



Less than Citizens

Abolishing Birthright Citizenship Would Create a Permanent Underclass in Our Nation

Sam Fulwood III and Marshall Fitz | May 2011

Introduction

In a move contrary to the most cherished of American values, a band of ultra-conservative activists are targeting the U.S.-born children of undocumented immigrants—and others—to score political points. Their stated objective is to overturn a bedrock constitutional right: the right of citizenship by birth on American soil.

Such efforts are unlikely to succeed, but they must be challenged because they strike at the core of what makes citizenship in this nation so unique, special, and coveted. Rooted in the post-Civil War reforms to reverse the infamous Dred Scott decision and establish birthright citizenship as a right of the then-recently emancipated black slaves, the 14th Amendment, ratified in 1868, guarantees that “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.”

For all practical and legal purposes, the law is clear and settled. For more than a century, our nation’s courts have affirmed that the 14th Amendment means what it says—the fundamental measure of citizenship in the United States is rooted in the soil on which an American is born.¹ It stands in direct opposition to notions that America is some sort of country club, a place where the vagaries of politics, prejudices, or popularity may recognize some and exclude others. Birthright citizenship is a profound American value.

Still, the matter is not dead in the eyes of some politicians. On January 25, 2011, Sens. Rand Paul (R-KY) and David Vitter (R-LA) introduced legislation to amend the Constitution and restrict citizenship to those newborns who can prove that one of their parents is a U.S. citizen, a legal immigrant, or an active member of the Armed Forces at the moment of the child’s birth. In what seems a coordinated effort, Republican lawmakers in the Arizona legislature and other state legislatures introduced bills aimed at blocking children born in the state to undocumented immigrants—as well as professional workers and other noncitizens with long-term visas—from claiming a right to

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citizenship. As Elizabeth Wydra points out for the American Constitution Society for Law and Policy, “[t]he goal, according to Arizona Representative John Kavanagh, a primary supporter of the legislation, is “to trigger . . . Supreme Court review of the phrase ‘subject to the jurisdiction thereof’ in the 14th Amendment.”²

Opportunistic politics helps explain the reasoning behind this attack on the Citizenship Clause of the Constitution. A broken national immigration system overlapping with a tepid economic recovery, featuring still-slow jobs growth creates an opening for some politicians to seek short-term electoral gains by demonizing immigrants. Nonetheless, numerous conservative politicians and scholars voice grave concerns about the political and policy ramifications of this tangent.³

Case in point: Linda Chavez, a conservative Republican and chairman of the Center for Equal Opportunity, believes that such a political gambit is “a terrible idea.”⁴ She argues that not only is it bad politics for Republicans to champion a cause that alienates Latino voters, but “more importantly, ending birthright citizenship would fundamentally change what it means to be an American.”⁵

She’s right, of course. Indeed, many conservative and progressive legal scholars find common ground on this issue and the implications of backing away from birthright citizenship. University of Baltimore legal scholar Professor Garrett Epps argues:

The authors of the Citizenship Clause had seen Southern slavery eat away at the very idea of democratic government, until it nearly destroyed the United States. They set the 14th Amendment, and its citizenship language, in the American sky as a reminder that inequality by birth was the doorway to dishonor.

Thus, there is an alarming irony in the proposition that the United States should alter its constitutional system to create a large internal population of native-born noncitizens, a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society.

If the children of “illegal aliens” are “illegal” themselves, then we have taken a giant step toward recreating slavery in all but name. If citizenship is the hereditary gift of the nation rather than the inheritance of its people, we are drifting back toward a discredited doctrine of Dred Scott. And if state governments arrogate to themselves the power to decide which groups within their borders “merit” citizenship, the central promise of the Amendment—paramount national citizenship—has been eviscerated.⁶

Noted conservative constitutional scholar James Ho, a former solicitor general of Texas, examined the history of the 14th Amendment and arrived at an even more basic conclusion than Epps. He writes:

“Ending birthright citizenship would fundamentally change what it means to be an American.”

– Linda Chavez

But nothing in text or history suggests that the drafters [of the 14th Amendment] intended to draw distinctions between different categories of aliens. To the contrary, text and history confirm that the Citizenship Clause reaches all persons who are subject to U.S. jurisdiction and laws, regardless of race or alienage.⁷

He also argues that the radical right-wing's attempt at historical revisionism:

fundamentally violates three values that conservatives typically put forth: the belief in textualism, that the words of a legal document matter; originalism, that you go with the original understanding of the Constitution or of a statute and not some subsequent, evolving concept; and American exceptionalism, that there are just some things about America and in particular about American law that [are] different than from other countries, and proudly so.⁸

It seems implausible, then, that even a conservative Supreme Court would accept the revisionist arguments necessary to end birthright citizenship. What's more, the high steps needed to alter the Constitution suggest the conversations about revoking constitutional citizenship are little more than hot air. After all, constitutional changes are difficult to pass, requiring a two-thirds vote from both the U.S. House of Representatives and the U.S. Senate *and* approval by three-fourths of the state legislatures, or alternatively two-thirds of the state legislatures could propose an amendment at a constitutional convention, a procedure that has never been successful.

In short, the prospects for changing the nation's birthright citizenship policies are far-fetched. Nonetheless, the far right's vision of this profoundly un-American position on birthright citizenship deserves to be unpacked. Americans need to call out the cynical and opportunistic politicians who are seizing on the repeal of the 14th Amendment to divide our country anew.

In this issue brief, then, we will examine the kind of society and democracy we would become if the 14th Amendment were amended to once again create a permanent underclass in our nation, delineating the costs and challenges of such policies if they were to prove successful. A retreat on birthright citizenship would set in motion a cascading effect of unforeseen, unintended, and unwanted consequences, among them:

- “Big Brother” in every hospital delivery room—a profoundly costly and intrusive process of checking and verifying documents for every baby born in the United States
- A new underclass of less-than-citizens—marginalized from society and weighing on our future economic competitiveness
- Women burdened with childbearing decisions depending on citizenship parentage—endangering the newly born and their mothers in our country
- An America that is suddenly and deeply anti-immigrant—contrary to our historical heritage and core national values

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Without a doubt, amending the 14th Amendment to end birthright citizenship would create a fundamentally different America, one with dual (and inevitably “dueling”) classes of residents born here—citizens and less-than citizens. This is a dark vision of America—one that deserves to be exposed to the full light of day.

“Big Brother” in every hospital delivery room

This nightmare scenario would begin with the Department of Homeland Security intruding in every hospital in the nation. Indeed, that is where the bureaucratic morass must originate. If birthright citizenship were repealed, some sort of federalized birth registry would have to be created and maintained in order to ensure that citizenship status is allocated properly. Currently, documents evidencing American citizenship are created by a decentralized system, where thousands of state-and-local governmental entities produce these documents.⁹ Instead of the current system, the new system would feature a process requiring every parent to produce documents establishing the parent’s citizenship or immigration status at the moment of the child’s birth.

Let’s be clear: This burden would affect every family in America. The creation of a national birth registry would be an extraordinarily complicated and costly feat. The nation would replace a simple system where “birth by its inherent energy and force gives citizenship,” as Vermont Sen. Justin Smith Morrill of the Reconstruction Congress described it.

In its place, policymakers would substitute the straightforward birthright citizenship with a complex and burdensome process for the more than 4.1 million children born in the country each year.¹⁰ Over 11,300 births per day would encounter vast bureaucratic red tape. One can imagine the result: an incredibly convoluted procedure that today only Americans born overseas must follow.¹¹

The costs and consequences: A birth tax and behemoth bureaucracy

The current procedures for proving one’s citizenship—absent birthright citizenship—are costly and cumbersome. Parents of Americans born abroad are required to undergo a lengthy and expensive individualized assessment of their child’s citizenship, with Department of State and Department of Homeland Security charging fees of up to \$600 to cover the cost of such assessments. In cases where the parents have clear documentation proving their citizenship status, these examinations can take weeks or months. If evidence from multiple documents is required to prove lineage, the waiting period can stretch into years.¹²

In the meantime, that child—an American citizen by law—is barred from receiving the benefits of citizenship, including access to healthcare and education in his or her own country.

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Imagine, then, what would happen if *every new parent in the United States* was required to undergo a similar process—an outcome almost guaranteed by a change in the laws. Using the costs from the current process for overseas births, we estimate that eliminating birthright citizenship has the potential to add a birth tax of \$600 *per child*, to say nothing of the long periods in which children would be stuck in legal limbo, further increasing the burden on new parents.

In addition to the fees required to submit these new citizenship forms, many families would need to hire lawyers to help them navigate the complex process, thereby driving up costs further. This is a burden that will be most severely felt by the economically disadvantaged.

Changing birthright citizenship would not only affect new parents, but many adults as well. According to a study by the Brennan Center at New York University, 13 million Americans cannot prove their citizenship.¹³ Those earning less than \$25,000 a year are twice as likely to be unable to produce U.S. passports, naturalization papers, or birth certificates. Certain groups, including the elderly, minorities, and the poor, are less likely to have proof of citizenship than the general population, thus making the repeal of birthright citizenship especially burdensome for them. Furthermore, for many, proof of citizenship exists, but not with their current name. This is the case for 34 percent of voting-age women.¹⁴

The burden of sorting out these complex, high-stakes issues and, where appropriate, correcting mistakes would inevitably fall on the federal government. Thousands of immigration litigators, bureaucrats, and skilled immigration examiners would be required to carry this sort of process out for every child born in the United States. It is truly amazing that the same people trying to eliminate funding to provide health care to low- and middle-income women in the name of “small government” are simultaneously proposing a massive, deeply intrusive new bureaucracy that will cost taxpayers billions of dollars a year.

Think about it. The implications for the Social Security Administration alone are staggering if that agency were to house the new citizenship registry system. Such a system would render the existing birth certificate moot, no longer sufficient to prove citizenship. Everyone in America would need new proof about whether they are a citizen or instead a less-than-citizen.

Less-than-citizens

Many proponents of repealing birthright citizenship argue it would be a method to deter illegal immigration, but in fact repeal of birthright citizenship would increase the number of undocumented individuals within the United States. Some experts estimate that in one year, 2008, 340,000 children were born to at least one undocumented parent.¹⁵ The citizenship of each of those children would be called into question. The clear rule of

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citizenship at birth would thereby be transformed into uncertainty for several hundred thousand children each year.¹⁶

In addition to the repeal, Congress would have to address a whole additional set of thorny questions about the legal status of these children:

- Would they be born “undocumented”?
- Would they come under immediate investigation and be placed in immigration proceedings?
- Would their parents and families be investigated if these children do not establish qualifying lineage?
- Would fearful women be less likely to deliver their babies at a hospital, raising an entirely new set of maternal health issues?

Even Arizona, at the center of the debate over state-level anti-immigrant legislation, recently declined to pass a bill aimed at prompting hospitals and emergency rooms to check the immigration status of their patients.¹⁷

According to a 2010 Migration Policy Institute study, if the 2009 Birthright Citizenship Act were adopted and the U.S.-born children of two undocumented immigrants were denied citizenship, the size of the U.S. undocumented population would expand significantly, even assuming no new undocumented migration. It would rise from 11 million today to 16 million in 2050.¹⁸ Of these 16 million, 4.7 million would represent U.S. born noncitizens, 1 million of whom had been born to parents who had themselves been born in the United States.¹⁹ But the impact of the change would be even larger than MPI estimated because current proposals would deny citizenship at birth not only to the U.S.-born children of undocumented immigrants, but also to U.S.-born children of many legally present noncitizens.

The costs and consequences of a marginalized population

The repeal of birthright citizenship would create a self-perpetuating class of undocumented noncitizens, one, two, three, or more generations going forward. As the MPI study authors Jennifer Van Hook and Michael Fix write:

Under a constitutional repeal of the birthright citizenship language of the 14th Amendment or the proposed Birthright Citizenship Act of 2009, these U.S.-born descendants of unauthorized immigrants would be denied legal status in the United States, even though in all likelihood they would be thoroughly American in other respects. Their descendants, the third generation and higher, might have no claim to citizenship in the countries of their immigrant ancestors because they and their parents were not born in those countries. In short, the repeal of the 14th Amendment or enactment of the Birthright Citizenship Act would lead to the establishment of a permanent class of unauthorized persons.²⁰

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Do Americans want to set in motion a set of policies guaranteeing that U.S.-born descendants of undocumented immigrants, for generations ahead, face zero opportunities in their own country? This self-perpetuating cohort of noncitizens would never be allowed to apply for citizenship, and therefore would be stuck being strangers in the land of their birth.

Worse, repealing birthright citizenship would punish children to a potential second-class existence for the actions of their parents or grandparents. It has the potential to create a subclass of hereditary stateless individuals, and severely hampers the ability of immigrants and their children to assimilate or aspire for upward mobility. Such a permanent underclass is inconceivable given our heritage as a nation of immigrants.

The costs of such short-sighted policy are similarly incalculable. Revoking birthright citizenship to hundreds of thousands of kids would mean denying them the ability to become prosperous members of society. These children would be barred from accessing the social and political institutions that their U.S. counterparts would be guaranteed. They would be unable to obtain legal employment, a driver's license, affordable health-care, or federal financial aid.

Indeed, these children would be denied the American Dream from the get-go.

As it stands now, the United States lags far behind the rest of the developed world in producing scientists and engineers.²¹ Repealing birthright citizenship would severely reduce the ability of the children of immigrants to thrive educationally, and would make the idea of college graduation, let alone job retention in critical fields such as science or engineering, virtually impossible.

An educated population is a productive population. Repealing birthright citizenship will do no favors to U.S. productivity and economic production. Consider the most telling foreign experience: Germany, a country that long withheld citizenship from the children of their guest workers turned residents, has seen the education and attainment level of second-generation students fall far behind their native peers. One study shows that second-generation students perform at a score level 93 points below that of their native counterparts, which equates to one-and-a-half proficiency levels.²²

Unique burden for women

The denial of citizenship to babies born in this country to undocumented women, the majority of whom are women of color, is undeniably an attack on immigrant women's fertility.²³ Accusations that immigrant women give birth to "anchor babies" in order to gain the right to citizenship for themselves and their families are based on made-up anecdotes—myths that depict immigrant women as less than human and that underscore the racist and sexist tone of anti-immigrant sentiment.

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Proposals to eliminate birthright citizenship would inevitably lead to ethnic profiling of pregnant women. In fact, without statutory prompting, this has already occurred in Utah.²⁴ Two state government workers sent the names of 1,300 people to law enforcement and the news media because they suspected them of being undocumented immigrants. The list included the due dates of pregnant women, practically an invitation for harassment, and most likely a violation of federal health privacy laws.

The impact of repealing birthright citizenship would disproportionately impact children born to families with low incomes. Why? Because a newborn's ability to access care through Medicaid or the State Children's Health Insurance Program may depend on his or her citizenship status. Bureaucratic hurdles for demonstrating citizenship would unavoidably result in delayed care for newborns, and delays and/or restrictions on access to such essential medical services as well-baby visits or vaccinations. As Priscilla Huang, associate policy director at the Asian & Pacific Islander American Health Forum, concludes: "Immigrant women are particularly prone to ideological attacks, as well as punitive welfare and immigration policies, because of their capacity for child-bearing."²⁵

Revoking birthright citizenship would create a context in which such attacks and policies will only escalate, hurting some of our nation's most vulnerable women and children. This is a path that serves neither our values nor our self-interest.

Conclusion: Why retreat to the dark days of Dred Scott?

In this, the sesquicentennial of the bloody Civil War, why would our nation, the beacon of liberty and equality, choose to revisit a mistaken and deplorable moment in our national history? Haven't those few political leaders who advocate changing or repealing the 14th Amendment learned the proper lessons from our past?

The debates during the Reconstruction Congress clearly reinforced the need for a bright-line citizenship rule. Those discussions about the scope and meaning of the 14th Amendment unequivocally set forth the principle that citizenship is conferred at birth, and that any child born in this country is a U.S. citizen. Supreme Court decisions have only affirmed this core premise.²⁶ Little can be gained by opening the system up to competing claims.

Still, some politicians press this lost cause, falsely claiming that the United States is rare among nations granting *jus soli*—the right of the soil—meaning citizenship by birth. There are 28 nations that do so, including Canada and Mexico, our closest neighbors.

More importantly, since when were the values upon which this nation was founded and built contingent on how other nations treat their citizens? Indeed, the nation's commitment to the core values of equality and opportunity upon which the 14th

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Amendment is grounded is the root of America's exceptionalism. Comparative arguments thus fail to persuade.

The misguided politicians who pursue this folly must sense short-term potential in divisive electioneering, but invoking the 14th Amendment serves neither their own best interests nor the interests of the country they desire to lead. Why? Fundamentally, their effort to alter the Citizenship Clause offends our deeply felt national values.

America is not a country club. We have always welcomed and accommodated individuals, especially immigrants from foreign lands, who wish to contribute to our experiment in self-governing democracy. In their case, citizenship is often a difficult decision, but a choice nonetheless.

Not so for the children born on our soil. For them, citizenship is neither earned, nor bartered. Descent does not decide their destiny in America. The appellation "Born in the U.S.A." contradicts the idea that they are less than citizens. It declares directly and forcefully that they are citizens and grants them the full set of rights, which are rooted in the highest moral and legal traditions of our nation.

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Endnotes

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