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Birthright citizenship, explained: why some on the right want to end it, and what they get wrong

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When it comes to immigration, Donald Trump is the rare politician who's been every bit as aggressive in office — in policy and rhetoric — as he was on the campaign trail.

But one of the “problems” that candidate Trump fixated on since way back in 2015 seems to have fallen off President Trump's radar: birthright citizenship.

Anyone born on US soil is automatically a citizen of the United States. Some people want to change that. Trump used to be one of them (and might still be, but he doesn't talk about it as much). And some of his advisers still are.

Michael Anton, the former spokesperson for the National Security Council known as one of the foremost intellectual proponents of Trumpism, chose birthright citizenship as his first target for public writing after leaving the White House, with a column in the Washington Post calling on the president to simply declare, by fiat, that the 14th Amendment to the Constitution did not actually guarantee citizenship for everyone born on US soil.

It was not well received. At all. 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.”

So why was Anton's argument a bridge too far? Part of it was the radicalism of his proposal — asserting flatly that the president could end birthright citizenship with a wave of the pen and that “judges faithful to their oaths will have no choice but to agree with him.”

But part of it is because of the awkward position ending birthright citizenship holds on the restrictionist agenda. It's always on the agenda — and many restrictionists see it as an important long-term solution to the ongoing problem of unauthorized immigration. But it's never very close to the top, because it's difficult as well as politically sensitive.

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 when it's just an op-ed from someone no longer in government.

Even when the president himself isn't talking about an end to birthright citizenship, his critics see it as a Rosetta stone that reveals what the agenda he *is* pushing really means. And the debate among conservatives is really a debate about whether those critics are correct — on what role ethnonationalism and racism play in restrictionism.

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.)

Who can be made American?

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.

The proposed changes to birthright citizenship have gotten more daring under Trump. Anton’s attack on birthright citizenship got attention not because it’s novel, but because it’s been the restrictionist dog that didn’t bark.

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 bills that attempt to “clarify” that the 14th Amendment did not grant citizenship to children born to unauthorized parents.

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.

But how to do that? The most conservative option is to accept the current interpretation of the 14th Amendment is accurate but pass a constitutional amendment to override it — which 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.

A more aggressive option would be for Congress to pass a bill that “clarified” who deserved birthright citizenship. This isn’t as easy as it sounds — even assuming a bill would ever pass. Congress definitely cannot override the Supreme Court when it comes to interpreting the Constitution, and because the current birthright citizenship policy relies on the Supreme Court’s understanding of the 14th Amendment, a congressional move along these lines would essentially be daring the Court to stop them.

Even more aggressive is the move contemplated 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.

An executive order changing birthright citizenship would bring a lawsuit (probably in California). It would make it to the Supreme Court. Then the Court would have to decide whether it was willing to tell the president that he was overstepping his bounds.

It’s hard to imagine what a modern immigration regime without birthright citizenship would look like. 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? Would the 4 million or so US citizens with at least one unauthorized immigrant parent actually stand to lose their citizenship post facto?

If the goal is to reduce the unauthorized immigrant population in the US, and their children's citizenship really is a draw for them, 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. But in a country that often has much more dovish instincts on immigration policy when children are involved, it's hard to imagine ending birthright citizenship without causing an uproar.

The irony is that citizenship helps drive integration — not the other way around

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.