to punitive damages be 1-to-1, as Judge Bolanos opined? Explain your responses.

In Judge Bolanos' opinion, the punitive damage award established by the jury, $250 million, represented "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution. Whether punitive damages should be capped at a 1-to-1 ratio with compensatory damages is an opinion question, and student opinion may vary. In discussing this issue with your students, ask them to assume that compensatory damages in this case were $100,000, and that punitive damages were set at $100,000, consistent with the 1-to-1 ratio favored by Judge Bolanos. Would justice be served in such a scenario? Punitive damages are designed to deter the defendant and others from future, similar "bad acts." Would a punitive damage award of $100,000 against a company the size of Bayer/Monsanto truly serve as a deterrent to similar egregious conduct in the future?

3. Comment on the causation evidence described in the article. In your reasoned opinion, did the plaintiff present sufficient evidence at trial to establish that his exposure to the weed killer Roundup caused his non-Hodgkin lymphoma? Explain your response.

This is an opinion question, so student responses may vary. Do remind students that the burden of proof in a civil case (such as the subject case) is merely to establish, by the greater weight of the evidence, that the defendant improperly caused the plaintiff's harm. This is a "greater than 50 percent" evidentiary standard, substantially lower than the "proof beyond reasonable doubt" standard required for a criminal conviction.

Article 2: "What Is Birthright Citizenship?"

https://www.economist.com/the-economist-explains/2018/11/02/what-is-birthright-citizenship

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According to the article, immigration is an animating topic for President Donald Trump, and a vocabulary-expanding one for most Americans. Phrases like chain migration, anchor baby and migrant caravan have entered popular parlance under his watch. This week added "birthright citizenship". Mr. Trump told Axios, an American news outfit, that he is looking to end the right—now 150 years old—by executive order. His proposal would deny citizenship to the American-born children of unauthorized immigrants and possibly to foreigners in the country on non-permanent visas. The suggestion set cable news and social media aflame, and drew instant backlash from legal experts. That he would attempt such a thing should come as little surprise. Mr. Trump trotted out the idea while campaigning in 2015. More recently, Michael Anton, a Trump acolyte and former White House official, argued in its favor in the *Washington Post*. Others are taking up the charge. Lindsey Graham, a Republican senator, says that he will write legislation to "deal" with birthright citizenship, calling it a "magnet for illegal immigration". What is the fuss about?

The concept of birthright citizenship is straightforward: those born in America are citizens, even if their parents are not. The principle, known as *jus soli*, or right of the soil, comes from English common law. It was established in England in the early 17th century and then later exported to the colonies. It no longer holds in the United Kingdom, where at least one parent must be a citizen for a child to enjoy the right. But it persists in some Commonwealth countries—including in Canada, Jamaica and Pakistan—as well as in nearly every country in Latin America. (This is news to Mr. Trump, who said, wrongly, that America is the only country to allow such a scheme.) In America, its history is tied up with race and slavery. The constitution outlined no criteria for citizenship, so an amendment enshrined the principle in 1868, cementing the legal status of former slaves, who had been denied citizenship until then. Lawmakers understood its broader sweep at the time. Would it "have the effect of naturalizing the children of Chinese and Gypsies born in this country?" asked one senator in 1866. "Undoubtedly," answered another.

The 14th Amendment made a few exceptions. Excluded from citizenship were the American-born children of foreign diplomats, members of an occupying army, or Indians under tribal government, since these groups were "not subject to the jurisdiction" of the United States. A few legal scholars have fixated on this clause; they see the children of unauthorized immigrants as another exception. They reason that their parents have no demonstrated political allegiance to America, nor has their presence in the country been sanctioned by other citizens. The Supreme Court upheld the principle of birthright citizenship in 1898. But it did not tackle the status of the children of unauthorized immigrants: the Chinese parents of the defendant in that case, a cook named Wong Kim Ark, were in America legally. The anti-birthright crowd spots an opening.

It looks likely to close. Limiting birthright citizenship would undermine over a century's worth of legal consensus. Even James Ho, acknowledged to be among the most conservative federal judges that Mr. Trump has appointed, has disagreed with his premise. And elsewhere the court has ruled that unauthorized immigrants fall under the jurisdiction of the United States, since they must obey the country's laws. National allegiance is not what matters, in legal terms, when determining jurisdiction. Whether Mr. Trump could enact his proposal by executive order is another question. Again, the answer is probably no, as the change would require a constitutional amendment. With the midterm elections next week, many see a political stunt by the president—an effort to rile up his base and stoke the anti-immigrant flame. Cynicism over civics, then.

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Discussion Questions

1. Define birthright citizenship.

Birthright citizenship is defined as the legal right to citizenship for all children born in a country's territory, regardless of parentage.

2. What is the constitutional argument supporting birthright citizenship?

According to the Fourteenth Amendment to the United States Constitution, "(a)ll persons born…in the United States…are citizens of the United States and of the state wherein they reside."

3. In your reasoned opinion, and based on your informed, non-political interpretation of law, does President Donald Trump or any other president have the constitutional authority to eliminate birthright citizenship? Explain your response.

This is an opinion question, so student responses may vary. In your author's opinion, given the clear, unambiguous language of the Fourteenth Amendment, eliminating birthright citizenship would require a constitutional amendment approved by the United States Congress. It is the responsibility of the United States Congress to make the law, while it is the president's responsibility to enforce the law as written.

Article 3: "Jury Delivers $25.5 Million 'Statement' to Aetna to Change Its Ways"

https://www.cnn.com/2018/11/10/health/aetna-verdict-oklahoma-orrana-cunningham/index.html

According to the article, an Oklahoma jury has awarded $25.5 million to the family of a cancer patient denied coverage by Aetna, with jurors saying that the insurer acted "recklessly" and that the verdict was meant as a message for Aetna to change its ways.

The award is believed to be the largest verdict in an individual "bad faith" insurance case in Oklahoma history, one court observer said, and could have major ramifications across the country for a form of cancer treatment called proton beam therapy.

The case revolved around the 2014 denial of coverage for Orrana Cunningham, who had stage 4 nasopharyngeal cancer near her brain stem. Her doctors wanted her to receive proton beam therapy, a targeted form of radiation that could pinpoint her tumor without the potential for blindness or other side effects of standard radiation.

Aetna denied her coverage, calling the therapy investigational and experimental.

Orrana and her husband, Ron Cunningham, a retired Oklahoma City firefighter, had been together since 1987. He was determined to do whatever it took to get the love of his life the treatment she

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needed. The couple mortgaged their dream home and set up a GoFundMe page to help pay the $92,082.19 to get the therapy her doctors had prescribed at the MD Anderson Cancer Center in Texas.

However, Orrana died May 30, 2015, at the age of 54, in part from a viral infection that reached her brain.

Ron Cunningham said this week's verdict was vindication for the suffering his wife went through. She had filed the initial paperwork to sue Aetna, saying that if her case helped save the life of one person, it would be worth it.

"My wife started the case, and I'm just finishing the fight," he said. "We did her proud. My wife wanted to make sure that it got out. Her comment was 'if we could just save one person.'
"As far as the money, I'd give it all back to spend just one more day with her."

Aetna attorney John Shely said in closing arguments that the insurance giant was proud of the three medical directors who denied coverage, even turning to thank them as they sat in the front row of the courtroom, according to jurors and other witnesses in court.

It was a message that didn't sit well with the 12 jurors, who found that Aetna "recklessly disregarded its duty to deal fairly and act in good faith with the Cunninghams."

"I just felt like Orrana Cunningham was failed at every turn," forewoman Ann Schlotthauer said. She said the verdict "was definitely a message to Aetna. We discussed that in jury deliberations -- that we wanted to make a statement. We wanted to make a point and get their attention."

Schlotthauer said it was clear from expert testimony that proton beam therapy was not experimental at all. She said jurors were turned off by one Aetna medical director who acknowledged handling 80 cases a day and by the fact that all three medical directors acknowledged they spent more time preparing for the lawsuit than on Orrana's medical case.

Schlotthauer said she believed that Aetna's medical directors "rubber-stamped" the denials without doing their due diligence. "No one was looking at her specific case," she said. "That's where we decided that obviously they were in breach of contract and should've paid for that treatment. It was medically necessary in her situation.

"I hope (the verdict) does result in huge changes," she said. "I hope it results in Aetna re-evaluating how they evaluate appeals and requests."

Juror Ora Dale cried and hugged Cunningham after the trial. She was one of two jurors who believed the monetary award should've been much higher than the $25.5 million handed down.
"I just wanted to let him know that I was on his side," Dale said. "Those medical directors did not exhaust every measure like they said that they did. They did not spend enough time on her claim. It just kept getting denied and denied.

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"Aetna needed to pay. They were in the wrong, and he deserved everything that he was asking for."

Cunningham had another encounter in court. He said Shely, Aetna's lead attorney, walked up to him and congratulated him after the verdict before telling him he'd lose on appeals.

Cunningham was an Oklahoma City firefighter when the Alfred P. Murrah building was bombed on April 19, 1995, killing 168 people and wounding hundreds more in one of the deadliest terror attacks in American history. The day after the bombing, he was assigned to comb through the wreckage of the day-care center on the second floor to search for bodies of children. He said he would spray corpses with Lysol to prevent the spread of bacteria.

He'd seen the worst of the worst. But little could've prepared him for that encounter with Aetna's attorney in the courtroom. He said he stood, stunned, trying to grasp what he'd just heard.
"That showed how callous these people are," he said.

Shely did not respond to a request for comment.

Aetna, the nation's third-largest insurer, declined to comment on the encounter but maintained that it acted appropriately in denying coverage in this case, saying there is a "lack of clinical data supporting proton therapy for treating nasopharyngeal tumors."

"While we have no comment on the ruling, juror motives or a potential appeal, we do want to make it clear that the proper steps under the health plan were followed in this instance," Aetna said in a written statement. "As our chief medical officer noted in a post earlier this year, it's never easy to tell an individual or family that a treatment or procedure is not approved -- it's the hardest thing we have to do.

"However, our guiding principles will continue to be proven effectiveness and member safety, as determined by rigorous scientific studies."

Doug Terry, the lead attorney for the Cunninghams, offered a much different take.
"We believe this case pulled the curtain back on what goes on at a health insurance company when claims are being denied," Terry said. "The jury's verdict delivered the message that the public will not stand for insurance companies putting profits before policyholders."

It is not uncommon for people with cancer to be denied proton beam therapy by insurers, despite the recommendations of their treating physicians. Many radiation oncologists express frustrations about the denials, and websites exist offering tips and recommendations on how to try to get insurance companies to pay for coverage of proton therapy.

Other cancer patients often turn to sites like GoFundMe to raise money for their treatment. Some insurers eventually agree to cover therapy for adult patients after a lengthy appeals process.
Daniel E. Smith, executive director of the Alliance for Proton Therapy Access, applauded the verdict and called on insurance commissioners in all 50 states to make sure the treatment will now be

covered by insurance companies when treating doctors believe that it is the best available treatment for their patients.

"We applaud Ron Cunningham for standing up to Aetna, and the jury for recognizing and holding Aetna to account for their broken system," Smith said in a statement. "We've seen a similar pattern of betrayal across the industry, where insurers use outdated information and medical staff with little knowledge of proton therapy to ultimately deny as many as four in 10 patients seeking the treatment. It's past time to hold insurers accountable."

Some jurors said that one of the most convincing experts was radiation oncologist Dr. Andrew L. Chang, who explained why proton beam therapy was the best treatment for Orrana Cunningham. He was not involved in her care but was called as an independent expert by her attorneys.
"The thing I tried to illustrate to the jury is that proton therapy is not a new, experimental technique, like Aetna wants to claim," Chang said. "Proton therapy is a well-established treatment for cancer and has been for decades. ... Nobody in the oncology community considers proton therapy experimental for the treatment of cancer."

He said he told jurors that Medicare covers proton treatment and that insurance companies often cover it for an array of cancers for pediatric patients, typically up to the age of 21.

"One thing we pointed out is that as much as Aetna and these other insurance companies like to say proton therapy is experimental, they always put a caveat in there that it's not experimental for pediatric patients," Chang said. "We pointed out Medicare pays for it for 65 years or older. So, what is it about 22-year-olds to 64-year-olds that makes proton therapy experimental? There is no good answer for that; insurance companies call it that because they decided to deem it as such."

Two top cancer specialists, not affiliated with the trial, said they agreed with Chang's assessment.

In Orrana's case, Chang said, the tumor was right next to her brain stem and optic nerve, and it had been growing up toward the base of her skull. He said he told jurors that standard radiation could've been used, as Aetna wanted, but the "risks were severe."

"She would go blind. She would lose a significant portion of her memory on the left side of her brain and still not have a very good chance at a cure," Chang said. "For her particular tumor, (proton therapy) was extremely valuable."

Before Orrana died, he said, scans showed that the tumor was shrinking and the treatment was working.

Aetna attorney Shely told jurors that this was a case "of misplaced blame by Mr. Cunningham and his lawyers," according to the official court transcript.

"Aetna has full confidence in your ability to hear the evidence from that witness stand and then later compare it to the opening statement you just heard," Shely said during his opening statement. "In

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short, the evidence that you will see and hear will convince you that Aetna has done nothing wrong, nothing."

After considering the evidence, the jury did, in fact, find fault with Aetna's handling of the case, voting to award $15.5 million in emotional distress damages and tacking on $10 million in punitive damages.

Kent McGuire, a personal injury attorney in Oklahoma who watched parts of the trial, called the verdict the biggest bad faith insurance verdict for an individual case in Oklahoma history. "It was certainly a stunning verdict to award that much money, and it was a message, too," he said.
Ron Cunningham said his wife would be pleased with the verdict.

She used to comfort him on hard days -- whether it was in the months after the 1995 bombing or after he'd find a child badly injured in a house fire. He'd come home, place his head in her lap and tell her everything on his mind.

"She was a rock for me, especially through my bad times," he said.

The past two weeks at trial, he said, were especially hard because it brought back so many memories. Of his own battle with cancer in 1998, when she stuck by his side. Of washing her body as she weakened from cancer. Of simply missing the gal who stole his heart four decades ago.

Orrana was known to take in stray animals. Cats, dogs, you name it. Ron would tell her he was the biggest stray she ever took in. He laughed while recalling that moment.

He then talked about the three Aetna medical directors; he said each testified that "they wouldn't change anything they did."
When the jury said Aetna "recklessly disregarded" Orrana's case, Ron Cunningham said, he finally felt justice.

"When they said that, it was like, 'I think we did her proud,' " he said.

Discussion Questions

1. Describe the good faith obligation imposed by contract law.

Good faith is generally defined as "honesty, trustworthiness, and truthfulness in the transaction concerned." Although contracting parties will often include express contractual language specifically referencing and requiring such an obligation, the law implies a good faith obligation in every contract.

2. In your reasoned opinion, was the jury verdict concluding that Aetna exhibited bad faith in denying insurance coverage in this case a sound one? Why or why not?

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This is an opinion question, so student responses may vary. In your author's opinion, the plaintiff introduced sufficient medical evidence at trial (more specifically, the expert testimony of radiation oncologist Dr. Andrew L. Chang) to establish that proton therapy is a well-established treatment for cancer, and not experimental.

3. As the article indicates, the jury awarded the plaintiff $15.5 million in emotional distress damages and $10 million in punitive damages. What are emotional distress damages? What are punitive damages? In your reasoned opinion, was the jury's decision regarding the amount of the verdict (a total of $25.5 million) a sound one? Why or why not?

Emotional distress is serious emotional pain and suffering the plaintiff experiences as a result of the defendant's intent (intentional infliction of emotional distress) or negligence (negligent infliction of emotional distress.) Although emotional distress is difficult to quantify in monetary form, the law does allow recovery for such damages, and the trial jury is expected to establish the appropriate monetary amount in setting the verdict. Punitive damages are designed to punish the defendant for egregious, wrongful behavior that would shock the conscience of a reasonable person. In terms of the $25.5 million jury verdict, student responses may vary in terms of whether such a verdict was reasonable under the circumstances.

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Video Suggestions

Video 1: "Mom of Student Who Died after Pancake-Eating Contest Sues Sacred Heart University"

https://www.cbsnews.com/news/mom-of-caitlin-nelson-student-who-died-after-pancake-eating-contest-files-lawsuit-against-sacred-heart-university-2018-10-30/

Note—In addition to the video, please see the following article also included at the above-referenced internet address:

"Mom of Student Who Died after Pancake-Eating Contest Sues Sacred Heart University"

According to the article, the mother of a Connecticut college student who choked to death on pancakes during an eating contest on campus last year has filed a wrongful death lawsuit against the university. Rosanne Nelson sued Sacred Heart University on Monday in Bridgeport state court over the death of her daughter, 20-year-old Caitlin Nelson, of Clark, New Jersey.

The lawsuit seeks an undisclosed amount of money and accuses the school of approving the contest despite the dangers and failing to provide adequate medical personnel.

Officials at the Catholic university in Fairfield declined to comment.

Caitlin Nelson was a junior social work major whose father, police officer James Nelson, was killed in the September 11, 2001 attacks in Manhattan.

When she started choking at the contest, two nursing students immediately began lifesaving measures and were quickly joined by police officers and paramedics, police said. She was taken to an area hospital, where she initially was in critical but stable condition, according to police.

She was transported to a New York hospital where she died three days after participating in the eating contest.

"It's a tragic event that started out as something fun," Fairfield police Lt. Bob Kalamaras said at the time. "It was just a tragic accident."

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1. What is a wrongful death lawsuit?

In a wrongful death lawsuit, a decedent's estate attempts to recover from a defendant who caused the decedent's death, either due to an intentional, extremely reckless, or grossly negligent act. In the subject case, the basis for the wrongful death lawsuit is the alleged negligence of Sacred Heart University in not preventing student Caitlin Nelson's death.

2. As the article indicates, the subject lawsuit seeks an undisclosed amount of money. In your reasoned opinion, should the rules of civil litigation require that the plaintiff disclose in the complaint the exact amount of damages he or she is seeking by way of the lawsuit? Why or why not?

This is an opinion question, so student responses may vary. Traditionally, the rules of civil procedure do not require (and may not allow) disclosure in the complaint of the exact amount of damages the plaintiff is seeking by way of the lawsuit. This is designed to prevent excess publicity of cases that involve substantial amounts of damages (a "media circus" surrounding such cases might prevent the litigants from receiving a fair trial), and account for the fact that as of the filing of the complaint, the plaintiff may not yet know the exact amount of damages he or she has sustained.

3. In your reasoned opinion, is this a strong wrongful death lawsuit (i.e., does it have a high probability of succeeding at trial)? Why or why not?

This is an opinion question, so student responses may vary. In your author's opinion, this is a problematic case, since student Caitlin Nelson was twenty years old when she participated in the pancake-eating contest. Assumption of the risk is a defense to negligence liability in every state, including New Jersey. Assumption of the risk means proceeding actively, voluntarily and willingly in the face of danger, with injury or death being reasonably foreseeable. If a jury concludes that the plaintiff assumed the risk, the plaintiff recovers nothing from the defendant. In the subject case, it is difficult to avoid the reality that participating in an eating contest might result in choking.

In terms of Sacred Heart University's response to the choking incident, as the article indicates, when Ms. Nelson started choking at the contest, two nursing students immediately began lifesaving measures and were quickly joined by police officers and paramedics. Ms. Nelson was then taken to a New York hospital. If these are indeed the facts, it will be difficult for the plaintiff to prove that attendant medical care was insufficient, and therefore represented negligence on the part of Sacred Heart University.

Video 2: "Amazon Building Collapses During Tornado in Maryland, Leaving 2 Dead"

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https://www.foxnews.com/us/amazon-building-collapses-during-tornado-in-maryland-leaving-2-dead

Note—In addition to the video, please see the following article also included at the above-referenced internet address:

"Amazon Building Collapses During Tornado in Maryland, Leaving 2 Dead"

According to the article, two men were killed after part of an Amazon distribution warehouse collapsed as a tornado recently tore through Maryland's largest city.

The Baltimore City Fire Department identified the men as Andrew Lindsay, 54, and Israel Espana Argote. No age was provided for Argote.

The National Weather Service said that an EF-1 tornado touched down along the Baltimore City and Baltimore County line before traveling two and a half miles.

The tornado was estimated to have peak winds of 105 mph, and a maximum width of 150 yards, according to the NWS. It was the first fatal tornado in Maryland in 16 years.

Severe storm damage was reported in the industrial complex where the tornado touched down, including blown over trucks and uprooted trees.

At the Amazon facility, the roof was blown off the building and a 50-foot concrete wall collapsed into the structure, killing the two men inside.

In a prepared statement, an Amazon spokesperson said the two men were third-party contractors and not Amazon employees. No other injuries were reported when the severe storms tore through the region.

"The safety of our employees and contractors is our top priority and at this time the building remains closed," the statement said. "We are incredibly thankful for the quick response from emergency services. Our thoughts and prayers go out to the families impacted by this tragic event."

The National Weather Service had earlier warned of thunderstorms in the area, with some producing gusty winds and heavy rain.

Discussion Questions

1. Define negligence.

Negligence is defined as the failure to do what a reasonable person would do under the same or similar circumstances. In order to prove negligence, the plaintiff must establish, by the greater weight of the evidence, that: a) the defendant owed the plaintiff a duty of care; b) the defendant

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breached such duty of care; c) the defendant caused the plaintiff harm; and d) the plaintiff experienced damages (economic and/or physical) as a result.

2. In your opinion, does Amazon have legal exposure for negligence in this case? Why or why not?

Although student opinions may vary in response to this question, in your author's opinion, the record does not indicate negligence on Amazon's part. Although the two individuals who died when the Amazon warehouse collapsed were invitees on Amazon's property (they were third-party contractors), their deaths were caused by an Act of God (more specifically, an EF-1 tornado), not by a defect on the property. Businesses owe invitees (parties who are on their property with their express or implied invitation) a duty to maintain safety on their property. This includes warning invitees of known defects on the property, remedying such defects, and inspecting the property to discover previously-unknown defects. In the subject case, however, there were no defects on the property, and Amazon therefore arguably did breach any duty of care owed to Mr. Lindsay and Mr. Argote.

3. As the article indicates, in a prepared statement, an Amazon spokesperson said the two men who were killed when the Amazon distribution warehouse collapsed were third-party contractors and not Amazon employees. If this was indeed the case, would the fact that Andrew Lindsay and Israel Espana Argote were third-party contractors absolve Amazon from liability? Why or why not?

The fact that Andrew Lindsay and Israel Espana Argote were third-party contractors would not, in and of itself, absolve Amazon from liability. However, as mentioned in response to Video 2, Discussion Question Number 2 above, their deaths were caused by an Act of God (more specifically, an EF-1 tornado), not by a defect on the property. Proprietors are generally not responsible for an Act of God that results in injuries to individuals on their property. A largely unforeseeable and uncontrollable extreme weather event is a common example of an Act of God.

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Of Special Interest

This section of the newsletter addresses the Food and Drug Administration's decision to approve a powerful new opioid medication during the midst of the nation's opioid crisis.

Ethical Dilemma

"Amid Deepening Addiction Crisis, FDA Approves Powerful New Opioid"

https://www.cnn.com/2018/11/02/health/new-opioid-dsuvia-fda-approval-bn/index.html

Note: In addition to the following article, please see the accompanying video at the above-referenced internet address.

According to the article, despite the ongoing opioid crisis plaguing the nation, the U.S. Food and Drug Administration recently approved a new opioid medication five to ten times more powerful than fentanyl.

Dsuvia, made by AcelRx Pharmaceuticals Inc., is a tablet in a single-dose, prefilled applicator to be administered under the tongue by health care providers to patients in settings such as hospitals, surgical centers and emergency rooms, according to the company.

FDA Commissioner Dr. Scott Gottlieb was quick to defend the approval in a statement: "The agency is taking new steps to more actively confront this crisis, while also paying careful attention to the needs of patients and physicians managing pain."

In April, Gottlieb said that opioids are the biggest crisis facing the nation, a crisis fueled by overprescribing. The numbers say it all: More people die in the U.S. each year from drug overdoses than from breast cancer.

Following the approval of Dsuvia, Gottlieb acknowledged that opioids are a unique class of medications. "I recognize that the debate goes beyond the characteristics of this particular product or the actions that we're taking to mitigate this drug's risks and preserve its differentiated benefits. We won't sidestep what I believe is the real underlying source of discontent among the critics of this approval -- the question of whether or not America needs another powerful opioid while in the throes of a massive crisis of addiction," he said.

But the criticism was quick. "The U.S. Food and Drug Administration (FDA) is recklessly and needlessly endangering people by approving a super-strong opioid," a statement from the public advocacy group Public Citizen said in response to the approval. The group noted that Dsuvia is five to 10 times more powerful than fentanyl and 1,000 times more potent than morphine.

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"It is certain that Dsuvia will worsen the opioid epidemic and kill people needlessly," said Dr. Sidney Wolfe, founder and senior adviser of Public Citizen's Health Research Group.

"DSUVIA will not be available in retail pharmacies or for outpatient use. DSUVIA will only be distributed to health care settings certified in the DSUVIA Risk Evaluation and Mitigation Strategy (REMS) program following attestation by an authorized representative that the healthcare setting will comply with appropriate dispensing and use restrictions of DSUVIA," AcelRx said.

Other restrictions, according to the FDA, include that it cannot be used for more than 72 hours and will have the same black-box warnings as are required for all opioids about the risk of misuse and abuse that can lead to addiction and overdose death.

"Because of the risks of addiction, abuse and misuse with opioids; Dsuvia is also to be reserved for use in patients for whom alternative pain treatment options have not been tolerated, or are not expected to be tolerated, where existing treatment options have not provided adequate analgesia, or where these alternatives are not expected to provide adequate analgesia," according to a statement from Gottlieb about the drug's approval.

The statement noted the benefit the drug could have for soldiers injured on the battlefield. It notes that the Department of Defense was involved in its development and that it was a priority for the Pentagon because it "fills an unmet need."

The same drug, with the chemical name sufentanil, is already available as an IV medication. In its newly approved form, it is an option for patients with acute pain who are not able to receive an IV or are unable to swallow a pill. Dsuvia was approved by the European Medicines Agency in June under the name Dzuveo.

Dsuvia was rejected by an FDA advisory committee in 2017 because the committee wanted more data. AcelRx returned to the committee this year, and on October 12 the drug was recommended for approval. It is expected to be available in the first quarter of next year.

"As a single-dose, non-invasive medication with a rapid reduction in pain intensity, DSUVIA represents an important alternative for healthcare providers to offer patients for acute pain management," Dr. David Leiman, clinical assistant of surgery at University of Texas at Houston, said in a statement from AcelRx. Leiman was a researcher on an AcelRx study of Dsuvia in post-surgical patients.

Discussion Questions

1. Describe the U.S. Food and Drug Administration (FDA). What are the principle responsibilities of the FDA as a federal regulatory agency?

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According to its internet site, the mission of the FDA is to protect the public health "by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices; and by ensuring the safety of our nation's food supply, cosmetics, and products that emit radiation." Further, the FDA is "responsible for advancing the public health by helping to speed innovations that make medical products more effective, safer, and more affordable and by helping the public get the accurate, science-based information they need to use medical products and foods to maintain and improve their health."

2. In your reasoned opinion, do the advantages associated with Dsuvia's FDA approval and release outweigh the disadvantages? Why or why not?

This is an opinion question, so student responses may vary.

3. In your reasoned opinion, can the FDA successfully assist in battling the ongoing opioid crisis plaguing the United States while also approving the release of an opioid 1,000 times more potent than morphine? Explain your response.

This is an opinion question, so student responses may vary.

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Of Special Interest

This section of the newsletter will assist you in addressing Article 2 ("What is Birthright Citizenship?") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 2: "What Is Birthright Citizenship?")—"The 14th Amendment Does Not Mandate Birthright Citizenship"

For an article addressing the issue of whether birthright citizenship is constitutionally mandated, please see the following:

"The 14th Amendment Does Not Mandate Birthright Citizenship"

https://www.nationalreview.com/2018/11/birthright-citizenship-14th-amendment-does-not-mandate/

Note: The following article was written by Andrew C. McCarthy, a senior fellow at the National Review Institute and a contributing editor of National Review.

Shortly after the Constitution went into effect, the first Congress enacted a naturalization law. Lawmakers superseded this statute just five years later. Both provisions derived from the Constitution's grant to the legislature (in Article I, Section 8) of the power "to establish an uniform Rule of Naturalization." That grant, along with these naturalization statutes of 1790 and 1795, edifies us about the Framers' conception of citizenship, and of the status of aliens and their children.

Status questions about the children of aliens have moved to the fore in recent months. Central Americans, enticed by laws that perversely incentivize illegal immigration, have sought entry en masse at our southern border. This week, with an oncoming "caravan" of migrants galvanizing President Trump's base on the eve of the midterm elections, these questions have stoked a heated debate — with all the shopworn smears of racism and bad faith that are now staples of American public discourse.

In campaign mode, the president floated the idea of issuing an executive order that would *purport* to deny "birthright citizenship," i.e., to end the *policy* of granting American citizenship to children born in the United States to alien parents who are not legally present here. I highlight "purport" and "policy" because the president's opponents counter that these newborn children of illegal aliens are granted citizenship by the Constitution, specifically, by the 14th Amendment. Therefore, the argument goes, this grant of citizenship is not a mere policy but a command of the highest law of the land; it may not be

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reversed by an executive order, or even by a law of Congress, the branch empowered to set the terms of citizenship.

That is a lot of weight to put on an amendment that had nothing to do with regulating aliens — an amendment ratified in 1868, a time when there was no federal-law concept of illegal aliens.
Rarely noticed in our era of the Beltway Behemoth is how sparse the Constitution is on the matter of central-government power over aliens. The naturalization clause is the beginning and the end of it. Congress was given the power to prescribe what aliens needed to do to become Americans. But there is not a word in the Constitution about law enforcement, nothing about which aliens would be allowed into the country, or on what conditions they would be permitted to stay.

Why is that? Because such matters were understood to be *state* responsibilities. The Constitution prescribes a federalist arrangement in which the states retain sovereignty. The states had control over their internal affairs. From the founding through most of the 19th century, that was understood to include deciding which non-Americans would be permitted in their territories.
America was vast, unsettled, and expanding ever westward. People were needed to fill it. And in the 1800s, aliens came to do just that, first in dribs and drabs and then, beginning in the 1840s, in droves. But, as University of Massachusetts immigration scholar Vincent J. Cannato recounted in a comprehensive 2012 *National Affairs* essay, it was not until 1891 — at the dawn of the progressive era, after years of urging by the federal courts and some statutory fits and starts — that Congress finally asserted federal control over immigration regulation and enforcement. Indeed, Ellis Island opened in 1892, essentially as a station charged with carrying out the 1891 Immigration Act.

This is a rich transitional history. I've described it only briefly here to make the point that the 14th Amendment was utterly unrelated to the challenge and complexities of immigration-law enforcement.

Again, the 14th Amendment was enacted in 1868, nearly a quarter-century before the federal government seized control of immigration regulation from the states. The driving objective of the Amendment was to shore up deficiencies of the 13th Amendment. Though it had formally abolished slavery upon its 1865 adoption, the 13th Amendment failed to prevent the states from denying black former slaves the privileges and immunities of citizenship.

As University of Texas Law School professor Lino Graglia has explained, Congress attempted to address this shameful situation by enacting the Civil Rights Act of 1866. President Andrew Johnson's veto of the measure was overridden, but it heightened uncertainty about Congress's authority to act. The purpose of the 14th Amendment was to remove all doubt.

That is the main point: The 14th Amendment was meant to ensure that the necessary relief for former slaves could not be undone by subsequent Congresses or court decisions. As we shall come to, the Supreme Court later resorted to the 14th Amendment in order to address an injustice done to an adult child of immigrants under the noxious Chinese Exclusion Act. The Court, however, was wrong to do so — certainly, to the extent that its ruling can be read (and has been read) to usurp Congress's constitutional power to prescribe citizenship qualifications for children born in the United States of

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aliens who are not legally here. The 14th Amendment was about black people enslaved in America for generations. It was not about aliens transiting America illegally.

In debating birthright citizenship, and assuming based on the Supreme Court's ruling, that the 14th Amendment was intended to speak to the issue, we have focused on the first sentence of the amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

Patently, this had nothing to do with illegal aliens or their children. To repeat: *There was no federal concept of "illegal alien" at the time.* There would, moreover, have been no reason to amend the Constitution for the purpose of dictating the status of the children of aliens. Congress had that covered: Its Article I power to prescribe terms of citizenship for aliens had never been in dispute; as noted at the start of this essay, Congress had been exercising that power since shortly after the Constitution went into effect.

The status of children of aliens was not a national issue. Unlike slavery, over which the nation nearly dissolved, it was not a subject of such nationwide concern that it could drive the Constitution's arduous amendment process. The rest of the 14th Amendment's first clause makes crystal clear that the amendment had nothing to do with aliens trying to settle in the country; its objective was to prohibit several of the outrages that black people, in America for over two centuries, had been made to suffer:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Let's return to the first sentence. The word *jurisdiction* is, of course, critical to the amendment's proviso that only persons "subject to the jurisdiction" of the United States become citizens if born here. *Jurisdiction* is a variegated term. Contrary to the insistence of birthright-citizenship proponents, it does not always and simply mean anyone who is subject to our laws (which would encompass virtually everyone who steps foot on our territory).

As Professor Graglia elaborates, the principal authors of the Civil Rights Act of 1866 and the 14th Amendment — Senators Lyman Trumbull of Illinois and Jacob Howard of Ohio — elucidated the meaning of *jurisdiction* in those provisions. The point was to stress "complete" jurisdiction, as in "not owing allegiance to anybody else."

Why? Because Congress's objective was to deal with a unique historical problem — the status of black people who had been in America for generations, bore allegiance to its sovereign power and the burdens of its laws, but were being denied citizenship and its attributes. This, indeed, was exactly how the Supreme Court saw the matter 18 years later when, in *Elk v. Wilkins* (1884), it denied birthright citizenship to the American-born adult child of members of an Indian tribe — observing that the point of the 14th Amendment was to settle the question of citizenship for black former

slaves, and adopting the reasoning of Trumbull and Howard that 14th Amendment "jurisdiction" meant *complete* jurisdiction. The amendment was designed to bring blacks formally into the American fold without purporting to affect the status of others who were regarded as non-Americans because they actually were non-Americans — foreign diplomats and their families, Indian tribes, and aliens who had not been naturalized.

To be sure, Senator Trumbull at one point conceded that the American-born children of Chinese and other legal resident aliens could be granted citizenship. As Professor Graglia observes, this was inconsistent with the trajectory of the argument, apparently driven by the political consideration that such an effect would be trivial and not worth pausing over. For our purposes, the point is that even this tangent assumed the *legal immigration status* of the parents.

That brings us back to the first naturalization acts. These congressional laws make manifest that the Framers adhered to two relevant principles: The citizenship status of newborn and minor children was derivative of the citizenship of their parents; and American citizenship for the minor children of aliens was dependent on the aliens' having become Americans — i.e., having gone through the naturalization process, and having demonstrated good character and loyalty to the Constitution. This understanding still held at the time that the 14th Amendment was adopted — there was no need to discuss it because it was utterly uncontroversial.

The first naturalization law, enacted on March 26, 1790, provided that an alien (in those days, a foreign-born "free white person") could become a citizen after living in the U.S. for just two years, as long as he proved to the satisfaction of a court that he was of good character and then took an oath to support the Constitution. Once that was done, any of his children under 21 at the time automatically became U.S. citizens.

The second naturalization law, enacted on January 29, 1795, was more elaborate, prescribing one naturalization standard for aliens who were already in the U.S. (two years' residency), and a prospective standard (five years' residency). For both categories, besides the required demonstration of good character and the oath of loyalty, there was added a formal renunciation of "all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever." Upon completing that naturalization process, again, citizenship was deemed automatic for the minor children of the naturalized citizen.

Congress tweaked the law again three years later, creating an alien registry and lengthening to 14 years the time an alien was required to reside in the United States before applying for citizenship. But the assumptions about children of aliens did not change: They derived citizenship from their parents.

The 14th Amendment undertook neither to disturb prior law on this subject, nor wrest Congress's Article I power to decide the status of children born to aliens while present in this country. To the extent the Supreme Court's 1898 *Wong Kim Ark* decision suggested otherwise, it was wrong. And to the extent it claimed that citizenship in United States was to be determined in accordance with the duties of fealty owed by the subjects of the British Crown — from whom the free people of this nation, refusing to be subjects, had broken away — its ruling was wayward.

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To give the Court its due, it was operating in a different environment: By 1898, the federal government had assumed control of immigration regulation, and there was a federal concept of illegal alien — foreigners who were present or sought entry in contravention of Congress's laws. And the Court may well have been offended by the unabashed racism of the aforementioned Chinese Exclusion Act of 1882. It was under this Act that 21-year-old Wong Kim Ark was denied re-entry into the United States, after a trip to China, despite having grown up in the U.S. — born to a married couple of Chinese immigrants who were lawful permanent residents at the time.

All that said, though, it was for Congress by targeted legislation, not for the Court by resort to an amendment related to the status of black former slaves, to decide the status of children born in the United States to non-American parents. And even if we agree, *arguendo*, that the Court was right when it came to a child born in the U.S. of alien parents who were *lawful settlers in our country*, this would not redound to the benefit of a child born here of aliens *whose presence violates our laws* — who have never sought legal status or naturalization, who have never taken an oath of loyalty to our Constitution, and who have never renounced ties to foreign sovereigns. In its reliance on British common law, the *Wong Kim Ark* Court itself said the Crown took on as subjects the children of "aliens in amity" — i.e., aliens whose presence in the realm was not hostile or an affront to the Crown's laws.

Let's put aside the American-born children of non-citizen members of Indian tribes, for they were granted citizenship by an act of Congress in 1924. And that, as we've seen, was only after *Elk v. Wilkins*, in which the Supreme Court reasoned that the 14th Amendment did not make them U.S. citizens because they were not "subject to the jurisdiction" of the United States in the sense of "complete," "direct and immediate allegiance."

The defenders of birthright citizenship have the equation backwards. Relying on *Wong Kim Ark*, they claim that all children born of aliens on U.S. soil, regardless of the aliens' status, are citizens unless they fall into two well-established exceptions: the children of foreign diplomats, and the children of a foreign invading force.

To the contrary, these categories are not exceptions to an otherwise obvious claim to birthright citizenship. They are the patent operation of venerable rules: The citizenship of the child derives from the citizenship of the parent; and American citizenship hinges on the parents' being subject to the jurisdiction of the United States, in the sense of lawfully aspiring to citizenship, demonstrating loyalty to the United States and our Constitution, and obeying the laws.
Looked at that way, the newborn children of illegal aliens are more analogous to the children of a foreign invading force than to Wong Kim Ark. The former are children of parents who lack immigration status and whose presence defies our laws; the latter was the child of lawful-permanent-resident aliens (the category of aliens now considered "U.S. persons" under our law, nearly indistinguishable from citizens).

The 14th Amendment did not extend citizenship to the newborn children of illegal aliens. Our law has never done this, though we have been operating for decades as if it had. That includes operating for decades under Congress's Immigration and Nationality Act of 1952 and its progeny, through

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which the 14th Amendment was codified, presumably edified by Congress's understanding of *Wong Kim Ark*. (See Section 1401(a) of the immigration laws.)

Whether we continue in this vein is for the Article I branch to decide. I do not believe President Trump may reverse by executive order a practice that has ensued for decades pursuant, at least ostensibly, to statutes enacted by the branch of government constitutionally empowered to prescribe qualifications for citizenship. (My friend Hans von Spakovsky makes a strong argument that the president does have this power.) But as for Congress itself, neither the 14th Amendment nor the Supreme Court's jurisprudence prevent it from adopting a sensible policy that does not create perverse incentives to immigrate illegally and violate our laws.
That policy is simply this: Children born in the United States should be deemed Americans only if their parents are U.S. persons — that is, either U.S. citizens or lawful-permanent-resident aliens.

Teaching Tip 2 (Related to Article 2: "What Is Birthright Citizenship?")—"What Is Birthright Citizenship—And Can Donald Trump Get Rid of It?"

For an excellent video addressing the issue of whether the executive branch of government (i.e., the president) has the legal authority to end birthright citizenship, please see the following:

https://www.youtube.com/watch?v=V2jzABGerpM

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Bennett-Alexander & Hartman, Employment Law for Business	N/A	N/A	N/A	N/A
Kubasek et al., Dynamic Business Law	Chapters 5, 9, 10 and 51	Chapter 9	Chapters 2, 44 and 45	Chapter 5
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 5 and 7	Chapter 7	Chapters 2, 4 and 25	Chapter 5
Liuzzo, Essentials of Business Law	Chapters 4, 5 and 34	Chapter 4	Chapters 2, 6 and 34	Chapter 5
Langvardt et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 3, 7, 20 and 27	Chapter 7	Chapters 4, 20 and 47	Chapter 3
McAdams et al., Law, Business & Society	Chapters 5 and 7	Chapter 7	Chapters 2, 8 and 15	Chapter 5
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 2, 7 and 9	Chapter 9	Chapters 5, 17 and 21	Chapter 2
Pagnattaro et al., The Legal and Regulatory Environment of Business	Chapters 6 and 10	Chapter 10	Chapters 2 and 15	Chapter 6
Sukys, Brown, Business Law with UCC Applications	Chapters 2, 6, 15 and 19	Chapter 6	Chapters 1 and 28	Chapter 2

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