

Vox

Birthright citizenship, explained

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President Donald Trump wants to end birthright citizenship — the principle that every child born on US soil is automatically a native-born citizen, regardless of the immigration status of the parents — with a stroke of the pen.

He told Axios reporter Jonathan Swan in a taped interview for Axios' upcoming HBO series that the US was the only country in the world with birthright citizenship — which is very much not true (see this list of 30 other countries) — and that it is something that “they say” he can change simply with an executive order — which isn't exactly true. The executive order would simply tee up a court fight; ultimately, the Supreme Court would have to decide whether to stick to its century-old interpretation of the 14th Amendment — which holds that children of noncitizens are in fact “born in the United States and subject to its laws,” and therefore citizens by right — or to specifically exempt children born to unauthorized immigrants.

The executive order doesn't appear to have actually been drafted yet. But Trump's comments on it have immediately received more attention than the things the administration is actually doing (or planning to do) on immigration as the midterm elections approach: from sending 5,000 troops to the US/Mexico border in anticipation of a “caravan” of a few thousand people, to published draft regulations that would allow for indefinite family detention and substantially raise economic requirements for immigrants applying for green cards, to a plan reportedly in the works — possibly in the coming days or week — to use the travel-ban provision of US law to stop many or all asylum-seekers from even entering the United States.

That's because ending birthright citizenship has always been the restrictionist immigration proposal that's hardest to disentangle from simple xenophobia: the fear of immigrants changing the character of America and overrunning its (white) population.

The arguments made in favor of ending birthright citizenship are arguments about the text of the Constitution, American history, and the rule of law — a comfortable register for elite conservative thinkers to speak in. But its urgency as an issue relies on fears about irreversible cultural change — that continuing to grant birthright citizenship will result in the loss of something irreducibly American.

That's exactly the undercurrent that the left associates with restrictionism itself — and makes liberals especially attuned to any attack on birthright citizenship, even as the issue makes conservatives wary.

As recently as a few months ago, the idea of ending birthright citizenship by fiat was a joke. Michael Anton, the former spokesperson for the National Security Council known as one of the foremost intellectual proponents of Trumpism, wrote a column in the Washington Post in July calling on Trump to do this — and got shellacked.

On the left, historians who study the 14th Amendment mocked his history at length on Twitter. On the right, the American Conservative — usually sympathetic to immigration restrictionism — ran an op-ed from a scholar at the Cato Institute, which does not share those views. And even the Federalist, known for the anti-anti-Trump tone of its writing, published a piece with the headline “Ending Birthright Citizenship Will Make Republicans Look Like the Party of Dred Scott.”

But now, the proposal is coming from the president himself. So the urgency has been validated — even if the executive order itself won’t be on the books anytime soon, if at all. And Trump’s endorsement of the strategy may make it much harder for conservatives to laugh off.

There is no indication that an executive order ending birthright citizenship is imminent

Donald Trump says a lot of things, and floats a lot of policies. Figuring out how likely they are to actually happen — and when — depends on context. So here’s the context:

Axios reporters have had several conversations over the past weeks and months with White House staffers, including staff in the White House Counsel’s office, about Trump’s interest in signing an executive order that would bar birthright citizenship to children of unauthorized immigrants.

Axios is about to launch an HBO series (the first episode will air November 4th). As part of that series, they taped an interview between correspondent Jonathan Swan and President Trump. And as part of that interview, Swan asked Trump about his plans for birthright citizenship.

In other words, the answer to “why is this happening right now, a week before the 2018 midterms?” could very well have everything to do with Axios’ desire to build buzz for its upcoming series.

Trump didn’t give Axios a timetable for when he planned to sign the executive order; he just said it was something he was going to do. (He claimed, “It’s in the process, it’ll happen,” but gave no other details.) Trump lies all the time, including about things he has done or will do — especially on immigration, where the president is particularly reactive. Most recently, Trump has claimed that he is ending foreign aid to Central American countries after a caravan of several thousand people crossed from Guatemala to Mexico last week; he cannot singlehandedly do that, and no further instruction from the White House to the State Department has been forthcoming.

It’s not clear that plans for a birthright-citizenship executive order have gone beyond the White House (including the White House counsel’s office). A lot more would have to be done before an executive order were ready for prime time. It would need extensive review from the Department of Justice (specifically the Office of Legal Counsel) to assess its legality, and from the Department of Homeland Security and other departments to work out consequences.

Trump and company haven’t always abided by this process — most notably, the first iteration of the travel ban was famously issued with barely any review or consultation. But the second and third iterations of the travel ban did, and generally, the administration appears to have learned its lesson — even the zero-tolerance policy that led to widespread family separation at the

US/Mexico border earlier this year (which wasn't exactly well planned) went through formal review and approval before being put into effect.

The Trump administration has an aggressive immigration agenda already. Trump himself doesn't singlehandedly determine what they focus on or when. And it's simply not clear that this is a priority. In other words, the president's remarks to Axios are better described as Trump talking about a thing he wants to do than Trump talking about a thing he's definitely going to do, much less already doing.

Birthright citizenship is unequivocal under the 14th Amendment — at least according to a Supreme Court decision from the 1890s

The 14th Amendment to the US Constitution states, “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.”

The amendment, ratified in 1868, was primarily intended to nullify the Supreme Court's infamous 1857 ruling in *Dred Scott v. Sandford*, which ruled that no African American could become a citizen, regardless of their status at birth. Without the guarantee of citizenship, black Americans had lacked clear rights to own property, move freely, or even remain in the United States — “colonization societies” raised money for the mass deportation of former slaves to Africa, a continent their ancestors had left generations before. The 14th Amendment offered them a legally secure position in the United States for the first time.

Congress didn't initially plan to use a constitutional amendment to fix *Dred Scott*. According to constitutional scholar Linda Monk, Congress first wrote a bill in 1866 to extend birthright citizenship to everyone “not subject to any foreign power, excluding [Native Americans who are] not taxed.” President Andrew Johnson, who was much more conservative than Congress on race and Reconstruction, vetoed the bill because he worried it would apply to immigrants — Chinese Americans and “gypsies” — as well as black Americans. Congress overrode the veto, and passed the constitutional amendment to boot.

At first, the Supreme Court interpreted the citizenship clause narrowly; in 1873, for example, it clarified that it did not apply to children of “citizens or subjects of foreign States.” But because there weren't yet any restrictions on immigration, the difference between citizen and noncitizen simply wasn't as meaningful as it would soon become with the passage of the Chinese Exclusion Acts of the 1880s — which not only excluded Chinese nationals from entering America but stated that they were outright barred from US citizenship.

In 1894, Wong Kim Ark, who was born in San Francisco, came back to the US after a visit to China. But immigration officials wouldn't let him in. He protested that he was a citizen; the federal government used the case to lay out the position that (in the words of historian Erika Lee) “American-born Chinese could not be considered citizens if their parents were not, and could never become, naturalized citizens.”

The case made its way to the Supreme Court, where the justices ruled 6-2 in favor of Wong, stating that “the right of citizenship ... is incident to birth in the country.”

The argument against: unauthorized immigrants aren't “subject to the jurisdiction” of the United States

Advocates of ending birthright citizenship don't say that *Wong Kim Ark* was wrongly decided. Instead, they argue it simply doesn't apply to people born in the US to unauthorized immigrants.

Because Wong's parents had immigrated permanently and legally to the US, critics of birthright citizenship believe that his case merely extended birthright citizenship to legal immigrants residing in the US for good. The fact that at the time they entered there was no such thing as illegal immigration doesn't matter to this argument — indeed, it explains why the Court might not have anticipated that its broad definition in *Wong Kim Ark* could ultimately apply to the children of unauthorized immigrants.

The Supreme Court hasn't explicitly ruled that the children of unauthorized immigrants are US citizens. In the 1985 case *INS v. Rios-Pineda*, in which the parent of two US-born children challenged his deportation order, the Court referred to the children as US citizens by birth — but because the Court didn't make a formal legal finding in this regard, the statement was just dicta, or rhetoric.

That may very well mean that the Court still believes *Wong Kim Ark* is being interpreted correctly. But opponents of birthright citizenship believe the ruling needs to be “clarified.”

The question is what it means to be “subject to the jurisdiction” of the United States, and if that term can apply to people living in the US without official authorization to be here — in other words, undocumented immigrants.

Logically, it's appealing to say that people who enter the US illegally, or who stay in the US after their visas expire, have acted in defiance of the government's “jurisdiction” and therefore excluded themselves from it. But, of course, the US government still has the power to act on unauthorized immigrants — they are able to deport them from the US, for example. And unauthorized immigrants are still taxpayers, meaning that they would clearly fit the original definition from the scrapped 1866 bill of all people except non-taxpaying Native Americans.

Looking to historical texts, in the originalist tradition, isn't terribly helpful because Congress appears to have been split on what “jurisdiction” meant. Interestingly, some senators opposed the phrase “subject to the jurisdiction” precisely because it would allow Asian immigrants to get citizenship. Some supporters of the amendment agreed with that view; others believed it clearly only referred to African-American ex-slaves.

Opponents of birthright citizenship point to a quote from a backer of the amendment that exempts “persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers.” But it's not actually clear whether that phrase means:

1. (Foreigners or aliens) who belong to the families of ambassadors or foreign ministers — in other words, only people who belong to a diplomatic family, or
2. Foreigners, aliens, (people) who belong to the families of ambassadors, or (people who belong to the families of) foreign ministers — in other words, four different categories of people, including all foreigners and all aliens.

Opponents of birthright citizenship endorse the second interpretation.

In 2015, a National Review writer argued that the quote offered proof that the children of foreigners and aliens weren't citizens — by inserting a parenthetical “or” to make it “foreigners, aliens, (or) who belong to the families.” That's the version of the quote Michael Anton used in 2018. (When critics pointed out Anton's error, National Review issued a correction to the piece — “to remove a bracketed insertion to a quotation that arguably changed its meaning” — three years after the piece was published.)

Signing an executive order would be a dare from Trump to the Supreme Court to stop him

Even if the Supreme Court has never explicitly said that US-born children of unauthorized immigrants are birthright citizens, they currently *are* — they're covered by extension by the precedent in *Wong Kim Ark*. And Trump is advancing a particularly aggressive idea of how that might be changed — with the stroke of a pen.

The most conservative option for ending birthright citizenship is to accept the current interpretation of the 14th Amendment is accurate, but pass a constitutional amendment to override it. That isn't going to happen in a Congress that can barely even pass its own bills, and with state governments that routinely sue to thwart the policies of the other party's president.

Alternatively, the federal government could force the question. It could simply assert a change to the definition of birthright citizenship, court a lawsuit, and force the Supreme Court to rule on the question of whether *Wong Kim Ark* applies to children of unauthorized immigrants.

This wouldn't just be an aggressive legal stance — it would also be aggressive tactically. Congress and the President definitely cannot override the Supreme Court when it comes to interpreting the Constitution, and the current birthright citizenship policy relies on the Supreme Court's understanding of the 14th Amendment. It would be tantamount to the elected branches of government doing something, and daring the judicial branch to stop them.

Generally, this has taken the form of proposing that Congress pass a law “clarifying” the scope of the 14th Amendment. Previous administrations have warned Congress that this is a very bad idea. In 1995, when Congress held a hearing on a proposed clarification law, then-Assistant Attorney General Walter Dellinger (who ran the Office of Legal Counsel) put it bluntly: “My office grapples with many difficult and close issues of constitutional law. The lawfulness of this bill is not among them. This legislation is unquestionably unconstitutional.”

The Trump administration obviously doesn't feel constrained by its predecessors' view. Indeed, they appear to be enthusiastic about the even more radical option floated by former Trump adviser Anton — simply having the president sign an executive order declaring that the children of unauthorized immigrants are not citizens.

This would be unthinkable under any other president. It would potentially be the biggest constitutional power grab by a president in a century.

But Trump has an extremely expansive view of his own powers, especially when it comes to immigration. He famously kicked off his presidency with a broad ban on immigration from seven countries, and maintained it was legal even when his administration quickly withdrew and replaced it. Administration officials told the Washington Post in June that Trump had wanted to use executive orders to accomplish the whole overhaul of legal migration he seeks.

Here is what would happen, in practice: Trump would sign the executive order. A lawsuit would be filed, probably in New York or California. A judge would almost certainly rule against the administration quickly, and put a temporary nationwide injunction on the executive order. The case would be appealed to the circuit court, which again would almost certainly rule against the president.

At some point — weeks, months or years, depending on how aggressively the administration wanted to escalate the case — the Supreme Court would be asked to take the appeal and rule on the constitutionality of the citizenship restrictions.

The current Supreme Court is a lot more willing to defer to the executive branch on immigration than some of the more liberal circuit courts — the court upheld the administration's third iteration of the travel ban 5-4 earlier this year, even before occasional moderate Anthony Kennedy was replaced by Brett Kavanaugh (whose view of executive power is far more expansive, and who was personally appointed by Trump).

But asking them to carve a major exception out of a century-old precedent is a very tall order. There are a lot of policies that the current Court is all but guaranteed to uphold, even if another court might disagree — this is not one of them.

On the other hand, the more closely identified with the president and the Republican Party this issue becomes, the harder it will be for a conservative Supreme Court to see Trump's actions as beyond the pale. When a former Trump advisor was floating the idea of an executive order, it was easy to dismiss. The same may not be true when it's Trump himself.

Even many conservatives find ending birthright citizenship a bridge too far

The idea that “foreigners” aren't automatically citizens is tautological on its face. (It would require Congress to clarify exactly which immigrants could give birth to US citizens, for one thing.) But it reflects how, as always, debates about immigration slip imperceptibly between debates about law and debates about culture — and how debates about culture are often heard or intended as debates about race.

In the US, there have only ever been three citizenship regimes. For much of American history, the US didn't have a legal principle governing citizenship at all. Then from *Dred Scott* to *Wong Kim Ark*, citizenship was based on race: denied to all people of African descent, then to all people of Chinese (and other Asian) descent. (Even after *Wong Kim Ark*, naturalization laws banned nonwhite immigrants from applying for citizenship themselves.) For the past several decades, citizenship has been a universal birthright on US soil.

There was never a period during which citizenship at birth was limited on a race-blind basis. Where there have been restrictions, those restrictions have been racial. Even the 19th-century Supreme Court understood this — in its *Wong Kim Ark* ruling, the Court pointed out that no one had complained about citizenship for the US-born children of German or Irish immigrants.

The existence of a large, settled unauthorized immigrant population in the US has distorted the center of gravity in the immigration debate. Restrictionists who simply want less immigration, and people who worry about demographic change, often claim they simply want less *unauthorized* immigration — that they're motivated by a neutral concern for the rule of law.

(Some restrictionists really do want this.) But rhetorically, the concerns about birthright citizenship often recycle longstanding racist tropes.

The myth that birthright citizenship is a major driver of unauthorized migration conjures the idea of Latinos as sneaky welfare cheats — and while “birth tourism” by legal immigrants genuinely does exist, the occasional panics over it often fall into stereotypes about Asians being irreducibly foreign and permanently loyal to their ancestral homeland.

As a result, defenders of birthright citizenship assume by default that its critics are motivated by a racist desire to slow the demographic change of the United States — to make America white again. Which only makes the critics more convinced that they are acting out of principle and their ideas are being unfairly persecuted — and more eager to come up with ostensibly race-neutral justifications for why ending birthright citizenship is important.

For an illustration of how difficult it is to square this circle, just see Anton’s piece — in which he claims that membership in the “social compact” on which government is based only extends to people who “all other citizen-members” agree should be included. The implication is that “all other citizen-members” believe that universal birthright citizenship threatens the polity. But because Anton doesn’t state that outright, he doesn’t have to defend it.

But without the official Trump imprimatur — Anton isn’t even a top-tier ex-Trump official — Anton’s argument was roundly mocked. It seemed obviously flimsy. It seemed like a fight that conservatives very much did not want to have.

Birthright citizenship comes up as a topic of debate every few years. It’s often brought up as a provocative idea by a conservative restrictionist (or counterintuitive libertarian); members of Congress then introduce attempted “clarification” bills.

In 2011, a group of Republican state officials, led by Kansas Secretary of State Kris Kobach, rolled out the framework for an immigration “compact” that would demonstrate their understanding that the children of unauthorized immigrants shouldn’t be eligible for citizenship — and that would start noting the legal status of a newborn’s parents on her birth certificate, for easier record-keeping once federal law actually changed.

None of these efforts have gone anywhere. It’s never been a fight conservatives have really wanted to pick. They’ve never found a race-neutral argument they find convincing — and conservatives have so far not been willing to take up a restrictionist policy whose most solid arguments are about limiting citizenship to white people.

It’s hard to know exactly who would be left in and left out of a new citizenship regime — because ending birthright citizenship wouldn’t do what restrictionists claim to want

It’s hard to imagine what a modern immigration regime without birthright citizenship would look like. Assuming that Wong Kim Ark applied solely to noncitizens who had permanent residency, the children of green-card holders would be fine. But would the children of parents who gave birth in the US while on tourist visas be citizens? If not, what about those on non-immigrant visas with pending applications for green cards or citizenship? Would a child be a citizen if the birth parent was unauthorized but the other parent had legal status?

Most importantly, there's the question of retroactivity. Would the 4 million or so US citizens with at least one unauthorized immigrant parent actually stand to lose their citizenship post facto?

It would be much, much harder to get the Supreme Court to endorse this policy. But if the goal is to encourage unauthorized immigrants to go back to their countries of birth — and if having US citizen children is really what's stopping them from doing that — it's hard to imagine anything short of the last would work.

Remember, most unauthorized immigrants have been in the US for 10 years or more — this is a settled population. The number of children born to unauthorized immigrants fell 25 percent from its peak of 370,000 in 2007 to 275,000 in 2014. If birthright citizenship is really a threat to the US, it's a threat from children who have already been born more than children who have yet to be born.

The heart of the problem here is that it's hard to suss out what changes to birthright citizenship would lead to the outcomes restrictionists themselves — the people pushing the policy — want. Because like many immigration arguments, the case for ending birthright citizenship is a normative argument wrapped in incorrect empirics.

Restrictionists generally argue that the ability to give birth to a US citizen motivates people to come to the US illegally — but there's simply no evidence that that's true. (People asked about why they came to the US will cite a range of answers, but having a citizen child is never among them.) Underlying that claim, though, is a belief about what citizenship really ought to be — a prize from the US government for having fully “become American” in every other respect.

Obviously, some people — those whose American roots go back generations — don't have to do anything to show the restrictionists they deserve citizenship. But at some point, an immigrant's family must do that for restrictionists to count their children as American. And people who show disrespect to the law, in this view, deserve to be punished by having their children deprived of that prize.

In its most speculative, this belief leads to the hope that if only people were told that their children (or even their children's children) would never be full Americans, they'd give up on their effort to live in the US without authorization. More realistically, it accepts that people will live in America, but insists that without citizenship or legal residence, their true allegiances must lie elsewhere.

But non-restrictionists have a different idea of citizenship. Many progressives and especially centrists (including, back when those used to exist, immigration-dove Republicans) think of citizenship as a form of buy-in; a guarantee that you'll be loyal to the United States because you have skin in the game. While restrictionists hold up Europe's crisis over multiculturalism as a dark vision of America's future, centrists reply that Europe's immigrant populations were alienated *because* families could remain legally excluded after several generations.

It's hard to prove this empirically. It's hard to measure feelings of inclusion and loyalty, and federal law is hardly the only thing that can determine whether immigrants feel integrated or excluded.

But there is some evidence suggesting that granting birthright citizenship to children leads whole families to continue the process of integration.

In 2000, Germany broadened its citizenship laws so that any newborn would automatically be a citizen if at least one parent was a permanent resident (who'd lived in the country for eight years). The difference between children born in the last months of 1999 and kids born in the first months of 2000 thus became a natural experiment for researchers to study. Their conclusion: Parents made different choices when their children had birthright citizenship; they were more likely to enroll their children in preschool, more likely to give them access to higher education, and more likely to learn German themselves.

It's a self-fulfilling prophecy, then, the idea that "jurisdiction" in the 14th Amendment is about choosing the US over other countries and that immigration status predicts whether one will do so. Knowing that their children have irrefutable access to all the legal privileges of citizenship causes parents to invest more in both their children and their chosen countries. It's not hard to imagine that the opposite would happen if that birthright were taken away.