

TO: Reporters and Editors
FR: **Neera Tanden**, President and CEO, Center for American Progress; **Tom Jawetz**, Vice President of Immigration Policy, Center for American Progress; **Philip E. Wolgin**, Managing Director of Immigration Policy, Center for American Progress
RE: There is No Serious Legal Debate about Whether a President Can Unilaterally Undo Birthright Citizenship
DA: October 30, 2018

Proponents of legislation or an executive order challenging birthright citizenship ignore the language of the 14th Amendment to the Constitution, as well as the debates surrounding the passage and ratification of the amendment. As the quotes below illustrate, there is no serious scholarly debate about whether all people born in the United States--regardless of the citizenship status of their parents and with only very limited exception--are covered by the 14th Amendment's guarantee of citizenship. This flows from the plain text of the Citizenship Clause of the 14th Amendment and has been affirmed by long-standing jurisprudence and legal scholarship. This understanding is also the settled position of the Department of Justice. Testifying for the DOJ in 1995, Assistant Attorney General Walter Dellinger [stated the Office of Legal Counsel opinion](#): "To have citizenship in one's own right, by birth upon this soil, is fundamental to our liberty as we understand it. In America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and with no exalted status, arising from the circumstance of his or her parentage. All who have the fortune to be born in this land inherit the right, save by their own renunciation of it, to its freedoms and protections."

2018

- [Steve Vladeck](#) (U Texas Law Professor), [Twitter](#), "This is a wild goose chase."

It doesn't matter what people think about birthright citizenship; #SCOTUS has rejected the exact argument at issue here, and we should all at least be able to agree that the President can't overrule a constitutional interpretation by Executive Order."

- [Laurence Tribe](#) (Harvard Law Professor), [Twitter](#), "If the 14th Amendment's guarantee of birthright citizenship could be wiped out with the stroke of Trump's pen, the whole U.S. Constitution could be erased that way. There's no limit to that dictatorial claim over all our rights."
- [Bill Kristol](#) (Conservative pundit and founder of the Weekly Standard), [Twitter](#), "The shrinking caravan of refugees isn't a threat to the country or the constitutional order. A president who tries to end birthright citizenship by executive order is."
- [Alfonso Aguilar](#) (President of the Latino Partnership for Conservative Principles), [Twitter](#), ".@realDonaldTrump one of the things that makes America exceptional is that anyone born here, regardless of blood, religion or how their parents arrived to US, is a US

Citizen. 14th Amendment enshrines this & SCOTUS has recognized it since 19th century!”

- Gerard N. Magliocca (Indiana University Law Professor), [Quoted in Washington Post](#), ““The text of Section One of the Fourteenth Amendment, as well as the background law, the debates in Congress, and the subsequent practice are clear on this point,” he wrote. “No doubt the White House can produce at least three stooges to say that the executive order is lawful and then claim that legal experts are ‘divided’ on this issue. It’s a lie.””
- Linda Chavez (Conservative author, former WH official), [The Hill](#) (responding to Anton), “The Supreme Court [has consistently upheld the 14th Amendment](#) to guarantee citizenship to children born in the United States, including an acknowledgment by no less than the late Justice Antonin Scalia in [his dissent in a terrorism-related case](#) involving an accused born in the U.S. to a Saudi working as a petroleum engineer.”
- Martha S. Jones (Professor of History and legal scholar, Johns Hopkins), [Washington Post](#), “So birthright has been affirmed, again and again, ensuring that no matter how racist the regime, the Constitution grants citizenship to all people born in the United States. The 14th Amendment transformed our governing text into a document that protects those born in the United States from arbitrary and politically motivated bars to citizenship, including race, religion and party affiliation. The 14th Amendment guarantees that no American will be subject to a test of patriotism, wealth or health. At birth, Americans are incorporated into the body politic and invited to take full part in the governance and the future of our democracy.”
- Garrett Epps (Professor of Constitutional Law, University of Baltimore), [The Atlantic](#), “A democratic country belongs to its people, not the other way around. The Framers of the Fourteenth Amendment knew this well. They’d had decades of experience with racist state laws denying citizenship to slaves, free black Americans, and immigrants. The citizenship clause placed American citizenship—national, equal, unitary, irrevocable—at the center of the democratic polity that they hoped to build from the ashes of the house divided. No one has offered convincing evidence that they secretly intended citizenship to be a gift of the state; no one but Anton has dared to suggest that a president could void the citizenship clause by executive order.”
- Elizabeth Wydra (President of the Constitutional Accountability Center), [Washington Post](#), “Virtually all the complaints from today’s birthright citizenship deniers were heard when the citizenship clause was debated 150 years ago. They lost. The Constitution won. Birthright citizenship is guaranteed to all those born on U.S. soil, regardless of the immigration status of their parents.”
- Alex Nowrasteh (Cato Institute), [The American Conservative](#), “No matter how strict our immigration laws become, there will always be some illegal immigrants and legal non-citizens in the United States. The 14th Amendment is an insurance policy that

guarantees that those born to them have the best shot at assimilating. On this, the 150th anniversary of the 14th amendment's ratification, we need to defend its principles against a president who seeks to undermine a great and exceptional American institution."

- Steve Kantrowitz (Historian, UW Madison), [Twitter](#), "It's possible to make a normative argument against birthright citizenship--I disagree with that argument, but it's possible. But there's no legitimate originalist case against birthright citizenship as formulated in 1866."

2017

- Peter J. Spiro (Temple U. Professor of Law), [Center for Migration Studies](#), "The failure of birthright citizenship amendments can also be attributed to the country's assimilationist norms. Even though the US Supreme Court has never directly ruled on the question, citizenship has been extended to all children born in the United States as a matter of administrative practice. It appears to be well entrenched as a matter of constitutional culture."
- Kristie de Peña (Niskanen Center legal/immigration scholar), [Niskanen Center](#), "There may be disagreement about the policy, but about whether the president can unilaterally change the law, there is none. Laws strengthened by the jurisprudence of the courts and cemented in our United States Code are not legally vulnerable to the whims of the executive. Congress can amend the Constitution, or (arguably) the statute alone, the Supreme Court can re-interpret the Fourteenth Amendment in a different light, but President Trump cannot — legally — use an executive order to undo more than a hundred years of legal precedent."
- Robert Tracinski, The Federalist, "[Ending Birthright Citizenship Will Make Republicans Look Like The Party Of Dred Scott](#)"

2015

- Hiroshi Motomura (UCLA Law Professor), [Quoted in CBS News](#), "ending birthright citizenship is "an overly simple solution for a really complex problem...with consequences that are going to be seriously negative consequences for this country. It would be much better to fix the immigration system.""
- Margaret Stock (Legal Scholar and MacArthur Genius Grant Awardee), [New York Times](#), "America has no national birth registry, no squads of skilled government lawyers who can determine whether a person's parents hold a particular immigration status at the moment of a baby's birth. We'd need a whole new government bureaucracy to make

birth adjudications. Americans would have to pay for this new bureaucracy, which would be tasked to decide the citizenship of some 4 million babies born in America each year.”

- Rose Cuison Villazor (UC Davis Law Professor), [New York Times](#), “The Insular Cases ensured that the question of citizenship in the U.S. territories is viewed as distinct from the issue of citizenship at birth in one of the 50 states. The caste system that existed for decades and continues to this day because of the failure to extend the citizenship clause to the U.S. territories should serve as cautionary tale. Doing away with birthright citizenship will create an even larger population of second-class members in the American polity.”
- Ediberto Roman (FIU Law Professor), [New York Times](#), “But even if Trump’s legally flawed proposal somehow succeeded — then what? The number of undocumented people would [increase to 25 million](#). We could have tens of millions of individuals that would be citizens of no country, stripped of any rights. In the Dominican Republic, this human rights tragedy is actually being played out: Dominicans of Haitian descent were [recently stripped](#) of their citizenship through the influence of similar anti-immigrant rhetoric. As a result, ten of thousands face deportation and persecution, often in the form of police “round-ups” of individuals who “look Haitian.””
- Elizabeth Wydra (now President of the Constitutional Accountability Center), [quoted in the Guardian](#), ““It’s pretty clear you would have to amend the constitution to eliminate birthright citizenship,” Wydra said. “That is very difficult to do. It’s not something a president could change on his own.” Indeed, the last amendment to the constitution was ratified in 1992.”

2011

- James C. Ho (now Judge on the 5th Circuit,) [WSJ](#), “The plain meaning of this language is clear. A foreign national living in the United States is “subject to the jurisdiction thereof” because he is legally required to obey U.S. law. (By contrast, a foreign diplomat who travels here on behalf of a foreign sovereign enjoys diplomatic immunity from—and thus is not subject to the jurisdiction of—U.S. law.)”
- Elizabeth Wydra (now President of the Constitutional Accountability Center), [Constitutional Accountability Center](#), “Despite the clear intent of the Reconstruction Framers to grant U.S. citizenship based on the objective measure of U.S. birth rather than subjective political or public opinion, opponents of citizenship at birth continue to fight this constitutional guarantee.”
- Roger Clegg (President and General Counsel, Center for Equal Opportunity, and Reagan and HWB appointee), [Washington Times](#), “Conservatives would usually, and rightly, be suspicious of using a few ambiguous (at best) snippets of legislative history to advance a reading of a constitutional text that is contrary to its natural meaning.

Therefore, there ought to be a strong presumption against any construction of the phrase “subject to the jurisdiction thereof” that is contrary to this natural meaning. Those who oppose birthright citizenship claim that the phrase has a second meaning, involving allegiance to the government and Lockean concepts of the consent of the governed. If this is what the founders meant, they could have, would have and should have said so in the text. They did not.”

2010

- Cristina Rodriguez (NYU Law Professor), [CNN](#), “Unless we are prepared to tolerate the emergence of castes based on parentage, universal birthright citizenship and a robust naturalization regime should remain in place.”
- Hiroshi Motomura (UCLA Law Professor), [New York Times](#), “Redlining citizenship to exclude millions of children who will grow up in America reflects a vanity that we can solve society’s complex problems if we only pass tougher laws or enforce them more harshly. A wall around citizenship reflects the same sort of false hope that responds to economic crisis in Mexico with higher border fences, or to drugs with more prisons, or to conflict with more troops.”
- Tamar Jacoby (Head of Immigration Works), [New York Times](#), “Does shouting fire in a crowded theater ever work? It won’t clear the theater — we all know that. But Republican lawmakers calling for an end to birthright citizenship probably aren’t aiming for anything as practical as clearing the theater — or dealing with illegal immigration.”

2009

- Cristina Rodriguez (NYU Law Professor), [Journal of Constitutional Law](#), “The Citizenship Clause, read in historical and textual context, represents our constitutional reset button. It places all people, regardless of ancestry, on equal terms at birth, with a legal status that cannot be denied them.”

2007

- James C. Ho (now Judge on the 5th Circuit), [LA Times](#), “Birthright citizenship is a constitutional right, no less for the children of undocumented persons than for descendants of passengers of the Mayflower.”

2006

- James C. Ho (now Judge on the 5th Circuit), [The Green Bag Law Journal](#), “Repeal proponents contend that this language does not apply to the children of aliens – whether legal or illegal (with the possible exception of lawful permanent residents) – because such persons are not “subject to [U.S.] jurisdiction.” But text, history, judicial precedent, and Executive Branch interpretation confirm that the Citizenship Clause reaches most U.S.-born children of aliens, including illegal aliens.”

1995

- Department of Justice, Office of Legal Counsel, [Testimony](#), “Since the Civil War, America has thrived as a republic of free and equal citizens. This would no longer be true if we were to amend our Constitution in a way that would create a permanent caste of aliens, generation after generation after generation born in America but never to be among its citizens. To have citizenship in one’s own right, by birth upon this soil, is fundamental to our liberty as we understand it. In America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and with no exalted status, arising from the circumstance of his or her parentage. All who have the fortune to be born in this land inherit the right, save by their own renunciation of it, to its freedoms and protections. Congress has the power to propose an amendment changing these basic principles. But it should hesitate long before so fundamentally altering our republic.”