

Ban on birthright citizenship unconstitutional

Principles that conservatives revere threatened by proposed legal change

By James C. Ho



Four conservative U.S. senators joined forces this week to propose legislation to repeal birthright citizenship for children born in the United States to undocumented persons. The proposal reflects the view of many conservatives who consider the repeal of birthright citizenship an essential component of any comprehensive strategy to combat illegal immigration.

But conservatives are far from united on this issue. To the contrary, proposals to repeal birthright citizenship by statute conflict with three principles deeply valued and frequently espoused by traditional conservatives: textualism, originalism and American exceptionalism.

To begin with, the proposal violates the first sentence of the 14th Amendment, commonly known as the Citizenship Clause: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”

The meaning of this provision is simple. “Jurisdiction” means power. The word appears in Article III of the Constitution to define the power of the federal courts. It is likewise used in the 14th Amendment to invoke the power of the federal government. So long as you are born in the United States and subject to its power, you are a U.S. citizen.

Of course, the phrase “subject to the jurisdiction” must mean something. It must exclude someone from birthright citizenship. And it does.

The Citizenship Clause denies birthright citizenship to persons who are not subject to, but instead enjoy legal immunity against, the power of the United States. That includes diplomats and lawful combatants — persons who enjoy legal immunity against U.S. law.

This is what the sponsors of the Citizenship Clause said they intended. It is why opponents of the Citizenship Clause said they opposed it. And it is the same rule as the English common law doctrine of *jus soli* on which the Citizenship Clause was based.

For their part, opponents of birthright citizenship respond that the Citizenship Clause was adopted during a very different era. Back then, our nation essentially followed a policy of relatively unrestricted immigration. We had a few laws excluding specific categories of persons, such as convicted criminals and prostitutes, as well as laws that prohibited the importation of slaves. But that was pretty much it. Don't modern times call for modern solutions?

But most conservatives are originalists who abhor notions of an evolving Constitution whose meaning changes with the times. According to originalists, the rule articulated in 1866 must remain the same today. So if you are born in the United States and not immune from U.S. law, you have a constitutional right to citizenship, whether you were born in 1911 or 2011.

Finally, opponents of birthright citizenship frequently resort to the fact that many foreign countries do not confer citizenship based solely on place of birth.

But most conservatives believe that America is unique among the community of nations. Most conservatives also abhor invoking foreign law to determine the meaning of our unique Constitution.

Given these values of textualism, originalism and American exceptionalism, it is unsurprising that support for birthright citizenship was shared by the Reagan administration, as well as all nine justices on the U.S. Supreme Court that decided the case of *Plyler v. Doe*, including then-Justice William Rehnquist.

The court had previously held that the Citizenship Clause applies to the U.S. born-children of noncitizens, in *U.S. v. Wong Kim Ark*. In *Plyler*, the majority extended *Wong Kim Ark* to undocumented persons — with the support of the dissenting justices and the Reagan administration. In the Court's words, "no plausible distinction with respect to 14th Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."

Many Americans of good faith have sincere concerns about illegal immigration — based on the challenges it presents to the rule of law.

But that is precisely why opponents of illegal immigration should oppose proposals to repeal birthright citizenship by statute. One cannot champion the rule of law and, in the same breath, propose policies that violate our Constitution.

Opponents of illegal immigration sacrifice the moral high ground they seek to claim by invoking the rule of law when they support proposals to repeal birthright citizenship by statute.

Birthright citizenship is not — and should not be — a left versus right issue. It is enshrined in our Constitution — and thus secured by the principles of textualism, originalism and American exceptionalism.

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